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FEB. 2022 – FIRE & EMS LAW NEWSLETER

[NEWSLETTER IS NOT PROVIDING LEGAL ADVICE.]

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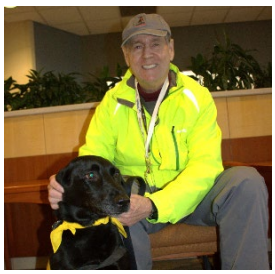
Honored to be invited to address this Symposium.

May 26, 2022: First Responders' Mental Health Resource Symposium / Marriott Hotel near Greater Cincinnati Airport: Click here to be redirected to info; Host: Phil Hall, CVG Airport FD: firehousechefphall@yahoo.com.

During lunch, meet members of new Pet Therapy Response Team (and their dogs) – including FRYE (6-yr-old Lab):



12 RECENT CASES

Contents

File: Chap. 1, American Legal System

U.S. SUP. CT: COVID-19 - OSHA MANDATE SET ASIDE – CMS MANDATE FOR HEALTH WORKERS UPHELD

On Jan. 13, 2022, in Biden v. Missouri, the U.S. Supreme Court (5 to 4) upheld the health workers mandate.

> "The Secretary of Health and Human Services administers the Medicare and Medicaid programs, which provide health insurance for millions of elderly, disabled, and low-income Americans. In November 2021, the Secretary announced that, in order to receive Medicare and Medicaid funding, participating facilities must ensure that their staff—unless exempt for medical or religious reasons—are vaccinated against COVID–19…. Two District Courts enjoined enforcement of the rule, and the Government now asks us to stay those injunctions. Agreeing that it is entitled to such relief, we grant the applications."

On Jan. 13, 2022, in National Federal of Independent Business, et al. v. U.S. Department of Labor (OSHA), the U.S. Supreme Court (6 to 3) struck down the OSHA rule.

> "The Secretary of Labor, acting through the Occupational Safety and Health Administration, recently enacted a vaccine mandate for much of the Nation's work force. The mandate, which employers must enforce, applies to roughly 84 million workers, covering virtually all employers with at least 100 employees. It requires that covered workers receive a COVID–19 vaccine, and it pre-empts contrary state laws. The only exception is for workers who obtain a medical test each week at their own expense and on their own time, and also wear a mask each workday. OSHA has never before imposed such a mandate. Nor has Congress. Indeed, although Congress has enacted significant legislation addressing the COVID–19 pandemic, it has declined to enact any measure similar to what OSHA has promulgated here. Many States, businesses, and nonprofit organizations challenged OSHA's rule in Courts of Appeals across the country. The Fifth Circuit initially entered a stay. But when the cases were consolidated before the Sixth Circuit, that court lifted the stay and allowed OSHA's rule to take effect. Applicants now seek emergency relief from this Court, arguing that OSHA's mandate exceeds its statutory authority and is otherwise unlawful. Agreeing that applicants are likely to prevail, we grant their applications and stay the rule."

Legal Lesson Learned: In Biden v. Missouri, the health mandate was upheld when two conservative Justices, Chief Justice John G. Roberts Jr. and Brett M. Kavanaugh—joined with the court's three liberal justices to form the majority.

> Note: On Jan. 13, 2022, the IAFC published this analysis. "Fire and EMS departments are not covered by the CMS rule. However, if a fire or EMS department is engaged in interfacility transport, it should discuss the CMS rule with the facilities for which it provides interfacility transport to see if the fire or EMS department must come into compliance."

File: Chap. 1, American Legal System

OK: RAILROAD FINED FOR BLOCKING ROADWAYS MORE 10 MIN. - STATE LAW SET ASIDE – FEDERAL LAW CONTROLS

On Jan. 10, 2022, in BNSF Railway Company v. Todd Hiett, Chairman of Oklahoma Corporation Commission, et al., the U.S. Court of Appeals for 10th Circuit (Denver) held (3 to 0) that the trial court properly held that Federal law preempts the state from issuing citations to railroads for blocking highway. The Court recognized why the state has safety concerns, but Federal law prevails. "Defendants explain that blocked crossings in Oklahoma have 'forced a paramedic . . . to jump between rail cars of a stopped train to reach a patient in time,' delayed firefighters and paramedics' response times generally, and caused Oklahomans to engage in risky behavior to avoid blocked crossings."

FACTS:

> "Oklahoma's Blocked Crossing Statute provides that 'no railcar shall be brought to rest in a position which blocks vehicular traffic at a railroad intersection with a public highway or street for longer than ten (10) minutes.' Okla. Stat. Ann. tit. 66, § 190(A). *** Plaintiff operates interstate trains nationally, including throughout 952 route miles in Oklahoma. Sixteen days after the Blocked Crossing Statute took effect, one of Plaintiff's trains occupied the side track in Davis, Oklahoma, for 38 minutes so that another train could pass on the main line.[1] While Plaintiff's train occupied the side track, it blocked at least one grade crossing. A police officer cited Plaintiff for violating the Blocked Crossing Statute. The next day, in Edmond, Oklahoma, one of Plaintiff's trains again occupied the side track for 80 minutes so that two other trains could pass. That train also blocked at least one grade crossing. And 12 days later, one of Plaintiff's trains blocked a crossing for a third time while it stopped on the side track in Edmond for 37 minutes to let another train pass. On both occasions, a police officer cited Plaintiff for violating the Blocked Crossing Statute. The City of Edmond and City of Davis each filed complaints against Plaintiff before the Oklahoma Corporation Commission ('OCC') to enforce the citations. The OCC secretary issued a citation and notice of hearing. *** Before that hearing took place, Plaintiff sued the City of Edmond, City of Davis, OCC Chairman Todd Hiett, OCC Vice-Chairman Bob Anthony, and OCC Commissioner Dana Murphy in federal court, asserting that the ICCTA, 49 U.S.C. §§ 10101 et seq., and the FRSA, 49 U.S.C. §§ 20101 et seq., preempt the Blocked Crossing Statute. Plaintiff sought a declaratory judgment and preliminary and permanent injunctions. The Oklahoma Attorney General intervened. On cross motions for summary judgment-granting Plaintiff's and denying Defendants'-the district court declined to consider the Blocked Crossing Statute exclusively under the FRSA, determined the ICCTA expressly preempts the Blocked Crossing Statute, and permanently enjoined Defendants from enforcing it. Defendants appeal."

