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AUG. 2019 – FIRE & EMS LAW Newsletter

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NEW COURSE – TERRORISM & CYBERSECURITY
See draft of new online course

Items in Newsletter

File: Chap. 1 – American Legal System; Fire Code Enforcement

IL: COMMERCIAL BUILDING FIRE ALARMS MUST GO DIRECT TO 911 DISPATCH – ORDINANCE REQ. ONE PROVIDER UPHELD

On July 15, 2019, in Alarm Detection Systems, Inc. v. Orland Fire Protect District, et al, the U.S. Court of Appeals for 7th Circuit held (3 to 0) that ordinances by several Villages were lawful and no violation of Sherman Antitrust Act.

> "ADS worries that without introducing competition against Tyco the alarm-system market will stagnate; Tyco will have little reason to innovate and more flexibility to charge high prices. We are not unsympathetic to the point, in theory. But ADS had its chance at trial to demonstrate to the district court that its alternative methods can work in an RSS system, and it did not. And no one should lose sight of the fact that competition for the exclusive contract is competition."

Facts:

> "In 2014, citing safety concerns, the Villages passed ordinances that require commercial buildings to send fire-alarm signals directly to the local 911 dispatch center. This decision, sensible as it may seem, comes at an economic cost: either by design or due to technological restraints, the ordinances allow only one alarm-system provider to operate in the Villages. That provider is Tyco Integrated Security, LLC. It services the area pursuant to an exclusive agreement with the Villages' dispatch center, Orland Fire Protection District.
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> ***
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> The logistics of the fire-alarm systems are important to this appeal. Each account's system has essentially three parts: heat or smoke detectors, a panel, and a transmitter. When a detector goes off, it sends an alert to the panel. The panel then connects to the transmitter. The transmitter, in turn, sends a radio signal to one of two places: (1) a central-supervising station run by the alarm-system provider (the 'CSS model'); or (2) a remote-supervising station operated by the local dispatch center (the 'RSS model'). Which model applies depends on the account and its provider's arrangement or, as here, what the local ordinance requires.
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> Here, the district court found, after carefully reviewing the record evidence and hearing testimony, that implementing an RSS protocol, which the Ordinances do mandate on their face, required an exclusive arrangement with an alarm-system provider. This was true, according to the district court, as a technological and economic matter. Radio signals operate on one frequency that is licensed by a provider. So to ensure that accounts can send signals directly to the dispatch center, as an RSS protocol requires, the accounts and the center must share a provider—that is, there must be exclusivity.
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> ***
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> Orland Fire and Tyco's deal has only a one-year, renewable term, and nothing we know of forecloses ADS from making a bid to Orland Fire for another deal."

Legal Lessons Learned: The Court of Appeals upheld the findings of the U.S. District Court judge, who held a 6-day bench [non-jury] trial, and referenced NFPA 72 and the safety need for an exclusive fire-alarm provider.

File: Chap. 2 – Line Of Duty Death / Safety

MI: RESTAURANT OPERATORS CLAIM THAT "ORIGIN & CAUSE" RPT. CHANGED TO "INCENDARY" TO DEFLECT ATTENTION FD DEFICIENCIES - LODD / $3,500 OSHA FINE

On July 10, 2019, in George Marvaso et al. v. John Adams et al., U.S. District Court Judge Linda V. Parker denied the defense motion to dismiss by the Fire Marshal, the Fire Chief, and his father, the former Fire Chief, holding the "Court concludes that Plaintiffs plead sufficient facts to support their §1983 claim against Defendants and that Defendants are not entitled to qualified immunity."

