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MAY 2019 – FIRE & EMS LAW Newsletter

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THREE "BEST TERM" PAPERS - CONGRATULATIONS:

- Illinois Firefighter Peer Support: Answering the Call for Help (Vish)
- Firefighter Health and Wellness (DiGiannantoni)
- Community Paramedicine (Palmer)

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File: Chap. 1, American Legal System

NY: 911 CALL - ELEVATOR SUDDENLY DROPPED WHILE FDNY AT SCENE – LAWSUIT DISMISSED, “SPECIAL DUTY” RULE

On April 24, 2019, in Daniel Ortiz v. City of New York, et al, the Supreme Court of New York, Appellate Division, Second Department, 2019 NY Slip Op 03062, held (5 to 0) that the lawsuit was properly dismissed by Kings County judge.

> “Here, the City defendants were acting in a governmental capacity when the plaintiff was injured during the firefighters' rescue operation (see Kadymir v New York City Tr. Auth., 55 AD3d 549, 552). The inquiry then turns to whether the City defendants owed the plaintiff a special duty (see Applewhite v Accuhealth, Inc., 21 NY3d at 426). Contrary to the plaintiff's contention that no special duty was required, a special duty was ‘an essential element of the negligence claim itself’ (id.). Because the plaintiff concedes that the City defendants owed him no special duty of care, ‘the analysis ends and liability may not be imputed to the’ City defendants (id.).”

Facts:

> “On July 23, 2014, the plaintiff was in a moving elevator in the Brooklyn Tabernacle when the elevator came to a stop. After the New York City Fire Department responded to a 911 call regarding the elevator, the

elevator dropped suddenly, without warning. The elevator then came to an abrupt stop, allegedly injuring the plaintiff's knee. The plaintiff commenced this personal injury action against the City of New York, Comptroller of the City of New York, New York City Fire Department (hereinafter collectively the City defendants), Brooklyn Tabernacle, and Prestige Elevator, Inc. (hereinafter Prestige), the elevator maintenance company."

Holding:

"When a plaintiff commences a negligence action against a municipality, 'a court must [first] decide whether the municipal entity was engaged in a proprietary function or acted in a governmental capacity at the time the claim arose' (Wittorf v City of New York, 23 NY3d 473, 478-479 [internal quotation marks omitted]). 'If the municipality's actions fall on the proprietary side, it is subject to suit under the ordinary rules of negligence applicable to nongovernmental parties' (id. at 479 [internal quotation marks omitted]). 'If it is determined that a municipality was exercising a governmental function, the next inquiry focuses on the extent to which the municipality owed a special duty' to the injured party' (Applewhite v Accuhealth, Inc., 21 NY3d 420, 426). 'The core principle is that to sustain liability against a municipality, the duty breached must be more than that owed the public generally' (id. at 426 [internal quotation marks omitted]). 'It is the plaintiff's obligation to prove that the government defendant owed a special duty of care to the injured party because duty is an essential element of the negligence claim itself" (id.). In situations where the plaintiff fails to meet this burden, the analysis ends and liability may not be imputed to the municipality that acted in a governmental capacity' (id.). If a plaintiff 'cannot overcome the threshold burden of demonstrating that defendant owed the requisite duty of care, there will be no occasion to address whether defendant can avoid liability by relying on the governmental function immunity defense' (Valdez v City of New York, 18 NY3d 69, 80). The special duty rule 'operates independently of the governmental function immunity defense, which precludes liability even when all elements of a negligence claim—including duty—have been proved' (id. at 77).

Here, the City defendants were acting in a governmental capacity when the plaintiff was injured during the firefighters' rescue operation (see Kadymir v New York City Tr. Auth., 55 AD3d 549, 552). The inquiry then turns to whether the City defendants owed the plaintiff a special duty (see Applewhite v Accuhealth, Inc., 21 NY3d at 426). Contrary to the plaintiff's contention that no special duty was required, a special duty was 'an essential element of the negligence claim itself' (id.). Because the plaintiff concedes that the City defendants owed him no special duty of care, 'the analysis ends and liability may not be imputed to the' City defendants (id.). Furthermore, because the plaintiff 'cannot overcome the threshold burden' regarding a special duty, we have 'no occasion to address' the plaintiff's argument that the City defendants were not entitled to a defense of governmental function immunity (Valdez v City of New York, 18 NY3d at 80)."

Legal Lessons Learned: The "special duty rule" protects municipalities when performing a governmental function.

File: Chap. 2, LODD / Safety

CA: FFs STRUCK HELPING MOTORIST CROSS HIGHWAY – HE FIRST DELAYED CROSSING - LAWSUIT NOT BARRED BY CA "FIREMAN'S RULE"

On April 30, 2019, in Moraga-Orinda Fire District v. Brian Favro, the Court of Appeal of California, First Appellate District, held (3 to 0) in unpublished decision, that trial court improperly dismissed the fire department's lawsuit seeking to recover cost of workers compensation for injured firefighters.

> "There is thus a triable issue of material fact as to whether Favro was negligent in failing to cooperate with the firefighters before they were struck by Briseno-Castaneda's SUV. If that issue were to be resolved in plaintiffs' favor, section 1714.9, subdivision (a)(1), would apply, and the firefighter's rule would not. Because there is a triable issue of material fact, the trial court erred in granting summary judgment."

Facts:

> "On a wet, rainy morning in the winter of 2012, Moraga-Orinda Fire District firefighters Michael Rattary, Kelly Morris, and Stephen Rogness (collectively, firefighters) were on the shoulder of eastbound Highway 24, tending to individuals who had recently been involved in a four-car pileup just east of the Caldecott Tunnel. Their fire engine was parked behind the four cars on the shoulder, with the fire engine purposefully blocking the lane closest to the shoulder. Respondent Favro then came speeding through the tunnel. Favro lost control of his vehicle, hit the fire engine, and ultimately spun to a stop in the path of oncoming traffic. To help Favro, the three firefighters left the shoulder of the road where they had been tending to the original accident. As they walked Favro from the middle of Highway 24 toward the shoulder, the three firefighters (and Favro) were struck and injured by yet another vehicle that had spun out of control–this time, an SUV driven by Salvador Briseno-Castaneda.
>
> Plaintiff Moraga-Orinda Fire District (Moraga-Orinda) sued Favro and Briseno-Castaneda in a subrogation action seeking to recover workers' compensation benefits paid to the injured firefighters. Plaintiff Rogness intervened as a plaintiff in Moraga-Orinda's action, while plaintiffs Rattary and Morris sued Favro and Briseno-Castaneda separately for personal injury. The trial court consolidated these actions with an earlier lawsuit filed by Favro against one of the drivers involved in the initial four-car pileup.
>
> Favro moved for summary judgment against Moraga-Orinda and the firefighters (collectively, plaintiffs). He argued that their lawsuits were barred by the firefighter's rule, a common law doctrine precluding emergency responders from suing a defendant for negligence when the negligent conduct in question caused the emergency that summoned the responders. On that basis, the trial court granted summary judgment in favor of Favro."

Holding:

> "On appeal, Moraga-Orinda argues that by granting summary judgment for Favro, the trial court erred in two respects. First, Moraga-Orinda contends that the facts of the case fall within the common law 'independent cause' exception to the firefighter's rule.
> In the alternative, Moraga-Orinda maintains that there are triable issues of fact which, if resolved in Moraga-Orinda's favor, would place the matter within the statutory exceptions to the firefighter's rule set forth in Civil Code1section 1714.9, subdivisions (a)(1) and (a)(2). In their consolidated appeal, the firefighters join the arguments raised by Moraga-Orinda and raise none in addition. We agree with plaintiffs' argument concerning section 1714.9, subdivision (a)(1) and reverse on that basis alone.
>
> ***

Firefighters Rattery, Rogness, and Morris walked into the No. 3 lane to tend to Favro.Favro told them that he was ‘really shook up’ and that he thought he “was going a little too fast.’ Seeing Favro get out of his car, the firefighters told him to follow them back to the right shoulder. Rather than following the firefighters immediately, Favro first walked around to the rear of his car and then back tot he driver’s side; he ultimately followed the firefighters’ recommendation. According to Rattery, ‘probably a couple minutes’ passed between the firefighters’ request that Favro accompany them and Favro’s eventual cooperation in that regard. As Rattery, Rogness, and Morris were escorting Favro to the right shoulder, Briseno-Castaneda lost control of his SUV after he drove through a large puddle; the vehicle flipped over, striking and injuring Favro and all three firefighters. Bristeno-Castaneda’s vehicle did not hit Favro’s car or any other vehicle before striking the group of four.

