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Nov. 2020 – FIRE & EMS LAW Newsletter

[NEWSLETTER IS NOT PROVIDING LEGAL ADVICE.]
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ONLINE CASE SUMMARIES – 18 Chapters (2018 – Present)
Updating 18 Chapters in Prof. Bennett's textbook: FIRE SERVICE LAW

NOV. NEWSLETTER - 17 RECENT CASES REVIEWED

Chap. 1, American Legal System

CA: ARSON – EMPLOYEE FIRED COFFEE SHOP - SEARCH WARRANT UPHELD – U.S. SUP. CT's "GOOD FAITH EXCEPTION" ALSO APPLIES

On Oct. 13, 2020, in The People v. Muhammad Khan, the Court of Appeal of the State of California (Sixth Appellate District), held (3 to 0) unpublished decision, that the trial court judge had properly denied the defense motion to suppress evidence seized at defendant's home. Court also held that even if the search warrant was found to be technically deficient, the evidence was properly allowed into evidence based on the U.S. Supreme Court's "good faith exception" in United States v. Leon, 468 U.S. 89 (1984),

> "Even if a close question, we conclude that the issuing magistrate had a substantial basis for concluding that probable cause existed for issuance of the search warrant, i.e., there was a fair probability that evidence of the crime would be found in defendant's home. In *Leon*, the United States Supreme Court recognized a good faith exception to the exclusionary rule where police conduct a search in 'objectively reasonable reliance' on a warrant later held invalid. (*Leon*, *supra*, 468 U.S. at p. 922; see *id*. at p. 924 [the good-faith exception turns on objective reasonableness].) The court explained: 'It is the magistrate's responsibility to determine whether the officer's allegations establish probable cause and, if so, to issue a warrant comporting in form with the requirements of the Fourth Amendment. In the ordinary case, an officer cannot be expected to question the magistrate's probable-cause determination or his judgment that the form of the warrant is technically sufficient.' (*Id*. at p. 921.)
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> [SEARCH WARRANT AFFIDAVIT]
> Based on his experience that people often keep receipts from recent purchases, Detective Bulatao stated his belief that receipts from purchases of 'items pertaining to [the] investigation (i.e. gas purchases, towels, canisters)' would be found in defendant's residence. He also stated, based on his training and experience, that he knew that fire accelerant is 'contained in canisters or other containers,' that 'persons who use accelerants to soak rags, such as the blue towels in this case, may do so in the safety of their homes to avoid detection,' that 'those canisters or other containers of accelerant may be found if a search is conducted,' and that 'when a specific item is used in a crime—in this case, blue towels cut into rags'—'often more of the same type of items will be found in a person's home.' The detective believed that 'a certified canine' would provide 'great assistance in locating the presence of accelerant.' The detective also knew, based on his training and/or experience, that 'liquids [such] as a fire accelerant can often spill onto a person's clothes,' that 'dogs trained in accelerant detection can alert to the presence or non-presence of an accelerant,' and that 'personal items of clothing will be found in a person's residence.'"

Facts:

> "Following a trial, a jury found defendant Muhammad Kahn guilty of arson of an inhabited structure (Pen. Code, § 451, subd. (b)). The jury found true an enhancement allegation that he committed the arson by use of a device designed to accelerate the fire (§ 451.1, subd. (a)(5)). Defendant was sentenced to a total term of nine years, which consisted of a five-year term on the arson and a four-year enhancement.
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> Shane Lopes, a fire investigator and a fire inspector for the City of Palo Alto Fire Department, testified as an expert. On January 9, 2016, Fire Inspector Lopes was the on-call arson investigator, and he was called out and asked to determine whether arson had occurred at the residence.
> On January 9, 2016, Dujan Green, a detective with the investigative services division of the Palo Alto Police Department, collected pieces of blue singed cloth, singed headwear with a 'TOP headwear' label, and a rubber gasket. At the crime scene, Detective Green smelled an odor "'resembl[ing] gasoline.' He took swabs of possible accelerant for testing.

William Whitaker, a City of Sunnyvale police officer, was certified as both a police officer and a firefighter. He was a ‘K9 handler’ of Kodiak, ‘a police service dog,’ which was certified in detecting accelerants, including gasoline. Officer Whitaker responded to the scene and was asked to perform an accelerant search. There were four burnt areas along the garage, and Kodiak alerted in three of the locations.
Fire Inspector Lopes determined that someone had intentionally set the fire. There were multiple start points, and the burn patterns suggested sequential ignition. The arson originated on the residence's exterior, specifically the corner of the garage near a sliding garage door. There were remnants of ‘shop rags or dish towels’ on the driveway. He smelled gasoline. ‘Gasoline is an extremely volatile, flammable liquid.’
A neighbor on S.S.'s street had a "Nest Cam," which continuously sent time-and-date-stamped video recordings to Google Cloud. Upon request, the neighbor provided recordings from the early morning hours of January 9, 2016 to the Palo Alto Police Department. In one recording, a vehicle could be seen leaving at 6:18 a.m. and the Fire Department could be seen arriving at 6:23 a.m.

Sergeant Anthony Becker, an officer with the Palo Alto Police Department, saw the home security video, which showed a vehicle, believed to be a Cadillac ATS, driving to and away from the crime scene. The sergeant learned that defendant had been identified as a person of interest, and he began trying to determine whether defendant owned or had rented a vehicle.

Christopher Moore, a City of Palo Alto police officer, was involved in the arson investigation on January 9, 2016, and he was tasked with searching the area for a dark-colored sedan. His vehicle's mounted camera recorded as he drove. A photograph of a vehicle that he passed at approximately 8:30 a.m. that morning was later extracted.

In reviewing Officer Moore's video, Sergeant Becker saw a dark (either black or dark gray) Cadillac ATS parked along the curb, adjacent to defendant's address. The sergeant could see the vehicle's license plate, and he was able to track the vehicle to Zipcar. Zipcar rental records obtained by search warrant showed defendant had rented a Cadillac ATS with that license plate. It would have taken 10 to 15 minutes, depending upon the route, to drive from defendant's address to the victims' address at about 6:00 a.m. on a Saturday morning.

Detective Eric Bulatao, an officer with the City of Palo Alto Police Department, also investigated the January 9, 2016 arson. The police obtained defendant's phone number from S.S. and then contacted the carrier. The police obtained the past 24 hours of defendant's phone records and determined that the last phone call had been made to Zipcar.”

Legal Lesson Learned: U.S. Supreme Court’s “Good Faith Exception” helps ensure that evidence seized pursuant to a search warrant will be introduced in evidence at trial.

File: Chap. 4, Incident Command

CA: KOBE BRYANT DEATH – NEW CA STATUTE – CRIME FOR EMERGENCY RESPONDERS TAKE PHOTOS WITH PERSONAL DEVICES

Sept. 28, 2020: CA - Gov. Newsom Signs New Law Prompted By Photo Scandal In Crash That Killed Kobe Bryant, 8 Others In Calabasas - Gov. Gavin Newsom has approved legislation prompted by the helicopter crash that killed Kobe Bryant and eight others in Calabasas earlier this year. The bill signed Monday makes it a crime for first responders to take unauthorized photos of deceased people at the scene of an accident or crime. Reports surfaced

after the Jan. 26 crash that graphic photos of the victims were being shared by eight deputies. Los Angeles County Sheriff Alex Villanueva said the department has a policy against taking and sharing crime scene photos, but it does not apply to accident scenes. Vanessa Bryant has sued the sheriff in a lawsuit seeking damages for negligence, invasion of privacy and intentional infliction of emotional distress.

> CA Law: 647.9: (a) A first responder, operating under color of authority, who responds to the scene of an accident or crime and captures the photographic image of a deceased person by any means, including, but not limited to, by use of a personal electronic device or a device belonging to their employing agency, for any purpose other than an official law enforcement purpose or a genuine public interest is guilty of a misdemeanor punishable by a fine not exceeding one thousand dollars ($1,000) per violation.

Legal Lesson Learned: Fire & EMS departments should have a policy or SOG regarding taking photos at scenes.

> For example, see Yakima County, WA Fire District 12 policy: "All personnel are permitted to photograph an incident scene so long as the photograph is taken with a Department issued camera. a. Personal devices: cell phone cameras, video cameras, digital cameras and film cameras are not permitted to take on scene photos at any time by any member."

Chap. 6, Employment Litigation

NJ: RECRUIT FIRED AFTER GRADUATION – PRIOR TO ACADEMY HAD ALTERED INSURANCE CARD TO SHOW ADDRESS IN CITY - REINSTATED

On Oct. 19, 2020, In The Matter of Christopher D'Amico, City of Plainfield, Fire Department, the Superior Court of New Jersey, Appellate Division, held (2 to 0) in unpublished decision, that the New Jersey Civil Service Commission, based on the findings of their Administrative Law Judge, properly ordered the City to rehire the firefighter, with back and seniority rights. The Fire Chief also supported the re-hire decision.

> "After reviewing the City's exceptions, the Commission agreed with the ALJ. It held D'Amico provided his true address on the card and the addition of correct information on the document did not indicate a lack of character or morals to be a firefighter. Even if it were, the Commission concluded the City was aware of the altered document in May 2017, before D'Amico was hired and attended the fire academy. In addition, because D'Amico was on the job for only three or four hours at the time he was terminated, the Commission concluded the City had the burden of proving D'Amico was guilty of the charges. Based on its findings, the Commission reinstated D'Amico, and awarded him back pay, benefits, and seniority status."

Facts:

> "The City of Plainfield (City) appeals from a May 22, 2019 decision of the Civil Service Commission (Commission), affirming an April 2, 2019 initial determination by an administrative law judge (ALJ). The Commission and the ALJ found Christopher D'Amico was wrongfully terminated from his employment as a City firefighter and reinstated D'Amico to his job position. We affirm.
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> To become a City firefighter, applicants are required to prove residency. D'Amico submitted several documents supporting his Plainfield residency, including a roller hockey alliance insurance card (card). D'Amico modified the card to include his actual residential address in Plainfield. According to D'Amico, he revised the card because he did not have additional proof of residency when he was asked for further documentation as part of the pre-employment review process. The City's hiring committee recommended against hiring D'Amico based on his alteration of the card submitted with his employment application.

However, the City's Fire Chief decided to hire D'Amico. D'Amico attended the fire academy starting in June 2017. A citizen questioned the residency of several cadets attending the fire academy at that time. As a result, D'Amico's residency was re-examined in July 2017. During the July re-examination, D'Amico again admitted to altering the card. Ultimately, the concerned citizen's non-residency allegation regarding D'Amico was deemed to be unfounded.

D'Amico graduated from the fire academy in September 2017. Because D'Amico admitted to altering a residency document, even though the information added to the card was accurate, the City's Director of Public Safety told the City's Fire Chief to terminate D'Amico. When D'Amico and two other cadets reported to work on September 11, 2017, they were terminated from their jobs.

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After reviewing the City's exceptions, the Commission agreed with the ALJ. It held D'Amico provided his true address on the card and the addition of correct information on the document did not indicate a lack of character or morals to be a firefighter. Even if it were, the Commission concluded the City was aware of the altered document in May 2017, before D'Amico was hired and attended the fire academy. In addition, because D'Amico was on the job for only three or four hours at the time he was terminated, the Commission concluded the City had the burden of proving D'Amico was guilty of the charges. Based on its findings, the Commission reinstated D'Amico, and awarded him back pay, benefits, and seniority status.