Facts:

> "On May 8, 2013, shortly before 8:15 a.m., a fire broke out in the kitchen of Marvaso's Italian Grille ('Marvaso's'), a restaurant located on Wayne Road in Westland, Michigan. Plaintiffs George and Mary Marvaso leased and operated Marvaso's, as well as an adjacent pool hall and charity poker facility called Electric Stick. Their son, Plaintiff George F. Marvaso, was an employee of Electric Stick. No one was inside Marvaso's or Electric Stick when the fire broke out. Wayne-Westland Fire Department Firefighter Brian Woehlke died from smoke and soot inhalation while fighting the fire.
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> ***
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> Officials from the Wayne-Westland Fire Department initially investigated the fire, refusing the Michigan State Police Department's offer to conduct the fire origin and cause investigation. The Wayne-Westland Fire Marshal … John Adams ('Fire Marshal Adams'), conducted an on-scene investigation which revealed no accelerants. Investigators who investigated the fire for the companies that insured the buildings' landlord and the tenant businesses classified the cause of the fire as 'undetermined.'
>
> Between May 8, 2013 and June 30, 2013, the Michigan Occupational Safety and Health Administration ('MIOSHA') investigated Woelke's death, conducting its 'closing conference' with Wayne-Westland Fire Department officials on the latter date. The Fire Chief for the Wayne-Westland Fire Department at the time was Defendant Michael J. Reddy Jr. ('Fire Chief Reddy'). During the meeting between MIOSHA and the city's fire department officials, MIOSHA indicated it would be issuing citations to the fire department for safety violations resulting in Woelke's death. On August 30, 2013, MIOSHA issued a citation to the City of Westland for a 'serious' violation of health and safety regulations. The City subsequently acknowledged the citation and agreed to pay the $3,500 penalty assessed against it.
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> ***
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> [Plaintiffs' allege in their Amended Complaint that in] mid-November 2013, Fire Marshal Adams submitted an alleged false fire origin and cause report to the Michigan State Police ('MSP') and Wayne County Prosecutor's Office, which triggered an MSP homicide investigation resulting in search warrants being executed for Plaintiffs' homes. Fire Marshal Adams' announcement that the fire had an incendiary cause and that the Michigan State Police would be opening a homicide investigation into Woelke's death was widely reported in the statewide news media.
>
> As of the date Plaintiffs filed their Amended Complaint in this action, however, no arrests had been made in connection with the fire."

Legal Lessons Learned: This lawsuit may now proceed to pre-trial discovery.

Read NIOSH Firefighter Fatality Report F2013-14: "Career Probationary Fire Fighter Runs Out of Air and Dies in Commercial Structure Fire—Michigan."

> "On May 8, 2013, a 29-year-old male career probationary fire fighter died after running out of air and being trapped by a roof collapse in a commercial strip mall fire. The fire fighter was one of three fire fighters who had stretched a 1½-inch hoseline from Side A into a commercial strip mall fire. The hose team had stretched deep into the structure under high heat and heavy smoke conditions and was unsuccessful in locating the seat of the fire. The hose team decided to exit the structure. During the exit, the fire fighter became separated from the other two crew members. The incident commander saw the two members of the hose team exit on Side A and called over the radio for the fire fighter. The fire fighter acknowledged the incident commander and gave his location in the rear of the structure. The fire fighter later gave a radio transmission that he was out of air. A rapid intervention team was activated but was unable to locate him before a flashover occurred and the roof collapsed. He was later recovered and pronounced dead on the scene."

File: Chap. 2 – Line Of Duty Death / Safety

KY: VOL. FF INJURED LEG & KNEE ON ICE – WORKERS COMP. FOR MEDICAL, BUT NO WAGE LOSS – FF IS SELF-EMPLOYED

On July 12, 2019, in Ken Lashley v. Kentucky Volunteer Fire Department, et al., the Kentucky Court of Appeals held (3 to 0; unpublished opinion) that the Administrative Law Judge correctly determined that the firefighter is not entitled to any wage loss reimbursement since he owns his own business and is self-employed without wages.

> "As a volunteer firefighter, his average weekly wage is based on his other 'regular employment.' KRS 342.140(3). In this case, Appellant is self-employed…. The ALJ held that because Appellant owned his own business, he did not have wages from regular employment. In other words, Appellant could not claim money earned as the owner of the business as wages for the purpose of calculating his average weekly wage."

Facts [from KY Workers Comp Board decision of March 1, 2019;]

> "Lashley filed a Form 101, on July 13, 2018 alleging he injured his left leg and knee when he slipped on ice and snow on January 18, 2018. KYVFD filed a Form 111 on July 27, 2018 admitting Lashley sustained a work-related injury, but indicated there is a dispute as to the benefits owed. A Benefit Review Conference ('BRC') was held on November 14, 2018.

