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NOV. 2021 – FIRE & EMS LAW Newsletter

[NEWSLETTER IS NOT PROVIDING LEGAL ADVICE.]

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GIVING BACK – PROF. BENNETT'S WORK IN SCHOLAR@UC:

- **2021: FIRE & EMS LAW- RECENT CASE SUMMARIES/ LEGAL LESSONS LEARNED [updated monthly]: Case summaries since 2018 from monthly newsletters**
- **2021: FIRE & EMS LAW – CURRENT EVENTS [updated bi-weekly]**
- **2021: FIRE & EMS OFFICER DEVELOPMENT / LEGAL LESSONS LEARNED / AMERICAN HISTORY [updated each Officer I, II, III class]**

Other new resources:
MENTAL HEALTH / PEER SUPPORT: See student's "Best Term Paper" and Video on Columbus Division of Fire excellent Peer Support program

CHEMICAL COMPANIES / FIRE DEPARTMENT POSITIVE RELATIONS: Check out Fire Science Chemical Safety Seminar 2021

20 NEW CASES REVIEWED

File: Chap. 1

OH: WOMAN DIED IN HOUSE FIRE – IGNORED 13 WARNING LOW BATTERY FROM CABLE COMPANY – CASE DISMISSED

On Oct. 26, 2021, in Jeffrey Kahl v. Sectrum Security, LLC, doing business as Spectrum, et al., the U.S. Court of Appeals for the 6th Circuit (Cincinnati) held (3 to 0) in unpublished decision that Federal District Court judge had properly dismissed the husband's lawsuit.

> "Under the unique facts of this case, a reasonable person must conclude that Heather's negligence in failing to heed the warnings provided by Spectrum about the low-battery signal outweighed any negligence by the defendants. At the outset, we emphasize that this is not a case where a fire-alarm company provided little or no warning about faulty equipment. Starting in June 2017, Spectrum repeatedly notified Heather of the smoke detector's dying battery, using different mediums to send duplicative alerts…. The company also provided a complimentary replacement battery to fix the problem…. When the issue persisted after Spectrum shipped the new battery to Heather, the company scheduled a maintenance appointment to have a technician examine the smoke detector…. Heather was certainly aware of the problem with the smoke detector as she cancelled that appointment the day it was scheduled to take place. *** It is true that the iControl panel in the Kahl residence registered a low-battery signal on September 14 and that the defendants did not alert Heather of that problem that day…. Crucially, however,

Spectrum made five attempts *after* September 14 to alert Heather to the issue, the last attempt coming approximately two weeks before the fire. *** By the last notification on October 16, 2017, Spectrum had contacted Heather on thirteen different days about the smoke detector's low battery."

Facts:

"Since 2003, the Kahls had lived in a two-bedroom, single-story, 844-square-foot house…. On October 10, 2013, Heather contracted with Time Warner Cable to have the company provide home security services through a package called the 'Intelligent Home System….' Included in the package was one free smoke detector, which a Time Warner Cable employee, Michael Blaney, installed…. The smoke detector was linked remotely to a monitoring center and could inform the company of different information, such as the outbreak of a fire.

At the time of the installation, the Kahl household had only one working smoke detector, which was in the hallway outside the bedrooms…. Blaney replaced the old smoke detector with a new one in the same place…. Jeffrey, who was out of town at the time, remembers seeing that the old smoke detector had been taken down when he returned home.

***

In June 2017, Spectrum began to receive a series of signals from the Kahls' smoke detector indicating that the device had a low battery…. Spectrum kept an activity log of each of these signals and the company's response to them…. When Spectrum received such a signal, the company notified Heather about the low battery by sending her an email and a text message as well as calling her on the phone…. The company also sent her a replacement battery…. The low-battery problem persisted into July, with Spectrum receiving a signal that indicated a 'loss of supervision' from the smoke detector…. This led the company to call Heather to schedule a service appointment for July 16, 2017, speaking with her directly to set up the appointment…. That appointment never took place, however; on the scheduled day, Heather cancelled via text.

***

By the last notification on October 16, 2017, Spectrum had contacted Heather on thirteen different days about the smoke detector's low battery.

Then, sometime during either the evening of October 28 or early morning of October 29, 2017, a fire began in the house…. Although investigators were unable to establish its cause, the fire likely originated in or near either a closet or attic stairwell that was close to the home's kitchen, smoldered for some time, and then vented through the roof…. At the time, Heather was alone in the house and asleep in the living room on the couch…. Eventually, a neighbor noticed flames projecting from the house's roof and alerted the authorities…. By the time firefighters arrived, Heather was unresponsive…. She was transferred to the local hospital and soon after pronounced dead due to the '[i]nhalation of products of combustion.' The smoke detector never alerted Spectrum of the fire."

Legal Lesson Learned: Working smoke detectors save lives; cable company not liable when customer ignores 13 notifications of low battery.

File: Chap. 1

IL: GAS LEAK - DRUNK HOMEOWNER DROVE OVER HIS GAS METER – OFFICER PROB. CAUSE – NOT "SELF DRIVING" CAR

On Oct. 26, 2021, in Gregory A. Switzer v. The Village of Glassford, Illinois and Andrew Burgess, U.S. District Court Judge James E. Shadid, Central District of Illinois, granted Officer Burgess' motion for summary judgment since he had probable cause to arrest, even if charges later dropped. The judge comically commented on the homeowner's claim that someone else must have been driving his vehicle.

> "While that possibility becomes ever-so-slightly more possible with advances in self-driving technology, it does not yet exist. Notwithstanding the state courts' contrary conclusion, Justice Schmidt was absolutely correct: Officer Burgess clearly had probable cause to arrest Switzer for the offense of driving under the influence. Accordingly, Defendants are entitled to summary judgment on each of Plaintiff's claims."

Facts:

> "This case involves the arrest of Plaintiff, Gregory Switzer, by Officer Andrew Burgess during the early morning hours of October 1, 2015. Prior to his arrest, Switzer arrived home and noticed the sound and smell of gas emanating from a gas line between his house and a neighbor's. Switzer called 911 and Officer Burgess responded. After ensuring the gas line was shut off, Officer Burgess investigated the cause of the broken gas line and determined Switzer hit the gas line with his vehicle when driving home intoxicated. Switzer was arrested for driving under the influence of alcohol. The charges were later dismissed by the state court based on a purported lack of probable cause, and that decision was affirmed by an Illinois appellate court. The issues currently before the Court are whether Officer Burgess had probable cause to arrest Switzer and whether Plaintiff's Fourth Amendment claim is timely. Because no dispute of material fact exists as to whether Officer Burgess has probable cause to arrest Plaintiff, the Court grants Defendant's Motion for Summary Judgment. Further, because Plaintiff's detention ended more than two years prior to him filing suit, the statute of limitations bars Plaintiff's claims."

Legal Lesson Learned: Judges sometimes offer comical comments in their decision; reflects on the frivolous nature of the lawsuit.

File: Chap. 1

CA: HOMEOWNDER REFUSED SIGN CITATION - BURNING 3 CANS POOL – ARRESTED – LAWSUIT DISMISSED

On Oct. 25, 2021, in James I. McMillan v. County of Shasta, U.S. District Court judge John A. Mendez, U.S. District Court for Eastern District of California, dismissed the lawsuit filed by the plaintiff (an attorney, representing himself) against the County, the Fire Chief and police officers.

> "Fire Defendants move to dismiss all claims against Chief Lowe and the Anderson Fire Protection District, contending that none of the factual allegations involving Lowe or the Anderson firefighters provide a basis for liability…. The Court agrees. *** Simply put, Plaintiff still has not pled any legally actionable conduct by the Fire Defendants. *** This analysis is not altered by Plaintiff's presentment of new evidence - evidence not alleged in the TAC, but rather presented in Plaintiff's request for judicial notice filed with his opposition brief - that his criminal conviction has been vacated…. Even if Plaintiff were correct that this update in his state criminal case means the Heck bar no longer applies, *see* Prior Order at 8-12, the factual deficiencies with the TAC remain and warrant dismissal."

Facts: [From Feb. 1, 2021 order of the Court].

> "Around 10 p.m. on March 7, 2019, Anderson firemen responded to reports of fire at a residential property where Plaintiff was located…. Plaintiff reluctantly led the firemen to the backyard, where three small metal cans were discovered at the bottom of an empty swimming pool. Id. Shortly thereafter, the Anderson Fire Chief Steve Lowe ('Lowe') arrived at the scene along with a few Anderson Police officers, including Officer Kameron Lee ("Lee")…. Lowe asked Plaintiff to provide his name, age, and driver's license…. Plaintiff refused to provide his license insisting he was not required to by law since he had not been driving…. Lowe then prepared a citation for violations of Cal. Health and Safety Code Section 42400.2(c) and Cal. Penal Code Section 148(a)(1) and asked Plaintiff to sign…. Plaintiff refused…. He was then arrested."

Legal Lesson Learned: Refusal to sign the citation was very unwise and led to the arrest.

File: Chap. 2

SC: CHARLESTON – COVID-19 VACCINATIONS MANDATED FOR POLICE AND FIRE – PRELIMINARY INJUNCTION DENIED

On Oct. 21, 2021, in three combined cases, Sean Bauer, et al. v. City of North Charleston; Aaron Gdovicak, et al. v. City of Charleston; Ashleigh Tucker v. St. John Fire District, U.S. District Court Judge David C. Norton, U.S. District Court for District of South Caroline (Charleston Division) denied request to issue a preliminary injunction against employers' vaccination mandates, citing 1905 U.S. Supreme Court decision requiring small pox vaccinations.

"While plaintiffs may remain unvaccinated at their own risk, the balance of equities and public interest do not require defendants to allow plaintiffs to spread that risk in their workplace and, by extension, into the communities they serve. Reasonable minds may disagree on the public health consequences of the Policies.