***

As originally adopted, ‘[t]he ‘[firefighter]'s rule’ . . . negates liability to [firefighters] by one whose negligence causes or contributes to the fire which in turn causes the death or injury of the [firefighter].’ (Giorgi v. PacificGas & ElectricCo.(1968) 266 Cal.App.2d 355, 357.) ‘The [firefighter]'s rule is primarily based on the principle of law denominated assumption of risk.’(Lipsonv. Superior Court(1982) 31Cal.3d 362, 370(Lipson).) ‘In terms of duty, it may be said there is none owed the [firefighter] to exercise care so as not to require the special services for which he is trained and paid.’ (Calatayud v. State of California(1998) 18 Cal.4th 1057, 1061, quoting Walters v. Sloan(1977) 20 Cal.3d 199, 205.

There are, however, judicial and statutory exceptions to the firefighter’s rule. The ‘independent cause’ exception applies ‘when the [firefighter’s] injuries are proximately caused by tortious conduct independent from that which was responsible for the summoning of the [firefighter]. In that case, the [firefighter’s] rule does not bar recovery.’ (Lipson, supra, 31 Cal.3d at p. 376.) Separately, section 1714.9, subdivision (a)(1) provides that the firefighter’s rule does not apply when the defendant’s negligent ‘conduct causing the injury occurs after the person knows or should have known of the presence of the . . . firefighter.’ Subdivision (a)(2) of the same section further excepts from the firefighter’s rule those cases ‘where the conduct causing injury violates a statute, ordinance, or regulation, and the conduct causing injury was itself not the event that precipitated either the response or presence of the . . .firefighter.’

***

A reasonable factfinder might well conclude that by prolonging the firefighters’ exposure to oncoming traffic, Favro’s alleged delay increased the risk of the firefighters being struck by another vehicle. Accordingly, if a jury were to conclude that Favro was negligent in delaying, the exception in subdivision (a)(1) would apply to that delay.”

Legal Lessons Learned: The California statute is a helpful exception to Fireman’s Rule – negligent conduct after individual “knows of the presence of the firefighter.”

File: Chap. 3, Homeland Security

NY: 2nd CIRCUIT – DEPORTATION OF OUTSPOKEN ACTIVIST SUSPENDED - "OUTRAGEOUS COMMENTS" BY ICE DIRECTOR

On April 25, 2019, in Ravidath Ragbir v. Thomas D. Homan, Director of ICE, the U.S. Court of Appeals for 2nd Circuit, held (2 to 1) that deportation order is suspended of the outspoken Executive Director of the New Sanctuary Coalition (which works to protect New York immigrant families from deportation). Congress cannot deprive federal courts of power to hold habeas corpus hearings when there is alleged violation of free speech under First Amendment.

> "To allow this retaliatory conduct to proceed would broadly chill protected speech, among not only activists subject to final orders of deportation but also those citizens and other residents who would fear retaliation against others. In short, the Government's alleged conduct plausibly fits within the 'outrageous [ness]' exception to AADC."

Facts:

> "Ragbir, a native and citizen of Trinidad and Tobago, lives in Brooklyn, NewYork. He became a lawful permanent resident of the United States in1994. His wife is an American citizen, as is their daughter. In2001, Ragbir was convicted of wire fraud and conspiracy to commit wire fraud in the United States District Court for the District of New Jersey, and he was sentenced to 30 months' imprisonment.
>
> ***
> ICE released Ragbir from its detention in February2008, having determined that he was not a flight risk. Ragbir has since continued to live in the United States under orders of supervision that authorized him to remain and work in the United States, provided that he complied with his supervision conditions. He also received four administrative stays of removal from ICE: in 2011, 2013, 2014, and 2016.
>
> ***
>
> After his release from immigration detention in2008, Ragbir became an outspoken activist on immigration issues, including publicly criticizing ICE. The New Sanctuary Coalition of New York City, which he founded, sends volunteers to accompany aliens to court dates and ICE check-in appointments. Ragbir maintained a 'regular presence' outside ICE's office and Department of Justice immigration courts in Manhattan, including leading weekly prayer vigils, called 'Jericho Walks,' with religious faith leaders.
>
> ***
>
> On March 9, 2017, Ragbir appeared for a scheduled check-in with ICE officials in New York City. He was accompanied by clergy and elected officials, including a New York State Senator, the New York City Council Speaker, and other New York City Council Members. At the check-in, ICE New York Field Office Director Thomas Decker confronted Ragbir and attempted to send away then individuals who had accompanied him. This confrontation garnered negative press coverage for ICE in prominent news outlets, in which Ragbir and several of the politicians who went with him to the check- in expressed criticism of ICE and U.S. immigration policy.
>
> Footnote: E.g., LizRobbins, Once Routine, ImmigrationCheck- Ins Are Now High Stakes,N.Y.Times (Apr.11,2017), NickPinto, Behind ICE's Closed Doors,TheMostUn-American Thing I've Seen, VillageVoice (Mar.10,2017)

***

On January 5, 2018, Micah Bucey, a minister in New York City, along with three other Faith leaders, had a meeting with ICE's New York Field Office Deputy Director Scott Mechkowski at ICE's office in Manhattan, to discuss Montrevil's case [Jean Montrevil, a co-founder of Ragbir's New Sanctuary organization, who was deported six day earlier] and the clergies' concern that ICE had been surveilling individuals outside a church. According to Ragbir's complaint and a sworn declaration submitted byBucey, Mechkowski stated at the meeting,

> 'Nobody gets beat up in the news more than we do, every single day. It's all over the place,..how we're the Nazi squad, we have no compassion.'

Mechkowski then stated,

> 'The other day Jean [Montrevil] made some very harsh statements....I'm like,' Jean, from me to you...you don't want to make matters worse by saying things.'

Unprompted, Mechkowski then brought up Ragbir,stating,

> 'Read something that Ravi [Ragbir] wrote, [stating]"do you think its easy walking around with a target [onyou]?' App'x253.7

Mechkowski stated that it,

> 'Bother[ed]' him that 'there isn't anybody in this entire building that doesn't...know about Ravi. Everybody knows this case. No matter where you go....'App'x253.1

Mechkowski also stated that Ragbir and Montrevil's cases were the two most high-profile cases that ICE had in New York City.

***

Ragbir's next check-in occurred on January11,2018. At the check-in meeting, Mechkowski told Ragbir that officials had decided that morning to deny Ragbir's application for a renewed stay of removal and that ICE would now enforce the removal order against him. Ragbir later learned that his current stay of removal, which was to last eight more days, had been revoked by ICE.

That same day, ICE detained Ragbir and transferred him to Florida, in preparation for his removal. He was detained in Florida for two weeks. During that period, Ragbir's counsel filed a petition for a writ of habeas corpus in the United States District Court for the Southern District of NewYork, which the district court granted on January29, 2018.

Ragbir was released that day, but ICE ordered him to check in again on February10,2018, and to bring luggage for his removal. A day before the February10 check-in was to occur, Ragbir filed this action in the United States District Court for the Southern District of New York. Later that day, the Government stipulated that Ragbir's removal would be stayed pending resolution of his motion for a preliminary injunction, which he filed onFebruary12, 2018."