Legal Lesson Learned: Kentucky statute, like many states, will award volunteer firefighters their loss wages based on wages of their "regular employment." This self-employed firefighter will have his medical expenses covered.

> The Administrative Law Judge awarded "temporary total disability ('TTD') based upon the state minimum benefit in effect for the date of injury, medical benefits, and placed the claim in abeyance until Lashley reaches maximum medical improvement ("MMI"). The ALJ noted Lashley has not yet reached MMI."

File: Chap. 4 – Incident Command / Training

CA: WILDLAND FIRE IN NATIONAL FOREST – WATER TRUCK RAN OVER FF SLEEPING AT BASE CAMP – NO AUTOMATIC GOVT IMMUNITY

On July 15, 2019, in Rebecca Megan Quigley v. Garden Valley Fire Protection District, et al., the Supreme Court of California held (7 to 0), the Court reversed the Court of Appeals which had held that the base camp management team and their Fire Departments were automatically protected from liability by CA governmental immunity statute.

> "If the Court of Appeal determines that section 850.4 immunity was not adequately raised in defendants' answer, the case should be remanded to permit the trial court to decide whether to exercise its discretion to allow the belated assertion of the defense after the commencement of the trial."

Facts:

> "In September 2009, a wildfire known as the Silver Fire broke out in the Plumas National Forest. Employees of two local fire protection districts managed a base camp set up at a local fairground for the firefighting response. The base camp management team allowed firefighters resting in between firefighting shifts to sleep in tents and sleeping bags near a portable shower unit. Plaintiff Rebecca Megan Quigley, a United States Forest Service firefighter, was sleeping in this area when she was run over by a water truck servicing the shower unit. She sustained serious and permanent injuries.
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> ***
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> She alleged that defendants were negligent in permitting firefighters to sleep in the area where she was run over, without roping the area off or posting signs forbidding vehicles from entering. She claimed defendants had thereby created a 'dangerous condition' of public property, for which public entities may be held liable under section 835 of the Government Code.

Legal Lessons Learned: The injured Federal firefighter was covered by workers comp, but under CA broad governmental immunity statute, she will have a difficult time obtaining damages from these California commanders or their fire department.

> "Government Code section 850.4(section 850.4), the provision at issue in this case, establishes one such immunity: 'Neither a public entity, nor a public employee acting in the scope of his employment, is liable for any injury resulting from the condition of fire protection or firefighting equipment or facilities or,' with the exception of certain motor vehicle accidents, 'for any injury caused in fighting fires.' Section 850.4 was enacted at the recommendation of the Law Revision Commission. The commission's report to the Legislature explained section 850.4's purpose as follows: 'There are adequate incentives to careful maintenance of fire equipment without imposing tort liability; and firemen should not be deterred from any action they may desire to take in combatting fires by a fear that liability might be imposed if a jury believes such action to be unreasonable.'"

File: Chap. 7 – Sexual Harassment

PA: PHILADELPHIA FD – FIRST FEMALE DEPUTY COMM. – LAWSUIT FOR HOSTILE WORKPLACE DISMISSED

On July 9, 2019, in Diane M. Schweizer v. City of Philadelphia, U.S. Magistrate Judge Jacob P. Hart granted the City's motion for summary judgment.

> "At her deposition, Schweizer admitted time and time again that she had no facts to support her belief that her gender underlay the treatment of which she complained. She may indeed have developed a hunch that she would have been treated better if she had been a man, but this is not enough to survive summary judgment."

Facts:

[See June 4, 2014 article, "Diane Schweizer To Become Philadelphia's First Female Deputy Fire Commissioner."]