HOLDING:

> "The district court held that the ICCTA preempts Oklahoma's Blocked Crossing Statute because it regulates railroad operations. We exercise jurisdiction under 28 U.S.C. § 1291 and affirm. Congress enacted the FRSA in 1970 to 'promote safety in every area of railroad operations and to reduce railroad-related accidents and incidents.' *Henning v. Union Pac. R. Co.*, 530 F.3d 1206, 1211 (10th Cir. 2008) (quoting 49 U.S.C. § 20101). It 'grants the Secretary of Transportation the authority to 'prescribe regulations and issue

orders for every area of railroad safety.'' *Id.* (quoting 49 U.S.C. § 20103(a)). And it requires the Secretary to 'maintain a coordinated effort to develop and carry out solutions to the railroad grade crossing problem and measures to protect pedestrians in densely populated areas along railroad rights of way.' 49 U.S.C. § 20134(a). But so that '[l]aws, regulations, and orders related to railroad safety' are 'nationally uniform,' the FRSA preempts a state's 'law, regulation, or order *related to railroad safety*' when the Secretary of Transportation 'prescribes a regulation or issues an order covering the subject matter of the State requirement.'49 U.S.C. § 20106 (emphasis added)."

Legal Lesson Learned: Congress has preempted railroad safety issues; unfortunately grade crossing issues continue to grow with longer and longer trains.

Note: See Association of American Railroads article, Sept. 2021, "How Railroads Collaborate ith Stakeholders to Reduce Grade Crossing Impacts." "With more than 200,000 grade crossings nationwide, railroads work closely with community leaders, government partners, first responders and the public to manage and mitigate the impact of rail crossings on communities. Each grade crossing is unique, and railroad operational teams deploy a range of strategies, depending on the circumstances, to keep rail and vehicle traffic safely moving through these intersections."

File: Chap. 2, FF Safety

LA: FF BLADDER CANCER – CLAIMS EXPOSURE AFFF FOAM - 2,000 CASES (50% FF) WTH FED. JUDGE IN SOUTH CAROLINA

On Jan. 27, 2022, in David G. Tibbetts v. 3M Company, Tyco Fire Products LP and Chemguard, Inc., Chief U.S. District Court Judge Nannette Brown, U.S. District Court, Eastern District of Louisiana, granted defense motion to stay all discovery in this case so the Judicial Panel on Multidistrict Litigation can decide to transfer it to Judge Richard M. Gergel, U.S. District Court in South Carolina, who has been presiding over similar cases since 2018 (now over 2,000 lawsuits, with more than half are firefighters with cancer).

FACTS:

"After working as a firefighter for more than 40 years, David Tibbetts developed bladder cancer, which he attributes to his occupational exposure to certain polyfluoroalkyl substances (PFAS) contained in firefighting agents known as aqueous film-forming foam (AFFF). *** Alleging that his November 2020 bladder cancer diagnosis "was due to and a consequence of his exposure to Defendants' Aqueous Fire Fighting Foam ("AFFF") products containing synthetic, toxic, per- and polyfluoroalkyl substances and products.

HOLDING:

"Before the Court is defendants' motion to stay this action pending final transfer decision by the Judicial Panel on Multidistrict Litigation. For the reasons that follow, the motion is GRANTED. *** Of the 2, 000+ cases comprising the MDL, more than half are lawsuits like Mr. Tibbetts's brought by current or former firefighters alleging personal injuries

from exposure to AFFF. *** [Footnote 1.] According to the defendants, the U.S. military developed the highly effective firefighting agent, AFFF, in the 1960s to quickly extinguish liquid fuel fires. Today, it is used on Navy ships and military bases and at larger civilian airports. The chemical components that give AFFF its superior fire-suppression features are various types of fluorinated surfactants, which are part of the large chemical family known as per- and polyfluoroalkyl substances (PFAS) and they contain or can degrade into other PFAS chemicals including perfluorooctanoic acid (PFOA) and perfluorooctaine sulfonic acid (PFOS)." Tibbetts v. 3M Co. - Jan. 2022

Legal Lesson Learned: AFFF should not be used at your FD.

File: Chap. 2, Safety

MD: FIREFIGHTER'S RULE – DEPUTY SHERRIF CAN'T SUE MOTORIST WHO STRUCK HER MOVING CAR AT ACCIDENT

On Jan. 4, 2022, in Kassondra Topper v. John C. Thomas, As Special Administrator of the estate of Lynwod Samuel Stride, the Court of Special Appeals of Maryland, held (3 to 0) that a Deputy Sheriff is barred by the Fireman's Rule from suing a motorist (or his estate, since he is now deceased) who ran into her for damages sustained while she was performing her normal duties. "The possibility of injury from the movement of the vehicle involved in the initial accident away from the lanes of travel was reasonably foreseeable as part of Deputy Topper's occupational risk in investigating a motor vehicle collision."

FACTS:

"While on routine patrol duty on February 11, 2017, Topper, a deputy with the Frederick County Sheriff's Office, responded to the scene of a minor motor vehicle collision in Emmitsburg, Maryland. When Deputy Topper arrived at the scene, she learned that a vehicle operated by Lynwood Stride had struck another vehicle in the rear. Stride accepted responsibility for the accident, explaining to Deputy Topper that he had been in a hurry. Because Stride's vehicle was blocking another motorist from exiting a parking lot, Deputy Topper instructed Stride to move his vehicle forward. Stride returned to his vehicle, started it, and began revving the engine. Then, although Deputy Topper put her hands up and shouted at him not to move because the car directly in front of him had not yet pulled away, Stride 'suddenly moved forward, lost control.' To avoid colliding with the car still in front of him, Stride 'jerked the wheel' to the left, towards Deputy Topper. He accidentally struck Deputy Topper with his vehicle, causing injury to her neck and left hand, arm, and shoulder. Deputy Topper later underwent shoulder surgery and was unable to return to work for several months."

HOLDING:

"The trial court issued a written opinion, finding that there were no material facts in dispute and that the firefighter's rule precluded Deputy Topper from recovering damages from Stride's estate. The court reasoned that Deputy Topper responded to a vehicle collision involving Stride and was injured 'by the very same party who occasioned her presence at the scene.' In addition, Deputy Topper had acknowledged, during her

deposition, that at the time she was struck she was engaged in her official duties of investigating a vehicle collision, which included controlling the traffic, clearing the intersection, and advising the drivers to move their vehicles. Because the accident that caused Deputy Topper's injuries occurred during the incident that required her presence at the scene and was not a separate unforeseeable event unrelated to the underlying call for service, the trial court concluded that the 'incident falls squarely within the [Firefighter's] Rule.' *** Here, the propriety of the trial court's ruling on Thomas's motion for summary judgment turns on the applicability of the firefighter's rule to the facts of the matter. The firefighter's rule, as a matter of public policy, 'generally precludes police officers and firefighters injured in the course of their duties from suing those whose negligence necessitated the public safety officers' presence at the location where the injury occurred.' *White v. State*, 419 Md. 265, 267-68 (2011); *Flowers v. Rock Creek Terrace Ltd. Partnership,* 308 Md. 432, 447 (1987). In other words, the very nature of the police officer's or firefighter's occupation limits their ability to recover in tort for work-related injuries. *Flowers*, 308 Md. at 447-48. *** Despite her claim that the accident that caused her injuries was independent of the accident requiring her services, we disagree. In our view, Deputy Topper was "injured by the negligently created risk that was the very reason for h[er] presence on the scene in h[er] occupational capacity." *Flowers,* 308 Md. at 447-48. In other words, her injury occurred when she "was unquestionably in the process of performing the duty for which [s]he was ordered[.]" *Hart,* 385 Md. at 525.