Holding:

"We conclude that Ragbir states a cognizable constitutional claim, and although Congress intended to strip all courts of jurisdiction over his claim, the Suspension Clause of the Constitution none the less requires that Ragbir may bring his challenge through the writ of habeas corpus. Accordingly, we vacate the district court's order and remand the case.
***

First Amendment speech is preeminent among the liberties that the Constitution protects. Indeed,'[i]f there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics...or other matters of opinion.' Janus v. Am. Fed'n of State, Cty. & Mun. Emps., Council 31, 138S.Ct.2448,2463(2018) (quoting West Va. Bd .of Educ. v. Barnette, 319 U.S.624,642(1943))."

Legal Lessons Learned: Inappropriate comments by governmental officials can be viewed as deprivation of Constitutional rights of individuals.

See article about the decision: "Split 2nd Circuit Panel Finds 'Outrageous' ICE Conduct Revives Activist's Removal Suit."

File: Chap. 3, Homeland Security

CT: WIDOW OF 9/11 VICTIM AT WORLD TRADE CENTER – $1.2 MILLION FED. FUNDS DAUGHTER – WIDOW CONTROLS – NOT PROBATE COURT

On April 16, 2019, in Carolyne Y. Hynes v. Sharon M. Jones, the Connecticut Supreme Court (7 to 0) held that the widow had full control of the federal dollars paid to her daughter, and did not need Probate Court guardian ad litem approval for spending of these funds.

"We conclude that our state statutes did not grant the Probate Court jurisdiction to monitor the plaintiff's use of the fund award or to prohibit the plaintiff from using that award in the absence of that court's approval."

Facts:

[From April 15, 2018 article: "Conn. Supreme Court Rules for 9/11 Widow Re: Victim's Compensation Award,"]

"Connecticut's high court has unanimously reversed a ruling against a Weston woman who filed suit for control over a victim's compensation award she received on behalf of her daughter after the death of her husband in the Sept. 11, 2001, terrorist attacks. Carolyne Hynes was pregnant with her daughter, Olivia, when her husband, Thomas Hynes, was killed in the tragedy while working for Thomson Financial Services at the World Trade Center. Following Olivia's birth in March 2002, she and Carolyne were approved as beneficiaries of the September 11th Victims Compensation Fund, which awarded Olivia approximately $1.3 million and Carolyne $1.2 million. Olivia's share of the award was paid to her mother as a representative payee.

Connecticut's Probate Court initially assigned attorney Brock T. Dubin as guardian ad litem for Olivia, and in 2008 a successor, Sharon M. Jones, was appointed by Probate Judge Anthony DePanfilis. In the meantime, Hynes moved from her original home town of Norwalk to a new house in Weston. During probate proceedings DePanfilis alleged Hynes had misspent some of the money

awarded to Olivia, which Hynes' attorney, Michael P. Kaelin, principal at Stamford's Cummings & Lockwood, said was false and unsupported by evidence.

The Probate Court insisted that Olivia's share of the benefits be placed into a guardianship account and ultimately froze the funds."

Holding:

"The decedent was killed in the September11, 2001 terrorist attack on the World Trade Center and died intestate. The plaintiff and the decedent resided in the city of Norwalk at the time of his death. On March 28, 2002, the plaintiff gave birth to their daughter, Olivia. On April 24, 2003, the plaintiff filed an application with the Probate Court seeking appointment as the administrator of the decedent's estate. The Probate Court granted the application and appointed Attorney Brock T. Dubin as guardian ad litem for the minor child.

***

After her appointment as administrator of the decedent's estate, the plaintiff filed a claim for compensation from the fund. By letter to the plaintiff, dated June 3,2004, the fund's special master, Kenneth R. Feinberg,6authorized a total award of $2,425,321.70. Specifically, the plaintiff was awarded $1,153,381.58 as a ''[b]eneficiary,' and the minor child was awarded $1,271,940.12 as a '[b]eneficiary.'

***

Following the terrorist attacks of September 11, 2001, Congress created the fund in connection with the Air Transportation Safety and System Stabilization Act (Stabilization Act), Pub. L. No. 107-42, 115 Stat. 230(2001). The express purpose of the fund was 'to provide compensation to any individual (or relatives of a deceased individual) who was physically injured or killed as a result of the terrorist-related aircraft crashes of September 11, 2001.'' Stabilization Act § 403, 115 Stat.237. A special master was appointed by the United States Attorney General to administer the fund, promulgate 'procedural and substantive rules,' and determine eligibility for compensation from the fund. Stabilization Act §§ 404 (a), 405 (b) (1) (A), 115 Stat. 238. Congress specified that the following individuals were eligible for compensation from the fund: (1) those present at the World Trade Center, the Pentagon, or the site of the aircraft crash in Shanksville, Pennsylvania, at the time, or in the immediate aftermath, of the terrorist related aircraft crashes on September 11, 2001, who suffered physical harm or death as a result of those crashes; (2) passengers and crew members on the four aircraft involved; and (3) ''in the case of a decedent who is an individual described in [one of the two preceding categories], the personal representative of the decedent who files a claim on behalf of the decedent.' Stabilization Act § 405 (c) (2), 115 Stat. 239.

***

[B]ecause the fund paid the award to the plaintiff in express contemplation of the absence of probate court supervision of her receipt and use of the award, we conclude that a fund award paid directly to a representative payee for the benefit of her minor child is not property to which the minor child is entitled or property belonging to the minor child within the meaning of §§ 45a-629 (a) and 45a-631 (a), respectively."

Legal Lessons Learned: Widow now has full discretion on how to spend funds granted to her minor child.

File: Chap. 4: IC / Training

NY: FDNY APPLICANT - PLED GUILTY MJ – CIVIL SERVICE COMM. PUT HIM BACK ON ELIGIBILITY LIST – LIST NOW EXPIRED - NOT HIRED

On April 18, 2019, In The Matter Of The Application Of Christopher Redden v. The City of New York, a judge on NY Supreme Court, Kings County, denied the applicant's request to be placed on a "special eligible list." Redden v. City of N.Y., 2019 NY Slip Op 50647(U) (N.Y. Sup. Ct., 2019).

> "Being named on an eligible list does not create any vested right to be appointed; at most it conveys the right to be considered and the possibility of an appointment. *** Thus, the FDNY, as a civil service department, has the discretion to disqualify a candidate on the eligible list who has been found guilty of a crime.

Facts:

> "This case addresses the issue of whether the Fire Department of the City of New York ('FDNY' or 'respondent') acted in violation of lawful procedure when it denied a candidate who had been disqualified from being on an eligible list, after pleading guilty to a misdemeanor, the right to be hired or placed on a special eligible list.
>
> ***
>
> Petitioner Christopher Redden ('petitioner' or 'Redden') took and passed Civil Service Exam No. 2000 for a position as a firefighter for the FDNY, which made him eligible to obtain a job as a firefighter. His name was placed on an "eligible list" created under Civil Service Law ('CSL') § 61. On October 7, 2016, petitioner was arrested and charged with disorderly conduct because his co-worker in a van with him possessed marijuana.
>
> On May 11, 2017, Mr. Redden pled guilty to possession of marijuana which, under New York State Law, constitutes a misdemeanor. On May 31, 2017 the FDNY Bureau of Human Resources sent Redden a Final Notice of Disqualification ('Notice') which stated that Redden was not qualified for Appointment because of Character - Arrest/ conviction history- and employment history. The Notice informed Redden that he had 30 days to appeal the determination and Redden timely appealed the decision on June 7, 2017.
>
> By Decision and Order dated June 12, 2017, the Civil Service Commission ('CSC') vacated Redden's disqualification based upon the fact that there was insufficient time prior to the expiration of the list on June 26, 2017 to hear his the appeal and complete the post-examination certification process; i.e., conducting a background check and determining whether petitioner was fit to perform the duties of a firefighter. The order noted that Redden could list the CSS's reversal of his disqualification on future applications for employment.
>
> Petitioner commenced this article 78 proceeding on June 26th - the date that the eligible list expired - claiming that his disqualification was arbitrary and capricious and contrary to law. Redden claims that the FDNY's reliance on his employment history was arbitrary because he was continually employed and the FDNY investigator never even called his current employer who would have given him a good reference. He also claims that FDNY candidates with 'far more egregious personal histories have been deemed qualified'

to become members of the FDNY. Finally he claims that he is too old to take the next FDNY exam so that it is necessary for him to be placed on the special eligibility list."