> "Schweizer maintains that she was subjected to a hostile work environment in the position of Deputy Commissioner of Administrative Services…. She alleges that she was repeatedly excluded from management meetings which were relevant to her work responsibilities…. She also points to the fact that she was the only Deputy Commissioner with no 'command' function to perform during the Pope's September, 2015, visit to Philadelphia, and was excluded from the planning and operational meetings pertaining to this visit. Id. at 26(f).
>
> ***
> The following incidents are also said by Schweizer to have contributed to the hostile work environment she has alleged: (a) there was no locker room or bathroom in the building 'for women of her rank', although there was a woman's restroom she could share with female staff; (b) she was assigned to share a one-desk office with David Beatrice for three months, whereas the three male Deputy Commissioners had offices of their own; (c) she had less support staff than the three male Deputy Commissioners; (d) she was given an old and damaged Ford Taurus, while the three male Deputy Commissioners had new Ford Expeditions; (e) she was 'denied and given less recognition and respect at staff meetings, photo shoots and press conferences' than the male Deputy Commissioners were given. Complaint at ¶12.

[The Court referred to her deposition testimony about meeting with new Fire Commissioner Adam Thiel, who was appointed on April 12, 2016.]

> "As is also noted above, in Schweizer's June 9, 2016, email to Commissioner Thiel asking for a meeting, she wrote that she stepped down as Deputy Commissioner 'due to a hostile work environment' and that nothing had changed….Nor did she mention any specific incident.
>
> Further, regarding Schweizer's June 10, 2016, meeting with Commissioner Theil, the following interchange occurred at her deposition:
>
> Q. Did you mention discrimination during that meeting?
> A. No.
>
> Q. Did you mention that you were being subjected to a hostile work environment based on your gender?
> A. No.

Q. Did you attribute to him – did you say anything to give him an inkling that you were complaining that you were being mistreated because you were a female?
A. No

Q. Okay. Did you say anything to Commissioner Thiel to give him any indication that you believed that you were retaliating – being retaliated against because you were a female?

A. No.

Q. Did you make any statement to Commissioner Thiel that you believed that you were being retaliated against because you made prior complaints of discrimination?
A. No."

Legal Lessons Learned: The EEOC's description of workplace harassment includes following: "Petty slights, annoyances, and isolated incidents (unless extremely serious) will not rise to the level of illegality. To be unlawful, the conduct must create a work environment that would be intimidating, hostile, or offensive to reasonable people."

File: Chap. 7 – Sexual Harassment

TX: DEP. FIRE CHIEF RESIGNED AFTER HE FACED TWO SEXUAL HARASSMENT INVEST – LAWSUIT DISMISSAL UPHELD

On July 10, 2019, in Carlos Mandujano v. City of Pharr, Texas, the U.S. Court of Appeals for the Fifth Circuit held (3 to 0; unpublished opinion) that the U.S. District Court judge had properly dismissed his lawsuit claiming the City's investigations created a hostile work environment and resulted in his "constructive discharge."

> "Mandujano's sex-discrimination claim rests on a theory that the City's investigations into him created a hostile work environment and resulted in his constructive discharge. To state a claim of constructive discharge, a plaintiff must allege that working conditions became 'so intolerable that a reasonable person would have felt compelled to resign.' Pa. State Police v. Suders, 542 U.S. 129, 147 (2004). Mandujano's initial complaint did not plausibly allege that this occurred."

Facts:

> "Carlos Mandujano was formerly employed as a deputy fire chief by appellee City of Pharr (the 'City'). In early 2014, the City opened an investigation into Mandujano for sexual harassment, apparently based on letters of complaint submitted by City Fire Marshal Jacob Salinas, Deputy Fire Chief Carlos Arispe, and Assistant Fire Marshal Dagoberto Soto. The letters reportedly accused Mandujano of sexually harassing a former City employee, Blanca Cortez. Denying that he harassed anyone, Mandujano alleges that Ms. Cortez had told him that he looked like a 'pollito' (Spanish for 'chick') and, on two other occasions, had referred to him as a 'hot young boss.' According to Mandujano, he responded to Ms. Cortez's comments by telling her that he did not like the 'pollito' comment and advising her to be professional.
>
> In August 2015, the City opened another investigation into Mandujano concerning 'the same subject matter as the prior investigation.' Later that month, Mandujano made a complaint to the City Manager 'about harassment by two deputy chiefs who were creating a negative and hostile work environment through further statements and commentary by the two individuals in connection with the [February 2014] sexual harassment complaints and continued through the date of [Mandujano's complaint to the City Manager].' Mandujano alleges that in September 2015, the Fire Chief told him 'that a sexual harassment finding would be made against [Mandujano] even though there was no evidence to support such a finding.' Mandujano resigned from the Fire Department on November 13, 2015."

