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Oct. 2019 – FIRE & EMS LAW Newsletter

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UC NEWS: New online course (Oct. 16 – Dec. 7, 2019): TERRORISM FOR EMERGENCY RESPONDERS – 12 Subject Matter Experts, 4 Profs.

ITEMS IN NEWSLETTER

KY: FF's STRENOUUS RETURN-TO-WORK PHYSICAL FITNESS TEST – HEART ATTACK SAME DAY – PRIOR HEALTH PROB - NOT LODD

On Sept. 20, 2019, in Sharon Jenkins v. Kentucky Retirement Systems, the Kentucky Court of Appeals held (3 to 0; unpublished opinion) that the Retirement Board properly denied wife of deceased firefighter "line-of-duty" death benefits, but she is entitled to "basic" death benefits.
LODD benefits would have include lump sum of $10,000 and a monthly payment equal to 10% of Malcolm's monthly final rate of pay; "Basic" benefits were an actuarial fund, or a lump sum.

Judge Kelly Thompson wrote:

"Sharon [Jenkins] points out that under federal law providing death benefits to federal safety officers, it is presumed that a fatal heart attack occurring within 24 hours of a nonroutine stressful or strenuous physical activity in the line of duty is presumed to be the direct and proximate result of that activity. 34 United States Code §10281. While such a presumption might resolve some of the inherent difficulty in determining the cause of a cardiac event, that same presumption is not found in KRS16.601. 'As administrative agencies are creatures of statute,' this Court cannot require that such a presumption be applied to claims for in-line-of-duty death benefits. Kentucky Retirement Systems v. Bowens, 281 S.W.3d 776,784 (Ky. 2009)."

Facts:

"Malcolm was a firefighter for the Fern Creek Fire Protection District for three decades, having served nineteen years as a volunteer firefighter, and then twelve years as a paid, full-time firefighter. At the time his death in October 2014, he held the position of firefighter/fire training officer and the rank of Major.

Malcolm had been on light duty during the summer of 2014 because of surgery on an injured knee. After Malcolm was released by his physician to return to full duty, Malcom was required to undergo an annual physical fitness examination. On October 30, 2014, at approximately 8:00 a.m., Malcolm reported to BaptistWorx for his annual physical. That examination included a physical demand test as well as various medical assessments. A resting EKG was performed at approximately 8:24 a.m.
Following the medical examination, Malcolm took the physical demand test during which he was required to perform various physical tasks [while wearing an SCBA] emulating actions typically undertaken by firefighters on the scene of a fire or medical emergency. Malcolm was required to perform strenuous physical tasks including carrying tools up a ladder four times within two minutes, caring heavy equipment, simulating a rescue by pulling a blanket with the equivalent of a 200-pound person on it for 55 feet in one minute and various other physical tests. Malcolm successfully demonstrated the ability to perform all essential functions of his position.

Although it is unknown precisely when Malcolm left BaptistWorx, he called Sharon at10:30 a.m. to tell her the testing was concluded. It is also known that he pulled into an abandoned gas station and, at 10:59 a.m., called 911 but hung up before a 911 operator answered. Almost immediately, a 911 operator called Malcom's number back, but Malcolm told the operator he did not need assistance. That call lasted fifteen seconds. A few minutes later, at approximately 11:08 a.m., he took a brief call from a co-worker. All further calls to Malcom's cell phone went unanswered.

Malcolm was found deceased in his vehicle at the abandoned gas station at 9:57 p.m.

***

On the death certificate, the deputy coroner indicated that the immediate cause of Malcolm's death was hypertensive and atherosclerotic cardiovascular disease. According to that death certificate, obesity was a 'significant condition contributing to his death' and Malcolm died of 'natural' causes.

***

Dr. Darius Arabadjief, a physician for the Office of Medical Examiner and a board-certified forensic pathologist, performed an autopsy on October 31, 2014. In Dr. Arabadjief's post-mortem report, he opined the cause of Malcom's death was hypertensive and atherosclerotic cardiovascular disease. He also noted obesity was a contributing factor. At his deposition, Dr. Arabadjief again opined that Malcolm's cause of death was hypertensive and atherosclerotic cardiovascular disease and his death resulted from the normal stressors of everyday life and not the direct result of any physical exertion experienced in the hours prior to his death. A she did in his report, Dr. Arabadjief stated obesity was a significant condition that contributed to Malcolm's death. He testified it was mere coincidence that Malcom suffered a fatal cardiac event after significant physical exertion. Specifically, he opined that the physical demand test was not a factor in Malcom's heart attack occurring when it did.

Dr. William Smock testified as Sharon's medical expert. Dr. Smock is a police surgeon for the Louisville Metro Government. In that position, he determines whether emergency personnel are fit for duty. He testified that the proximity in time was an 'extremely significant' indication of the causal effect between the physical demand test Malcom undertook and his heart attack. He testified that the cardiovascular stress put on Malcolm during his physical examination directly resulted in his death.

The hearing officer issued a recommended order denying Sharon's application for in-line-of-duty death benefits.

The hearing officer explained why he was not convinced by Dr. Smock's testimony:

> 'Significant emphasis was placed by Dr. Smock on the temporal proximity of [Malcolm's] death to the physical demand test. However, the record does not establish [Malcolm's] actual time of death in proximity to the completion of the physical demand test with any specificity. [Malcolm] was not located and pronounced dead until 9:57 p.m. and his status during the hours that elapsed is largely unexplained by the record. Further, Dr. Smock's testimony wasbasedsolely upon his review of the medical records provided by Claimant. While Dr. Smock testified that the physical exertion led to the fatal arrythmia suffered by Claimant, he confirmed that [Malcolm's] activities on October 30, 2014 could not have caused the significant amount of plaque buildup in [Malcom's] arteries.
>
> Dr. Arabadjief noted that there was at least a 30-minute gap between events based (on) the information available to him, which would have been time for Claimant to relax and recover while driving. Moreover, [Malcolm's] EKG showing ischemia was marked at 8:24 a.m. and interpreted that reading to be before the physical agility test was performed. The undersigned concludes that Dr. Smock' testimony is less persuasive than that of Dr. Arabadjief, given that Dr. Arabadjief's Board-certification in Pathology and personal examination of [Malcolm] during the autopsy.'