Holding:

"Pursuant to Article V, § 6 of the New York Constitution, periodic examinations are given to candidates for appointment to civil service positions, including firefighter positions and, once the results of an examination are calculated, an eligible list is established which places the successful candidates in order of their grades. The list continues for not less than one nor more than four years, and terminates upon the establishment of a new list. Appointments to civil service positions must be made from the names on the list but the appointing authority has the discretion to select any one of the top three candidates who are willing to the accept the appointment. CSL § 61(1); Mtr of Deas v. Levitt, 73 NY2d 525, 529 (1989).

***

Being named on an eligible list does not create any vested right to be appointed; at most it conveys the right to be considered and the possibility of an appointment. Andriola v. Ortiz, 82 NY2d 320, 324 (1993); Cassidy v. Municipal Civil Service Com., 37 NY2d 526, 529-530 (1975). In recognition that 'examination success cannot reveal any possible defects of personality, character or disposition which may impair the performance of ones duties in a civil service position,' the 'one-of-three' rule affords an appointing authority with the discretion to individually consider each candidate and decline to promote the highest scoring candidate on an eligible list, so long as it appoints one of the three top scoring candidates.' Mtr. Of Stanley v. NY State Dept. Of Corrections, 145 AD3d 1160, 1162 (3d Dept. 2016) citing to Mtr. Of Professional, Clerical, Tech. Empls. Assn. [Buffalo Bd. of Educ.], 90 NY2d 364, 375 (1997). Pursuant to CSL§ 50(4), the civil service department may investigate the qualifications and background of a candidate who has passed the examination and disqualify a candidate from appointment if it finds that he is unfit to perform the duties of the position in a reasonable manner. Thus, the FDNY, as a civil service department, has the discretion to disqualify a candidate on the eligible list who has been found guilty of a crime.

***

Here, Redden filed his administrative appeal before the list expired and was placed back on the eligible list for 14 days. However, Redden never challenged the validity of the list itself, much less successfully challenged it, the second crucial component that an applicant must show before being put on a special eligibility. See, Mtr of Carozza v. City of NY 37 AD3d 247 (1st Dept. 2007) (to be placed on eligible list, petitioner must challenge validity of list itself prior to its expiration); Mtr of Pena v. NYC, 27 AD3d 293 (1st Dept. 2006) (only if a petitioner's challenge to the list itself was successful would a petitioner have a remedy that comports with the NY Constitution, 'in that the original list would have had no legal existence, and thus could not have expired, allowing for extension of a 'corrected list'). In light of the above, the petition is denied. This constitutes the Decision and Order of the Court."

Legal Lessons Learned: After eligibility list expires, applicant must wait for next exam. If he is then too old to apply, then he is without a remedy.

File: Chap. 7, Sexual Harassment

NE: FEMALE FF "HOSTILE WORKPLACE" LAWSUIT MAY PROCEED – JUDGE REF. MALE CAPTAIN'S $1.1M JURY VERDICT AGAINST FD

On April 22, 2019, in Manda Benson v. City of Lincoln, Senior U.S. District Court judge Richard G. Kopf, denied the City's motion to dismiss:

> "In yet another lawsuit [Footnote 1] alleging that employees of the City of Lincoln and Lincoln Fire and Rescue … discriminated against, retaliated against, and created a hostile work environment for female firefighters on the basis of sex and/or national origin, Plaintiff Amanda Benson asserts in her Second Amended Complaint (Filing No. 18) the following causes of action ('COA') against the City of Lincoln and eight other Defendants in their individual and official capacities…
>
> Footnote 1: *See Hurd v. City of Lincoln* (No. 4:16CV3029) (D. Neb. 2016) and *Giles v. City of Lincoln* (No. 4:17CV3050) (D. Neb. 2017).
>
> ***
>
> Footnote 9: The court takes judicial notice of the jury verdict in the amount of $1,177,815.43 in *Hurd v. City of Lincoln*, No. 4:16CV3029, Filing No. 250 (D. Neb. Feb. 26, 2019), in favor of Troy Hurd and against the City of Lincoln on Hurd's Title VII and NFEPA claim that he was retaliated against after complaining about sexual and national-origin discrimination of a fellow female LF&R firefighter and the resulting hostile work environment. Hurd had complained about the discrimination and hostile work environment to LF&R personnel, City management, and the NEOC/EEOC."

Facts:

> "Plaintiff alleges the following specific facts, among many others, in support of the above allegations ***
>
> • When LF&R Captain Mahler learned that Plaintiff would be replacing a male firefighter at Station 8, Mahler was visibly upset and had a "verbal confrontation" with co-workers. When Plaintiff began her service at Station 8, Mahler refused to speak to her and did not review rules, expectation, or procedures with her. (Filing No. 18 ¶¶ 20-22.) When Mahler eventually spoke to Plaintiff, he was "demeaning and condescending." (*Id.* ¶ 34.)
>
> • Unlike male firefighters, Mahler did not allow Plaintiff to participate in the "standard rotation" on the truck for engine firefighters, thereby denying Plaintiff training "that would allow her to perform her job duties more effectively and assist her in her career trajectory." (*Id.* ¶¶ 23-24, 30.) When Plaintiff questioned Mahler about his failure to include her in the truck rotation, Mahler told her "she should stick with medical specialties because typically women are less mechanically-minded than men." (*Id.* ¶ 30.)
>
> • Mahler told Plaintiff she could not perform roof-venting operations because she did not own a fall-protection belt, despite the fact that LF&R policy did not mandate such belts. Other similarly situated male firefighters who did not purchase fall-protection belts were allowed to vent roofs under Mahler. (*Id.* ¶ 30.) Plaintiff eventually purchased a fall-protection belt, but Mahler stated that Plaintiff "had still not proven to him that she was trained to his standards." (*Id.* ¶ 38.) Mahler also refused to train Plaintiff on rope rescue and rigging because "it was not his job to train her." (*Id.* ¶ 33.)

***

Plaintiff was eventually forced to surrender her Station 8 assignment to become a "floating firefighter" because "the environment was so toxic and retaliatory towards her she felt she had no other option." (*Id.* ¶ 113.) Defendants McDaniel and Casady tried to force Plaintiff to stay at Station 8, but Plaintiff refused because the situation had not been remedied. After discussing her options with newly appointed LF&R Fire Chief Michael Despain, Plaintiff was transferred to Station 3. (*Id.* ¶¶ 117-118.)

Holding:

"However, as to Plaintiff's equal-protection/discrimination and hostile-work environment claim, Plaintiff alleges numerous specific facts suggesting that City of Lincoln policymaking officials were deliberately indifferent to, or tacitly authorized, a continuing and persistent pattern of gender discrimination and creation of a hostile work environment by LF&R employees as against Plaintiff and other female firefighters, and that such indifference or authorization caused the alleged constitutional violations. Therefore, Defendants' Motion to Dismiss these claims against the City will be denied."

Legal Lessons Learned: The lawsuit will now proceed to trial; Federal juries have returned some very large verdicts.

Note: On May 2, 2019, the U.S. District Court judge in Captain Troy Hurd's case issued following order:

"The Court finds the jury's damage award in the amount of $930,472.12 for future emotional distress is shocking and excessive, and Hurd must choose to accept remittitur of $300,000 or a new trial on the issue of future emotional distress damages by filing a notice with the Court on or before May 10, 2019."