Legal Lessons Learned: Fire & EMS departments, like other employers, have an obligation to investigate claims of sexual harassment; individuals being investigated may obviously feel uncomfortable, but that does not support a claim of hostile workplace.

File: Chap. 7 – Sexual Harassment

IL: CHICAGO FEMALE MEDICS (5) SUE FOR INADEQUATE INVEST – MAY SEE COMPLAINT / INVESTIGATION FILE OF MALE RIDE-ALONG

On July 9, 2019, in Jane Does 1-5 v. City of Chicago, U.S. District Court Magistrate Judge Sunil R. Harjani granted the plaintiffs' motion to compel the City to produce a male student's allegation that the City's fire department's employee sexual assaulted and harassed him during an observational ride-along.

> "Differing treatment of one gender's sexual misconduct allegations, compared to the other gender's treatment, has been found to indicate 'an informal yet established custom or policy of discrimination' against one gender while treating the other gender's complaints more seriously. Hicks v. Sheahan, No. 03 C 0327, 2004 WL 3119016, at *18 (N.D. Ill. 2004)."

Facts:

> "Specifically, Plaintiffs' motion seeks the student's complaint, the OIG Report, witness statements, documents detailing the allegations, and documents that reflect the outcome of the investigation into the student's allegation.
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> ***
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> Plaintiffs argue that these documents are relevant to compare how Defendant treats male versus female sexual misconduct complainants. *** Here, the Complaint's Monell [Monell v. Dep't of Social Services, 436 U.S. 658 (1978)] claim alleges, in part, that Defendant had a discriminatory policy or practice of failing to adequately investigate and discipline its employees accused of sexual misconduct.

Legal Lessons Learned: Courts favor pre-trial discovery. The U.S. Supreme Court in Monell held that municipalities can be liable under § 1983 for deprivations pursuant to official policy or entrenched practices.

Monell v. Department of Social Services, 436 U.S. 658 (1978).

> "To prevail on a Monell claim, a plaintiff must show that: '(1) the City had an express policy that, when enforced, causes a constitutional deprivation; (2) the City had a widespread practice that, although not authorized by written law or express municipal policy, is so permanent and well settled as to constitute a custom or usage within the force of law; or (3) plaintiff's constitutional injury was caused by a person with final policymaking authority.'"

File: Chap. 9 – Americans With Disabilities Act

VA: FF With PTSD – MOVED TO DAY SHIFT TEMPORARILY - BUT LATER MOVED BACK TO 24/48 SHIFT - LAWSUIT TO PROCEED

On July 8, 2019, in David Webb v. Chesterfield County, Virginia aka Chesterfield Fire And EMS, U.S. District Court Judge John A. Gibney, Jr. denied the County's motion to dismiss, finding that the firefighter has alleged sufficient facts to proceed on his claim for failure to accommodate under Americans With Disabilities Act.

> "Under the ADA, an employer discriminates against an employee by failing to 'mak[e] reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability … unless [the employer] can demonstrate that the accommodation would impose an undue hardship on the operation of the business [.] 42 USC 12112(b)(5)(A)."

Facts:

> "Webb began working as a firefighter with Chesterfield Fire in 2003. In late 2015 or early 2066, Webb began to suffer from PTSD. His doctor informed him that some symptoms, such as insomnia, depression, and panic attacks, would be very severe for three to five years, and that extended periods of downtime or idleness would aggravate his PTSD.
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> ***
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> Webb informed Chesterfield Fire that his doctor recommended that he stop working 24-hour shifts to avoid aggravating his PTSD. Webb asked Chesterfield Fire to assign him to a 'day work' shift where he would work normal, daytime hours adding up to 40 hours per week…. Chesterfield Fire agreed, and Webb worked 'day work' hours without incident until late 2017.
>
> At that time, Chesterfield Fire switched Webb back to 24-hour shifts…. His supervisor refused to schedule Webb for 'day work' shift, but did not provide a reason. Instead, his supervisor asked, 'What are we to do with the next 25 employees who need accommodation?'… Chesterfield Fire placed another fireman on 'day work' shift to replace Webb."