Both parties filed exceptions. Kentucky Retirement Systems adopted the recommended order with only a minor correction."

Holding:

"We conclude there was substantial evidence to support Kentucky Retirement Systems' finding of fact that Malcolm's heart attack was not the direct result of an act in the line of duty and, therefore, properly denied in-line-of-duty death benefits. We further conclude that no evidentiary errors were committed at the hearing and that a denial of an open hearing does not require an award of in-line-of-duty death benefits. Finally, we conclude that Kentucky Retirement Systems improperly denied Sharon's receipt of basic death benefits pending appeal and remand to the Franklin Circuit Court to determine what, if any, amount is owed Sharon."

Legal Lessons Learned: In cases involving a "battle of the experts," Courts will normally not overturn findings of the Administrative Agency. The federal death benefits statute for firefighters and other public safety officers, who die within 24 hours of "nonroutine stressful or strenuous physical" activity was written to avoid these kinds of disputes. See May 15, 2018 announcement: "Justice Department Announces Improvements to Public Safety Officers' Benefits Program."

File: Chap 2 – LODD; Safety

PA: THREE FF KILLED – ROW HOUSE STRUCTURE FIRE - MAYOR, FIRE CHIEF DENIED QUALIFIED IMMUNITY – "ROLLING BROWNOUTS"

On Aug. 28, 2019, in Firefighter Brad Speakman, Ret., et. al v. Dennis P. Williams, James M. Baker, Anthony S. Goode, William Patrick, and City of Wilmington, U.S. Magistrate Judge Mary Pat Thynge, U.S. District Court for the District of Delaware, issued a Report And Recommendation to a U.S. District Court judge assigned to this lawsuit arising from September 24, 2016 structure fire in a row house started by an arsonist. The Magistrate recommended that Mayor Williams, Fire Chief Goode not be granted qualified immunity at this time because of their "brownouts" of fire stations – called "rolling bypass policy."

Magistrate Judge Thynge wrote:

"Mayor Williams and Chief Goode understood that, with fire houses closed, overtime, the main impetus for the rolling bypass policy, substantially increased during both the Goode and Williams' administrations. Union Officials routinely warned Mayor Williams and Chief Goode of the dangers associated with the continued use of rolling bypass. Despite repeated, emphatic warnings and concerns expressed by Union officials, firefighters, City Council, the public, and the media, Mayor Williams and Chief Goode maintained the rolling bypass policy. Accordingly, Plaintiffs adequately state facts which support conduct that shocks the conscious against Mayor Williams and Chief Goode.

***

In the instant matter, City Council enacted a statute to address its concerns of under-staffing and overtime. Plaintiffs contend that Mayor Williams and Chief Goode failed to comply with that statute, and were clearly aware of the dangers concerning rolling bypass. They further maintain that the City, through its Mayors and City Council, understood these dangers. Despite this awareness, neither Mayor heeded these concerns. Such inaction supports Plaintiffs' allegations. Accordingly, the court finds that Plaintiffs allege sufficient facts against the City for maintaining policies, practices or customs."

Facts:

"The Canby Park Fire.

Plaintiffs assert that the tragic incident on September 24, 2016 resulted from the continued use of rolling bypass combined with persistent under-staffing. At approximately 2:56 a.m., Ladder 2, Engine 1, Engine 5, Squad 4, Battalion 2, and Battalion 1 were dispatched to 1927 Lakeview Road, in the Canby Park area, upon a report of a residential fire in a brick row home with persons trapped inside. The fire was a result of arson, initiated by Beatriz Y. Fana-Ruiz. [Footnote 53: WFD requested an investigation of the fire's origins. Beatriz Y. Fana-Ruiz was indicted for arson and multiple other counts, including first degree murder, for the fire on November 16, 2016.]

Plaintiffs allege that the 'first due' engine was Engine 6, located nearby, but it was out of service because of under-staffing and rolling bypass. The next closest station was twice the distance away.

Ladder 2, commanded by Lt. Leach, arrived on scene. Lt. Leach noted heavy fire in the rear of the home. He requested Dispatch send an engine to the rear of the home. Several minutes later Engine 1 and Engine 5 arrived and immediately began applying water to the front of the home. Crews from Engine 1 and Engine 5, including Ffr. Speakman, Lt. Cawthray, Sr. Ffr. Hope, and Lt. Leach, entered the first floor and searched for trapped civilians. As they began their search and rescue, the first floor collapsed on the south side of the home, which caused Lt. Leach, Ffr. Speakman, and Sr. Ffr. Hope to fall into the basement. After a Mayday transmission, firefighters on the scene attempted to rescue their endangered companions.

***

Within hours thereafter, Chief Goode emailed all battalion Chiefs suspending conditional company closures until further notice. However, conditional company closures were resumed before the end of November 2016."

Report And Recommendation:

"Qualified or good faith immunity operates as an affirmative defense for the benefit of government officials. A two-step analysis is involved to determine whether a government official is entitled to qualified immunity.

The court must decide whether the facts alleged by a plaintiff show a violation of a constitutional right, and whether the right at issue was clearly established at the time of the defendant's alleged misconduct.

***

Because the court has found certain allegations sufficient as against Mayor Williams and Chief Goode, at this stage of the proceedings, factual issues remain that affect the application of this defense under Rule 12(b)(6)."

