

1/8/2020

LEGAL LESSONS LEARNED: RECENT CASES FROM MY FIRE & EMS LAW NEWSLETTERS

[NEWSLETTER IS NOT PROVIDING LEGAL ADVICE.]

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Recent cases supplement to textbook: TEXTBOOK: EMS LAW (Second Edition): June 2018; [FREE ONLINE TEXTBOOK:](#) [\(ISBN: 978-1-949104-03-5\)](#); (First Edition, 2012, MBS Direct, Columbia, MO).

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Chap. 1 American Legal System; Fire Code Enforcement

1-35

FL: FIRE CHIEF – CODE ENFORCEMENT / 100-YR OLD LODGE WAS CONDEMNED – FIRED – 1st AMENDMENT CASE DISMISSED

On Dec. 12, 2019, in [Bradley Batz v. City of Sebring](#), the U.S. Court of Appeals for the 11th Circuit (Atlanta) held (3 to 0) that the U.S. District Court judge had properly dismissed his First Amendment lawsuit, despite his claims of retaliation for his lawful efforts to condemn a 100-year old Lodge, partially owned by a member of City Council.

“In other words, one of Batz’s core responsibilities as the City employee responsible for enforcing the Safety Code was ensuring public safety. Thus, his continued assertion that his speech was motivated by a concern for public safety does not remove it from the realm of employment-related speech.... At the very least, he made no effort to communicate his safety concerns to the public or otherwise communicate with anyone outside other government officials.... Accordingly, we conclude Batz spoke in his role as a City employee when he expressed concerns about efforts to undermine and delay his enforcement efforts against the Lodge. His speech therefore was not protected by the First Amendment.

1-34

VA: HYDRANT NEAR HOUSE OUT OF SERVICE – 1000 FOOT LAY – PERSON DIED - GOVERNMENTAL IMMUNITY, CASE DISMISSED

On Dec. 12, 2019, in [Sam Massenburg, Administrator of the Estate of Corey Demetrius Massenburg, Deceased v. City of Petersburg](#), the Supreme Court of Appeals of Virginia, held that the Circuit Court judge properly granted summary judgment to the City.

“A fire hydrant, as the name suggests, exists to facilitate the firefighting function of the municipality that installed it. That function is quintessentially governmental. That fire hydrants can be put to other uses is inconsequential because the sole reason municipalities undertake the expense of installing fire hydrants is to promote their ability to respond to fire emergencies. *** The City’s provision and maintenance of fire hydrants is therefore an immune governmental function.

1-33

OH: ARSON CONVICTION UPHeld – FIRE IN 3 LOCATIONS – FESH GASOLINE – DIRECT & CIRCUMSTANTIAL EVIDENCE

On Dec. 12, 2019, in [State of Ohio v. Gina M. Huler](#), the Ohio Court of Appeals for the 8th District (Cuyahoga County), held (3 to 0) that there was sufficient direct and circumstantial evidence for the trial judge to find her guilty of aggravated arson.

“[Jeff] Koehn [Ohio Fire Marshal investigator] also determined that three separate fires were set in three separate locations in the house and a fourth was attempted, but failed to erupt. In support of his determination, Koehn discussed in detail three distinct fire patterns, which had no connection to each other and did not

spread across the ceiling as a normal house fire would spread. A determination that there were three separate and distinct fires, with no connecting patterns, serves to eliminate the notion that sparks from the masonry work completed earlier that day could have gone down the chimney, into the house, and started the fire. *** The debris from the trash can on the stairs tested positive for acetone; debris from the attic tested positive for gasoline, and the plastic water bottle tested positive for gasoline. The forensic lab report also indicated the gasoline was fresh, not weathered or aged gasoline. *** Further, although the fire investigation determined that the cause of the fire was classified as incendiary and was intentionally set by Huler, we could arrive at the same conclusion using only circumstantial evidence. 'Circumstantial evidence and direct evidence inherently possess the same probative value.' Jenks, 61 Ohio St.3d 259, 574 N.E.2d 492, at paragraph one of the syllabus.”

1-32

WA: ARSON – DEFENSE EXPERT FAILED TO FOLLOW NFPA 921 – TESTIMONY PROPERLY LIMITED – SENTENCED TO LIFE IN PRISON

On Dec. 5, 2019, in [State of Washington v. Shelly Margaret Arndt](#), the Supreme Court of Washington (en banc – all 9 Justices hearing the case) held (8 to 1) that the trial court properly restricted the testimony of the defense expert, Dale Mann (former State Patrol crime lab supervisor and certified arson investigator) for failure to conduct a cause and origin investigation under NFPA 921.

“After a three month trial, a jury found Arndt guilty [in death of her boyfriend] of all crimes as charged by the State. The trial court sentenced Arndt to life without the possibility of parole per RCW 10.95.030(1). CP at 475.

Arndt takes issue with the limitations the trial judge placed on Mann's testimony due to the fact that he had not personally conducted a complete origin and cause investigation of the scene.... In placing these limitations on Mann's testimony, the judge clearly stated that her rationale was based on Mann's failure to follow well established scientific methodology:

THE COURT: It is not a problem that he goes to the scene, as [the]defense argues, but it is a problem when he starts to test If he were to do an origin and cause, he would need to follow the scientific method and eliminate various hypotheses. Instead by focusing on one area, which seems to be this foosball area, he's taking one hypothesis and testing it. And not eliminating, under the scientific method, the entire scene.

Legal Lessons Learned: The trial court properly restricted the testimony of the defense expert for failure to follow [NFPA 921, Guide for Fire and Explosion Investigations](#) (excellent guide for conducting cause & origin investigations).

[See my case analysis for arson case in the State of Washington.](#)

1-31

IN: DRONE – WOMAN FINDS DRONE IN HER YARD – ONBOARD VIDEO SHOWS NEIGHBOR CARRYING DRUGS [also filed, Chap. 4]

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

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

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

[See my case analysis for drone case in Illinois.](#)

1-30

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

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

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

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

[See my case analysis for house in fire in Pennsylvania.](#)

1-29

CA: ARSON - FF TESTIFIED AGAIN GIRLFRIEND – SHE ADMITTED ARSON CAR FIRE – HE WAS NOT ACCOMPLICE, NO JURY INSTRUCTION NEEDED

On Aug. 29, 2019, in [The People v. Crystal Lynn Rothgery](#), the Court of Appeal of State of California, Third Appellate District, in an unpublished opinion, denied (3 to 0) her appeal of jury conviction of arson. The trial judge did not need to instruct jury about being suspicious of accomplice testimony since no evidence that her boyfriend [a “wilderness firefighter”] was involved in the car fire.

The Court wrote:

“Here, the trial court was not required to instruct the jury sua sponte on accomplice testimony because there was no evidence from which a reasonable jury could find Hoskey was an accomplice. To be an accomplice, one must, ‘act with knowledge of the criminal purpose of the perpetrator and with an intent or purpose either of committing, or of encouraging or facilitating commission of, the offense.’ (People v. Stankewitz (1990) 51 Cal.3d 72, 90-91.) In arguing Hoskey was an accomplice, defendant cites no evidence to satisfy these elements.”

Legal Lessons Learned: No proof this “wilderness firefighter” was involved in his live-in girlfriend’s arson.

[See my case analysis for arson case in California.](#)

1-28

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

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

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

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

[See my case analysis for commercial building fire alarms in Illinois.](#)

1-27

U.S. SUPREME CT: DRUNK DRIVER UNCONSCIOUS – BLOOD DRAW WITHOUT SEARCH WARRANT PERMITTED - EXIGENT CIRCUMSTANCES

On June 27, 2019, in [Mitchell v. Wisconsin](#), the U.S. Supreme Court held (5 to 4), on the defendant's appeal from decision of the Wisconsin Supreme Court, that when the driver is unconscious, and cannot be given a breath test, they may generally obtain a blood draw at a hospital without a search warrant under the "exigent circumstances" doctrine. **Legal Lessons Learned: Very helpful majority decision, expanding the "exigent circumstances" doctrine, to allow police to rapidly obtain blood draws without a search warrant.**

Justice Samuel Alito wrote the majority opinion:

"Today, we consider what police officers may do in a narrow but important category of cases: those in which the driver is unconscious and therefore cannot be given a breath test. In such cases, we hold, the exigent-circumstances rule almost always permits a blood test without a warrant. When a breath test is impossible, enforcement of the drunk-driving laws depends upon the administration of a blood test. And when a police officer encounters an unconscious driver, it is very likely that the driver would be taken to an emergency room and that his blood would be drawn for diagnostic purposes even if the police were not seeking BAC information. In addition, police officers most frequently come upon unconscious drivers when they report to the scene of an accident, and under those circumstances, the officers' many responsibilities—such as attending to other injured drivers or passengers and preventing further accidents—may be incompatible with the procedures that would be required to obtain a warrant. Thus, when a driver is unconscious, the general rule is that a warrant is not needed."

[See my case analysis for US Supreme Court decision for drunk driving in Wisconsin.](#)

1-26

IL: SUICIDE - U.S. SUP. CT. NOT TAKE APPEAL - SUICIDE BY ATTORNEY ON ANTI-DEPRESSANTS - FDA DID NOT APPROVE LABEL

On May 28, 2019, in [Wendy B. Dolin v. GlaxoSmithKline, LLC](#), the U.S. Supreme Court declined to hear the appeal of widow of 57-year old attorney who committed suicide after taking Paxil. Thereby leaving in place the decision of the U.S. Court of Appeals for the 7th Circuit, which had set aside \$3 million jury verdict for widow.

On Aug. 22, 2018, the [7th Circuit held that Food and Drug Administration](#) refused to allow the manufacturer to add to Paxil label a warning that the drug may lead to increase in suicide of not only patients under 24, but also in older adults. The FDA wanted the same, uniform warning on all anti-depressant drugs.

