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Feb. 2019 – FIRE & EMS LAW Newsletter

[NEWSLETTER IS NOT PROVIDING LEGAL ADVICE.]
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UC FIRE SCIENCE:

COMMUNITY PARAMEDICINE / HOSPITAL PARTNERSHIPS: March 20, 2019, free seminar, FDs, elected officials and hospital representatives sharing best practices; will be videotaped and posted on our web page.

DRONES: See Feb. 8, 2019 article on UC Fire Science Adjunct Professor / Battalion Chief Doug Wehmeyer's deployment to Florida on Hurricane Michael, Oct. 2018, **"**UC Students Plan Drone Use for Hurricane Response"

HAZMAT: Fall, 2019 two-day class, UAVs For Emergency Responders, FST 3055 will include presentations for Incident Commanders [Nov. 8, 2019 at UC Flight Lab] and multi-agency HAZMAT drill [Nov. 9, 2019 at a FD training center]. UC Fire Science Adjunct Professor / Fire Chief (retired) BJ Jetter, PhD will be coordinating the drill.

Items in Newsletter

Feb. 2019 – FIRE & EMS LAW Newsletter 1
COMMUNITY PARAMEDICINE / HOSPITAL PARTNERSHIPS 1
DRONES 1
HAZMAT: 1
File: Chap. 1, American Legal System 2
U.S. SUPREME COURT: EXECUTION 2
File: Chap. 5, Emergency Vehicle Operations 4
IL: STATE IMMUNITY STATUTE 4
KS: WORKERS COMP 7
File: Chap. 6, Employment Litigation 10
OH: FIRE CHIEF'S AGE / ADA LAWSUIT DISMISSED 10
File: Chap. 7, Race Discrimination 12
MI: DETROIT – CITY WIDE LAYOFFS 12
File: Chap. 15, Critical Incident Stress Management 14
IL: PTSD 14
File: Chap. 16, Discipline 17
MA: NEPOTISM 17
File: Chap. 17, Arbitration / Mediation 19
NY: MINIMUM MANNING OF 15 FF / SHIFT 19

File: Chap. 1, American Legal System

U.S. SUPREME COURT: EXECUTION – 11th CIR. INJUNCTION QUICKLY SET ASIDE – INMATE NOT ENTITLED TO HAVE IMAM PRESENT IN DEATH CHAMBER, BUT MAY BE IN WITNESS ROOM

On Feb. 7, 2019, in Jefferson S. Dunn, Commissioner, Alabama Department of Corrections v. Dominique Hakim Marcelle Ray, the majority of Justices [5 to 4] overturned 11th Circuit's Feb. 6, 2019 stay of execution of Ray, who has raped and murdered a 15-year old girl in 1995. Ray had asked Alabama prison officials to allow an imam to be in the death chamber, but only correction employees are allowed, including a long employed Christian chaplain. [The State of Alabama then executed the prisoner on Feb. 7, at 10:12 pm.]

Per 11th Circuit decision, "The inmate's designated witnesses, limited to six, along with any spiritual advisor other than Chaplain Summers, may be seated in a witness room, separated from the death chamber by a large window."

Facts:

[Majority decision by 5 Justices: John G. Roberts, Jr., Chief Justice of the United States; Clarence Thomas; Samuel A. Alito, Jr.; Neil M. Gorsuch; Brett M. Kavanaugh.]

> "On November 6, 2018, the State scheduled … Ray's execution date for February 7, 2019. Because Ray waited until January 28, 2019 to seek relief, we grant the State's application to vacate the stay entered by the United States Court of Appeals for the Eleventh Circuit. See Gomez v. United States Dist. Court for Northern Dist. of Cal., 503 U. S. 653, 654 (1992) (per curiam) ('A court may consider the last-minute nature of an application to stay execution in deciding whether to grant equitable relief.').

Dissent: [4 Justices]:

> "JUSTICE KAGAN, with whom JUSTICE GINSBURG, JUSTICE BREYER, and JUSTICE SOTOMAYOR join, dissenting from grant of application to vacate stay.
>
> Holman Correctional Facility, the Alabama prison where Domineque Ray will be executed tonight, regularly allows a Christian chaplain to be present in the execution chamber. But Ray is Muslim. And the prison refused his request to have an imam attend him in the last moments of his life…. Given the gravity of the issue presented here, I think that decision profoundly wrong.
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> ***
>
> To justify such religious discrimination, the State must show that its policy is narrowly tailored to a compelling interest. I have no doubt that prison security is an interest of that kind. But the State has offered no evidence to show that its wholesale prohibition on outside spiritual advisers is necessary to achieve that goal. Why couldn't Ray's imam receive whatever training in execution proto-col the Christian chaplain received? The State has no answer. Why wouldn't it be sufficient for the imam to pledge, under penalty of contempt, that he will not interfere with the State's ability to perform the execution? The State doesn't say. The only evidence the State has offered is a conclusory affidavit stating that its policy "is the least restrictive means of furthering" its interest in safety and security. That is not enough to support a denominational preference."

Legal Lessons Learned: The Supreme Court's five "conservative" Justices have made it clear that last minute stays of execution are not favored.

> See Feb. 7, 2018 article, "Alabama Executes Muslim Inmate Who Wanted Imam Present." "Ray was convicted in 1999 after another man, Marcus Owden, confessed to his role in the crime and implicated Ray. Owden told police that they had picked the girl up for a night out on the town and then raped her.

> Owden said that Ray cut the girl's throat. Owden pleaded guilty to murder, testified against Ray and is serving a life sentence without parole. A jury recommended the death penalty for Ray by an 11-1 vote."

See Feb. 8, 2019 Washington Post article: "Abortion, Death Penalty, Religion: Late-Night Rulings Show New Alliances At Supreme Court."