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Applying these principles, we discern no basis for disturbing the Commission's decision to reinstate D'Amico to his position as a City firefighter and to award him back pay and benefits. The Commission conducted an independent review of the evidence and examined the ALJ's decision in light of the evidence. Based on that independent review, the Commission agreed D'Amico 'was simply lazy in inputting truthful information,' and his laziness in completing the information to procure the card did not "significantly impinge upon the character and morals of being a [f]irefighter . . . ." The Commission also accepted the ALJ's credibility findings. The ALJ found D'Amico to be credible, indicating he only 'showed me true remorse for what I can only conclude was laziness not moral ineptitude.'

While the City suggests we independently review the facts presented to the ALJ and make our own inferences based on that evidence, we decline to do so. Whether we might have reached a different result is contrary to the well-established standard for review of agency determinations on appeal. We only review whether the agency's final decision was arbitrary, capricious, unreasonable, or lacked sufficient credible evidence in the record."

Legal Lesson Learned: Civil Service Commissions can perform valuable service; Courts will normally uphold unless "arbitrary, capricious, unreasonable, or lacked sufficient credible evidence in the record.

Note: The Ohio Supreme Court, in Lima v State, on June 10, 2009, 2009-Ohio-2597, held 5-2 that a state law prohibiting general residency requirements for public employees is valid and supersedes local laws that might require residency.

For Ohio firefighters and other emergency responders, a political subdivision may require that they live in the county or adjacent county. ORC 9.481:

> "To ensure adequate response times by certain employees of political subdivisions to emergencies or disasters while ensuring that those employees generally are free to reside throughout the state, the electors of any political subdivision may file an initiative petition to submit a local law to the electorate, or the legislative authority of the political subdivision may adopt an ordinance or resolution, that requires any individual employed by that political subdivision, as a condition of

employment, to reside either in the county where the political subdivision is located or in any adjacent county in this state. “

File: Chap. 7, Sexual Harassment

IL: FEMALE IN CHICAGO FD’s PARAMEDIC ACADEMY – INJURED “LIFTING & MOVING SEQUENCE” – REFUSED RE-HIRE - CASE PROCEED

On Act. 27, 2020, in Donna Griffin v. City of Chicago, U.S. District Court Judge Sara L. Ellis, Northern District of Illinois, denied City’s motion to dismiss the lawsuit; plaintiff may pursue claim that the CFD administered physical fitness tests solely to eliminate women from the Academy, leading to her injury and termination April 11, 2019, and the City’s refusal to allow her to re-apply after she failed a return-to-work Independent Medical Exam in June 2019 (she was prescribed medications for insomnia and adjustment disorder).

> “In October 2016, Griffin (who was known as Donna Ruch at the time) and several other female paramedics filed the *Livingston* lawsuit, alleging that the City discriminated against them based on their sex. In connection with the parties' attempts to make progress in settling *Livingston*, the City agreed to conditionally hire Griffin as a CFD Fire Paramedic candidate pending medical processing.
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> The relevant question is whether Griffin has plausibly alleged that discriminatory and retaliatory motives were the bases underlying the City's June 2019 denial of her application. She has. Griffin alleges that the City ‘refused to allow her to enter a subsequent training academy’ class because of her gender, her complaints about illegal sex discrimination, and her disability. *Griffin*, Doc. 1 ¶¶ 17, 18, 21, 24-26. She further alleges that the City has allowed men who use alprazolam or trazodone—the medications that Griffin had taken or was taking when she went through the medical evaluation process in March and April 2019—to train and work as Fire Paramedics and that the City has also allowed individuals who have not complained of discrimination to use these medications while training or working as Fire Paramedics. These allegations plausibly state claims for relief based upon the City's June 2019 denial of Griffin's application.”

Facts:

> “Griffin is a licensed paramedic. In 2015, she entered the Academy as a Fire Paramedic candidate. At the Academy, the CFD required Griffin to take two physical tests: a ‘Lifting and Moving Sequence’ and a ‘Step Test.’ [She alleges these] tests, however, did not measure a candidate's qualifications to work as a Fire Paramedic; rather, the CFD administered these tests solely to eliminate women from the Academy. Griffin was injured while performing the Lifting and Moving Sequence. The following year, in August 2016, the CFD terminated Griffin's employment.
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> In October 2016, Griffin (who was known as Donna Ruch at the time) and several other female paramedics filed the *Livingston* lawsuit, alleging that the City discriminated against them based on their sex. In connection with the parties' attempts to make progress in settling *Livingston*, the City agreed to conditionally hire Griffin as a CFD Fire Paramedic candidate pending medical processing. The City and Griffin memorialized this agreement in a term sheet titled ‘Proposed Hiring Opportunity for the First 2019 Paramedic Training Academy Class’ (the ‘Term Sheet’), which sets forth certain ‘terms and conditions relating to a potential hiring opportunity in 2019’ for Griffin. *Griffin*, Doc. 20-1 at 2. According to the Term Sheet, Griffin had to meet all of the CFD's current hiring standards, which included passing a medical evaluation, to enter the April 2019 Paramedic Training Academy class. The Term Sheet further provides that

the CFD's Medical Division would evaluate Griffin's medical fitness for hire. If the Medical Division determined that Griffin was not medically fit for duty, and Griffin disputed this determination in good faith, the parties agreed that an independent medical examination ("IME") would determine Griffin's fitness for duty. If an IME was necessary, Griffin would select a physician from an already-compiled list of physicians to perform the IME. The parties further agreed that the results of the IME as to Griffin's fitness for duty "shall be binding upon the parties." *Id*. at 3 (¶ 2(g)).

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Griffin began processing for entry into the Academy in September 2018. She was still undergoing processing in March 2019 when the City determined that it would not medically clear Griffin for instatement to the Academy. According to the City, it would not clear Griffin because further medical evaluation was necessary due to her use of alprazolam and trazodone. At the time, Griffin suffered from a mental health disability (insomnia and adjustment disorder) or the City regarded her as having a mental health disability. A physician had prescribed Griffin alprazolam and trazodone to treat her insomnia and adjustment disorder. Griffin's physician had also given her written medical clearance before the City's refusal to medically clear her.

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Footnote 4: Griffin alleges that the addictions specialist provided this verification before the City refused to medically clear her, but her filings in *Livingston* show that she did not see the specialist until after the City's refusal and the March 27 hearing. *Livingston*, Doc. 127 at 2 (‘After the March 27 hearing, Griffin was found fit for duty by Dr. Eric Schieber, a board-certified psychiatrist and addiction specialist with 30 years of experience diagnosing and treating patients with addiction. Dr. Schieber 'performed a comprehensive diagnostic psychiatric evaluation of Griffin' on March 28[.]’ (citation omitted)).

Legal Lesson Learned: Plaintiff may now proceed with pre-trial discovery, including how the FD has medically dealt with male firefighters using the same medications.

File: Chap. 8, Race Discrimination

MI: PROB. FF (WHITE) - WATERMELLON WITH PINK RIBBON TO FIRE STATION WHERE HE WAS JUST ASSIGNED – FIRED – CASE PROCEED

On Oct. 22, 2020, in Robert Patterson v. City of Detroit, et al., the State of Michigan Court of Appeals held (3 to 0) in an unpublished decision, that the trial court judge properly denied the City’s motion for summary judgment concerning race discrimination allegations in the complaint. The probationary firefighter’s internal investigation was shoddy, and he was treated much more harshly than a non-probationary African American firefighter who had posted a racially insensitive item.

“The evidence indicates that both plaintiff and Bragg should have received substantially the same kind and intensity of investigation, impartiality, and benefit of any doubt. Because a violation of the zero-tolerance policy would seem to constitute ‘cause,’ it is irrelevant that plaintiff was at-will and Bragg was not. Because the real-world effect of both plaintiff's conduct and Bragg's conduct dramatically affected working conditions, the fact that one occurred on City premises and the other occurred on social media does not seem relevant. *** The trial court correctly denied summary disposition as to Counts I and III, being plaintiff's claims for race-based discrimination under the ELCRA and 42 USC § 1981.”

Facts:

"This proceeding arises out of plaintiff's termination as a trial firefighter[2] from the Detroit Fire Department. Plaintiff, who is Caucasian and in his early 40s, completed firefighter training and was assigned to a fire station, Engine 55, that was, unbeknownst to plaintiff, predominantly African American. The weekend before his assignment was scheduled to start, plaintiff (who was off-duty at the time) brought to Engine 55 a large watermelon with a pink bow attached. The watermelon was poorly received, and many people present were deeply offended and hurt.

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Plaintiff maintains that he purchased the watermelon before he knew of his assignment,[4] he did not know the racial composition of Engine 55, and he intended the watermelon to be a friendly gift. Plaintiff also maintains that he was under the impression that it was traditional for newly-assigned trial firefighters to bring a gift of food to their assigned stations, and he intended the watermelon to be a healthy and nutritious alternative to the more-common gift of donuts or similar sweets.

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An internal investigation ensued. Unfortunately, the record makes it clear that the investigation was, at a minimum, disorganized.

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It is also readily apparent that no one involved in the investigation cared about plaintiff's motives, either because they felt his motives did not matter or because they felt it was nearly impossible for plaintiff to have had any motive other than racial insensitivity.

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Biondo [Eugene Biondo, the Deputy Chief of Fire Operations], however, did nothing more than meet with plaintiff for five minutes and send an email to Green with a summary of his impression of the interview, which he believed concluded his role in the investigation…. Biondo's five-minute interview with plaintiff was, seemingly, the only effort anyone involved in the investigation made to consider plaintiff's perspective. Biondo asked plaintiff to explain the pink bow, and he opined (and emailed to Green) that plaintiff had no answer beyond the bow being a 'failed attempt at humor.' Plaintiff testified that the humor had actually been an intended play on firefighters possibly getting 'a smirk out of' the pink bow, which, generously construed, appears to imply a play on gender-role stereotypes rather than anything racial.

[Footnote 3: We are unaware of any racial connotations to bows, the color pink, or pink bows; nor have defendants offered any indication that such connotations exist. Our own independent research has only revealed some possible gender-related connotations, or possibly a breast cancer awareness campaign.]

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All trial firefighters are given a "Final Probation Report." Green did not recall how much of plaintiff's Final Probation Report he filled out, but he "wrote the charges up" and signed it. In plaintiff's Final Probation Report, Green [Alfie Green, the Chief of Training for the Fire Department] found plaintiff's 'work behavior' unsatisfactory because bringing the watermelon with a pink bow on it was racially offensive, in violation of the City's zero-tolerance policy.

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Jones [Eric Jones, the Fire Commissioner for the City of Detroit Fire Department] affirmatively refused plaintiff's request for an interview, explaining that he did not believe plaintiff would be truthful with him.

