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OCT. 2020 – FIRE & EMS LAW Newsletter

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ONLINE CASE SUMMARIES – 18 Chapters (2018 – Present)
Updating 18 Chapters in Prof. Bennett's textbook: FIRE SERVICE LAW

OCT. NEWSLETTER - 17 RECENT CASES REVIEWED

Chap. 1 – American Legal System

TN: FIRE MARSHAL – OPPOSED CANDIDATE FOR ALDERMAN – CITY PHONE, ON DUTY – NO FED. 1st AMEND VIOL., LAWSUIT DISMISSED

On Sept. 17, 2020, in Chris Spencer v. City of Henderson, et al., U.S. District Court Judge Aleta A. Trauger, U.S. District Court for the Middle District of Tennessee (Nashville Division) granted the defendants' motion to dismiss; a political activist who lost (by 359 votes) an election to become a city Alderman. He had campaigned for "small government – anti-corruption" and sued Fire Marshal Paul Varble and City alleging Varble used city phones while on duty to oppose his candidacy.

> "Even though Varble is alleged to have engaged in this conduct during City time and using City resources, the court cannot find that this behavior would deter a person of ordinary firmness from continuing to campaign on his own behalf and to attempt to spread his own political message. An adverse campaign is the price of running for political office. The fact that Varble may have violated state law or a city ordinance while campaigning against Spencer does not make the conduct so adverse as to give rise to a First Amendment retaliation claim."

See Plaintiff's Oct. 14, 2018 family photo and press announcement: "Spencer announces bid for alderman seat." of his candidacy.

Facts:

> "Plaintiff Chris Spencer is a political activist who lives in Hendersonville, Tennessee….The City is an 'aldermanic municipality,' meaning that it is governed by a Board of Mayor and Aldermen ('BOMA'), consisting of an elected mayor and twelve elected aldermen, two from each of the City's six wards. Spencer decided to run for election as an alderman in Ward 5, running on a 'small government, anti-corruption' platform, and his views in that regard were well known…. He registered as a candidate on December 6, 2017 for the election to be held in November 2018 and began campaigning shortly thereafter.
> ***
> He alleges that the mayor instructed [Fire Chief] Bush to perform an investigation into whether Varble's campaign efforts were unlawful. Bush claimed that he performed such an investigation. He provided a report to Mayor Clary on April 9, 2019 stating that it was his understanding of City policy that City employees could use City-issued phones for personal business so long as they paid for any overages, which Varble had done on occasion. Bush also reported that Varble would be reprimanded for using a City-issued phone for personal business. Bush issued a 'general, oral reprimand' to Varble, but neither he nor the mayor otherwise reprimanded or disciplined Varble or any of the firemen, nor did anyone take steps to change City policy or 'prevent such from occurring in the future.'
> ***
> Bush and Varble were also advocates for new administrative offices and a new fire station for the HFD. The project was approved in 2017, but, due to the expense of the project and the City's difficulty in finding money to allocate to it, the project had not been built by the fall of 2018. Bush and Varble continued to advocate for the project, including by petitioning aldermen and by supporting candidates running for the office of alderman who, they believed, would support that project and pay raises for firemen as well. Hayes was one such candidate. Spencer, on the other hand, publicly took the position that he did not believe the City should allocate funds away from other projects, like paving, to pay for new HFD offices.
>
> ***
> On August 21, 2018, the International Association of Fire Fighters, Local Chapter 3460 … endorsed Hayes, and Hayes posted a photograph on his Facebook page of him with two firemen, both wearing shirts that read 'Hendersonville Fire.'

***

The election was held on November 6, 2018. Spencer lost to Jonathan Hayes by 359 votes.

***

The court finds that the plaintiff has not alleged a violation of his First Amendment rights. The plaintiff, notably, does not allege that Varble or anyone else misrepresented the plaintiff's views (or their own) in order to thwart Spencer's campaign. Moreover, the plaintiff does not allege that he was kept off the ballot or prevented from announcing his candidacy. He does not allege actual interference with his own right to campaign, his right to express his political views, or his right to political association. Instead, he alleges that Varble used public resources to promote other candidates without actually interfering with the plaintiff's own ability to campaign and spread his own message. He also implies that Varble promised other candidates that he would campaign—and get HFD firemen to campaign—in support of the other candidates in exchange for their agreement to promote projects important to firefighters. The court does not condone Varble's (alleged) conduct, and it may well have violated state and local law, as the plaintiff alleges. The operative question, however, is whether the conduct violated the First Amendment. With regard to that question, the court cannot find that Varble's alleged conduct interfered with the plaintiff's own exercise of his protected right to express his political opinions or to engage in any other conduct protected by the First Amendment."

Legal Lessons Learned: Fire & EMS departments should have a policy concerning political activity on duty, and use of FD computers, cell phones or other property concerning political candidates.

Note: Hamilton County Ohio requires employee annual refresher training – see their Manual, "Ethics In Government Guide For Employees"

Ohio Revised Code 2921.43(C)(2): 2921.43 Soliciting or accepting improper compensation.

[Note: RC 2921.43(C)(2) applies to ALL employees, both classified and unclassified.]

(C) No person for the benefit of a political party, campaign committee, legislative campaign fund, political action committee, or political contributing entity shall coerce any contribution in consideration of either of the following:

(1) Appointing or securing, maintaining, or renewing the appointment of any person to any public office, employment, or agency;

(2) Preferring, or maintaining the status of, any public employee with respect to compensation, duties, placement, location, promotion, or other material aspects of employment.

See also: 123:1-46-02 Political activity of employees in the classified service of the state.

(C)(7) Campaigning by writing for publications, by distributing political material, or by writing or making speeches on behalf of a candidate for partisan elective office, when such activities are directed toward party success;

(8) Solicitation, either directly or indirectly, of any assessment, contribution or subscription, either monetary or in-kind, for any political party or political candidate….

(D) An employee in the classified service who engages in any of the activities listed in paragraphs (C)(1) to (C)(13) of this rule is subject to removal from his or her position in the classified service."

Chap. 2 – LODD / SAFETY

PA: DISPATCHER TOLD MOTHER STAY 3rd FLOOR APARTMENT – 3 DEAD FIRE – NO "STATE CREATED DANGER," LAWSUIT DISMISSED

On Sept. 22, 2020, in Tamika Johnson, Administratrix of Estates of Alita Johnson, Horace McCouellem and Haashim Johnson v. City of Philadelphia, the U.S. Court of Appeals for the Third District (Philadelphia) held (3 to 0) that the trial court properly granted the City's motion to dismiss. Recognizing the tragic consequences of the error by the Dispatcher, there was no prior history of similar mistaken advice by dispatchers for 911 callers to remain in the apartment; no violation of the "State Created Danger" theory of municipal liability – no violation of "shock the conscience" test.

> "The District Court held that, as alleged, neither the Dispatcher nor the Operator was liable for the Johnson Family's harm. Because the Dispatcher did not act affirmatively, and because the Operator's behavior did not shock the conscience, we agree.
>
> ***
>
> Appellant alleges that the Operator violated the Johnson Family's constitutional rights by 'directing them to close themselves inside the burning building's 3rd floor rear room, assuring them that [f]irefighters were coming to their rescue, but then failing inexplicably to inform the [f]irefighters of [their] existence, location, or need of rescue.' …. The District Court held that those allegations do not 'shock the conscience,' as that phrase is defined in our precedent. We agree.
>
> ***
>
> Finally, Appellant alleges that the City simply ignored the history of problems at the Johnson Family's residence, by failing to fix the building's fire hazards and failing to stop the building owners' practices. The District Court held that the City was immune from these negligence claims because it had insufficient control over the building. Under the relevant Commonwealth law, we agree."

Facts:

> "Ms. Johnson, her son, and her stepfather (here, for convenience, 'the Johnson Family') rented an apartment in a Philadelphia rowhome. Long before the fire, problems plagued the building. In 2014, the city's Department of Licenses and Inspections sued the building's owners, Granite Hill Properties LLC and Tyrone Duren, for illegally operating a boarding home. The owners agreed to vacate the property but later resumed renting to multiple tenants, including the Johnson Family.
>
> Late one evening in 2018, a fire ignited on the building's second floor. Alita Johnson did what anyone would do and called 911. Once connected, the phone operator directed city firefighters to the address of the burning building. The incorrect address, it turns out, sending emergency responders the wrong way. In the meantime, 911 transferred Ms. Johnson to an operator with the Philadelphia Fire Department's emergency call center ('Operator').
>
> Ms. Johnson told the Operator that she and her family were inside the burning building, in a room on the rear third floor. The Operator gave clear guidance in response: shut the door, place a towel across its bottom, and open a window. Ms. Johnson did as instructed. The Operator also encouraged Ms. Johnson to remain calm, explaining that rescuers were on the way. After a few minutes, for reasons unknown, the call disconnected. That was the last communication with the Johnson Family.
>
> During the call, the Operator discovered the address error and relayed the correct address to a fire department dispatcher ('Dispatcher'), who rerouted the rescuers. But while the location of the fire was now correct, the scope of the emergency was not, since neither the Operator nor the Dispatcher told the

firefighters that the Johnson Family was waiting inside the building. So the firefighters left after extinguishing the fire without ever looking for them. Days later, after relatives reported them missing, a full search of the building found their bodies, dead from smoke inhalation.

***

A. State-Created Danger Claims

The state-created danger doctrine traces to a few words in the Supreme Court's opinion in *DeShaney v. Winnebago County Department of Social Services*, 489 U.S. 189 (1989)Like the case here, the facts were disturbing. County officials allegedly learned of a father's penchant for beating his son Joshua. *Id*. at 192-93. Rather than protect the defenseless child, the officials elected against intervening, and the dad's final attack caused "brain damage so severe that [the boy was] expected to spend the rest of his life confined to an institution." *Id*. at 193. Joshua and his mother then sued, alleging, novelly, that the officials' failure to intervene violated the boy's constitutional rights. *Id*.

The Supreme Court rejected the claim. Such rights appear nowhere in the text of the Constitution, of course, and 'the Due Process Clause[] generally confer[s] no affirmative right to governmental aid, even where such aid may be necessary to secure life, liberty, or property interests of which the government itself may not deprive the individual.' *Id*. at 196. Rather, only 'in certain limited circumstances' does 'the Constitution impose[] upon the State affirmative duties of care and protection with respect to particular individuals,' such as prisoners and the 'involuntarily committed.' *Id*. at 198-99. In those cases, the State has taken an 'affirmative act of restraining the individual's freedom to act on his own behalf,' and that could be a 'deprivation of liberty' triggering the protections of the Due Process Clause.' *Id*. at 200. But there was not that kind of 'special relationship' between the county and the young boy. *Id*. at 197, 201. Further, while the county "may have been aware of the dangers that Joshua faced in the free world, it played no part in their creation, nor did it do anything to render him any more vulnerable to them." *Id*. at 201.