File: Chap. 5, Emergency Vehicle Operations

IL: STATE IMMUNITY STATUTE PROTECTS PRIVATE & PUBLIC AMBULANCES – ONLY WHEN A PATIENT IS ON BOARD

On Feb. 1, 2019, in Roberto Hernandez v. Lifeline Ambulance, LLC and Joshua M. Nicholas, the Appellate Court of Illinois (First District; Fifth Division) held (2 to 1): "As the ambulance driven by Nicholas was not transporting a patient to a health care facility at the time of the collision with the vehicle driven by the plaintiff, section 3.150(a) of the EMS Act does not provide Nicholas or Lifeline with immunity from liability for any negligent acts or omissions which proximately resulted in damages to the plaintiff.

Facts:

> "In his first amended complaint, the plaintiff alleged that, on March 11, 2016, he was operating his motor vehicle in a westerly direction on Grand Avenue in Chicago when his vehicle was struck by an ambulance traveling southbound on Lake Shore Drive. The complaint alleged that the ambulance was owned by Lifeline and being operated by its employee, Nicholas.
>
> ***
>
> The defendants moved for dismissal of counts I and III of the plaintiff's first amended complaint and count I of American's amended complaint pursuant to section 2-619 of the Code (735 ILCS 5/2-619 (West 2016)) predicated upon the immunity provision of the Emergency Medical Services (EMS) Systems Act (EMS Act) (210 ILCS 50/3.150(a) (West 2016)). The defendants asserted that Nicholas was operating Lifeline's ambulance in the performance of non-emergency medical services at the time of the collision with the plaintiff's vehicle, and as a consequence, they are immune from civil liability unless Nicholas's acts or omissions constituted willful and wanton misconduct. The defendants' motion was supported by the affidavits of Nicholas and Eric Hagman, a Lifeline employee who was a passenger in the ambulance at the time of the collision with the plaintiff's vehicle. The affidavits state that, prior to the collision with the plaintiff's vehicle, they received a radio dispatch call from Lifeline 'directing the ambulance crew to proceed to pick up a patient in the western suburbs for transport to a second location.'
>
> ***
>
> The plaintiff responded, arguing both that the immunity provision of the EMS Act does not apply to the operation of an ambulance until it is engaged in providing medical services to a patient and that there exists an issue of fact on the question of whether the ambulance driven by Nicholas at the time of the collision was being operated in the performance of non-emergency medical services.
>
> ***

On March 7, 2018, the circuit court [trial judge] entered an order, granting the defendants' section 2-619 motion and dismissed counts I and III of the plaintiff's first amended complaint and count I of American's amended complaint in the consolidated action 'with prejudice.'"

Holding:

"For the reasons which follow, we reverse the judgment of the circuit court dismissing counts I and III of the plaintiff's first amended complaint and remand the matter for further proceedings.

***

Section 3.150(a) of the EMS Act provides, in relevant part, as follows:

> 'Any person, agency or governmental body certified, licensed or authorized pursuant to this Act or rules thereunder, who in good faith provides emergency or non-emergency medical services *** in the normal course of conducting their duties *** shall not be civilly liable as a result of their acts or omissions in providing such services unless such acts or omissions *** constitute willful and wanton misconduct.' 210 ILCS 50/3.150(a) (West 2016).

Section 3.10(g) of the EMS Act defines "Non-emergency medical services" as

> 'medical care *** rendered to patients whose conditions do not meet this Act's definition of emergency, *** during transportation of such patients to or from health care facilities visited for the purpose of obtaining medical or health care services which are not emergency in nature, using a vehicle regulated by this Act.' 210 ILCS 50/3.10(g) (West 2016).

Relying upon the supreme court's decision in Wilkins v. Williams,2013 IL 114310, the defendants correctly assert that section 3.150(a) immunizes the operator of an ambulance from civil liability for negligence committed in the non-emergency transport of a patient. Id. ¶¶ 21, 59.They argue that immunity from liability for negligence applies to acts or omissions committed from the time that the ambulance is dispatched to provide non-emergency medical transportation of a patient. We believe that the defendants' reliance upon the holding in Wilkinsis misplaced.¶ 16 In Wilkins,the defendant ambulance driver was transporting a patient on a non-emergency basis from a hospital to a nursing home when the driver was involved in a collision with a vehicle driven by the plaintiff. Wilkins,2013 IL 114310, ¶ 3. The supreme court found that the accident occurred while the ambulance was transporting a patient, and as a consequence, there was no dispute that the ambulance operator was providing non-emergency medical service. Wilkins,2013 IL 114310, ¶ 21. In the instant case, there was no patient being transported at the time of the accident; the ambulance was in route to pick up a patient for non-emergency transport.

***

Had the legislature intended to provide immunity for the negligence of an ambulance driver while in route to pick up a patient for transport as suggested by the defendants, it could have included the activity within the definition of 'non-emergency medical services.' The legislature did not include the activity within the definition of non-emergency medical services, and we are not at liberty to do so under the guise of statutory construction.

***

We conclude, therefore, that the circuit court erred in granting the defendants' motion and dismissing counts I and III of the plaintiff's first amended complaint, and as a consequence, we reverse the judgment of the circuit court and remand the matter for further proceedings."

Dissent:

> "Driving an ambulance to pick up a patient is a service rendered before transportation of a patient. I would find that driving to pick up a patient is as much medical care as driving with the patient; it is all in service to the patient. I would therefore affirm the decision of the circuit court granting defendants' motion to dismiss and dismissing counts I and III of plaintiff's first amended complaint."

Legal Lessons Learned: The Illinois immunity statute broadly includes non-emergency transports, but not so broad as to cover driving ambulance to pick up a patient. Hopefully the ambulance company's private insurance will cover both the company and its employee.

KS: WORKERS COMP – 2008 & 2010 BACK INJURIES, NEEDS SURGERY – COURT ORDERS STATE BOARD TO COVER SINCE FF FILED WITHIN 2 YEARS OF LAST PAYMENT

On Feb. 8, 2019, in Paul H. Schneider v. City of Lawrence, the Court of Appeals of State of Kansas (3 to 0), overturned the Workers Compensation Board, and granted the firefighter's claim for coverage of two on-duty back injuries (2008; 2010). Kansas statute requires workers comp request for a hearing be filed within 3 years of the injury, or "within two years of the date of the last payment of compensation." The Court held, "Here, because Schneider received compensation from the City in December 2015 and in January 2016 and because he filed his applications for hearings in January 2016, his applications under the revived two-year statute of limitations were timely."