Legal Lessons Learned: A tragic loss of life; "rolling brownouts" of fire stations or apparatus continue to be a very controversial issue.
See NIOSH Fire Fighter Fatality Investigation report F2016-18 (November 9, 2018).

"Ladder 2 was 1st due at this residential structure fire. Note: The 1st due engine (Engine 6) was out of service due to budget constraints affecting overtime and daily staffing of companies. The fire department has to detail fire fighters throughout the city to maintain minimum staffing on a prescribed number of engine companies and ladder companies (e.g., 'rolling brown outs'). Engine 6 was housed with Ladder 2. The impact of Engine 6 being out of service is unknown." [Page 25.]

See also: Philadelphia Fire Department Needs to Reconsider Its Brownout and Rotation Policies (Feb. 11, 2016).

File: Chap. 3 – Homeland Security / Active Shooter / Cybersecurity

CO: TERRORIST SENTENCED LIFE FED. MAX PRISON – TRIED BLOW UP PLANE IN DETROIT – COMPLAINTS ABOUT PRISON DISMISSED

On Sept. 18, 2019, in Umar Farouk Abdulmutallab v. William Barr, Attorney General of the United States, U.S. District Court Judge Raymond P. Moore, United States District Court of Colorado, upheld the recommendations of U.S. Magistrate Judge that the prisoner's claims should be dismissed for failure to exhaust his U.S. Bureau of Prisons administrative remedies.

Judge Moore wrote:

> "Plaintiff was convicted for the attempted use of a weapon of mass destruction on a commercial airliner that landed in Detroit, Michigan, and the attempted murder of the 289 people on board. Plaintiff is from Nigeria and a Muslim. Plaintiff is housed at the United States Penitentiary-Administrative Maximum ('ADX') in Florence, Colorado, and serving four terms of life imprisonment plus 50 years for his convictions. Prior to Plaintiff's transfer to ADX, in March 2012, the United States government placed Plaintiff under Special Administrative Measures ('SAMs'). The SAMs have been renewed every year, with some modifications.
>
> ***
>
> "As Plaintiff acknowledges, '[t]he primary purpose of a grievance is to alert the prison to a problem and facilitate its resolution.' (ECF No. 128, p. 5 (quoting *Griffin v. Arpaio,* 557 F.3d 1117, 1120 (9th Cir. 2009).) Thus, in the absence of a prisoner alerting a prison of the problem which he alleges in his complaint, such allegation is not exhausted and cannot serve to support the prisoner's claim or claims. As applied to the recommendation of dismissal here, this objection is overruled."

Facts:

> "The matters at issue … are as follows:
>
> Summary of claim or allegation:
>
> 1 Plaintiff's transfer to ADX in 2012 in deprivation of entirely his liberty without due process in violation of the Fifth Amendment;
>
> 2-5 The imposition of SAMs in violation of the First [Amendment] as to allegations of Amendment and in violation of substantive due restricting communications process rights under the Fifth Amendment with 13 nieces and nephews;
>
> 6 Retaliation against Plaintiff by confining him in entirely Special Housing Unit in Range 13, for engaging in a hunger strike to protest his conditions of confinement in violation of the First Amendment;
>
> 7 Denial of Plaintiff's right to refuse medical to extent alleges treatment, i.e., the force feeding of nutrients related forced feeding without to his hunger strikes, in violation of the Fifth medical necessity, for Amendment; purposes of retaliation, and/or without following the BOP's procedures on force-feeding;
>
> 8 Denial of access to group prayer in violation of the entirely Religious Freedom Restoration Act ('RFRA');

9 Failure to provide meaningful access to an imam in entirely violation of RFRA;

10 Denial of a halal diet in violation of RFRA entirely;

11 Responding to hunger striking by force feeding to extent alleges violation of RFRA forced feeding without medical necessity, for purposes of retaliation, and/or without following the BOP's procedures on force-feeding;

12 Force feeding non-halal nutritional supplement in entirely violation of RFRA;

13 Excess force by force feeding in violation to extent alleges Eighth Amendment forced feeding without medical necessity, for purposes of retaliation, and/or without following the BOP's procedures on force-feeding;

14 Cruel and unusual punishment under totality to the extent it circumstances in violation of the Eighth Amendment relies on unexhausted allegations;

147 Allegations that the BOP restricted Plaintiff's access Dismissal of allegation to certain books, identifying two books that allegedly were not delivered."

Holding:

"The PLRA [Prison Litigation Reform Act of 1996] attempts to eliminate 'unwarranted federal-court interference with the administration of prisons.' Woodford v. Ngo, 548 U.S. 81, 93 (2006). Therefore it 'seeks to afford corrections officials time and opportunity to address complaints internally before allowing the initiation of a federal case.' Id. (quotations, alteration, and citation omitted). The prison grievance system is to be given 'a fair opportunity' to consider the grievance and can do so only if 'the grievant complies with the system's critical procedural rules.' Id. at 94. Thus, 'proper exhaustion of administrative remedies is necessary.' Id. at 84.

***

The BOP provides a four-tiered Administrative Remedy Program for inmate grievances — one informal and three formal. The required steps and their timing of these four tiers are not disputed, including the requirement that the inmate has 20 days following the date on which the basis for the request occurred to complete a first step informal resolution and file a formal written Administrative Remedy Request known as a BP-9. See 28 C.R.F. §§ 542.13(a) & 542.14(a). An inmate exhausts his administrative remedies when he has properly and timely sought review at all three formal levels. See 28 C.R.F. § 542.15(a)

***

Exhaustion is mandatory. Because Plaintiff has failed to exhaust his administrative remedies as argued by Defendants, the Court orders dismissal of his unexhausted claims …."

Legal Lessons Learned: Nice to read about a life sentence of this terrorist to the Federal max prison.