From those simple words—'played no part in their creation' and 'render him any more vulnerable'—sprang a considerable expansion of the law. While seemingly not part of *DeShaney*'s holding, lower courts seized on those words to create a new remedy that would, it was thought, aid the next '[p]oor Joshua.' Thus was born the 'state-created danger' theory of liability, which we adopted in *Kneipp v. Tedder*, 95 F.3d 1199, 1205 (3d Cir. 1996). There, a severely intoxicated husband and wife were walking home from a bar. *Id*. at 1201. Police officers stopped the couple, separated them, and allowed the man to continue on his way. *Id*. at 1201-02. The officers later 'sent [the woman] home alone,' but she never made it; she was 'found unconscious at the bottom of an embankment' the next day. *Id*. at 1202-03. The woman's parents then sued, asserting that the officers had violated their daughter's substantive due process rights. *Id*. at 1203. But there was no 'special relationship' between the state and the decedent falling within *DeShaney*'s narrow holding. *Id*. at 1205. Charting a new course, we elevated the commentary in *DeShaney* and discovered that the Court had 'left open the possibility that a constitutional violation might . . . occur[]' when a state 'play[s a] part in . . . creat[ing]' a danger or when it 'render[s a person] more vulnerable to' that danger. *Id*. at 1205 (quoting *DeShaney*, 489 U.S. at 201). Since the police separated the couple, 'then sen[t the woman] home unescorted in a seriously intoxicated state in cold weather'" the state, through its actors, 'made [her] more vulnerable to harm.' *Id*. at 1209. The danger, we explained, was not the plaintiff's intoxicated journey from tavern to domicile. *Id*. Rather, it was the 'state-created danger' of removing her male companion, who presumably would have sheltered her from peril, that violated the guarantee of due process framed in the Fourteenth Amendment.[5] *Id*. at 1211.

***

But we remain bound to faithfully apply our precedent explaining the scope of the doctrine. As currently formulated, that requires a plaintiff to plead four elements: first, foreseeable and fairly direct harm; second, action marked by 'a degree of culpability that shocks the conscience'; third, a relationship with the state

making the plaintiff a foreseeable victim, rather than a member of the public in general; and fourth, an affirmative use of state authority in a way that created a danger, or made others more vulnerable than had the state not acted at all.

***

Here, there are no allegations of affirmative conduct by the Dispatcher that caused the Johnson Family's harms. Rather, Appellant claims only that the Dispatcher failed to communicate the Johnson Family's location to the firefighters. But this is a classic allegation of omission, a failure to do something—in short, a claim of inaction and not action. That is not enough under our prior decisions, and so we will affirm the dismissal of that claim.

***

The District Court believed that the Operator faced 'emergency circumstances,' so the intent-to-cause-harm standard applied. (App. at 24.) On appeal, Appellant argues for a lower standard. But the claim fails even under the deliberate-indifference test. Consider the Operator's instructions and assurances. Sheltering in place rather than risking a perilous descent through a raging fire mirrors standard practices. As for the promises of timely help, Appellant notes that the Johnson Family 'forwent attempting to escape the burning building by . . . another rear window that opened onto a flat, walkable roof.' (App. at 51.) But she does not allege that the Operator knew about this means of escape."

Legal Lessons Learned: Tragic set of facts; hopefully Dispatchers throughout the Nation have learned from this event.

Chap. 3 – Homeland Security

NY: 911 CLEAN UP - 124 WORKERS CLEANUP AT STUYVESANT HIGH – LAWSUIT PROPERLY DISMISSED, ACCEPTED PRIOR SETTLEMENT

On Sept. 28, 2020, in In re: World Trade Center Lower Manhattan Disaster Site Litigation, the U.S. Court of Appeals for Second District (New York City) held in a Summary Order (3 to 0) that U.S. District Court Judge Alvin K. Hellerstein properly dismissed their lawsuit in 2019 since it was moot; they are covered by settlement agreements with the City of New York and the WTC Captive by entering into the 2010 Final Settlement Agreement ("FSA"). Judge Hellerstein on Aug. 30, 2019 held that "All of the present plaintiffs, among a group of plaintiffs that at one time numbered around 11,000, had settled previously with the WTC Captive and its insureds, including the City of New York."

"Here, the district court properly held that Appellants' 2010 settlement agreement with the WTC Captive and its insureds (the World Trade Center Litigation Final Settlement Agreement, or 'FSA') reduced their potential recovery in these proceedings to zero, and that, accordingly, their claims are moot."

Facts:
"Plaintiffs-Appellants, 124 workers who participated in cleanup efforts at Stuyvesant High School ('Stuyvesant') after the terrorist attacks on the World Trade Center in 2001, appeal from the district court's judgment dismissing their claims as moot.

***
Although Appellants do not deny entering into the FSA, they argue that the FSA's judgment-reduction provision should not apply to this matter for essentially two reasons. First, they argue that they discounted their recovery under the FSA based on their understanding that they would be able to recover in the future against defendants like BPCA [Battery Park City Authority].

First, they argue that they discounted their recovery under the FSA based on their understanding that they would be able to recover in the future against defendants like BPCA. But as the district court emphasized, nothing in the text of the FSA supports this assertion; according to the FSA's recovery formula, "while claims might have been discounted by time spent in a different building serving as the basis for liability against another defendant, there was no reduction based on the presence of unsettled claims against more than one defendant in any single given building, here, the BPCA at Stuyvesant.

***
Second, Appellants argue that the judgment-reduction provision should not apply here because the BPCA was not a party to the FSA.While Appellants are correct that the BPCA was not a signatory to the FSA, it was, as the district court recognized, 'a third party beneficiary of [that] agreement.'

***
We have considered Appellants' remaining arguments and find them to be without merit. Accordingly, we AFFIRM the judgment of the district court."
Legal Lessons Learned: When you enter into a "global settlement" and accept the settlement money, it is designed to avoid future litigation such as this case.

Note: See Nov. 19, 2010 article, "Over 95% of Plaintiffs Accept World Trade Center Settlement." "10,043 plaintiffs signed releases accepting settlement terms, according to the Allocation Neutral's report to the Court, with 98% of those claiming some of the most severe injuries signing on. *** The WTC Captive Insurance Company confirms the 95% participation threshold of eligible plaintiffs has been reached."

Chap. 4 – Incident Command

TN: CHIMNEY TOPS FIRE – GREAT SMOKY MOUNTAINS NAT. PARK – FD, RESIDENTS NOT PROPERLY WARNED – LAWSUIT TO PROCEED

On Sept. 8, 2020, in Michael B. Reed, et al. v. United States of America, U.S. District Court Judge J. Ronnie Greer, U.S. District Court for the Eastern District of Tennessee at Knoxville, denied the U.S. Governments second motion to dismiss, since the National Park Service failed to timely contact the City of Gatlinburg and others of the ever-growing size of the fire which started on Nov. 23, 2016. Plaintiffs allege that the fire was burning for six days before the Park Service contacted the Gatlinburg FD and PD on Nov. 28 to advise that fire might burn outside the park boundaries. The fire killed 14 people, forced 14,000 to evacuate, destroyed or damaged 2,400 structures, and blackening 17,000 acres. Over 40 insurance companies have filed lawsuits against the U.S. Judge Greer is the second Federal judge to deny Government's motion to dismiss; both Judges held that U.S. can be sued under Federal Tort Claims Act, because the National Park Service breached its mandatory Fire Management Plan ("FMP"); Press Releases and E-Blasts were inadequate notification.

Court again denied Government's motion to dismiss:

"The United States cannot rely on the press releases and an E-Blast to satisfy a requirement to notify 'Park Neighbors, Park visitors, and local residents' when it doesn't tell the Court where the press releases and E-Blast were sent to.

***

Because the United States has not entered into the record any evidence that could satisfy the requirement to notify Park Neighbors, Park visitors, and local residents of 'all planned and unplanned fire management activities that have the potential to impact them[,]' this Court finds that the United States did not perform mandatory actions as required by Section 3.3.2 of the FMP and Section 4.4.2, Table 13 of the FMP.

***

The United States failed to carry that burden because it did not provide evidence showing that it performed required conduct. For that reason, the Renewed Motion to Dismiss is DENIED."

Facts:
"On November 28, 2016, the Chimney Tops 2 Fire ('Fire'), the largest wildfire in the Great Smoky Mountains National Park's ('Park') history, left the Park's boundaries, burned the surrounding areas, and led to tragic losses of life and significant property damage. This case, and in particular this matter, is about the actions of the United States, the National Park Service ('NPS'), and their employees on the days leading up to and on November 28, 2016.

***

The United States argued that this Court did not have jurisdiction because the policies, actions, and decisions relating to the Chimney Tops 2 Fire fell within the discretionary function exception to the FTCA [Federal Tort Claims Act]. Judge Thomas Phillips denied the Motion to Dismiss and ruled that Section 3.3.2 and Section 4.4.2, Table 13 of the Park's FMP required the United States to take required actions.

***

On November 28, the "Temporary Road and Facilities Closures" webpage stated that several trails, campsites, and shelters were closed due to the fires…. The Park Service also released a press release stating, in part: Park fire crew numbers responding to the Chimney 2 Fire have continued to increase over the course of the weekend. Currently park firefighters have been joined by firefighters from Utah and additional support resources have been ordered including an incident management team along with 4 hand crews (total of 80 people) and air support. The additional crews are expected to begin to arrive Mon (11/28) and early Tue (11/29).

***

According to the United States, which cites to the Complaint, "FMO Salansky contacted a Gatlinburg Fire Department ('GFD') Captain [on Nov. 28, 2016] at 10:58 a.m. and explained 'the potential for the Fire's smoke to travel to the city….' Plaintiffs say that this was the "'first communication of any kind between the Park and any Gatlinburg employee regarding a fire that had been burning—and growing—for six days.'
Later that day, 'Chief Ranger Kloster and Superintendent Cassius Cash traveled to GFD headquarters to brief GFD Chief Miller, Gatlinburg Police Department Chief Randy Brackens, and Gatlinburg City Manager Cindy Ogle on the progress of the Fire and its 'potential to leave the Park….' A meeting was also held at Mynatt Park, a location near the Park, with 'various leaders,' and 'FMO Salansky recommended voluntary evacuations of the Mynatt Park area."
Legal Lessons Learned: When managing a wildland fire, National Park Service had mandatory obligation to inform Gatlinburg and residents in the area. Phone call to FD would have been very helpful.

Note:

> *See Dec. 17, 2019 article: "**More than 40 insurance companies sue government over fire that burned into Gatlinburg**." "Five days after it started in Great Smoky Mountains National Park on November 23 the*

Chimney Tops 2 Fire *spread into the eastern Tennessee city killing 14 people, forcing 14,000 to evacuate, destroying or damaging 2,400 structures, and blackening 17,000 acres."*

See also National Park Service report on the fire that was first spotted on Nov. 23, 2016: "On Monday, November 28th, the exceptional drought conditions and extreme winds caused the wildfire to grow rapidly. Helicopters could not fly due to high winds and poor visibility. The National Park Service was in communication with the Gatlinburg Fire Department and the Tennessee Division of Forestry throughout the day. Winds further increased throughout the day to a sustained 40-50 mph in the evening with gusts up to 87 mph, causing numerous new wildfire starts from embers carried far in front of the main fire, as well as downed powerlines within the Gatlinburg community. The wildfire was determined to be human-caused and under the investigation of the National Park Service, ATF, and Tennessee Bureau of Investigation. Two juveniles have been arrested for Aggravated Arson in connection with the fire."