Facts:

> "Schneider worked for the City's fire department. The parties do not dispute that he injured his back while working for the City on September 21, 2008, and September 27, 2010. [He apparently submitted injury reports to FD, since the city paid for physical therapy, including payment on Feb. 28, 2012.]
>
> He explained that by 2015, it was difficult for him to work. He testified that he went to his personal doctor, Dr. David Fritz, and they discussed him having back surgery. This was the first doctor he had visited since his last physical therapy appointment paid for by the City on February 28, 2012. Schneider testified that his personal health insurance paid for his appointment with Dr. Fritz. Yet, he further testified that his personal health insurance denied his request for back surgery once it learned that his back pain stemmed from work-related injuries. He admitted that after his personal insurance denied his request for back surgery, he contacted the City, and the City sent him to its doctor, Dr. Chris Fevurly. [City made a payment on Dec. 14, 2015.]
>
> On January 28, 2016, Schneider filed two applications for hearings, in which he asserted that he had a right to benefits under the Act. In the first application, Schneider stated that his work accident occurred while working for the City on September 21, 2008. In his second application, Schneider stated that his work accident occurred while working for the City on September 27, 2010. Schneider alleged that both of his injuries were to his low back and body as a whole.
>
> The City responded that it intended to deny Schneider's applications for benefits as untimely. Schneider asserted that his applications were timely because the City had provided him authorized medical care for back injuries on December 14, 2015. Schneider argued that the statute of limitations under K.S.A. 44-534(b) was revived upon the City's December 14, 2015 payment.
>
> At the regular hearing before the administrative law judge (ALJ), Schneider testified about his back pain becoming progressively worse after his 2010 injury. He explained that by 2015, it was difficult for him to work. He testified that he went to his personal doctor, Dr. David Fritz, and they discussed him having back surgery. This was the first doctor he had visited since his last physical therapy appointment paid for by the City on February 28, 2012. Schneider testified that his personal health insurance paid for his appointment with Dr. Fritz. Yet, he further testified that his personal health insurance denied his request for back surgery once it learned that his back pain stemmed from work-related injuries. He admitted that

after his personal insurance denied his request for back surgery, he contacted the City, and the City sent him to its doctor, Dr. Chris Fevurly.

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Dr. Fevurly explained that at the end of the examination, he concluded that Schneider's 2008 and 2010 work injuries were the cause for his current ongoing back pain. Dr. Fevurly also explained that Schneider returned to him for treatment on January 18 and 22, 2016, because of increased back pain. He testified that on those dates, he gave Schneider medicine and modified his duties. Dr. Fevurly testified that he told Schneider to schedule another appointment for February 2016, but Schneider never did so.

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Dr. Fevurly testified that he had treated Schneider for the 20 years that Schneider had been employed with the fire department. He testified that he had also examined him annually for the firefighter fitness exam. He explained that for Schneider's 2008 and 2010 work injuries, he had treated Schneider for "spondylolysis of L5 and then spondylolisthesis grade two of L5 and S1." Dr. Fevurly testified that on December 14, 2015, Schneider returned for another examination, complaining of back pain. He testified that at that examination, Schneider told him he was there because his personal insurance denied his back surgery.

***

[Garry Cooper, the city's risk manager] testified that as the risk manager he kept records of all payments for work-related injuries made by the City to medical providers and workers compensation claims. Cooper testified that the last medical payment from the City for Schneider's September 21, 2008 injury happened on February 19, 2009. Cooper testified that the last medical payment from the City for Schneider's September 27, 2010 injury happened on June 24, 2012. On cross-examination, Cooper agreed that the City paid for Schneider to see Dr. Fevurly when he reported his back problems in December 2015.

***

The parties filed briefs with the ALJ. The City argued that the ALJ should deny Schneider's claims because he failed to file his application for benefits within three years of his accidents or within two years from the City's last payment as required under K.S.A. 44-534(b). The City cited Graham v. Pomeroy, 143 Kan. 974, 57 P.2d 19 (1936), for the proposition that its payments for Schneider's medical treatment in December 2015 and in January 2016 did not revive the two-year timeline to file an application for hearing….

In the end, the ALJ denied Schneider's claims for benefits. The ALJ first noted that Schneider's 'entire case rests on the two-year clause for the last payment of compensation.'

***

Schneider appealed the ALJ's decision to the Board. The Board noted that Schneider had a "compelling" argument…. [However the] Board further noted that in Graham, our Supreme Court held that R.S. 1933 Supp. 44-520a's statute of limitations language prohibited reviving an employee's time-barred claim upon an employer's later voluntary medical payment. Based on Graham, the Board felt compelled to affirmthe ALJ's decision, concluding that Schneider's claims were untimely under K.S.A. 44-534(b)."

Holding:

“As a preliminary note, the City also briefly asserts that ‘[t]he uncontroverted evidence in the administrative record does not support that the examination and treatment of Dr. Fevurly in 2015 and 2016 were payment of compensation for the 2008 and 2010 injuries.’ The City contends that each of Schneider's appointments were for ‘acute exacerbation symptoms which the claimant indicated occurred on January 14, 2016.’ This argument, however, is patently meritless because Dr. Fevurly testified that the injuries Schneider presented related to his 2008 and 2010 injuries. Dr. Fevurly merely explained that Schneider's January 29, 2016 appointment also related to an acute aggravation of his injury, which occurred on January 14, 2016.

***

Indeed, had the Legislature wanted to prevent workers from reviving the statute of limitations as the City argues, the Legislature could have easily included the following language after the above "whichever is later" language in K.S.A. 44-534(b): however, if there is a gap of two years or more from the last payment of compensation, no proceeding will be maintained under the workers compensation act. If the previously italicized language would have more clearly expressed what the Legislature was attempting to say under K.S.A. 44-534(b), the Legislature could have easily included this language in K.S.A. 44-534(b). Nevertheless, the Legislature included no such language in K.S.A. 44-534(b).