Sustaining injury after directing the driver of a car damaged during a motor vehicle collision-which was blocking other vehicles from accessing the public road-to move his vehicle falls squarely within the range of hazards that police officers are expected to confront in the course of their duties on behalf of the public. *See, e.g.*, *Crews v. Hollenbach,* 358 Md. 627, 653 (2000) ("[A] firefighter who is injured by a risk inherent in the task of firefighting may be barred from asserting claims for those injuries because it is the firefighter's duty to deal with fires and [they] cannot recover damages caused by the reason that made [the] employment necessary."). The possibility of injury from the movement of the vehicle involved in the initial accident away from the lanes of travel was reasonably foreseeable as part of Deputy Topper's occupational risk in investigating a motor vehicle collision." Topper v. Thomas case- Jan. 2022.

Legal Lesson Learned: The Fireman's Rule is still effective in MD, OH and many other states. It has been abolished in FL and narrowed in NY.

File: Chap. 3, Homeland Security

PA: TREE OF LIFE SYNAGOGUE – SHOOTER'S STATEMENTS TO SWAT ADMISSIBLE – PUBLIC SAFETY EXCEPTION

On Jan. 20, 2022, in United States of America v. Robert Bowers, Senior U.S. District Court Judge Donetta Ambrose, U.S. District Court for Western District of Pennsylvania, denied the defendant's motion to suppress statements made to police at that scene prior to being given Miranda warning, based on the "public safety exception." The defendant was armed with an

AR-15-style assault rifle and at least three handguns, shouted anti-Semitic slurs and killed 11 congregants and wounded four police officers.

FACTS:

> "On October 27, 2018, over the course of approximately two and a half hours, tragedy struck in the Squirrel Hill neighborhood of Pittsburgh, Pennsylvania. The incident that unfolded that day involved a heartbreaking loss of life. Those who responded to the scene did so with a remarkable amount of selflessness and bravery. That those individuals were able to maintain their composure and act with such professionalism in the face of what they encountered is a testament to their training and character. The City of Pittsburgh and surrounding region are fortunate to have had them on site that day. *** D. Communications with Bowers: Moments later, Thimons heard a man's voice coming from Room TT…. Although multiple people initially spoke to Bowers, SWAT is trained as a unit to have only one person speaking…. Thimons became that person. Bowers indicated that he was injured, required help, and wanted SWAT to provide aid…. Thimons responded 'crawl out or you will die….' Bowers again repeated that he was injured and could not. Thimons instructed that 'he had to crawl out if he wanted to survive his injuries, if he wanted to live….' *** Thimons also asked Bowers about weapons…. Again, Thimons did so in order to gauge the threat Bowers posed. Bowers responded that he had a Glock handgun on his waist and on his ankle. He also stated that he had an AR-15 but left that weapon in Room TT…. Another SWAT officer asked Bowers why he gave up. Bowers responded that he had run out of ammunition. *** Officers Saldutte and Mescan both expressed concerns about the possibility that Bowers was wearing an improvised explosive device. Their communications about the threat concerning improvised explosive devices reinforce my finding that the situation remained dangerous and volatile despite the fact that numerous SWAT officers had guns trained on Bowers. Mescan credibly testified that it is not uncommon in active shooter situations that individuals also have improvised explosive devices…. Consequently, SWAT operators instructed Bowers to pull his jacket up, pull up his shirt, and expose both his stomach and his back in order to demonstrate either the presence or absence of explosives…. During the silence while Bowers was exposing his back and stomach as directed, Thimons asked Bowers 'why he did it…' Bowers responded that 'he's had enough, that Jews are killing our children, and he couldn't take it anymore, that all Jews had to die….' He said, 'I had to do it. Jews are the children of Satan, and they're murdering our children….'"

HOLDING – PUBLIC SAFETY EXCEPTION

> "The questions posed by the SWAT officers were designed to ensure the safety of the officers and the public rather than to elicit incriminating answers. To find otherwise would place officers … in the untenable position of having to consider, often in a matter of seconds, whether it best serves society for them to ask necessary questions without the *Miranda* warnings and render whatever probative evidence they uncover inadmissible, or for them to give the warnings in order to preserve the admissibility of evidence they might uncover but possibly damage or destroy their ability to obtain that evidence and neutralize the volatile situation confronting them." *Quarles*, 467 U.S. at 657-658. Consequently, all statements at issue are admissible under the public safety exception to

Miranda. *** Footnote 13: The Supreme Court recognized the public safety exception to Miranda in New York v. Quarles, 467 U.S. 649 (1984). In *Quarles*, a woman reported a rape to police officers who were on road patrol. She indicated that the assailant was carrying a gun and had just entered a nearby supermarket. One of the officers entered the store and spotted the defendant who matched the woman's description. After initially losing sight of him, the officer then located and handcuffed the defendant. Before giving *Miranda* warnings the officer inquired as to the gun's location. The defendant indicated where it was and the officer retrieved the gun. The trial court excluded the defendant's initial statement regarding the gun's location because the defendant had not been *Mirandized*. *Quarles*, 467 U.S. at 651. The Supreme Court reversed, finding that such an exception 'does not depend upon the motivation of the individual officers involved.' *Id*., at 656. The Court explained that 'the need for answers to questions in a situation posing a threat to the public safety outweighs the need for the prophylactic rule protecting the Fifth Amendment's privilege against self-incrimination.' *Id*. at 657. In so holding, the Court sought to avoid placing the officer in the 'untenable position' of having to consider, 'often in a matter of seconds, whether it best serves society for them to ask the necessary questions without the Miranda warnings and render whatever probative evidence they uncover inadmissible, or for them to give the warnings in order to preserve the admissibility of evidence they might uncover but possibly damage or destroy their ability to obtain that evidence and neutralize the volatile situation confronting them.' *Id*. at 657-58."

Legal Lesson Learned: The "public safety exception" to Miranda ruling allows into evidence statements of defendants in response to police questioning in situations where there is a threat to public safety.