> ***
> Notably, the Supreme Court has expressly rejected the idea of a fundamental right to refuse vaccination. In *Jacobson v. Massachusetts*, 197 U.S. 11, 26–27 (1905), the Supreme Court upheld a state law allowing cities and towns to implement vaccine mandates in order to contain smallpox outbreaks. In so holding, the Supreme Court rejected an argument that liberty interests under the Fourteenth Amendment inevitably prevail in these circumstances. Specifically, the Supreme Court stated, 'We are unwilling to hold it to be an element in the liberty secured by the Constitution of the United States that one person, or a minority of persons, residing in any community and enjoying the benefits of its local government, should have the power thus to dominate the majority when supported in their action by the authority of the state.'
>
> ***
> In light of plaintiffs' failure to show that their claims are likely to be meritorious, the balance of hardships that weighs in defendants' favor, and the strong public interest that weighs against enjoining the Policies, the court finds that a preliminary injunction is not appropriate in this case. In denying plaintiffs' motions, this court is not impugning either the integrity or the sincere nature of plaintiffs' beliefs. However, it is not the court's role to determine and impose the employer policies that best strike the balance of the competing interests of a pandemic that has plagued not just this state or country, but the world, for almost two years. Irrespective of politics, the court has evaluated and analyzed the law and the legal arguments raised by both sides. Unfortunately for plaintiffs, they have not stated a viable legal theory in support of an injunction, as each of the factors required to be considered, individually and collectively, weigh against the grant of injunctive relief."

Facts:

> "This matter arises out of certain policies issued by the City of North Charleston, the City of Charleston, the County of Charleston, and the St. John Fire District imposing mandatory COVID-19 vaccine requirements on their employees and other affiliated personnel. Plaintiffs in each of the above-captioned actions filed suit against the respective government entities by whom they are employed or affiliated, challenging the COVID-19 vaccine mandates as violative of their rights under the United States and South Carolina Constitutions and under certain South Carolina statutes and common law.
>
> ***
> The court held a hearing on the North Charleston, Charleston, County, and District plaintiffs' (collectively, "plaintiffs") motions for preliminary injunction in all four above-captioned cases on October 14, 2021. As such, the motions are now ripe for review.

***

Finally, even if 'political opinions' or 'political rights' encompass vaccine refusal and plaintiffs did not have an existing legal remedy, plaintiffs have not clearly shown that the termination provisions in the Policies are based on their political opinions or beliefs. On the contrary, defendants have presented substantial evidence that the Policies are based not on the fact that plaintiffs hold a certain belief regarding vaccination, but rather on the legitimate threat that their unvaccinated condition poses to public safety and effective governmental operations. Therefore, plaintiffs have not shown that they are likely to succeed in proving wrongful discharge based on their political beliefs."

Legal Lesson Learned: The Court issued a very detailed decision, examining and rejecting numerous Constitutional arguments by the plaintiffs.

Note: See Oct. 19, 2021 decision in JANE DOES 1-6, et al. v. Janet T. Mills, Governor of State of Maine, where U.S. Court of Appeals for First Circuit (Boston) held (3 to 0) that Federal District Court Judge properly denied preliminary injunction for several Maine healthcare workers (and a healthcare provider who runs his own practice).

See Oct. 18, 2021 decision – Malcolm Johnson, et al. v. Brown, where U.S. District Court Judge Michael H. Simon, U.S. District Court, Oregon, denied temporary restraining order for 42 individuals who are healthcare providers, healthcare staff, teachers, school staff, a school volunteer, and a State agency employee.

See also Aug. 12, 2021 article, "Supreme Court won't stop Indiana University's COVID vaccination requirement." "INDIANAPOLIS, Ind. (WFIE) - NBC News reports the Supreme Court refused to block Indiana University's vaccination requirement, ruling in the first COVID vaccine case to reach the high court on Thursday."

See July 19, 2021 article: "IU wins court case, can proceed with COVID-19 vaccine requirement." "Indiana University has won a court case that could have stopped them from requiring the coronavirus vaccine. The U.S. District Court for the Northern District of Indiana in South Bend issued a ruling overnight that denies an injunction south by at least eight IU students."

File: Chap. 3

MD: ISIS SENTENCED 20 YEARS – OBTAINED FUNDS MAKE "ATTACK IN USA" – PLEA DEAL, JUDGE SET THE SENTENCE

On Oct. 14, 2021, in Mohamed Y. Elshinawy v. United States of America, U.S. District Court Judge Ellen L. Hollander, U.S. District Court for District of Maryland, denied the defendant's post-conviction petition to be given a trial; when he was sentenced the Judge informed him of maximum possible sentence of 68 years. Serious charges, including: "Beginning in March 2015,

Petitioner received money transfers from a foreign entity based in Wales, United Kingdom, and Dhaka, Bangladesh…. The funds were "to be used to fund a terrorist attack in the United States."

"Petitioner also alleges that he would have gone to trial if he knew that he would be exposed to a sentence of sixty-eight years in the Plea Agreement…. There is no merit to this claim, as the Plea Agreement explicitly outlines the maximum sentence available…. Furthermore, petitioner explicitly acknowledged on the record that he had read and understood the Agreement…. And, the Supreme Court has explained that a reviewing court may presume that competent counsel explained a plea and its consequences to a defendant. *Marshall*, 459 U.S. at 436 (quoting *Henderson*, 426 U.S. at 647)."

***

Perhaps most telling here is that petitioner voluntarily and knowingly pled guilty on all counts, which renders baseless his claim of ineffective assistance of counsel claim based on the waiver of preliminary hearing…. Moreover, the government notes that the facts establishing probable cause were clearly outlined in the criminal complaint, suggesting that it was reasonable for counsel to waive the preliminary hearing."

Facts:

> **"**Elshinawy is a United States citizen of Egyptian descent…. He was born in Pittsburgh, while his father was engaged in medical training. However, defendant's parents are not United States citizens, and the family returned to Egypt when defendant was an infant…. Defendant spent a good portion of his life in Egypt and Saudia Arabia, raised by well-educated parents: his father is a retired physician and his mother is a professor of statistics…. Defendant, too, is college educated….
>
> In or about 2007, Elshinawy began to travel frequently between Egypt and the United States. On December 11, 2015, he was arrested in Maryland…. About one month later, on January 13, 2016, the defendant was indicted.
>
> ***
>
> On August 15, 2017, pursuant to a Plea Agreement (ECF 120), Elshinawy entered a plea of guilty to all charges…. The Plea Agreement included a 'Stipulated Statement of Facts…' In the Stipulation, Petitioner admitted that he knowingly and intentionally conspired with others to provide material support or resources to ISIS (Count One); that he knowingly provided and attempted to provide material support or resources to ISIS (Count Two); that he willfully collected funds, directly or indirectly, with the knowledge that such funds were to be used, in whole or in part, to carry out a terrorist attack intended to cause death or serious bodily injury to civilians (Count Three); and he knowingly and willfully made false statements to agents of the FBI with respect to a terrorism investigation (Count Four).
>
> ***
>
> Beginning in March 2015, Petitioner received money transfers from a foreign entity based in Wales, United Kingdom, and Dhaka, Bangladesh (the "UK Company"). *Id.* The

funds were “to be used to fund a terrorist attack in the United States.” *Id.* at 10. The UK Company provided IT-related products and services, and the owner, Individual #2, was a national of Bangladesh who had joined ISIS in 2014 and assisted in the development of weaponized drone technology. *Id.* at 10. Individuals #3 and #4, who were associated with the UK Company, helped to send monies to defendant and to purchase components of drone technology for Individual #2.”

Legal Lesson Learned: Plea Agreement with this terrorist clearly left the sentencing decision to the judge, and he was informed by the judge that his maximum sentence of sixty-eight years.

File: Chap. 4

U.S. SUPREME CT – UNANIMOUS - "QUALIFIED IMMUNITY" FOR PD - TWO CASES – HIGH RISK EMERGENCY DECISIONS

On Oct. 18, 2021, the U.S. Supreme Court, issued summary dispositions (9 to 0; two per curiam opinions – not authored by a single Justice) dismissing two lawsuits against police officers on the basis of "qualified immunity." The Court unanimously reversed the 9th Circuit in one case, and the 10th Circuit in another, ordering lawsuits against the police officers be dismissed. "The doctrine of qualified immunity shields officers from civil liability so long as their conduct 'does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.' Pearson v. Callahan, 555 U. S. 223, 231 (2009).

DANIEL RIVAS-VILLEGAS v. RAMON CORTESLUNA:

"Plaintiff stopped 10 to 11 feet from the officers. Another officer then saw a knife sticking out from the front left pocket of Cortesluna's pants and shouted, 'he has a knife in his left pocket, knife in his pocket,' and directed Cortesluna, 'don't put your hands down,' 'hands up….' Cortesluna turned his head toward the instructing officer but then lowered his head and his hands in contravention of the officer's orders. Another officer twice shot Cortesluna with a bean-bag round from his shotgun, once in the lower stomach and once in the left hip. *** [Officer] Rivas-Villegas then straddled Cortesluna. He placed his right foot on the ground next to Cortesluna's right side with his right leg bent at the knee. He placed his left knee on the left side of Cortesluna's back, near where Cortesluna had a knife in his pocket. He raised both of Cortesluna's arms up behind his back. Rivas-Villegas was in this position for no more than eight seconds before standing up while continuing to hold Cortesluna's arms."

Holding reversing 9th Circuit: "On the facts of this case, neither LaLonde nor any decision of this Court is sufficiently similar. For that reason, we grant Rivas-Villegas' petition for certiorari and reverse the Ninth Circuit's determination that Rivas-Villegas is not entitled to qualified immunity."