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Meanwhile, plaintiff contends that another, similar incident demonstrates bias in the Fire Department. According to a complaint filed as a consequence of that other incident, Willie Bragg, an African American male EMT made a post on Facebook to the effect that 'white men, women and children should be raped and killed,' enslaved and beaten, and 'used as alligator bait.' Kimberly Asaro, a Caucasian female EMT who was 'friends' with Bragg on Facebook, saw the post and took offense. Asaro complained to Jones and to her immediate supervisor, the latter of whom ordered Bragg not to have any contact with Asaro. Bragg allegedly disregarded the order and commenced a campaign of harassment and intimidation toward Asaro at work. Asaro continued to complain to her supervisors, who undertook no further disciplinary action toward Bragg, even though a Caucasian firefighter had allegedly been terminated the previous year 'for posting 'racist remarks' on Facebook.' Asaro eventually resigned due to medical issues caused by the stress of the situation.

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Although it is clear that there are some differences between plaintiff and Bragg, the overwhelming majority of them are irrelevant to the core issue: both of them engaged in racially insensitive conduct while off-duty, which caused great offense and pain to a member of a different race, which in turn spilled over into employees' practical abilities to work comfortably with each other. In both cases, the ultimate decisionmaker was Jones. The evidence indicates that both plaintiff and Bragg should have received substantially the same kind and intensity of investigation, impartiality, and benefit of any doubt. Because a violation of the zero-tolerance policy would seem to constitute "cause," it is irrelevant that plaintiff was at-will and Bragg was not. Because the real-world effect of both plaintiff's conduct and Bragg's conduct dramatically affected working conditions, the fact that one occurred on City premises and the other occurred on social media does not seem relevant."

Legal Lesson Learned: Even an "at will" probationary firefighter is entitled to a thorough investigation prior to making a termination decision.

Note: The Court of Appeals also held trial court judge properly dismissed plaintiff's defamation claim against the Fire Commissioner for issuing a Press Release after plaintiff was terminated. "[T]he evidence indicates that Jones's issuance of the press release was within the scope of his authority as Fire Commissioner. Therefore, he is entitled to absolute immunity for any defamatory (or false light invasion of privacy) content within that press release."

The October 6, 2017 Press Release read:

> "There is zero tolerance for discriminatory behavior inside the Detroit Fire Department. On Saturday, Sept. 30, 2017, at Engine 55, a trial firefighter (probationary employee) engaged in unsatisfactory work behavior which was deemed offensive and racially insensitive to members of the Detroit Fire Department. After a thorough investigation, it was determined that the best course of action was to terminate the employment of this probationary employee."

File: Chap. 8, Race Discrimination

OH: EMS CAPTAIN (BLACK) SHIFT CHANGED – SO WHITE CAPTAIN ON EACH SHIFT – UNFAIR, INCONVENIENT - BUT NOT TITLE VII VIOL.

On Oct. 8, 2020, in Michael Threat, et al. v. City of Cleveland, U.S. District Court Judge James S. Gwin, Northern District of Ohio, granted the City's motion for summary judgment. Five African-American Captains sued, after the EMS Commissioner changed the shift of Captain Reginal Anderson from his requested day shift to night shift; the Commissioner wanted at least one Caucasian Captain with more seniority on duty.

"Not all undesirable or unfair work conditions that employees face are material for purposes of Title VII. 'Reassignments without changes in salary, benefits, title, or work hours usually do not constitute adverse employment actions.' Plaintiff Anderson's shift change, while unfair and inconvenient, does not rise to the level of a materially adverse employment action. A change to night shift 'is not materially adverse without some reduction in pay, prestige, or responsibility.' Anderson's shift change did not affect the basic terms of his employment; it merely temporarily affected when he worked and who he worked with. Anderson's family life preference for day shift does not change things.[44] Courts employ an objective standard for Title VII materiality. Working night shift is not objectively less desirable than day shift or viewed by the City or EMS Commissioner as a duty performed by lower-ranking employees. In fact, two captains more senior than Anderson each used their top bids on A-key and B-key nights."

Facts:

"Plaintiffs work as captains of the Cleveland Emergency Medical Services ('EMS') Division. Plaintiffs sued the City and their supervisor, EMS Commissioner Nicole Carlton. In their lawsuit, Plaintiffs, all African American, claim discrimination and retaliation under Title VII of the Civil Rights Act and the Ohio Civil Rights Act, Fourteenth Amendment Due Process Clause violations, and Ohio intentional infliction of emotional distress.

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Plaintiffs Michael Threat, Margarita Noland-Moore, Pamela Beavers, Lawrence Walker, and Reginald Anderson are African American captains in Defendant Cleveland's EMS Division. This dispute comes from the EMS Division's scheduling of Plaintiffs' work shifts.

EMS schedules are divided into 'A' days or 'B' days and day shift or night shift. Every fall, the EMS Captains bid on their coming year schedules, choosing 'A' or 'B' days and day or night shift. Cleveland generally uses seniority to assign schedules, with the most senior captains getting their top shift bids. But Article XIV of Plaintiffs' Collective Bargaining Agreement with Cleveland allows the EMS Commissioner, Defendant Carlton, to transfer up to four captains to a different schedule even when the transfers would be inconsistent with captain seniority.

Plaintiffs' discrimination claims involve the 2018 shift-bidding process, beginning in fall 2017. Plaintiffs claim that Defendant Carlton misused her Collective Bargaining Agreement authority, overriding seniority to avoid having a shift with only African American captains.

However, the shift-bidding forms show that during 2018, Defendant Carlton did not alter Plaintiffs Threat, Noland-Moore, Walker, or Beavers's shift assignments; they each received assignments that matched their seniority relative to the other bidders for the same shifts.

But Defendant Carlton did alter Plaintiff Anderson's shift assignment. Carlton swapped Anderson's shift assignment with a white male captain on two occasions. In her deposition, Carlton admitted that both times she changed Anderson's shift assignment she made the change based upon racial grounds. [Footnote 17: Doc. 29 at 69-70 (Anderson switched with Captain Nick Kavouras, a white male); *id*. at 83 (Anderson switched with Captain Warren James, another white male, after Kavouras self-demoted).]
Carlton maintained that she wanted to diversify Anderson's shifts, which otherwise would have been entirely African-American-staffed.

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Anderson's family life preference for day shift does not change things. Courts employ an objective standard for Title VII materiality. Working night shift is not objectively less desirable than day shift or viewed by the City or EMS Commissioner as a duty performed by lower-ranking employees. In fact, two captains more

senior than Anderson each used their top bids on A-key and B-key nights. [Footnote 46: R.33-2 ¶ 11 (Captain Robert Raddell (white male) and Captain Carol Cavin (white female) are each more senior than Plaintiff Anderson); R.33-8, PageID.1048 (Cavin bids), 1054 (Raddell bids).]

Nor does Defendant Carlton's discriminatory intent change the outcome. The intent of the employer and the materiality of the negative employment conditions are separate inquiries. Blatant discriminatory intent does not convert an immaterial employment action into a material one.

Plaintiff Anderson has not shown a genuine issue of material fact as to whether he was subject to a materially adverse employment action.

Legal Lesson Learned: Staffing decisions based on race can lead to litigation and poor workplace morale; should be carefully reviewed with legal counsel prior to implementation.

File: Chap. 9, Americans With Disabilities Act

AL: BATTALION CHIEF INJURED NECK IN OFF DUTY MVA – AFTER LIGHT DUTY PERIOD, ORDERED BACK TO 24-HRS – NO ADA VIOL.

On Oct. 2, 2020, in Jay Hawthorne v. City of Prattville, U.S. District Court Judge R. Austin Huffaker, Jr., Northern District of Alabama, granted the City's motion for summary judgment. Here's the timeline after the March 31, 2017 MVA: Battalion Chief granted light duty (8-hour clerical) from Oct. 23, 2017 until medically cleared back to work on May 2, 2018. That day he was re-injured in quarterly physical fitness testing; returned to work May 20, 2018 (15-pound lifting restriction), and City put him back to 24-hour shift; he was denied 8-hour shift and given his continuing physical limitations, on Aug. 15, 2018 he was removed from active service, to go on worker's comp (retired Sept. 17, 2019).

> "[A]n employer is not obligated to 'bump' another employee from a position to accommodate a disabled employee. *Lucas*, 257 F.3d at 1256. Nor is an employer required to create a new position for an employee. *Boyle v. City of Pell City*, 866 F.3d 1280, 1289 (11th Cir. 2017); *Sutton v. Lader*, 185 F.3d 1203, 1210-11 (11th Cir. 1999) (an employer 'is under no obligation to hire an employee for a non-existent job,' nor is it required to create a light-duty position for a disabled employee).
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> The Court concludes that working a 24-hour shift is an essential function of the battalion chief position within the City's fire department. As Hawthorne admits, the fire department required a battalion chief to be on-duty at all times, and all battalion chiefs and most other fire department personnel worked 24-hour shifts. As such, for Hawthorne to work only a daily 8-hour shift, compared to the 24-hour shifts required of all the other battalion chiefs, there would be a disruption of the shift rotation of the other battalion chiefs who would have to cover Hawthorne's overnight hours in addition to their own, or alternatively, the City would have had to hire an additional battalion chief."

Facts:

> "On March 31, 2017, Hawthorne injured his neck in a non-work-related car accident for which he ultimately underwent surgery. (Doc. 16-1; Doc. 16-2.) Hawthorne used and exhausted his twelve weeks of Family and Medical Leave Act ('FMLA') leave but was not immediately released by his physician to return to work full duty. (Doc. 16-3.)

Therefore, Hawthorne used his accrued sick and vacation time as an accommodation during his continued absence. (Doc. 16-3.)

On October 13, 2017, Hawthorne provided the City with a return-to-work plan, stating that he could return to light-duty work on October 16, 2017 and then to full-duty work four months later. (Doc. 16-4.) Beginning October 23, 2017, the City provided Hawthorne with light-duty clerical work in 8-hour daily shifts as a temporary accommodation while he continued to recover. (Doc. 16-13 at 28-29; Doc. 16-14 at 4, 9; Doc. 16-15 at 4.) During the time that Hawthorne was working in the temporary light-duty position, his battalion chief duties were performed by Captain Josh Brown as acting battalion chief. (Doc. 16-13 at 29; Doc. 16-17 at 3.)

Four months later, in February 2018, the City's Human Resource Director, Lisa Thrash, requested that Hawthorne submit a status plan. (Doc. 16-4.) In response, on February 27, 2018, Hawthorne provided an updated plan, stating that he could not return to full-duty work but that he could return to a modified work capacity, lifting no more than 75 pounds for the next 6 weeks. (Doc. 16-4; Doc.16-5.) Hawthorne remained in his temporary position while under these restrictions.
On April 12, 2018, Hawthorne provided another update regarding his recovery and ability to work, stating that he needed to work under restrictions for another month. (Doc. 16-4.)

On April 19, 2018, Thrash emailed Hawthorne to advise that the temporary accommodation would end on April 21, 2018 and that the City would continue to accommodate him through his use of leave time, or alternatively, he needed to retire. (Doc. 16-5; Doc. 16-15 at 5; Doc. 21-2 at 2; Doc. 21-13.) Hawthorne, however, did not want to use his accrued leave or retire, so he convinced his doctor to allow him to return to work full duty, with no limitations. (Doc. 21-2 at 3; Doc. 16-5; Doc. 16-13 at 28.) This decision proved to be a mistake, at least medically.