Chap. 4 – Incident Command, incl. Training, Drones, Communications
Chap. 5 – Emergency Vehicle Operations

File: Chap. 6, Employment Litigation

IL: STATE "CATASTROPHIC INJURY" BENEFITS – CITY CAN'T DENY TO FF / PD WHO CAN DO "GAINFUL WORK"

On Jan. 21, 2022, in IAFF Local 50 v. The City of Peoria, the Supreme Court of Illinois held (7 to 0), that the city does not have "home rule" authority to enact an ordinance restricting state pension law for career firefighters and police officers. "Under the ordinance, if a firefighter can volunteer part-time as a store greeter, he or she will not be considered to have suffered a catastrophic injury-even if that firefighter is not compensated." The Illinois 1997 Public Safety Employee Benefits Act, as interpreted by state Supreme Court, covers injured firefighters and police who can no longer perform their public safety jobs, but may be able to do other work. Their employer "shall pay the entire premium of the employer's health insurance plan for the injured employee, the injured employee's spouse, and for each dependent child of the injured employee."

FACTS:

"In 1997, the Illinois General Assembly passed the Public Safety Employee Benefits Act (Act) (820 ILCS 320/1 *et seq.* (West 2018)). See Pub. Act 90-535, § 1 (eff. Nov. 14, 1997). In section 5, the General Assembly states that it 'determines and declares that the provisions of this Act fulfill an important State interest.' 820 ILCS 320/5 (West 2018). That interest, as detailed in section 10, requires that an employer 'who employs a full-time law enforcement, correctional or correctional probation officer, or firefighter, who *** suffers a catastrophic injury or is killed in the line of duty shall pay the entire premium of the employer's health insurance plan for the injured employee, the injured employee's spouse, and for each dependent child of the injured employee.' *Id.* § 10(a). However, because the Act does not provide a definition for 'catastrophic injury,' this court was ultimately tasked with discerning the legislature's intent as to that term's meaning in 2003. In *Krohe v. City of Bloomington,* 204 Ill.2d 392, 400 (2003), this court held that 'catastrophic injury' is 'synonymous with an injury resulting in a line-of-duty disability under section 4-110 of the [Illinois Pension] Code' (40 ILCS 5/4-110 (West 2000)). That holding has never been disturbed. *** Nonetheless, on June 12, 2018, the City passed an ordinance-amending section 2-350 of the Peoria City Code-which, relevant here, defined terms used in section 10 of the Act. Specifically, the ordinance defined the terms 'catastrophic injury' and 'injury' but also added and defined the term 'gainful work.' See Peoria Ordinance No. 17584 (approved June 12, 2018); Peoria City Code § 2-350 (amended June 12, 2018). On July 23, 2018, the Union filed a complaint for declaratory judgment, alleging that the City had defined the terms in a way that violates the Act. In its answer, the City denied that it had exceeded its home rule authority in passing the ordinance; that the ordinance violated or contradicted the Act, the Illinois Constitution, or any other statute; and that the ordinance was invalid or otherwise ineffective. The parties filed cross-motions for summary judgment. See 735 ILCS 5/2-1005 (West 2018)."

HOLDING:

"The ordinance's definition of 'catastrophic injury' is inconsistent with the requirements of the Act in the following ways. First, it introduces the term and legal showing of 'direct and proximate consequences.' Neither the language of the Act nor case law requires such a showing. In fact, to be entitled to a line-of-duty disability pension, a 'firefighter need not prove that his or her acts of duty were the 'sole or even the primary cause' of the disability.' *City of Peoria v. Firefighters' Pension Fund,* 2019 IL App (3d) 190069, ¶ 35 (quoting *Prawdzik v. Board of Trustees of the Homer Township Fire Protection District Pension Fund,* 2019 IL App (3d) 170024, ¶ 40). Second, the ordinance's definition requires that a catastrophic injury result in the permanent disability of a firefighter to perform 'any gainful work.' Peoria City Code § 2-350(b) (amended June 12, 2018). The Act's definition of that term only requires that a firefighter be permanently disabled from performing service in the fire department. Under the ordinance, if a firefighter can volunteer part-time as a store greeter, he or she will not be considered to have suffered a catastrophic injury-even if that firefighter is not compensated. This is because, under the definition of 'gainful work,' if that sort of volunteer work 'commonly is compensated,' a firefighter is not permanently prevented from performing any gainful work and thus will not meet the showing for a 'catastrophic injury.' Therefore, the ordinance's definitions of

'catastrophic injury' and 'gainful work' operate to impermissibly disqualify those who would otherwise be 'persons covered under [the] Act.' 820 ILCS 320/20 (West 2018)."

Legal Lesson Learned: The Court prevented this "Home Rule" city from seeking to avoid financial obligations under the state statute.

Chap. 7 – Sexual Harassment, incl. Pregnancy Discrimination, Gay Rights

File: Chap. 8, Race Discrimination

OH: RECRUIT FAILED VERTICAL VENTILTION TESTS 9 TIMES - TERMINATED – NOT RACE DISCRIMINATION

On Sept. 7, 2021, in Major Smith, III v. City of Toledo, et al., 13 F.4th 508, the U.S. Court of Appeals for the 6th Circuit (Cincinnati) held (2 to 1) that trial court judge properly granted summary judgment to the City of Toledo. The recruit class of 29 recruits, including three African-Americans and two Hispanics, "twenty-seven passed the vertical ventilation test on the first try; the twenty-eighth passed on his second try; Smith never passed, despite nine attempts."

FACTS:

"The Academy hired Smith as a firefighter recruit in December 2017. Recruits at the Academy undergo rigorous training in almost three dozen topics. Each class of recruits is broken up into smaller 'squads.' Each squad completes the entire curriculum together. The curriculum includes both classroom and hands-on learning; recruits then take both written and practical skills examinations. The Academy gives recruits three chances to pass their practical skills exams. If recruits do not pass after three tries, they are dismissed from the Academy. One such exam is the vertical ventilation test. To perform this task, firefighters cut a hole in the roof of a burning building to release the toxic gasses and pressure that build up inside. This is an essential skill that firefighters must be able to do quickly and efficiently. To pass the vertical ventilation test, recruits, wearing full firefighting gear, must climb up a ladder and cut a four-by-four-foot hole in a roof within ten minutes. Recruits first study this skill in the classroom and then practice on a simulator—a pretend roof with a plywood board in the space where they must cut the hole. The simulated roof is not attached to a real house, so it is only a few feet off the ground. *** Smith and his squad took the vertical ventilation test in March 2018. After going through the classroom and hands-on instruction together, they all took the test on the same house. Everyone passed on the first attempt, except for Smith and one other recruit. The other recruit passed on his second try. Smith failed both his second and third attempts. The evaluating instructors noted that Smith hit the ladder with the running chainsaw, 'would not follow directions given by instructors for safety,' and 'repeatedly cut towards his body instead of standing out of the way as he was instructed to multiple times.' Smith was given a copy of his score sheet, which explained why he failed and included the notes from his evaluators. *** It was Academy policy to dismiss recruits after failing a practical skill test three times. Chief Sally Glombowski, then-head of training for firefighter recruits, reviewed Smith's exam results and recommended that he be dismissed. But because the City was trying to attain a more racially diverse fire