CITY OF TAHLEQUAH, OKLAHOMA, ET AL. v. AUSTIN P. BOND, AS SPECIAL ADMINISTRATOR OF THE ESTATE OF DOMINIC F. ROLLICE, DECEASED:

"At this point the video is no longer silent, and the officers can be heard yelling at Rollice to drop the hammer. He did not. Instead, Rollice took a few steps to his right, coming out from behind a piece of furniture so that he had an unobstructed path to Officer Girdner. He then raised the hammer higher back behind his head and took a stance as if he was about to throw the hammer or charge at the officers. In response, Officers Girdner and Vick fired their weapons, killing Rollice."

Holding reversing 10th Circuit: "Neither the panel majority [10th Circuit panel of 3 judges] nor the respondent have identified a single precedent finding a Fourth Amendment violation under similar circumstances. The officers were thus entitled to qualified immunity. The petition for certiorari and the motions for leave to file briefs amici curiae are granted, and the judgment of the Court of Appeals is reversed."

Legal Lesson Learned: These unanimous decisions are not only helpful for police officers, but also to Fire & EMS incident commanders are others needing to make rapid decisions.

> Note: See article, Oct. 18, 2021, "The U.S. Supreme Court rules in favor of officers accused of excessive force." "Congressional Democrats have made multiple attempts in recent years to limit qualified immunity, though none has been successful. The George Floyd Justice In Policing Act, which passed the House, would have restricted the defense, but negotiations over a compromise bill petered out earlier this year."

See also this article, Oct. 19, 2021, "Supreme Court just doubled down on flawed qualified immunity rule. Why that matters." "If we end qualified immunity, officers will still not violate the Constitution if they act reasonably because courts will continue to assess whether an officer's decision to use force was reasonable under the framework supplied by Graham [v. Connor, 1989; – which requires that courts consider the totality of the circumstances not "with the 20/20 vision of hindsight" but with the recognition that "police officers are often forced to make split-second judgments – in circumstances that are tense, uncertain, and rapidly evolving – about the amount of force that is necessary in a particular situation."

Graham v. Connor (May 15, 1989): U.S. Supreme Court (9 to 0; Justice Rehnquist writing majority opinion). "This case requires us to decide what constitutional standard governs a free citizen's claim that law enforcement officials used excessive force in the course of making an arrest, investigatory stop, or other 'seizure' of his person. We hold that such claims are properly analyzed under the Fourth Amendment's 'objective reasonableness' standard, rather than under a substantive due process standard."

See May 23, 2019 article: "Graham v. Connor: Three decades of guidance and controversy. The solid bedrock of Graham v. Connor provides a strong foundation for LEOs doing the work few in society are willing to do." "Cited over 54,000 times and the subject of nearly 1,200 law review articles, [1] one cannot overstate the profound effect of the United States Supreme Court's decision in *Graham v. Connor* on American law enforcement."

Legal Lesson Learned: These two unanimous decisions will also be helpful for Fire & EMS Incident Commanders, making rapid decisions in emergency situations.

Chap. 5 – Emergency Vehicle Operations

File: Chap. 6

RI: STATE PENSION BOARD – CAN'T RECOUP $129,000 OVERPAY 15 RETIRED FF – WAITED 6 YEARS INFORM THEM

On Oct. 25, 2021, in Frank Andre, et al. v. Employee's Retirement System of Ohio, the Judge Susan E. McGuirl, Superior Court of Rhode Island, Providence, held that while the North

Providence Fire Department's CBA provided that FF overtime pay be reported to State Pension Board as part of their regular wages, this violated state law and must be stopped, but the Board knew of the problem since 2011 and never informed retirees until 2017.

> "The record reflects that, in total, the fifteen Petitioners would be required to pay back $129, 286.64. As discussed above, ERSRI had discovered the mistaken overpayment of benefits by early 2011, as evidenced when its internal legal counsel reached out to the Town for assistance in correcting the matter…. It was not until April and May 2017 that ERSRI informed Petitioners of the overpayments, their cessation, and the recoupment of the overpaid benefits… In the interim, Petitioners had continued to receive those benefits. *** While the above emails indicate that ERSRI was in sporadic contact with the Town regarding the need for recalculations, this Court is troubled by the lengthy and recurring gaps between those communications. ERSRI knew that with each pension check they drew, Petitioners received what it considered to be improper benefits. Accordingly, ERSRI needed to act with diligence and expedition to obtain the information required. This Court also notes the apparent lack of urgency with which ERSRI sought to notify Petitioners of the issue, as Petitioners could have been informed of the potential change to their pensions before the exact adjustments were determined.
>
> ***
> In conclusion, while the Board's interpretation of § 36-8-1(8) as excluding longevity payments calculated with reference to overtime was not an error of law, the Board's decision to unilaterally recoup the overpaid benefits from Petitioners is barred by the doctrines of laches and equitable estoppel. Accordingly, Petitioners' appeal is sustained, and the decision of the Board is hereby reversed. Counsel shall submit the appropriate order for entry.

Facts:

> "Petitioners are all retired members of the North Providence Fire Department…. The North Providence Fire Department was a participant in a pension plan administered by the Municipal Employees' Retirement System (MERS)…. Petitioners were members of the plan pursuant to a Collective Bargaining Agreement (CBA)…. The Town of North Providence (Town) was required to contribute to the plan in an amount equal to 6 percent of the salary or compensation earned by each member pursuant to G.L. 1956 § 45-21-41(a)-(b)…. In calculating that amount, the Town had been using the full amount of longevity payments made to Petitioners as part of the salary or compensation on which to base their contributions…. Those longevity payments were, in accordance with the CBA between the Town and the firefighters' union, calculated as a percentage of Petitioners' gross pay, meaning that part of the longevity payments was based on payment for overtime pay.
>
> ***
> In early 2011, ERSRI discovered that the Town had been using the aforementioned method to calculate its plan contributions and informed the Town that its contributions ought to exclude the portion of longevity payments made on the overtime portion of gross

> pay…. It was not until May and June 2017, however, that ERSRI sent letters to Petitioners informing them of the issue…. In those letters, ERSRI informed the Petitioners of their decision to both prospectively reduce their pension benefits and recoup the previously overpaid amounts.
>
> ***
> Petitioners appealed and requested a hearing via letter dated March 9, 2018; the matter was heard before the Hearing Officer on October 1, 2018. In a written decision on April 22, 2019, the Hearing Officer upheld the decision to recalculate, reasoning as follows: contributions are meant to be calculated using a percentage of 'salary or compensation' according to § 45-21-41(a). Decision of Hearing Officer at 5. In § 36-8-1(8), 'compensation' is defined as 'salary or wages earned and paid for the performance of duties for covered employment, including regular longevity or incentive plans approved by the board, but shall not include payments made for overtime or any other reason other than performance of duties[.]' *Id.* at 5-6. Therefore, she concluded that longevity payments based on overtime pay should be excluded from 'compensation' for contribution calculation purposes."

Legal Lesson Learned: Nice to see decision that six-year delay by Pension Board protects retirees from forced payback. State may appeal this decision.

File: Chap. 6

MT: VOLUNTEER FD IS OWNED BY TOWN – "BUDGET-STRAPPED" TOWN HAS RIGHT TO MANAGE FD BUDGET

On Oct. 19, 2021, in Town of Ekalaka v, Ekalaka Volunteer Fire Department, Inc., the Supreme Court of Montana held (5 to 0) that District Court judge properly granted summary judgment to the Town. It's all about the money: "[B]eginning around 2014, the contract money in the Department's separate coffers began to swell and outmatch that coming from Town and community funds. The Department now contends that the budget-strapped Town is trying to seize the assets of a private association."

> "The Town acknowledges its technically improper department oversight, but it also cites ways in which its management of the department has conformed to what *only* municipalities can do. For example, the town provides workers compensation insurance through the Montana Municipal Interlocal Authority, which is exclusive to municipal departments. The Town has also maintained property and liability insurance on the Department's vehicles and equipment.
>
> ***
> At most, what much of this evidence proves is that Ekalaka's volunteer fire department acted with an amount of delegated independence over the decades that the Town does not

contest, and perhaps that some individual volunteers misperceived or lacked the language to correctly describe its municipal ownership. It is not unusual for two parts of a Town's government to interact with each other in ways that require arms-length language, nor is it odd for a fire department to thank its town government for support. Additionally, every piece of evidence the Department presents must be weighed against contrary evidence from the Town, including the perceptions and actions of former Department leaders; the Town's establishment of a relief association under state laws on municipalities; the impressions of third parties like the vehicle donors; mutual aid agreements that exist between *the Town* and Carter County, even if arranged or signed by the fire chief; and municipal fire department reports the Town has sent to the Montana State Auditor.

The documentary evidence from the parties overwhelmingly weighs toward declaratory judgment affirming the duly established municipal department. The evidence that the Department claims exemplifies its practical legal sovereignty is equivocal at best, and the Department cites no legal authority for the notion that individual beliefs or vocabulary can excise an agency from town government. As the District Court noted, the Town's extensive financial and managerial delegation to the Department may be ill-advised and may be worth reconsidering-this controversy is proof enough of the pitfalls. But a small municipality's somewhat casual oversight of its volunteer fire department does not give that department a license to declare itself divested."

Facts:

"Laws in effect in 1915 gave municipal town councils the power to establish fire departments and defined their components. Sections 3326, 3327, RCM (1907). The newly established town of Ekalaka did so through its 1915 ordinance purchasing everything from the 'old fire department.' The Department does not dispute these events.

***

The fire department in Ekalaka predated the Town. Then, in 1915, the year after Ekalaka incorporated as a third-class municipality, the Town passed an ordinance to create a municipal fire department out of the 'old fire department.' The ordinance made the existing fire chief of the old department the first fire chief of the municipal department, and it authorized and directed the mayor and town clerk to purchase the fire equipment, building, and "all property of every name, nature, and kind" from the old department. Through 1940, the Town followed statutory procedures for municipal departments by nominating and appointing fire chiefs and taking other required steps.