PA: HIGH SCHOOL STUDENT EXPELLED – THREATING COMMENT – "BEAT RECORD OF 19" OF PARKLAND, FL

On Sept. 10, 2019, in In The Interest Of: J.J.M, A Minor, the Superior Court of Pennsylvania, 2019 PA Super 277, upheld (3 to 0) the Juvenile Court judge's finding of "delinquency adjudication for terrorist threats."

Judge Mary Jane Bowles wrote:

> "Appellant's statement was uttered six days after seventeen victims were killed at Marjory Stoneman Douglas High School in Parkland, Florida, eclipsing the Columbine High School shooting as the most deadly high school shooting in United States history.
> ***
> Further, we conclude that the evidence sufficiently established that Appellant made his threat with reckless disregard for the risk that it would cause terror. Again, the facts are that, while the news was dominated by the deadliest high school shooting in this country's history, Appellant proclaimed in a high school hallway, between classes, loud enough for other students to hear, that he wanted to 'beat the record of 19.' We do not hesitate to conclude that Appellant consciously disregarded a substantial and unjustifiable risk that his threat would terrorize his fellow students. See18 Pa.C.S. §302(a)(3) (defining recklessness)."

Facts:

> "At the time of the events in question, Appellant was a fifteen-year-old student at West Side Career and Technology Center, a vocational high school in Luzerne County, Pennsylvania. The juvenile court summarized the testimony offered at the adjudication hearing arising from those events as follows.
>
> M.W., a fifteen-year-old student at West Side C.T.C. testified that on February 20, 2018 she was in school and is familiar with [Appellant]. M.W. identified [Appellant]for the record and related that they have several classes together. She testified that she heard [Appellant]make statements regarding 'things in reference to death and such,' in the hallway, between classes and she was within two to three feet of him at the time the statements were made.
>
> M.W. further testified that [Appellant]stated 'he wanted to beat the record of 19.' She testified he was either talking to someone or just said it and it was not directly said to her. She then notified school administrators Mr. Rava and Mr.Paulauskas. She further testified she went to the school authorities 'because t was concerning due to past statements. I felt it needed to be taken seriously.'
> When asked on cross-examination if she felt that she needed to talk to [Appellant] to ask what he meant by the statement she replied 'no, I felt it was unneeded.' She stated the statements concerned her because he's shown signs of possibly being violent.
>
> The Commonwealth next called K.S. a fourteen-year-old student at West Side C.T.C. K.S. testified that she was in school on February 20, 2018 and did not have any conversations with [Appellant] that day. She stated she did have conversations with him a few weeks before.
>
> K.S. testified [Appellant] said 'he doesn't think people deserve to live and everyone should just die.' She went to school administrator Mr. Paulauskas and reported this incident.
>
> K.S. testified that she did not immediately report the statement to school administration however, a few weeks later after she heard other statements he made, she then spoke up about it because it was a

serious problem. She stated 'I was scared, like, I was nervous. I was scared because I didn't know what was going to happen. There was previously school shootings like you never know. I spoke with Mr. Paulauskas and Mr. Rava, I approached them because my friends approached me about him saying he was going to beat the record. She stated she was concerned and reported this information to school personnel and believed [Appellant] was then suspended from school. He was no longer at school.'

K.S. further testified about previous statements that she heard coming out of J.M's mouth that worried her. She stated the statement that she heard was 'that he thought people should die, people like shouldn't live. That's what I heard myself.' She further related that other people told her about other statements he had made.

On cross-examination K.S. was asked if she was generally uneasy and anxious because of matters recently reported in the news. She testified 'yes, I was uneasy and anxious because there had recently been school shootings.'

Richard Rava, Administrator of West Side [C.T.C.] testified. He indicated he is the Assistant Director/Principal. He is familiar with [Appellant]. When asked if action was taken by the school regarding [Appellant]'s conduct, Mr. Rava testified that [Appellant]was expelled from school.

Juvenile Court Opinion, 7/16/18, at 2-4 (some punctuation corrected; citations omitted).

***

On May 14, 2018, the juvenile court adjudicated Appellant delinquent of terroristic threats under 18 Pa.C.S. §2607(a)(3), and provided that the disposition order drafted by the hearing officer remain in effect. That order, inter alia, placed Appellant on probation, required that he comply with mental health recommendations, and prohibited Appellant from having any contact with weapons."

Holding:

"Appellant challenges the sufficiency of the evidence to sustain this adjudication on two grounds. First, he contends that his statements do not amount to a 'threat.' Appellant's brief at 8-11. Second, Appellant maintains that the evidence does not support a finding of a mens rea beyond mere negligence, because there was no evidence that Appellant knew that anyone who overheard his statement would associate it with previous school shootings. Id. at 12-13. We are not persuaded by either argument.

***

To reiterate, § 2706(a)(3) provides:

'A person commits the crime of terroristic threats if the person communicates, either directly or indirectly, a threat to: ... cause serious public inconvenience, or cause terror or serious public inconvenience with reckless disregard of the risk of causing such terror or inconvenience." 18 Pa.C.S. §2706(a)(3).

As the term 'threat' is not defined in the statute, we imbue the word with its ordinary meaning. Commonwealth v. Kelley, 801 A.2d 551, 555 (Pa. 2002) ('We construe non-technical words and phrases in statutes, which remain undefined, according to their ordinary usage.').

Black's Law Dictionary offers the following definitions of 'threat':

1. A communicated intent to inflict harm or loss on another or on another's property, esp. one that might diminish a person's freedom to act voluntarily or with lawful consent; a declaration, express or

implied, of an intent to inflict loss or pain on another ....2.An indication of an approaching menace; the suggestion of an impending detriment . . . .3.A person or thing that might well cause harm . . . .

***

There is no question that true threats made with the intent to terrorize fall outside of the First Amendment's protection. What has not been decided by either our Supreme Court or the United States Supreme Court is whether threats communicated not with the subjective intent to terrorize, but instead with reckless disregard for the risk of causing terror in the listener, is permissible under the First Amendment."