department, Smith was given another opportunity to take the vertical ventilation test. No other firefighter had ever been given more than the initial three chances to pass. And although Academy policy dictated that recruits not be allowed to move on to the next skill if they had failed, Smith was allowed to complete the rest of the course with his squad and to participate in the graduation ceremony, though he was not given a certificate of completion. He was not allowed to take the Academy's final exam or the state certification exam on the simulator because he had not yet passed the Academy exam on the roof. *** In May, Smith was given a second set of opportunities to pass the test. Lieutenant Eric Pinkham testified that he chose a house that was 'almost identical' to the house Smith and the rest of his squad had tested on in March, and at the time, Smith agreed that the May house 'look[ed] like the same one' as the March house, though he was 'not totally sure.' Smith would later testify, however, that when he got on the roof of the May house, it felt like it 'had a steeper pitch.' It is undisputed, however, that in one respect, testing on the May house should have been easier; it had a newer roof and fewer layers of shingles than the house that was the site of Smith's first failed attempts. Before the May test, the Academy provided Smith with eight hours of individual instruction and practice with three trainers. At the end of his training session and before testing, instructors asked Smith if he had any questions or wanted more practice. He said no. *** Smith again failed each of his three attempts. Instructors noted that he again hit the ladder with the running chainsaw, broke a rafter under the roof, and continued to cut toward his body with the chainsaw. Chief Glombowski again recommended that Smith be dismissed from the Academy. Although Fire Chief Luis Santiago initially agreed, he later argued that Smith should be given another chance because of timing inconsistencies during the May testing. Specifically, the examiners started the timer when Smith was at the base of the ladder in the May tests, while they had started the timer when Smith was on the roof in the March tests. *** During his training for the June test, Smith again mishandled the chainsaw. Though he had been repeatedly instructed otherwise, he cut toward his body; Chief Hitt, who observed the June training, noted that this would constitute 'an immediate fail' on an actual exam. The chainsaw stalled out several times. Hitt thought that Smith needed more work on his sawing skills. But though instructors asked Smith, before his first testing attempt in June, if he would like more practice, Smith declined, saying 'I need no more practice; let's get this over with.' Later, at his deposition, he explained that he did not want to take up more time because 'they [were]n't gonna pay [him] overtime,' he 'had already had three attempts at practicing and [he] felt good about it,' and he wanted to 'just try to finish it and try to get it done as quickly as possible.' *** Smith failed the test all three times he attempted it. During one attempt, the chainsaw stalled out and it took Smith two to three minutes to get it started again. An evaluator wrote that '[e]ven with all the instruction and practice [Smith] acts as if it's the first time he has ever used [a chainsaw],' '[t]he chainsaw was so poorly used that it failed to start for the second attempt that day,' and 'Recruit Smith will harm himself if we continue this.' Smith was dismissed from the Academy the next day."

HOLDING:

"Major Smith, III wanted to be a firefighter. But he could not perform the critical firefighting skill of cutting a hole in a roof using a chainsaw. The Toledo Fire and Rescue Training Academy (the Academy) had a policy of dismissing recruits who were unable to

perform this skill after the third attempt. Smith, however, was given nine chances to perform this skill; yet he failed every time. He was dismissed from the Academy. Smith argues that he was dismissed because of his race. The district court disagreed and granted summary judgment to defendants. We AFFIRM. *** There were thirty recruits in Smith's class. Three of them, including Smith, were African-American, two were women, and two were Hispanic. One of the African-American recruits, Anthony Bronaugh, took different employment with the City of Toledo and did not become a firefighter. Of the remaining twenty-nine recruits, twenty-seven passed the vertical ventilation test on the first try; the twenty-eighth passed on his second try; Smith never passed, despite nine attempts. It is undisputed that no recruit, other than Smith, has ever been offered more than three chances to pass the test. And there is no evidence that any recruit has ever graduated from the Academy without passing the test. It appears, therefore, that Smith has failed to identify anyone, of any race, who was similarly situated to him but who was treated better. *** But, Smith says, this is because his test was rigged. He claims the defendants 'manufactured' his failure through their 'wholly inadequate' training and testing of him. If by inadequate, Smith means 'unequal,' then the legal principle Smith asserts is surely right. An employer cannot claim to dismiss employees according to a neutral criterion, like passing a test, if it actually gives different and harder tests to some employees because of their race. The Academy requires recruits to pass the vertical ventilation test on a real roof before they can take the state test on a simulator. And Smith never passed the test on a real roof. There is no dispute on these two points. Yet Smith suggests that summary judgment was inappropriate because a fact dispute remains over whether the Academy's 'real roof' test is also a requirement for state certification. We disagree. Whether this is strictly an Academy requirement or also a state requirement is immaterial. There is no dispute that every recruit, not just Smith, was required to pass the Academy's test on a real roof. Smith acknowledges that the Academy may require more of its recruits than the state minimum and concedes that it is not unfair for the Academy to require that he take a real roof test. *** Smith offers affidavits from others who say that Chief Brian Byrd told them that he had self-demoted from his position as Deputy Chief of the fire department in 2016 because of rampant racial discrimination in the fire department. He has also submitted an affidavit from Professor Earl Murry, who wrote that Mayor Kapszukiewicz admitted to being 'aware[ ] of the race discrimination problems in the TFRD.' *** Assuming that these statements are admissible, they are insufficient to establish that discriminatory animus motivated the Academy's decision to dismiss Smith. Allegations of racial discrimination by unknown persons against Chief Byrd several years before Smith entered the Academy are too abstract and attenuated to indicate that Smith's supervisors at the Academy were motivated by discriminatory animus in their actions against Smith. *See O'Donnell* , 838 F.3d at 726. Furthermore, Smith has not pointed to any specific remarks by his superiors in the Academy that would raise an inference of discrimination against Smith personally or against African Americans in general. A complete lack of detail leaves us unable to 'evaluate factors affecting the statement[s'] probative value, such as ... 'the purpose and content of the statement[s], and the temporal connection between the statement[s] and the challenged employment action.' ' *Ercegovich* , 154 F.3d at 357 (quoting *Ryder v. Westinghouse Elec. Corp.* , 128 F.3d 128, 133 (3d Cir. 1997)). '[C]onclusory allegations and subjective beliefs are simply not enough to establish pretext. *See Mitchell* , 964 F.2d at 585."

Legal Lesson Learned: Race discrimination not proved; the FD gave him additional opportunities but he still couldn't pass the vertical ventilation.