See complaint by Captain Troy Hurd:

"During the training class, Troy repeatedly witnessed the harassment of the recruits, including Sara Khalil (hereinafter 'Khalil'). Khalil was a Kurdish, female firefighter recruit from Iraq. 14. Troy overheard Mueller tell Khalil to... [g]o sit the fuck down!"
Khalil reported to Troy that Jamie Pospisil (hereinafter '·Pospisil") said to her, "Do you need a fucking interpreter?" Troy reported that he believed that Mueller and Pospisil were harassing Khalil on the basis of her sex and national origin and complained to Chief Roger Bonin (hereinafter 'Bonin'), Troy's Supervisor. Bonin passed Troy' s complaint to Chief Benes (hereinafter 'Benes'), Mueller's supervisor. Benes removed Troy from his training position after Troy made complaints about Mueller's harassment based on sex and national origin of Khalil.

See also complaint by Captain Brian Giles.

See April 24, 2019 article.

File: Chap. 11, FLSA

WA: FED. JUDGE REFUSES DECLARATORY JUDGMENT – BATTALION CHIEFS / FIRE MARSHALS ARE "EXEMPT" FLSA – IAFF NOT SUED FD

On April 18, 2019, in Spokane Valley Fire Department v. IAFF Local 3701, U.S. District Court Judge Salvador Mendoza, Jr., held:

> "But the problem for the Department is that it fails to demonstrate any potential FLSA overtime claims have accrued or are certainly impending and pose an imminent threat, so as to establish standing and ripeness. By continuing to operate under the existing collective bargaining agreement, the Department is preserving an injury-free status quo."

Facts:

> "The parties have been negotiating a new collective bargaining agreement since October 2016…. They have not reached a final agreement. Id. The Department alleges the FLSA's exemption for bona fide executive or administrative employees applies to battalion chiefs and fire marshals…. In negotiations, Local 3701 has remained steadfast in its position to the contrary…. Local 3701 first asserted this position on April 20, 2017 and has not changed it since…. The Department offered a new collective bargaining agreement that the exemption would not affect, regardless of whether it applies…. But Local 3701 rejected the proposal because, it argues, doing so 'would reduce its members' contractual entitlement to overtime below the amount required by the FLSA….' Local 3701 soon declared an impasse in negotiations and demanded mediation…. The parties are currently in mediation and the next step may be interest arbitration.
>
> ***
>
> Specifically, Local 3701's members state they have not given their written consent to become plaintiffs in any FLSA lawsuit against the Department, they are not aware of any unpaid overtime owed to them by the Department that would entitle them to recovery under the FLSA, they have no intention of filing an FLSA lawsuit against the Department, they do not anticipate having an intention of filing an FLSA lawsuit against the Department in the future, they have never expressed an intention of filing an FLSA lawsuit against the Department, and none of Local 3701's other members have expressed to them an intention to bring an FLSA lawsuit against the Department."

Holding:

> "The FLSA exempts
>
> > any employee employed in a bona fide executive, administrative, or professional capacity . . . (as such terms are defined and delimited from time to time by regulations of the Secretary[of Labor], . . . except that an employee of a retail or service establishment shall not be excluded from the definition of employee employed in a bona fide executive or administrative capacity because of the number of hours in his workweek which he devotes to activities not directly or closely related to the performance of executive or administrative activities, if less than 40 per centum of his hours worked in the workweek are devoted to such activities) . . . . 29 U.S.C. § 213(a)(1).
>
> A so-called 'first responder regulation …' provides this exemption does not apply to firefighters under some circumstances, 29 C.F.R. § 541.3(b)(1)–(3).
>
> ***
>
> The Department alleges this exemption applies to battalion chiefs and fire marshals…. In negotiations, Local 3701 has remained steadfast in its position to the contrary…. The Department offered a new collective

bargaining agreement that the exemption would not affect, regardless of whether it applies. Id. But Local 3701 rejected the proposal because, it argues, doing so "would reduce its members' contractual entitlement to overtime below the amount required by the FLSA…." Local 3701 soon declared an impasse in negotiations and demanded mediation.

***

Here, the Department presents no evidence showing any potential FLSA overtime claims have accrued or are certainly impending and pose an imminent threat, so as to establish standing and ripeness.

***

Second, the Department expresses concern that it may be subject to investigation by the U.S. Department of Labor or the Washington State Department of Labor and Industries. Id. at 2, 5–6. But no such investigation would arise unless the employer began violating FLSA overtime requirements by failing to pay the employees what they are due. As discussed above, the parties' current collective bargaining agreement properly implements the § 207(k) exemption to the extent that it has not, to date, produced any known violations of FLSA overtime requirements. As Local 3701 notes, 'contractual overtime payments under the [agreement] may well exceed the FLSA's minimum overtime payment requirements, regardless of how Local 3701 members are classified under the [agreement]….' Thus, the Department fails to demonstrate how the status quo threatens a potential 'coercive action in federal court' that would "arise under" federal law.' Hornish, 899 F.3d at 691 n.2 (quoting Janakes, 768 F.2d at 1093).

***

In sum, the record establishes that no genuine dispute exists as to any material fact and Local 3701 is entitled to judgment as a matter of law because the Court lacks subject matter jurisdiction over the Department's claim for relief."

Legal Lessons Learned: The Fire Department can always consult with U.S. Department of Labor, Wage & Hour Division, or seek a formal opinion letter concerning the proper classification of their Battalion Chiefs and Fire Marshals based on a detailed description of their job duties.

For example, see Opinion Letter FLSA 2005-40:

"Accordingly, the duties described in your letter are sufficient to qualify the City's Police Lieutenants, Police Captains, and Fire Battalion Chiefs as exempt from the minimum wage and overtime provisions of the FLSA. Therefore, so long as the actual duties performed by these employees are consistent with those described, the referenced employees are exempt from these provisions of the FLSA."

File: Chap. 13, EMS

NY: EMT SUING RESTAURANT - SLIP & FALL ICY SIDEWALK, HELPING PATIENT WHO FELL – MUST PROVE RESTAURANT KNEW ABOUT ICE

On April 5, 2019, in Michael Benny v. Concord Partners 46Stree LLC, Supreme Court of New York, Part 63, 2019 NY Slip Op 30983(U), Judge Tanya R. Kennedy denied the EMT's motion for summary judgment.

> "Here, the testimony raises factual issues as to the length of time the alleged condition existed and whether the defendants knew about the condition in enough time to remedy the situation. Plaintiff testified that he did not observe any ice prior to his accident, and it is unknown whether the condition was visible and apparent to the defendants."

Facts:

> "Plaintiff alleges that he sustained personal injuries on January 4, 2012 after a slip and fall accident on ice during his employment as an emergency medical technician for St. Luke's Roosevelt Hospital (second amended complaint, Jr58; verified bill of particulars dated April 9, 2012, Jrl lc). On the date of his accident, plaintiff traveled by ambulance to respond to a 911 call at 46th Street between Sixth and Seventh A venues in Manhattan to assist a woman in front of Havana Central restaurant with an injury to her lower leg (Benny deposition transcript, P. 33, L. 12-28; P. 36, L. 6-23; P. 37, L. 2-17).
>
> Once plaintiff and his partner arrived, he observed the woman, later identified as Susan Stark (Stark), located on the ground …. After exiting the ambulance, plaintiff proceeded to assist Stark by stabilizing her ankle and subsequently slipped on ice…. Plaintiff maintained that he slipped toward his right side and fell onto the right side of his leg while lifting Stark onto the stretcher and that his elbow landed onto the stretcher ….. Plaintiff also maintained that1his knee touched the ground, which was wet …. However, plaintiff could not recall observing the ice or the ground condition prior to his accident…. Plaintiff maintained that a responder must first ensure their own safety, and he acknowledged that his ambulance was not equipped with either calcium chloride or rock salt …."
>
> ***
>
> Both defendants submit an affidavit from William Ozga (Ozga) in support of their opposition. Ozga averred that he served as a licensed emergency medical technician since 1986 and trained such technicians, as well as served as a licensed respiratory care specialist since 1991 (Ozga affidavit, JrJr4-5). After his review of the documents, plaintiff's deposition transcript, and surveillance video, Ozga opined 'within a reasonable degree of EMT and medical probability and I certainty' that plaintiff failed to ensure a safe environment for himself while assisting Stark …. Ozga maintained that the concept of scene safety requires an emergency medical techniciano first protect himself/herself, his/her partner and other individuals assisting at the scene (id., Jr30). Ozga also· maintained that plaintiff should have requested that someone apply sand to provide traction since plaintiff and others observed that the sidewalk was icy (id., Jr35). Ozga further maintained that plaintiff failed to immobilize Stark's leg or to properly seJure her onto a spinal longboard to even out her weight distribution (id., Jr33). According to Ozga, plaintiff could have placed Stark on the longboard and slid her onto the ambulance rather than lift her from the ground due to the icy condition (id., Jr34). Lastly, Ozga indicated that: the surveillance video failed to depict plaintiffs fall (id., Jr27).