Chap. 6 – Workplace Litigation

OH: CLEVELAND LOCAL 93 – PUBLIC RECORDS REQUEST FOR FD's 2019 EXPENSE REPORTS – CITY RESPONSE WAS INADEQUATE

On Sept. 22, 2020, in Association of Cleveland Fire Fighters IAFF Local 93 v. City of Cleveland, Court of Claims of Ohio, Special Master Jeff Clark, after mediation, published his Report and Recommendations to the Court of Claim, findings that City failed to promptly produce Excel records showing 2019 expense records [Dec. 31, 2019 request; City produced some financial records Feb. 12, 2020, but FD expense records not produced until May 20, 2020]. If the City was unclear about the records being requested it had obligation under Ohio code to ask Local 93 to clarify. The only remedy, however, is $25 filing fee under Ohio Revised Code 2743.75(F)(3)(b). In order to recover attorneys fees, Local 93 would have had to file a mandamus action in Court of Common Pleas under Section 149.43.

> "Presented with a request that it considered ambiguous, Cleveland had an obligation to 'provide the requester with an opportunity to revise the request by informing the requester of the manner in which records are maintained by the public office and accessed in the ordinary course of the public office's or person's duties.' R.C. 149.43(B)(2). When Local 93 contacted Cleveland on February 12, 2020 and objected that the record provided was not the record that it sought, Cleveland's proper response was not to offer that Local 93 could send another email (Response at 4), but instead to affirmatively *inform* Local 93 of the manner in which itemized expense reports for the Cleveland Division of Fire were maintained and accessed in the ordinary course of duty. As demonstrated in the record, Cleveland kept and used more than one such report."

Facts:

> "On December 31, 2019, requester Association of Cleveland Fire Fighters IAFF Local 93 (Local 93) made a public records request to respondent City of Cleveland, Department of Law, for 'the full 2019 itemized expense report for the Cleveland Division of Fire from 1/1/19 to 12/31/19. I would prefer to receive this file electronically in excel if possible.' (Complaint at 3.) On February 12, 2020, the Cleveland Public Records Center advised Local 93 that it had located a record responsive to the request, and posted it for retrieval online. (*Id*. at 2.)
>
> ***
>
> Local 93 asserts that production was delayed well beyond the "reasonable period of time" allowed by R.C. 149.43(B)(1) to provide public records access, from December 31, 2019 until May 20, 2020. Cleveland blames initial delay on the alleged ambiguity of the request. Cleveland states that it provided one of two city

finance reports that include identical expense information (Sur-reply at 3.), but asserts that Local 93's request failed to clearly identify the specific report sought. Local 93 distinguishes the two records by noting that the Mayor's Estimate was "not the specific record *or format [Excel]* of the record Local 93 requested." (Emphasis added.) (Response to sur-reply at 3.) The Mayor's Estimate does not appear to be formatted in Microsoft Excel, or capable of export in Excel.

***

While Local 93's initial request did not name the report by the title 'annually appropriated budget vs actuals,' or reference its source as the 'Cleveland Advantage' accounting program, neither did it ask for the 'Mayor's Estimate.' Presented with a request that it considered ambiguous, Cleveland had an obligation to 'provide the requester with an opportunity to revise the request by informing the requester of the manner in which records are maintained by the public office and accessed in the ordinary course of the public office's or person's duties.' R.C. 149.43(B)(2). When Local 93 contacted Cleveland on February 12, 2020 and objected that the record provided was not the record that it sought, Cleveland's proper response was not to offer that Local 93 could send another email (Response at 4), but instead to affirmatively *inform* Local 93 of the manner in which itemized expense reports for the Cleveland Division of Fire were maintained and accessed in the ordinary course of duty. As demonstrated in the record, Cleveland kept and used more than one such report.

***

The delay in this case began with Cleveland's unwillingness to resolve perceived ambiguity at the outset, as required by statute. Even when Local 93 provided additional identifying details on March 18, 2020, the requested record was not provided for two more months.

***

On February 12, 2020, Local 93 filed a complaint pursuant to R.C. 2743.75 alleging denial of access by Cleveland to the specific expense report requested, in violation of R.C. 149.43(B). Following mediation, respondent filed its response on April 14, 2020.

***

On May 20, 2020, Cleveland provided Local 93 with a copy of a Cleveland Advantage expense report covering the requested time period. (Sur-reply at 2, Defendant's Exh. A.) Local 93 agrees that provision of this record has rendered the claim for production of the report moot. (Response to sur-reply at 2.)"

Legal Lessons Learned: If unclear about records being requested, City had obligation to request clarification.

Note:
RECOVER ONLY FILING FEE: Ohio Rev. Code Section 2743.75(F)(3)(b):
(b) The aggrieved person shall be entitled to recover from the public office or person responsible for the public records the amount of the filing fee of twenty-five dollars and any other costs associated with the action that are incurred by the aggrieved person, but shall not be entitled to recover attorney's fees, except that division (G)(2) of this section applies if an appeal is taken under division (G)(1) of this section.

RECOVER ATTORNEY FEES: Section 149.43:
(C) If a person allegedly is aggrieved by the failure of a public office to promptly prepare a public record and to make it available to the person for inspection in accordance with division (B) of this section, or if a person who has requested a copy of a public record allegedly is aggrieved by the failure of a public office or the person responsible for the public record to make a copy available to the person allegedly aggrieved in accordance with division (B) of this section, the person allegedly aggrieved may commence a mandamus action to obtain a judgment that orders the public office or the person responsible for the public record to comply with division (B) of this section and that awards reasonable attorney's fees to the person that

instituted the mandamus action. The mandamus action may be commenced in the court of common pleas of the county in which division (B) of this section allegedly was not complied with, in the supreme court pursuant to its original jurisdiction under Section 2 of Article IV, Ohio Constitution, or in the court of appeals for the appellate district in which division (B) of this section allegedly was not complied with pursuant to its original jurisdiction under Section 3 of Article IV, Ohio Constitution.

Chap. 8 – Race Discrimination

FL: FEMALE AFRICAN AMERICAN FF – ON PROMOTION LIST - JURY DETERMINED WERE NO OPENING – NEW TRIAL ORDER REVERSED

On Sept. 23, 2020, in Miami-Dade County v. Faye Davis, the Third District Court of Appeal, State of Florida, held (3 to 0) that the trial judge improperly granted the plaintiff's motion for a new trial.

"We hold that the evidence supported the jury's verdict, in which it determined that the County did not deny Davis a promotion during the 2009-10 and 2010-11 promotional cycles based on her race or sex, and further determined that the County did not deny her a promotion because she engaged in protected activity. The trial court erred in granting Davis' motion for directed verdict and abused its discretion in alternatively granting a new trial.

***

To find that the County failed to present any evidence showing a non-discriminatory reason for Davis's lack of promotion, the trial court's order relied on [Miami-Dade Fire Chief MDFR Fire Chief Herminio] Lorenzo's inability to remember his reasons for not promoting Davis. Such reliance is misplaced where, viewing the evidence in the light most favorable to the County, a reasonable inference can be drawn that the County's decision was based on legitimate, non-discriminatory, non-retaliatory reasons i.e., overages and an agreement between the County and the union prohibited Chief Lorenzo from filling the two 'vacant' positions. We also note that Chief Lorenzo testified that the only criteria he used to make CFO promotions was to go 'straight down the list,' and that he never took race into consideration. Davis' own testimony on cross-examination allowed for the reasonable inference that Chief Lorenzo simply went 'straight down the list' where she acknowledged that, from 2005 to 2009, he had promoted Blacks, Hispanics, women, and active members of the PFA." [Footnote 3.]

Facts:

"In 1987, the Miami-Dade Fire Rescue Department ('MDFR') hired Faye Davis, an African American female, as a Firefighter. Davis took the promotional exam to become a Chief Fire Officer ('CFO') in 2007, 2008, 2009, and 2010, but was not promoted. Davis is a member of the Progressive Firefighters Association and served for several years as the association's first female president, advocating for diversity and fairness in the hiring process.

In 2012, Davis filed a complaint against Miami-Dade County, alleging that her lack of promotion to the rank of CFO during the promotional cycles in 2009-10 and 2010-11 was due to: (1) racial discrimination; (2) gender discrimination; and (3) retaliation for her activism, all in violation of the Florida Civil Rights Act ('FCRA').

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The CBA requires that an employee seeking a promotion must take an objective promotional exam which is offered every year; the exam scores remain in effect for one year from the date they are released. Employees who pass the exam are placed on a certified promotional-eligible list ranked according to their respective

exam scores. During the 2009-10 hiring cycle, Davis ranked 2 out of 4 on the promotional list, and, in 2010-11, she ranked 5 out of 6 on the promotional list.

***

Throughout trial, the parties' primary disagreement was the number of actual vacancies during the 2009-10 promotional cycle. Chief Lorenzo testified at trial that the County and the Union entered into an agreement for the County to pay existing CFOs thirty minutes overtime per shift in exchange for the Union's agreement to reduce the MDFR's required number of CFOs by two, resulting in seventy-seven *actual* vacancies for the relevant promotional period. As noted above, there were eighty-one employees in the CFO position at the start of the 2009-10 cycle, and four retirements and promotions over the course of that year. That left seventy-seven employees in the CFO position at the end of the 2009-10 promotional period. Thus, accepting that the agreement testified to by Chief Lorenzo existed, no vacancy would have existed to permit Davis to be promoted.

***

Conversely, Davis maintained that because the CBA requires vacant CFO positions to be filled based on the budgeted number of positions, she was improperly denied a promotion during the 2009-10 cycle where there were seventy-nine budgeted positions but only seventy-seven people in the CFO position by the end of the year. This would have required Chief Lorenzo to promote two individuals from the list to CFO—the individual who had the highest score and Davis, who placed second. As for the 2010-11 list, she maintained that—because the 2009-10 vacancies were never filled—they rolled over to the next cycle to create five vacancies, and therefore she should have at least been promoted in 2010 where she ranked fifth among exam takers. Stated differently, under Davis' theory of the case, no agreement existed between the County and the union to reduce by two the number of CFOs.

***

There is no dispute that Davis, an African American woman, qualified for a promotion (given she took and passed the required test), and was included on the eligibility lists for promotion to CFO. Instead, the case came down to whether, despite being qualified, Davis was rejected from a job for which the employer was seeking applicants. In other words, was there an actual vacancy in 2009-10 and 2010-11 available to be filled by Davis? By its verdict, the jury answered this question 'no,' determining that Davis had failed to establish this element. In order to set aside the jury's verdict and to direct a verdict in Davis's favor, the trial court would have had to conclude that there was no evidence at trial, nor any reasonable inferences from the evidence, to support the County's position that it was not actively seeking applications because (due to overages) there was no vacancy in the CFO position. Kopel, 229 So. 3d 818-19. We conclude, upon our *de novo* review, that there was in fact evidence presented at trial to support the County's position.