***

After 1940, such formalities largely went by the wayside. The volunteer-run Department operated with a degree of independence and trust. It also contained interpersonal overlap with other parts of the Town's government. For example, Elston Loken, the fire chief from around 1983 to 2013, worked as the Town's public works director. And Stephen DeFord, the Ekalaka mayor from 2014 to 2018, during which time the present controversy arose, had volunteered with the Department and was assistant fire chief before his election.

***

The Department's current fire hall is approaching a century old and lacks bathrooms and other much-desired features. In 2016, the Town and the Department began seriously discussing how to construct a new fire hall. The Town considered incorporating the Department as a nonprofit entity that could more promptly facilitate the necessary steps. The town attorney helped the Department draw up the paperwork to incorporate that entity, Ekalaka Volunteer Fire Department, Inc. However, personalities clashed, and progress halted. Plans for the hall were never finalized. After finding out that municipal workers compensation insurance coverage would be impossible if the Department went private, the Town decided not to pursue that option.

The Department contends that although the 1915 ordinance may have subsumed the "old fire department," the private volunteer fire company's identity somehow remained intact-either that or the Town's lenient oversight caused municipal ownership to evaporate in the intervening decades. The Department claims it was always a private fire company that existed as an unincorporated association until 2016, when it filed its incorporation paperwork following the town attorney's advice.

The Town went to the Carter County District Court and filed for a declaratory judgment that the Department was municipally owned. The Department responded with its theory of independence. Each party presented affidavits and voluminous documents to bolster its portrayal of the Department's status. The District Court granted summary judgment to the Town. The Department appeals."

Legal Lesson Learned: Volunteer fire departments should have a clear understanding on the legal status of that department.

File: Chap. 7

LA: FIRE CHIEF (Ret) – "AT WILL" JOB – CONFRONTED BY FEMALE HE HAD DISCIPLINED - HE'S FIRED, NO CASE

On Oct. 28, 2021, in Paul Smith v. City of Alexandria, U.S. District Court Judge David C. Joseph, U.S. District Court for Western District of Louisiana (Alexandria Division) granted the City's motion for summary judgment. The retired Fire Chief was hired as an "at will" city employee to install smoke detectors in the community and was confronted at a retirement reception for Assistant Chief. The woman who then worked for current Fire Chief confronted him about being at the reception. City said he was fired on the basis that his report to HR falsely stated he had been invited to the retirement reception.

"On May 22, 2019, Plaintiff attended a retirement reception for an Assistant Fire Chief…. While at the reception, Fire Department employee Debbye Johnson ('Johnson')

allegedly approached Plaintiff, stuck her finger in his face 'in a hostile manner,' and 'loudly shouted' at Plaintiff, stating, 'your balls must be as big as they ever were for you to come up in here you mother fucker…."

As one might expect given the nature of this interaction, Plaintiff and Johnson knew each other and, in fact, had a personal history encompassing several decades. Debbye Johnson was hired by the City in August of 1983 as a Secretary or a 'Fire Records Clerk…' On August 18, 1997, Plaintiff, who was then Chief of the Alexandria Fire Department, terminated Johnson's employment for allegedly requesting additional time off after exhausting all of her sick leave, annual leave, and vacation days…. Johnson was then re-hired as a Fire Records Clerk for the City after Plaintiff left the Fire Department and remained in that position from September of 2007 until May of 2014, at which time she became the Fire Chief's Secretary…. Although she was still serving as the Fire Chief's Secretary when she interacted with Plaintiff at the May 22nd reception, she was then suffering from Stage IV cancer. She died approximately four and a half months later.

***

Plaintiff was, in fact, terminated two weeks after his protected activity. Importantly, however, his June 6, 2019, termination date was also two weeks after: (i) Plaintiff's involvement in a public altercation with another City employee at an official retirement reception; and (ii) his alleged untruthfulness about having been invited to the retirement reception, which was the reason proffered by the City as its legitimate non-retaliatory reason for Plaintiff's termination. Plaintiff has not provided evidence to show that his complaint of sexual harassment, as opposed to his involvement in the events at the May 22nd retirement reception or his supervisor's belief that he had lied, was the but-for cause of his termination."

Facts:

"Prior to his most recent term of employment with the City, Plaintiff had been an employee of the Alexandria Fire Department for almost 32 years…. Plaintiff served as the Fire Chief for the City of Alexandria for nearly ten of those years before retiring in 2007, when he was appointed by Louisiana Governor Kathleen Blanco as the State Fire Marshal…. In January of 2014, after serving as State Fire Marshal and subsequently as the Superintendent of Fire for Jefferson Parish, Louisiana, Plaintiff left full-time employment and returned to work for the City of Alexandria in a part-time capacity as a SAFEAlex technician….

The SAFEAlex program was an initiative designed by the City of Alexandria to promote interaction between city officials and neighborhood watch groups for the purpose of discovering and remedying crime and other problems throughout Alexandria's neighborhoods and communities…. Plaintiff, for his part, was employed as a Fire Safety Liaison for SAFEAlex…. His job entailed, among other things, installing smoke detectors in homes throughout the City.

***

After leaving the May 22nd retirement reception, Plaintiff reported the events of the day to Human Resources at the advice of his supervisor…. The next day, Plaintiff submitted a written memorandum to Human Resources explaining his version of the events that had occurred at the reception…. In response, on May 23, 2019, Johnson was given a 'counseling' by her supervisor regarding the incident…. On June 6, 2019, Plaintiff was terminated from his position as a SAFEAlex technician on the grounds that he had allegedly made misrepresentations to his supervisor that he was, in fact, an invited guest at the May 22nd reception.

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Here, it is undisputed that Plaintiff is a male, that he was qualified for his position as a SAFEAlex technician, and that he was subject to an adverse employment action when he was terminated. The focus of the Court's inquiry, then, is on the fourth element, *i.e.*, whether Plaintiff can demonstrate that there is a genuine issue of material fact as to whether he was treated less favorably than a similarly situated female employee.

Here, Plaintiff alleges that Johnson is similarly situated and therefore a comparator under the *McDonnell Douglas* framework. The Court disagrees. It is undisputed that Johnson and Plaintiff worked for two different departments of the City-Johnson in the Fire Department and Plaintiff in the SAFEAlex program…. It is likewise clear that Johnson and Plaintiff did not share the same job responsibilities, supervisory chain, or violation histories…. Additionally, Johnson was a classified, permanent employee, whereas Plaintiff was a non-classified, employee-at-will…. As a permanent status employee, Johnson could not be terminated without just cause and certain procedural requirements…. Plaintiff, on the other hand, was an employee at-will and could be terminated, 'at any time for any reason, with or without notice or cause.' For these reasons, the Court finds that Johnson and Plaintiff are not similarly situated employees under the *McDonnell Douglas* framework."

Legal Lesson Learned: "At will" employees can be fired "with or without notice or cause."

File: Chap. 8

NY: FDNY - HISPANIC "PRIORITY HIRE" – INJURED AT ACADEMY, 2 LIGHT DUTIES – FIRED FOR MEDICAL REASONS

On Oct. 20, 2021, in Xavier Lopez v. City of New York, U.S. District Judge Nina Gershon granted the City's motion for summary judgment. Plaintiff was a "priority hire" on Jan. 27, 2014 as part of the Vulcan Society [African-American firefighters] settlement; during his second week, he injured his ankle while jogging; after light duty, he returned to Fire Academy on July 7, 2014, and in August injured his left knee. He returned to Academy on Aug. 28, 2014, and then re-injured his left knee and toe and was again placed on light duty. He was terminated on Jan. 14, 2015 after numerous medical reviews.

“Defendant's position is that plaintiff was terminated based on his inability to return to a third firefighter academy as a result of his subjective complaints of pain, which were unsupported by medical evidence. Specifically, according to Dr. Kelly, plaintiff was not capable of working as a firefighter based on his continued symptomology, in light of, essentially, a negative work up, an opportunity to [complete] physical therapy, [plaintiff's] failure to pursue outside orthopedic consultations when [BHS] gave him the authorization, and his evaluation by [BHS] medical team, who saw no physical disability [despite his] persistent subjective complaints…. Defendant has presented evidence that plaintiff's inability to return to a third firefighter academy based on subjective complaints of pain, unsupported by medical evidence, supplied a legitimate non-discriminatory reason for his termination.

***

In support of his theory that he was treated differently because of his race or national origin, plaintiff points to six other firefighters who were given more than two opportunities to complete the fire academy. But, of the six, four were priority hires like plaintiff, one was a Hispanic man like plaintiff, and plaintiff has not presented any evidence indicating that the injuries or situations of the two white firefighters who were given three opportunities were comparable to his.”

Facts:

“Plaintiff Xavier Lopez, a former probationary firefighter with the New York City Fire Department (‘FDNY’)…. He claims that he was discriminated against on the basis of his race, national origin, and age, and that he was retaliated against for complaining about his treatment. Defendant City of New York now moves for summary judgment. For the reasons set forth below, the motion is granted.

***

On January 14, 2015, plaintiff received a letter terminating him from his position with the FDNY. The letter did not state a reason for the termination. While the letter was signed by Fire Commissioner Daniel Nigro, it is undisputed that the decision to fire plaintiff was made by the FDNY Chief of Personnel, Michael Gala, with input from Dr. Kelly.

Defendant's position is that plaintiff was terminated based on his inability to return to a third firefighter academy as a result of his subjective complaints of pain, which were unsupported by medical evidence. Specifically, according to Dr. Kelly, plaintiff was not capable of working as a firefighter based on his continued symptomology, in light of, essentially, a negative work up, an opportunity to [complete] physical therapy, [plaintiff's] failure to pursue outside orthopedic consultations when [BHS] gave him the authorization, and his evaluation by [BHS] medical team, who saw no physical disability [despite his] persistent subjective complaints.”