Legal Lessons Learned: PTSD is a real issue in fire service. Studies have found that anywhere between approximately 7 percent and 37 percent of firefighters meet criteria for a current diagnosis of PTSD. "Development of PTSD in Firefighters," (June 10, 2019).

File: Chap. 9, Americans With Disabilities Act

TX: PARAMEDIC INJURED ANKLE ON ICE COMING TO WORK - OFF 13 DAYS – LATER FIRED FOR MISSING SHIFTS – LAWSUIT DISMISSED

On July 3, 2019, in Michael Bankhead v. Lifeguard Ambulance Service of Texas, U.S. District Court Judge John McBryde granted the employer's motion for summary judgment.

> "In this case, plaintiff has not shown that he suffered from a disability under the ADA. In fact, he pleaded that his injury was only temporary… (plaintiff injured his foot on January 13, 2017, wore a boot to stabilize his ankle, and was cleared to return to work on January 26, 2017). In his summary judgment response, he mentions that he has diabetes…. But, even if true, simply having a diagnosis does not amount to proof that one has an impairment under the ADA."

Facts:

> "Lifeguard is a nationwide company providing air and ground ambulance services…. Lifeguard has specific policies concerning attendance and punctuality of employees…. Employees must report to their shifts regularly and be on time…. Plaintiff began working for Lifeguard on May 9, 2016, as a paramedic…. On August 24, 2016, plaintiff received a written warning for being absent from his shifts on May 17, June 10, August 9, and August 21, 2016…. On December 2, 2016, plaintiff received a corrective action form noting that he had been absent on November 29, 2016, and that the problem was a recurring one….
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> On January 13, 2017, plaintiff was scheduled to work a 24-hour shift beginning at 8:00 a.m…. Plaintiff failed to report to work or call his immediate supervisor…. His manager attempted to contact plaintiff but could not reach him. He also attempted to contact plaintiff's emergency contact person but was unable to reach her. Later in the day, plaintiff contacted his manager to say that he had injured his ankle when he slipped on ice on his way to work….
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> ***
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> On January 16, 2017, Lifeguard's human resources manager attempted to contact plaintiff. She followed up with an email advising plaintiff that she would need documentation regarding his medical condition and that he did not qualify for leave under the Family and Medical Leave Act since he had been employed for less than 12 months…. The email cautioned that plaintiff's employment status was pending a decision as to whether his absences were approved… On January 18, 2017, the human resources manager again emailed plaintiff, saying that she had expected to hear from him regarding his work status and since she had not, plaintiff had been removed from his next scheduled shift… Ultimately, the human resources manager reviewed medical documentation provided by plaintiff and determined that he had suffered a minor injury. Taking into consideration plaintiff's prior attendance issues, his employment was terminated effective January 26, 2017.
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> ***
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> "The impairment's impact must be permanent or long term. Toyota Motor Mfg., Ky., Inc. v. Williams, 534 U.S. 184, 198 (2002). An impairment does not include a transitory injury that has no permanent effect on the plaintiff's health. Williamson v. Am. Nat'l Ins. Co., 695 F.Supp.2d 431, 448 (S.D. Tex. 2010). A broken leg is a standard example of an intermittent episodic injury not constituting an impairment for purposes of the ADA. Vande Zande v. Wise. Dep't of Admin., 44 F.3d 538, 544 (7th Cir. 1995); Street v. Maverick Tube

Corp., No. 4:15-CV-2736, 2016 WL 5711338, at *6 (S.D. Tex. June 17, 2016), adopted, 2016 WL 3948106 (July 19, 2016) (broken foot and limp for several weeks not a disability under the ADA)."

Legal Lessons Learned: Impairment under ADA must be permanent or long term; even a broken leg does not qualify as a "disability."