***

Where, as here, the evidence presented at trial is in conflict, it is also well settled that it is within the jury's province to resolve that conflict, and the trial court may not act as a seventh juror with a 'veto' power to decide that the verdict is against the manifest weight of the evidence."

Legal Lessons Learned: Jury's verdict is upheld.

Note: Trial judge who ordered new trial thought the jury had been "deceived" because a FD report had not been provided to plaintiff's counsel prior to trail.

> "The [trial judge's] order also concluded the jury was 'deceived as to the force and credibility of the evidence or [] [] influenced by considerations outside the record,' a reference to a small portion of testimony stricken by the trial court. More specifically, the trial court struck testimony from Robin Duran (a division chief and then-Deputy Chief to Alfredo Suarez) stating that there were only seventy-seven 'required' CFO positions for the 2009-10 promotional cycle. Duran further explained

that she prepared a report reaching the same number of available CFO positions—seventy-seven. Because the report was never provided to plaintiff's counsel, the trial court struck the testimony as a 'blatant, willful violation of discovery.' *** The trial court's finding that the jury was influenced by the stricken testimony is not supported by the evidence. We also note that the trial court gave a curative instruction as requested by Davis, and that Davis did not make a contemporaneous motion for mistrial. Black v. Cohen, 246 So. 3d 379, 384 (Fla. 4th DCA 2018) (noting: '[T]he Florida Supreme Court has held that a trial court may not grant a new trial based upon objections to attorney misconduct which were sustained, but for which no motion for mistrial was requested.'). The testimony in question was at most cumulative, did not advance the County's theory beyond that which had already been established." [Footnote 4.]

Chap. 9 - ADA

MA: FF RETIRED DISABILITY – CFH / HEARING LOSS – SEEKS JOB BACK WITH "AGE-ADJUSTED" HEARING TEST – TRIAL JUDGE TO REVIEW

On Sept. 29, 2020, in John Rodrigues v. Public Employee Retirement Administration Commission, the Appeals Court of Massachusetts held (3 to 0) that firefighter's reinstatement was properly denied because of his heart condition, but case remanded to trial court to decide if the Commonwealth's Human Resources Division [HRD] requirement that FF must past the hearing standard for new hires, not "age-adjusted" standards, is lawful.

> In addition to his claims for reinstatement or damages, Rodrigues also brought claims seeking declaratory relief -- in particular, count one seeks, among other things, a determination that PERAC should apply age-adjusted, in-service health and fitness standards in determining restoration to service under c. 32, § 8, and count two specifically seeks a declaration that PERAC violated G. L. c. 31, § 61A, by failing to employ such age-adjusted hearing standards. These claims should not have been dismissed. They raise primarily questions of law that could well arise in any of Rodrigues's future reinstatement evaluations (which under G. L. c. 32, § 8 [1] [a], are to occur at least every three years), not to mention those of other firefighters and police officers on disability retirement. The legal questions implicate the requirements of the two above-mentioned statutes, and how those statutes interrelate. Answering them also will require analysis of a 2016 regulation issued by PERAC, discussed infra. The issue is appropriate for declaratory relief."

Facts:

> "Rodrigues began as a firefighter with the Fall River fire department in 1993. Rodrigues was compelled to retire due to disability in March of 2010, after receiving a diagnosis of a congenital heart condition. Thereafter, Rodrigues began receiving a disability retirement allowance. Apparently, the heart condition did not substantially alter Rodrigues's lifestyle; he has maintained a vigorous exercise regimen during retirement. Two years after his disability retirement, Rodrigues sought reinstatement through the c. 32, § 8, 'reexamination' and 'restoration to service' (return to service) process. That statute requires all members of public employee retirement systems on disability retirement to undergo periodic medical evaluations to determine whether they are 'able to perform the essential duties' of their prior position. G. L. c. 32, § 8 (1) (a), (2) (a). The process works as follows: the retiree undergoes an initial evaluation, which may be conducted by a single physician appointed by PERAC; if the retiree is found able to perform the essential duties of his former position, he is then separately evaluated by three physicians comprising a 'regional medical panel,' appointed by PERAC. If all members of that panel also find that the retiree is able to perform the essential duties, then the retiree must be reinstated. See G. L. c. 32, § 8 (2) (a); 840 Code Mass. Regs. § 10.13(2) (2000); 840 Code Mass. Regs. § 10.15(2) (2004). One important component of this process is the standards applied to determine whether a disability retiree is able to perform those essential duties; for

firefighters like Rodrigues, PERAC instructs the physician evaluators to apply HRD's initial health and fitness standards promulgated pursuant to c. 31, § 61A, applicable to persons first being appointed as firefighters.

***

a. The 2012 evaluation. The physician who conducted the initial evaluation of Rodrigues in 2012 (2012 evaluation) concluded that his hearing loss exceeded the amount permitted by the initial HRD health and fitness standards in effect at the time. Under those standards, Rodrigues was not allowed to wear a hearing aid during the test, and he could not have hearing loss of an average of thirty-five decibels (dB) or more in either ear. The test results showed an average of 60 dB hearing loss in Rodrigues's left ear, and an average of 62.5 dB hearing loss in his right. The physician concluded that Rodrigues was ineligible for reinstatement, and PERAC so notified Rodrigues in March of 2012. In December of 2012, Rodrigues sought reconsideration, which was denied in January of 2013.

b. The 2015 evaluation. In 2015, Rodrigues underwent a second round of return to service evaluations. This time he passed the initial evaluation, and was thereafter evaluated by a regional medical panel (medical panel or panel) composed of two cardiologists and one otolaryngologist (an ear, nose, and throat physician). One of the cardiologists found that Rodrigues was able to perform the job's essential duties. A second cardiologist, however, found a 'small but significant risk for [a] cardiac event to occur with strenuous exercise,' and that 'severe emotional or physical stress' -- which is expected for firefighters -- posed a "risk of sudden cardiac death or myocardial infarction." Accordingly, the second cardiologist concluded that Rodrigues was ineligible to return to service. The third physician, the otolaryngologist, determined that Rodrigues's hearing loss in his left ear exceeded the HRD standard then in effect.

***

[Plaintiff's hearing-loss] claims should not have been dismissed. They raise primarily questions of law that could well arise in any of Rodrigues's future reinstatement evaluations (which under G. L. c. 32, § 8 [1] [a], are to occur at least every three years), not to mention those of other firefighters and police officers on disability retirement. The legal questions implicate the requirements of the two above-mentioned statutes, and how those statutes interrelate. Answering them also will require analysis of a 2016 regulation issued by PERAC, discussed infra."

Legal Lessons Learned: Will be interesting to see if the Trial Court, and the Court of Appeals, eventually holds that hearing standards for firefighters and police officers seeking reinstatement can be "age adjusted."

Note: See OSHA Guidance: 1910.95 App F - Calculations and application of age corrections to audiograms: "In determining whether a standard threshold shift has occurred, allowance may be made for the contribution of aging to the change in hearing level by adjusting the most recent audiogram. If the employer chooses to adjust the audiogram, the employer shall follow the procedure described below. This procedure and the age correction tables were developed by the National Institute for Occupational Safety and Health in the criteria document entitled 'Criteria for a Recommended Standard . . . Occupational Exposure to Noise,' ((HSM)-11001)."

See also: IAFF's "Fire Department Guide to Implementing NFPA 1582."

See also EEOC Guidance: "**Deafness and Hearing Impairments in the Workplace and the Americans with Disabilities Act."** **"**An employer only may exclude an individual with a hearing impairment from a job for safety reasons when the individual poses a direct threat. A 'direct threat' is a significant risk of substantial harm to the individual or others that cannot be eliminated or reduced through reasonable accommodation. This determination must be based on objective, factual evidence, including the best recent medical evidence."

Chap. 9 – ADA

LA: FF HEARING LOSS – REIMBURSED FOR HEARING AIDS – BUT NO ENTITLED TO DISABILITY PAYMENTS – NOT "SINGLE ACCIDENT"

On Sept. 22, 2020, in Glenn Hankel v. Jefferson Parish Fire Department, the Fifth Circuit Court of Appeal of State of Louisiana, held (2 to 1) that while the fire department reimbursed the retired firefighter for cost of hearing aids based on LA firefighter statutory presumption statute, he was not entitled to permanent partial disability payments [which would be 66 2/3rd weekly wages, up to 100 weeks] since the LA statute only applies to disabilities caused by a single accident.

> "In the instant case, there is no dispute that Mr. Hankel's hearing loss was gradual and not the result of a single accident or event. The plain language of La. R.S. 23:1221(4)(p) only provides benefits for permanent hearing losses resulting solely from a single traumatic accident. Accordingly, after a *de novo* review of the record, we find that there is no genuine issue as to material fact and that the JPFD is entitled to judgment as a matter of law. Thus, we find no error in the trial court's ruling that Mr. Hankel is not entitled to permanent partial disability benefits for his hearing loss.

Facts:

> "Mr. Hankel was employed by the JPFD from October 11, 1986, until his retirement on November 7, 2017. Mr. Hankel claims that, over time, he was exposed to loud noise as a firefighter sufficient to cause a permanent partial loss of his hearing in both ears.
> The record shows that Mr. Hankel had yearly examinations of his hearing from approximately 2004 through 2018, and into his retirement. These tests, as a whole, revealed an accelerating cumulative deterioration of Mr. Hankel's ability to hear out of either ear. When he retired in 2018, Mr. Hankel was diagnosed as having '38% binaural loss.'
>
> After his retirement, Mr. Hankel filed a disputed claim for compensation on June 11, 2018, which sought indemnity benefits for his permanent partial disability caused by his noise-induced hearing loss, pursuant to La. R.S. 23:1221(4)(p). JPFD filed a motion for summary judgment at that time, arguing that Mr. Hankel's hearing loss was an occupational disease, rather than an injury precipitated by some specific event, which disqualified him from coverage under La. R.S. 23:1221(4)(p). After the OWC judge denied JPFD's motion for summary judgment on November 1, 2018, the parties entered into a consent judgment awarding Mr. Hankel medical benefits, including $3,890.00 for previously purchased hearing aids and payment for all future hearing loss related medical treatment and expenses. The consent judgment also provided that JPFD was to pay $5,000.00 in attorney fees.
>
> ***
> In granting JPFD's second motion for summary judgment, the OWC judge relied on the plain language of La. R.S. 23:1221(4)(p), which provides for permanent partial disability in instances where 'the employee is seriously and permanently disfigured or suffers a permanent hearing loss solely due to a single traumatic accident.'
>
> ***
> In the instant case, the OWC judge made several specific findings of fact in its October 4, 2019 Order. Specifically, the court found that Mr. Hankel was "exposed to injurious noise" while employed with the JPFD which caused a permanent partial loss of hearing. The court classified the hearing loss as a "cumulative hearing loss that occurred over time." Finally, in determining that Mr. Hankel was not entitled to permanent partial benefits pursuant to Louisiana Revised Statute 23:1221(4)(p), the court concluded that Mr. Hankel's hearing loss was not the result of a single traumatic event."

