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Nov. 2019 – FIRE & EMS LAW Newsletter

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WATCH VIDEOS: Subject Matter Experts in new UC course - TERRORISM FOR EMERGENCY RESPONDERS

We want to publicly thank three members of IAFC's Terrorism & Homeland Security Committee for recording great videos on YouTube for the course (open link to course Syllabus, go to Homework Assignments):

- Kevin McGee, Fire Chief (ret) Prince William County, VA – (Oct. 23, 2019 Video): **Response to 9/11 Plane Into The Pentagon**;
- John Donnelly, Assistant Fire Chief, DC Fire and EMS – (Oct. 26, 2019 Video): **Response to D.C. Navy Yard Active Shooter**;
- Steve Heitman, Fire Chief, Mercer Island, WA Fire Department – (Oct. 30, 2019 Video): **Developing Coordinated Police & Fire Terrorist Response Plan**.

Link to Newly Offered Terrorism Course, FST3021: Terrorism for Emergency Responders

ITEMS IN NEWSLETTER

File: Chap. 1 – American Legal System

IN: DRONE – WOMAN FINDS DRONE IN HER YARD – ONBOARD VIDEO SHOWS NEIGHBOR CARRYING DRUGS

On Oct. 24, 2019, in Galen Byers v. State of Indiana, Court of Appeals of Indiana held (3 to 0) that the search warrant was obtained timely, and the trial court properly denied the defendant's motion to suppress. Criminal case for dealing methamphetamine will now be tried, unless the defendant enters a guilty plea.

> "Moreover, while we look at the date of the video footage to determine whether probable cause existed, some lapse can also be accounted for here because [Marcie] Vormohr was in possession of the drone for likely at least one of those days. And, although we acknowledge that the woman in the video handled the alleged substances, the video also shows another individual—a man who Vormohr testified was Byers—handling the drone moments later in the same and subsequent video recordings. Based on the facts and circumstances before us, we cannot say that a four-day period between the activity and the finding of probable cause renders the warrant constitutionally stale."

Facts:

> "Marcie Vormohr was Byers' neighbor in Portland, Indiana. In May 2018, Vormohr was mowing her yard when she noticed something in her yard; after an inspection, Vormohr realized it was a drone. [Footnote 1.] Vormohr noticed that the drone also had a computer drive attached. Vormohr purchased a reader for the device and plugged the device into her home computer to determine the owner of the drone.
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> > Footnote 1: Vormohr testified that she does not recall exactly when she found the drone; however, it would appear to have been sometime between May 10, 2018, when the last of the video footage was filmed on the drone, and May 14, 2018, when police obtained the search warrant after reviewing the drone's video footage.
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> Vormohr found video footage on the drive, that depicted a woman 'tak[ing] out a white, baggie, a small baggie with white powder substance in it, [and a] cut off straw, and [Vormohr] found that to probably be drugs.' Tr. Vol. II p. 8. Vormohr also identified Byers on the video, whom she recognized as her neighbor. After observing the video footage, Vormohr turned the device and the drone over to law enforcement due to the video's contents and because she previously had an issue with drones being flown over her property. [Footnote 2.] Vormohr testified that she could not remember the exact date she turned the materials over to law enforcement; however, she believed that it "may have been one or two days" after she discovered the drone.
>
> > Footnote 2: Vormohr was uncertain if it was Byers' drone or another drone she had issues with previously. Vormohr and Byers previously had a discussion about Vormohr's issues with drones being flown over her property; however, Byers indicated it was not his drone flying over Vormohr's property.
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> Officer Cody Jessee with the Jay County Sheriff's Department testified that he received the drone and, on May 14, 2018, reviewed the video footage. Officer Jessee observed that the video's last modified date was May 10, 2018, at 9:32 a.m. Based on Officer Jessee's review of the video footage, Officer Jessee believed the woman on the video was in possession of illegal substances. Officer Jessee also observed Byers flying

the drone on the video. After reviewing the video footage, Officer Jessee obtained a search warrant for Byers' home.

A search of Byers' home on May 14, 2018, revealed several drug paraphernalia items, including "snorting devices containing a powder like substance in them"; "several empty baggies containing a paw print sticker"; [Footnote 3] an unlocked safe with "a scattered crystal like substance as well as a cut straw containing a crystal like substance." Appellant's App. Vol. II p. 13. In a locked safe, which officers opened, they discovered "a Glock 30 gen 4, .45 Cal[iber handgun]. . . . [and] our empty plastic baggies baring [sic] the paw print sticker;" "green plastic baggie with a crystal like substance," which weighed .8 grams in its packaging and tested positive for methamphetamine when field tested. Id. at 13 -14. Officers also found $160.00 in twenty-dollar bills in the safe and an "ink stamp and pad and stamp of a paw print" in Byers' bedroom. Id. at 14.

> Footnote 3: Officers believed the paw print stickers were being placed on the baggies "as a possible brand name." Appellant's App. Vol. II p. 13.

In the living room, officers uncovered 'several burnt foils which are used in the consumption of methamphetamine'; a 'digital scale under the couch and a glass bowl,' which contained a 'crushed crystal like substance and a cut red straw' that tested positive for methamphetamine when field tested. Id. Officers also found with 'several feminine items,' three cut straws, and three plastic baggies 'containing a residue.' Id. A search of the bathroom yielded $3,684.00 of cash inside a makeup bag; a box containing baggies with a crystal like substance; and more cut straws. The three baggies weighed approximately 2.4 grams in their packaging and tested positive for methamphetamine when field tested. Officers believed these items to belong to Jennifer Cook—a woman who was at Byers' home when officers arrived. Finally, officers found more burnt foils, burnt marijuana 'roaches,' snorting devices, another digital scale; [Footnote 4] and another 2.4 grams of methamphetamine 'in its original packaging"\'; and another weapon loaded with a magazine and additional magazines upstairs. Id. Finally, Byers had $2,003.00 on his person.

> Footnote 4: These items are also believed to belong to Cook.

On June 13, 2018, the State charged Byers with Count I, dealing in methamphetamine, a Level 2 felony; Count II, possession of methamphetamine, a Level 4 felony; Count III, maintaining a common nuisance, a Level 6 felony; and Count IV, possession of marijuana, a Class B misdemeanor.

***

The amended motion to suppress sought to suppress 'any evidence found as a result of law enforcement activity leading to and including a search of a drone' under the Fourth Amendment to the United States Constitution and Article 1, Section 11 of the Indiana Constitution…. Byers argued that the search was improper under both constitutions because of the manner in which the drone came into possession of law enforcement and because the probable cause was stale.

***

The trial court held a hearing on Byers' motion to suppress on November 29, 2018. The trial court entered an order on December 18, 2018, and denied Byers' amended motion to suppress, 'declin[ing] to find that the four … intervening days necessarily make … the evidence stale or that the search was unreasonable under these circumstances.' Appellant's App. Vol. II p. 87."

Holding:

> "The Fourth Amendment to the United States Constitution and article 1, section 11 of the Indiana Constitution both require probable cause for the issuance of a search warrant.6Mehring v. State, 884 N.E.2d 371, 376 (Ind. Ct. App. 2008) (citations omitted). 'Probable cause is "a fluid concept incapable of precise definition and is to be decided based on the facts of each case.'" Mehring, 884 N.E.2d at 376 (quoting Figert v. State, 686 N.E.2d 827, 830 (Ind. 1997)).
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> Moreover, while we look at the date of the video footage to determine whether probable cause existed, some lapse can also be accounted for here because Vormohr was in possession of the drone for likely at least one of those days. And, although we acknowledge that the woman in the video handled the alleged substances, the video also shows another individual—a man who Vormohr testified was Byers—handling the drone moments later in the same and subsequent video recordings. Based on the facts and circumstances before us, we cannot say that a four-day period between the activity and the finding of probable cause renders the warrant constitutionally stale.
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> ***
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> The trial court did not err in denying Byers' motion to suppress due to staleness under the Fourth Amendment. We affirm.