Legal Lessons Learned: Great decision – school administrators need to repeatedly remind students to report any threatening behavior. See 9/12.2019 article on this case: "Court: Student's Claim to Want to 'Beat the Record' Following Parkland Shooting Was Terroristic Threat."

File: Chap. 6, Employment Litigation

OH: FD LT. DEMOTED WITHIN 1-YR OF PROMOTION – NOT "PROBATIONARY EMPLOYEE" – MAY FILE GRIEVANCE / ARBITRATION

On Sept. 18, 2019, in Steve Conti v. Mayfield Village, U.S. District Court Judge James S. Gwin, U.S. District Court for the Northern District of Ohio, denied the City's motion for summary judgement, and rejected the City's claim that the Lieutenant "did not have a property interest in his probationary lieutenant position."

Judge Gwin wrote:

"Defendant points to the 'Fire Lieutenant, Class B – Probationary' position in Section 21.1's salary schedule as support its reading that Plaintiff was a probationary employee. However, the placement of the undefined term 'Probationary' after a promotional position without further explanation is hardly dispositive of this matter. Defendant's argument ignores the other CBA references to probationary employees that distinguishes between probationary employees and promoted employees.

Facts:

"In September 2013, Mayfield Village hired Plaintiff as a full-time firefighter/paramedic… Plaintiff served a one-year probationary period following his hiring…. On June 19, 2017, Defendant Mayfield Village promoted Plaintiff to the position lieutenant…. On February 16, 2018, Defendant Mayfield Village notified Plaintiff that Plaintiff Conti was demoted from lieutenant to the position of firefighter/paramedic. [Court did not describe any reasons for the demotion.]

***

A collective bargaining agreement ('CBA') controls the employment relationship between Defendant and its firefighters…. On February 22, 2018, Plaintiff filed a grievance under the CBA's grievance procedure with the fire chief…. The fire chief denied the grievance. Plaintiff then took the next step in the grievance procedure with an appeal to the mayor. In reply to Plaintiff's grievance appeal to the mayor, the mayor responded that 'Firefighter Conti's reduction in rank is not appealable through the grievance procedure.….' The mayor refused to schedule a meeting about the grievance…. Plaintiff did not seek to arbitrate his grievance….On March 18, 2019 Plaintiff filed this suit."

Holding:

> "Whether Plaintiff has or has not satisfied the CBA's grievance procedure is beside the point. The Court has subject matter jurisdiction over Conti's claim because the collective bargaining agreement does not explicitly stop judicial review of statutory § 1983 claims.
>
> ***
>
> Defendant next argues that Plaintiff was a probationary employee with no vested property interest in his lieutenant position…. Responding to this argument, Plaintiff says that he finished his one and only required probationary period after his first year working for the Defendant.
>
> ***
>
> The disputed language, Article 8 of the CBA, reads:
>
> > Section 8.1. All full-time employees shall be required to successfully complete a probationary period of one (1) year, prior to their permanent appointment. The probationary period shall begin on the first day for which the employee receives compensation from the Employer.
> > Section 8.2. Probationary employees may be removed during their initial probationary period. Removal during the probationary period is not appealable through the grievance procedure contained herein.
>
> Although the CBA is not a model of clarity, especially in regard to its lack of defined terms, Section 8.1 is clear…. The probationary period only applies to employees 'prior to their permanent appointment' and begins 'on the first day for which the employee receives compensation from the Employer….' In September 2013, Plaintiff began work for the Defendant. Mayfield village has paid compensation to Plaintiff Conti since that time. Under the CBA, he is not a probationary employee.
>
> ***
>
> As Plaintiff was not a probationary employee, he had a property interest in his lieutenant position…. The Court denies Defendant's motion for summary judgment on this ground."

Legal Lessons Learned: If promoted personnel are to be treated as "probationary" for the first year after probation, clearly state this in the CBA or Employee Handbook. See Sept. 18, 2013 article and photo – hiring Steve Conti and two other firefighters.

File: Chap. 8, Race Discrimination; also Chap. 13, EMS

LA: BLACK EMS CAPT. – NITROGLYCERIN WAS FOR MOUTH, NOT CHEST – SUSPENSION / REMEDIATION PROPER - NOT RACE / GENDER

On Sept. 17, 2019, in Deborah Mills v. City of Shreveport, U.S. District Court Judge Terry A. Doughty, U.S. District Court of Louisiana, Western District, Shreveport Division, dismissed her claim of "hostile work atmosphere." He had previously dismissed her race and gender discrimination claims.

"While Mills may subjectively believe that she has been treated differently and more harshly because of her race and/or gender, neither her subjective belief or that of others is enough to present this case to a jury. The Court finds that Mills has presented no genuine issue of material fact regarding whether she was subjected to harassment based on race or gender, and therefore she has failed to present a *prima facie* case for a hostile work environment under Title VII. Therefore, the Court GRANTS the City's Motion for Summary Judgment on this remaining claim."

On June 21, 2019, here other claims of race and gender discrimination were dismissed:

Facts:

"Mills is employed by the City as a Captain with the Shreveport Fire Department ('SFD'). She serves as an EMS Supervisor.
On December 10, 2015, the SFD received a call requesting assistance for a patient experiencing cardiorespiratory distress.
The crew of Fire Engine-8 responded to the call and found the patient face down in a bathtub, bleeding from her mouth and nose. The patient had no pulse and had stopped breathing. The firefighters began CPR in an attempt to restore the patient's pulse and inserted a 'King LT' airway device, which is a laryngeal tube that allows for mechanical ventilation.