"GSK asked the FDA for permission to modify the paroxetine label as plaintiff argues was needed. The FDA said no, repeatedly. Federal law thus preempted plaintiff's Illinois-law claim that GSK should have warned of a risk of adult suicidality on the paroxetine label in 2010. GSK added a similar warning in 2006, and the FDA ordered that GSK remove that label and replace it with a class-wide SSRI warning in 2007."

Legal Lessons Learned: FDs should have a drug-free workplace policy that requires disclosure of anti-depressant medication that could affect performance of their duties.

[See IAFC Position: Drug and Alcohol-Free Awareness](#), including:

"Any personnel using over-the-counter or prescription medications where potential side effects that may reasonably affect the performance of their duties have been identified by a healthcare provider or manufacturer's packaging should report their use to their supervisor when they are functioning in a capacity responsible for emergency and non-emergency operations. Upon notification, supervisors should, in the case of prescription medications, direct personnel to obtain appropriate documentation from the prescribing healthcare provider attesting to the medication's safety while performing the essential duties of the fire

service position. In the case of over-the-counter medications, supervisors should contact the fire department physician or other health care provider to consult on the potential side effects. Personnel should refrain from engaging in such activities until the appropriate release is obtained.”

[See my case analysis for US Supreme Court appeals decision in Illinois.](#)

1-25

IL: BILLING FOR FD SERVICES – ORDINANCE LAWFUL TO BILL NON-RESIDENTS

On March 28, 2019, in [The City of Effingham, Illinois v. Diss Truck & Repair, LLC](#), the Appellate Court of Illinois - Fifth District, held (3 to 0) that the Fire Department may bill for these services for a non-resident. “After reviewing the legislative history, both before and after the enactment of the statute, we conclude that the legislature’s intent in allowing a municipality to seek reimbursement for firefighting services provided to nonresidents was to eliminate the taxpayer’s burden for such services; the intent was to allocate the cost of the services to nonresidents so that the citizens of the municipality were not forced to bear the cost of services performed on behalf of those not paying taxes to the municipality.”

Legal Lessons Learned: Soft billing of residents deemed lawful.

[See my case analysis for billing for FD services in Illinois.](#)

1-24

IA: STATE SUP. CT. UPHOLDS STATUTE - NO PAYROLL DEDUCT. OF UNION DUES – LIMITED COLLECTIVE BARG. LESS 30% PUB SAFETY

On May 17, 2019, in [AFSCME Iowa Council 61, et al. v. State of Iowa and Iowa Public Employment Relations Board](#), the Iowa Supreme Court held (4 to 3) that the 2017 statute was constitutional.

“Our role is to decide whether constitutional lines were crossed, not to sit as a super legislature rethinking policy choices of the elected branches. We conclude the 2017 amendments withstand the constitutional challenges. The plaintiffs concede there is no constitutional right to public-sector collective bargaining or payroll deductions. The parties agree the equal protection claims are reviewed under the rational basis test. The legislature could reasonably conclude that the goal of keeping labor peace with unions comprised of at least thirty percent public safety employees, and the greater risks faced by emergency first responders, justified the classification. We hold the legislative classifications are not so overinclusive or underinclusive as to be unconstitutional under our highly deferential standard of review. We further hold the amendments do not violate constitutional rights of freedom of association. Public employees remain free to belong to the same unions. Accordingly, we affirm the district court's summary judgment.”

Legal Lessons Learned: Collective bargaining for fire & police has been addressed by many state legislatures. [The U.S. Supreme Court’s Janis decision on June 27, 2018](#), - “States and public-sector unions may no longer extract agency fees from nonconsenting employees” - may lead other states to also limit employer deduction of union dues.

See footnote 4 of the Majority's decision:

As of 2018, twenty-eight states require collective bargaining. Eric J. Brunner & Andrew Ju, *State Collective Bargaining Laws and Public-Sector Pay*, 72 ILR Rev. 480, 487 (2019) [hereinafter Brunner & Ju]. Fifteen states allow state employers to decide whether or not to collectively bargain. *Id.* The range of topics public employees are able to bargain over varies from state to state, as does the employees' ability to compel arbitration in the event of an impasse. Raskin-Ortiz & Martin at 4-10. Of the states that require or permit collective bargaining, Alabama, Delaware, Idaho, Kentucky, Oklahoma, Rhode Island, and Wyoming have separate bargaining rights for police officers and/or firefighters. *Id.* Three states—North Carolina, South Carolina, and Virginia—prohibit collective bargaining for any public employees. Brunner & Ju at 487. Arizona and Texas limit collective bargaining to police officers and firefighters, while Georgia limits collective bargaining rights to firefighters alone. *Id.*

See also this article: "[Union Dues Deductions – Tips for Public Employers](#)"

[See my case analysis Iowa State Supreme Court decision.](#)

1-23

TX: APARTMENT FIRE - DRUG PARAPHERNALIA IN "PLAIN VIEW" - PD CALLED IN, SEARCH WARRANT – METH CONVICTION UPHELD

On May 16, 2019, in [Casey Allen Martin v. State of Texas](#), the Court of Appeals of Texas, Second Appellate District (Fort Worth) held (3 to 0) the trial court properly denied the defendant's motion to suppress the methamphetamine.

"Fire broke out in appellant Casey Allen Martin's apartment, and firefighters entered to battle the blaze. Firefighters saw drug paraphernalia inside, and they called police in to observe the scene. Officers then obtained a search warrant, which led to the discovery of the methamphetamine that was the basis for Martin's conviction. In one issue, Martin appeals the denial of his motion to suppress. Martin does not dispute that the fire permitted firefighters to enter the apartment. But he contends that the same exigent circumstances did not also authorize officers to enter and observe, in plain view, the same contraband that firefighters had already seen. Because we disagree, we affirm.

Legal Lessons Learned: The "Plain View Rule" is alive and well. The police probably could have seized the meth and the firearm without a search warrant, but getting the warrant "virtually guaranteed" that a motion to suppress would be denied.

[See my case analysis for apartment fire in Texas.](#)

1-22

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.*)."

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

[See my case analysis for 911 call in New York lawsuit.](#)

1-21

IL: BILLING FOR FD SERVICES – ORDINANCE LAWFUL TO BILL NON-RESIDENTS, INCLUDING EXTRICATING EMPLOYEE UNDER VEHICLE

On March 28, 2019, in *The City of Effingham, Illinois v. Diss Truck & Repair, LLC*, the Appellate Court of Illinois - Fifth District, held (3 to 0) that the Fire Department may bill for these services for a non-resident. "After reviewing the legislative history, both before and after the enactment of the statute, we conclude that the legislature's intent in allowing a municipality to seek reimbursement for firefighting services provided to nonresidents was to eliminate the taxpayer's burden for such services; the intent was to allocate the cost of the services to nonresidents so that the citizens of the municipality were not forced to bear the cost of services performed on behalf of those not paying taxes to the municipality."

Legal Lessons Learned: Ordinances authorizing billing of non-residents for fire department services are becoming increasingly common.

[See my case analysis for billing for FD's services in Illinois.](#)

1-20

CO: ARSON - \$3M LOSS TO HOTEL BEING BUILT- NO SECURITY FENCE, NO INSURANCE

On March 1, 2019, in [Praetorian Insurance Company v. Axia Contracting, LLC and 255 Blackhawk Hospitality, LLP](#), U.S. District Court Judge William J. Martinez, District of Colorado, granted summary judgment to the insurance company. "On summary judgment, the parties seek clarity from this Court on whether, under the Policy, Defendants' failure to maintain a protective device, a six-foot fence enclosing the entire job site, which was listed in an endorsement and schedule attached to the contract, relieves Praetorian of its obligation to pay for Defendants' losses due to fire.... For the reasons discussed below, the Court will grant Praetorian's Motion for Summary Judgment ('the Motion'), direct entry of judgment, and terminate this case."

Legal Lessons Learned: FDs should encourage owners of large construction sites to enclose the site with fencing and nighttime lights.

[See my case analysis for arson in Colorado.](#)

1-19

MD: GOVT IMMUNITY – COUNTY 911 SYSTEM DOWN 3 HOURS – RESIDENT DIED

On Feb. 22, 2019, in [Raul T. Aristorenas, et al. v. Montgomery County, Maryland](#), the Court of Appeals of Maryland, held (3 to 0) in unreported decision upheld the dismissal of the lawsuit by Circuit Court trial judge: “The [trial] court concluded that the allegations did not state a claim for negligence—which underlies both the wrongful death and the survival claims—because the County is immune from suit and the individual defendants did not owe a duty to Mr. Somarriba or Marlon. We agree and affirm.”

Legal Lessons Learned: This is a tragic case – amazing there was no back up system, or ability to have another 911 Center pick up the calls.

[See my case analysis of government immunity in the state of Maryland.](#)

1-18

U.S. SUPREME COURT: EXECUTION – INMATE NOT ENTITLED TO HAVE IMAM PRESENT IN DEATH CHAMBER

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.]

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

[See my case analysis for the US Supreme Court execution of an inmate.](#)

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.](#)”

[See my case analysis for the US Supreme Court decision of inmate execution.](#)

MA: SPRINKLERS - DRUG REHAB HOUSE WITH 8 PATIENTS – COURT UPHOLDS FIRE CODE

On Jan. 29, 2019, in [Crossing Over, Inc, et al. v. City of Fitchberg](#), Justice Rosemary Connelly, MA Superior Court upheld the July 14, 2017 decision of the “Automatic Sprinkler Appeals Board” which held:

Based upon the aforementioned findings and reasoning, the Board hereby upholds the Order of the Fitchburg Fire Department and requires the installation of an adequate system of sprinklers throughout all portions of the subject building used and/or occupied for boarding or lodging purposes....”

Justice Connelly denied the property owner’s motion to reverse the Board, [holding that the Board’s decision is legal](#), supported by the record, and the Board has not exceeded its authority. The court will give deference to the Board’s reasonable interpretation of its own statute.”

Legal Lessons Learned: Sprinkler ordinances save lives.