Legal Lessons Learned: If you are a drug dealer, be cautious of drones with video cameras.

File: Chap. 1, American Legal System

PA: HOUSE FIRE - ARSON SUSPECTED, OWNER BEHIND MORTGAGE – INSUR. CO. PROPERLY DELAYED PAYMENT

On Oct. 21, 2019, in Darlene Merrone v. for Allstate Vehicle And Property Insurance Company, U.S. District Court Judge Kim R. Gibson, U.S. District Court for Western District of Pennsylvania, granted summary judgment for Allstate.

> "Because payment of the insurance proceeds negates any breach of contract action, Allstate has paid the policy limits on both the structure and ALE claims, and Plaintiff has not presented any evidence that Allstate has failed to compensate her for lost personal property, Plaintiff's claim must fail. Plaintiff argues that Allstate breached the insurance contract by failing to pay her claim once it was clear that Allstate could not prove arson. (ECF No. 28 at 9.) Allstate responds that it had a reasonable basis to investigate and delay payment. For the reasons discussed in depth above, Plaintiff has not shown that Allstate did not have a reasonable basis to investigate and delay payment, so this delay cannot form the basis of a breach of contract."

Facts:

> "On September of 2012, Plaintiff purchased and moved into a home (the "House") located at 334 Village Run Road, Boswell, Pennsylvania….Plaintiff lived in the House with her daughter, Johanna Graham, and Johanna's three children…. On July 20, 2017, a fire completely destroyed the House…. While fighting the fire, the fire department used an excavation company to assist, which destroyed and leveled the house as well

as all the appliances, making it difficult to determine the cause of the fire…. There were initial reports that local fire officials had declared the cause of the fire to be a 'gas line explosion,' but neither the fire department nor the police released a cause of the fire immediately after it occurred….

At the time of the fire, Plaintiff was a year behind on the House's mortgage and intended to sell the property; she also owed approximately $7,500 for installing new windows on the House…. Johanna was a recovering heroin addict, did not work, was receiving state assistance, and was on probation for retail theft and use of Plaintiff's credit cards without permission…. At the time of the fire, Plaintiff was in North Carolina, and Johanna reported that she was at a friend's house….

***

Following the fire, Allstate assigned three adjusters to Plaintiff's claim: Jason Gant to handle the structure, Arny Corona the personal property lost, and Yvette Sienkiewicz the ALE claim…. On July 24, 2017, Corona spoke to Plaintiff, who mentioned that she had spoken with the fire marshal regarding the fire…. In Allstate's file on the claim, Corona recorded that the fire marshal may have told Plaintiff that he believed Johanna had started the fire, and asked that Johanna take a polygraph test…. Around the same time, Sienkiewicz contacted Plaintiff's bank to confirm that she was a year behind on her mortgage….

***

On August 4, 2017, Gant spoke to Bob Rice, the [Fire Marshal's] cause and origin investigator, who told Gant that he was trying to hire a company to excavate the scene of the fire…. Allstate then issued a reservation of rights regarding intentional acts of Plaintiff on August 14, 2017, in which Allstate asserted that their delay in payment was based upon a report of potential arson, information that the fire marshal and police were investigating Johanna for possible arson, and Plaintiff's financial motive.

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After Allstate received an arson immunity letter [Footnote 6] from the fire marshal, it referred Plaintiff's claim to Richard DiBella, an attorney, to obtain examinations under oath ("EUO") of Plaintiff and Johanna….

> Footnote 6: The parties do not define an arson immunity letter, but the Court believes it refers to letters issued under 40 Pa. Stat.§ 1610.1 et seq. which permits insurers to investigate arson without being subject to liability from civil actions arising from information that may be released as part of such an investigation.

Initially scheduled for October 12, 2017, the EUOs were postponed when, during a break in Plaintiff's EUO, Plaintiff learned that the police were searching her car and questioning Johanna about possible drugs found with her in the vehicle…. Plaintiff and Johanna eventually had their EUOs on October 24, 2017.

In addition to having Plaintiff and Johanna undergo the EUOs, [Insurance Investigator Holly] Kelly also did the following during her investigation: (1) spoke to several of Plaintiff's neighbors, one of whom saw cars and people at the House the evening before the fire and heard fighting and yelling; (2) followed up with the same neighbor, who was reluctant to provide information, potentially due to Johanna's boyfriend's reputation as a troublemaker; (3) reviewed the social media profiles of Plaintiff and Johanna, as well as Johanna's criminal record; (4) obtained Plaintiff's bankruptcy petition; (5) requested records from the propane company and a real estate firm that Plaintiff sought to use to sell the House; (6) performed a credit check; and (7) spoke with Plaintiff's realtor, who stated that the House was in poor condition….

Kelly spoke with the fire marshal, Trooper Richards on November 16, 2017 about their investigation into the fire, and Trooper Richards stated that he intended to pursue a polygraph test for both Plaintiff and Johanna…. On January 8, 2018, Trooper Richards informed Kelly that the police had scheduled a date for Johanna's polygraph, but that she was not responding to calls, and also that he had spoken with a detective on a drug task force who stated that a confidential informant heard Johanna admit to setting the fire…. Allstate contacted the putative informant and interviewed him, but he denied any knowledge, though the investigator believed he may have had more information to share.

Following the interview with the informant, Allstate determined that it would pay the claim and issued payments on the structure in February of 2018, an advance on the personal property in December of 2017, the remainder of the personal property in February and July of 2018, and the remainder of the ALE claims in March of 2018….

The cause of the fire remains 'undetermined.'

***

Plaintiff filed the Complaint, which alleged two Counts, one for breach of contract, the second for insurance bad faith in violation of 40 P.S. § 1171.5 … in the Somerset County Court of Common Pleas on August 31, 2018…. Allstate timely removed the Complaint to this Court on September 21, 2018…."

Holding:

"In order to recover in her bad faith claim, Plaintiff must demonstrate the following elements: (1) that Allstate lacked a 'reasonable basis for denying benefits under the policy;' and (2) that the insurer 'knew of or recklessly disregarded' the fact that it did not have a reasonable basis to deny the claim. Rancosky v. Wash. Nat'[Ins. Co., 170 A.3d 364, 365 (Pa. 2017). If Plaintiff fails to show either of these elements, her claim must fail as a matter of law.

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Under Pennsylvania law, insurers are permitted to 'conduct a thorough investigation' of a questionable claim without acting in bad faith. Nw. Mut. Life Ins. Co. v. Babayan, 430 F.3d 121, 138 (3d Cir. 2005). Where an insurer sees 'red flags' that cause concern of insurance fraud and prompt an investigation, the insurer has a reasonable basis for investigation, and is therefore not liable for claims of bad faith. See Aquila v. Nationwide Mut. Ins. Co., No. 07-cv-2696, 2008 WL 5348137, at *8 (E.D. Pa. Dec 15, 2008).