An SFD ambulance unit, 'Sprint-8,' arrived at the scene as the crew of Fire Engine-8 continued to provide emergency care. Mills, acting in her capacity as EMS Supervisor, also responded to the scene separately in her department vehicle (Unit C-82).
Mills contacted the physician at the Willis-Knighton North emergency room and requested that the physician authorize the administration of nitroglycerin as the patient was not responding to the other treatment. According to firefighters, a pulse was detected.
The City contends that Mills had obtained authorization to administer nitroglycerin sublingually, but that when the patient's mouth could not be accessed, she ordered responders to rub the nitroglycerin into the patient's chest. It is not within protocol to administer sublingual nitroglycerin topically to the chest. [Doc. No. 20, Exh. A, pp. 30-31; Exh. A-6]. The responders did not follow Mills' alleged instructions. In support of these allegations, the City provided copies of complaints received about the incident. [Doc. No. 20, Exh. A-4 & A-5].
***
Mills was advised on January 8, 2016, that an internal affairs investigation had been initiated. On January 12, 2016, the investigation was assigned to Fire Investigator Chris Robinson ('Robinson'). From January 12, 2016, to February 8, 2016, Robinson conducted eyewitness interviews. According to Robinson, all firefighters who were witnesses to the event said that Mills issued the command to apply the sublingual nitroglycerin topically. On January 26, 2016, Robinson interviewed Mills, who denied issuing the command.
***
On February 8, 2016. Robinson issued an investigation report to Chief Wolverton, finding that Mills had given treatment orders in violation of departmental rules and regulations.
On February 23, 2016, four physicians who serve as EMS medical directors and under whose licenses the EMS personnel provide emergency services wrote a letter to Chief Wolverton expressing concerns about Mills' alleged conduct. Mills contends that the letters were generated at the request of Chief Wolverton and based on false information provided to the physicians by Chief Wolverton.
***
On May 5, 2016, Mills met with Chief Wolverton and received a remediation plan. She was placed on paid suspension from practicing as a paramedic until she completed remediation training between May 9 and 30, 2016. She was further placed on probation for one year. Because of the City's actions, Mills contends that she suffered a loss of pay from her lack of ability to practice as a paramedic while off duty.
***

On May 6, 2016, Mills filed an appeal of Chief Wolverton's decision, and a Civil Service Board Hearing was scheduled for September 7, 2016.
***

After her counsel had conducted a lengthy cross examination of Chief Wolverton (the first witness at the hearing), the City offered to resolve the matter by granting Mills all of her requests with the exception of attorney's fees. As part of the agreement, Mills was removed from probation effective immediately; Chief Wolverton would issue a new Variance Policy requiring all complaints regarding patient care issues be filed in writing through the procedures set forth in the policy, prohibiting employees from filing complaints anonymously or making verbal complaints to the Medical Director, and subjecting employees to discipline if they do so; the City agreed to pay for a mediator to meet with Mills and Dr. Callahan to address any lingering issues; and Chief Wolverton would discuss the anonymous complaint with Dr. Callahan to investigate and determine how she received it. [Doc. No. 25-5, Exh. 27]. Mills continued her duties as EMS supervisor in the same capacity, for the same pay, as before the investigation. The Civil Service Board awarded Mills $1,000 in attorney's fees to be paid by SFD, over SFD's objection. *Id.*
SFD appealed the attorney's fee ruling to the Louisiana First Judicial District Court, which affirmed the award.
***
On October 3, 2016, Mills filed a charge of discrimination with the Equal Employment Opportunity Commission ("EEOC"), alleging harassment, discrimination, and retaliation on the basis of sex and race in violation of Title VII of the Civil Rights Act of 1964 ("Title VII"), 42 U.S.C. § 2000e, *et seq.,* and LA. REV. STAT. 23:332, *et seq.,* for the time period of January through August 2016.

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On August 29, 2017, Mills filed the Complaint in this Court asserting sex and race discrimination and harassment claims, as well as retaliation claims, all under Title VII, and for intentional infliction of emotional distress under Louisiana law. She sought declaratory and injunctive relief and damages."

Holding:

"On June 21, 2019, the Court issued a Ruling [Doc. No. 29] and Judgment [Doc. No. 30] granting the City's Motion for Summary Judgment and dismissing all of Mills' claims except for her hostile work environment claims.

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Mills opposes summary judgment, contending that she suffered a hostile work environment based on her race and sex because Chief Wolverton "used drastically different standards for [her] and other black officers than he used for white male officers," he and other white officers "made racial comments and no actions were taken," he lied to start an investigation against her, so he could place her on one-year probation, he helped a white male captain get information about her to file a complaint, and he has "continued harassment of her" after the Civil Service Board appeal. [Doc. No. 36, p. 1]. In summary, she contends that "[Chief] Wolverton has continued to single out Mills and treat her differently and more harshly than white officers and male officers. His dramatically different treatment of her compared to white employees caused her humiliation, stress, effected [sic] her reputation, and impacted her ability to perform her duties." *Id.* at p.2. In addition to the evidence and arguments she has previously relied on, as part of her opposition, Mills lists several allegations for the first time [Court references names of other FD personnel that plaintiff alleges received lesser discipline].

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Finally, out of an abundance of caution, and given the somewhat conflicting Fifth Circuit precedent, the Court finds that, even assuming arguendo Mills were permitted to proceed with new factual allegations, she has failed to establish she was subjected to severe or pervasive conduct constituting a hostile work environment and that such conduct was based on race or sex. Mills recounts a series of actions or inactions taken by the City through its employees and attributes racial and/or sexual/gender animus to those actions and inactions. However, she presented no evidence other than her own subjective belief that the actions allegedly taken against her were based on her race or sex. Mills' allegations largely center around Chief Wolverton, but she has not alleged that he uses racial epithets or slurs or has made derogatory statements about women, toward her or anyone else. She attributes one statement to Wolverton, that he adopts black children, as evidence of his race-based animus. While she claims this statement is false (and the Court has no information whether Chief Wolverton does or does not adopt black children), regardless, it is unclear how such a statement indicates that he is biased against black employees. She also asserts that another employee, who is not a supervisor over her, used an unidentified racial slur at an unidentified time during a Facebook live event. This evidence, even when viewed in the light most favorable to Mills, is insufficient to raise a genuine issue of material fact for trial."