Legal Lesson Learned: Recruits must be physically capable of performing the job.

File: Chap. 8

WI: POLICE CHIEF WANTED CIVILIAN TO RUN 911 – PRIOR COMMENTS ON MINORITIES – BLACK CAPT. CASE PROCEED

On Oct. 20, 2021, in Andra Williams v. City of Milwaukee, et al., U.S. District Court Judge Brett H. Ludwig, U.S. District Court for Eastern District of Wisconsin, denied the City's motion for summary judgment, citing comments that Police Chief made to the Executive Director of the Police and Fire Commission, and to the Mayor after a "Advancement in Management" (AIM) meeting in Fall 2015 [a year prior to June 2016 panel rated applicants for Director of 911], where they were reviewing police department hiring of minorities and lesbians.

> "Williams relies on a web of interrelated incidents to support his allegations of discrimination, but the most important is [Police Chief Edward] Flynn's tirade following an Advanced in Management (AIM) meeting in the Fall of 2015…. Mary Nell Regan (Regan), then Executive Director to the City of Milwaukee Fire and Police Commission, was present after the AIM meeting along with Mayor Tom Barrett, Barrett's chief of staff Patrick Curley, Flynn, and Flynn's chief of staff Joel Plant…. Regan testified:
>
> > 'Chief Flynn got very upset, real red in the face, upset about-I think even slammed his hands down a couple times-very upset about minorities and lesbians that were coming after him. And he saw in the future that he would go down like Chief Jones, and he wasn't going to let that happen, and he was outraged because he had promoted many of those same people, and then he rattled off the list of names.'
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> Examining the record, Flynn's 2015 AIM comments emerge as Williams' most consequential allegation, but the defense has asked the Court to tare the weight of those comments…. Defendants are off base in arguing that Flynn's stray remarks should count for nothing at all. The Seventh Circuit has reminded courts, however, that its cases "should not be overread to mean that 'stray remarks' of a derogatory character are never evidence of discrimination. What our cases hold . . . is that if someone not involved in the decision making in a plaintiff's case expressed discriminatory feelings, that is not evidence that the decision was discriminatory." *Gorence v. Eagle Food Centers, Inc.*, 242 F.3d 759, 762 (7th Cir. 2001). Here, Flynn was the decisionmaker in this case, so his derogatory remarks, even if unrelated to an employment decision, can support Williams' case."

Facts:

> "In 2016, Andra Williams, an African American Captain of Police with the Milwaukee Police Department (MPD), applied for two different Emergency Communications positions within the MPD and City of Milwaukee. Despite significant relevant experience-he had headed MPD's 9-1-1 dispatch and call centers for almost eight years-Williams was not offered either role. According to Former Police Chief Edward Flynn and City Director of Administration Sharon Robinson, they passed over Williams

because he lacked qualities they thought essential to the positions. According to Williams, what he really lacked was the proper race and gender.

***

From July 30, 2006 to September 17, 2011 and again from June 21, 2013 to March 7, 2016, Andra Williams was a sworn Captain of Police, in charge of the MPD's 9-1-1 dispatch and call centers…. As Captain to the Communications Division, he was responsible for day-to-day operations and implementing then-Police Chief Flynn's long-term strategic vision…. Flynn wanted to prioritize call response efficiency, so Williams created a database to track officer performance on the Differential Police Response program, which tests how police respond to calls for service…. Williams also worked to develop the OpenSky 911 and computer ID dispatch system whereby calls made to the County went directly to the MPD.

***

As part of its 2016 City Budget, Milwaukee decided to create an Emergency Communications Manager position to replace the role of Captain to the Communications Division that Williams occupied…. The Emergency Communications Manager was to be a civilian who would control the MPD's 9-1-1 dispatch and call centers, direct 180 employees, including sworn officers and civilians, and possess specialized knowledge of the software and infrastructure platform used in the Communications Division. Because of his experience in the Division, Williams applied for the new Emergency Communications Manager position ahead of his July 8, 2016 full duty retirement…. He was one of eight qualified candidates selected to interview with an independent, three-person panel on June 21, 2016…. Based solely on the interview scores, Williams ranked first among the candidates…. However, the final memo provided by HR Specialist Pamela Roberts ranked Williams second behind Jill Price, a White female.

[She turned down the job; it was re-posted and went to white, retired police officer from another city.] The records also shows that Flynn stated he passed over Williams because he wanted to civilianize the Emergency Communications Manager position and appoint someone who would view it as a career. If those really were Flynn's goals, it seems odd that he ultimately gave the job to a 34-year veteran of the Greendale Police Force whose career was mostly behind him."

Legal Lesson Learned: "Stray remarks" by police or fire chiefs, and other executives in hiring and promotion process, can come back to "bite" in employment litigation.

File: Chap. 9

TN: SERVICE DOG – FORMER EMT WITH "PTSD" – NOW AT&T, WANTS DOG RIDE WITH HIM - CASE TO PROCEED

On Oct. 22, 2021, in Wayne Schroeder v. AT&T Mobility Services, LLC, U.S. District Court Chief Judge Waverly D. Crenshaw, Jr., U.S. District Court for Middle District of Tennessee

(Nashville Division) held that neither the plaintiff, nor AT&T are entitled to Summary Judgment. Pre-trial discovery will therefore continue, and if not settled the case will go to trial.

> Mr. Schroeder has a German shepherd named Dakota…. Dakota is a service dog who 'can sense when Mr. Schroeder is entering a depressive state or suffering from an anxiety attack and will notify Mr. Schroeder of his change in condition….'' Without Dakota's help, Mr. Schroeder is 'more apt to keep going and try to work his way through a depressive episode or anxiety attack,' rather than pausing what he is doing and 'refocus[ing]' as is necessary…. Dakota 'also acts as a physical barrier when Mr. Schroeder is in a public space, keeping people from crowding or getting too close to him, which can trigger Mr. Schroeder's PTSD and anxiety…. '
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> ***
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> "Mr. Schroeder claims AT&T failed to accommodate his mental health conditions by refusing to alter his job requirements and company vehicle to permit his service dog to work alongside him. AT&T argues the accommodations Mr. Schroeder proposed were unreasonable. Both parties moved for summary judgment…. The Court will deny each motion because genuine issues of material fact remain regarding the reasonableness of Mr. Schroeder's requested accommodations."

Facts:

> "Mr. Schroeder is a military veteran and former Emergency Medical Technician ('EMT')…. He has combat experience and saw 'death and all kinds of horrors' as an EMT…. He suffers from anxiety, depression, and post-traumatic stress disorder ('PTSD')…. The symptoms of these conditions, for Mr. Schroeder, include flashbacks, anxiety attacks, mood shifts, and negative thinking.
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> Mr. Schroeder is a senior specialist RAN engineer for AT&T…. He drives through states trying to detect electronic interference with AT&T's cell signal frequencies…. If he detects interference, he locates the property from which it is emitting and attempts to convince the property owner to shut down the source of the interference…. Currently, Dakota does not accompany Mr. Schroeder while he is working.
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> In 2019, Mr. Schroeder requested a variety of accommodations to permit Dakota to accompany him at work…. He asked AT&T to switch out his company vehicle for one with enough space for Dakota…. He also asked AT&T to make certain modifications to the car for Dakota, including 'removal of the backseat, installation of a barrier to contain equipment, installation of a barrier to protect Dakota, installation of LED lighting, installation of a fan in Dakota's door to help cool him, window tinting and remote start to help cool or heat the vehicle, and placards to notify others that a service animal was in the truck….' He also requested 'more overnight stays when he was on the road to cut down on travel stress on Dakota….'
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> ***

> Brooke Cisneros, a human resources specialist for AT&T, received Mr. Schroeder's accommodation request…. Ms. Cisneros accepted that Mr. Schroeder was 'a qualified individual with a disability….' Ms. Cisneros spoke to Mr. Schroeder on the phone and communicated with him via email regarding his request…. She also reviewed a PowerPoint presentation Mr. Schroeder prepared…. However, she did not conduct a cost-analysis of Mr. Schroeder's requested accommodations and did not propose any alternative accommodations…. Ultimately, Ms. Cisneros rejected Mr. Schroeder's accommodation request.
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> If a disabled employee requests an accommodation, his employer must engage in an 'interactive process' with him. *Jakubowski v. Christ Hosp., Inc.*, 627 F.3d 195, 202 (6th Cir. 2010). 'This process should identify the precise limitations resulting from the disability and potential reasonable accommodations that could overcome those limitations.' *Id.* (quoting 29 C.F.R. § 1630.2). The 'interactive process is mandatory, and both parties have a duty to participate in good faith.' *Kleiber v. Honda of Am. Mfg., Inc.*, 485 F.3d 862, 871 (6th Cir. 2007).
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> Several questions of fact relevant to whether Mr. Schroeder's requested accommodations were reasonable remain unresolved. For instance, it is unclear how much Mr. Schroeder's accommodations would have cost AT&T, given that AT&T conducted no cost-analysis…. Summary judgment is improper because the record does not establish whether Mr. Schroeder's requested accommodations were reasonable."

Legal Lesson Learned: ADA requires employees to identify the precise limitations resulting from the disability and employers to consider potential reasonable accommodations.

Note: Some fire departments have adopted "station dogs." City of Franklin, Ohio Fire Department is one of the first in our state. See article, July 17, 2021,"Sworn Therapy Dog Supports Ohio Responders."
[The author of this newsletter introduced FD to Circle Tail, which trains service dogs and places dogs that aren't suited for service work.]