***

This court's first obligation is to determine if a statute has a clear meaning. If it does, then this court merely applies the language of the statute. Here, the language of K.S.A. 44-534(b) is clear and unambiguous. As a result, this court is required to apply K.S.A. 44-534(b) as written.

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As a result, the Board erred when it concluded that an employer could not revive the two-year statute of limitations when it made a payment of compensation to an injured worker after the time for the injured worker to file a timely application for hearing had run. Here, because Schneider received compensation from the City in December 2015 and in January 2016 and because he filed his applications for hearings in January 2016, his applications under the revived two-year statute of limitations were timely. Thus, we reverse and remand to the Board for further proceedings consistent with this opinion. Reversed and remanded with directions.”

Legal Lesson Learned: Workers comp statutes of limitation are designed to require prompt disclosure of workplace injuries. The City may decide to appeal this decision to the Kansas Supreme Court.

Note: See Aug. 4, 2017 article: “Ohio General Assembly Alters Statute of Limitation for Workers' Compensation Claims”

“As part of the biennial budget process the Ohio General Assembly passed House Bill 27 to create the workers compensation budget for 2018-2019. In addition to establishing the budget the bill also amended sections of the Ohio Revised Code that relate to workers compensation law. Mainly among the changes, the bill shortens the statute of limitations for an employee to file a workers compensation claim against Ohio Employers.

Current law requires an employee to bring a workers’ compensation claim within two years from the date of injury or death. Effective September 29, 2017, all workers compensation claims must be filed within

one year from the date of injury or death. After that date, if new claims are not brought within the one year limitation the claim will be forever barred and there can be no recovery. All claims with a date of injury after September 29, 2017 are subject to the new limitation. The amendment attempts to strike a balance between allowing a sufficient time for a claim to be brought while not prejudicing employers by allowing claims to be filed long after any contemporaneous evidence has since vanished."

File: Chap. 6, Employment Litigation

OH: FIRE CHIEF'S AGE / ADA LAWSUIT DISMISSED – DIDN'T FILE WITH EEOC - ALLEGED RACIAL SLURS / BULLYING – REQUIRED TO TAKE "PROFESSIONAL DEVELOPMENT" TRAINING AT OWN EXPENSE

On Dec. 6, 2018, in, U.S. District Court Judge James S. Gwin, granted the City's motion to dismiss. "Plaintiff Keller claims that Defendants discriminated against him because of his age and his disability in violation of federal law by requiring him to complete a physical examination. However, Plaintiff needed to file his age and disability discrimination claims with the Equal Employment Opportunity Commission ('EEOC') before bringing this lawsuit. Because Plaintiff has not exhausted his administrative remedies, the Court dismisses his federal discrimination claims without prejudice."

Facts:

[From Plaintiff's complaint.]

"Plaintiff, Chief Jay W. Keller is a contracted employee with the City of Bucyrus. On July 20, 2017, he was notified and disciplined –while on disability leave for major surgery to his back -in accordance with the due process afforded him under his contract. Unnamed employees accused Chief Keller of essentially using racially insensitive slurs in the workplace and 'bullying' employees/ member of the Bucyrus City Fire Department. Thereafter, the City of Bucyrus –under the leadership and direction of Defendant Mayor Jeffrey Reser and Defendant Safety-Service Director Jeffrey Wagner – engaged in a pattern of conduct, using the disciplinary notice of July 20, 2017 as its basis, that created a hostile work environment for Chief Jay W. Keller, violated the terms and conditions of the Defendant City of Bucyrus and Plaintiff's contract, and engaged in age discrimination and violations of the Americans with Disabilities Act and its state analogue.

Over the course of nearly a year, in order to mitigate his damages and maintain his employment with the Defendant City of Bucyrus, Chief Keller was required by Defendant Mayor Jeffrey Reser and Defendant Safety-Service Director Jeffrey Wagner to undergo unnecessary, age and disability inappropriate trainings and certification for which Plaintiff is now economically liable and for which he has been damaged; Chief Keller was not paid during periods of his contract when he was, in fact, due his normal and regular salary; he was not allowed to work on or otherwise be around the Bucyrus Fire Department for which he was ultimately accountable as chief; he was disciplined for using a device necessary to meet his disability needs in a Defendant City of Bucyrus administrative meeting to which he was invited despite being on leave and under disciplinary sanctions.

***

During the period of time that Plaintiff has acted as Chief of the Bucyrus City Fire Department, he has had 5 total surgeries for various job and personal related injuries….

Prior to the actions leading up to this cause of action, Plaintiff has never been required to undergo a physical training examination to return to duty as Chief of the Bucyrus City Fire Department;

***

On March 18, 2018, Defendants Mayor Reser and Safety Service Director Wagner, acting in their professional capacities on behalf of the Defendant City of Bucyrus, engaged in age discrimination by forcing Plaintiff to undergo a physical training exercise to determine his fitness to return to duty that did not conform to any of the duties and responsibilities incumbent with his position as the Chief of the Bucyrus Fire Department…."

[From Federal Judge's decision]

"Around 2017, Plaintiff took disability leave for major back surgery. Keller's back surgery is not result from work-related injuries. In July 2017, while Plaintiff was still on medical leave, Defendants gave Keller a disciplinary notice, citing alleged racial slurs and bullying.

Subsequently, Defendants placed Plaintiff Keller on unpaid leave. Further, they required Keller to pay for professional development and complete a physical examination. Plaintiff satisfied these physical examination and professional development requirements and returned to work.

On September 28, 2018, Plaintiff brought this action. He claims that Defendant's disciplinary actions broke his employment contract, and unlawfully discriminated against him because of his disability and age."

Holding:

"Because Plaintiff has not exhausted his administrative remedies, the Court dismisses his federal discrimination claims without prejudice.

Footnote 16: The Court notes that Plaintiff Keller may have missed his chance to file claims with the EEOC… Plaintiff was required to file any EEOC complaint within 180 days of the challenged conduct…. Here, the allegedly wrongful conduct appears to have occurred on July 20, 2017 and March 18, 2018.