Dissent:

> "To be clear, Mr. Hankel has already been awarded medical benefits for an occupational injury pursuant to La. R.S. 33: 2581.1. We are now examining whether Mr. Hankel is additionally entitled to 'compensation not to exceed sixty-six and two-thirds percent of wages for a period not to exceed one hundred weeks' pursuant to La. R.S. 23:1221(4)(p).
>
> ***
>
> There is no doubt that Mr. Hankel suffers a disability, namely hearing loss, caused by his work. Because the Louisiana Supreme Court, in *Arrant* [*Arrant v Graphic Packaging Int'l, Inc*., 13-2878, 169 So. 3d 296, 305 (La. 5/5/15)] found that a noise induced hearing loss of the exact type suffered by Mr. Hankel qualifies as a "Personal Injury by Accident" and applying the *Arrant* court's holding to §1221(4)(p)'s text, Mr. Hankel should be given the opportunity to litigate his right to permanent, partial disability at the trial level. Minimally, summary judgment should be reversed and the matter remanded to the compensation court to allow the parties to bring forth expert testimony such as the trial court heard in both the *Arrant* and *Becker* cases."

Legal Lessons Learned: This case may be appealed to the Louisiana Supreme Court; Dissenting judge references prior Louisiana Supreme Court decision in *Arrant v Graphic Packaging Int'l, Inc*., 13-2878, 169 So. 3d 296, 305 (La. 5/5/15).

> Note: See Louisiana Firefighter Statutory Presumption For Hearing Loss
> La. R.S. 33:2581.1 provides:
>
> A. Any loss of hearing which is ten percent greater than that of the affected employee's comparable age group in the general population and which develops during employment in the classified fire service in the state of Louisiana shall, for purposes of this Section only, be classified as a disease or infirmity connected with employment. The employee affected shall be entitled to medical benefits including hearing prosthesis as granted by the laws of the state of Louisiana to which one suffering an occupational disease is entitled, regardless of whether the fireman is on duty at the time he is stricken with the loss of hearing. Such loss of hearing shall be presumed to have developed during employment and shall be presumed to have been caused by or to have resulted from the nature of the work performed whenever same is manifested at any time after the first five years of employment in such classified service. This presumption shall be rebuttable by evidence meeting judicial standards and shall be extended to an employee following termination of service for a period of twenty-four months.

Chap. 10, FMLA / Military Leave

IL: FF IN U.S. ARMY RESERVE – NOT ENTITLED TO "DIFFERENTIAL PAY" UNDER USERRA – MAY HAVE CLAIM UNDER STATE STATUTE

On September 28, 2020, in Gregory Heckenbach v. Bloomingdale Fire Protection District et al., U.S. District Court Judge Steven C. Seeger granted the City's motion for judgment on the pleadings concerning alleged violation of the federal USERRA (Uniformed Services Employment and Reemployment Rights Act of 1964). While the State of Illinois has enacted a statute requiring differential pay under the Illinois Military Leave of Absence Act (for example, plaintiff states Chicago Police Department makes up difference) the federal statute has no such provision. Court also dismissed his defamation claim concerning FD calls to his Army Reserve commanders, since Illinois has

a statute protecting public employees from on duty defamation claims. His lawsuit on other counts concerning hostile workplace may proceed; he may also now sue in State court on his differential pay claim.

> "Heckenbach relies on the fact that the Illinois Military Leave of Absence Act requires differential pay. *Id*. at 4-5. Again, that's the statute that governed during the period in question. The text of the statute required differential pay during training, *see* 5 ILCS 325/1(a) (repealed 2019), and during active duty, *see id*. at § 1(b). Like that statute, the current Illinois statute requires differential pay, too. The text is straightforward: 'Differential compensation shall be paid to all forms of active service except active service without pay.' *See* 330 ILCS 61/1-15(b).
>
> That language sinks, rather than supports, Heckenbach's argument. No comparable language appears in the federal statute. The USERRA does not mention differential pay, let alone require public entities to pay it. The text of the state statute expressly requires differential pay, but the text of the federal statute does not. If anything, the foothold for differential pay in the state statute exposes the fact that there is no toehold for differential pay in the federal statute."

Facts:

> "Plaintiff Gregory Heckenbach has served his community and his country for more than a decade. He is a firefighter and paramedic in the Village of Bloomingdale, where he has protected the public for fourteen years. He is also a member of the U.S. military. But he can't be two places at once, and sometimes his service to the local government has conflicted with his service to the federal government.
> Heckenbach's military service has led to tension with the Fire Department, and then some. As the complaint tells it, the Fire Department is engulfed by 'anti-military animus.' *See* Cplt. ¶¶ 14, 19, 56, 57, 59, 72, 79, 82, 119, 129 (Dckt. No. 1). Heckenbach claims that the Fire Department and its leadership were 'hostile, defiant, confrontational, and antagonistic" to his military service.
>
> ***
> Heckenbach is also a non-commissioned officer in the United States Army Reserve, holding the rank of Staff Sergeant. *Id*. at ¶¶ 10, 25-26. The Army calls him up for active duty from time to time, which interferes with his civilian responsibilities. *Id*. at ¶¶ 37, 43. For example, he answered the call and guarded terrorists during their prosecutions at Guantanamo Bay, Cuba. *Id*. at ¶¶ 11, 38.
>
> ***
> The military service requires regular training - one weekend a month, plus two weeks a year. *Id*. at ¶ 36. But his military obligations are not a surprise to the Fire Department. The Army Reserve publishes its monthly training schedule one year in advance, and Heckenbach provided that training schedule to the District. *Id*. at ¶¶ 44-47. So, the Fire Department knew in advance when Heckenbach would have to miss work to serve his country. *Id*. Sometimes he needed to perform additional military duties, too, often with short notice from the Army Reserve. *Id*. at ¶ 37.
>
> ***
> Defendants complained that Heckenbach was breaking the rules and had been a 'problem' for years. *Id*. at ¶ 86. Defendant Kaderabek (the Deputy Chief) wrote to the Army Reserve, complained that Heckenbach wasn't providing enough notice about his military training, and threatened discipline. *Id*. at ¶¶ 83-84. Defendant Christopher Wilson (the Battalion Chief) sent texts to Heckenbach's military chain of command, explaining that Wilson was '[t]rying to light a fire under his a**.' *Id*. at ¶ 85.
> In January 2018, Defendants arranged a conference call with Heckenbach's military superiors to discuss his failure to notify the Fire Department about the training schedule. *Id*. At ¶¶ 87-89. After the call, Kaderabek (again, the Deputy Chief) confronted Heckenbach, telling him that leadership of the District was 'tired of your sh**.' *Id*. at ¶ 89. He added: 'We've been putting up with your sh** for over a year. The chief has done

nothing but bend over backwards for you and all you want to do is f*** around. These f***ing games are going to stop.' *Id*.; *see also id*. at ¶3.

***

Seventh Circuit precedent forecloses Heckenbach's federal claim. Unlike state law, the USERRA does not require the District to provide differential pay at all. The 'USERRA prohibits discrimination by, among other things, denying any benefit of employment on the basis of the employee's membership in the uniformed services. It does not expressly require paid military leave.' *Miller v. City of Indianapolis*, 281 F.3d 648, 650 (7th Cir. 2017).

***

The complaint carves its own exit from the courthouse. Heckenbach alleges that Defendants are employees of a public entity, and defamed his character when acting within the scope of their employment. The Tort Immunity Act gives Defendants absolute immunity for that type of claim. The Court grants Defendants' motion for judgment on the pleadings on the defamation claim (Count V)."

Legal Lessons Learned: USERRA provides for *unpaid* but job protected leave for service in the uniformed services. If you are in the Reserves, keep your FD well informed when you will be on military duty.

See Sept. 23, 2019 TV news story interviewing plaintiff: "Army Reservist Sues Suburban Fire District for Alleged Retaliation."

See this July 2016 Law Review article concerning lawsuit by Indianapolis firefighters who were in the Reserves: **"**Right to Paid Military Leave Is a Matter of State Law, not USERRA."

Miller v. City of Indianapolis, 281 F.3d 648(7th Cir. 2002)

Chap. 11- FLSA

TX: DALLAS / FORT WORTH AIRPORT FD – CROSS-TRAINED PERSONNEL IN EMS DIVISION ONLY DID EMS DUTIES - OVERTIME AFTER 40 HOURS

On Sept. 28, 2020, in Douglas Patterson, et al. v. Dallas/Fort Worth International Airport Board, U.S. District Court Judge Ada Brown held that the FD failed to prove that the cross-trained EMS Division personnel ever engaged in firefighting in 3 years prior to the 2019 merger of EMS and Fire Service Divisions; only two of EMS personnel engaged in live fire training, and SOG for EMS Division had no firefighting responsibilities. Court granted Summary Judgment to the plaintiffs and they are entitled to overtime after 40 hours, with back pay for 2 years; not 3 years and not liquidated damages [back pay doubled] since FD acted in good faith. 29 USC 260:

"The fact that DFW required plaintiffs to hold firefighting certifications is some indication that they might be expected to engage in fire suppression. However, neither Chief McKinney's declaration nor any other evidence shows the circumstances, other than the odd training exercise, under which plaintiffs might have been required to engage in fire suppression prior to this lawsuit being filed. Instead, they were assigned exclusively to MICUs or Trauma Unit 611, neither of which held any fire rescue or firefighting equipment. They were not dispatched to every fire incident and did not wear their bunker gear when responding to calls. Perhaps most importantly, the SOP setting out their procedures and responsibilities made no reference to fire suppression. Nor is there any evidence that plaintiffs would be disciplined for failing to engage in fire

suppression. Without more, the Court finds DFW has not met its burden to show, or raised a genuine issue of material fact, that plaintiffs had even a forward-looking obligation or responsibility to engage in fire suppression as EMS division Firefighters before this suit was filed. *Compare Regan v. City of Hanahan*, No. 02-16-cv-1077-RMG, 2017 WL 2303504, at *3 (D.S.C. May 26, 2017) (plaintiffs, who were almost always assigned to ambulances but, at various times, were assigned to fire trucks, were employees in fire protection activities). Accordingly, plaintiffs are entitled to summary judgment that they were not employees in fire protection activities and the section 207(k) exemption does not apply."