Under ADA, a "disability" is defined as: "(A) a physical or mental impairment that substantially limits one or more major life activities of such individual; (B) a record of such an impairment; or (C) being regarded as having such an impairment." 42 U.S.C. § 12102(1).

File: Chap. 13 - EMS

IN: UNRESP. DRIVER – DRIVES OFF WHEN MEDIC SEES REVOLVER – CONV. WITHOUT GUN FOUND – MEDIC'S FIREARM KNOWLEDGE

On July 15, 2019, in Evan Michael Sapp v. State of Indiana, the Court of Appeals (3 to 0) upheld the jury's conviction, even though no firearm was ever recovered. He received 12-year sentence as a serious violent felon, based on prior burglary conviction.

"We likewise reject Sapp's broader argument that no reasonable trier of fact could have found from the evidence presented that what Osborne saw was a firearm (i.e., not a toy).
Osborne, who had decades of experience with guns, testified in considerable detail about the gun that he saw, including its color, that it was a revolver, similar to one he owned, and had a 'trap door' feature consistent with small caliber pistols. Transcript Vol. II at 232, 235. He also said that, when he saw it, he did not think it was a toy and, in fact, was afraid for his safety when Sapp appeared to be reaching for it."

Facts:

"On June 13, 2018 at approximately 7:30 a.m., a 911 caller reported that a man was asleep or unconscious in the driver's seat of a running Dodge Ram pickup truck parked in an alley behind her house and that she had tried to wake him, but he was unresponsive. First to arrive at the scene were three Terre Haute firefighters and paramedics, including Matthew Osborne. The driver's side window of the pickup truck was about halfway down, and the driver's head was slumped over and resting on the top of the steering wheel. Osborne approached the vehicle, and while about ten feet away, Osborne yelled to the driver, later identified as Sapp, asking if he was alright. Osborne wondered if the person had suffered a stroke or some other medical emergency. Sapp immediately woke up and replied, yah, yah I'm okay.'

***

At the two-day September 2018 jury trial, the State called various witnesses, including Osborne…. Osborne read from his statement that he had given to police a few hours after the incident, where Osborne described the gun that he had seen as follows:

"It was a black revolver approximately six-inch barrel, looked to be small caliber. Had a brown and white handle on it and it, it had one of the trap doors for just to re-load it. So that's kind a how I saw

that it was a small caliber handgun. It's from my experience, what I've seen on some of those smaller ones."

***

Legal Lessons Learned: Paramedic's long experience with firearms, and his written report to police shortly after the EMS run, were powerful evidence.

Note: Under prior Indiana case law, a firearm does not need to be recovered to convict for unlawful possession.

> "Sapp acknowledges that our courts have sustained a conviction in circumstances when the firearm was not located after the defendant's arrest but urges that, unlike where a defendant displayed or used a weapon, he did nothing "to signify or imply that the item [in his truck]was a 'firearm.'" Id. at 5. We disagree… Footnote 1: See e.g., Gray v. State, 903 N.E.2d 940, 943 (Ind. 2009).

File: Chap. 17 – Arbitration

IL: CT OVERTURNS ARBITRATOR – PURGING POLICE DISCIPLINE RECORDS IS VIOLATION OF STATE'S PUBLIC POLICY

On March 29, 2019, in City of Chicago v. Fraternal Order of Police, Chicago Lodge No. 7, the Illinois Appellate Court (1st District) held (3 to 0) that an arbitrator's decision upholding FOP's grievance must be set aside.

> "The arbitration award requiring destruction of the records pursuant to section 8.4 of the CBA clearly violated well-defined Illinois public policy requiring the proper retention of important public records."