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

File: Chap. 11

PA: FIRST DEPUTY CHIEF – 1996 RE-CLASSIFIED AS "EXEMPT" - LAWSUIT TO PROCEED – JURY DECISION

On Oct. 27, 2021, in Gary Mogel v. City of Reading, U.S. District Court Judge John M. Gallagher, U.S. District Court for Eastern District of Pennsylvania, denied motions for summary judgment by both the plaintiff and the city, and will have a jury decide if there has been a violation of FLSA. The Court did hold that if the plaintiff does win, he is entitled to liquidated damages (double amount of back pay) since the City failed to show it contacted U.S. Department of Labor or consulted legal counsel when in 1996 it stopped paying overtime to First Chiefs.

> "In sum, each party has produced evidence that could persuade a jury to resolve the exemption issue in its favor. Since there remains a genuine dispute as to what Plaintiff's primary duty was, it would be inappropriate to enter summary judgment for either party on this issue.
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> Defendant argues that caselaw from other circuit courts, the Department of Labor's regulations, and a Department of Labor opinion letter comport with Defendant's compensation scheme, and Defendant asks the Court to infer from the mere existence of these authorities that Defendant relied on them in good faith. Def.'s Mem. Law Opp. Pl.'s Mot. Summ. J. at 18. But Defendant has not produced any evidence that it actually reviewed or was aware of these authorities when it decided to stop paying First Deputies overtime or at any point thereafter. While these authorities might support a conclusion that Defendant had a reasonable basis to change compensation schemes, they cannot support a finding of good faith unless Defendant can show that Defendant actually consulted them…. It is yet to be determined whether Defendant's compensation scheme violated the FLSA. But if a jury finds that it did, then Plaintiff will be entitled to liquidated damages."

Facts:

> "Prior to 1996, Defendant paid First Deputies on an hourly basis and compensated them for overtime at time-and-a-half…. After 1996, however, Defendant began paying First Deputies on a salary basis, rendering them ineligible for overtime compensation….. Despite the change in compensation, First Deputies' job duties did not change, and they remained the same when Plaintiff retired as they were before 1996…. Plaintiff did not receive any overtime compensation during his time working as a First Deputy.
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> ***
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> The FLSA expressly includes firefighters as employees within its scope. 29 U.S.C. § 207(k). And, like other employees, firefighters are exempt from the overtime requirement when their 'primary duty' is 'executive' or 'administrative.' *Cf.* 29 C.F.R. § 541.3(b)(2)&(3) (providing that firefighters engaged in frontline firefighting are *not* exempt because their "primary duty" is not executive or administrative); *see also Mullins v. City of New York*, 653 F.3d 104, 115-16 (2d Cir. 2011). In evaluating a firefighter's

primary duty, however, a firefighter's duty to manage or direct fire response on the frontlines should be treated as a frontline response duty rather than as an executive or administrative duty. 29 C.F.R. § 541.3(b); *Maestas*, 664 F.3d at 828 ('[F]irst responders are not exempt executives even if they also direct the work of other employees in the conduct of an investigation or fire').

For example, Defendant's Fire Chief declared under penalty of perjury that First Deputies spend 'less than 1% of their total time' engaged in 'frontline firefighting' and that their 'most important function' is the 'supervision and management of the platoon….' This supervision and management allegedly included providing feedback to subordinates, making recommendations on personnel decisions, inspecting equipment and filing reports."

Legal Lesson Learned: If a FD is going to re-classify officers as "exempt" it is wise to consult with legal counsel or the U.S. Department of Labor to prove you acted in "good faith" to avoid liquidated damages.

File: Chap. 11

OH: VILLAGE FD FAILED TO PAY ANY OVERTIME – FF GET $25K BACK PAY – DOUBLED LIQUIDATED DAMAGES - $50K

On Oct. 26, 2021, in David Vance v. Village of Highland Hills, the U.S. Court of Appeals for 6th Circuit (Cincinnati), held (3 to 0) in unpublished opinion that since the Fire Chief never paid any firefighters overtime, and never established a 28-day pay period, the U.S. District Court judge properly held that the firefighter is entitled to $50,160.90.

"The Village 'bears the burden of proving it adopted a work period that brings it within the rule of § 207(k).' *Brock*, 236 F.3d at 810. Based on the stipulated facts, the district court found that the Village did not meet this burden. The Village did provide evidence that its personnel manual calls for a 28-day pay period for public safety employees and for the payment of overtime, but both parties stipulated that this policy was not applied to Vance. The fire chief himself acknowledged this, noting both that a previous fire chief 'used to tell us, you guys can work as much as you want, but you're not going to get paid overtime . . .' and that '[t]o my knowledge nobody was paid overtime within our department.' This led the district court to find that the Village 'did not establish a 28-day work period as the § 207(k) exemption required[,]' and '[t]here is no indication that the fire department ever actually followed the employee manual policy with respect to [Vance].' *Vance*, 2020 WL 7490100, at *2-3. This conclusion is well-supported by the record, and it was not erroneous. We affirm."

Facts:

"Appellant Village of Highland Hills hired Appellee David Vance as a firefighter in 2014. Vance worked overtime but was not paid for it. In fact, the Village's fire chief

admitted in a deposition that 'to [his] knowledge nobody was paid overtime within our department.' Because Vance was not paid overtime, he is owed backpay for that overtime plus liquidated damages. These facts are not in dispute.

What the parties do dispute is how much Vance is owed. The Village believes it has established a qualifying work period under the Fair Labor Standards Act (FLSA) that would entitle it to a statutory exemption from *some* overtime pay, resulting in the Village owing Vance $11, 220.25 in overtime and $11, 220.25 in liquidated damages, for a total of $22, 440.50. Vance believes that the Village is not entitled to this exemption and, thus, owes him $25, 080.45 in overtime and $25, 080.45 in liquidated damages, for a total of $50, 160.90.

***

Vance filed suit in January 2020, alleging these overtime violations and seeking compensation he believed was due to him. The Village answered with several affirmative defenses, including that it qualified for the exemption for overtime for public safety officers set out in the FLSA, 29 U.S.C. § 207(k). The district court ruled in Vance's favor, finding that the Village did not establish the 28-day work period required by § 207(k). We agree."

Legal Lesson Learned: Under the FLSA, liquidated damages are designed to punish an employer who ignores the law.

Note: Good faith exception under FLSA: "In any action commenced prior to or on or after May 14, 1947 to recover unpaid minimum wages, unpaid overtime compensation, or liquidated damages, under the Fair Labor Standards Act of 1938, as amended [29 U.S.C. 201 et seq.], if the employer shows to the satisfaction of the court that the act or omission giving rise to such action was in good faith and that he had reasonable grounds for believing that his act or omission was not a violation of the Fair Labor Standards Act of 1938, as amended, the court may, in its sound discretion, award no liquidated damages or award any amount thereof not to exceed the amount specified in section 216 of this title."

File: Chap. 11

MO: FLSA VIOLATED – 450 FF – CITY PAID OVERTIME WITHOUT "REGULATE RATE" – CBA NOT DEFENSE

On September 29, 2021, in Craig Adams, et al. v. City of Kansas City, Missouri, U.S. Magistrate Judge W. Brian Gaddy, U.S. District Court for District of Missouri (Western Division) granted summary judgment in this class action on behalf of 450 firefighters. The City didn't include their wage augments (such as for HAZMAT cert) in calculating their "regular rate of pay" for

time they were working overtime, while they did include wage augments for FF non-overtime hours. The City's defense is that they were following the CBA. "The CBA pronounces the wage augments 'shall not be regarded as wages.' states that wage augments 'shall not be considered wages.'" The Court found that this is violation of FLSA.

> "The City argues the firefighters are paid a salary, and the salary is intended to compensate the firefighters for working 49.5 hours per week…. According to the City, if a firefighter 'chooses to work beyond those 49.5 hours in a week,' the firefighter is paid the base hourly rate…. The firefighter is not paid the wage augment because the wage augment 'pay is only to be awarded in addition to the salary, not for hours worked beyond what the salary covers.' The City, however, cites no authority for this proposition….
>
> Instead, the City directs the Court's attention to the CBA, which indicates the wage augments are not to be regarded as 'wages…'This argument is without merit and ignores the precedent this Court must follow. See Barrentine [v. Arkansas-Best Freight Sys., 450 U.S. 728 (!981)]450 U.S. at 740 (holding 'FLSA rights cannot be abridged by contract or otherwise waived because this would 'nullify the purposes' of the statute and thwart the legislative policies it was designed to effectuate.'). The City's failure to pay the regular rate (i.e., the "one...times the regular rate") for hours worked in excess of 212 hours during a 28-day period violates the FLSA.
>
> Because, at a minimum, the City failed to pay the regular rate (i.e., the 'one...times the regular rate') for hours worked in excess of 212 hours during a 28-day period, and thus, violated the FLSA, the Court DENIES the City's motion for summary judgment on the issue of whether it violated the FLSA and GRANTS Plaintiffs' motion for partial summary judgment."

Facts:

> "In January 2020, the Honorable John T. Maughmer granted Plaintiffs' motion to conditionally certify an FLSA collective action of current and former firefighters employed by the City who received certification or incentive pay at any time since January 10, 2016…. Pursuant to the Court's Order, those firefighters were notified of the collective action and instructed to submit consent forms if they wanted to join the collective action…. More than 450 consent forms were submitted by April 14, 2020.
>
> ***
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> In addition, firefighters may be entitled to wage augments for special duties, assignments, and/or certifications…Wage augments provide additional compensation as a percentage, ranging from three to ten percent, of a firefighter's salary or an additional amount of money, ranging from $25 to $75, per pay period….
>
> These wage augments and their pay codes are as follows:

Members with an associate degree 'in a field reasonably related to the fire service... shall receive...$25.00 per pay period….'

Members with a bachelor's degree … 'shall receive...$50.00 per pay period.'

Members with a master's degree … shall receive $65.00 per pay period.'

Members with a doctoral degree ...shall receive $75.00 per pay period.'