***
Hawthorne returned to work full duty, per his physician's release, on May 2, 2018. (Doc. 21-2 at 3; Doc. 16-5; Doc. 16-13 at 17.) The day of his return, Hawthorne participated in a quarterly physical exercise evaluation and afterwards complained of pain and numbness in his neck that radiated through his shoulder. (Doc. 16-6; Doc. 16-13 at 28.) As a result, he visited the City's workers' compensation physician, was diagnosed with a muscle strain, and was released back to work with a lifting limitation of 15 pounds. (Doc. 16-7; Doc. 21-2 at 3.)

***
The City scheduled Hawthorne to return to work on May 20, 2018, on a 24-hour shift, restricted-duty status, based on the medical restrictions placed on Hawthorne by his physician. (Doc. 16-8; Doc. 16-13 at 30.) According to the City (Thrash), their logic was several-fold — Hawthorne could be effective in assisting shift members in his battalion with their reports, it was in his best interest to return to the shift to which he was most accustomed, and he would soon recover from his muscle strain. (Doc. 16-15 at 6; Doc. 21-7 at 4, 6.)

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Of all the new restrictions, the 24-hour shift requirement was the most problematic for Hawthorne. According to Hawthorne, because of his medical condition, his physician recommended that he sleep on a "regular bed" (that is, his own bed at home), instead of a cot at the station. Therefore, Hawthorne believed he should not have been required to work 24-hour shifts as did the other fire department employees, including all of the other battalion chiefs. (Doc. 16-9.) Instead, Hawthorne believed he should have been permitted to work only reduced 8-hour shifts and stay at his own home at night.

***
On September 17, 2019, Hawthorne notified the City of his retirement due to his work-related injury that prohibited him from being heavy-duty rated as required for his battalion chief position. (Doc. 16-12.)

Hawthorne concedes that, following his motor vehicle accident on March 31, 2017, he never was able to physically perform all of the duties required of a battalion chief. (Doc. 16-13 at 6, 9, 14.).

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Hawthorne's admitted inability to perform the job duties of a battalion chief also serves as a legitimate, non-discriminatory reason for Hawthorne's termination, if his separation is characterized as such.

Legal Lesson Learned: Under ADA, an employee's inability to perform the job duties serves as a legitimate, non-discriminatory reason for termination.

File: Chap. 10, FMLA / Military Leave

IL: CHICAGO FF WHILE ON MILITARY LEAVE – MISSED TEST FOR ENGINEER, FD REFUSED MAKE-UP – CASE PROCEED

On Oct. 23, 2020, in lawsuit filed by U.S. Department of Justice in Derrick Strong v. City of Chicago, U.S. District Court Judge Elain E. Bucklo, Northern District of Illinois, denied the City's motion for summary judgment. The written exam for Firefighter Engineer was given on Nov. 14, 2016. When the firefighter completed his active duty in June 26, 2017, he requested a make-up exam but was denied. The U.S. Department of Justice filed this lawsuit on his behalf under the Uniformed Services Employment and Reemployment Rights Act of 1994 ("USERRA"), 38 U.S.C. § 4313, even if the City had offered him opportunity to take exam remotely while on military duty.

"Accordingly, plaintiff can potentially prevail on his § 4313 claim if he can show that without undue hardship, the City could have administered a make-up examination upon his return to service that might have earned him a spot on the 2016 Eligibility List. Of course, plaintiff would also have to show that his promotion to Fire Engineer was reasonably certain assuming his successful completion of the exam.

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The City also argues that because it offered to administer the exam remotely during plaintiff's period of active duty, it was not required to offer him a make-up exam upon his return. As noted above, however, the inquiry into the reasonableness of an employer's efforts focuses on hardship to the employer in qualifying the returning service member *after* his or her return from service, not on the employer's conduct during the service member's military leave. Moreover, one of USERRA's primary purposes is 'to encourage military service by minimizing the disadvantages to civilian careers.' *DeLee v. City of Plymouth, Ind.*, 773 F.3d 172, 175 (7th Cir. 2014). While it may be true that plaintiff could have avoided missing the qualifying exam if he had agreed to take the written portion remotely, plaintiff might be able to show that requiring him to prepare for and take the test during his period of active duty placed him at a disadvantage as compared to non-service members, arguably in violation of the statute's purpose."

Facts:

"Plaintiff has worked for the City of Chicago as a cross-trained Firefighter/Emergency Medical Technician-Basic since August of 2009. Since 2015, he has been a member of the United States Army Reserve, where he currently holds the rank of Captain and is a member of the Judge Advocate General's Corp.

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In late August of 2016, plaintiff received notice that he was to begin a period of active duty on September 30, 2016. On September 4, 2016, he submitted to the City's Department of Human Resources ('DHR') a written request for military leave of absence from September 30, 2016 through June 26, 2017.

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On September 16, 2019, the DHR posted a job announcement for the position of Fire Engineer and began accepting applications for the promotional examination that candidates were required to pass to qualify for the '2016 Fire Engineer eligibility list' from which promotions would be made. The examination comprised two parts: first, a written component, and second, a hands-on proficiency test. The job announcement stated that the written portion would be administered on November 14, 2016, and that the proficiency test would be offered between November 30, 2016 and March 16, 2017, only to candidates who completed the written exam. The job announcement stated that '[n]o reschedules will be permitted for either exam component.'

***

The City administered the written portion of the examination on November 14, 2016 and offered the skills-based proficiency exam in January, February, and June of 2017. Following his honorable discharge from active duty on June 27, 2017, plaintiff again requested to take a make-up exam. To date, the City has not allowed him to make up the missed exam. Accordingly, plaintiff is not included on the 2016 Fire Engineer eligibility list the City established in May of 2018, which comprises the field of candidates who may be promoted to Fire Engineer as positions become available until such time as the City administers another promotional examination. According to plaintiff, the City typically offers such examinations once every ten years.

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Section 4312 of USERRA grants members of the uniformed forces who leave civilian employment for military service the right to be rehired after their release from service, and it establishes the requirements they must meet to invoke that right.[1] For service members such as plaintiff, whose period of service exceeded ninety days, § 4313(a)(2) provides the rule for determining the appropriate reemployment position. The returning service member must be rehired "in the position of employment in which the person would have been employed if the continuous employment of such person with the employer had not been interrupted by such service, or a position of like seniority, status and pay, the duties of which the person is qualified to perform." 38 U.S.C. § 4313(a)(2)(A).

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While it may be true that plaintiff could have avoided missing the qualifying exam if he had agreed to take the written portion remotely, plaintiff might be able to show that requiring him to prepare for and take the test during his period of active duty placed him at a disadvantage as compared to non-service members, arguably in violation of the statute's purpose."

Legal Lesson Learned: The U.S. Department of Justice has aggressively enforced the Uniformed Services Employment and Reemployment Rights Act. See their Web page:

See also the Complaint they filed in this case: He was on military duty as an attorney at Fort Riley, Kansas. "On October 31, 2016, Jill May notified Strong that the DHR's October 5, 2016, grant of his request to take the Fire Engineer examination upon his return from active duty was erroneous. She noted that the DHR was prepared to remotely administer the first part of the examination to Strong on December 10, 2016, while he was on approved military leave from the CFD, at the site of his military duty station, and required that he accept or decline the remote test administration notice by November 4, 2016." [Para. 32.]

Relief requested includes: "should his score merit, providing Strong a certification for promotion date that corresponds to that of others who took the 2016 Fire Engineer promotional examination and achieved the same or similar score…." [Para. 62 (40).]

File: Chap. 10, Family Medical Leave Act / Military Leave

AL: MEDIC WORKED 48-HR SHIFT - "I CAN'T TAKE IT ANYMORE" & I'M TURNING IN GEAR – FD SAID HE RESIGNED - NO FMLA VIOL.

On Oct. 6, 2020, in Kyle Blake v. City of Montgomery, Alabama, U.S. District Court Judge R. Austin Huffaker, Jr., Middle District of Alabama, granted the City's motion for summary judgment. The plaintiff was burned out from being forced to work 48-hour shifts and told his Supervisor he would turn his stuff.

> "Does telling your employer that, due to burnout, you 'couldn't do it anymore' and that you 'would turn [your] stuff in if [you] needed to' support a claim under the Family Medical Leave Act, 29 U.S.C. § 2601 *et seq*. ('FMLA') when your employer ultimately accepts these statements as your voluntary resignation from your job? … Plaintiff Kyle Blake claims that it does, and this lawsuit tests the legitimacy of that position.
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> "Blake's statements to Hackett that he 'couldn't do it anymore,' that he would 'turn [his] stuff in,' and that he needed to speak with his wife to sort this out, simply do not rise to a level sufficient to give the City notice he was experiencing a serious medical condition, let alone a qualifying medical condition, of any sort for which he wanted, needed or should be given FMLA leave."

Facts:

> "Blake formerly was employed as a paramedic by the City of Montgomery ('the City') in its fire department ('the Department'). Blake began his employment with the Department in 2012 … and became a certified paramedic in 2014…. Prior to the events of August 22, 2018, Blake was an otherwise exemplary firefighter and paramedic.
>
> ***
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> Due to short staffing, Blake and other paramedics often were required to work 48-hour shifts, which were contrary to the rules and regulations of the Department. (Doc. 32-7; Doc. 33 at 3.) The staffing issues were so dire that *The Montgomery Advertiser* published an article on September 6, 2018, that quoted a city representative as saying that the City was aware of the fatigue issues among its EMT personnel who were having to work double shifts. (Doc. 32-3.)
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> On August 21, 2018, Blake began work on his regularly scheduled 24-hour shift, from 8:00 A.M. to 8:00 A.M. (Doc. 29-1 at 52-53.) The following morning, prior to finishing his assigned shift, the supervisor for the next shift, District Chief B.S. Hackett, informed Blake that he had to work the next 24-hour shift (an overtime shift) also. (Doc. 29-1 at 54.) In response, Blake told Hackett that he 'couldn't do it anymore' and '[t]hat I would turn my stuff in if I needed to, something like that.(Doc. 29-1 at 54, 82.)
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> ***
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> Later that day, Hackett and Assistant Fire Chief R.H. Bozeman spoke about Blake and his situation. (Doc. 39-1 at 3.) During the conversation, Bozeman instructed Hackett not to contact Blake because Blake would not be allowed back to work. (Doc. 39-1 at 3.)
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> The next day, Bozeman contacted Blake and told him that his verbal resignation had been accepted and that he needed to turn in his gear to the Department's supply division. (Doc. 29-1 at 68.) While Blake claims that he was surprised by the call, he responded with "10-4 Chief" before Bozeman ended the phone call. (Doc. 29-4 at 2.)"

Legal Lesson Learned: When facing burn out, request FMLA leave or call EAP.

File: Chap. 11, Fair Labor Standards Act

FL: "ON CALL" TIME - DEPUTY SHERIFF, 1-HR TO RESPOND – PERSONAL TIME NOT SEVERELY RESTRICTED – NO PAY

On Oct. 3, 2020, in Joseph Caiazza, on his own behalf and those similarly situated v. Carmine Marceno, U.S. District Court Judge Sheri P. Chappell, Middle District of Florida (Fort Myers Division), granted the County's motion for summary judgment concerning on call time; during on call times, Deputy Sheriff had to respond within one hour, and no alcohol; but case may proceed on plaintiff's allegation that County failed to pay him when held over after working shifts.