[See my case analysis regarding sprinklers cases in Maryland.](#)

PA: ARSON – DEFENDANT SMELLED OF GASOLINE, TRAINED ARSON DOG ALERTED

On Jan. 11, 2019, in [Commonwealth of Pennsylvania v. Jamat Ali Manzoor](#), the Superior Court of PA (3 to 0) upheld the jury conviction on two counts of arson, and insurance fraud.

Legal Lessons Learned: Evidence of trained arson K-9 alerting for accelerants to admissible in arson trial.

[See my case analysis for arson case in Pennsylvania.](#)

U.S. SUPREME COURT: QUALIFIED IMMUNITY FOR POLICE OFFICERS – DOMESTIC VIOLENCE ARREST

On Jan. 7, 2019, in [City of Escondido, California v. Mart Emmons](#), the U.S. Supreme Court (9 to 0), in a per curiam decision [not authored by a specific Justice], reversed the 9th Circuit without the need to even hear oral argument. The Court held: “As to Officer Craig, the Ninth Circuit also erred. As we have explained many times: ‘Qualified immunity attaches when an official’s conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.’ *Kisela v. Hughes*, 584 U. S. ___, ___ (2018) (per curiam). The Court of Appeals made no effort to explain how that case law prohibited Officer Craig’s actions in this case.”

Legal Lessons Learned: Great decision on “qualified immunity” for emergency responders.

[See my case analysis for US Supreme Court decision regarding police officer immunity.](#)

See also Chap. 13: Aug. 14, 2018 decision by 7th Circuit in [Billie Thompson v. Lance Cope](#) where Indianapolis police called EMS to help with person found naked, running in street, high on amphetamines, and combative. EMS administered a sedative – Versed - patient stopped breathing, and was revived; he ultimately died 8-days later. The Court held (3 to 0), “The paramedic is entitled to qualified immunity on the excessive force claim. Case law did not (and does not) clearly establish that a paramedic can violate a patient-

arrestee's Fourth Amendment rights by exercising medical judgment to administer a sedative in a medical emergency.”

[See my case analysis for case decision in Indianapolis.](#)

1-16

KY: “RIGHT TO WORK” STATUTE UPHELD; SIMILAR TO U.S. SUPREME COURT DECISION IN *Janis*

On Nov. 15, 2018, in [Fred Zuckerman, As Representative Of The General Drivers, Warehousemen And Helpers Local Union No. 89 v. Matthew G. Bevin, Governor](#), the Kentucky Supreme Court (4 to 3) upheld the statute: “we hold that the Unions’ constitutional challenges to the Act are without merit. In this area of economic legislation, the legislature and the executive branch make the policy, not the courts.”

Legal Lessons Learned: Fire & EMS departments, not only in Kentucky, but in all states must now follow the U.S. Supreme Court’s decision, June 27, 2018, in [Janus v. American Federation of State, County, and Municipal Employees, Council 31](#), which held (5 to 4), “Under Illinois law, public employees are forced to subsidize a union, even if they choose not to join and strongly object to the positions the union takes in collective bargaining and related activities. We conclude that this arrangement violates the free speech rights of nonmembers by compelling them to subsidize private speech on matters of substantial public concern.”

[See my case analysis for Kentucky’s Right to Work statute.](#)

See IAFF statement in response to the *Janus* decision:

General President Harold Schaitberger issued this statement on the Supreme Court 5-4 decision overruling decades of precedent in the case of [Janus v AFSCME Council 31](#):

Washington, DC – “The *Janus v AFSCME Council 31* case was pushed by forces that want to take away the voices of fire fighters and the power of all public employee unions. The intent is to handicap unions in our ability to improve members' lives and to weaken the political power of public employees.

“We know the potential negative impacts that could come from the Supreme Court’s decision in *Janus*, however we are ready to take the best punch and deliver some blows ourselves to those that want to see fire fighters and their unions weakened.

“While the *Janus* decision is another attack on organized labor, every attack can be turned into an opportunity, and we are determined not to let this decision hold us back from our important mission. The IAFF has operated successfully under *Janus*-like rules in right-to-work and non-collective bargaining states for decades. We have proven that you can have strong affiliates that deliver better pay, health care, retirement security, health and safety provisions and a voice in keeping their communities safe in these tough environments.

“We represent more than 85 percent of all professional fire fighters and paramedics in the U.S. because we consistently demonstrate our value, through our strong affiliates, that being union fire fighters provides a significantly better standard of living and safer working environment than those who are not union. We believe that difference will become even more stark, and we are working to represent that small percentage of fire fighters who aren't in our union so that we can raise their standard of living and increase their ability to have a strong voice in public safety.

“This case was intended as a political push to eliminate the power of people who work to support their families and the power of their unions. But instead, the *Janus* case is activating an army of union leaders to better engage their members.”

1-15

WI: FOREST FIRE – INSURANCE COMPANY HAS LIMITED LIABILITY OF \$500,000

On Oct. 30, 2018, in [SECURA Insurance, A Mutual Company v. Lyme St. Croix Forest Company, LLC, et al.](#), the Wisconsin Supreme Court reversed the trial court, and the Wisconsin Appeals Court, and held (7 to 0): “Despite the fact that the fire crossed several property lines, Secura contends it was a single, uninterrupted cause of the alleged damages. *** We conclude that the fire at issue constitutes a single occurrence pursuant to the CGL [Commercial General Liability] policy. Consequently, the \$500,000 per-occurrence limit for property damage applies.”

Legal Lessons Learned: The logging equipment company, which paid for insurance against this type of loss, must feel that its insurance company has treated their customer like “manure.” Insurance policies are often difficult to interpret. Fire & EMS departments should invite their liability insurance carrier(s) in for a discussion about what is covered and what is not covered.

[See my case analysis for forest fire case in Wisconsin.](#)

1-14

OH: FIRE CODE VIOLATIONS - COURT MAY ORDER INSPECTION OF UNOCCUPIED BUILDING

On Oct. 11, 2018, in [City of Cleveland v. James Grunt, Jr.](#), the Ohio Court of Appeals for Cuyahoga County held (3 to 0) that a judge on the Cleveland Municipal Court – Housing Division had authority to allow warrantless inspections of the property to confirm that owner is complying with Cleveland Building Department requirements. “[W]e find no cases in Ohio directly on point, i.e., discussing the constitutionality of ordering a property inspection as a condition of CCS. However, we find guidance in R.C. 2951.02, which authorizes warrantless searches during an offender’s misdemeanor CCS under certain circumstances.”

Legal Lessons Learned: This decision can be helpful precedence in Ohio for communities struggling with empty properties.

[See my case analysis for Ohio Fire Code violations case in Cleveland.](#)

1-13

OH: AUTOPSY REPORTS NOT PUBLIC RECORDS – ONGOING INVESTIGATION, BUT JOURNALISTS CAN READ

On Sept. 19, 2018, in [The State Ex Rel. Cincinnati Enquirer v. Pike County General Health District, et al.](#), the Ohio Supreme Court held (5 to 0) that: “the function of R.C. 313.10(D) is to give journalists limited access to records that are not public records. If a journalist could review only autopsy reports that are public records, then he would have no greater access than the general public, and R.C. 313.10(D) would be a dead letter.”

Legal Lessons Learned: The Cincinnati Enquirer may next seek reimbursement of attorney fees. Fire & EMS departments, when requested to produce documents that may not be “public records” (for example, HIPAA-protected EMS run reports), should consult legal counsel before deciding whether to release the documents. See my case analysis of Ohio Supreme Court case regarding autopsy reports.

Note: On Nov. 13, 2018, arrests were made: “[Pike County: Wagner Family Arrested In The Rhoden Family Massacre](#)... Arrested and charged with murder and a slew of other charges were Angela Wagner, 48, her husband George ‘Billy’ Wagner, 47, and their two sons, George Wagner IV, 27, and Edward ‘Jake’ Wagner, 26.”

1-12

TX: FREE SPEECH - PD OFFICER LAWSUIT MAY PROCEED - FIRED ORGANIZING POLICE ASSOCIATION [also filed, Chap. 16]

On Aug. 31, 2018, in [Marcus Mote v. Debra Walthall](#), the U.S. Court of Appeals for 5th Circuit held (3 to 0) that Police Chief Debra Walthall is not entitled to qualified immunity, and Officer Mote’s lawsuit against her may proceed. Officer Mote sought before he was fired to organize police officers with the City of Corith, TX into a “Corith Police Officers Association” [no collective bargaining rights under TX law], affiliated with the Texas Municipal Police Association. The Court wrote, “The First Amendment protects the right of all persons to associate together in groups to ‘advanc[e] beliefs and ideas.’ Put another way, ‘the [F]irst [A]mendment protects the right of all persons to associate together in groups to further their lawful interests.’ When groups gather together for this purpose, ‘it cannot be seriously doubted’ that they comprise associations protected by the First Amendment. *** We conclude that Mote’s right to speak in furtherance of forming the CPOA was clearly established as an integral part of his association rights. *** We agree with the district court that Mote’s association and speech rights to engage in the activities he alleged were clearly established. We therefore DISMISS the appeal.”

Legal Lessons Learned: Very strong opinion concerning free speech rights of public employees. Fire & EMS departments should adopt a “Social Media” policy that recognizes free speech rights, but also cautions members to not publicly discuss internal matters.

1-11

OH: DYING DECLARATION IN BACK OF AMBULANCE ADMISSIBLE IN MURDER TRIAL [also filed Chap. 13]

On July 25, 2018, in [State v. Fred Taylor](#), 2018-Ohio-2921, the Ohio Court of Appeals for Summit County, upheld (3 to 0) his conviction of felony murder of Javon Knaff.

“Mr. Knaff’s repeated statements concerning the fact that he was dying, coupled with the severity of his condition, demonstrate his awareness of his impending death at the time that he stated, ‘Fred shot [me].’ Consequently, this statement was admissible as a dying declaration.”

Legal Lessons Learned: Document on your EMS run report the actual words spoken by the patient; a “dying declaration” is admissible in evidence. Recording the words on your run report can help prosecution reach a plea agreement.