Legal Lessons Learned: EMS protocols must be followed, and suspension / remediation training is an appropriate corrective action.

File: Chap. 8 – Race Discrimination

MO: BLACK FF SCORED 32nd CAPTAIN'S TEST – RESIGNED 1-YR LATER & RETIRED – NOT "CONSTRUCTIVE DISCHARGE"

On Sept. 6, 2019, in Travis Yeargans v. City of Kansas City, Senior U.S. District Court Judge Ortrie D. Smith, U.S. District Court for Western District of Missouri, granted the City's motion for summary judgment on the "constructive discharge" claim. The lawsuit alleging other racial discrimination claims may now proceed to trial.

Senior Judge Smith wrote:

"Moreover, Plaintiff admits he did not discuss his reasons for leaving the KCFD with Defendant, and he did not complain to Defendant that he was the victim of discrimination. Doc. #36-5, at 1-2. These admissions are fatal to his constructive discharge claim. *See, e.g.*, *Anda*, 517 F.3d at 535; *Davison*, 121 F. App'x at 672; *Williams v. City of Kan. City*, 223 F.3d 749, 754 (8th Cir. 2000) (finding the plaintiff did not give the city an opportunity to address her concerns, and therefore, the Court could not say resignation was the plaintiff's only plausible alternative); *Knowles v. Citicorp Mortg., Inc.*, 142 F.3d 1082, 1086 (8th Cir. 1998) (citations omitted).

In addition, Plaintiff does not explain why he left his employment in April 2014 when he received his oral examination scores in November 2012, and the promotional list was published in December 2012. Plaintiff does not demonstrate how his working conditions became 'so intolerable' during that timeframe. In fact, Plaintiff points to nothing specific that occurred during that timeframe that rendered his working conditions so intolerable. Instead, the passage of more than a year between the alleged discriminatory act(s) and Plaintiff's decision to leave his employment does not support his contention that his working conditions were so intolerable he felt he had no choice but to quit."

Facts:

"The Kansas City Fire Department ('KCFD') is a department within Defendant The City of Kansas City, Missouri. Relevant to this matter, a KCFD employee wishing to be promoted to captain must take the

Captain's Test, which occurs during the fall in even-numbered years. In 2012, the Captain's Test consisted of (1) a written examination; (2) a fire ground component known as the Oral Tactical Exercise; (3) a company officer situational component known as the Situational Exercise; and (4) points for seniority. Each component accounted for twenty-five percent of a candidate's composite score. According to the record, 126 KCFD employees took the written examination for the 2012 Captain's Test. Doc. #36-6, at 10-12.[5] Ninety-five KCFD employees who took the written examination also participated in the oral examinations (i.e., Oral Tactical Exercise and Situational Exercise) for the 2012 Captain's Test. [Footnote 4: Of those who took the written examination, ninety-eight identify as Caucasian, twenty-two identify as African-American, four identify as Hispanic, one identifies as Asian, and one employee's race is not identified by the parties.]

***

During the oral examinations, the employees responded to the same scenarios, which were presented via video and written materials. The oral examinations were evaluated by in-house personnel who held the rank of captain or above (hereinafter, 'assessors'). The assessors utilized benchmarks as guidelines, but each assessor used his or her own judgment, which Defendant admits was subjective. [Footnote 6: Of those who took the oral examinations, seventy-one identify as Caucasian, nineteen identify as African-American, four identify as Hispanic, and one employee's race is not identified by the parties.]

***

The oral examinations were graded in October 2012, and the candidates received their scores in November 2012. Regarding the oral examinations, Caucasian candidates received a mean score of 13.05 on the Situational Exercise and a mean score of 17.98 on the Oral Tactical Exercise, and African-American candidates received a mean score of 13.21 on the Situational Exercise and a mean score of 18.23 on the Oral Tactical Exercise. Candidates could request a review of their scores if they believed their scores were inaccurate. The 'second review' process occurred in November and December 2012.

***

The first promotion was made on January 13, 2013, to the top scoring applicant, an African-American employee whose composite score was 86.5537…. From the 2012 Captain's Test promotional list, which was valid for two years, Defendant promoted sixteen employees — twelve identify as Caucasian, three identify as African-American, and one identifies as Hispanic. The last promotion was made on December 14, 2014. After that date, promotions were awarded from the promotional list generated from the 2014 Captain's Test.

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Plaintiff Travis Yeargans, who identifies as African-American, became employed with the KCFD as a firefighter in March 1991. In 1996, he was promoted to the position of Fire Apparatus Operator ('FAO'), a driving position. Between 1998 and 2012, Plaintiff unsuccessfully attempted to be promoted to captain on five occasions. Regarding the 2012 Captain's Test, Plaintiff received a composite score of 68.5778….He was listed thirty-second on the promotional list, meaning thirty-one candidates received higher composite scores than he did. *Id.*

***

Effective April 1, 2014, Plaintiff's employment concluded. Plaintiff alleges he was constructively discharged when the KCFD failed to promote him through the 2012 Captain's Test promotional process. When he left his employment, Plaintiff felt the opportunity for promotion was gone, and he believed he had no other alternative but to leave. Defendant contends, and its records reflect, Plaintiff retired….. It is undisputed that Plaintiff did not discuss his reasons for leaving with Defendant and he did not complain to Defendant that he was the victim of discrimination….. In May 2018, Plaintiff filed this lawsuit, alleging a failure to promote claim and a constructive discharge claim under 42 U.S.C. § 1983."