> Note: Judge HELENE N. WHITE, Circuit Judge, concurring in part and dissenting in part. "I agree that the district court properly granted summary judgment to the City of Toledo on Smith's § 1983 and intentional-infliction-of-emotional-distress claims and properly denied Smith's motion for additional discovery. However, because there is a genuine dispute of material fact about whether the City dismissed Smith from the academy because of his race, I would reverse the grant of summary judgment on Smith's discrimination and conspiracy claims.*** And, since 2014, 80% of the recruits who were dismissed from the Academy were African American, and the remaining 20% were Hispanic, despite African Americans making up a minority of the class. This further supports an inference of discrimination."

Chap. 9 – Americans With Disabilities Act
Chap. 10 – Family Medical Leave Act, incl. Military Leave
Chap. 11 – Fair Labor Standards Act
Chap. 12 – Drug-Free Workplace, inc. Recovery

File: Chap. 13, EMS

OH: AMBULANCE AIR HORN MISTAKENLY BLASTED – CIVILIAN HEARING LOSS - EMPLOYER MAY BE SUED

On Jan. 19, 2022, in Stephanie M. King v. Emergency Medical Transport, Inc., the Court of Appeals of Ohio, Fifth District (Stark County) held (3 to 0) that the trial court should not have dismissed the ambulance company (EMT Inc.) from this lawsuit. The trial court found the alleged incident did not occur within the scope of employment; therefore, EMT was not vicariously liable for the conduct of its employees. The Court of Appeals disagreed, finding that the paramedics worked 24-hour shift and were therefore on duty for the employer when the air horn was mistakenly activated.

FACTS:

> "On August 20, 2016, King was an employee of the McDonald's restaurant located in Bellaire, Ohio. At 1:20 p.m., King took a break and went outside to sit on a retaining wall facing the restaurant parking lot. An ambulance pulled into the parking spot in front of where King was sitting, so that the front of the ambulance was about two feet from King. King observed the ambulance had two air horns on the bottom of the front bumper. The female driver got out of the ambulance, sat down on the wall with King, and they had a conversation. The male passenger exited the ambulance and went into the McDonald's restaurant. The male passenger exited the McDonald's restaurant with a bag of food and walked to the ambulance. The female driver got into the driver's seat and the male passenger got into the passenger seat of the ambulance. King heard the ambulance start and at the same time as the ignition, King heard the ambulance horn. King immediately put her fingers to her ears when the ambulance horn sounded for approximately eight to ten seconds before the horn stopped. The ambulance pulled out of the parking spot and

left the parking lot. *** King followed up with her physician and hearing specialists because her hearing did not return. In May or June 2017, she was prescribed hearing aids for both ears due to 72% hearing loss in the right ear and 74% hearing loss in the left ear. After August 20, 2016, she also experienced headaches and balance issues. King said she did not have any hearing difficulties prior to August 20, 2016, but her colleague at McDonald's stated that prior to August 20, 2016, he believed she had difficulty hearing."

HOLDING:

"EMT [Inc.] contracted with the Village of Bellaire to provide emergency medical transport to its residents. Quickly responding to emergency medical requests would serve a benefit upon EMT. A reasonable fact finder could draw an inference that EMT[Inc.] imposed the two requirements on paramedics who drove the assigned ambulance for the purpose of purchasing a meal, so the paramedics were in close proximity to quickly respond in the assigned ambulance to emergency medical requests. It could be argued the employees' choice to drive the ambulance to purchase lunch on August 20, 2016 was actuated by a purpose to serve EMT. Not every deviation from the course of duty is a departure relieving the employer from liability for the acts of the employee. In this case, reasonable minds could reach different conclusions as to whether Swoyer and Thompson were on a personal errand that removed them from the scope of employment or did the circumstances of the 24-hour shift and the use of the ambulance keep them within the scope of employment because there was a benefit to EMT. Upon our de novo review, we find there are genuine issues of material fact for a jury's determination as to whether Swoyer and Thompson were outside the scope of their employment on August 20, 2016. Accordingly, we sustain King's sole Assignment of Error."

Legal Lesson Learned: Employers may be liable for injuries caused by EMS personnel, including during their on duty lunch time.

File: Chap. 13, EMS

RI: PARAMEDIC FIRED – POOR SKILLS – UNION REFUSED PAY ATTY - NO BREACH DUTY OF FAIR REPRESENTATION

On Jan. 14, 2022, in Augustine Eddy v. Pascoag Fire District, Pascoag Fire and Rescue Association, and International Association of Firefighters, Local 4908, the Supreme Court of Rhode Island held (4 to 0) that the trial court properly dismissed the lawsuit against the Fire District and the union, since he never pursued arbitration. The paramedic in Jan. 2016 was presented with a plan for remedial training to address complaints from his partner regarding his job performance, but on a transport March 27, 2016 he failed to start an IV. He admitted in writing to Chief, "I know, I know, my skills are not what they should be, I should of [*sic*] started an IV." The union did not breach its duty. "Specifically, under the union's constitution and by-laws, plaintiff had the ability to appeal the union's decision not to pay for arbitration to the union's general president, but he failed to do so." Lawsuit against Fire District properly dismissed since he didn't pursue arbitration.

FACTS:

"The plaintiff is trained as a firefighter and emergency medical technician (EMT) and holds various related licenses and certifications. In 1997 he began working per diem for the district, and he became a full-time employee in 2013. In January 2016, the district presented Eddy with a plan for remedial training to address complaints from his partner regarding his job performance. Eddy was given three months to show improvement before the district would consider suspension. Thereafter, on March 27, 2016, plaintiff and three coworkers were dispatched to transport a thirty-seven-year-old patient with paraplegia experiencing difficulty breathing. Eddy was the primary patient caregiver for the dispatch. During the transport, the patient lost consciousness and ultimately passed away at the hospital. The plaintiff was told that night that he was suspended, with pay, pending an investigation. *** On April 3, 2016, Chief Carter sent a letter to the Board of Fire Commissioners (the board) notifying the board that he was recommending plaintiff's termination. The letter stated that Chief Carter had suspended plaintiff with pay pending an investigation following the March 27, 2016 incident and that a subsequent investigation found deficiencies in plaintiff's performance during the transport. Chief Carter's letter concluded that plaintiff's failures, in addition to his admission to Chief Carter shortly after the incident that 'I know, I know, my skills are not what they should be, I should of [*sic*] started an IV[,]' made clear that the action plan that had been implemented earlier in the year to address plaintiff's need for improvement had had no effect on his performance. On April 6, 2016, the district held a pretermination hearing to provide plaintiff with an opportunity to respond to the issues that had led to Chief Carter's recommendation that he be terminated. At that hearing, plaintiff presented a letter from Daren Girard, M.D., the physician who had treated the patient who had been transported to the hospital by Eddy and his coworkers on March 27, 2016. *** The plaintiff was terminated by the district on April 12, 2016. By letter, Chief Carter reiterated that his recommendation that Eddy be terminated was based on Eddy's 'conduct and performance during a rescue run on March 27, 2016[,]' and his 'continuing and ongoing inability to perform the functions of [his] position despite counseling and additional training.' On April 19, 2016, plaintiff met with the executive board of the union to discuss his termination and the grievance process steps, including arbitration. Thereafter, plaintiff began the grievance process in accordance with the collective bargaining agreement (CBA) between the district and the union. On April 24, 2016, pursuant to the CBA, plaintiff submitted his initial grievance alleging wrongful termination and requesting that the district immediately rescind the termination. This grievance was rejected by Chief Carter on the grounds that Eddy had failed to exercise good judgment and take basic actions during a critical situation-the March 27, 2016 transport incident-and that he had his performance called into question in the past and had not improved despite efforts to that end. On May 3, 2016, plaintiff proceeded to the next step of the grievance process, again alleging wrongful termination and requesting that the district immediately rescind the termination. This grievance was similarly rejected by David Carpenter, the chairman of the board. By letter dated June 10, 2016, the union executive board informed Eddy that it had decided not to seek arbitration for his grievance. The executive board opined in that letter that plaintiff's termination had merit. The union president later represented in an interrogatory answer that the union "could not afford going to arbitration" for Eddy. According to Eddy, however, one day before the deadline to submit the matter to