Holding:

> “Further, plaintiff contends that the ‘danger invites rescue’ doctrine is applicable, and eliminates any claims of comparative negligence, since he voluntarily placed himself in a perilous situation to prevent another person from suffering serious injury or death and acted reasonably under the circumstances to assist an injured party.
>
> ***
>
> Plaintiff maintains that the ‘danger invites rescue’ doctrine precludes a finding of negligence against him in any manner.
>
> > The danger invites rescue doctrine was born of the principle that the law has so high a regard for human life that it will not impute negligence to an effort to preserve it, unless made under such circumstances as to constitute rashness in the judgment of prudent persons. The doctrine was created to avoid a plaintiff being found contributorily negligent as a matter of law when he voluntarily placed himself in a perilous situation to prevent another person from suffering serious injury or death. The doctrine was subsequently expanded to create a duty of care towards a potential rescuer where one party, by his culpable act, has placed another person in a position of imminent peril which invites a third person, the rescuing plaintiff, to come to his aid. The doctrine also encompasses a situation where the culpable party has placed himself in a perilous situation which invites rescue" (Ha-Sidi v South Country Cent. School Dist., 148 AD2d 580, 582 [2d Dept 1989] [internal citations and quotations omitted]).
>
> Here, plaintiff has failed to present any evidence to demonstrate that he faced a situation of imminent peril for the ‘danger invites rescue’ doctrine to be applicable. Additionally, the affidavit which Ozga submitted presents issues of fact as to whether plaintiff acted reasonably and complied with standard emergency medical technician procedures. Based upon his more than thirty years of experience as an emergency medical technician, Ozga maintained that plaintiff: had an opportunity to ensure a safe environment for himself while assisting Stark, since plaintiff; had knowledge of the sidewalk condition and had an opportunity to utilize alternative means to transport Stark into the ambulance. Despite the conclusions and questions Ozga set forth in his affidavit, plaintiff failed to submit an expert report to refute Ozga' s contentions.”

Legal Lessons Learned: Lawsuit will now be tried. The “danger invites rescue” doctrine is applicable only in extreme emergency, helping another avoid serious injury or death.

File: Chap. 15, CISM

NY: PTSD - CAR FIRE / MASK DISLODGED BY SNOW - PSYCHIATRIST’S NOTES FF INTERVIEW - ACCIDENTAL DISAB. RETIREMENT DENIED

On April 25, 2019, In The Matter of Alexander Hanon v. Thomas P. PiNapoli, State Comptroller, the New York Appellate Division, Third Department, (5 to 0), upheld the denial of his claim.

“Leslie Citrome, the psychiatrist who conducted an independent medical examination of petitioner on behalf of the Retirement System, opined that petitioner's PTSD and depressive disorder were causally related to [his off duty] June 2010 motor vehicle accident. He stated that the February 2010 accident [car fire run, snow from garage roof] was incidental to his psychiatric assessment as petitioner only mentioned this incident briefly, indicating that he suffered cardiac problems from inhaling smoke, and focused primarily on the June 2010 motor vehicle accident in discussing his history of psychiatric problems and symptoms.”

Facts:

“Petitioner worked as a firefighter for the City of Yonkers Fire Department for approximately 17 years. In February 2010, he and members of his company responded to a car fire at a parking garage. The car that was ablaze was located on the first floor partially outside the garage. As petitioner was opening the hood of the car to extinguish the fire, an avalanche of snow fell from the roof above, causing petitioner's mask to become dislodged and him to be buried completely. Other firefighters assisted in extracting petitioner from beneath the snow and he returned to the firehouse, but experienced chest pain and tightness while responding to another call. He sought immediate medical treatment and it was determined that he suffered from methemoglobinemia due to excessive carbon monoxide exposure, causing him to develop a heart arrythmia. He was placed on medical leave, but returned to work on a restricted duty assignment in May 2010.

In June 2010, as he was driving home from work, petitioner was involved in a motor vehicle accident when he lost consciousness while experiencing heart irregularities. He crashed into a fence and, when he awoke, the car door was jammed and he was temporarily trapped. He was hospitalized as a result of this accident and did not return to work thereafter. He subsequently sought psychological treatment for anxiety and depression, and was diagnosed with posttraumatic stress disorder (hereinafter PTSD) and depressive disorder.

Petitioner filed an application for accidental disability retirement benefits claiming that he was permanently disabled due to his heart arrhythmia and psychological problems, which were attributable to the February 2010 incident. His application was denied by the New York State and Local Police and Fire Retirement System on the ground that his disability was not caused by an accident sustained in service.”

Holding:

“Leslie Citrome, the psychiatrist who conducted an independent medical examination of petitioner on behalf of the Retirement System, opined that petitioner's PTSD and depressive disorder were causally related to the June 2010 motor vehicle accident. He stated that the February 2010 accident was incidental to his psychiatric assessment as petitioner only mentioned this incident briefly, indicating that he suffered cardiac problems from inhaling smoke, and focused primarily on the June 2010 motor vehicle accident in discussing his history of psychiatric problems and symptoms. Citrome noted that petitioner did not obtain any psychiatric treatment prior to the June 2010 motor vehicle accident and that the medical notes of Norman Weiss, a psychiatrist who treated petitioner after this accident, did not reveal that petitioner complained of symptoms before this time. He further noted that petitioner did not begin taking psychotropic medications until after the June 2010 motor vehicle accident. Furthermore, Citrome stated that petitioner related to him that his symptoms began 7 to 10 days after he was released from the hospital following the June 2010 motor vehicle accident.

Weiss, who began treating petitioner in November 2012, concurred with Citrome's diagnosis of PTSD and depressive disorder. Unlike Citrome, he opined that the February 2010 accident was causally related to petitioner's depressive disorder and stated that, given its proximity to the June 2010 motor vehicle accident, it made him more vulnerable to a diagnosis of PTSD. He acknowledged, however, that petitioner did not

disclose the February 2010 accident when he inquired about petitioner's medical history and that he was only aware of the June 2010 motor vehicle accident during his course of treatment. He indicated that he did not become aware of the February 2010 accident until petitioner's attorney advised him that it was referenced in the medical notes of David Kreditor, the psychiatrist from whom petitioner first sought treatment in December 2010. Notably, Weiss provided an initial opinion that petitioner's psychiatric disability was caused by the June 2010 motor vehicle accident. He admittedly changed his opinion after learning of the February 2010 accident.

In view of the foregoing, respondent could credit Citrome's rational and fact-based opinion over the contrary opinion of Weiss in concluding that petitioner's psychiatric disability was not causally related to the February 2010 accident. Significantly, Citrome's opinion was in accord with petitioner's psychiatric history and treatment. Weiss' opinion, on the other hand, was at times confusing and inconsistent. Therefore, inasmuch as substantial evidence supports respondent's determination, we find no reason to disturb it (see Matter of Dellaripa v DiNapoli, 150 AD3d at 1605; Matter of Chomicki v Nitido, 145 AD3d at 1339)."