***

The Court agrees with Allstate that it had a reasonable basis to investigate the fire, and will grant Allstate summary judgment…. The fire marshal was investigating the fire and had asked Johanna to submit to a polygraph test, and Plaintiff had a financial motive to start a fire in her house. It is a reasonable inference from these circumstances that arson may have been the cause of the fire. It is not a requirement that arson actually be the cause of the fire, just that it be reasonable that arson may have been the cause."

Legal Lessons Learned: "Red flags" were certainly flying in this case.

File: Chap. 2, Line Of Duty Death; Safety

WA: UNION PROPOSAL INCREASE IN MINUMUM STAFFING – MANDATORY SUBJECT FOR COLLECTIVE BARGAINING

On Oct. 28, 2019, in City of Everett v. State of Washington Public Employment Relations Commission, the State of Washington Court of Appeals, held (3 to 0) that shift staffing has a direct relationship to workload and safety, and therefore is a mandatory subject of collective bargaining (union wants to increase from 28 to 35 per shift).

> "We conclude PERC did not err in balancing the strong fundamental prerogative of the City on shift staffing and the unrebutted workload and safety testimony, and substantial evidence supports PERC finding the Union demonstrated a direct relationship between the Union proposal to increase the minimum number of crew on each shift and the workload and safety of the firefighters and paramedics. We affirm the PERC decision."

Facts:

> "The Everett Fire Department operates six stations and responds to residential and commercial building fires, fires at the Navy shipyard, medical emergencies, and emergencies on Interstate 5.The International Association of Fire Fighters Local 46 (Union) represents firefighters, paramedics, captains, and battalion and assistant chiefs,
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> ***
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> In 2008, the City imposed a zero-growth budget for the fire department.
>
> In 2010, the City reduced the minimum crew on duty for each shift from 33 to 28. However, the City 'neither reduced the number of personnel assigned to an apparatus nor changed the number and type of apparatuses required to respond to calls.' For a medical emergency, 'a minimum of seven people on an engine, a paramedic unit, and, possibly, an aid unit' are required to respond. If no aid unit is available, 'a second engine responds.' For a residential fire, 'a minimum of 17 personnel respond." For a commercial fire, 'a minimum of 21 personnel respond.'
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> In 2014, the City and the Union engaged in negotiations for a successor collective bargaining agreement. In response to the significant increase in workload and safety concerns, the Union proposed an amendment to Article 27 to increase the minimum crew on duty [from 25] for each shift to 35.
>
> The City objected to the Union proposal to increase the minimum crew on duty for each shift to 35. In a memorandum dated March 16, 2015, the City cited International Ass'n of Fire Fighters, Local Union 1052 v. Public Employment Relations Commission,113 Wn.2d 197, 778 P.2d 32 (1989), to assert the Union proposal was a 'permissive—not mandatory' subject of collective bargaining. The Union disagreed and insisted on bargaining the proposed amendment to impasse.
>
> The Washington State Public Employment Relations Commission (PERC) executive director certified the issue for resolution by mediation and, if necessary, interest arbitration.
>
> ***

> The City filed an unfair labor practice complaint with PERC. The City alleged the Union violated the PECBA 'by insisting to impasse on a permissive subject, namely, shift staffing.' The City alleged the Union proposal for 'shift staffing, or minimum crew level, of thirty-five (35) firefighters on duty at all times,' is a nonmandatory subject of bargaining under Washington case law. The City requested PERC issue a cease and desist order and award attorney fees.
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> ***
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> A [PERC] hearing examiner conducted a four-day evidentiary hearing on the unfair labor practice complaint [and found for the City]. Several witnesses testified, including Everett Fire Department Chief Murray Gordon, Everett Fire Department Administrative Coordinator Bonnie Netherby, division and battalion chiefs, Oregon Health and Science University Sports Medicine Chief and Human Performance Laboratory Director Dr. Kerry Kuehl, and occupational and environmental medicine expert Dr. Carl Brodkin. The hearing examiner admitted more than 100 exhibits into evidence.
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> The Union appealed the decision of the hearing examiner to PERC…. PERC reversed the decision of the hearing examiner.
>
> ***
> The City filed a petition for judicial review. The superior court certified the petition for direct review. We accepted review under RCW 34.05.518(2)."

Holding:

> "We hold the Washington State Supreme Court decision in International Ass'n of Fire Fighters, Local Union 1052 does not support the City's argument that without regard to workload and safety, as a matter of law shift staffing is never a mandatory subject of collective bargaining. Because the Union proposal to amend Article 27, Health and Safety, to increase the minimum number of firefighters and paramedics on duty for each shift both relates to 'conditions of employment and is a managerial prerogative,' PERC did not err in balancing the City and Union interests to determine 'which of these characteristics predominates.' Int'l Ass'n of Fire Fighters, Local Union 1052,113 Wn.2d at 203."

Legal Lessons Learned: Fire & EMS officials need to consult with legal counsel in their State concerning whether minimum staffing is a subject mandatory bargaining.

File: Chap. 3 – Homeland Security, Active Shooter, and Cybersecurity

CA: NO FLY LIST – FOUR U.S. CITIZENS ON THE LIST - TSA's ANTI-TERRORIST PROGRAM PROVIDES DUE PROCESS RIGHTS

On Oct. 21, 2019, in Faisal Nabin Kashem; Raymond Earl Knaeble IV; Amir Meshal; Stephen Durga Persuad v. William Barr, Attorney General, the U.S. Court of Appeals for the 9th Circuit (San Francisco), upheld (3 to 0) the No Fly List.

"The plaintiffs are on the No Fly List, which prohibits them from boarding commercial aircraft flying to, from or within the United States or through United States airspace. They challenge, under the Due Process Clause of the Fifth Amendment to the United States Constitution, both their inclusion on the No Fly List and the sufficiency of the procedures available for contesting their inclusion on the list. Specifically, the plaintiffs argue (1) the criteria for inclusion on the No Fly List are unconstitutionally vague; (2) the procedures for challenging inclusion on the list fail to satisfy procedural due process; and (3) their inclusion on the list violates their substantive due process rights. The district court granted summary judgment to the government on the vagueness and procedural due process claims and dismissed the substantive due process claims for lack of jurisdiction under 49 U.S.C. § 46110. We affirm."

Facts:

"The plaintiffs are on the No Fly List, which prohibits them from boarding commercial aircraft flying to, from or within the United States or through United States airspace.

***

The No Fly List is a register of individuals who are barred from boarding commercial aircraft flying to, from, within or over the United States. It contains a subset of the individuals appearing on the government's more extensive terrorist watchlist, formally known as the Terrorist Screening Database (TSDB).The TSDB is maintained by the Terrorist Screening Center (TSC), which is administered by the Federal Bureau of Investigation (FBI). An individual is placed on the TSDB when there is 'reasonable suspicion' that he or she is a known or suspected terrorist – i.e., when there is 'articulable intelligence or information which, taken together with rational inferences from those facts, reasonably warrant[s] the determination that an individual is known or suspected to be, or has been engaged in conduct constituting, in preparation for, in aid of or related to, terrorism and terrorist activities.'

***

As to the remaining four plaintiffs, all of whom are United States citizens, the government reevaluated their statuses under the revised DHS TRIP procedures…. At the conclusion of this review, each received a notification letter informing him of his continued inclusion on the No Fly List, identifying the criterion on which the government relied, providing a statement – sometimes incomplete – of the reasons for his inclusion on the list, and providing an unclassified summary of the evidence upon which the government relied in making its determination…. The unclassified summaries are paraphrased below. We again emphasize that these summaries are based on the government's allegations as to the plaintiffs' conduct. Whether the allegations are true has not been decided in this litigation, and, given their sensitive nature, nothing we say in this opinion should suggest otherwise.