***

Because the Court has dismissed the federal claims in this case, it declines to exercise its supplemental jurisdiction over the breach of contract claim [under Ohio law] and dismisses it without prejudice. The Court notes, however, that it seriously doubts the breach of contract claim would survive the motion to dismiss."

Legal Lessons Learned: (1) FDs should have written policy regarding when personnel on leave will be required to pass medical or physical fitness for duty testing, and any retraining of job skills; and (2) must timely file EEOC charge to pursue federal ADA case.

See U.S. Department of Justice web:
"Filing a Complaint with the Equal Employment Opportunity Commission.

If you think you have been discriminated against in employment on the basis of disability, you should contact the **U.S. Equal Employment Opportunity Commission** (EEOC). A charge of discrimination generally must be filed within 180 days of the alleged discrimination. You may have up to 300 days to file a charge if there is a State or local law that provides relief for discrimination on the basis of disability. However, to protect your rights, it is best to **contact the EEOC** promptly if discrimination is suspected. After your complaint is filed with the EEOC, the EEOC investigates the charge. If the EEOC determines that there is reasonable cause to believe that the charge is true, the EEOC attempts to conciliate or settle the charge. If conciliation is unsuccessful, the EEOC refers charges against state and local government employers to the Department of Justice. The Department of Justice makes a determination whether to bring a lawsuit based on the charge. If it decides not to bring a lawsuit, the Department issues to the charging party a notice of right to sue. Charges against private employers are retained by the EEOC for a determination of whether to bring a lawsuit based on the charge or issue a notice of right to sue."

File: Chap. 7, Race Discrimination

MI: DETROIT – CITY WIDE LAYOFFS - 11 FF LAWSUIT AGAINST UNION DISMISSED – NO EVIDENCE RACE WAS FACTOR IN UNION INITALLY FOLLOWING CBA [SENIORITY ON FD] INSTEAD OF TIME EMPLOYED WITH CITY

On Feb. 4, 2019, in Eric Peeples, et al. v. City of Detroit, et al, Civil Action No. 13-13858, U.S. District Court Judge Dean F. Cox, Eastern District of Michigan (Southern District), granted the motion for summary judgment filed by Detroit Fire Fighters Association, Local 344, finding: "Plaintiffs have no direct evidence of race discrimination. In opposing the Union's motion, Plaintiffs have not presented any statistical evidence to this Court." The Judge, however, did not require Plaintiffs to reimburse Union for its attorney fees: "The Court also concludes that the Union has not shown that an award of attorney fees against the Plaintiffs themselves is warranted in this case. *Christiansburg Garment Co. v. EEOC*, 434 U.S. 412 (1978) (A district court may, in its discretion, award attorney fees to a prevailing defendant in a Title VII case upon a finding that the plaintiff's action was frivolous, unreasonable, or without foundation, even though not brought in subjective bad faith). Such awards against Title VII plaintiffs are rare, and this Court does not believe one is warranted here."

See also Judge Cox's Jan. 26, 2017 decision where he described the RIF: *Peeples v. City of Detroit*, 891 F.3d at 627-28.

Facts: [From Judge Cox's 2017 decision.]

"On July 18, 2013, the City of Detroit filed for bankruptcy protection. Prior to the filing, on July 2, 2012 the City notified agencies that the City would initiate RIF activities across different agencies, with a goal to lose 2,227 employees through various means, including layoffs. The Detroit Fire Department ("DFD") received notification on June 18, 2012, that the deadline for implementation of layoffs for the July 1, 2012 fiscal year was passing that day, and as of July 2, 2012, the DFD would not be in compliance with its 2012-2013 fiscal budget. Two days later, the City notified the DFFA by letter that layoff notices would be issued in accordance with the collective bargaining agreement ("CBA") between the parties and attached a matrix with the number of reductions to be made, detailed by position. According to this initial matrix,

twenty-two firefighters would be laid off.

To effectuate the RIF, Human Resources Officer Roger Williams applied Human Resources Rule 10, which indicated that the RIF should be based on total city seniority, determined by total number of years as a city employee. Plaintiffs were not included in the group to be laid off. According to Williams, after he created the RIF matrix, the DFFA contested the City's methodology and argued that departmental seniority should apply to layoffs, rather than total city seniority. On July 30, 2012, the DFFA provided the City with lists by departmental seniority. Plaintiffs were included in this list. The next day, the DFFA filed Grievance #17-12, a class action grievance alleging that the City's proposed RIF violated the parties' CBA. On August 10, 2012, the City proceeded with the RIF by departmental seniority, as urged by the DFFA, and laid off twenty-seven firefighters, including ten of the Plaintiffs. Plaintiff Anthony McCloud was demoted from firefighter to fireboat deckhand.

In September 2012, the DFFA changed its position and agreed that total city seniority was in fact the proper method for layoffs under the CBA. Plaintiffs were recalled to work on October 29, 2012. Their layoff had lasted eighty days. In March 2013, the DFFA and the City finalized a settlement, which provided Plaintiffs with backpay, overtime pay, and medical expenses.

***

That is, that under existing Sixth Circuit law, Plaintiff has to show that the Union breached its duty of fair representation in order to prevail on its claim and that is has not shown it can do so here."

6th Circuit holding – Lawsuit Against Union Remanded – New Standard of Title VII Liability:

"The DFFA also moved for summary judgment on June 6, 2016, arguing that Plaintiffs' claim failed because the DFFA did not breach its duty of fair representation to the Plaintiffs, which it urged is 'an essential component of a Title VII race discrimination claim against a union.' The DFFA also argued that Plaintiffs could not prove damages given that they had been reinstated and made whole, and neither compensatory nor punitive damages were available as a matter of law. Finally, the DFFA argued that it should be awarded attorney fees and costs because Plaintiffs' claims were unmeritorious.