arbitration, the union informed Eddy that it would proceed to arbitration provided that Eddy retain an attorney at his own expense. The plaintiff asserts that he 'was unable to retain an attorney to handle the arbitration so the deadline passed without the union filing for arbitration.' Eddy sought no further relief through the administrative process."

HOLDING:

"[W]e discern no competent evidence in the record to suggest that the union prevented plaintiff from exhausting the administrative remedies available to him. Specifically, under the union's constitution and by-laws, plaintiff had the ability to appeal the union's decision not to pay for arbitration to the union's general president, but he failed to do so. There is no evidence to suggest that the union prevented him from appealing under the union by-laws. Therefore, plaintiff fails to establish that the union induced him to fail to act. *See State v. Parrillo*, 158 A.3d 283, 293 (R.I. 2017) (concluding that equitable estoppel did not apply where claimant failed to show that his conduct "was somehow induced" by the opposing party's actions). Because we are satisfied that plaintiff did not exhaust his administrative remedies and that his equitable estoppel claim fails as a matter of law, he cannot establish an action for breach of duty of fair representation against the union. *** Further, because Eddy's claim that the union breached its duty of fair representation fails, his claim against the district for breach of contract also must fail. See DiGuilio v. Rhode Island Brotherhood of Correctional Officers, 819 A.2d 1271, 1273 (R.I. 2003) (recognizing federal law that 'in order to prevail in court against an employer for breach of contract when a union refuses to arbitrate an employee's grievance, the employee must demonstrate not only that the employer breached the contract but also that the union breached its duty to represent the employee fairly.')."

Legal Lesson Learned: Under the CBA, the paramedic failed to exhaust his administrative remedy by pursuing arbitration.

Chap. 14 – Physical Fitness, incl. Heart Health

File: Chap. 15, CISM, Mental Heath

MA: CAPTAIN PSYCHIATRICT EXAM – FIRE CHIEF DENIED IMMUNITY – ALLEGED RETALIATION / BREACH OF FMLA

On Jan. 26, 2022, in Andrew Brennan v. City of Everett and Anthony Carli, the Appeals Court of Massachusetts held (3 to 0; unpublished decision) that trial judge properly denied the Fire Chief Anthony Carli's motion to be dismissed from lawsuit based on qualified immunity. "Here, Brennan alleged that Carli placed him on leave and provided false information to medical evaluators under the false belief that Brennan was mentally unfit."

FACTS:

"In November 2017, Brennan, a captain in the department, was working a fire detail at a construction site when he suggested that an ambulance be called for an injured employee; the paramedic on site refused to do so and shouted at Brennan. Brennan reported the

incident to a deputy chief, and a few days later, he made a report to the Office of Emergency Medical Services (OEMS) and copied Carli on the report. Carli met with Brennan and advised him that he broke the chain of command by reporting the incident directly to OEMS. Thereafter Carli showed increasing hostility towards Brennan. In 2018, Carli disciplined Brennan for abusing sick time; the discipline was ultimately rescinded. *** In May 2019, Brennan experienced stress due to medical situations involving his family. Carli met with Brennan, at the behest of the union president following a conversation between Carli and the union president about Brennan's stress. Carli told Brennan that it was brought to his attention that Brennan was 'not okay' during roll call. In response, Brennan explained his circumstances, and asked for leave under the FMLA. Carli failed to provide Brennan with any FMLA information. Instead, Carli arranged for a mental health evaluation and drug test for Brennan later that day. After being evaluated, Brennan was cleared to return to work immediately. When Brennan returned to the fire station, Brennan was met by several Everett police officers who were standing near his car; Brennan's firefighter gear had been placed inside the car. Police officers seized Brennan's personal firearms, (both those lawfully stored in his car at the fire station and those at his residence) and his license to carry. At the time the complaint in this action was filed, those items had not been returned to Brennan. A few days later, Brennan was evaluated by a psychiatrist who advised him to remain out of work for six weeks. In September 2019, Brennan was reevaluated and cleared to return to work. Notwithstanding that, Carli scheduled an independent medical examination (IME) with a different psychiatrist in October 2019, who concluded that Brennan was not fit to return to duty based on reports of Brennan's erratic behavior and his denial of the same. *** In December 2019, Brennan filed a charge of discrimination with the Massachusetts Commission Against Discrimination (MCAD) against Carli and the psychiatrist who conducted the October 2019 IME. In December 2019 and February 2020, another doctor conducted another IME; this doctor concluded that there was insufficient evidence for him to opine on whether Brennan was fit for duty. In March 2020, Carli sent a letter to Brennan that he was to return to work. The letter advised Brennan that if he was 'involved in any incidents of concern . . . [he would] be subject to further appropriate action . . . including, depending on the circumstances, an involuntary separation from employment.'"