1-10

MI: HOMEOWNER CONV. ARSON – NO “MIRANDA WARNING” REQUIRED, SPOKE TO PD INFORMANT

On July 24, 2018, in [Cynthia Marie Stewart-Matzen v. Shawn Brewer](#) [Deputy Warden, Michigan state prison], U.S. District Court judge David M. Lawson, Eastern District of Michigan, Case No. 15-13050 denied prisoner’s petition for writ of habeas corpus:

“The petitioner was not entitled to Miranda warnings when she was questioned by an informant at a restaurant or when questioned by Detective Morey in connection with her unemployment benefits because she was not in “Miranda custody.”

Legal Lessons Learned: If suspect in arson case is not in custody, then Miranda warnings not required.

1-9

U.S. SUPREME COURT – UNION “FAIR SHARE” FEES – REQUIRES EMPLOYEE SPECIFIC CONSENT

On June 27, 2018, in [Janus v. American Federation of State, County, And Municipal Employee, Council 32, et al](#), the U.S. Supreme Court (5 to 4) held in opinion by Justice Alito:

“Under Illinois law, public employees are forced to subsidize a union, even if they choose not to join and strongly object to the positions the union takes in collective bargaining and related activities. We conclude that this arrangement violates the free speech rights of nonmembers by compelling them to subsidize private speech on matters of substantial public concern.”

Legal Lessons Learned: Fire & EMS Departments with unions need to dialog with their union officers about getting written authorization from each employee to deduct “fair share” or other union fees. [See also IAFF Statement](#), and [Blog](#).

1-8

U.S. SUPREME COURT: SEARCH WARRANT REQUIRED FOR CELL TOWER DATA, UNLESS EMERGENCY

On June 22, 2018, in [Carpenter v. United States](#), the U.S. Supreme Court (5 to 4), in opinion by Chief Justice Roberts, held that a search warrant is normally required to track a person's cell phone location, but also recognized an emergency exception.

“Further, even though the Government will generally need a warrant to access CSLI [cell-site location information], case-specific exceptions may support a warrantless search of an individual's cell-site records under certain circumstances. ‘One well-recognized exception applies when “the exigencies of the situation” make the needs of law enforcement so compelling that [a] warrantless search is objectively reasonable under the Fourth Amendment.’ *Kentucky v. King*, 563 U. S. 452, 460 (2011) (quoting *Mincey v. Arizona*, 437 U. S. 385, 394 (1978)). Such exigencies include the need to pursue a fleeing suspect, protect individuals who are threatened with imminent harm, or prevent the imminent destruction of evidence. 563 U. S., at 460, and n. 3. As a result, if law enforcement is confronted with an urgent situation, such fact-specific threats will likely justify the warrantless collection of CSLI. Lower courts, for instance, have approved warrantless searches related to bomb threats, active shootings, and child abductions. Our decision today does not call into doubt warrantless access to CSLI in such circumstances. While police must get a warrant when collecting CSLI to assist in the mine-run criminal investigation, the rule we set forth does not limit their ability to respond to an ongoing emergency.”

Legal Lessons Learned: Fire & EMS Departments in emergency situations – for example, when conducting search for a missing person who may be carrying a cell phone – may still coordinate with law enforcement and get cell tower information without a search warrant. [Note: Justice Kennedy announced his retirement on June 27, 2018; he has been the “swing vote” in many 5 to 4 decisions. Future cases involving access to electronic records will undoubtedly get to the U.S. Supreme Court.]

1-7

PA: DOT EMPLOYEE FIRED FOR FACEBOOK POSTS ON BAD SCHOOL BUS DRIVERS – REINSTATED [also filed, Chap. 16]

On June 12, 2018, in [Rachel L. Carr v. Commonwealth of Pennsylvania / Department of Transportation and Civil Service Commission](#), the Commonwealth Court of Pennsylvania held (3 to 0) that the employee's FACEBOOK posts about local school bus drivers were “inappropriate” but were protected since it “touched on a matter of public concern.” The Court wrote: “After a thorough review of the record and a conscientious analysis of the factors articulated by the United States Supreme Court, we conclude that the Department's generalized interest in the safety of the traveling public does not outweigh Carr's specific interest in commenting on the safety of a particular bus driver. While Carr's comments are undoubtedly inappropriate, such comments still receive protection under the First Amendment.”

Legal Lessons Learned: Fire & EMS Departments should have a Social Media Policy that clearly advises personnel that their “Free Speech rights” are limited when discussing FD internal matters.

1-6

NY: NYPD / FDNY TRADEMARKS – CITY SUING “COP SHOP”

On June 7, 2018, in [The City Of New York v. Blue Rage Inc, d/b/a THE COP SHOP, and Salvatore Piccolo & Susan Piccolo](#), a United States Magistrate Judge in Central Islip, New York, held in a pre-trial dispute that the City does not need to disclose the profits it makes on its merchandise, or its contributions to non-profit organizations.

Legal Lessons Learned: Protect your trademarks. “Under trademark law, the amount of statutory damages can range from a low of \$1,000 for innocent infringement to a high of \$2,000,000 for willful infringement.” [15 U.S.C. § 1117\(c\).](#)

1-5

OH: FIRE LOSS INSURANCE – CLEVELAND MUST RETURN \$175,000 DEPOSITED WITH CITY

On May 31, 2018, in [WRRS, L.L.C. v. City of Cleveland](#), the Court of Appeals for 8th Appellate District (County of Cuyahoga), 2018 Ohio 2129, held (3 to 0):

“The Board's 2012 decision, however, does preclude the City from continuing to withhold the \$175,000 WRRS deposited with the City pursuant to Ohio's fire loss statute. In 2012, the Board [of Building Standards] found the WRRS property to be in compliance after the fire. The City could have appealed from the 2012 decision, but chose not to do so. Thus, the City is now precluded under res judicata from challenging the Board's 2012 decision. As a result, the City is ordered to return the \$175,000 to WRRS.”

Legal Lessons Learned: Under Ohio Revised Code 3929.86, “Fire loss claims,” for claims in excess of \$5000, insurance companies must first deposit payment with political subdivision.”

“(A) No insurance company doing business in this state shall pay a claim of a named insured for fire damage to a structure located within a municipal corporation or township in this state where the amount recoverable for the fire loss to the structure under all policies exceeds five thousand dollars, unless the company is furnished with a certificate pursuant to division (B) of this section, and unless there is compliance with the procedures set forth in divisions (C) and (D) of this section.”

1-4

SC: ARSON INVESTIGATOR “EXPERT” – 1YEAR OF EXPERIENCE - ARSON DOG ALSO QUALIFIED

On April 11, 2018, in [The State v. Paula Reed Rose](#), the South Carolina Court of Appeals affirmed (3 to 0) the conviction of Ms. Rose of third-degree arson, filing a false police report, burning personal property to defraud an insurer, and making a false insurance claim to obtain benefits for fire loss, for which the trial court sentenced her to a cumulative term of five years' home incarceration with five years' probation.”

LEGAL LESSONS LEARNED: There is no specific “time on the job” requirement to be qualified as an expert in origin and cause.

1-3

U.S. SUPREME COURT: LANDMARK DECISION ON QUALIFIED IMMUNITY – ONLY IF CLEAR CONSTIT. VIOL. [also filed, Chap. 2]

On April 2, 2018, in [Andrew Kisela v. Amy Hughes](#), the U.S. Supreme Court reversed the 9th Circuit and held (7 to 2) the police officer who shot Amy Hughes should have been dismissed from the lawsuit: “Here, the Court need not, and does not, decide whether Kisela violated the Fourth Amendment when he used deadly force against Hughes. For even assuming a Fourth Amendment violation occurred—a proposition that is not at all evident—on these facts Kisela was at least entitled to qualified immunity. Qualified immunity attaches when an official’s conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.”

Legal Lessons Learned: Justices sent a message that qualified immunity protects police officers from personal liability unless conduct clearly unjustified.

[See New York Times article on this decision](#): “The court’s decision was unsigned and issued without full briefing and oral argument, an indication that the majority found the case to be easy.”

1-2

TX: MURDER TRIAL FOR KILLING A POLICE OFFICER – POLICE MAY ATTEND TRIAL IN UNIFORM

On March 27, 2018, in [Shelton Denoria Jones v. Lorie Davis, Director, Texas Department of Criminal Justice](#), the U.S. Court of Appeals for 5th Circuit, held (3 to 0) that the defendant was not deprived of a fair trial in state court: “the record before us does not suggest the police presence intimidated the jury or disrupted the factfinding process in any way.”

LEGAL LESSONS LEARNED: Helpful decision – no evidence of jury intimidation by having emergency responders in uniform, watching a jury trial. Before showing up in uniform, please discuss with your Chief and the prosecutor, who may want to review with trial judge, prior to start of trial.

1-1

IL: DEPUTY FIRE CHIEF FIRED - WARNED ABOUT “POLITICAL COMMENTARY” ON FACEBOOK [also filed, Chap. 16]

On Jan. 11, 2018, in [Richard Banske v. City of Calumet City, U.S. District Court, Northern District of Illinois](#) (Case No. 17C5263), Judge Harry D. Leinenweber granted City’s motion to dismiss. “[A] policymaking employee may be discharged ‘when that individual has engaged in speech on a matter of public concern in a manner that is critical of superiors or their stated policies.’ Hagan, 867 F.3d at 826 (quoting Kiddy-Brown v. Blagojevich, 408 F.3d 346, 358 (7th Cir. 2005)). *** Without well pled factual allegations, the Court is left to guess whether Banske’s at-issue speech touches upon a subject of public concern. This the Court will not do. The Complaint fails to establish that Banske engaged in constitutionally protected speech, so it fails to state a claim upon which relief may be granted.”

Legal Lessons Learned: Fire, EMS, police and other public employees have only limited First Amendment rights under the “balancing test” of [U.S. Supreme Court’s decision in Pickering v. Board of Education, 391 U.S. 563 \(1968\)](#).