Facts:

"DFW operates the Dallas/Fort Worth International Airport (Airport) on behalf of the Airport's owners, the cities of Dallas and Fort Worth (Doc. 65-1). The Airport has a Department of Public Safety (DPS) with two divisions: Police Services and Fire Services (*Id.*). Fire Services employs Firefighters in four different divisions: Fire Rescue, Emergency Medical Services (EMS), Career Development, and Fire Prevention and Planning (Doc. 65-4). To become and remain a Firefighter, an employee must be certified by the Texas Commission on Fire Protection (TCFP) as Basic Structure Fire Protection Personnel and Basic Aircraft Rescue Fire Fighting Personnel (Doc. 65-13). Individuals with prior experience and the required TCFP certifications are hired as Firefighters (Doc. 65-4). Those without prior experience or certifications are hired as Firefighter Recruits (*Id.*). After receiving the required certifications and a twelve-month probationary period, a Firefighter Recruit is promoted to Firefighter (*Id.*).

***

Plaintiffs, except one who served as a Captain, were employed as Firefighters in the EMS division during the three years prior to commencement of this action [2015 – 2018] …. They claim DFW failed to properly compensate them for overtime work. The FLSA generally requires an employer to pay employees one-and-a-half times their regular rate of pay when they work more than forty hours per week. 29 U.S.C. § 207(a). An exemption, however, applies to public agency employees in fire protection activities. 29 U.S.C. § 207(k). Under section 207(k), employees in fire protection activities are subject to an increased overtime threshold. *Id.*

***

[EMS DIVISION – ONLY TWO DID FIRE TRAINING] Plaintiff Angie Harmon testified that she participated in a wildland fire training on Airport property as a member of a Texas Intrastate Fire Mutual Aid System team (Doc. 66-44, pp. 23-25). Plaintiff Israel Ramirez testified that he took part in a live fire training, mainly to serve as a translator for visiting firefighters from Costa Rica (Doc. 66-49, p. 25).

***

Section 203(y) of the FLSA defines an "employee in fire protection activities" as:

> an employee, including a firefighter, paramedic, emergency medical technician, rescue worker, ambulance personnel, or hazardous materials worker, who—
> (1) is trained in fire suppression, has the legal authority and responsibility to engage in fire suppression, and is employed by a fire department of a municipality, county, fire district, or State; and
> (2) is engaged in the prevention, control, and extinguishment of fires or response to emergency situations where life, property, or the environment is at risk.

29 U.S.C. § 203(y).

***

At issue, then, remains whether plaintiffs had the legal authority and responsibility to engage in fire suppression. Except for two plaintiffs who each participated in a live fire training exercise, plaintiffs did not, and were not asked to, perform any fire suppression activities while working in the EMS division during the

three years prior to this suit's filing[6] (Doc. 69, pp. 595-600). Instead, plaintiffs provided medical services and were assigned to a Mobile Intensive Care Unit (MICU) or Trauma Unit 611, which was used for mass casualty incidents and carried medical and trauma supplies (Doc. 69, pp. 276, 289, 376, 425, 454, 545, 602-03).

***

The MICUs and Trauma Unit 611 did not carry equipment associated with fire rescue or fire suppression (Doc. 69, pp. 266, 353, 380, 445, 619-22, 627-28). Plaintiffs were issued bunker gear, which consisted of fire-resistant personal protective equipment including a firefighting coat, pants, gloves, boots, a helmet, a hood, and a custom-fit mask designed to be connected to a Self-Contained Breathing Apparatus (SCBA) (Doc. 65-22; Doc. 65-23). Plaintiffs had their bunker gear with them when assigned to a shift, but there is no evidence they were required to wear it (Doc. 66-41, p. 12; Doc. 66-46, pp. 686-87; Doc. 69, pp. 238-39, 339-40, 402-03, 454). SCBAs were not kept in MICUs or Trauma Unit 611, but were available on fire vehicles and in the Airport's Fire Training and Research Center (Doc. 65-22; Doc. 69, pp. 492, 623). In a typical air rescue firefighting response, extra SCBAs were available for any Firefighter dispatched to the scene (Doc. 65-22).

***

A separate DPS Standard Operating Procedure (SOP) addresses the policies, procedures, and responsibilities of the EMS division, which was ‘established to provide profession emergency medical services to patrons, employees and tenants of the airport’ (Doc. 69, pp. 10-14, 616). The policies, procedures, and responsibilities relate to providing and reporting on medical services, including, among other things, maintaining treatment and rehabilitation areas and transporting patients in the event of structure fires, hazardous materials incidents, and aircraft alerts (*Id*.). The SOP, however, does not contain any procedures or responsibility related to fire suppression activities. Consistent with the SOP, the mission of the EMS division was to ‘provide exceptional prehospital medical care in both routine aviation and mass casualty environments by applying superior technical skills, compassion, and professionalism’ (Doc. 69, p. 19).

***

They were not dispatched to every fire incident and did not wear their bunker gear when responding to calls. Perhaps most importantly, the SOP setting out their procedures and responsibilities made no reference to fire suppression. Nor is there any evidence that plaintiffs would be disciplined for failing to engage in fire suppression. Without more, the Court finds DFW has not met its burden to show, or raised a genuine issue of material fact, that plaintiffs had even a forward-looking obligation or responsibility to engage in fire suppression as EMS division Firefighters before this suit was filed.[11] *Compare Regan v. City of Hanahan*,

No. 02-16-cv-1077-RMG, 2017 WL 2303504, at *3 (D.S.C. May 26, 2017) (plaintiffs, who were almost always assigned to ambulances but, at various times, were assigned to fire trucks, were employees in fire protection activities). Accordingly, plaintiffs are entitled to summary judgment that they were not employees in fire protection activities and the section 207(k) exemption does not apply.

***

DFW, however, has presented evidence that it made a good-faith attempt to comply with section 207(k). Its legal counsel advised DPS personnel that it needed to comply with the statute's requirements in order to be eligible for the fire employee exemption (Doc. 65-3). And, attaching a power point presentation, DFW asserts it communicated to EMS division Firefighters that they were partially exempt (Doc. 65-12). The evidence, however, does not demonstrate the specific efforts DFW made to determine whether plaintiffs fell within the exemption.”

Legal Lessons Learned: The FD may appeal this decision. As the Trial Court judge acknowledged in this case, there are several Federal Courts of Appeal that have held that FD personnel who are trained as both EMS and firefighters ("cross trained"), but assigned only to EMS duties, are "firefighters" under the 207(k) exemption.

Note: The Court denied summary judgment to plaintiffs on issue of bonus payments; this will be decided in future proceedings. The plaintiffs' in their 2018 Complaint allege that bonuses were not included in their "regular rate" of pay when calculating overtime pay.

> 56. Plaintiff and Class Members' regular rate must include all compensation, bonuses, and other remuneration paid by Defendant for purposes of calculating the overtime rate. See 29 C.F.R. 778.208. Defendant has failed to include all bonuses into the regular rate for purposes of calculating the overtime premium rate.

Court held: Without any evidence on the issue, plaintiffs cannot be entitled to summary judgment. *See* FED. R. CIV. P. 56(c). Further, DFW presented evidence that, where plaintiffs were entitled to overtime pay in a given pay period, they received an overtime adjustment to compensate them for the increased regular rate for that pay period based on incentive pay received (Doc. 65-30). Accordingly, the Court must deny plaintiffs' summary judgment motion on this ground.

Note – New DOL Rules On Regular Rate Of Pay
The U.S. Department of Labor, on Jan. 15, 2020, issued its "Final Rule" changes on items to be excluded from the "regular rate of pay." "The final rule clarifies when payments for forgoing unused paid leave, payments for bona fide meal periods, reimbursements, benefit plan contributions, and certain ancillary benefits may be excluded from the regular rate."

Chap. 11 – FLSA

LA: CITY OWES $1.6 MILLION BACKPAY 32 FF – LONGEVITY - MUST WAIT FOR MUNICIPALITY TO RAISE $ THROUGH LEVY

On Sept. 23, 2020, in Arnold Lowther v. Town of Bastrop, the Court of Appeal, Second Circuit, State of Louisiana, held (3 to 0) that while the firefighters won their 2008 lawsuit in 2014, and trial court ordered the City and its fire department to enact a uniform pay plan, which the trial court approved with backpay from 2005. However under Louisiana law the courts cannot order municipality to create a deficit. According to Press Reports, $1.6 million in back pay: "A recent judgement from a lawsuit dating back to 2005 under a prior administration mandates that the city must repay $1.6 million to 32 current and former firemen. The suit claimed city firemen weren't paid properly for their longevity, performance or responsibilities for a number of years. The problem Mayor Henry Cotton says is that the city doesn't have that kind of money, and needs a mill increase to do it. The proposal would be designated for 10 years to repay the debt."

> "Judgments against a political subdivision of the State may only be paid 'out of funds appropriated for that purpose by the named political subdivision,' LSA-R.S. 13:5109(B)(2); *Hoag*, 04-0857, p. 5, 889 So. 2d at 1023, and under no circumstance shall 'public property or public funds ... be subject to seizure.'"

Facts:

> "On May 5, 2008, appellants filed suit against the City of Bastrop ('City'), alleging that the City's pay practices violated applicable law.
> On November 13, 2014, the trial court granted appellants' petition for declaratory judgment, and ordered the City and its fire department to enact a uniform salary/plan scheme that complied with applicable law.

> On December 19, 2016, the trial court adopted appellants' proposed pay plan from January 1, 2005 through the indefinite future, and awarded a monetary judgment for all amounts due appellants under that plan. Following the May 6, 2019 trial, judgment was rendered in favor of each appellant, confirming the calculated back pay amounts as mandated by law.
> On October 16, 2019, appellants filed a petition for writ of mandamus requesting the trial court order the City to comply with its ministerial duty to pay its firemen in accordance with applicable law, as reflected in the May 6, 2019 judgment. In response, the City filed an answer and exception of no cause of action. The City argued that appellants are not entitled to use a writ of mandamus as an alternative means to execute a judgment against a political subdivision.
>
> ***

This case falls squarely within the scope of La. Const. art. XII, § 10(C), and La. R.S. 13:5109(B)(2), and thus requires an appropriation of funds by the legislature or the political subdivision against which a judgment was rendered. Payment of a judgment is not ministerial act. Appellants, as judgment creditors of the City of Bastrop, are required to use the statutory mechanisms provided by the legislature for executing a judgment against a political subdivision. Appellants must obtain an appropriation of funds by the city council."

Legal Lessons Learned: In order for these 32 current and former fighters to collect on their judgment, they must wait for the City to raise the money.

Chap. 11 – FLSA

IN: FLSA SETTLEMENT – CITY SETTLES WITH 15 FF - PLUS NOT DEMAND PAYBACK OVERPAYMENTS – FED JUDGE MUST APPROVE

On Sept. 22, 2020, in Eric Camel, et al. v. Town of Chesterton, Indiana and John Jarka, Fire Chief, U.S. District Court Judge Theresa L. Springmann, U.S. District Court, Norther District of Indiana (Hammond Division) has generally approved the settlement, but has taken the matter "under advisement" until the parties advise the Court how much of the funds go to attorney fees. 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.

> "Under the FLSA, settlement agreements for the recovery of unpaid overtime compensation must be approved by the Court in the absence of direct supervision by the Secretary of Labor.
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> 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 [amount owed, doubled], inclusive of all attorney's fees and costs; and (3) a payment of $25,000 to all Plaintiffs, inclusive of all attorney's fees and costs.
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> ***
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> 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."