***

One plaintiff was included on the No Fly List based in part on statements he allegedly made about his support of violent terrorism and his willingness to fight in Iraq against the United States. According to the government, this plaintiff was interviewed in July 2010 by FBI agents, with counsel present. During that interview, the plaintiff allegedly acknowledged purchasing and distributing lectures by Anwar Al-Aulaqi, emailing Al-Aulaqi on one occasion and authoring posts on Al-Aulaqi's website advocating the bombing of Jewish settlements. Al-Aulaqi, an American Muslim cleric and specially designated global terrorist, was killed in a U.S. drone strike in 2011.

***

A second plaintiff was included on the No Fly List based on statements he allegedly made to FBI agents after his arrest by the Kenyan military in 2007. According to the government, this plaintiff admitted engaging in militant activities in Somalia. The government alleged the plaintiff admitted receiving weapons training at a camp in Somalia; fighting in Somalia with a group of armed militants that probably included members of al-Qaeda; and being hosted in Somalia by individuals associated with the Council of Islamic Courts, the military wing of which – al-Shabaab – is a designated foreign terrorist organization (FTO).

A third plaintiff was included on the No Fly List based in part on his alleged travel to Somalia to train for and engage in jihad. According to the government, this plaintiff was interviewed by the FBI on 12 occasions. The plaintiff allegedly acknowledged traveling to Somalia and joining and receiving weapons training from the Islamic Courts Union, which is associated with al-Shabaab.

In contrast to the relatively detailed letters provided to the other plaintiffs, a fourth plaintiff's notification letter provided only the following unclassified statement of reasons for his inclusion on the No Fly List: "The Government has concerns about the nature and purpose of [plaintiff's] travel to Yemen in 2010." The government expanded on the reasons for this plaintiff's inclusion on the No Fly List in classified information filed ex parte and in camera in district court."

Holding:

"Upon review of the government's public and classified filings, we are satisfied that the No Fly List criteria are governed by constitutionally sufficient standards, at least as applied to these plaintiffs. Rules governing the No Fly List require a nominating agency to provide a summary of the underlying substantive information demonstrating that a nominee meets the criteria for inclusion on the list. This information is then assessed according to the interagency Watchlisting Guidance to determine whether there is reasonable suspicion that the individual represents a threat of committing a terrorist act. The nominator must rely on articulable intelligence to meet the reasonable suspicion standard; mere guesses or 'hunches' are insufficient.

***

Under the revised DHS TRIP procedures, individuals have a right to: (1) an administrative challenge to their inclusion on the No Fly List; (2) a letter identifying the criterion or criteria used to place them on the list; (3) an unclassified summary of the information supporting their inclusion on the list that identifies at least some of the reasons for their placement on the list, subject to national security concerns; (4) submit exculpatory information to the government for reconsideration of their placement on the list; (5) review by the TSA Administrator; and (6) judicial review of the TSA's decision based on the administrative record before the TSA Administrator.

***

Given the national security concerns at issue, and with the exceptions noted, the government has taken reasonable measures to ensure basic fairness to the plaintiffs and followed procedures reasonably designed to protect against erroneous deprivation of the plaintiffs' liberty."

Legal Lessons Learned: The TSA program provides written notice to individuals why they are on the No Fly list, and an administrative and judicial appeal process.

NY: RE-KINDLE WAREHOUSE FIRE – FD HAD TURNED OFF SPRINKLER SYSTEM – NO GOVERNMENTAL IMMUNITY

On Oct. 23, 2019, in Zurick American Insurance Company v. City of New York, the Supreme Court of New York, Appellate Division / Second Judicial Department held (5 to 0) that the insurance company for the warehouse may proceed with the lawsuit against the City of New York.

> "Here, the plaintiffs' allegations that FDNY personnel, upon arriving at the scene and assuming control over the ongoing fire, shut off the main water supply valve to the warehouse's sprinkler systems, then certified to warehouse employees that it was safe to reenter the building when in fact the fire was still at risk of rekindling—which it did within minutes after FDNY personnel left the premises—are sufficient to establish a special relationship (see Trimble v City of Albany, 144 AD3d 1484; S.C. Freidfertig Bldrs. v Spano Plumbing & Heating, Inc., 173 AD2d 454). Therefore, we agree with the Supreme Court's determination denying the defendant's motion to dismiss the complaint."

Facts:

> "On January 31, 2015, at approximately 4:36 a.m., the New York City Fire Department (hereinafter the FDNY) responded to a fire alarm at a warehouse operated by the plaintiff Recall Corporation. When they arrived, FDNY personnel observed a fire on storage shelves approximately 50 feet into the building. Upon concluding that the fire was being controlled by the building's sprinkler system, FDNY personnel wet down the debris, then turned off the main water valve that controlled the flow of water to the entire sprinkler system, rendering it inoperable. After certifying to warehouse personnel that the building was safe to re-enter, FDNY personnel left the premises. Within minutes, a warehouse employee observed an orange glow toward the center of the warehouse, and a second fire alarm was activated at 6:32 a.m. However, because the sprinkler system had been disabled by FDNY personnel, the fire spread quickly and destroyed the entire building and its contents.
>
> ***
> In January 2016, Zurich American Insurance Company (hereinafter Zurich), as subrogee of its insureds, Recall Corporation and the plaintiffs Recall Holdings Ltd., Recall Total Information Management, and Citipostal, Inc. (hereinafter collectively the Recall plaintiffs), commenced an action against the defendant, the City of New York, seeking to recover the amounts it paid to the Recall plaintiffs under the terms of a certain insurance policy covering the warehouse. The Recall plaintiffs commenced a separate action against the defendant to recover for damage to property. The two actions were subsequently consolidated.
>
> The defendant moved pursuant to CPLR 3211(a)(7) to dismiss the complaint in the consolidated action on the ground that the plaintiffs had not pleaded the existence of a special relationship giving rise to a duty of care under the public duty rule (see Valdez v City of New York, 18 NY3d 69, 75). The Supreme Court denied the motion, and the defendant appeals."

Holding:

> "A municipality may not be held liable for the negligent performance of a governmental function, such as police and fire protection, absent a duty born of a special relationship between the injured plaintiff and the defendant municipality (see Applewhite v Accuhealth, Inc., 21 NY3d 420, 426; Valdez v City of New York, 18 NY3d at 75; McLean v City of New York, 12 NY3d 194, 199). A special relationship may arise in three situations: (1) when the municipality violates a statutory duty enacted for the benefit of a particular class of person; (2) when it voluntarily assumes a duty that generates justifiable reliance by the person who benefits

from the duty; or (3) when it assumes positive direction and control in the face of a known, blatant, and dangerous safety violation (see McLean v City of New York, 12 NY3d at 199).

Here, the plaintiffs' allegations that FDNY personnel, upon arriving at the scene and assuming control over the ongoing fire, shut off the main water supply valve to the warehouse's sprinkler systems, then certified to warehouse employees that it was safe to reenter the building when in fact the fire was still at risk of rekindling—which it did within minutes after FDNY personnel left the premises—are sufficient to establish a special relationship (see Trimble v City of Albany, 144 AD3d 1484; S.C. Freidfertig Bldrs. v Spano Plumbing & Heating, Inc., 173 AD2d 454). Therefore, we agree with the Supreme Court's determination denying the defendant's motion to dismiss the complaint."