> "Caiazza contends all the time he spent on call is compensable. Marceno counters that such time was not spent working under the FLSA, so no pay was necessary. The Court agrees with Marceno and holds the time Caiazza spent on call (but not called out) was not compensable, so Caiazza is not entitled to overtime pay based on those hours."

Facts:

> "Marceno is the Lee County Sheriff. And Caiazza is a retired Sheriff's Deputy. During the relevant time, Caiazza worked on Captiva and Sanibel Islands (collectively, the 'Islands'). The Islands had only one other patrol officer, along with a supervisor who had mostly administrative duties.
> Every fourteen days, Marceno scheduled Caiazza for seven twelve-hour shifts of active patrol, with each followed by a twelve-hour on-call period. For one other day every week, Caiazza was on call again. When on call, Caiazza had to respond to call outs within one hour. Given geographical reality, this restricted Caiazza to the Islands and their surrounding waters while on call. To facilitate his job, Caiazza lived in a condo on Captiva, with rent paid by Marceno. After a shift, Caiazza turned off his radio to charge it. So dispatchers notified him of call outs on a work cell phone. While not required, Caiazza regularly watched his work computer for call outs too because notifications sometimes appeared in that system before the dispatcher could make a call. Even when not on call, Caiazza could receive call outs to serve as backup. When on call, Caiazza could not drink alcohol. Because of these conditions, Caiazza says he used on-call time to benefit Marceno, his coworkers, and Island residents.
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> ***
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> On-call employees may be entitled to pay for the time they spend waiting. *Armour & Co. v. Wantock*, 323 U.S. 126, 134 (1944). Traditionally, the distinction has been whether an employee "was engaged to wait" or "waited to be engaged," with only the former compensable. *Skidmore v. Swift & Co.*, 323 U.S. 134, 136 (1944). Deciding whether an employee is working during on-call time "depends on the degree to which the employee may use the time for personal activities." *Birdwell v. City of Gadsden, Ala.*, 970 F.2d 802, 807 (11th Cir. 1992). In other words, "whether 'the time is spent predominantly for the employer's benefit or for the employee's.'" *Id.* (quoting *Armour*, 323 U.S. at 133). To determine if time is compensable, courts scrutinize "the agreements between the particular parties, appraisal of their practical construction of the working agreement by conduct, consideration of the nature of the service, and its relation to the waiting time, and all of the surrounding circumstances." *Skidmore*, 323 U.S. at 137.
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> ***
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> While not controlling, regulations interpreting the FLSA address "on-call time":
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> > An employee who is required to remain on call on the employer's premises or so close thereto that he cannot use the time effectively for his own purposes is working while "on call." An employee who is not required to remain on the employer's premises but is merely required to leave word at his home or with company officials where he may be reached is not working while on call.
> > 29 C.F.R. § 785.17.

The regulations explain on-call time spent at home. Such time 'may or may not be compensable depending on whether the restrictions placed on the employee preclude using the time for personal pursuits.' 29 C.F.R. § 553.221(d). 'Where, for example, [a firefighter] has returned home after the shift, with the understanding that he or she is expected to return to work in the event of an emergency in the night, such time spent at home is normally not compensable.' *Id*. 'On the other hand, where the conditions placed on the employee's activities are so restrictive that the employee cannot use the time effectively for personal pursuits, such time spent on call is compensable.' *Id*. At bottom, for on-call time to be work time, an employee's use of the 'time must be severely restricted.' *Birdwell*, 970 F.2d at 810.

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Here, the restrictions were not severe enough to transform Caiazza's on-call time into work time and the period was not predominantly for Marceno's benefit. Mainly, Caiazza contends he was on call for twenty-four hours at a time and had to monitor his computer constantly, which prevented him from pursuing personal activities. Yet Marceno did not impose significant restrictions on Caiazza, who could use on-call time for his own benefit.

According to Christopher Lusk (the Islands' other patrol officer), he spent on-call time reading, watching tv or movies, cooking, entertaining guests, visiting friends, eating out, shopping, playing with his kids, fishing (on or near the Islands), exercising, and sleeping. (Doc. 49-1 at 4). In other words, Lusk used on-call time primarily for his benefit rather than Marceno's. While Caiazza blankly states he could not do similar activities, he never explains why. Marceno imposed no restriction on those activities. And besides the limitations described below, Caiazza never points to evidence showing any restriction on his personal pursuits."

Legal Lesson Learned: Unless the on call employee is severely restricted in his personal pursuits, the employee is "off the clock."

File: Chap. 11, Fair Labor Standards Act

IN: FLSA SETTLEMENT APPROVED BY FED. JUDGE - $26K AND TOWN DROPPED DEMAND THAT FF PAY BACK $89,878 IN OVERPAY

On Oct. 2, 2020, in Eric Camel, et al. v. Town of Chesterton, U.S. District Court Judge Theresa L. Springmann, Northern District of Indiana, approved the settlement for overtime pay of from 2011 to 2019 of $26,371, and waiver of City's demand for repayment by 10 firefighters of $89,878 in overpayments received.

"Counsel for the parties represent that they reached an arms-length agreement to settle the case on August 10, 2020, after two months of extensive negotiations over the language of the Settlement Agreement. The parties agree that Plaintiffs' attorney's fees are reasonable in relation to the requirements of the case. They finalized the terms of the Settlement Agreement on August 25, 2020.
The Settlement Agreement provides for a total payment of $26,371.24, which includes (1) a payment of $647.40 to Plaintiff Amanda Shine for back pay and liquidated damages, inclusive of all attorney's fees and costs; (2) a payment of $723.84 to Plaintiff Michael A. Coslet for back pay and liquidated damages, inclusive of all attorney's fees and costs; and (3) a payment of $25,000.00 in attorney's fees. The Settlement

Agreement further provides for significant non-economic awards such as the addition of four vacation days in lieu of reduction time (and the elimination of reduction time), enacted through amendments to the Personnel Handbook and to the agreement between the Town of Chesterton and Chesterton Firefighters

Local 4600; waiver of the $89,878.26 overpayment the Town of Chesterton alleges is owed by ten of the Plaintiffs; and the removal of a reprimand in two of the Plaintiffs' personnel files. And, the Settlement Agreement provides that Plaintiffs and the Town of Chesterton agree to dismiss all of their claims with prejudice within three business days of receipt of the settlement funds. The parties have submitted a spreadsheet showing the breakdown by named Plaintiff of the alleged overtime wages owed, the pre-suit payments made, the amounts to be paid pursuant to the Settlement Agreement, and the overpayments that will be waived pursuant to the Settlement Agreement. *See* ECF No. 60-1."

Facts:

"Plaintiffs allege, among numerous other claims against both Defendants, that Defendant Town of Chesterton failed to comply with statutory overtime provisions when it failed to pay them overtime wages when they worked in excess of 204 hours in a twenty-seven (27) day work period from 2011 through and including 2019…. Defendants denied any wrongdoing in their Answer…. In its Counterclaim, Defendant Town of Chesterton alleges that ten of the seventeen individual Plaintiffs received payments in excess of the payments authorized by the salary ordinances adopted by the Town and seeks return of the overpayment in the amount of $89,878.26.

***

Based on the pleadings and the instant Motion, the Court finds that serious questions of law and fact exist as to liability and damages in this case. In light of these issues, the value of an immediate recovery outweighs the mere possibility of further relief after litigating the matter further at the trial court level. In addition to the monetary settlement, the Settlement Agreement provides significant non-economic awards to Plaintiffs. The parties are represented by counsel, who have negotiated in good faith and at arm's length. The Court finds that the $25,000.00 payment for attorney's fees is reasonable in relation to the overall settlement and Plaintiffs' statutory rights under the FLSA. *See, e.g., Wendorf*, 2020 WL 2473759, at *2; *Burkholder*, 750 F. Supp. 2d at 997. Plaintiffs' attorneys accepted representation on a contingency basis, have accrued over $100,000.00 in attorney fees at an hourly rate of $275.00, and have incurred approximately $13,455.97 in expenses. Finding that the settlement is fair and reasonable and "reflects a reasonable compromise of disputed issues," *Burkholder*, 750 F. Supp. 2d at 995, the Court approves the Settlement Agreement."

Legal Lesson Learned: FLSA settlements must be approved by Federal court or by the U.S. Department of Labor to ensure fairness of the settlements.

Note: The governing provision of the FLSA provides:

"The Secretary is authorized to supervise the payment of the unpaid minimum wages or the unpaid overtime compensation owing to any employee or employees under section 206 or section 207 of this title, and the agreement of any employee to accept such payment shall upon payment in full constitute a waiver by such employee of any right he may have under subsection (b) of this section to such unpaid minimum wages or unpaid overtime compensation and an additional equal amount as liquidated damages." 29 U.S.C. § 216(c).

File: Chap. 13, EMS

IL: ET TUBE IN ESOPHAGUS – PATIENT MONITORED DURING TRANSPORT, BUT NO PULSE OX – CASE DISMISSED

On Oct. 26, 2020, in Sally Grant, as Administrator of the Estate of Amanda Gary v. City of Calumet City, the Appellate Court of Illinois (First Judicial District / First Division), 2020 IL App (1st) 191812-U, held (3 to 0) that

the trial court properly granted summary judgment to the City. Plaintiff alleged that the medics did not use a pulse oximeter to continuously monitor the patient's blood oxygen levels after she was intubated, but their Training Officer testified this was not a required action.

> "Construing the record liberally in favor of plaintiff (*Williams*, 228 Ill. 2d at 417), a reasonable finder of fact could conclude that Pierce performed the intubation incorrectly by inserting the tube into Amanda's esophagus rather than her trachea. A finder of fact could also reasonably conclude that this error might have been discovered and fixed prior to Amanda's arrival at the hospital if the paramedics had used a pulse oximeter to continuously monitor Amanda's blood oxygen levels. But even taking these things as true, such errors do not reflect 'an utter indifference to the decedent's safety' (*Bowden*, 304 Ill. App. 3d at 282) as required for a finding of willful and wanton misconduct. This is particularly true where, as here, the paramedics utilized multiple other methods to assess the intubation in a tense and time-sensitive emergency situation.
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> To defeat summary judgment, plaintiff would have had to present evidence that the City either knew [Deputy Fire Chief / EMS Training Officer Peter] Bendinelli's training imperiled patients, or that the City failed to recognize this danger through recklessness. *Affatato v. Jewel Companies, Inc.*, 259 Ill. App. 3d 787, 800 (1994). Plaintiff presented no such evidence. On the contrary, all three of Amanda's treating physicians corroborated Bendinelli's statement that pulse oximeter readings can be inaccurate. In light of their testimony, plaintiff has not presented an issue of fact as to whether Bendinelli's training reflects an utter indifference to patients' safety."