Facts:

"In the instant Motion, Defendants represent that, prior to suit being filed, the Town of Chesterton paid all Plaintiffs, except Plaintiffs Michael A. Coslet and Amanda Shine (who were added with the First and Second Amended Complaints), overtime wages that were owed under the FLSA, including liquidated damages. Separate, individual payments to Plaintiffs Coslet and Shine are included in the Settlement Agreement, as set forth below. After the Complaint was filed, the parties conducted discovery, and Plaintiffs hired an expert to determine the amount of overtime wages allegedly owed to each Plaintiff. The parties disagree about the accuracy of the expert's findings and whether Defendants' liability was discharged by the pre-suit payments made to Plaintiffs. 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. They finalized the terms of the Settlement Agreement on August 25, 2020.

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Based on the foregoing, the Court TAKES UNDER ADVISEMENT the Joint Motion for Approval of FLSA Settlement Agreement and Dismissal …and GRANTS the parties leave to file, on or before October 7, 2020, a supplement to the motion setting forth the necessary additional information regarding the distribution of the $25,000 settlement payment and the reasonableness of the attorney's fee in relation to the overall settlement. The Court DENIES as moot the Parties' Joint Motion for Approval of FLSA Settlement Agreement and Dismissal.

Legal Lessons Learned: FLSA requires approval of settlements by U.S. Department of Labor, or by U.S. District Court judge.

Note: See FD's web page: The department currently has 15 full-time personnel that staff an engine 24/7/365, as well as a full time Fire Chief and Deputy Fire Chief. The department also utilizes a staff of 15 volunteer personnel who respond to calls for assistance.

Chap. 13 – EMS

NY: LAWSUIT AGAINST EMS – COURT OF APPEALS HOLDS "SPECIAL RELATIONSHIP" – NO GOV'T IMMUNITY

On Sept. 23, 2020, in Rashawn Watts, et. al, v, City of New York, 2020 NY Slip Op 05084, the Supreme Court of the State of New York, Appellate Division (Second Judicial Department) held (4 to 0) that the trial court judge properly denied the City's motion to dismiss the case, taking the legal position that when EMS provides services to a patient, governmental immunity no longer applies since the City now has established a "special relationship." [Note: Courts in some other jurisdictions require proof of gross negligence for case to proceed.]

"A municipality will be held to have voluntarily assumed a duty or special relationship with the plaintiff where there is: '(1) an assumption by the municipality, through promises or actions, of an affirmative duty to act on behalf of the party who was injured; (2) knowledge on the part of the municipality's agents that inaction could lead to harm; (3) some form of direct contact between the municipality's agents and the injured party; and (4) that party's justifiable reliance on the municipality's affirmative undertaking' (*Applewhite v Accuhealth, Inc.*, 21 NY3d at 430-431; *see Laratro v City of New York*, 8 NY3d at 83; *Cuffy v City of New York*, 69 NY2d 255, 260).'

***

The prehospital care report summaries and computerized automated dispatch report submitted in support of the City defendants' motion did not constitute documentary evidence within the intendment of CPLR 3211(a)(1) (*see Santaiti v Town of Ramapo,* 162 AD3d at 926; *Fontanetta v John Doe 1*, 73 AD3d 78, 87).

Facts:

[The Court does not describe the EMS run.]

"In an action, inter alia, to recover damages for medical malpractice, negligence, and wrongful death, the defendants City of New York, City of New York Fire Department, and City of New York Emergency Medical Services appeal from an order of the Supreme Court, Queens County (Kevin J. Kerrigan, J.), entered October 31, 2018. The order denied their motion pursuant to CPLR 3211(a)(1) and (7) to dismiss the complaint insofar as asserted against them."

Legal Lessons Learned: Governmental immunity normally protects the municipality from EMS liability unless proof of gross negligence or willful or wanton misconduct. The case will now proceed to pre-trial discovery.

Note: See Ohio Revised Code 4765.49, Emergency medical personnel and agencies - immunity.

"(A) A first responder, emergency medical technician-basic, emergency medical technician-intermediate, or emergency medical technician-paramedic is not liable in damages in a civil action for injury, death, or loss to person or property resulting from the individual's administration of emergency medical services, unless the services are administered in a manner that constitutes willful or wanton misconduct. A physician, physician assistant designated by a physician, or registered nurse designated by a physician, any of whom is advising or assisting in the emergency medical services by means of any communication device or telemetering system, is not liable in damages in a civil action for injury, death, or loss to person or property resulting from the individual's advisory communication or assistance, unless the advisory communication or assistance is provided in a manner that constitutes willful or wanton misconduct. Medical directors and members of cooperating physician advisory boards of emergency medical service organizations are not liable in damages in a civil action for injury, death, or loss to person or property resulting from their acts or omissions in the performance of their duties, unless the act or omission constitutes willful or wanton misconduct.

(B) A political subdivision, joint ambulance district, joint emergency medical services district, or other public agency, and any officer or employee of a public agency or of a private organization operating under contract or in joint agreement with one or more political subdivisions, that provides emergency medical services, or that enters into a joint agreement or a contract with the state, any political subdivision, joint ambulance district, or joint emergency medical services district for the provision of emergency medical services, is not liable in damages in a civil action for injury, death, or loss to person or property arising out of any actions taken by a first responder, EMT-basic, EMT-I, or paramedic working under the officer's or employee's jurisdiction, or for injury, death, or loss to person or property arising out of any actions of licensed medical personnel advising or assisting the first responder, EMT-basic, EMT-I, or paramedic, unless the services are provided in a manner that constitutes willful or wanton misconduct."

Chap. 13 - EMS

OH: TEMPORARY IMMUNITY DURING COVID-19 PANDEMIC – EMERGENCY RESPONDERS, SCHOOLS PROTECTED TORT LIABILITY

On Sept. 14, 2020, Ohio Governor Mike DeWine signed House Bill 606 into law. "The bill ensures civil immunity to individuals, schools, health care providers, businesses and other entities from lawsuits arising from exposure, transmission or contraction of COVID-19, or any mutation of the virus, as long as they were not showing reckless, intentional or willful misconduct. It also shields health care providers from liability in tort actions regarding the care and services they provide during this pandemic unless they were acting recklessly or displaying intentional misconduct." This will be particularly helpful to FDs that host paramedic and EMS students needing "ride time" for their certifications. See the statute.

Facts:
The bill provides, in part:

> To make temporary changes related to qualified civil immunity for health care and emergency services provided during a government-declared disaster or emergency and for exposure to or transmission or contraction of certain corona viruses.
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> ***
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> (E) This section applies from the date of the Governor's Executive Order 2020-01D, issued on March 9, 2020, declaring a state of emergency due to COVID-19, through September 30, 2021, and supersedes section 2305.2311 of the Revised Code during that period.
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> ***
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> (B)(1) Subject to division (C)(3) of this section, a health care provider that provides healthcare services, emergency medical services, first-aid treatment, or other emergency professional care, including the provision of any medication or other medical equipment or product, as a result of or in response to a disaster or emergency is not subject to professional disciplinary action and is not liable in damages to any person or government agency in a tort action for injury, death, or loss to person or property that allegedly arises from any of the following:(a) An act or omission of the health care provider in the health care provider's provision, withholding, or withdrawal of those services;(b) Any decision related to the provision, withholding, or withdrawal of those services;(c) Compliance with an executive order or director's order issued during and in response to the disaster or emergency.
> (C)(3) This section does not grant an immunity from tort or other civil liability or a professional disciplinary action to a health care provider for actions that are outside the skills, education, and training of the health care provider, unless the health care provider undertakes the action in good faith and in response to a lack of resources caused by a disaster or emergency."

Legal Lessons Learned: The statute is an excellent example of legislation providing immunity from tort liability during the pandemic for those serving others, including emergency responders.

Note: See legislative history.

Chap. 16 - Discipline

CA: CAPTAIN'S EXAM - INTERVIEW QUESTIONS LEAKED TO 3 - DEMOTED, REAPPOINTED, THEN DEMOTED AGAIN – OVERTURNED

On Sept. 23, 2020, in Justin Chaplain, et al. v. State Personnel Board and Department of Forestry And Fire Protection, the Court of Appeals of the State of California, First Appellate District (Division One), held (3 to 0) that the State Personnel Board is reversed; CAL FIRE could not reimpose demotion of two Captains, since those firefighters had never appealed from their original demotion. Third Captain did appeal so Board does have jurisdiction over his case [hopefully CAL FIRE will likewise re-promote him].

> "Here, the firefighters [Justine Chaplain and Justin Michels] have consistently claimed that the Board lacked the legal authority to proceed against them twice for the same behavior. Their specific argument that a substitution of disciplinary charges must occur before an action is concluded is based on principles related to statutory finality, not on those related to limitation periods.
> On the merits, we agree with the firefighters that once a disciplinary action becomes final, the employer is prohibited from withdrawing it and initiating a new adverse action. The plain language of section 19575 could not be clearer: an appointing power's discipline is final where no appeal is taken within 30 calendar days.
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> ***
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> Our analysis is different, however, for Schonig, who appealed the first notice of adverse action to the Board. His discipline thus was not final under section 19575 when CAL FIRE served him with the new notice of adverse action."

Facts:

> "Appellants started with the Department in the 2000's: Chaplin in 2002, Michels in 2004, and Schonig in 2006. In April 2014, they and four other candidates applied to be interviewed for three fire captain positions that had become available. Before the interviews, a battalion chief surreptitiously texted information to appellants about the interview, including interview questions and desired responses. Without reporting that they had received this information, appellants proceeded with the interview and performed well. Chapin and Schonig were appointed to be limited-term fire captains, and Michels was appointed to be a permanent fire captain.
> An investigation was launched against the battalion chief after he was accused of murdering his girlfriend and engaging in wrongdoing at CAL FIRE's Academy. In the course of this investigation, appellants admitted that they had received the text messages about the interviews.
>
> In January 2015, CAL FIRE served disciplinary notices, known as notices of adverse action, on appellants. Chaplin and Schonig were notified that their appointments as limited-term fire captains would end, and Michels was notified that he failed his probationary period. They were also all notified that their pay would be reduced by five percent for 12months. This discipline was upheld in February, after each of the men was given a hearing conducted in compliance with Skellyv. State Personnel Bd.(1975) 15Cal.3d 194(Skelly). The three firefighters did not appeal their discipline to the Board before the deadline to do so, but Schonig later sought and received a good-cause exception to the deadline. His appeal was therefore allowed to proceed.
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> ***
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> Within weeks of their discipline being upheld, two of the three firefighters were given new interviews and were again promoted: Schonig to be a permanent fire captain, and Chaplin to be limited-term fire captain at a different unit from his previous appointment.
>
> ***

In early May, the Sacramento Bee published an article with comments by the director of CAL FIRE about Schonig and Chaplin's 'boomerang promotions.' The article reported that the firefighters' 're-promotions caught [the director] off-guard,' and he was 'unhappy that both men so quickly regained the rank he stripped from them.' According to the article, the director would 'like to bust them down again.'