Legal Lessons Learned: Extreme care must be exercised when a sprinkler system is shut down, and the FD leaves the scene.

File: Chap. 5 – Emergency Vehicle Operations

TX: PD RESPONSE ROBBERY CALL – MVA – CONFLICTING REPORTS ON EMERENCY LIGHTS, LAWSUIT REINSTATED

On Oct. 29, 2019, in Marcia Gomez v. City of Houston, the Texas Fourteenth Court of Appeals held (en banc decision of all judges on court, vote of 6 to 3) held that the trial court improperly granted immunity to the City.

"Thus, the City's evidence of good faith assumes the truth of a disputed fact —that [Officer] Simmons was using his overhead emergency lights as he approached the Crosstimbers intersection. Simmons testified that he used overhead emergency lights continuously from the beginning of his response to the armed-robbery call, but the record contains other evidence that he did not do so. This evidence includes (1) [plaintiff] Gomez's affidavit testimony that Simmons was not using his vehicle's overhead emergency lights and (2) [Houston PD Accident Investigator Isaac] Jefferson's PD accident determination in his investigation report that Simmons was not using his vehicle's overhead emergency lights before the collision."

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The City did not conclusively establish Simmons's good faith, and a material fact issue exists as to whether Simmons acted recklessly.3Therefore, we reverse the trial court's judgment and remand the case to the trial court for further proceeding consistent with this opinion.

Facts:

"Appellant Maria Christina Gomez was driving eastbound on Crosstimbers Road on a cold and rainy Christmas Eve morning. As she approached the intersection at Lockwood, the traffic light facing her turned green and she proceeded into the intersection. A City police car slid into the intersection and collided with Gomez's vehicle. According to Gomez, Bobby Joe Simmons, the officer who was driving the police car, was not using the police car's emergency lights or siren when his car collided with hers. That morning Simmons was on patrol when he was dispatched to respond to a nearby armed robbery in progress. According to Simmons, an armed robbery is normally a Priority One call, but dispatch reduced this call to Priority Two due to the weather conditions. Simmons testified that as he responded to the robbery-in-progress call, he turned on his emergency lights but not his siren.

Simmons explained that the Houston Police Department's policy for Priority Two calls normally requires a silent approach. Simmons further explained that an officer retains the discretion to use the emergency lights and siren on a Priority Two call when the officer deems it necessary and notifies the dispatcher. Simmons decided that he did not need to exceed the posted speed limit of 35 miles per hour to arrive safely and quickly at the robbery scene.

As his patrol car approached the intersection, Simmons looked down to increase the volume of his police radio. When he looked up, he was startled to see that the Crosstimbers traffic light had turned yellow. He pressed his brakes, but he was unable to stop his police car on the wet street, and the car slid into the intersection, where it collided with Gomez's vehicle.

***

Houston police officer Isaac Jefferson investigated the collision and prepared the investigation report. Jefferson noted in his report, among other things, that Simmons was responding to a robbery call when the collision occurred. Jefferson also stated in his report that Simmons was driving south on Lockwood without his emergency lights or siren engaged when the signal light changed from green to yellow. Jefferson then stated that Simmons "applied his brakes but because the roads were wet he was unable to stop." Finally, Jefferson determined that Simmons disregarded a stop-and-go signal and so was at fault in the collision.

During his deposition, Simmons testified that he received a letter of reprimand as a result of the collision. The reprimand letter notified him that he was at fault in the collision. Simmons also testified that he did not contest the fault determination because he already had admitted fault in the collision."

Holding:

"In today's case, the fact issue bears on the decisions that Simmons made that are the subject of the good-faith analysis. Simmons and Jefferson each based his opinion on good faith in part on Simmons's use of his car's overhead emergency lights, thus indicating that each thought that this issue was material to the good-faith determination. If Simmons did not use his car's overhead emergency lights, that decision presumably would bear directly on the level of risk to drivers of cars travelling on Crosstimbers Road.

***

The evidence also demonstrates that Simmons chose to (1) look down and away from the road as he approached the intersection and (2) refrain from using his patrol car's siren. Further, there is a factual dispute regarding whether Simmons was using his car's overhead emergency lights as he approached the Crosstimbers intersection. Finally, the evidence shows that Simmons applied his brakes but, because the streets were wet, he was unable to stop his patrol car before the intersection, and his car slid into the path of Gomez's car. Taken together, this evidence could support a finding that Simmons acted recklessly during his response to the armed-robbery call."

Dissent (3 Judges):

"Regrettably, I part ways with the majority on the latter point and conclude that this record does not contain a scintilla of evidence that the responding officer took any challenged action with conscious indifference or reckless disregard for the safety of others."

Legal Lessons Learned: Emergency response when lights & siren not used, extreme care must be exercised to prove you drove with "due regard" for the safety of others. For example, Ohio Revised Code 4511.03,

Emergency Vehicles At Red Signal Or Stop Sign, provides: "(A) The driver of any emergency vehicle or public safety vehicle, when responding to an emergency call, upon approaching a red or stop signal or any stop sign shall slow down as necessary for safety to traffic, but may proceed cautiously past such red or stop sign or signal with due regard for the safety of all persons using the street or highway."

File: Chap. 6 – Employment Litigation

WA: FF BRAIN MELANOMA - WINS PERMANENT DISABILITY – PREV. DENIED TEMPORARY DISAB, MELANOMA ON BACK

On Oct. 17, 2019, in Michael Weaver v. City of Everett and State of Washington, Department of Labor & Industries, the Supreme Court of State of Washington, held (9 to 0) that the firefighter's melanoma was an occupational disease entitling his to permanent disability benefits, even though the State had previously denied him temporary disability.

> "We conclude that the substantial disparity of relief between Weaver's temporary and permanent disability claims kept Weaver from fully and vigorously litigating the issue at the temporary disability claim stage. Therefore, because applying the doctrine in this instance would work an injustice and contravene public policy, we hold that collateral estoppel does not apply."

Facts:

> "Michael Weaver worked as a firefighter paramedic for the City of Everett (City)from 1996 until 2014, when malignant metastatic melanoma halted his ability to work.
>
> ***
> Weaver was originally diagnosed with melanoma in 2011, when an irregular mole on his upper back was found to be cancerous. Weaver underwent surgery, which he thought "cured" his melanoma. Administrative Record (AR) at 47.
>
> ***
> Believing that his melanoma was work related. Weaver filed an application with the Department [of Labor & Industries] for temporary disability benefits for the five weeks of work that he missed during surgery and recovery. His claim consisted solely of lost wages worth approximately $10,000.
>
> The Department initially granted Weaver's claim, but the City protested the order and hired two doctors specializing in cancer treatment and dermatology to perform independent medical examinations of Weaver. The Department reversed its initial order, concluding that Weaver's 'condition is not an occupational disease.' AR at 278.
>
> Weaver retained counsel to appeal the Department's denial to the Industrial Insurance Appeals Board (Board).
>
> Weaver's counsel purportedly did not explain the appeal process to Weaver or prepare him for the hearing before an administrative law judge (ALJ) and arrived 90minutes late to the hearing. Weaver's sole expert witness was a family physician who had not treated, examined, or met Weaver. The physician opined in deposition to an affirmative causal correlation between firefighters' occupational chemical exposure and melanoma. Both doctors whom the City had hired to examine Weaver opined that Weaver's cancer was

likely due to sun exposure as a child rather than occupational exposure as a firefighter. Weaver's treating oncologist was not called to testify.