Facts:

> "On October 12, 2014, 31-year-old Amanda Gary suffered a severe asthma attack. Her mother, plaintiff Sally Gary, called 911. Paramedics from the Calumet City Fire Department administered treatment to Amanda and brought her to the hospital. Amanda died ten days later.
> ***
> In her amended complaint, plaintiff alleged that the responding paramedics made a series of errors that led to her daughter's death. First, although Amanda's blood oxygen levels were dangerously low when the paramedics arrived on the scene, the paramedics unnecessarily delayed intubating her for 14 minutes. Second, when they finally did intubate her, they inserted the breathing tube into her esophagus rather than her trachea. Third, they failed to monitor Amanda's blood oxygen level after intubation and, therefore, failed to discover the tube was placed incorrectly.
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> In support of her complaint, plaintiff submitted a healing arts malpractice affidavit by Dr. John Ortinau pursuant to section 2-622 of the Code of Civil Procedure (735 ILCS 5/2-622 (West 2014)). Dr. Ortinau opined that the aforementioned errors constituted deviations from the standard of care, and they contributed to a prolonged state of hypoxia (i.e., absence of sufficient oxygen to maintain bodily functions) which led to Amanda's death.
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> ***
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> The following facts were adduced in discovery, which included the depositions of the paramedics and doctors who treated Amanda. On October 12, 2014, at approximately 10:30 p.m., Amanda was at home when she suffered an asthma attack. Sally called 911, and paramedics Ryan Banks and Chris Pierce responded to the scene. Banks observed that Amanda was in severe respiratory distress; she was wheezing and unable to speak in complete sentences. He gave her a breathing mask and administered albuterol. Pierce placed a pulse oximeter—a device which measures a patient's pulse and the amount of oxygen saturation in their blood—on Amanda's finger. Amanda had a blood oxygen level of 54%. (A normal healthy person has a blood oxygen level above 96%.) Amanda commented that the number was low, then fell unconscious.

According to Banks and Pierce, when a patient falls unconscious, it indicates that not enough oxygen is reaching her brain, and it is important to supply her with oxygen as soon as possible. However, they decided not to intubate Amanda in the house for multiple reasons: her mother was nearby and 'really anxious'; a child was screaming; and it was dark and difficult to see. Instead, Banks gave Amanda some assisted respirations with a bag valve mask, and then he and Pierce brought her to the ambulance. She was still breathing on her own at this time.

At the ambulance, before the paramedics intubated Amanda, they spent five minutes establishing an intraosseous line (*i.e.*, into bone marrow) through which they administered Versed, a paralytic drug. Pierce explained that even with an unconscious patient, Versed must be administered prior to intubation if the patient has a gag reflex, because otherwise the patient might vomit and then aspirate the vomit.
Pierce then performed the intubation. Because Amanda's trachea was swollen from her asthma, he had to use force to insert the breathing tube. He stated that he was sure he placed the tube in her trachea and not in her esophagus. He estimated that it took around 12 minutes from the time she fell unconscious to the time she was intubated. Banks, observing the intubation, saw the tube pass through Amanda's vocal cords, an indication that the tube was in the right place.

After a patient is intubated, paramedics consider multiple factors to determine whether the tube has been performed correctly: lung sounds, lack of abdominal sounds (which would indicate placement in the esophagus), chest rise and fall, CO_2 readings, and pulse oximeter readings. Banks and Pierce heard only "diminished" lung sounds, but they did not hear any abdominal sounds, and the CO_2 detector reflected a positive change. Banks also observed Amanda's chest rising and falling. Thus, they concluded that the intubation was a success.

However, Banks and Pierce did not record any pulse oximeter readings from Amanda after the initial 54% reading in her home. Banks stated that the pulse oximeter '[p]robably' fell off her finger in the house, but, in any event, they would not have used that pulse oximeter in the ambulance; they would have used the one attached to the cardiac monitor. But no such readings were listed in their incident report, and Banks did not independently recall if they obtained any such readings.

Once the intubation was complete, Pierce called St. Margaret North Hospital to inform them that a critical patient was incoming. The drive to the hospital took three to four minutes. At the hospital, the paramedics transferred care to emergency room personnel. Both Banks and Pierce did not believe Amanda was in pulseless cardiac arrest at the time. Pierce specifically recalled she had a pulse when they brought her out of the ambulance.

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Within a minute of Amanda's arrival, Dr. Cole and Dr. Mussman observed she had no pulse and was in cardiac arrest. She was not making any breath sounds, and there were audible sounds over her stomach, indicating that the breathing tube was in her esophagus. Thus, the doctors removed the tube and reintubated her at 11:05 p.m.

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All three doctors were asked to comment on the paramedics' care of Amanda based on the paramedics' incident report. Dr. Cole stated that the paramedics' report did not reflect that they incorrectly intubated her. Dr. Arrentegui-Rodriguez stated that monitoring a patient's pulse oximeter readings after intubation would be 'helpful' and 'appropriate' (though she declined to state that it was 'necessary'). Finally, Dr. Mussman stated that in a hospital setting, she would 'definitely' monitor pulse oximeter readings on an intubated patient, because if the tube was placed incorrectly, the patient's oxygen saturation could decrease. However, she stated that pulse oximeter readings can be inaccurate, and she cited a number of other factors to consider,

including seeing the tube go through the vocal cords, listening for lung sounds, using a CO_2 detector, and watching for condensation in the tube. Dr. Cole and Dr. Arrentegui-Rodriguez similarly acknowledged that pulse oximeter readings can be inaccurate for a variety of reasons, including nail polish and skin temperature.

***

Finally, in regards to their training, both Banks and Pierce referenced various Standing Medical Orders (SMOs) that they were trained to follow. SMO Code 75, governing intubations, called for "[c]ontinuous pulse oximetry and cardiac monitoring." However, deputy fire chief Peter Bendinelli, who was in charge of the fire department's EMS training from 2009 to 2017, opined that pulse oximeter readings were not important in assessing an intubation. He gave two reasons: First, the readings might be inaccurate. Second, even if accurate, a drop in blood oxygen levels might be caused by patient heart failure rather than an error in intubation. Thus, rather than relying on a pulse oximeter, Bendinelli would consider lung and abdominal sounds, chest rise and fall, CO_2 monitoring, the presence of condensation on the breathing tube, and the color of the patient's skin. Bendinelli trained ambulance crews in accordance with this protocol.

***

Under the Emergency Medical Services Act, the City is immune from civil liability for the provision of medical services in good faith, except in cases of willful and wanton misconduct. 210 ILCS 50/3.150(a) (West 2014). The trial court found that the evidence did not support a conclusion that the City's paramedics acted willfully and wantonly, and it granted summary judgment for the City. Plaintiff now appeals. For the reasons that follow, we affirm."

Legal Lesson Learned: Carefully follow your protocol after placement of ET Tube.

File: Chap. 13, EMS

OH: MVA - MEDIC FOUND NO PULSE – 1-HR LATER PATIENT COVERED BLANKET MOVED – NO PROOF "FAILURE TO TRAIN" - CASE DISMISSED

On Oct. 20, 2020, in Lynne Gooden, Individually and as Guardia of Terrell D. Gooden v. Chris Batz, Butler Township, et al., Sharon L. Ovington, United States Magistrate Judge, U. S. District Court for Southern District of Ohio, issued a Report & Recommendation to Federal District Judge that the lawsuit against Butler Township, and against City of Vandalia should be dismissed for alleged "failure to train." There was no allegation that the Medic who first checked on the patient and found no pulse had a history of similar issues. After an hour at the scene, the same Medic saw Mr. Gooden spontaneously move and discovered he had a weak pulse; he survived with permanent brain damage and other long-term disabling health problems.

"Life-threatening accidents are heartbreaking. Such an accident occurred to Plaintiff Terrell D. Gooden in 2016 when his vehicle collided with a tractor-trailer on Interstate 75. Plaintiffs allege that when Paramedic Chris Batz checked Mr. Gooden's pulse and respiration, he incorrectly concluded that Mr. Gooden had not survived the accident. Batz told other first responders that Mr. Gooden was not alive. And neither Batz nor other first responders immediately attempted to resuscitate Mr. Gooden or provide him with any emergency medical care.

***

The Complaint, for instance, does not allege that Batz made serious mistakes when examining victims of previous accidents that should have alerted Butler Township officials that his training was inadequate and likely to cause harm to accidents victims like Mr. Gooden. And, as to Defendants Gallup and Miller,

Plaintiffs' Complaint contains no non-conclusory allegation indicating that they received inadequate training and that such training resulted in a violation of Mr. Gooden's constitutional rights."

Facts:

"Upon his arrival, Batz found Mr. Gooden unconscious and partially ejected from the passenger-side window of his vehicle.

***

More than an hour later, Batz saw Mr. Gooden spontaneously move and discovered he had a weak pulse. First responders immediately administered advanced life-support treatment and transported Mr. Gooden to the hospital. He survived with severe, permanent brain damage and additional long-term disabling health problems.

***

More than an hour after paramedics arrived at the scene of the accident, Defendant Batz began searching Mr. Gooden's vehicle for identification. During his search, Defendant Batz noticed Mr. Gooden make a sporadic movement. A re-check of Mr. Gooden's vital signs located a weak carotid pulse. Mr. Gooden was then removed from his vehicle and then given advanced life-support treatment, "which should have been done at the first encounter." *Id*. at ¶ 47. One hour and sixteen minutes had lapsed during which Mr. Gooden suffered from a lack of oxygen yet received no medical treatment. *Id*. at ¶ 49.

***

Plaintiffs allege that Defendants also failed to 'use basic SALT—Sort, Assess, Life-Saving Intervention Treatment/Transport procedure ... which if they had ... would have confirmed to Defendants that Gooden was alive ....' *Id*. at ¶ 32. Plaintiffs' Complaint describes additional things that should have been done—but were not—to medically care for Mr. Gooden and ameliorate his injuries. *See, e.g*., ¶s 33-38. And they charge: All of these steps were required according to EMS protocols, procedures, training and as part of the requirement under the standard and duty of care to provide emergency lifesaving services by EMS professionals at an emergency. They would have taken only moments to assess and begin to administer and would have resulted in substantial reduction or elimination of ... Gooden's injuries.

***

Plaintiffs' Complaint fails to assert a plausible claim § 1983 claim against Defendants Batz, Gallup, and Miller. Qualified immunity therefore shields them from Plaintiffs' § 1983 claims.

***

Plaintiffs' Complaint takes the opposite path by identifying 'Regional EMS Protocols, Procedures and Employment Policies' that Defendants failed to follow. *Id*. at ¶s 29-39. They allege that implementation of these protocols, procedures, and policies 'would have taken only moments ... and would have resulted in substantial reduction or elimination of ... Gooden's injuries.' *Id*. at ¶ 39. To this extent, Plaintiffs' Complaint contains specific information about polices that would have helped Mr. Gooden had them been followed but contains no similarly specific information about a policy that violated his constitutional rights. For these reasons, Plaintiffs' Complaint fails to raise a plausible § 1983 claim under *Monell* against the City of Vandalia or Butler Township. *See Prado v. Mazeika*, 2018 WL 3456500, at *3 (S.D. Ohio 2018) (Newman, MJ) Report & Recommendation adopted, 2018 WL 4521935, at *1 (2018) (Rice, J).

***

Plaintiffs claim that Butler Township and the City of Vandalia are liable under § 1983 for the failure to train, evaluate, discipline, or supervise the conduct of their paramedics including Batz, Gallup, and Miller. They

assert that these local governments failed 'to teach and hold paramedics responsible and discipline for the applicable policies, procedures, protocols and training of the paramedics.' (Doc. No. 48, ¶ 121).