Holding:

"Nevertheless, there is nothing in the record demonstrating (1) Defendant deliberately allowed or made Plaintiff's working conditions so intolerable, (2) Plaintiff's working conditions were so intolerable he had no other reasonable choice but to resign, and (3) Plaintiff gave Defendant a reasonable chance to resolve the

intolerable working conditions. Plaintiff does not address whether he had alternatives to resigning. He could have requested a second review of his oral examination scores or complained about his scores, but Plaintiff admitted he never complained. *Jones*, 285 F.3d at 716 (noting the plaintiff had alternatives to resignation including lodging a formal complaint against her supervisor). While Plaintiff claims he gave Defendant 'years to correct the problem of his non-promotion,' he does not show that he reported this 'problem' to Defendant. Plaintiff claims members of management were aware of assessors bartering to promote Caucasian applicants over African-American applicants, but he cites nothing indicating this occurred in 2012…. When considering the foregoing, Plaintiff has not demonstrated he was constructively discharged. ***

For the foregoing reasons, the Court (1) grants in part and denies in part Defendant's Motion to Strike Plaintiff's Declaration and strikes Paragraphs 15, 17, 19, 21, 23, 24, 43, and 47, a portion of Paragraph 18, and Exhibit 1 to the declaration; (2) grants Defendant's Motion for Summary Judgment; and (3) finds as moot the parties' motions to strike experts."

Legal Lessons Learned: The promotion process used by Kansas City was well constructed and well documented. If a firefighter believes that a promotion process was improperly conducted, or racially discriminatory, promptly file an internal complaint so the matter can be investigated, or file an EEOC charge:

"Time Limits For Filing A Charge: The anti-discrimination laws give you a limited amount of time to file a charge of discrimination. In general, you need to file a charge within 180 calendar days from the day the discrimination took place. The 180 calendar day filing deadline is extended to 300 calendar days if a state or local agency enforces a law that prohibits employment discrimination on the same basis.

File: Chap. 11 – FLSA

GA: FF WORKING 40-HOURS, BUT CLASSIFIED "PART-TIME" - CLASS ACTION LAWSUIT ON BEHALF OF 86 FF PROCEED

On Sept. 16, 2019, in City of Roswell v. David Bible and Brian Rogers, the Court of Appeals of Georgia, held (3 to 0) that trial judge properly held that the class action lawsuit on behalf of about 86 firefighters may proceed.

Presiding Judge Christopher J. McMillan wrote:

"The City alleges that because Bible and Rogers acquiesced in their non-benefitted status and worked over 2,080 hours per year, they are not typical of other class members who did not waive their entitlement to any benefits or those who worked less than 2,080 hours per year. However, it is clear that Appellees' breach of contract claims, arising from the City's denial of full-time employment benefits, are virtually identical to the claims of each proposed class member. *** The City argued that in order to be considered a full-time employee, the employee should have worked 2,080 hours each year (a number that would require the employee to work 40hours per week for each of the 52 weeks per year). However, even under the City's proposed definition, the Appellees maintained that the class would include 86 members."

Facts:

"The record shows that the City has a population of nearly100,000 and employed over 100 firefighters each year during the class period. [Footnote 1: The class period spans August 29, 2011 through August 29, 2017.]

In 2000, the City converted from a system of employing mostly full-time firefighters–with some reliance on volunteer firefighters–to a system of employing a significant number of 'part-time' firefighters who are not entitled to the same benefits as full-time City employees.... Bible worked at the Roswell Fire Department (the 'Department') in various capacities, including as a firefighter, fire lieutenant, fire captain, and emergency medical technician, from1992 until his retirement in March 2017. Rogers worked at the Department from2007 to 2018 as a firefighter, a fire captain, and a paramedic. [Footnote 3: Rogers was terminated shortly after he provided deposition testimony in this case. Two weeks later, class plaintiffs Willey McCluskey and Ronnie Harper withdrew from the case.]

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Footnote 2: Appellees allege the City converted to this system in order to cut approximately $8 million from its budget.

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Footnote 5: The benefits enjoyed by full-time employees include retirement benefits, holiday pay, paid time off, and paid sick leave.

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Appellees allege that for each year during the class period, they worked forty hours or more per standard work week 'virtually every week."' And they both testified at their depositions that they believed throughout their employment with the City that they were considered part-time employees and were therefore not eligible for most of the benefits available to full-time employees. In 2016, Rogers asked the City's benefits manager about participating in the City's retirement plan, and she told Rogers that he should do some research about how part-time employees are treated in other jurisdictions. Approximately one year later, Appellees filed their complaint against the City, asserting claims for breach of contract, breach of duty of good faith and fair dealing, quantum meruit, declaratory judgment, and attorney fees.
***

The trial court ultimately concluded that the Appellees had satisfied each of the class certification requirements under OCGA §9-11-23(a) and that class issues predominate over the issues of any individual class members. This appeal followed."

Holding:

"Here, the trial court found that there is a single contract that applies only to City employees and that within that single document the plaintiffs are challenging only those provisions regarding benefits to full-time employees. Thus, where each of the class members' claims arise out of identical terms in the Policy Manual and each of their claims are brought under the same causes of action, the issue of the City's contractual liability will be determined on a class-wide basis. And we have previously held that similar claims arising from the breach of a single contract present a classic case for treatment as a class action. See, e.g., Unum Life Ins. Co. of America v. Crutchfield, 256Ga. App. 582, 583(568SE2d767) (2002)…."

Legal Lessons Learned: Class actions are an effective method of resolving a matter affecting numerous class members. This case will now proceed to trial, unless settled by the parties. In Ohio, see Ohio Revised Code statute ["1500 Hour Rule"] that applies to Township firefighters:

(G) As used in this section and section 505.601 of the Revised Code:
(1) "Part-time township employee" means a township employee who is hired with the expectation that the employee will work not more than one thousand five hundred hours in any year.