Pickering decision: “Appellant Marvin L. Pickering, a teacher in Township High School District 205, Will County, Illinois, was dismissed from his position by the appellee Board of Education for sending a letter to a local newspaper in connection with a recently proposed tax increase that was critical of the way in which the Board and the district superintendent of schools had handled past proposals to raise new revenue for the schools. *** In sum, we hold that, in a case such as this, absent proof of false statements knowingly or

recklessly made by him, a teacher's exercise of his right to speak on issues of public importance may not furnish the basis for his dismissal from public employment. *** Footnote 3: It is possible to conceive of some positions in public employment in which the need for confidentiality is so great that even completely correct public statements might furnish a permissible ground for dismissal.”

Chap. 2 Line Of Duty Death; Safety

2-24

NY: FF WORKED WTC – HEART ATTACK / DROWNING – 7-YR APPEAL - MEDICAL BOARD “BAD FAITH”, NO SANCTIONS

On Dec. 4, 2019, in [Fernandez v. Nigro](#), the Supreme Court of New York / Appellate Division (Second Judicial Department), 2019 NY Slip Opinion 8672, held (3 to 0) that trial judge did not have authority to impose additional sanctions against the Fire Department for “bad faith” in denying benefits for seven years.

“The conduct at issue did not constitute conduct in the proceeding before the court and, therefore, sanctions were not authorized by 22 NYCRR 130-1.1. Further, an award of costs or the imposition of sanctions may be made only after a reasonable opportunity to be heard (see 22 NYCRR 130-1.1[d]). The Supreme Court's sua sponte determination to impose sanctions here was made without notice to the parties....Accordingly, the Supreme Court was without authority to impose sanctions, and the order must be reversed insofar as appealed from.”

Legal Lessons Learned: It is unfortunate the NY statute does not allow sanctions, when the trial judge finds that the family of the deceased firefighter was “plainly entitled under the relevant law” to accidental death benefits. The pension is increased from one-half his salary (taxable) to three-quarters of his salary (tax-free), retroactive to August 23, 2007.

[See my case analysis for case of medical appeal for firefighter that worked at the World Trade Center.](#)

2-23

NV: HEART ATTACK - FF ENTITLED WORKERS COMP – WAS DIETING, WORKING OUT TO LOWER WEIGHT, COLLESTEROL

On Nov. 13, 2019, in [City of Las Vegas v. Burns](#), the Court of Appeals of Nevada, held (3 to 0) that despite the firefighter’s predisposition for a heart attack, he was entitled to workers comp coverage, upholding trial court which had overturned administrative appeals officer.

“Moreover, there is not substantial evidence in the record to indicate that Burns was capable of reducing his cholesterol, triglycerides, or weight by dieting and exercising. To the contrary, the record indicates that, following his required annual physicals in 2010, 2011, and 2012, the physicians' assessments and recommendations indicate Burns ‘continue[s] to do an excellent job maintaining [his] health;’ that he should ‘[k]eep up [his] exercise regimen ... it's doing great for [him];’ and that he was ‘doing well maintaining [his] health.’ In 2012, the physician noted that although his ‘bad’ cholesterol and triglycerides were high, Burns was taking fish oil supplements as previously directed by his private physician and his total cholesterol was fine. Thus, the physicians' reports indicate that Burns was doing what he was instructed to do, he was exercising and taking supplements, and despite that, his predisposing factors did not change, which reflects that he was not capable of correcting his predisposing conditions.

Because there is no evidence in the record to support the conclusion that correcting Burns' predisposing conditions was within his ability, we necessarily hold that the appeals officer's conclusion is not supported by substantial evidence.

Legal Lessons Learned: The statutory requirement that firefighters must seek to correct their “predisposing condition” to cardiac problems makes lots of sense.

[See my case analysis for Court of Appeals case for firefighters workers comp.](#)

2-22

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

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

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

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

[See my case analysis of the State of Washington Court of Appeals collective bargaining decision.](#)

2-21

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

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

Judge Kelly Thompson wrote:

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

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

[See my case analysis regarding the State of Kentucky’s Court of Appeal’s decision return to work for firefighter.](#)

2-20

NY: LIVER CANCER - FF WORKED AT 9/11 WORLD TRADE CENTER – ACCIDENTAL DISABILITY BENEFITS AWARDED

On Sept. 3, 2019, in [Matter Of Joseph Daly v. Daniel Nigro](#), Supreme Court, Kings County (Judge Katherine A. Levine), in unpublished opinion, held that there is a statutory presumption that the firefighter’s liver cancer was caused by his work at the World Trade Center cleanup operation. The firefighter’s pension is therefore increased from one-half his salary (taxable) to three-quarters of his salary (tax-free).

“While the Pension Fund does not dispute that Daly has a qualifying physical condition, it argues that it presented competent evidence to the court which disproves that petitioner's disability was attributable to his WTC rescue, recovery and cleanup operations, and proves that it was caused by persistent ascites and abdominal distention due to alcoholic cirrhosis of the liver. This court finds that respondent failed to proffer competent evidence to rebut the presumption that petitioner's qualifying physical condition was caused by the hazards he encountered at the WTC site.”

Legal Lessons Learned: The World Trade Center legislation created a “statutory presumption” that cancer was caused by their work at the WTC. All firefighters should keep a record of structure fires and other exposures to hazardous environments, including even if you work in a state that have enacted workers comp. statutory presumptions, such as Ohio. [See the Ohio application:](#)

“Have you been assigned to at least six years of hazardous duty as a fire fighter? Yes No If yes, please provide a history of your hazardous duty as a firefighter. “Hazardous duty” means duty performed under circumstances in which an accident could result in serious injury or death.”

[See my case analysis State of New York’s Supreme Court decision regarding accidental disability benefits for WTC firefighter.](#)

2-19

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

On Aug. 28, 2019, in [Firefighter Brad Speakman, Ret., et. al v. Dennis P. Williams, James M. Baker, Anthony S. Goode, William Patrick, and City of Wilmington](#), U.S. Magistrate Judge Mary Pat Thyng, U.S. District Court for the District of Delaware, issued a Report And Recommendation to a U.S. District Court judge assigned to this lawsuit arising from September 24, 2016 structure fire in a row house started by an arsonist. The Magistrate recommended

that Mayor Williams, Fire Chief Goode not be granted qualified immunity at this time because of their “brownouts” of fire stations – called “rolling bypass policy.”

Magistrate Judge Thyng wrote:

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

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

Legal Lessons Learned: A tragic loss of life; “rolling brownouts” of fire stations or apparatus continue to be a very controversial issue.

[See NIOSH Fire Fighter Fatality Investigation report F2016-18 \(November 9, 2018\):](#)

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

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

[See my case analysis regarding Pennsylvania firefighter’s death.](#)

2-18

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

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

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

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

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

[See my case analysis for case Kentucky volunteer firefighter injury.](#)

2-17
MI: RESTAURANT OPERATORS CLAIM THAT “ORIGIN & CAUSE” RPT. CHANGED TO “INCENDARY” TO DEFLECT ATTENTION FD DEFICIENCIES - LODD / \$3,500 OSHA FINE

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

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

[Read NIOSH Firefighter Fatality Report F2013-14: “Career Probationary Fire Fighter Runs Out of Air and Dies in Commercial Structure Fire—Michigan.”](#)

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

[See my case analysis for a Michigan’s restaurant operator’s claim regarding OSHA fine.](#)

2-16

MO: CANCER – WIFE OF DECEASED CAPTAIN - WINS WORKERS COMP CLAIM – OCCUPATIONAL EXPOSURES TO CARCINOGENS

On June 4, 2019, in [David Cheney \(Deceased\), Donna Ceney \(Spouse\) v. City of Gladstone](#), the Missouri Court of Appeals, Western District, held (3 to 0) that the cancer was work related and she is entitled to workers comp death and burial benefits.

Judge Edward R. Arnidi, Jr. wrote:

“Both Drs. Lockey and Koprivica reviewed David Cheney’s medical records. Dr. Koprivica also conducted a physical examination of David Cheney before his death. Based on the information gleaned from the records and the physical examination, both doctors concluded that David Cheney’s occupational exposure to carcinogenic smoke, fumes, and particulates experienced during his employment as a firefighter for the City was the prevailing factor in the development of his NHL. The Commission found this evidence credible and persuasive, and we defer to this finding. *** The Commission determined that David Cheney suffered a compensable injury by occupational disease arising out of and in the course of his employment as a firefighter with the City. We affirm.”

Legal Lessons Learned: Litigation such as this case reflects the need for statutory presumption for firefighter cancer. [See 33 states with presumption statutes.](#)

See also July 7, 2019 article about this important win: [“Cancer is killing our firefighters’: Missouri widow’s court win may aid those at risk”](#).

[See my case analysis for workers comp claim for deceased captain in Missouri.](#)

2-15

IL: FF PRIOR HEART ISSUES - PATIENT DROPPED ON STRETCHER – LINE-OF-DUTY PENSION, LIFETIME HEALTH INSURANCE

On May 28, 2019, in [Patrick Cronin v. Village of Skokie](#), the Appellate Court of Illinois, First District, held (3 to 0) that the retired firefighter was properly awarded lifetime health insurance.

“In summary, because Mr. Cronin was awarded a line-of-duty disability pension by the Pension Board, he met the requirements of section 10(a) of the Benefits Act—that he suffered a catastrophic injury in the line of duty—as a matter of law. Mr. Cronin also met the requirements of section 10(b): the only work-related incident that was presented as a cause of his injury was his act of holding the stretcher as a cardiac patient was dropped onto it and he presented uncontradicted evidence that he reasonably believed he was responding to an emergency. Accordingly, Mr. Cronin is entitled to benefits under the Act, and the circuit court properly granted summary judgment in favor of Mr. Cronin and against the Village.”

Legal Lessons Learned: The Illinois statute applies even to firefighters with a prior heart issue.