The ALJ concluded that the City had rebutted the statutory presumption of occupational disease and affirmed the Department's denial of Weaver's claim. The Board adopted the ALJ's order and denied Weaver's petition for review. Weaver's counsel withdrew from representation, and Weaver filed a pro se appeal in superior court. Months later, lacking professional assistance or knowledge of how to pursue the appeal. Weaver signed an agreed order of dismissal prepared by the City.

***

In January 2014, Weaver began having trouble recalling words. A brain scan revealed a tumor, which was confirmed to be metastatic melanoma. Weaver does not dispute that the brain tumor was a metastasis of the same melanoma at issue in his temporary disability claim. Weaver's treating oncologist estimated in 2015 that Weaver had a 20-30 percent chance of surviving two more years and opined that the metastatic melanoma would likely cause his death.

Unable to continue working, Weaver filed a permanent disability benefits claim. The total amount of pension benefits that Weaver sought was estimated at greater than$2 million: more than $5,000 per month, which his wife would continue to receive for the rest of her life to support their three minor children.

The Department rejected Weaver's claim, reasoning that the "'laim was filed for the same cancer that was denied previously.' AR at 270. Assisted by new counsel. Weaver appealed to the Board. The City moved for summary judgment, arguing that Weaver's claim was precluded by collateral estoppel and res judicata. At a hearing before an ALJ, Weaver's counsel introduced declarations from Weaver's treating oncologist and a physician specializing in occupational medicine among firefighters: both opined that Weaver's sun exposure as a firefighter was a cause of his melanoma. The ALJ affirmed denial of Weaver's claim and granted the City's motion for summary judgment, concluding that collateral estoppel applied as a matter of law.

***

Weaver appealed to the superior court, which affirmed the Board's order. Weaver then appealed to the Court of Appeals, which reversed, holding that neither collateral estoppel nor res judicata applied because preclusion would work an injustice and the subject matter of the two claims was not identical."

Holding:

"Reviewing the facts in the light most favorable to Weaver, we hold that as a matter of law, collateral estoppel does not apply to preclude the issue of whether Weaver's melanoma was an occupational disease for purposes of his permanent disability claim because application of the doctrine in this instance would work an injustice and contravene public policy. We further hold that as a matter of law, resjudicata does not apply to preclude his permanent disability claim because the two claims do not share the same subject matter. While collateral estoppel and resjudicata dictate that at common law, claimants are 'entitled to one bite of the apple,'Reninger, 134 Wn.2d at 454, applying either doctrine here would be an apples-to-oranges application of common law doctrines to statutory claims, which would result in a 'distasteful fruit salad of injustice.' Weaver, 4 Wn. App. 2d at 309. Accordingly, we affirm the Court of Appeals."

Legal Lessons Learned: Nice to see Court supporting a firefighter's cancer claim, to avoid an "injustice."

AL: CAPT. (AFRICAN-AMERICAN) CLAIMED FIRE CHIEF (ALSO AFRICAN-AMERICAN) PROMOTED SAME RACE OF PRIOR PERSON IN POSITION

On Oct. 24, 2919, in Franklin Edwards v. City of Selma, U.S. District Court Judge Jeffrey U. Beaverstock, U.S. District Court for the Southern District of Alabama (Northern Division) granted summary judgment for the City.

> "Selma's proffered reasons for failing to recommend or promote Plaintiff to a 'Chief-level' position include that applicants who received recommendations and promotions had been with the Fire Department longer than Plaintiff and had fewer disciplinary infractions… Selma has presented evidence that each candidate who received a 'Chief-level' recommendation and promotion was with the Fire Department longer than Plaintiff and/or had fewer disciplinary infractions than Plaintiff. Seniority and disciplinary history are legitimate non-discriminatory reasons for Stephens' recommendations for promotion."

Facts:

> "Plaintiff ('Edwards'), an African American man, works in the Selma Fire Department. Plaintiff alleges that his former supervisor, former Fire Chief Toney Stephens ('Stephens'), also an African American man, implemented racially discriminatory promotional procedures that precluded Plaintiff's advancement within the fire department in violation of the 42 U.S.C. § 1981 and the Equal Protection Clause of the Fourteenth Amendment. Specifically, Plaintiff alleges that Stephens carried out a policy whereby promotions to various "Chief-level" positions in the Department were done on a racially consistent basis; when one position was vacated by a member of one race, Stephens would recommend a candidate of the same race to fill that vacancy. For instance, if a position was vacated by a white person, Stephens would recommend a white applicant to fill that position, eliminating Plaintiff from consideration for the position due to his race.
>
> ***
> Plaintiff was employed as a firefighter by the Selma Fire Department beginning in 2004, and thereafter, was promoted to Engineer and Captain in 2004 and 2007, respectively.
>
> ***
> It is further undisputed that Edwards applied for the following positions: (1) Battalion Chief in 2016; (2) Assistant Chief in 2017; and two Battalion Chief positions that became available in 2018…. Each job posting required the following qualifications: a bachelor's degree with five years' experience in the Fire Department, or, as a substitute for educational experience, requisite experience and rising leadership roles in the Fire Department…. Plaintiff met the minimum requirements for the departmental postings. It is further undisputed that Plaintiff was denied these positions and that at least two of these positions were filled with persons outside Plaintiff's protected class.
>
> ***
>
> [The Court referenced his deposition testimony]
>
> > Q: . . . Are you only suing because the white guy got the position?
> >
> > A: You said only because?
> >
> > No. I'm suing because I wasn't –I feel as though I wasn't given a fair and equal opportunity.

Q: And we're going to get to it, but there's two positions for battalion chief in 2016. One went to a white guy and one went to a black guy; is that correct?

A: That's correct.

Q: I want to talk about the position that went to Murphy, the black guy.

A: Okay.

Q: You're saying that you were more qualified than he was, correct?

A: That's correct.

Q: But your complaint only mentions Horton, the white guy. Are you not suing the City of Selma because Murphy got a position and you thought you were more qualified than he was?

A: No. I feel I was more qualified than both.

***

It is undisputed that Plaintiff has no direct evidence of discrimination…. Therefore, in order the prevail on his Equal Protection claims, Plaintiff must make a showing of circumstantial evidence that satisfies the test in McDonnell Douglas Corp. v. Green,411 U.S. 792, 93 S. Ct. 1817, 36 L.Ed.2d 668 (1973), which identified the necessary elements to establish a prima facie violation when an employee 'loses out' to another applicant competing for a promotion.

***

According to the record, Stephens could not remember a time where the Mayor did not follow his recommendation…. However, nothing in the record indicates that the Mayor did not make the decisions of his own volition. In fact, the record shows that the Mayor had a chance to see every applicant's information and form his own opinion….

***

Selma's City Charter grants the Mayor exclusive authority to make certain appointments. Nothing in the City Charter concerning the Fire Chief's responsibilities state that he or she is authorized to make intra-departmental appointments. The City's Charter, therefore, establishes that Stephens was not authorized to make promotions within the Fire Department.

***

It is further undisputed that Edwards applied for the following positions: (1) Battalion Chief in 2016; (2) Assistant Chief in 2017; and two Battalion Chief positions that became available in 2018…. Each job posting required the following qualifications: a bachelor's degree with five years' experience in the Fire Department, or, as a substitute for educational experience, requisite experience and rising leadership roles in the Fire Department…. In this respect, Plaintiff met the minimum requirements for the departmental postings. It is further undisputed that Plaintiff was denied these positions and that at least two of these positions were filled with persons outside Plaintiff's protected class.