***

Assuming arguendo that all Plaintiffs could assert their claims, we proceed to the prima facie case. Plaintiffs argue that they adduced record evidence sufficient to make their prima facie case of intentional discrimination under Title VII. The district court concluded that Plaintiffs failed to adduce either direct or circumstantial evidence to prevail on their discrimination claims. We likewise find, as explained below, that Plaintiffs fail to establish direct evidence proving a fact that requires no inferences or circumstantial evidence to create an inference of discrimination.

***

On appeal, Plaintiffs assert that they have direct evidence— [Plaintiff Eric] Peeples' [deposition] testimony that Williams stated that the union wanted to "save" the white firefighters and submitted the layoff list including Plaintiffs to that end…. Peeples stated that Williams, a City employee, had concluded that the DFFA wanted to 'protect the white boys.' McCloud testified that he heard from Exander Poe that Williams said that the DFFAdid not want to "lay those white boys off." Plaintiffs' argument therefore requires an inference that the City knew of and approved of that discrimination. Accordingly, we find that the statements do not constitute direct evidence of any motive the City harbored.

***

The picture here is similarly incomplete. The City argues that Plaintiffs fail to account for the fact that only ten of the layoffs resulted from the switch between types of seniority to use as a basis for discharge. Plaintiffs also fail to present the racial makeup of the DFD before and after the RIF…. Plaintiffs' statistical evidence is not probative. Furthermore, Plaintiffs provide no legal argument that their statistics are sufficient under this Court's precedent. Accordingly, Plaintiffs' discrimination claims against the City fail."

***

Plaintiffs and the EEOC, amicus in this case, urge that the standards governing a duty of fair representation claim do not govern Title VII discrimination claims against a union, and that the district court relied on reasoning that has been withdrawn.

***

We are persuaded by the reasoning of the Seventh and Ninth Circuits and adopt it here. Accordingly, we reverse the district court's grant of summary judgment in favor of the DFFA. As a result, we also reverse the district court's denial of compensatory and punitive damages, which the court improperly analyzed pursuant to a duty of fair representation claim. Both remedies are available under Title VII. Kolstad v. Am. Dental Ass'n, 527 U.S. 526, 533-34 (1999); Turic v. Holland Hosp., Inc., 85 F.3d 1211, 1215-16 (6th Cir. 1996)."

Legal Lessons Learned: Plaintiffs failed to establish Title VII liability for City or the Local.

File: Chap. 15, Critical Incident Stress Management

IL: PTSD – APPELATE COURT ORDERS DISABILITY PENSION - CHICAGO PARAMEDIC'S TRAUMATIC WORK EXPERIENCES

On Feb. 1, 2019, in Leah Siwinski v. The Retirement Board of the Fireman's Annuity and Benefit Fund of the City of Chicago, the Appellate Court of Illinois (First District) held (3 to 0), "In summary, because the manifest weight of the evidence showed that the plaintiff sustained PTSD arising from an act or acts of duty while working for CFD, and as a result, was disabled from performing any of her assigned duties, we reverse the decision of the Board that denied her a duty disability pension, and reverse the decision of the circuit court, which confirmed the Board's decision."

Facts:

"The plaintiff, in her testimony and affidavit, stated that she began working as a paramedic for CFD in December 2008. Her duties included responding to 911 calls and transporting individuals to hospitals. On December 22, 2010, she and Kelly responded to a "[m]ayday" call involving injured firefighters. When she arrived at the scene, firefighters placed the body of a firefighter whom she recognized on her stretcher. She had transported nonresponsive individuals "quite a few" times without being affected, but "wasn't prepared to have somebody that [she] had worked with dead on [her] stretcher" and felt like it "could have

been [her].” At that moment, she “mentally and emotionally *** turned off” and “couldn’t hear any noise, *** [or] notice any lights.” The rest of the incident was a “blur,” but she finished her shift as required. Later, the plaintiff saw videos and photographs of her carrying the stretcher, and attended the funerals of the firefighters who died.

According to the plaintiff, during the following months, she became hypervigilant, felt startled when the alarm at the firehouse sounded, experienced anxiety while on calls, withdrew from her family and friends, and developed problems in her romantic relationship. In June 2011,she was hospitalized after becoming “near syncopal” while taking a patient’s blood pressure. In August 2011, she went on leave for “non-duty illness,” and multiple doctors told her that the syncope related to anxiety. As she was already seeing a therapist and did not want to “admit” that her syncope was caused by anxiety, she did not seek further treatment and returned to work in March 2012.

The plaintiff stated that, on October 12, 2012, she heard gunshots near her firehouse and was dispatched to the scene of the shooting where a large crowd stood by the body of a victim who had been shot in the head. When the paramedics confirmed that he was dead, people in the crowd closed around them and threw objects, used racial slurs, accused them of not doing their job, and threatened to kill them. Police officers restrained the victim’s sister, who attempted to reach the plaintiff, but she felt ‘frozen in fear’ and thought she would be killed. Although she had been threatened on other calls, that incident caused her to ‘break down,’ and for several weeks, she feared that she would be “shot in retaliation for not saving [the victim’s] life.” Due to the ‘stigma’ of talking about her feelings as a first responder, she did not tell anyone how she felt and enrolled in college courses to avoid thinking about work. However, she began failing her classes, her romantic relationship ended, and she felt herself ‘spiraling out of control.’ She topped cleaning and cooking, showered less frequently, struggled to leave bed, and developed a shopping addiction.

***

The plaintiff further testified that, in November 2013, she was dispatched to a hospital to meet with an ambulance crew that had transported a firefighter who shot himself in the head. She knew the firefighter, and saw him on life support when she arrived. The following month, she began cutting herself as a ‘coping mechanism’ when therapy and medication failed to help. She felt ‘hopeless and alone,’ experienced nightmares, anxiety, and depression, and was ‘afraid of [her] job.’ In January 2014, her symptoms became ‘unbearable’ and she ‘decided that [she] needed to get help.’ On January 25, 2014, she ‘explained the situation’ to Chief Bob Ertl, who placed her on medical leave.