[See my case analysis for Illinois firefighter with prior heart issues.](#)

2-14

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.”

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.

[See my case analysis for the California firefighter that was struck while helping a motorist cross the highway.](#)

2-13

NJ: FF ACCIDENTAL DEATH BENEFITS - ONLY FOR THOSE WHO DIED WHILE IN “ACTIVE SERVICE”

On March 26, 2019, in [Scott Rogow \(Deceased\) v. Board of Trustees, Police And Firemen’s Retirement System](#), the Superior Court of New Jersey / Appellate Division held (3 to 0) in an unpublished opinion: “Accordingly, we conclude the Board properly determined that Rogow was ineligible for accidental death benefits because he was not a member in active service at the time of his death, as required by N.J.S.A. 43:16A-10, but was retired and receiving an accidental disability retirement allowance. The legislative history supports the Board’s decision.”

Legal Lesson Learned: Courts will enforce the plain language of statutes, particularly when the language is supported by the legislative history of the statute

[See my case analysis for New Jersey’s firefighter who died while in “active service”.](#)

2-12

IL: FF WITH PROSTATE CANCER - DENIED COVERAGE

On Nov. 14, 2018, in [Clifford A. Ekkert v. Illinois Workers Compensation Commission and Village of Oak Brook](#), the Appellate Court of Illinois, Second District, Workers Compensation Division, held (5 to 0) that firefighter Ekkert is not covered by workers comp: “claimant did not adequately set forth and develop an argument as to why the ultimate decision of the Commission was contrary to the manifest weight of the evidence.”

Legal Lessons Learned: A firefighter with prostate cancer, seeking workers compensation, needs to consult a board-certified expert in urology. The statutory presumption is rebuttable by employer’s expert witness.

[See my case analysis for Illinois firefighter denied coverage.](#)

2-11

PA: SKIN CANCER - FF DID NOT SHOW SCIENTIFIC EVIDENCE CONNECTING TO JOB

On Oct. 18, 2018, in [City Of Philadelphia Fire Department v. Workers' Compensation Appeal Board \(Appeal of Scott Sladek\)](#), the Supreme Court of Pennsylvania (sitting in Eastern District, Philadelphia) held (4 to 3) that a firefighter with skin cancer must present scientific evidence to Workers Comp Board that his malignant melanoma is a type of cancer caused by the Group 1 carcinogens. The City's expert, "Dr. Guidotti, testified that there is considerable epidemiological evidence to support a causative relationship between malignant melanoma of the skin and sunlight exposure (sunburn), but no similar evidence to support a causative connection between malignant melanoma and the inhalation of any substance."

Legal Lessons Learned: There are [statutory presumption statutes in many states](#); some cover specific cancers, such as leukemia, non-Hodgkin lymphoma, brain cancer, bladder cancer, and gastrointestinal cancer. Other statutes do not specify the specific cancers, and epidemiological evidence may be required to win a workers comp claim.

2-10

PA: Q-SIREN LAWSUIT DISMISSED – DID NOT PROVE WAS "UNREASONABLY DANGEROUS"

On Aug. 20, 2018, in [Ronald Dunlap and Carl Roel v. Federal Signal Corporation, et al.](#), the Superior Court of Pennsylvania, held (2 to 1) that the trial court properly granted summary judgment to the siren manufacturer. The Court wrote: "Plaintiff firefighters' acoustics expert, Mr. Struck, presented an alternative siren design that would afford greater protection for firefighters from hearing loss by adding a Bromley Shroud, which would direct the noise to the front of the fire truck and away from the cab. However, he focused solely on the benefits of the shrouded design to the firefighters occupying the cab of the firetruck; he did not opine whether that design would protect the public."

Legal Lesson Learned: Hearing loss is a serious issue in fire and EMS; hearing protection should be worn when the siren is activated.

2-9

PA: HEARING LOSS LAWSUIT DROPPED - PLANITIFF'S ATTORNEY MUST PAY DEF. ATTORNEY FEES

On June 20, 2018, in [Gerald Carroll, et al. v. Federal Signal Corporation, et al.](#), the U.S. Court of Appeals for the 3rd Circuit (Philadelphia) held (3 to 0) that plaintiffs' attorney must pay \$127,823.47 in attorney fees.

"Although attorneys' fees and costs are typically not awarded when a matter is voluntarily dismissed with prejudice, we conclude that such an award may be granted when exceptional circumstances exist. Exceptional circumstances include a litigant's failure to perform a meaningful pre-suit investigation, as well as a repeated practice of bringing meritless claims and then dismissing them with prejudice after both the opposing party and the judicial system have incurred substantial costs. Because such exceptional circumstances are present in this case, the District Court's award will be affirmed."

Legal Lessons Learned: Hearing loss is a real issue in fire & EMS - wear hearing protection.

[See NFPA 1582 for more information on the standard on Comprehensive Occupational Medical Program for Fire Departments.](#) See also these research articles, [“Hearing Loss Prevention and a Survey of Firefighters,”](#) [“Hearing Conservation For Firefighters,”](#) [Audiology Today \(Nov / Dec. 2012\):](#) “This hearing loss is irreversible, but preventable by using hearing protection or managing the noise and noise exposure. Unfortunately, audiologists see this population only after the hearing loss has become debilitating.”

2-8

MD: PART-TIME EMS INJURED FOOT ON DUTY – AVERAGE WEEKLY WAGE

On June 1, 2018, in [Justin Stine v. Montgomery County, Maryland](#), the Court of Special Appeals of Maryland, held (3 to 0) that he is entitled to a jury trial to determine average weekly wage, which may include wages earned working for private ambulance company rather than merely the wage he earned as a part-time EMT in the 14-weeks prior to the injury.

Legal Lesson Learned: helpful decision for part-time EMT, who has second part-time job while also going to school.

2-7

U.S. Department of Justice: Improvements In Public Safety Officer Benefits Program

On May 15, 2018, the [U.S. Department of Justice issued Press Release](#), summarizing the following improvements:

- “Heart Attack, Stroke, and Vascular Rupture Claims: The new rule helps implement a change in the law that reduces the need in many cases for families to submit difficult-to-find and costly medical records for their loved ones. This regulatory change alone positively impacts nearly one-third of the PSOB death claims filed each year.
- Filing Process: The new rule includes administrative updates to make filing claims more straightforward and less burdensome for survivors and public safety agencies.
- Law Enforcement and Firefighter Trainees: Recognizing the dangerous nature of law enforcement and fire suppression, and the rigorous training required to help keep communities safe, the new rule clarifies the coverage of certain individuals fatally or catastrophically injured during formal training provided by law enforcement and fire academies.
- September 11th Exposure Claims: The new rule facilitates the PSOB Program’s medical examiners’ review of the nearly 150 claims pending for certain public safety officers who responded to the September 11th attacks to assist in rescue, recovery, and clean-up efforts, and who were exposed to hazards and toxins resulting from the attacks.”

Legal Lessons Learned: Hopefully these new rules will expedite review of pending claims, including claims by public safety officers who responded to the Sept. 11 terrorist attacks and were exposed to toxins.

2-6

KY: LINE OF DUTY DEATH – “STEP CHILD” ENTITLED TO FREE TUITION AT STATE COLLEGES

On June 1, 2018, in [Miles Devon Skeens v. University of Louisville](#), the Commonwealth of Kentucky Court of Appeals (3 to 0) held that a stepchild qualifies as a “child” under Kentucky Revised Statutes (“KRS”) 164.2841 which grants free tuition at state-supported schools for survivors of firefighters killed in the line of duty.

Legal Lesson Learned: Great decision; what was University of Louisville thinking?

2-5

VA: FIREMAN’S RULE – REFRIGERATOR EXPLODED – PD / VOL. FF CAN’T SUE MANUFACTURER

On April 13, 2018, in [Brian Colbert v. Norcold, Inc.](#), the U.S. Court of Appeals for the 4th Circuit held (3 to 0; unpublished opinion): “we agree with the district court: the Fireman’s Rule applies to products liability claims, and Norcold’s conduct was not willful or wanton.”

LEGAL LESSONS LEARNED: Police officers and firefighters in Virginia can only seek workers comp (no damages for pain & injury, loss of consortium, etc.) unless proof of willful or wanton misconduct, or gross negligence, by the product manufacturer.

[See also March 12, 2015 decision of 10th Circuit in Chester W. Peake v. Central Tank Coatings](#), where several Kansas firefighters were injured by exploding box of paint thinner: “The undisputed material facts are that several hours after Central Tank completed its work on the roof [of the city’s water tower] and left the site, the wooden members of the tower caught fire, fell to the ground, caught the surrounding grass on fire and eventually spread to the tires of the trailer. This domino chain of events was unforeseeable. *** A large, unmarked metal container box was mounted to the wood deck of the trailer. It was used by the crew to store various tools, oxygen/acetylene tanks, and other materials, including paint thinner.” The Court held that the firefighters could not sue the company for damages, since here is “no evidence that Central Tank knew that the storage of paint thinner was dangerous

[See also this article about the Kansas case](#): “Notably, a sizable minority of states (18) do not currently apply the Fireman’s Rule... and have either explicitly declined to adopt, rejected, limited, or failed to address it... These states are Alabama, Colorado, Florida, Maine, Massachusetts, Michigan, Minnesota, Montana, New Jersey, New York, North Carolina, North Dakota, Oregon, Pennsylvania, South Carolina, Vermont, West Virginia, and Wyoming.”

2-4

NY: FDNY RECRUIT DIED DURING PHYSICAL EXERCISES – LAWSUIT DISMISSED - HEART CONDITION

On April 10, 2018, in [Sherita Sears v. The City of New York](#), the Appellate Division of the Supreme Court of State of New York (5 to 0) denied the death claim, holding: “Plaintiff is not entitled to recover under GML § 205-a, as the injuries decedent sustained were not the type of occupational injury that Labor Law § 27-a was designed to protect,

but rather, arose from risks unique to firefighting work (Williams v. City of New York, 2 N.Y.3d 352, 368, 779 N.Y.S.2d 449, 811 N.E.2d 1103 [2004]).”