***

> Selma's proffered reasons for failing to recommend or promote Plaintiff to a 'Chief-level' position include that applicants who received recommendations and promotions had been with the Fire Department longer than Plaintiff and had fewer disciplinary infractions… Selma has presented evidence that each candidate who received a 'Chief-level' recommendation and promotion was with the Fire Department longer than Plaintiff and/or had fewer disciplinary infractions than Plaintiff. Seniority and disciplinary history are legitimate non-discriminatory reasons for Stephens' recommendations for promotion."

Holding:

> "Given these undisputed facts, there can be no material question of fact that Selma had no knowledge of any sort of 'demographic' promotion rule implemented by [Fire Chief] Stephens. Moreover, there is no evidence that the Mayor and Stephens were operating in concert. Accordingly, Plaintiff cannot proceed on his Equal Protection claims under this theory of liability.
>
> ***
>
> Plaintiff finds himself at the summary judgment stage of proceedings where there is sufficient evidence to show that those who allegedly discriminated against him did not act with any sort of racial animus. Further, Plaintiff has not provided significantly probative evidence that the proffered reasons for non-promotion were merely pretextual, and Plaintiff has not provided any evidence suggesting that Selma violated his Due Process rights when Stephens suspended him. Accordingly, the Court grants Defendant's motion and finds that it is entitled to summary judgment on all claims."

Legal Lessons Learned: Plaintiff failed to prove that the Mayor or other city officials knew about or concurred in the alleged "demographic promotion process."

File: Chap. 8, Race Discrimination

GA: APPLICANT (AFRICAN-AMERICAN) FOR FIRE CHIEF NOT SELECTED – IN HOUSE CANDIDATE MORE QUALIFIED, EVEN IF NO DEGREE

On Oct. 4, 2019, in Roderick Jolivette v. City of Americus, Georgia, the U.S. Court of Appeals for 11th Circuit (Atlanta) held 3 to 0 (unpublished opinion), upheld the U.S. District Court judge's decision granting summary judgment to the City.

> "Although Jolivette possessed a bachelor's degree, as required in the job posting, the City policies weighed equally candidates who possessed an "equivalent combination of education, training, and experience." Dee Jones, the human resources director for the City, testified that [Roger] Bivins qualified for the position of Fire Chief 'because of the totality' of his skills, experience, and education, as provided for in the job posting and 'our job description.' Jolivette does not dispute that Bivins possessed skills, experience, and abilities that 'substitute[d] for a lack of a college degree.'"

Facts:

> "Roderick Jolivette appeals the summary judgment against his complaint that the City of Americus, Georgia, refused to hire him as Fire Chief because he was African-American and in retaliation for suing his former employer for unlawful employment practices, in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(a), and of his right to the free and equal benefit of all laws, id.§ 1981. *** The district

court ruled that the legitimate, nondiscriminatory reasons the City proffered for hiring Roger Bivins, a Caucasian man, were not pretexts for discrimination and retaliation. We affirm.

***

The City submitted an affidavit from its final decisionmaker, Steve Kennedy, who stated that he hired Bivins based on his 'combination of education, training, and experience,' his 'overall experience and qualifications,' his 'intimate knowledge of the [Americus] Fire Department and its personnel,' his 'enthusiasm for the job,' his 'performance during his interviews and receipt of higher interview scores' and his 'efficiency, positivity, and ambitiousness.' Bivins served the Department for 15 years as a firefighter, engineer, and captain, followed by 10 years as its Battalion Chief. His resume also listed numerous certifications that he had acquired as a fire officer, a fire control instructor, and a safety officer and for emergency training and planning.

As Kennedy averred, the interviewers overwhelmingly preferred Bivins. Interviewers consisted of local officials, the outgoing Fire Chief, firefighters, and fire chiefs from other locales. Of the 28 interviewers who submitted opinions by email, 20 ranked Bivins as their choice for Fire Chief, two ranked Bivins as tied for the position, and none ranked Jolivette as their first choice."

Holding:

"The City was entitled to rely on subjective hiring criteria in making its hiring decision. 'A subjective reason is a legally sufficient, legitimate, nondiscriminatory reason if the defendant articulates a clear and reasonably specific factual basis upon which it based its subjective opinion.' Chapman v. AI Transp., 229 F.3d 1012, 1034 (11th Cir. 2000).

Legal Lessons Learned: Using experienced panel members to rate candidates for Fire Chief is a great process.

File: Chap. 16, Discipline

TX: FF'S INTERNAL COMPLAINTS ABOUT FIRE CHIEF - NOT PROTECTED FIRST AMENDMENT – NOT "PUBLIC CONCERN"

On Oct. 10, 2019, in Billy Fratus v, The City of Baumont, the Court of Appeals, Ninth District of Texas at Beaumont, held (3 to 0) that trial court properly dismissed the firefighter's lawsuit alleging he was fired [later reinstated] in retaliation for his internal complaints.

"The speech Fratus claims is protected under the Texas constitution is (1) that he 'joined the public outcry against Huff when she illegally fired' a firefighter, (2) he 'made it quite clear and said that he opposed Huff or any command officer sexually harassing members of the department,' and (3) he 'publicly opposed Huff's public, on duty support' of a former firefighter in a criminal prosecution. According to the City, Fratus failed to allege how these instances of speech constituted a matter of public concern.

***

On this record, we conclude that Fratus has failed to plead a prima facie free speech claim because he failed to meet his burden of showing he engaged in speech primarily as a citizen involving a matter of public concern."

Facts:

> "The petition alleged that Fratus was excluded from certain management meetings; that Beaumont Fire Chief [Anne] Huff did not like that Fratus was the only Hispanic among all the fire chiefs; that Chief Huff had a 'dismissive attitude' toward Fratus and excluded him from certain discretionary 'perks'; that Chief Huff tried to fire Fratus; that Chief Huff was angry when Fratus was promoted; that Chief Huff 'falsely accused [Fratus] of insurance fraud' over equipment that was donated to the department; that Chief Huff fired him [later reinstated] while he was on disability; and that the City sent Fratus to a chiropractor chosen by the City during his disability and thereby 'interfered with [Fratus's] relationship with his physician[.]'
>
> ***
> Fratus also alleged that the City retaliated against him for speaking out against what he believed was Chief Huff's sexual harassment of another employee, and for disagreeing with Chief Huff's firing of one employee and her support of another former employee."

Holding:

> "To prevail on a retaliation claim based on protected free speech under the Texas constitution, Fratus had the burden to plead that: (1) he suffered an adverse employment decision; (2) his speech involved a matter of public concern; (3) his interest in commenting on matters of public concern outweighed the City's interest in promoting efficiency; and (4) his speech motivated the adverse employment decision.
>
> ***
>
> Whether a person's speech involves a matter of public concern is a question of law determined by 'the content, form, and context of [the] given statement[s], as revealed by the whole record.' See Connick v. Myers, 461 U.S. 138, 147-48 & n.7(1983). When an employee speaks not as a citizen on matters of public concern, but as an employee upon matters of personal interest, generally a court is not the appropriate forum to handle a personnel decision. Id. at 147. Speech made privately between a speaker and his employer rather than in the context of public debate is generally not of public concern.
>
> ***
>
> For constitutional purposes, a person does not engage in constitutionally protected speech when speaking about his employment with other individuals in the organization that employs him."