Hazardous Materials ('HazMat') Team members … shall receive additional pay of three percent (3%) above what his/her salary would otherwise be.'

HazMat Team members … shall receive additional pay of five percent (5%)….'

Aircraft Rescue and Firefighting ('ARFF"' Division members …'shall receive additional pay of five percent (5%)….

Rescue Division members 'shall receive additional pay of five percent (5%) ….

Credentialed members 'permanently assigned to a cross trained dual role ALS [advanced life-saving] company...shall receive three percent (3%) bonus pay….

"Members who have successfully completed a language proficiency assessment of a foreign language or American Sign Language...shall receive $50.00 per pay period."

Members serving as field training officers or instructors in specified areas receive additional pay of ten percent (10%) above what their salary would otherwise be.

***

The CBA pronounces the wage augments 'shall not be regarded as wages.' Nonetheless, the parties stipulate the wage augments are considered 'remuneration' and are included in the "regular rate" as defined by the FLSA.

Legal Lesson Learned: The City will now have to pay back pay; the amount is based on whether the Court finds this a "willful" violation (3 years versus 2 years back pay) and "liquidated damages" (back pay doubles) if City did not act in good faith.

Note: Under the FLSA, the statute of limitations is "two years after the cause of action accrued...except that a cause of action arising out of a willful violation may be commenced within three years after the cause of action accrued." 29 U.S.C. § 255(a)

If an employer violates 29 U.S.C. § 207, the employer is liable to the affected employees in the amount of unpaid overtime compensation, and it may also be liable for 'an additional equal amount as liquidated damages.' 29 U.S.C. § 216(b). If the employer 'shows to the satisfaction of the court' that its actions were 'in good faith' and it 'had

reasonable grounds for believing' its actions were not violating the FLSA, 'the court may, in its sound discretion, award no liquidated damages or award any amount thereof not to exceed the amount specified in section 216 of this title."

File: Chap. 12

MI: FREELANCE PHOTOGRAPHER – LAWFULLY BANNED FROM FIREHOUSES FOR DRINKING – NOT RETALIATION

On Oct. 27, 2021, in Alexander Haggart v. City of Detroit, et al., U.S. District Court Judge Steven J. Murphy, U.S. District Court, Eastern District of Michigan (Southern Division) granted defendants' motion for summary judgment, including Fire Chief Patrick McNulty and Deputy Chief Robert Shinske. The Court held the banning was not in retaliation for taking photo of Deputy Chief Shinske's command vehicle at bar 18 months earlier, where Deputy Chief received a 5-day suspension. Note: the photo was picked up by press and "went viral." See Oct. 18, 2017 article, "Detroit fire chief investigated for taking department car to bar."

> "And the evidence shows that Deputy Chief Shinske had a legitimate reason to ban Plaintiff from firehouses based on Plaintiff's drinking and horsing around on department equipment. In all, Plaintiff has failed to show that Deputy Chief Shinske would not have banned him but for posting the photos on social media. Because no evidence shows a but-for causation, Deputy Chief Shinske did not violate Plaintiff's constitutional rights and is therefore entitled to qualified immunity."

Facts:

> "Plaintiff moonlights as a freelance photographer…. Plaintiff photographs the aftermaths of accidents, crimes, and fires and then sells the photos to news agencies…. Plaintiff also posts the photos on a social media account called Southeast Michigan Fire and Weather….
>
> On the night of October 13 and the early morning of October 14, 2017, Plaintiff livestreamed a video on social media…. The video shows Plaintiff, a white man, and another white man, driving a vehicle slowly behind a black woman, who is walking on a sidewalk…. Plaintiff and the other man in the vehicle claimed that the woman lit a mattress on fire in a building…. The two men allegedly could not report the woman for arson because the police and fire department were not answering calls…. The two men ultimately followed the woman for a mile until she ran into a house…. The two men claimed that they 'held her at gun point for ten minutes' sometime during the pursuit.
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> ***
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> The next day, Patrick McNulty, Chief of the Fire Investigation Division, was notified of Plaintiff's video and began to investigate Plaintiff's conduct….Chief McNulty was concerned that the video showed vigilantism and so he forwarded the video to a sergeant

> in his office for review…. Chief McNulty was specifically concerned with Plaintiff's 'admissions made in the video about holding [the woman] at gunpoint' and Plaintiff's lack of a concealed carry license…. '[T]he investigation encompassed the whole act, the arson, the person who committed the arson, and the subsequent detainment or following of th[e] suspect…' Later that same day, Detroit Police took over the investigation, and Chief McNulty was no longer involved in the investigation.
>
> ***
> A few days later, Plaintiff posted photos of a Detroit Fire Department vehicle outside a bar in Dearborn, Michigan…. The vehicle belonged to Deputy Chief Robert Shinske…. The photo went viral, and the local news featured it in a story. Deputy Chief Shinske received a five-day suspension because of the photo….
>
> Two months later, Plaintiff posted another photo of Deputy Chief Shinske's department vehicle; the vehicle was smashed into Shinske's house….
>
> Eighteen months later, in June 2019, Deputy Chief Shinske learned that Plaintiff-who was not a Detroit Firefighter-was drinking beer and riding equipment in a firehouse…. Under department policy, civilians are only allowed in a firehouse if they are invited but are not allowed after a certain time…. Drinking is also forbidden inside firehouses…. Deputy Chief Shinske then banned Plaintiff from entering Detroit firehouses in two June 2019 orders….Plaintiff later sued Defendants in August 2019."

Legal Lesson Learned: (1) Even if off duty, don't drive your marked FD vehicle to bar unless conducting official business; (2) station officers who allow civilian to drink a beer at the station should also face discipline.

File: Chap. 12

LA: FF 3rd DUI – AFTER FIRST DUI SIGNED "RETURN TO WORK AGREEMENT" - TERMINATION UPHELD

On Oct. 20, 2021, in Lance Martin v. Department of Fire [New Orleans], the Court of Appeals of Louisiana, Fourth Circuit, held (3 to 0) that the Civil Service Commission properly upheld the firefighter's termination. After his first DUI (July 18, 2018), he agreed to seek help from EAP and signed a "Return to Work Consent for Information Disclosure' Agreement which obligated him to abstain from alcohol consumption during the term of his employment. Thereafter he had two more DUIs: Oct. 10, 2018, and July 12, 2019.

> "Upon review of the record, we find the Commission's decision to uphold Mr. Martin's termination is rationally based on the facts established in the record. The record reflects that after entering into the return to work agreement, Mr. Martin had two additional incidents of alcohol misuse, which led to him being arrested. Consequently, he violated his return to work agreement. While we acknowledge

> that termination from permanent employment is the most extreme form of disciplinary action taken against an employee, we cannot say the Commission's decision to uphold the termination in this case was arbitrary, capricious, or an abuse of discretion."

Facts:

> "On July 18, 2018, Mr. Martin, while driving his personal vehicle, struck several parked cars near the NOFD headquarters, and was charged with operating a vehicle while intoxicated ('DWI'). On July 20, 2018, Mr. Martin entered into NOFD's Employee Assistance Program ('EAP') to obtain assistance with managing alcohol substance abuse. As a condition of the program, Mr. Martin signed a 'Return to Work Consent for Information Disclosure' agreement, which obligated him to abstain from alcohol consumption during the term of his employment.
>
> On October 10, 2018, Mr. Martin was arrested and charged with DWI, reckless operation of a vehicle, and other moving violations. In a third incident, on July 12, 2019, Mr. Martin was arrested and charged with DWI and reckless operation of a vehicle, following a single-car accident.
>
> On July 19, 2019, Superintendent of Fire, Timothy A. McConnell issued a disciplinary letter, terminating Mr. Martin.
>
> ***
>
> Superintendent of Fire, Timothy A. McConnell explained in the disciplinary letter:
>
> > 'Your conduct has jeopardized the safety of yourself and the general public. Your actions have also represented the New Orleans Fire Department (NOFD) in a manner that is detrimental to the standards of the fire service. The Department has provided you with assistance and allowed you the opportunity to modify your conduct over the last twelve months through the City's Employee Assistance Program (EAP). However, you have continued to engage in actions that have twice resulted in your arrest for driving while under the influence of alcohol (intoxicated) after entering the EAP.'
>
> ***
>
> Mr. Martin timely appealed his termination to the Commission. On October 8, 2019, a Civil Service hearing took place before Hearing Examiner Jay Ginsberg. At the hearing, Mr. Martin admitted to consuming alcohol on July 12, 2019. Thereafter, the hearing examiner provided the Commission with an advisory report dated June 10, 2020. The hearing officer recommended that Mr. Martin's appeal be granted, finding that Mr. Martin did not report to work intoxicated or pose a public safety risk while on the job.
>
> On December 22, 2020, the Commission rejected the hearing examiner's findings and recommendation, and denied Mr. Martin's appeal, finding that 'granting Appellant's appeal, given the facts presented, would in the eyes of the NOFD, its firefighters, and the public potentially damage the integrity and effectiveness of the EAP, specifically and

correspondingly the NOFD's overall efficiency, credibility, and effectiveness in the eyes of all.' It is from this judgment that Mr. Martin now appeals.

***

Upon review of the record, we find the Commission's decision to uphold Mr. Martin's termination is rationally based on the facts established in the record."

Legal Lesson Learned: Return to work agreements and other "last chance agreements" are enforceable.

File: Chap. 13

AL: EMT WITNESS FOR FED. GOVT – WAS CALLED TO COUNTY JAIL - POLICE LIEUTENANT CONVICTED

On Oct. 25, 2021, in United States of America v. Alex Huntley, the U.S. Court of Appeals for the 11th Circuit (Atlanta, GA) held (3 to 0; unpublished opinion) that federal jury properly convicted former lieutenant of the Tuskegee, Alabama police department of deprivation of rights under color of law resulting in bodily injury, in violation of 18 U.S.C. § 242. Huntley was sentenced to 36 months' imprisonment and three years' supervised release.