Legal Lessons Learned: The New York statute requires proof of “neglect, omission, willful or culpable negligence.”

[New York Consolidated Laws, General Municipal Law - GMU § 205-a](#). Additional right of action to certain injured or representatives of certain deceased firefighters. “In addition to any other right of action or recovery under any other provision of law, in the event any accident, causing injury, death or a disease which results in death, occurs directly or indirectly as a result of any neglect, omission, willful or culpable negligence of any person or persons in failing to comply with the requirements of any of the statutes, ordinances, rules, orders and requirements of the federal, state, county, village, town or city governments or of any and all their departments, divisions and bureaus, the person or persons guilty of said neglect, omission, willful or culpable negligence at the time of such injury or death shall be liable to pay any officer, member, agent or employee of any fire department injured, or whose life may be lost while in the discharge or performance at any time or place of any duty imposed by the fire commissioner, fire chief or other superior officer of the fire department, or to pay to the wife and children, or to pay to the parents, or to pay to the brothers and sisters, being the surviving heirs-at-law of any deceased person thus having lost his life, a sum of money, in case of injury to person, not less than ten thousand dollars, and in case of death not less than forty thousand dollars, such liability to be determined and such sums recovered in an action to be instituted by any person injured or the family or relatives of any person killed as aforesaid.”

2-3

U.S. SUPREME COURT: LANDMARK DECISION ON QUALIFIED IMMUNITY – ONLY IF CLEAR CONSTITUTIONAL VIOLATION [also filed, Chap. 1]

On April 2, 2018, in [Andrew Kisela v. Amy Hughes](#), the U.S. Supreme Court reversed the 9th Circuit and held (7 to 2) the police officer who shot Amy Hughes should have been dismissed from the lawsuit: “Here, the Court need not, and does not, decide whether Kisela violated the Fourth Amendment when he used deadly force against Hughes. For even assuming a Fourth Amendment violation occurred—a proposition that is not at all evident—on these facts Kisela was at least entitled to qualified immunity. ‘Qualified immunity attaches when an official’s conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.’”

LEGAL LESSONS LEARNED: Very helpful decision, not only for police officers, but for all emergency responders who may be sued arising out of split-second decisions. The 7-Justices sent a message that qualified immunity protects police officers from personal liability unless conduct clearly unjustified.

[See New York Times article on this decision](#): “The court’s decision was unsigned and issued without full briefing and oral argument, an indication that the majority found the case to be easy.”

2-2

TX: MURDER TRIAL FOR KILLING A POLICE OFFICER – PD MAY BE AT TRIAL IN UNIFORM [also filed, Chap. 1]

On March 27, 2018, in [Shelton Denoria Jones v. Lorie Davis, Director, Texas Department of Criminal Justice](#), the U.S. Court of Appeals for 5th Circuit, held (3 to 0) that the defendant was not deprived of a fair trial in state court: “the record before us does not suggest the police presence intimidated the jury or disrupted the factfinding process in any way.”

LEGAL LESSONS LEARNED: Helpful decision – no evidence of jury intimidation by having emergency responders in uniform, watching a jury trial. Before showing up in uniform, please discuss with your Chief and the prosecutor, who may want to review with trial judge, prior to start of trial.

2-1

PA: SEAGRAVE FIRE APPARATUS – INSURANCE COMPANIES MUST DEFEND ON HEARING LOSS CLAIMS

On March 26, 2018, in [Seagrave Fire Apparatus, LLC v. CAN D/B/A Continental Casualty Company, et al.](#), the Superior Court of Pennsylvania held (3 to 1) that several insurance companies that insured Seagrave must defend Seagrave under their contracts for firefighter hearing loss claims.

LEGAL LESSONS LEARNED: Insurance companies are obligated per terms of their contracts to defend Seagrave against the many pending claims.

[See, for example, this 2015 lawsuit filed on behalf of 34 New Jersey firefighters.](#)

Chap. 3 Homeland Security; Active Shooter

3-17

NY: TERRORIST – ATTACKED FBI AGENT, 8-INCH KNIFE – PLED GUILTY – 2nd Cir: 17 YRS IN PRISON NOT ENOUGH

On Dec. 27, 2019, in [United States of America v. Fareed Mumuni](#), the U.S. Court of Appeals for Second Circuit (NYC), held 2 to 1 that U.S. District Court judge must re-sentence the convicted terrorist.

“In this terrorism case, the Government appeals the substantive reasonableness of the sentence imposed on Defendant-Appellee Fareed Mumuni (‘Mumuni’). He was convicted of, inter alia, conspiring to provide material support to the Islamic State of Iraq and al-Sham (‘ISIS’) and attempting to murder a federal agent in the name of ISIS. His advisory sentence under the United States Sentencing Guidelines (‘Guidelines’ or ‘U.S.S.G.’) was 85 years’ imprisonment. The sole question on appeal is whether the United States District Court for the Eastern District of New York (Margo K. Brodie, Judge) erred—or ‘abused its discretion’—by imposing a 17-year sentence, which constitutes an 80% downward variance from Mumuni’s advisory Guidelines range. We conclude that it did. Accordingly, we REMAND the cause for resentencing consistent with this opinion.”

3-16

UC TERRORISM & HOMELAND SECURITY FOR EMERGENCY RESPONDERS

- **MASS CASUALTY / EMERGENCY ROOM PREPARATION:** [See new video by Dr. Dustin Calhoun, a subject matter expert in our new course.](#)
- **25 SUBJECT MATTER EXPERTS:** [See presenters from IAFC and elsewhere including: Wash. DC, GA, OH, NV, WA & Canada – click Syllabus, Attachment A.](#)

3-15

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

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

“The plaintiffs are on the No Fly List, which prohibits them from boarding commercial aircraft flying to, from or within the United States or through United States airspace. They challenge, under the Due Process Clause of the Fifth Amendment to the United States Constitution, both their inclusion on the No Fly List and the sufficiency of the procedures available for contesting their inclusion on the list. Specifically, the plaintiffs argue (1) the criteria for inclusion on the No Fly List are unconstitutionally vague; (2) the procedures for challenging inclusion on the list fail to satisfy procedural due process; and (3) their inclusion on the list

violates their substantive due process rights. The district court granted summary judgment to the government on the vagueness and procedural due process claims and dismissed the substantive due process claims for lack of jurisdiction under 49 U.S.C. § 46110. We affirm.”

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

[See my case analysis for ruling in California regarding the TSA’s no fly list.](#)

3-14
CO: TERRORIST SENTENCED LIFE FED. MAX PRISON – TRIED BLOW UP PLANE IN DETROIT – COMPLAINTS ABOUT PRISON DISMISSED
On Sept. 18, 2019, in [Umar Farouk Abdulmutallab v. William Barr, Attorney General of the United States](#), U.S. District Court Judge Raymond P. Moore, United States District Court of Colorado, upheld the recommendations of U.S. Magistrate Judge that the prisoner’s claims should be dismissed for failure to exhaust his U.S. Bureau of Prisons administrative remedies.

Judge Moore wrote:

“Plaintiff was convicted for the attempted use of a weapon of mass destruction on a commercial airliner that landed in Detroit, Michigan, and the attempted murder of the 289 people on board. Plaintiff is from Nigeria and a Muslim. Plaintiff is housed at the United States Penitentiary-Administrative Maximum (‘ADX’) in Florence, Colorado, and serving four terms of life imprisonment plus 50 years for his convictions. Prior to Plaintiff’s transfer to ADX, in March 2012, the United States government placed Plaintiff under Special Administrative Measures (‘SAMs’). The SAMs have been renewed every year, with some modifications.

“As Plaintiff acknowledges, ‘[t]he primary purpose of a grievance is to alert the prison to a problem and facilitate its resolution.’ (ECF No. 128, p. 5 (quoting *Griffin v. Arpaio*, [557 F.3d 1117](#), 1120 (9th Cir. 2009).) Thus, in the absence of a prisoner alerting a prison of the problem which he alleges in his complaint, such allegation is not exhausted and cannot serve to support the prisoner’s claim or claims. As applied to the recommendation of dismissal here, this objection is overruled.”

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

3-13
U.S. SUPREME CT: NEW U.S. GOV’T ASYLUM RULES REMAIN IN EFFECT – REFUGES FIRST APPLY TO MEXICO, ELSEWHERE – NO INJUNCTION
On Sept. 11, 2019, in [William Barr, Attorney General v. East Bay Sanctuary Covenant](#), the majority of Justices (7 to 2) issued an Order granting U.S. Government’s request for a stay of a nationwide injunction issued by U.S. District Court judge Jon Tigar in San Francisco, after the injunction was modified to only apply to California & Arizona, by a 3-judge panel the U.S. Court of Appeals for 9th Circuit (San Francisco).

“The district court’s July 24, 2019 order granting a preliminary injunction and September 9, 2019 order restoring the nationwide scope of the injunction are stayed in full pending disposition of the Government’s appeal in the United States Court of Appeals for the Ninth Circuit and disposition of the Government’s petition for a writ of certiorari, if such writ is sought.”

Legal Lessons Learned: The case, now pending before a Federal Judge in California, will most likely then go to the 9th Circuit, and eventually then reach the U.S. Supreme Court.

See [Press Reports: “President Trump tweeted that the ruling was a "BIG United States Supreme Court WIN for the Border on Asylum!"](#) The administration [had argued in a brief to the Supreme Court](#) that unless the injunctions were totally lifted everywhere, it ‘would severely disrupt the orderly administration of an already overburdened asylum system.’”

[See my case analysis for the US Supreme Court ruling regarding refugees applying for asylum.](#)

3-12
PA: HIGH SCHOOL STUDENT EXPELLED – THREATING COMMENT – “BEAT RECORD OF 19” OF PARKLAND, FL

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

Judge Mary Jane Bowles wrote:

“Appellant’s statement was uttered six days after seventeen victims were killed at Marjory Stoneman Douglas High School in Parkland, Florida, eclipsing the Columbine High School shooting as the most deadly high school shooting in United States history.