Legal Lessons Learned: Firefighters and other public employees have limited First Amendment rights, unless speech relates to items of "public concern." An example on an item that would be covered – public comments on proposed tax levy. See the U.S. Supreme Court's decision in Pickering v. Board of Education, 391 U.S. 563 (1968) (establishing the so-called "balancing test"), where the Court reversed the termination of a teacher who sent letter to local newspaper about proposed school board tax levy: "Appellant Marvin L. Pickering, a teacher in Township High School District 205, Will County, Illinois, was dismissed from his position by the appellee Board of Education for sending a letter to a local newspaper in connection with a recently proposed tax increase that was critical of the way in which the Board and the district superintendent of schools had handled past proposals to raise new revenue for the schools. *** In these circumstances, we conclude that the interest of the school administration in limiting teachers' opportunities to contribute to public debate is not significantly greater than its interest in limiting a similar contribution by any member of the general public.

File: Chap. 16 – Discipline

TX: "LAST CHANCE AGREEMENT" - BREACHED WITHIN TWO YEARS, SICK LEAVE ABUSE – FIRED – LAWSUIT DISMISSED

On Oct. 3, 2019, in Michael Scott Nix v. City of Beaumont, Texas, the Court of Appeals, Ninth District of Texas ay Beaumont, the Court held (3 to 0) that trial court properly dismissed his lawsuit seeking a declaration that the City violated his rights when he was "indefinitely suspended" [terminated] on Sept. 13, 2019 for sick leave abuse during the two-year period following the Last Chance Agreement of April 2, 2015 where he served a 90-day suspension for prior disciplinary conduct.

> "Importantly, Nix agreed in writing to voluntarily accept his 2015 disciplinary suspension, with no right to appeal the terms and conditions of the Agreement or the Chief's decision to indefinitely suspend his employment in 2015. See Tex. Loc. Gov't Code Ann. § 143.052(g). When Nix accepted the Agreement in 2015, he had the opportunity to refuse the Chief's offer and appeal his suspension to the [Civil Service] Commission; however, Nix agreed to waive his right to appeal, including the right to appeal the Chief's 2017 decision determining that Nix had violated the Agreement and reinstating his indefinite suspension."

Facts:

> "On April 20, 2015, Nix entered into a Settlement Agreement ('Agreement') with Beaumont Fire Chief, Ann Huff ('Chief'), and the Union.
>
> ***
>
> Nix agreed to immediately serve a ninety-day suspension without pay beginning April 2, 2015, and ending on June 30, 2015, and Nix agreed that the remainder of the indefinite suspension initially imposed by the Chief would be held in abeyance pending Nix's strict compliance with the terms and conditions of the Agreement.
>
> ***
> The statement of action in the disciplinary suspension of Nix provides that on September 13, 2017, Nix was indefinitely suspended for disciplinary purposes due to violating (1) section 143.051 of the Local Government Code, (2) the City's Rules of the Firemen and Policemen Civil Service Commission, and (3) the City's Fire/Rescue Service Rules, Regulations, or Special Orders. See Tex. Loc. Gov't Code Ann. § 143.051(6), (8), (12) (West 2008). In the statement of action, the City alleged that Nix violated state and local civil service and fire department rules, regulations, and guidelines by violating sick leave regulations, and the City alleged that the instances of sick leave abuse occurred within the period covered by the Agreement."

Holding:

> "Nix further alleged that the City had violated his constitutionally protected property interests without due process of law by basing his 2017 indefinite suspension on the void CBA 2012-2015 and his Agreement. Nix argued that the City is not immune from suits seeking equitable relief for alleged violations of the Texas Constitution, and that the district court has jurisdiction to order his reinstatement.
>
> ***

> On August 29, 2018, the trial court conducted a hearing on the City's plea to the jurisdiction, and counsel for the City argued that Nix had initiated a [Civil Service] Commission hearing, which had been reset several times, and after Nix filed his petition, Nix's counsel indicated that Nix wanted to continue with the Commission hearing. According to the City, the Civil Service Rules prohibit Nix from appealing to the district court until the Commission hearing has concluded and Nix receives an adverse ruling.
>
> ***
>
> [A]s we have already stated, Nix accepted the Agreement and waived his right to appeal, which included his right to file suit against the City regarding any issue relating to the Agreement or his indefinite suspension. See Moayedi v. Interstate 35/Chisam Road, L.P., 438 S.W.3d 1, 6 (Tex. 2014) (stating that parties may waive statutory rights); Benton, 728 S.W.2d at 37. Additionally, Nix specifically agreed that in the event the Chief decides to reinstate his indefinite suspension during the terms of the Agreement, Nix would indemnify and hold harmless the Chief, the City, and the City's employees, agents, and representatives, from future claims or actions founded, in whole or in part, upon constitutional violations."

Legal Lessons Learned: Last Chance Agreements are an effective method to give a firefighter "one last chance."

File: Chap. 17 – Arbitration / Mediation

NY: NEW FD PARAMEDIC TRAINING – UNION ALLEGES BREACH OF CBA – GRIEVANCE CAN GO TO ARBITRATION

On Oct. 30, 2019, in Matter Of City of Yonkers v. Yonkers Fire Fighters, Local 628, the Supreme Court of New York, Appellate Division (Second Judicial District), held 5 to 0 that a Judge in Westchester County (dated September 20, 2016) improperly granted the City's petition to permanently stay arbitration.

> "According to Local 628, the City, by offering a paramedic training course to its firefighters, violated article 33 of the CBA, which contains various provisions concerning the EMS Program, including a provision stating that the 'EMS Program shall mean the level of services provided as of the date of this Agreement.' Contrary to the City's contention, a reasonable relationship exists between Local 628's grievance and the general subject matter of the CBA.
> ***
>
> Where, as here, the relevant arbitration provision of the CBA is broad, providing for arbitration of any grievance 'involving the interpretation or application of any provision of this Agreement,' a court 'should merely determine whether there is a reasonable relationship between the subject matter of the dispute and the general subject matter of the CBA.'"

Facts:

> "This proceeding involves a dispute between the petitioner, City of Yonkers, and Yonkers Fire Fighters, Local 628, IAFF, AFL-CIO (hereinafter Local 628), regarding a paramedic training course offered by the City to its firefighters, which was funded by a federal Assistance to Firefighters grant. After the City denied Local 628's requests for documents related to the paramedic training course, Local 628 filed a grievance asserting that the City violated, among other provisions, article 33 of the parties' collective bargaining

agreement (hereinafter the CBA). Upon exhausting its internal grievance remedies, Local 628 demanded arbitration of the dispute. The City subsequently commenced this proceeding pursuant to CPLR article 75 to permanently stay arbitration. The Supreme Court, in effect, granted the petition, determining that the parties' dispute was not arbitrable since there was no reasonable relationship between the subject matter of the dispute and the general subject matter of the CBA. Local 628 appeals."

Holding:

> [The quoted from prior precedent: "As a general rule, public policy in this State favors arbitral resolution of public sector labor disputes" (Matter of City of Long Beach v Civil Serv. Empls. Assn., Inc.-Long Beach Unit, 8 NY3d 465, 470 [internal quotation marks omitted]…."
>
> ***
>
> Here, it is undisputed that there is no statutory, constitutional, or public policy prohibition to arbitration of this grievance. Therefore, the only issue is whether the parties agreed to arbitrate this particular dispute. Where, as here, the relevant arbitration provision of the CBA is broad, providing for arbitration of any grievance 'involving the interpretation or application of any provision of this Agreement,' a court 'should merely determine whether there is a reasonable relationship between the subject matter of the dispute and the general subject matter of the CBA.'"

Legal Lessons Learned: Courts favor arbitration to resolve labor disputes.