HOLDING:

"R*etaliation claim*. On these facts, the complaint made out claims of violations of clearly established law, and a reasonable fire chief would have known that he could not 'threaten' to discipline Brennan for conduct or impairment protected by G. L. c. 151B or vague 'incidents of concern' without reference to department standards or metrics. *** *FMLA interference claim*. Employers are required to notify employees of their FMLA rights and to respond promptly to employee questions about the applicability and procedures for FMLA leave. See 29 C.F.R. §§ 825.300 (c)(1), (d) (2019). More specifically, an employer must provide an employee who requests FMLA leave with notice of eligibility within five business days absent extenuating circumstances. See 29 C.F.R. § 825.300(b)(1) (2019). Here, Brennan claimed that Carli interfered with his FMLA rights by refusing to provide him with information about these rights upon request thereby causing damages. On these facts, the complaint alleged violations of

clearly established law of which a reasonable fire chief would be aware. Cf. *Crevier v. Spencer*, 600 F.Supp.2d 242, 257 (D. Mass. 2008) ('employer's failure to explain FMLA procedures can constitute interference with employee's FMLA rights' [quotation and citation omitted])."

Legal Lesson Learned: If employee may need psychiatric evaluation, provide specific information to the medical evaluators; and if employee asks about FMLA, provide form to request leave.

File: Chap. 16, Discipline

DE: PARAMEDIC LICENSE SUSPENDED – PLED GUILTY - TRESPASS INTENT PEER (PEERING ON SEPERATED WIFE)

On Jan. 26, 2022, in Kevin Imhoff v. Delaware Board of Medical Licensure and Discipline, Judge Noel Primos of the he Superior Court of Delaware upheld the suspension of the paramedic's license but remanded to case for Board to possibly reduce the 2-year suspension for failure to timely report his plea of guilty. In September 2019 he pled guilty to Criminal Mischief, Violation of Privacy, and Trespass with Intent to Peer or Peep, but didn't report this within 30 days to the Board (apparently on bad advice of his criminal defense attorney). In May 2020, when renewing his license, he reported the convictions.

FACTS:

"In 2019, Imhof completed a questionnaire and underwent a pre-employment polygraph test as part of his application for a position with the Delaware State Police. On the questionnaire and during the test, Imhof made certain admissions, including the following: 1) he had accessed his former wife's social media accounts, emails, and text messages without her permission during the second half of 2018; 2) he had driven to his former wife's residence and had watched through an outside window while she and another individual engaged in sexual activity; 3) he had trespassed into his former wife's house and committed lewd acts within; and 4) he had committed acts of vandalism by keying his former wife's automobile, and then his own-to conceal his actions-and, thereafter, had filed a fraudulent insurance claim related to such damages. In consequence, the Delaware State Police made a criminal referral. *** Footnote 2: Imhof and his former spouse divorced in November 2018, but most of the conduct to which he admitted during the polygraph test occurred while they were still married but separated. In September 2019, Imhof entered guilty pleas to the offenses of Criminal Mischief, Violation of Privacy, and Trespass with Intent to Peer or Peep. The remaining charges were dropped. Imhof did not inform the Board of the criminal charges or his convictions until he applied to renew his license in May 2020."

HOLDING:

"For the foregoing reasons, the Court affirms the Board's finding that Imhof engaged in conduct constituting crimes substantially related to the practice of medicine in violation of 24 *Del. C.* § 1731(b)(2) and that he engaged in dishonorable, unethical, or other conduct likely to deceive, defraud, or harm the public in violation of 24 *Del. C.* §

1731(b)(3). However, further inquiry by the Board is needed regarding whether Imhof wilfully failed to report certain conduct in violation of 24 *Del. C.* § 1731(b)(14), and whether, as a result of that inquiry, the discipline imposed should be modified. Therefore, the Board's decision is **AFFIRMED IN PART**, but the matter is **REMANDED** for further proceedings consistent with this opinion as follows:

> 1. With regard to the third alleged violation, the Board will consider whether there was a willful failure to report in violation of 24 *Del. C.* § 1731(b)(14) in light of the fact that "abuse" is not defined in the statute. In this regard, the Board should consider whether that term could be open to interpretation, *e.g.*, regarding whether it requires physical contact between the perpetrator and the victim, and whether and how any issues of interpretation could impact the required statutory element of willfulness. The Board will also determine whether any such inquiry would require any further evidentiary hearings or supplemental findings of fact."

Legal Lesson Learned: Criminal misconduct can lead to suspension of EMS license.

File: Chap. 17, Arbitration, Labor Relations

NY: CBA – 5 FF MINIMUM MANNING – CHIEF CANNOT UNILATERALLY CHANGE – ARBITRATION TO PROCEED

On Jan. 13, 2022, In the Matter of the Arbitration Between The City of Ogdensburg and IAFF Local 1792, the Superior Court of New York (Third Department), held (5 to 0) that the trial court improperly granted the City's motion to permanently stay arbitration between the parties. The CBA provides for arbitration, and "having adequate personnel on hand would be essential to ensure firefighter safety as well as success in fighting the fires."

FACTS:

> "Petitioner and respondent entered into a collective bargaining agreement (hereinafter CBA) for a term beginning January 1, 2020 through December 31, 2025. Among other things, the CBA provides for grievance-arbitration procedures and, as relevant here, contains certain minimum staffing regimens. Specifically, article 18 (d) of the CBA states that '[t]here shall be [four] shifts of bargaining unit employees and each shift must have an officer structure of one Assistant Chief, one Captain, with the remaining shift members being Firefighters.' Further, article 18 (e) of the CBA provides that '[a] minimum of [five] bargaining unit employees ([four] firefighters plus [one] officer, or [three] firefighters plus [two] officers) shall be on-duty at all times unless otherwise mutually agreed to in writing for the period of this contract.' No written agreement to alter these staffing rules was ever reached.
>
> In December 2020, petitioner's acting fire chief, unilaterally, informed respondent of its intention, beginning in 2021, to operate its fire department with less than five on-duty members, possibly as few as three firefighters, on each shift. Respondent initiated a grievance pursuant to the grievance procedure set forth in article 22 of the CBA alleging that petitioner violated the entire CBA, including article 18 (d) and (e). Respondent's grievance was eventually denied and, thereafter, respondent filed a demand for

arbitration. In response, petitioner commenced this proceeding under CPLR article 75 seeking to permanently stay arbitration. Supreme Court granted petitioner's application, finding that the grievance concerned a job security clause that is non arbitrable as against public policy. Respondent appeals, and we reverse.

HOLDING:

"Although the provisions at issue here do not expressly mention safety as a reason for the minimum staffing requirements, the safety considerations are self-evident from the nature of the work to be performed - the quintessentially dangerous task of addressing conflagrations that, from time to time, beset the community. It goes without saying that, in such situations, having adequate personnel on hand would be essential to ensure firefighter safety as well as success in fighting the fires. In addition, the parties plainly agreed to arbitrate matters such as this as article 22 of the CBA clearly contemplates arbitration of grievances. Supreme Court therefore erred in staying arbitration here. In view of our decision, respondent's remaining contentions are academic."

Legal Lesson Learned: If CBA includes provision on minimum manning per shift, it cannot be unilaterally changed.

Chap. 18 – Legislation