Facts:

> "The records at issue are complaint register files (CR files). CR files are produced in the course of investigations by the Civilian Office of Police Accountability (COPA) and the CPD's Bureau of Internal Affairs (Internal Affairs) of alleged misconduct by CPD officers. COPA and Internal Affairs had the authority to recommend to the CPD superintendent disciplinary action for violations of CPD rules and regulations.
>
> ***
>
> Future CBAs continued to include some version of section 8.4, including the 2007-12 CBA at issue in this case, which provided, in relevant part:
>
> > 'All disciplinary investigation files, disciplinary history card entries, Independent Police Review Authority and Internal Affairs Division disciplinary records, and any other disciplinary record or summary of such record other than records related to Police Board cases, will be destroyed five (5) years after the date of the incident or the date upon which the violation is discovered, whichever is longer[.]'
>
> ***

The City's destruction of records pursuant to section 8.4 ceased following a federal court's 1991 order in a civil rights case, which required the City to cease destroying CR files. Thereafter, other federal district court judges began entering similar orders as a matter of - 3 - routine, and the City sought to eliminate section 8.4 from the CBA during negotiations with the FOP.

***

Meanwhile, in October 2014, the City notified the FOP that the City intended to comply with requests under the Freedom of Information Act (FOIA) (5 ILCS 140/1 et seq. (West 2014)), from the Chicago Tribune and Chicago Sun-Times for CR files dating back to 1967. The FOP sought a preliminary injunction in the circuit court on the basis that disclosure of the CR files during arbitration would interfere with the FOP's ability to obtain relief in arbitration. In December 2014, the circuit court granted the FOP's request for a preliminary injunction barring the release of the CR files to maintain the status quo until the FOP's claims under the CBA were adjudicated.

***

In December 2015, the United States Department of Justice (DOJ) opened an investigation into the CPD's use of force policies. The City informed the arbitrator of the pendency of the DOJ investigation and requested guidance on how the City should respond to the DOJ's requests for the production of misconduct and disciplinary records.

***

In January 2017, the DOJ issued its report. Among its conclusions, the DOJ found that section 8.4's 'document destruction provision not only may impair the investigation of older misconduct, but also deprives CPD of important discipline and personnel documentation that will assist in monitoring historical patterns of misconduct.' A local police accountability task force (Task Force) was also formed to evaluate the CPD's practices separately from the DOJ's investigation. The Task Force also concluded that section 8.4 was problematic and likely violated Illinois law."

***

The arbitration award requiring destruction of the records pursuant to section 8.4 of the CBA clearly violated well-defined Illinois public policy requiring the proper retention of important public records. The award ignored the requirements of the Local Act and obviates the local record commission's authority to determine what records should be destroyed or maintained. Further, the award required the City to destroy records related to alleged police misconduct without regard to the statute's explicit concerns for those records' 'administrative, legal, research or historical value.' 50 ILCS 205/10 (West 2016)."

Legal Lessons Learned: Purging of disciplinary records, even if authorized under a CBA, can result in public records litigation.

The Court referenced a Chicago FD case where an arbitrator was overturned based on public policy. Chicago Fire Fighters Union Local No. 2 v. City of Chicago, 323 Ill. App. 3d 168, 176-77 (2001):

> "In May 1997, CFD Internal Affairs Division ('IAD') Executive Assistant Mark Edinburg learned of the existence of a videotape of an unauthorized retirement party held on April 12, 1990, at the CFD firehouse known as Engine 100. The videotape depicted firefighters drinking alcoholic beverages inside the firehouse; leaving the firehouse in fire trucks to respond to fire calls; some participants

making offensive racial, gender and ethnic slurs; and some engaging in other conduct such as exposing their bare buttocks and genitals. Edinburg viewed the videotape on May 9, 1997. *** This matter calls upon the court to address a serious matter of public policy affecting the health, safety and welfare of the citizens of the city of Chicago. *** The conduct at issue in the present case was recorded on video-tape and reveals public safety workers in an on-going state of intoxication, some participants setting about to perform their duties by way of responding to an alarm for a fire. Nevertheless, the arbitrator ordered reinstatement and barred all discipline and sanctions without considering the merits of the case. Firefighters have the extraordinary responsibility for carrying out the well-stated public policy of safe and effective fire prevention. Firefighters must be prepared to respond immediately to emergency conditions at all times, and in all weather conditions, whenever the alarm bell in the firehouse sounds. For these reasons, and for all of the reasons cited by our supreme court in AFCSME II, 173 Ill. 2d 299 et seq., we adhere to our original opinion as set forth above."]