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Shortly after the article was published, CAL FIRE notified Chaplin and Michels that the disciplinary action taken against them was 'withdrawn,' and they were placed on administrative leave. It also notified Schonig, who was still in the process of appealing his original discipline, that his discipline was being rescinded and he would also be placed on administrative leave. CAL FIRE then notified the three that they would be sanctioned more severely by being demoted from their then-current positions to the position of Fire Fighter II, effective June1. They appealed the new discipline to the Board.

***

A consolidated evidentiary hearing on the new disciplinary actions was held in January2016. In a proposed decision, the ALJ concluded that CAL FIRE had proven the charges against the firefighters by a preponderance of the evidence, that their conduct constituted legal cause for discipline, and that their demotions were warranted. The Board adopted the decision at a meeting in April 2016.

***

Furthermore, even if we were to assume that an employer may set aside a final adverse action upon a showing of good cause, and that CAL FIRE preserved its right to do so here, we disagree with CAL FIRE's claim that it 'had more than sufficient good cause to withdraw and revise the adverse actions' against the firefighters. CAL FIRE argues that it revised the original adverse actions to include additional facts, causes of action, and evidence, and it claims that the original actions were 'too lenient given the dishonesty inherent in the appellants' misconduct.' This argument fails to prove good cause; it mostly just describes what actions the agency took after it withdrew the previous notices."

Legal Lessons Learned: The FD did not adequately prove that there was new evidence or other good cause to re-impose discipline a second time. +

Note:

See June 14, 2015 article: "New Cal Fire demotions challenged, reveal more alleged cheating details."
"Michels, Schonig and Chaplin allegedly received text messages last year from then-Cal Fire Academy instructor Orville Fleming that contained interview questions and answers for temporary fire captain jobs at the Ione training facility. Fleming was on the interview panel that ranked candidates, according the new batch of state records obtained via Public Records Act request."

See June 24, 2015 article, "Ex-Cal Fire battalion chief convicted of stabbing girlfriend to death."

Chap.16 - Discipline

TX: DISTRICT CHIEF POSTED COMMENTS ABOUT TRANSFER OPENING - FF SOCIAL MEDIA GROUP – DISCIPLINE UPHELD, FD POLICY BREACH

On Sept. 16, 2020, in Steven M. Dunbar v. Samuel Pena, Houston Fire Chief and Robert I. Garcia, Houston Assistant Fire Chief, the U.S. Court of Appeals for Fifth Circuit (New Orleans) held (3 to 0) that the Houston Fire Department lawfully suspended District Chief Dunbar (3 days, later reduced to one day) and transferred him to an

administrative position in another FD district. The posting concerned a transfer opportunity, which is not a matter of public concern and therefore not protected under First Amendment. The District Chief posted on a private social media group for HFD firefighters: "If you are thinking about putting in for a spot in District 64 on C-shift you better have your sh** together. Wanna play games like previously-assigned members? You will be miserable...promise."

> "Public employees are entitled to circumscribed constitutional protections in connection with their governmental duties, but they 'do not surrender all their First Amendment rights by reason of their employment. Rather, the First Amendment protects a public employee's right, in certain circumstances, to speak as a citizen addressing matters of public concern.' *Garcetti v. Ceballos*, 547 U.S. 410, 417 (2006). Therefore, to be protected against adverse employment action in retaliation for speech, a public employee must speak in the employee's 'capacity as a citizen,' rather than pursuant to the employee's 'official duties,' and the employee must address a matter of public concern. *Id*. at 417, 421. Otherwise, 'the employee has no First Amendment cause of action based on his or her employer's reaction to the speech.' *Id*. at 418.
> By contrast, employee-to-employee communications concerning particular transfer decisions generally do not implicate matters of public concern….

Facts:

> "In July 2019, Steven Dunbar, a District Chief for the Houston Fire Department ('HFD'), made a post in a private social media group for HFD firefighters. Discussing a transfer opportunity HFD had posted the month before, he wrote: "If you are thinking about putting in for a spot in District 64 on C-shift you better have your sh** together. Wanna play games like previously-assigned members? You will be miserable...promise."
>
> ***
>
> HFD Assistant Fire Chief Robert Garcia saw Dunbar's post and expressed concern about it to HFD Fire Chief Samuel Peña, which ultimately led to Dunbar being transferred to an administrative position in another district. The transfer form filled out by Garcia explained that Dunbar was being transferred because his '[s]ocial media posts meant to discourage members from transferring to their district compromises the integrity of the HFD Transfer policy.' [HFD transfer guidelines prohibit members of the FD from seeking to influence or discourage a member from applying for a posted or anticipated vacancy. See full guideline - posted at the end of this case review in Legal Lessons Learned.]
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> Soon after Dunbar was transferred, Garcia also asked the HFD Professional Standards Office to investigate Dunbar for creating a hostile work environment through his social media post. The investigation resulted in Dunbar being suspended for three days for violating the transfer guidelines, a suspension that was later reduced to one day. Dunbar has since been assigned to a post as District Chief in a different district.
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> Dunbar, filing pro se, sued Garcia and Peña in their official capacities under 42 U.S.C. § 1983 in federal district court, alleging that they violated his First Amendment speech rights and that HFD's transfer guidelines are unconstitutional. He sought a declaratory judgment and injunctive relief. The district court dismissed the case with prejudice under Federal Rule of Civil Procedure 12(b)(6) for failure to state a claim. Dunbar timely appealed.
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> ***
>
> For similar reasons, Dunbar's broader challenge to the constitutionality of the HFD transfer guidelines also fails. A public employer like HFD can adopt policies restricting its employees from speaking on issues that are not of public concern so long as those policies do not unduly restrict other, protected speech. *See, e.g., Commc'ns Workers of Am. v. Ector Cty. Hosp. Dist.*, 467 F.3d 427, 437-39 (5th Cir. 2006) (en banc) (concluding that a public employer's policy prohibiting the adornment of hospital uniforms did not violate

hospital workers' First Amendment rights in large part because the policy primarily limited speech on matters not of public concern). On their face, the transfer guidelines here prohibit only employee-to-employee communications that influence potential transferees' applications to vacant positions."

Legal Lessons Learned: Social media posts about internal FD matters are not protected under First Amendment.

Note: Under HFD's transfer guidelines, 'No member will communicate with [a] member requesting [a] transfer, including the incoming officer, to promote or influence the candidacy of a member or to discourage a member from applying for a posted or anticipated vacancy. Any violation of this directive will result in disciplinary action.' A similar statement was included in the memorandum announcing the transfer opportunity.

Chap. 17 – Arbitration / Labor Relations
OR: $25M BUDGET SHORTFALL – UNION PRES. AGREED TO STAFFING, CHANGES - 26 FF JOBS SAVED – UNFAIR LABOR CHARGE DISMISSED

On Sept. 24, 2020, in Portland Fire Firefighters' Association, IAFF Local 43 v. City of Portland, the Employment Relations Board of the State of Oregon, held that union is bound by its agreement not to file contest to budget cuts and eliminating Dive Team, transferring Safety Chief and Chief Investigator to management positions, and other management changes. The FD developed its proposed budget through a budgetary advisory committee (BAC). The Union's president, Alan Ferschweiler, served on the BAC. Between May 9 and approximately May 23, 2013 Ferschweiler met three times with Siegel, the mayor's budget liaison, to discuss and negotiate how the Bureau would implement the budget cuts, including consideration of the availability of a federal grant (the SAFER grant) that might fill budget gaps. Fire Chief Janssens attended one of those meetings.

"Thus, the City and the Union agreed to the following terms: (1) two double companies would be consolidated into single companies with each station's truck and engine being replaced with a quint; (2) two additional RRVs [Rapid Response Vehicles] would be added (for a total of four); (3) the Union would not oppose or contest these changes; (4) the bargaining unit members would retain their COLA; (5) all stations would be kept open; and (6) the City would apply for the SAFER grant, notwithstanding the mayor's earlier concern that a short-term funding mechanism was merely a "band-aid," with the understanding that receiving the grant would prevent 26 bargaining unit members from being laid off.

***

The Union never requested to bargain about any of the operational changes agreed to above, which are also the subject of this unfair labor practice complaint.

***

Finally, we disagree with any contention that the Union should prevail on a (1)(e) unilateral change claim where the Union agreed not to contest those unilateral changes. Rather, as set forth above, we conclude that such an express action precludes the filing of a (1)(e) unilateral change claim. In reaching this conclusion, we reiterate that, unlike other budget discussions, the agreement here included a Union agreement not to contest the specific operational changes that are now the bases for the (1)(e) claim."

Facts:

"In December 2012, the City began its 2013-14 budget process anticipating a 25 million dollar shortfall. The City asked Portland Fire and Rescue (the Bureau) to develop its budget using a modified zero-based budget

approach, requesting up to 90 percent of current appropriation levels with prioritized add-back packages for cut items. The Bureau developed its proposed budget through a budgetary advisory committee (BAC). The Union's president, Ferschweiler, served on the BAC.

***

At the outset, the mayor's proposed budget directed the Bureau to replace four companies with four RRVs [Rapid Response Vehicles], which would have resulted in laying off 26 firefighters. That budget also directed the Bureau to eliminate: (1) the Safety Battalion Chief position (shifting all functions to the Deputy Chiefs Office): (2) two Firefighter Specialists assigned during the Training Academy; (3) one Inspector position; (4) two carpenters; (5) the Hazardous Materials Coordinator (shifting those duties to the Training Division); (6) the Dive Rescue Team; and (7) three Investigators positions.

***

Siegel [the Mayor's budget liaison] and [Alan] Ferschweiler [IAFF Local] met again on May 16, this time accompanied by [Fire Chief Erin] Janssens. At the meeting, the three agreed to a common course of action—namely, that they would try to reach the following compromise. The City would not close four companies or eliminate 26 firefighter positions, but would instead introduce quints and consolidate double-engine companies by adding RRVs to stations that already had an engine. The City would also apply for a SAFER grant, although Siegel explained that the SAFER component would be a difficult sell to the mayor, who had made clear that such an option ‘was not his first choice.’ Thus, if Siegel were to pursue this option with the mayor, he needed the assurance that the Union would not object to or grieve the ‘innovation’ changes outlined above.

***

Siegel then returned to the mayor's office and delivered on his end of the bargain—namely, the mayor agreed to pursue the SAFER grant so that the Union would not lose the 26 positions. The City ultimately received the SAFER grant, which was used as contemplated by the parties' agreement—namely, to pay for the 26 represented positions that otherwise the City would have eliminated due to the budget shortfall.

***

The City ultimately received the SAFER grant, which was used as contemplated by both the Union and the City—namely, to pay for the 26 represented positions that otherwise would have been cut by the City."

Legal Lessons Learned: Unfair Labor Practice complaint properly dismissed; Union President was active participant in budget process.