The plaintiff explained that her therapist, Myriah Vargo, directed her to a residential treatment facility where she was diagnosed with Major Depressive Disorder and Post-Traumatic Stress Disorder (PTSD) in February 2014. For five or six months, she attended inpatient and outpatient programs in Illinois and Florida. In October 2014, she began treating with Gilligan, who specialized in PTSD. As of the date of the hearing, she still experienced hypervigilance, isolation, intrusive thoughts, and nightmares. Ambulance lights and sirens produced ‘flashback[s]’ and ‘strong anxiety,’ and wearing a uniform ‘trigger[ed]’ her to cut herself. She could not ‘sleep’ or ‘function’ due to ‘images of calls’ that she had been on and her fear of being ‘violently killed’ like some of the victims she had seen, and added that the December 2010 incident “haunts [her] thoughts every day and night.

***

On December 16, 2015, the Board issued a unanimous written decision denying the plaintiff's application for a duty disability pension. The Board stated that the plaintiff's PTSD diagnosis was 'not well supported' because (1) she did not report her symptoms until several years after the underlying incidents occurred; (2) those incidents were common to paramedic work; (3) her diagnosis relied on 'self-report[ed]' symptoms without 'independent verification'; and (4) her self-reporting was not credible in light of her explanation for failing to provide her mental health history when she applied for her job, her delay in reporting her symptoms to 'CFD or any other treating physician,' and her statements in treatment that suggested 'a possible secondary motivation' for seeking a duty disability pension."

Holding:

"The plaintiff, Leah Siwinski, appeals from an order of the circuit court of Cook County which confirmed a decision of The Retirement Board of the Firemen's Annuity and Benefit Fund of the City of Chicago (Board), denying her a duty disability pension under section 6-151 of the Illinois Pension Code (Code) (40 ILCS 5/6- 151 (West 2016)). For the reasons which follow, we: (1) reverse the decision of the Board; (2) reverse the decision of the circuit court; and (3) remand the matter to the circuit court, with directions.

***

In summary, because the manifest weight of the evidence showed that the plaintiff sustained PTSD arising from an act or acts of duty while working for CFD, and as a result, was disabled from performing any of her assigned duties, we reverse the decision of the Board that denied her a duty disability pension, and reverse the decision of the circuit court, which confirmed the Board's decision."

Legal Lesson Learned: PTSD is a recognized disability issue in the emergency services.

See this April 13, 2018 article: Study: More firefighters died by suicide than in the line of duty in 2017 - A study found that 103 firefighters and 140 police officers died by suicide in 2017, compared to 93 firefighter and 129 officer line-of-duty deaths.

File: Chap. 16, Discipline

MA: NEPOTISM - FIRE CHIEF'S NIECE AND BROTHER ON FD – CITY INFORMED STATE ETHICS BOARD HE MAY HAVE INTERFERED WITH DISCIPLINE – CHIEF RESIGNED, LAWSUIT DISMISSED

On Jan. 19, 2019, in Kevin Robinson v. Town of Marshfield, et al, U.S. District Court Judge Nathaniel M. Gorton granted the Town's motion for summary judgment, and dismissed the former Fire Chief's lawsuit: "The Chief has not met his burden of showing intentional interference. First, defendants' conduct does not rise to the level of spiteful or malignant purpose because there was a legitimate interest in temporarily removing the Chief during the investigation of his alleged ethical misconduct. Moreover, even if this Court assumes arguendo that the Chief has met his prima facie burden of showing improper motive through age discrimination, the Chief has failed to show that such discrimination was the controlling factor in the alleged interference."

Facts:

> "The case arises out of a dispute related to the resignation of Kevin Robinson ('Robinson' or 'The Chief') as the Chief of the Fire Department in Marshfield, Massachusetts. Robinson alleges that he was constructively discharged as Fire Chief in retaliation for lodging internal complaints for age and gender discrimination against other officials in the Town of Marshfield.
>
> ***
>
> In October, 2013, the Chief's niece, Shauna Robinson Patten ('Ms. Patten'), was selected for a full-time firefighter trainee position with the Marshfield Fire Department. Before Ms. Patten began her employment, the Board of Selectmen ('the Board') met with the Chief and he submitted a conflict of interest disclosure form which stated that he would 1) recuse himself from any involvement in the interview or promotion process for which his brother, son or niece (all then employees of his department)became candidates, 2) not make any discretionary assignments resulting in extra pay for his family members and 3) notify the Town of any potential disciplinary situation involving a family member.
>
> During the first year of Ms. Patten's training, two of her supervisors expressed concerns about her ability to make decisions. Upon hearing about those concerns, the Chief asked that Ms. Patten be transferred to his group and, at one point, despite concerns from supervisors, he placed Ms. Patten on 'shift strength' (meaning that she was able to take regular shifts). While defendants contend that Ms. Patten received special treatment during her training, Robinson submits that his niece was subject to gender discrimination by the defendants.
>
> With respect to the Chief's brother, Shaun Robinson, a captain in the Marshfield Fire Department, defendants argue that the Chief conducted a disciplinary hearing without the presence of the Town Administrator or Town Counsel and later improperly reduced the disciplinary punishment meted out to his brother. The Chief responds that the Town Administrator, Rocco Longo ('Longo') gave him permission to reduce the punishment.
>
> ***
>
> Contemporaneously, the Town declined to renegotiate the Chief's contract, which had expired in 2013, and allegedly encouraged him to retire at least three times. The Town also reported the Chief's supervision of family employees to the State Ethics Commission ('the Commission').

***

In January, 2015, Chief Robinson filed a complaint with the Board [of Selectmen] alleging that he was a victim of age discrimination and harassment. The Board retained Attorney Regina Ryan who concluded in February that those complaints were meritless.

That same month, Attorney Mark Smith, whose firm had been retained by the Town in November, 2014, to investigate allegations of conflict of interest, issued a report ("the Smith Report") which concluded that the Chief and his brother violated one or more sections of the Massachusetts conflict of interest laws. He recommended that the matter be referred to the Commission for further proceedings.

Following a February, 2015, meeting, the Board placed the Chief on paid administrative leave for 60 days. The next day, he was notified of his right to a public hearing to demonstrate why he should not be removed for cause. Nine days later, the Chief tendered his resignation as a result of which the [State Ethics] Commission informed the Town that its investigation into the Chief's alleged misconduct would be terminated."