Legal Lessons Learned: Courts rely on the expert testimony of independent medical examiners. Psychiatrist's notes from interview with firefighter become part of the "psychiatric history" of patient.

File: Chap. 16, Discipline

FL: NARCOTICS OFFICER - $1,300 MISSING – VOLUNTARY STATEMENTS ADMISSIBLE – AFTER TOLD JOB AT RISK, "GARRITY" WARNING REQ.

On April 10, 2019, in State of Florida v. Armando Socarras, 2019 WL 1548623 (Fla. Dist. Ct. App. 2019), the Third District Court of Appeal, held (3 to 0) that the officer's first two statement to Internal Affairs are admissible.

"Finally, Socarras did not reference the missing currency in his initial statement, and, unprompted, volunteered an exculpatory explanation in his second statement. As in Murphy, Socarras 'apparently felt no compunction about adamantly denying' he engaged in criminal activity, strongly suggesting any subjective belief of employment sanctions 'did not overwhelm his resistance.' 465 U.S. at 438, 104 S. Ct. at 1148.

Facts:

"In 2016, the Miami-Dade Police Department ("MDPD") initiated an investigation into allegations of corruption within its Narcotics Bureau. In an effort to ascertain the identity of the purportedly corrupt law enforcement officers, the Criminal Conspiracy Section of MDPD's Professional Compliance Bureau orchestrated a clandestine 'sting operation.' MDPD rented a motel room and designated an undercover police officer from the Orlando Police Department to pose as a drug peddler. The undercover officer was furnished with $3,113.00 in pocket cash, an altered identification card, and two bags containing illegal narcotics and $14,314.00 in currency. Officers marked the money with fluorescent powder and recorded the serial numbers reflected on each banknote.

***

Socarras, a ten-year veteran of MDPD, was a member of the Narcotics Bureau. On the evening of the sting operation, Socarras's partner, Edwin Diaz, received a 'tip' from a confidential informant regarding a male

subject selling narcotics out of the motel room. Socarras and his squad responded to the location and arrested the undercover officer outside of the motel room. A search incident to arrest yielded a wallet containing cash and narcotics. Diaz obtained a search warrant and the two bags containing currency and narcotics were recovered from inside of the motel room. All evidence was designated for impoundment.

Socarras was tasked with inventorying and impounding the narcotics and currency. He and Diaz drove to the Property and Evidence Bureau (the "Bureau") to impound the property. Two sergeants were waiting at the Bureau to verify the inventory of the impounded property. After Socarras and Diaz left, the sergeants discovered $1,300.00 of the seized currency was missing.

Shortly after driving away from the Bureau, Detective David Colon detained Socarras. Colon was dressed in plainclothes and driving an undercover police vehicle, but had a police badge prominently displayed around his neck. He pulled behind Socarras's vehicle and activated his emergency lights. Colon drew his firearm, ordered Socarras out of his vehicle at gunpoint, and identified himself as an internal affairs officer.2After Socarras exited his vehicle, he was subjected to a protective pat-down, relieved of his service weapon, and placed in the back seat of Colon's undercover police vehicle. A backup officer arrived and handcuffed Socarras. While Socarras was on the scene, his automobile was wrapped in police evidence tape and impounded. Officers obtained a search warrant and located the missing $1,300.00 inside of a compartment located in Socarras's automobile.

***

Socarras was administered his Miranda warnings, orally and through a standard written Miranda waiver form, which he signed and initialed accordingly. Socarras then made an initial verbal statement. Approximately four hours later, he submitted to a recorded formal interview. During the interview, Socarras, unprompted, stated he inadvertently neglected to impound some of the currency. The recording device was then deactivated. Forty minutes later, Socarras provided his third and final statement to law enforcement, wherein he disclosed he was experiencing financial difficulties and confessed to purloining the money.

***

Socarras was charged with grand theft. He sought suppression of all three of his statements, contending they were improperly compelled in violation of his Fifth Amendment privilege against self-incrimination. The trial court conducted an evidentiary hearing on the merits of the suppression motion and subsequently issued a written order.

The court rendered the following factual findings:

> Socarras was never told that Fryer and Appleby were conducting a criminal investigation. When Colon pulled Socarras over, he identified himself as IA. Socarras was not cuffed, but simply placed in the back seat of a police car. When it was time to be transported to the IA office, a second officer shows up to the scene, also states he is an IA officer and cuffs him, because that's the policy. Prior to going on the record during the first interview, Fryer tells Socarras that this is an internal affairs investigation. During the second interview, shortly after disclosing that he had forgotten to inventory the money he found in the bag of drugs, Socarras states, '[expletive], man. Is that why we're here?' Fryer responds, 'I'm here asking you questions. That's it.'

The trial court granted suppression, concluding Socarras reasonably believed he was compelled to give all three statements under threat of job loss, thus, the statements were improperly coerced in violation of Garrity."

Holding:

> "In Garrity v. New Jersey, the Court discussed one such exception to the general rule that the privilege against self-incrimination is not self-executing, namely where statements are the product of an impermissible condition imposed on the privilege. 385 U.S. 493, 87 S. Ct. 616. The Court addressed whether the state could use the threat of discharge to secure self-incriminatory testimony from an employee. Id. Under the facts therein, several police officers were questioned during an investigation into police corruption involving the manipulation of traffic tickets. Before being questioned, each officer was warned that anything he said might be used against him in a state court criminal proceeding, and that he had the right to refuse to answer if the disclosure would be incriminating, but if he refused to answer he would be subject to termination. Given the choice 'either to forfeit their jobs or incriminate themselves,' the officers confessed. Id. at 497, 87 S. Ct. at 618. The statements were later used in prosecutions for conspiracy to obstruct the administration of traffic laws and the officers were convicted. The Supreme Court found: The choice imposed on [the officers] was one between self-incrimination or job forfeiture. Coercion that vitiates a confession under Chambers v. Florida, 309 U.S. 227, 60 S. Ct. 472, 84 L. Ed. 716 (1940), and related cases can be 'mental, as well as physical'; 'the blood of the accused is not the only hallmark of an unconstitutional inquisition.' Blackburn v. Alabama, 361 U.S. 199, 206, 80 S. Ct. 274, 279, 4 L. Ed. 2d 242 (1960). Subtle pressures (Leyra v. Denno, 347 U. S. 556, 74 S. Ct. 716, 98 L. Ed. 948 (1954); Haynes v. Washington, 373 U.S. 503, 83 S. Ct. 1336, 10 L. Ed. 2d. 513 (1963)) may be as telling as coarse and vulgar ones. The question is whether the accused was deprived of his 'free choice to admit, to deny, or to refuse to answer.' Lisenba v. California, 314 U.S. 219, 241, 62 S. Ct. 280, 292, 86 L. Ed. 166 (1941). Id. at 496, 87 S. Ct. at 618.
>
> ***
>
> Here, it is undisputed that prior to Socarras's first and second statements, the State did not threaten Socarras with adverse employment consequences or any other impermissible penalty. Similar to the officers in Sapp, Connor, and Vangates, Socarras testified to a subjective belief that an invocation of his right against self-incrimination would result in termination. However, unlike the officers in the analogous authorities, Socarras was administered Miranda warnings and explicitly waived his rights.
>
> ***
>
> With regard to the two initial statements, we cannot conclude there is a reasonable basis to find the State attempted to attach an impermissible penalty to the exercise of Socarras's privilege against self-incrimination. Thus, the prophylactic rule established in Garrity is inapplicable, as Socarras's Fifth Amendment privilege, as applied through the Fourteenth Amendment, was not self-executing. Accordingly, the trial court erred in suppressing the initial two statements and we reverse the suppression of the two initial statements. Reversed in part, affirmed in part."