***

This falls short of raising a plausible failure-to-train claim against Butler Township because it does not offer factual information sufficient to raise a reasonable inference that his training was inadequate or caused Mr. Gooden to incur constitutional harm. The Complaint, for instance, does not allege that Batz made serious mistakes when examining victims of previous accidents that should have alerted Butler Township officials that his training was inadequate and likely to cause harm to accidents victims like Mr. Gooden. And, as to Defendants Gallup and Miller, Plaintiffs' Complaint contains no non-conclusory allegation indicating that they received inadequate training and that such training resulted in a violation of Mr. Gooden's constitutional rights.

Accordingly, Plaintiffs' Complaint fails to raise plausible failure-to-train claims under § 1983 against Butler Township or the City of Vandalia.

Legal Lesson Learned: Follow your protocols concerning determination of death; ask for a second opinion at the scene.

File: Chap. 13, EMS

MD: 21-YR OLD PATIENT IN BASEMENT, DIFFICULTY BREATHING – ARRIVED 6 MIN – ADMINISTERED NARCAN - IMMUNITY

On Oct. 1, 2020, in Octavia T. Coit, et al. v. Nicole Nappi, et al., the Court of Special Appeals of Maryland, held (4 to 0) that trial court properly dismissed the lawsuit. The 21-year old patient was at a friend's house and was in the basement having difficulty breathing; history of asthma, died of cardiac arrest. Administration of Narcan was not harmful and did not contribute to the patient's death. Plaintiffs also complained of a delayed response, but the CAD records show they arrived at scene within 6 minutes and 44 seconds of the 911 call.

"In the absence of willful or grossly negligent conduct, emergency responders covered under the Good Samaritan Act and/or the Fire & Rescue Companies Act are immune from civil liability for any acts or omissions in providing assistance or in the performance of their duties.

***

[Appellants] contend that the administration of Narcan was unnecessary because there was no specific indication that Mr. Coit was experiencing an opioid overdose. The Court understands and appreciates Mr. Coit's family's concern over a misperception that he was using drugs. The evidence demonstrates, however, that, regardless of how unnecessary the administration of Narcan may have been, there are no applicable contraindications for someone who did not overdose on opioids, and that Narcan does not otherwise harm someone to whom it is administered. Even if Paramedic Nappi and EMT Jackson were, in some way, negligent in their assessment and treatment of Mr. Coit, which the Court is not suggesting, there is not sufficient evidence of gross negligence regarding their post-arrival conduct."

Facts:

"Ceontay Coit died on December 11, 2015, at the age of 21 as a result of cardiac arrest following an acute asthma attack.

***

The [appellants] do not dispute that the call for service to M19, the unit Paramedic Nappi and EMT Jackson were operating, was dispatched at 5:08:46 a.m. on December 11, 2015, as reflected in a computer-aided dispatch (CAD) report that is part of the evidentiary record. [Appellants] dispute that Paramedic Nappi and EMT Jackson were 'en route' as of 5:11:12 a.m., as reflected in the CAD report. That dispute is based on an attempt to parlay Paramedic Nappi's and EMT Jackson's inability to recall details at a deposition on October [23, 2018], nearly three years after the date of the call for service related to Mr. Coit, into allegations that they falsely reported when they were en route. Regardless of whether the dispute regarding the dispatch time is genuine, it is not disputed that Paramedic Nappi and EMT Jackson arrived on the scene at 5:15:30 a.m., which was 6 minutes and 44 seconds after the call was dispatched. Paramedic Nappi and EMT Jackson's arrival time is further corroborated by the CAD report and other evidence reflecting their arrival time. There is undisputed evidence in the CAD report that units, EMS5 and E19 arrived at the scene after Paramedic Nappi and EMT Jackson, at 5:16:57 a.m. and 5:22:24 a.m.[,] respectively. Based on the CAD report, EMS5 arrived 1 minute and 27 seconds after Paramedic Nappi and EMT Jackson, and E19 arrived 6 minutes and 54 seconds after Paramedic Nappi and EMT Jackson. Although [appellants] attempt to call into question the entire CAD report based on Paramedic Nappi's and [EMT] Jackson inabilities to recall details nearly three years after the incident and even go so far as to suggest that the report was falsified, there is no evidentiary basis for that. Although, in the context of a motion for summary judgment, non-moving parties are entitled to have the Court draw all reasonable inferences in their favor, non-moving parties are not entitled to all conceivable inferences. There are no genuine disputes regarding material facts related to the timing of Paramedic Nappi and EMT Jackson's arrival at Mr. Watkins' home.

***

[Appellants'] reference at the hearing to a policy-based expectation of a 90-second 'turn-out time' for emergency medical service providers does not provide a basis for gross negligence. Even if Paramedic Nappi and EMT Jackson were, in some way, negligent in their response to the call for service, which the Court is not suggesting, there is not sufficient evidence that their pre-arrival conduct was willful or grossly negligent.

***

There is also insufficient evidence that Paramedic Nappi's and EMT Jackson's post-arrival conduct was willful or grossly negligent. Although the Court recognizes that seconds may seem like minutes during an emergency, the evidence demonstrates that, upon entering the basement of Mr. Watkins' home, Paramedic Nappi and EMT Jackson promptly assessed and treated Mr. Coit. They checked for a pulse, observed agonal respirations, placed an oxygen mask on Mr. Coit, prepared an intravenous line and began administering fluids, began transcutaneous cardiac pacing to address Mr. Coit's heart rate, administered Narcan, and administered Atropine. Treatment and assessment of Mr. Coit's condition continued after Mr. Coit was removed from the house and taken to the medic unit for transport to Northwest Hospital. He was intubated with an endotracheal intubation tube. Further assessment resulted in noting the absence of mechanical capture with transcutaneous pacing and agonal electrical rate without a pulse. Emergency medical service providers began administering CPR and administered Epinephrine during transport to Northwest Hospital. Upon arrival at Northwest Hospital, Paramedic Nappi reported to emergency department personnel regarding what treatment had been provided and the status of Mr. Coit's condition."

Legal Lesson Learned: Immunity statutes like the Maryland statutes are designed to protect EMS and other emergency responders from civil liability; it is frankly hard to understand why this lawsuit were ever filed.

TX: RECRUIT BROKE ANKLE TRAINING RUN, RESIGNED - CLAIMS HARASSED BY LIEUTENANT – AN "ISOLATED INCIDENT" - DISMISSED

On Oct. 14, 2020, in Bryce Baker v. City of Arlington, U.S. District Court Judge Mark T. Pittman, Northern District of Texas, granted the City's motion to dismiss. The recruit broke his ankle during a training run and resigned; he claims that prior to injury, Training Lieutenant harassed him in front of recruit class about having joined in a class action lawsuit against City, and following the injury urging him to resign. Case dismissed; isolated acts by training officer does not prove City endorses such conduct.

> "Baker asserts a single claim against Arlington for First Amendment retaliation under 42 U.S.C. § 1983. Compl. at ¶¶ 20-24. However, as explained below, Arlington cannot be held liable under *Monell* because Baker actually pleaded a policy ***against*** the harassment Baker alleges. *Id*. at ¶ 18. Further, Baker's bare allegation that Lt. Price is a policymaker is conclusory and, as such, is insufficient to state a claim.
>
> ***
>
> Further, Arlington cannot be held liable under § 1983 for an isolated incident involving one of its employees. Under § 1983, "isolated unconstitutional actions by municipal employees will almost never trigger liability." *Piotrowski*, 237 F.3d at 578. Arlington makes this argument in its Motion to Dismiss when it states that Baker's claims are 'directed at a single former Arlington employee—a fire department trainer.' MTD at ¶ 2.01. Baker fails to plead any facts that the alleged harassment and badgering were anything more than an isolated situation between one trainer and one employee. These isolated acts of one employee do not constitute 'widespread practice' and thus cannot be said to qualify as a custom under *Monell*. *See Peterson*, 588 F.3d at 847. Therefore, the Court finds that Baker did not plead sufficient facts to identify any official Arlington policies or customs actionable under § 1983. Arlington's Motion to Dismiss should be and hereby is **GRANTED."**

Facts:

> "After undergoing testing since 2012, Plaintiff Bryce Baker was hired as a fireman by the City of Arlington to begin on April 9, 2018…. As part of his hiring, Baker was required to complete sixteen weeks of fire training followed by sixteen weeks of EMS training…. On April 11, 2018, Baker suffered a fractured ankle injury during a run…. Baker attempted to push through this injury because of his 'dream of becoming a firefighter,' but this only worsened the injury, leading Captain Campbell, in a private meeting with Baker, to attempt to force Baker into resigning 'instead of following normal procedures.'
>
> ***
>
> Prior to Baker's injury, Lieutenant Nevin Price began harassing Baker for his involvement in a class action lawsuit against the City…. In one instance, Lt. Price harassingly questioned Baker in front of the entire class of seventeen recruits regarding Baker's thoughts on the civil action lawsuit, and at one point demanded that Baker 'be straight' with him and stated, 'I know you were part of a possible class action against the City…." Lt. Price taunted Baker in front of the class by stating that Baker 'needed to make some MAN decisions,' while making him stand at attention for 'hour long PT…." Price then wrote Baker up for failing to achieve the time run in which Baker was injured. *Id*. Baker alleges Lt. Price's harassment continued and that he badgered Baker about his injury '*despite* City policy against harassment….' As a result of this harassment and badgering, Baker 'had no choice but to 'resign.'
>
> ***
>
> In order to establish municipal liability under § 1983, a plaintiff must show that (1) an official policy, (2) promulgated by the municipal policymaker, (3) was the moving force behind the violation of a constitutional

right. *Peterson*, 588 F.3d at 847 (citing *Piotrowski*, 237 F.3d at 578); *see also Monell v. Dep't of Soc. Servs. of City of New York*, 436 U.S. 658, 694 (1978)."

Legal Lesson Learned: Isolated acts by training lieutenant, while unfortunate, do not establish a basis for liability of the City.

File: Chap. 16, Discipline

LA: ASSISTANT CHIEF - LYING TO CHIEF ABOUT LUNCH PRESENTATION – PURGED CELL PHONE TEXTS – TERMINATION UPHELD

On. Oct. 20, 2020, in Frederick N. Meiners, III v. St. Tammany Parish Fire Protection District No. 4, et al., the Supreme Court of Louisiana, held (6 to 1) that the District Court judge had no authority to overturn the Civil Service Board's decision upholding the termination.

> "We acknowledge the district court did not specifically impose a new sanction; rather, the district court's judgment simply states 'remanded to the St. Tammany Parish Fire Protection District No. 4 Civil Service Board for further proceedings in accordance with this Judgment and the written reasons issued by the Court on November 14, 2018.' Nonetheless, the clear implication of the court's judgment is that termination is excessive, and the Board must therefore revise its decision to impose a lesser sanction. Thus, although the district court did not explicitly dictate the sanction, it defined the parameters of the sanction as being something other than termination. This action clearly goes beyond the authority granted to the district court under La. R.S. 33:2561(E)."