Holding:

"The Chief alleges that he was faced with a take-it-or-leave-it choice: he could retire or be discharged. In support of that claim, he points to a series of incidents in which the Town refused to renegotiate his contract, pressured him to retire, threatened to damage his reputation if he refused to retire, initiated an internal investigation against him and voted to place him on paid administrative leave.

This Court finds that such allegations do not rise to the level of constructive discharge. Despite the Town's encouragement to retire and refusal to renegotiate his employment contract, the Chief continued his employment until he resigned in 2015. Thus, unlike the employee in Herbert v. Mohawk Rubber Co., the Chief did not suffer a 'forced choice' with respect to retirement. Cf. Herbert v. Mohawk Rubber Co.,872 F.2d 1104, 1113 (1st Cir. 1989) (holding that an early retirement offer is distinguished from a discharge when the employee has the choice to remain employed).

***

As noted previously, the defendants have offered a legitimate, nondiscriminatory reason for placing the Chief on administrative leave based on the fact that an independent investigation conducted by retained counsel concluded that he had violated several conflict of interest laws.

Legal Lessons Learned: Fire Chiefs, in states that do not prohibit close family members on their FD, must be extremely careful to avoid even an "appearance" of conflicts of interest.

See list of state statutes on Nepotism: "Some states may take a broader approach by denying any relative of a qualifying official from being hired by the same branch of government. Other states might more narrowly prevent a public official from having direct supervisory or hiring authority over a relative. A legislator even advocating on behalf of a relative before a hiring or appointing authority might be a violation in some states."

See also Ohio Ethics Commission – Information Sheet No. 1, RESTRICTIONS ON NEPOTISM OR HIRING FAMILY MEMBERS.

File: Chap. 17, Arbitration / Mediation

NY: MINIMUM MANNING OF 15 FF / SHIFT –8 CAPTAINS DEMOTED IN 2015 - UNION WANTS BINDING ARBITRATION – CITY OBTAINED INJUNCTION, COURT OF APPEALS RULES FOR UNION - CITY SEEKS APPEAL TO NY'S HIGHEST COURT

On Feb. 1, 2019, City of Watertown v. Watertown Professional Firefighters Association, Local 191, 2019 NY Slip Op 00753, the New York Supreme Court, Appellant Division, overturned a lower court's decision and held (5 to 0) that any changes in minimum manning shall go to arbitration under the collective bargaining agreement. "Contrary to the City's contention, the staffing provisions do not operate to mandate a total number of firefighters that must be employed; rather, they relate solely to the minimum number of firefighters required to be present during shifts and regular operations…."

Facts:

[From Feb. 5, 2019 article: "City to Take Firefighters Union to NY Supreme Court."]

> "Last January, Judge McClusky ruled in the city's favor to block arbitration over the minimum manning clause, which requires that 15 firefighters must be on duty at all times. *** In 2015, the city demoted eight fire department captains, leaving firefighters to cover those duties. The move caused the dispute to become more contentious. The 68-member union has been without a contract since July 2014."

[From Court of Appeals decision.]

> "Petitioner City of Watertown (City) commenced this proceeding pursuant to CPLR article 75 seeking a permanent stay of arbitration of a grievance filed by respondent, the collective bargaining representative for the employees of the City's Fire Department.
>
> In its grievance and demand for arbitration, respondent alleged that the City violated, among other things, certain provisions of the parties' collective bargaining agreement (CBA) relating to minimum staffing levels for shifts and regular operations within the Fire Department (staffing provisions).
>
> [The trial court judge] granted the petition, determining that the staffing provisions are unenforceable job security provisions that violate public policy and, therefore, may not be arbitrated. Respondent appeals, and we now reverse."

Holding:

> "Further, the record establishes that the parties contemplated during their negotiation of the CBA that the staffing provisions were necessary to protect the health, safety and well-being of respondent's members,

and, contrary to the City's contention, the staffing provisions are not tantamount to ‘no-layoff’ clauses (see id.). We therefore conclude that the court erred in determining that the staffing provisions are job security provisions that are not subject to arbitration.

***

Where, as here, the CBA contains a broad arbitration clause, our determination under that part of the analysis ‘is limited to whether there is a reasonable relationship between the subject matter of the dispute and the general subject matter of the CBA’ (Matter of City of Watertown [Watertown Professional Firefighters' Assn. Local 191], 152 AD3d 1231, 1232-1233 [4th Dept 2017], lv denied 30 NY3d 908 [2018] [internal quotation marks omitted]; see Board of Educ. of Watertown City Sch. Dist., 93 NY2d at 143). Because respondent references the staffing provisions in its labor grievance, the grievance ‘is reasonably related to the general subject matter of the CBA’ (Watertown Professional Firefighters' Assn. Local 191, 152 AD3d at 1233; see Lockport Professional Firefighters Assn., Inc., 141 AD3d at 1088). Thus, we conclude that the parties agreed to arbitrate the labor grievance.”

Legal Lessons Learned: Courts favor arbitration regarding CBA disputes, unless it involved items that are clearly management right (such as lay-offs).

The City has reportedly decided to ask New York’s highest court [Court of Appeals – 7 Justices] to hear their appeal. See Feb. 5, 2019 article: “City to Take Firefighters Union to NY Supreme Court.” “WATERTOWN — Three days after losing a lower court’s ruling, the city is taking steps to take an arbitration case against the city’s firefighters’ union to the state’s highest court. *** Coming out of a lengthy executive session, Mayor Joseph M. Butler Jr. said on Monday night the City Council agreed to file the appeal with the Court of Appeals, the state’s highest court…. With the highest court granting just a few of those requests, the city must petition the Court of Appeals and convince the seven-judge panel to take the case because the lower court’s decision was unanimous. ‘It’s a long shot,’ the mayor said.”

See also Feb. 7, 2019 article: “Lawyer Fees For Watertown Fire Department Dispute Nearing $800,000.”