"At trial, the government presented evidence of the facts recounted above, including, among other things, (1) testimony from Turk, EMT Peterson, Officer Echols, Officer Craig, and four Tuskegee Police Department trainees who were at the police station on December 24, 2014; (2) the pants Turk wore that day, which had blood stains on them; and (3) pictures of Turk taken by his mother soon after the incident, in which he had chipped teeth, cuts, scratches, swollen wrists, and bruises."

***

Moreover, the trial testimony sufficiently showed that Huntley's actions leading into the police station and inside the building resulted in at least some bodily injury to Turk. Trial witnesses testified that Turk had blood in his mouth and on his face after the briefing room incident, indicating some kind of cut or abrasion occurred in the briefing room. The government entered into evidence a pair of bloodstained pants that Turk testified were stained as a result of his injuries from Huntley and pictures taken of Turk soon after the incident showing him with chipped teeth, cuts, and bruises. Peterson testified that Turk had a bloody lip, abrasions, and red eyes, and that Turk reported feeling pain all over his body. In addition, Turk himself testified that he was in pain because of the mace sprayed in his eyes and the physical assaults that occurred inside the holding cell room and the briefing room."

Facts:

"Huntley is a former lieutenant of the police department in Tuskegee, Alabama. In December 2014, while working an off-duty security detail at the Tuskegee municipal

complex, he saw Edward Turk ride an all-terrain vehicle ('ATV') through the Tuskegee town square toward a local liquor store. He radioed the police department to request assistance in responding.

In response, Officer Justin Echols arrived in a marked patrol vehicle at the liquor store and stopped near Huntley and the ATV. Huntley was dressed in full uniform but had driven to the liquor store in his personal vehicle. When Turk came out of the liquor store, Huntley told him that he was not supposed to be riding an ATV in the town area.

***

Officer Echols drove Turk to the police station, and when they arrived, Turk, who was still handcuffed, complied with Officer Echols's command to exit the vehicle and walk toward the station. Huntley met them at the front door of the station and had a conversation with Turk. While they were standing outside, Huntley sprayed Turk with mace twice, even though Turk was still handcuffed, not making any threatening movements, and not attempting to escape. The mace burned Turk's eyes.

***

Huntley then took Turk inside the police station to the holding cell room, where he tripped Turk and began beating him while he was on the ground. Officer Echols, Officer Cedric Craig, and four trainee officers either saw Huntley hitting and kicking Turk or heard Turk screaming while in the holding cell room. Huntley told the trainees to leave. A few minutes later, Huntley walked Turk to the station's briefing room and placed him in a chair while the officers began to do paperwork to process his arrest. Turk was still handcuffed. At some point, Turk made a comment that Huntley did not like, and Huntley walked over to Turk, knocked him off his chair, and kicked him while he was on the ground. When the trainees saw Turk later in the briefing room, his face and eyes were swollen, he was spitting blood, and he had blood on his face.

Officer Echols drove Turk to the Macon County Jail and, once there, Turk requested medical attention. Audrey Peterson, an emergency medical technician, was called to the jail to examine Turk. When she got there, Turk's lip was bloody, he had bruises and scrapes on him, his eyes were red, and he told her that he was in pain all over his body. Peterson advised Turk to go to the hospital for further testing, which he did after he was released from the jail."

EMT's role was further described in Gov't appellate brief:

"Eventually, an emergency medical technician was summoned to the jail to examine Turk for injuries…. She checked his scalp and observed that a dreadlock had been pulled out. She recommended to Turk that he go to the hospital for further examination…. Later that day, after his release from the jail, Turk sought treatment at the East Alabama Medical Center."

Legal Lesson Learned: EMS personnel may become witnesses to a police assault; fully document the patient's injuries and our advice that prisoner be taken to hospital.

File: Chap. 13

OH: AMBULANCE CO. SUED BY BILLING MGR., BILLER & EMT - "UP CODE" BILLING – U.S. GOV'T HAS INTERVENED

On Oct. 18, 2021, in United States of America ex rel. Brandee White v. Mobile Care EMS & Transport, Inc. et al., U.S. District Court Judge Douglas R. Cole, U.S. District Court, Southern District of Ohio (Western Division) denied Mobile Care's motion to dismiss the lawsuit.

> "Relator White was a Mobile Care employee…. The company hired her to oversee Mobile Care's billing practices…. She claims that, beginning in December of 2009 and continuing at least through the date of the second amended complaint, Mobile Care had 'knowingly … caused the submission of false or fraudulent claims to Government healthcare programs, and made or caused to be made false records and statements to get claims for ambulance services to Government healthcare programs paid…." In particular, she alleges that Mobile Care was 'pressuring its employees' to 'upcode' medical transport services to higher billing levels.
>
> ***
>
> The other two relators are likewise Mobile Care employees, one a biller and one a licensed EMT…. The former claims she "refus[ed] to bill for services that were not supported by … records…." The latter claims that he was instructed 'to add specific statements and words to [his] Patient Care Reports in order to create the impression that the patients had a medically necessary reason requiring them to be transported' even if that was not the case…. The Complaint also provides examples of meetings and other interactions in which Mobile Care allegedly applied pressure to EMTs and billers to assist in the fraudulent billing scheme.
>
> ***
>
> If Mobile Care can show that it in fact did not make false claims, either as to the five specified examples, or others identified during discovery, Mobile Care will be entitled to prevail at trial, or perhaps even at summary judgment. But it is not entitled to dismissal of the complaint. Thus, the FCA claims can move forward."

Facts:

> "Buttressing the allegations, Relators point to five examples of alleged fraudulent billing. All five examples involve patients who Mobile Care transported. According to Relators, as to each of the five, Mobile Care overbilled. And as to two of the five, LogistiCare was aware of the overcharges, but nonetheless participated in scheduling further transport for those patients through Mobile Care, knowing that such overbilling was occurring…. As to each of the five, Relators describe the date on which the transport occurred, and provide sufficient details about the transport that the defendants should be able to identify the transport at issue. For example, Relators identify emails that employees exchanged in connection with the transport, as well as the services provided, the billed amount, and, in some cases, the dates of claim submission and payment.

***

Relator White alleges two adverse employment actions. She first says that Mobile Care demoted her in an attempt to prevent or minimize her interference in the allegedly fraudulent billing. (SAC, Doc. 53, #431). Separately, she alleges that Mobile Care fired her…. As separate support for the causal link, Relator White alleges that, when Mobile Care terminated her, it offered her $15, 000 in what she claims amounted to a form of hush money to remain quiet about the alleged violations.

***

Next, the Court turns to Mobile Care's arguments on the merits. The Court rejects those arguments for two reasons. First, Mobile Care is essentially arguing that it has an innocent (or at least merely negligent) explanation for all of the facts that the government has alleged relating to Mobile Care's billings. That may well be the case. But a motion to dismiss is not the proper vehicle to assess which of two competing explanations of the facts are accurate. The allegations in the government's complaint plausibly show that Mobile Care knowingly submitted false claims for ambulance transport that was not medically necessary, and the allegations provide sufficient details regarding the specific examples it offered to allow defendants 'reasonably to pluck out' those claims 'from all the other claims they submitted.' *See United States ex rel. Owsley v. Fazzi Assocs., Inc.*, No. 19-4240, 2021 WL 4771702, at *3 (6th Cir. Oct. 13, 2021)."

Legal Lesson Learned: The False Claims Act is designed to award whistleblowers who inform the U.S. Government of fraudulent claims.

Note: Relator's awards. "A Guide To The Federal False Claims Act"

"Intervention: the FCA provides for a relator share of 15%-25% of the proceeds collected by the United States 'depending upon the extent to which the person substantially contributed to the prosecution of the action.'

Declination: the FCA provides for a relator share of 25%-30% of the proceeds collected by the United States based on what the court finds 'reasonable' for collecting the damages and penalties."

Chap. 14 – Physical Fitness, incl. Light Duty

Chap. 15 – CISM, incl. Peer Support, Mental Health

File: Chap. 16

OH: NEW HAZING LAW – AIMED AT COLLEGE FRATERITIES – BUT ALSO MESSAGE FOR ALL ABOUT RISKS OF HAZING

On Oct. 7, 2021, the new "Collin's Law" came into effect; named after Collin Wiant who died after a hazing incident at Ohio University in 2018. On July 6, 2021, Governor Mike DeWine signed into law "The Ohio Anti-Hazing Act' which is a criminal statute that amends Ohio Revised Code 2903.31.

> See article: "Fraternity members waited to call 911 as Collin Wiant was dying." May 17, 2021. "Collin Wiant took the small canister filled with nitrous oxide, inhaled, and within seconds fell backward onto a futon. His face drained of color and he began to make noises that alarmed the three Sigma Pi fraternity brothers nearby. *** Joshua, who bought the "whippit" canister from which Collin had inhaled the gas, pressed down on Collin's chest over and over. He was breathing into Collin's mouth every 20 seconds. Paramedics arrived within minutes at the unofficial, off-campus home of the Sigma Pi fraternity. But it was too late to save him. Collin died at an Athens hospital shortly after 3 a.m. on Nov. 12, 2018.

Legal Lesson Learned: Fire & EMS departments should conduct training on their state laws on hazing.

> Note: "Under the new 2903.31, 'hazing' adds the language in bold: (1) 'Hazing' means doing any act or coercing another, including the victim, to do any act of initiation into any student or other organization **or any act to continue or reinstate membership in or affiliation with any student or other organization** that causes or creates a substantial risk of causing mental or physical harm to any person, **including coercing another to consume alcohol or a drug of abuse, as defined in section 3719.011 of the Revised Code."**

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

Chap. 18 – Legislation