Facts:

> "Frederick Meiners, III was employed as Assistant Fire Chief with the St. Tammany Parish Fire Protection District No. 4 ('District'). On February 19, 2016, Mr. Meiners agreed to retrieve a repaired ambulance unit from Hattiesburg, but informed his supervisor, provisional fire chief Kenneth Moore, that he first had to attend a speaking engagement with a ladies' group that would last approximately thirty minutes. At 1:08 p.m. that day, Jennifer Glorioso, the wife of Fire Equipment Operator Glorioso (hereinafter referred to as 'FEO Glorioso'), photographed Mr. Meiners sitting at a table at the La Madeleine restaurant with his wife and his lawyer. She later sent a text message containing this photograph to her husband.
>
> ***
>
> At 2:37 p.m., Chief Moore called Mr. Meiners and inquired as to his whereabouts. Mr. Meiners advised Chief Moore that he was en route back to the station. Mr. Meiners reported to Chief Moore's office at 3:00 p.m., at which time Chief Moore gave Mr. Meiners the address to the ambulance repair shop in Hattiesburg. Chief Moore also asked Mr. Meiners about his meeting with the ladies' group. Mr. Meiners told Chief Moore that 'they were just asking me about my career and what we did here at Fire District 4 . . . I'm not ever going to do that again.'
>
> At 3:07 p.m., Chief Moore received a text message from an unknown number that contained a photograph of Mr. Meiners taken at the restaurant. When Mr. Meiners returned, he confronted FEO Glorioso about the photograph by standing over him and demanding that FEO Glorioso tell him who had taken the photograph.
>
> ***
>
> Thereafter, on Monday, February 22, 2016, Chief Moore asked [District Chief Brady] Anderson to put together a timeline of events of that day. Chief Moore then provided a written notice of investigation to Mr.

Meiners, stating that he was ‘initiating an investigation into an incident involving you in a matter which occurred on February 19, 2016, specifically, conflicting details regarding a speaking engagement while on duty.’ The notice of investigation also stated the ‘persons conducting this investigation will be Corianne Green and a PMI representative.’ Chief Moore then placed Mr. Meiners on administrative leave with pay.

***
Unbeknownst to the District, Mr. Meiners conducted a "factory reset" of his employer-issued mobile phone at 11:58 p.m. on February 29, 2016. The factory reset permanently erased certain data, including all text messages.

***
The pre-disciplinary hearing occurred on April 19, 2016. On April 20, 2016, Chief Moore issued a Letter for Final Decision to Mr. Meiners, which terminated Mr. Meiners's employment based on his ‘conduct, as described in the Notice of Pre-Disciplinary Hearing.’

Mr. Meiners appealed his termination to the St. Tammany Parish Fire Protection District No. 4 Civil Service Board (‘Board’), asserting procedural and substantive violations of his rights in the District's disciplinary action. The Board affirmed the termination. The Board found that Mr. Meiners's statements under oath about the Pinkberry meeting were untruthful; Mr. Meiners improperly used his position to intimidate FEO Glorioso; and Mr. Meiners intentionally destroyed evidence that would have been unfavorable to him: . . . .The Appointing Authority has presented evidence that, at a minimum, casts serious doubt on Meiners' claim that he was at Pink Berry meeting with a ladies group before going to La Madeleine. The question of whether Meiners was actually at Pink Berry is a matter that is peculiarly within his knowledge. Under these circumstances, the burden shifted to Meiners to prove that he was at the Pink Berry meeting. See, *Artificial Lift*. The Board closely observed Meiners' live testimony on this point and finds that it was not credible. The Board, thus, finds that Meiners' February 19, 2016 statements to Chief Moore, Meiners' statements under oath at the March 8, 2016 interrogation, and the statements under oath that Meiners made at his April 12, 2016 pre-disciplinary hearing were untruthful.

The Board also finds that: (a) Mr. Meiners improperly used his position to intimidate FEO Glorioso on February 19, 2016; and (b) Meiners intentionally, and without credible explanation, conducted a factory reset of his District 4 phone thereby intentionally destroying evidence that would have been unfavorable to him.

***
Meiners was second in command at District 4. Only Chief Moore was above him in the chain of command. Meiners occupied a unique position of trust, i.e., he was in charge of the entire fire department in Chief Moore's absence. By his untruthfulness, Meiners betrayed that trust. His leadership position also required him to set a sterling example for the lesser ranks. His untruthfulness to his superior and his untruthfulness during the investigation fell far short of this mark. His misconduct struck at the heart of the structure and discipline necessary to a successful fire department. It, therefore adversely affected the efficiency and operation of the department. Meiners' termination was warranted.

***
But even assuming that the charge against plaintiff might be considered in the light of the above quoted general provisions of paragraph 30 (which authorize either dismissal or suspension of the employee) **unquestionably the district court was without authority to substitute**, **as it did**, **its judgment for that of the Board (changing the punishment meted out from dismissal to suspension).** Paragraph 31 of the Civil Service Law provides: 'Any Employee under classified service and any appointing authority may appeal from any decision of the board, or from any action taken by the board under the provisions of the Section which is prejudicial to the employee or appointing authority. * * * **This hearing shall be confined to the**

determination of whether the decision made by the board was made in good faith for cause under the provisions of this Section. No appeal to the court shall be taken except upon these grounds.' "

Dissent by Chief Justice Burnette J. Johnson:

"Even accepting there was sufficient evident to support the Board's findings relative to Chief Meiner's actions, termination was clearly disproportionate to any infractions committed by Chief Meiner. Chief Meiner, a 32-year veteran of the fire department who was nearing retirement, was essentially fired for not being forthright regarding having lunch during a work day with his wife and attorney. These actions, even if they involved untruthfulness, should not mandate termination. This is especially true here, where there is no evidence the misconduct had a detrimental effect on the efficient and orderly operation of the fire department. There was no evidence Chief Meiners left the boundaries of the District during the relevant time period; the evidence established he had his radio with him and operational at all times and did not miss any calls; and Chief Meiners complied with Chief Moore's order to pick up the repaired ambulance timely. Moreover, there is apparently no policy which prohibited Chief Meiners from going to lunch within the district while on duty; there is no specific time limit within which one is to take a lunch break; and there is no prohibition for an employee to have lunch with a spouse or attorney."

Legal Lesson Learned: When under investigation for lying to a superior officer, conduct involving destruction of evidence (deleting texts from cell phone) can have very serious consequences.

File: Chap. 18, Legislation

NY: PUBLIC RECORDS – CITIZEN COMPLAINTS - NY LEGISLATURE REPEALED STATUTE – PROTECTED POLICE & FIRE PERFORM. RECORDS

On Oct. 9, 2020, in Buffalo Police Benevolent Association, Inc. and Buffalo Professional Firefighters Association, Inc. v. Byron W. Brown, Mayor of City of Buffalo, Judge Frank A. Sedita III, Superior Court, Erie County, 2020 NY Slip Op 20257, while recognizing that many other professionals (including judges and attorneys) are protected from public disclosure of unfounded complaints, declined to declare the New York repeal a violation of State or U.S. Constitution.

"§50-a of the NY Civil Rights Law (50-a) was repealed on June 12, 2020. Enacted in 1976, 50-a provided, in relevant part, that personnel records used to evaluate the performance of police officers and firefighters could not be publicly disclosed unless the officer/firefighter consented to it or a court ordered it.

***

At the core of this case, is Petitioners' dismay that FOIL [Freedom of Information] officers will release unfiltered information that serves not to inform but to defame, especially when revealed to those whom already view police officers with disdain. The prospect of such irreparable harm is viewed as especially inequitable given the fact that members of so many other occupations and professions — including lawyers and judges — are protected by statutes that prevent the disclosure of misconduct allegations made against them, unless and until they are actually proven to be true.

***

"What Petitioners essentially seek — a pre-emptive strike that will serve as a blanket prohibition on the release of any and all information regarding any complaint deemed 'unsubstantiated' — is not merely drastic remedy, it is an inappropriate one. Petitioners advance no persuasive arguments as to why the controlling statutes violate due process, equal protection or any other provision of the Federal and State Constitutions."

Facts:

"§50-a of the NY Civil Rights Law (50-a) was repealed on June 12, 2020. Enacted in 1976, 50-a provided, in relevant part, that personnel records used to evaluate the performance of police officers and firefighters could not be publicly disclosed unless the officer/firefighter consented to it or a court ordered it.

***

[New York Legislature also amended the] Public Officers Law §86(6)(a), now provides law enforcement disciplinary records that must presumptively be disclosed, include "***any*** record created in furtherance of a law enforcement disciplinary proceeding [including] complaints, ***allegations***, and charges against an employee" (emphasis supplied). In other words, there exists clear statutory authorization for release of the very information that Petitioners seek to enjoin.

***

Soon after the repeal of 50-a, the Buffalo Common Council requested that the Buffalo Police Department turn over information concerning complaints of police officer misconduct. The Buffalo Police Benevolent Association (PBA) filed a grievance, under its collective bargaining agreement with the City of Buffalo, to prevent the release of this information. This lawsuit — a Petition pursuant to CPLR Articles 75 and 78, combined with a Declaratory Judgment action — was commenced by the filing of an Order to Show Cause application on July 22, 2020.

***

Petitioners emphasize that they are not seeking to block the public disclosure of information concerning proven instances of police misconduct. They are instead seeking protection from the irreparable reputational harm that would result from the disclosure of unsubstantiated allegations; i.e. alleged instances of misconduct that were not proven to be true or turned out to be unfounded or demonstrably false. Petitioners note that members of many other occupations and professions are afforded statutory protection from the disclosure of unsubstantiated allegations made against them. 50-a had afforded similar statutory protections to police officers and firefighters.

***

Respondents [City of Buffalo] objected to neither the issuance of a show cause order nor the imposition of a temporary restraining order. Respondents then filed an Answering Affirmation, additionally consenting to the injunctive relief sought by Petitioners.

***

James Kistner promptly filed a motion to intervene. Mr. Kistner is the plaintiff in an ongoing federal lawsuit, alleging mistreatment at the hands of City of Buffalo police officers. The defendants in the federal case allegedly refused to release their disciplinary files, even for the limited purpose of discovery. The basis for that refusal was none other than the TRO issued in this action. Mr. Kistner wished to intervene because he was being directly and substantially impacted by the TRO.

***

It would be error for the court to consider whether the Respondents, in their capacity as FOIL officers, acted or might act arbitrarily or capriciously. *Spring v. County of Monroe*, 141 AD3d 1151. It would also be inappropriate for the court to speculate as to how the Respondents might rule on the disclosure requests before them, what they might exempt or whether those rulings or disclosures would be consistent with or inconsistent with the lawful provisions of any collective bargaining agreements.

***

Finally, it should be noted that the court's rulings do not mean that police disciplinary records — whether requested by the Buffalo Common Council or whether demanded by some other entity by some other method — shall be released or must be released. The court is not mandating or otherwise authorizing the public release of any particular records. That decision will presumably be made by the Respondents in accordance with the provisions and exemptions set forth in the Public Officers Law, including §87(2)(b)."

Legal Lesson Learned: It is unfortunate to make mere complaints of misconduct "public records.

Note: See Aug. 20, 2020 article: "323,911 Accusations of N.Y.P.D. Misconduct Are Released Online." The records had been sealed for decades, but last month, New York repealed a law keeping them secret after national protests against police brutality. *** The complaints were published in an online database by the New York Civil Liberties Union, which obtained the records from the review board after state lawmakers repealed a law that had kept them secret.

See review of state statutes on police disciplinary records. In 12 states where "police disciplinary records are generally available to the public. Many of these states still make records of unsubstantiated complaints or active investigations confidential."