Legal Lessons Learned: When conducting an internal investigation, advise the "target" of the investigation of both their <u>Miranda</u> rights to remain silent, and their <u>Garrity</u> rights that their statements may lead to disciplinary action.

See, for example, Lansing Fire Department advise on Garrity rights:

> FIFTH AMENDMENT APPLIES TO INTERROGATIONS OF PUBLIC EMPLOYEES (GARRITY RIGHTS)
> Public employees have certain constitutional rights that apply in their employment that may not apply to private employees. For example, in *Garrity v. New Jersey*, the Supreme Court held that statements obtained in the course of an investigatory interview under threat of termination from public employment couldn't be used as evidence against the employee in subsequent criminal proceedings.

If, however, you refuse to answer questions after you have been assured that your statements cannot be used against you in a subsequent criminal proceeding, the refusal to answer questions thereafter may lead to the imposition of discipline for insubordination. Further, while the statements you make may not be used against you in a subsequent criminal proceeding, they can still form the basis for discipline on the underlying work-related charge.

To ensure that your Garrity rights are protected, you should ask the following questions:

1) If I refuse to talk, can I be disciplined for the refusal?
2) Can that discipline include termination from employment?
3) Are my answers for internal and administrative purposes only and are not to be used for criminal prosecution?

File: Chap. 16, Discipline

NJ: FF PRANK – FIRECRAKER "BANG SNAP" ON TOILET - INJURED FF – ONLY REMEDY IS WORKERS COMP, CAN'T SUE FOR DAMAGES

On April 1, 2019, in Raymond Johns v. Thomas Wengerter and City of Linden, the Superior Court of New Jersey, Appellate Division, held (3 to 0; unpublished decision) that injured firefighter cannot sue his fellow firefighter or the city for damages.

> "As noted above, the Legislature unequivocally provided that injuries caused by 'horseplay or skylarking on the part of a fellow employee, not instigated or taken part in by the employee who suffers the accident, shall be construed to have arisen out of and in the course of the employment of such employee and shall be compensable under the act[.]' N.J.S.A. 34:15-7.1."

Facts:

> "Johns is employed by the City of Linden (City) as a firefighter. On November 27, 2015, Johns was on duty at the firehouse. He was in the men's bathroom when he sat down on a toilet and heard and felt an explosion beneath him. Johns examined himself for injury and discovered a significant amount of blood coming from the left side of his scrotum, on which a blood blister had formed. The remnants of an exploded bang snap, a small firework without a fuse that detonates when compressed, was discovered on the toilet. After an investigation, defendant Thomas Wengerter, a fellow City firefighter, admitted to having placed bang snaps in various places in the firehouse as a prank, although he later denied having placed a bang snap on the toilet. The record, however, contains significant evidence contradicting Wengerter's denial, including his apology to Johns immediately after the incident.
>
> Shortly after being injured, Johns left work to be treated at a medical facility. He was diagnosed with a second-degree burn on his scrotum and a contusion of the left testicle. He was thereafter placed off duty. He returned to work on December 9, 2015. Johns suffered no lost wages, and the City paid all his medical expenses. He did not file a workers' compensation claim. Wengerter was suspended for the incident."

Holding:

"In its oral opinion, the trial court concluded that Johns was harmed as the result of a coworker's prank within the meaning of the 'horseplay or skylarking' provision of the WCA. N.J.S.A. 34:15-7.1. That statute provides that

> '[a]n accident to an employee causing his injury or death, suffered while engaged in his employment but resulting from horseplay or skylarking on the part of a fellow employee, not instigated or taken part in by the employee who suffers the accident, shall be construed to have arisen out of and in the course of the employment of such employee and shall be compensable under the act[.][N.J.S.A. 34:15-7.1.]'

***

Johns produced no evidence that Wengerter's placement of the bang snap on the toilet was anything other than an ill-conceived prank or 'so far a deviation' from work-related activity 'as to constitute an abandonment of his employment.' Trotter v. Cty.of Monmouth, 144 N.J. Super. 430, 435 (App. Div. 1976). To the contrary, the record establishes that Wengerter was accustomed to playing what he perceived to be harmless pranks on his coworkers while they were in the firehouse between assignments. The placement of a bang snap on a men's room toilet falls within the realm of coworker horseplay intended to startle, but not injure, a coworker despite the unfortunate and unintended result in this instance. Wengerter's acts took place at the workplace, while Johns and Wengerter were on duty, and involved, in part, an employer-owned fixture. We agree with the trial court that the express provisions of N.J.S.A. 34:15-7.1 encompass Wengerter's acts and bar Johns's claims."

Legal Lessons Learned: Horseplay among firefighters can lead to unfortunate outcomes. Share this article with your firefighters and ask who paid for the attorney representing the firefighter who placed the "bang snap" on the toilet.

File: Chap. 17, Arbitration

MA: FIRE WATCH – ARBITRATOR UPHELD - EVEN IF FEDERAL EPA WILL NOT PAY, CBA REQUIRES CITY HAVE FF PRESENT DEMOLITION BLDG

On April 30, 2019, in City of Lawrence v. Lawrence Firefighters IAFF Local 146, the MA Appeals Court, held (3 to 0) that the arbitrator's decision in favor of union must be enforced.

> "The arbitrator read the CBA to require the city to utilize fire watch details at every site of demolition work in the city. If the contractor would not agree to pay for the fire watch detail, the city itself had to pay for it."

Facts:

> "This case arose when an off-duty firefighter discovered that demolition was being done by the United States Environmental Protection Agency (EPA) at the Merrimack Paper Mill, a 'Superfund' cleanup site. The firefighter informed the union president, who brought the matter to the attention of the city's fire chief. At some point the city's fire chief asked the EPA to hire a fire watch detail, but was informed by the EPA's on-site coordinator that a city could not require the EPA to do so and that it would not do so in this case. The union grieved the failure to utilize a fire watch detail at the demolition site, and eventually its claim was addressed in arbitration.
> ***

The CBA between the parties provides that the city must require a fire watch detail at the site of any demolition work in the city. The CBA contains provisions requiring the city to ‘act as custodian of the funds collected as a result of Fire Watch Duty’ and to create an escrow account ‘for payment of all detail compensation to which members of the Lawrence Fire Department are entitled.’

***

The arbitrator read the CBAto require the city to utilize fire watch details at every site of demolition work in the city. If the contractor would not agree to pay for the fire watch detail, the city itself had to pay for it. Specifically the arbitrator concluded that,

> ‘contrary to the City's contention, the mutually agreed-upon language does not condition the requirement of a fire watch detail upon a contractor's willingness to pay. The contract does not contain any language that [makes]fire watch detail activities contingent upon collected, or anticipated, funds....The City's argument ... overlooks a central element of Article XVII[of the CBA] --the parties' mutual recognition of a public safety consideration. To address that concern, the City, 'in the interest of public safety' agreed it 'shall require fire watch details at all demolition activities ....' The contract language contains no caveats about, or conditions precedent with respect to, contractors' agreeing to pay for fire watch details. Instead, the contract reflects that the City has an enforceable contractual obligation to have fire watch details at all demolition activities.’

As the arbitrator's remedy makes clear, she read the CBA to require the city to hire the detail itself if the demolishing entity refused to pay.

The arbitration statute provides for a very limited scope of judicial review: ‘An arbitrator's award may not be vacated’ because of either ‘error of law or [an] error of fact.’ School Comm.of Waltham v. Waltham Educators Ass'n, 398 Mass. 703, 705 (1986). "Absent fraud, the court's inquiry is confined to the question whether the arbitrator exceeded the scope of his reference or awarded relief in excess of his authority." Id.

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Regardless of how we might have construed the CBA, the arbitrator's conclusions of law are not subject to review for error by this court, and we must accept them for purposes of our decision, even were we to disagree with them.”

Legal Lessons Learned: Hopefully in the next CBA, the parties can reach agreement that a “fire watch” will be required only when the owner of the building being demolished has paid for the cost of the fire watch.