Further, we conclude that the evidence sufficiently established that Appellant made his threat with reckless disregard for the risk that it would cause terror. Again, the facts are that, while the news was dominated by the deadliest high school shooting in this country’s history, Appellant proclaimed in a high school hallway, between classes, loud enough for other students to hear, that he wanted to ‘beat the record of 19.’ We do not hesitate to conclude that Appellant consciously disregarded a substantial and unjustifiable risk that his threat would terrorize his fellow students. See 18 Pa.C.S. §302(a)(3) (defining recklessness).”

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

[See my case analysis for Pennsylvania student expulsion for terrorists threats.](#)

3-11

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 2ndCircuit, 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.”

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.”](#)

[See my case analysis for New York’s 2nd Circuit court regarding suspended activist deportation.](#)

3-10

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 [Carolyn 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.”

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

See my case analysis for Connecticut Supreme Court’s decision for World Trade Center 9/11 victim’s funds.

3-9

CT: SANDY HOOK ELEMENTARY SCHOOL - LAWSUITS MAY PROCEED / VIOLENT ADS BY GUN MFG.

On March 14, 2019 in [Donna L. Soto, Administratrix \(Estate of Victoria L. Soto\), et al. v. Bushmaster Firearms International, et al.](#), the Connecticut Supreme Court (4 to 3) reinstated the lawsuit brought by families of nine of the 20 children and six adults killed in the elementary school. The Court held: “The plaintiffs have offered one narrow legal theory, however, that is recognized under established Connecticut law. Specifically, they allege that the defendants knowingly marketed, advertised, and promoted the XM15-E2S for civilians to use to carry out offensive, military style combat missions against their perceived enemies. Such use of the XM15-E2S, or any weapon for that

matter, would be illegal, and Connecticut law does not permit advertisements that promote or encourage violent, criminal behavior.”

Legal Lessons Learned: The case will not be sent back for trial or settlement by Remington Arms Co. LLC and its “daughter company” Bushmaster Firearms International LLC.

[See my case analysis for Connecticut Supreme Court decision for Sandy Hook Elementary gun manufacture lawsuit.](#)

3-8

PA: SANCTUARY CITY / ICE - 3rd CIRCUIT HOLDS FED. GOVT CANNOT WITHHOLD FORMULA GRANT

On Feb. 15, 2019, in [City of Philadelphia v. Attorney General Of The United States Of America](#), the U.S. Court of Appeals held (3 to 0), “Concluding that Congress did not grant the Attorney General this authority, we hold that the Challenged Conditions were unlawfully imposed. Therefore, we will affirm the District Court’s order to the extent that it enjoins enforcement of the Challenged Conditions against the City of Philadelphia. We will vacate part of the order, however, to the extent that it exceeds the bounds of this controversy.”

Legal Lessons Learned: The DoJ is likely to seek review by U.S. Supreme Court.

[See my case analysis for Pennsylvania court case regarding ICE and sanctuary city.](#)

3-7

NY: JUVENILE TERRORIST – CAN’T DEPORT, BECAME U.S. CITIZEN WHEN FATHER BECAME CITIZEN

On Sept. 13, 2018, in [Mohammed Khalid v. Jefferson Sessions, U.S. Attorney General](#), the U.S. Court of Appeals for Second Circuit [N.Y.], held (3 to 0): “We hold that the short, temporary physical separation caused by Khalid’s time in federal pretrial juvenile detention did not strip Khalid’s father of his ‘physical custody’ of Khalid as that term is used in 8 U.S.C. §1431(a), and that consequently, Khalid is a U.S. citizen.

Legal Lessons Learned: Citizenship is a great privilege. Congress needs to consider revising the Immigration laws so that those convicted of terrorism are not automatically granted citizenship when their parent becomes a citizen.

[See article, “Mohammad Hassan Khalid given five years in jail for his part in jihadist plot,”](#) Khalid, the youngest person at 15 to be prosecuted for terrorism in the US, found guilty of involvement in conspiracy by 'Jihad Jane' to kill Swedish artist. Khalid, a Pakistani migrant living in Maryland, was 15 years old when he first began chatting on the internet with Colleen LaRose, the Philadelphia housewife who called herself “Jihad Jane”. LaRose, who is serving a 10-year prison sentence for her part in the conspiracy, drew him into a plan to kill the Swedish artist Lars Vilks, who had drawn the head of the prophet Muhammad on the body of a dog.

3-6

U.S. SUPREME COURT: PRESIDENT TRUMP'S "TRAVEL BAN" ON 8 NATIONS LAWFUL

On June 26, 2018, in [Trump, President Of The United States v. Hawaii, et al.](#), the U.S. Supreme Court (5 to 4), in decision by Chief Justice Roberts, held that President has the authority under federal statutes to ban travel to USA of citizens from 8 countries with weak travel clearance processes: Chad, Iran, Iraq, Libya, North Korea, Syria, Venezuela, and Yemen.

“By its plain language, §1182(f) grants the President broad discretion to suspend the entry of aliens into the United States. The President lawfully exercised that discretion based on his findings—following a worldwide, multi-agency review—that entry of the covered aliens would be detrimental to the national interest. And plaintiffs’ attempts to identify a conflict with other provisions in the INA, and their appeal to the statute’s purposes and legislative history, fail to overcome the clear statutory language.”

Legal Lessons Learned: The Congress has granted President great powers to protect our national security.

3-5 NY: EMPLOYEES OF BATTERY PARK CITY AUTHORITY MAY SUE BUILDING OWNER FOR 9/11 INJURIES

On June 6, 2018, in [In Re: World Trade Center, Lower Manhattan Disaster Site Litigation](#), the U.S. Court of Appeals for Second Circuit held (3 to 0) that 18 workers who became sick as a result of working in lower Manhattan after the Sept. 11 terrorist attacks may proceed with their lawsuit against building owner, the public benefit corporation Battery Park City Authority. The 2nd Circuit decision followed confirmation by State of New York’s highest court (NY Court of Appeals) that the 2009 “Jimmy Nolan” statute (named after recovery worker) allowing time-barred lawsuits for one additional year against public benefit corporations was lawful.

Legal Lessons Learned: The 18 workers will finally get their day in court, or will negotiate a settlement. [There reportedly have been 12,000 claims settled against various defendants.](#)

3-4 PA: PHILADELPHIA IS "SANTUARY CITY" - WINS INJUNCTION – ENTITLED FED. POLICE GRANT

On June 6, 2018, in [The City of Philadelphia v. Attorney General of United States](#), a federal judge has issued an 89-page opinion holding that \$1.6 million in police grant funds may not be withheld.

Legal Lessons Learned: The U.S. Department of Justice will likely appeal this decision to the 3rd Circuit. Fire & EMS must likewise deal with aliens, and Congress needs to enact legislation concerning 11 million undocumented aliens.

3-3

U.S. SUP. COURT: DRUG DEALER E-MAILS STORED BY MICROSOFT IN IRELAND – CASE MOOT

On March 30, 2018, in [Microsoft Corp. v. United States](#), the U.S. Solicitor General has filed a motion asking the Court to dismiss the case as moot, and advised the Court that DoJ has obtained a new search warrant against Microsoft for e-mails stored in their facility in Ireland under the new “Cloud Act.” The Solicitor General wrote, “The CLOUD Act resolves the question presented by specifying that a service provider responding to a Section 2703 order must produce information within its ‘possession, custody, or control, regardless of whether such * * * information is located within or outside of the United States.’ CLOUD Act § 103(a). The United States has obtained a new warrant under the CLOUD Act, and Microsoft’s sole objection—that the prior warrant was impermissibly extraterritorial—no longer applies. The United States respectfully submits that this case is now moot.”

LEGAL LESSONS LEARNED: Congress has enacted the “Cloud Act” so that search warrants on Microsoft and other companies must be honored, even if the e-mail information is stored in a facility outside the USA. In some case, our national security demands access to this information.

3-2

NY: NYPD SURVEILLANCE OF MUSLIMS – FOIA - DO NOT NEED TO EVEN DISCLOSE RECORDS EXIST

On March 29, 2018, In the [Matter of Talib W. Abdur-Rashid and Samir Hashmi v. New York City Police Department, et al.](#), the State of New York Court of Appeals held (4 to 3): “The issue presented is whether an agency may decline to acknowledge that requested records exist in response to a Freedom of Information Law request ... when necessary to safeguard statutorily exempted information. Under these circumstances, we hold that it may and therefore affirm the Appellate Division order, which reached the same conclusion.”

LEGAL LESSONS LEARNED: Surveillance records are protected from disclosure; don’t need to even confirm existence of intelligence records.

[See article on this decision for the New York City Police surveillance of Muslim residence.](#)

3-1

U.S. SUP. COURT: HAMAS BOMBINGS IN ISRAEL – CAN’T SEIZE ANCIENT IRANIAN TABLETS IN CHICAGO

On Feb. 21, 2018, in [Rubin v. Islamic Republic of Iran](#), the U.S. Supreme Court held (8 to 0; Justice Kegan did not participate) that 30,000 ancient clay tablets held at University of Chicago cannot be seized to pay \$71.5 million judgement against Iran. Justice Sotomayor wrote, “Where the FSIA goes so far as to divest a foreign state or property of immunity in relation to terrorism related judgments, however, it does so expressly. See §§1605A, 1610(a)(7), (b)(3), (f)(1)(A); §201(a) of the TRIA. Out of respect for the delicate balance that Congress struck in enacting the FSIA, we decline to read into the statute a blanket abrogation of attachment and execution immunity for §1605A judgment holders absent a clearer indication of Congress’ intent.”

LEGAL LESSONS LEARNED: Congress can amend FSIA to clarify that Iran is a sponsor of terrorists, and their property in USA can be subject to seizure.

[See article on the decision of US Supreme Court:](#) “Wednesday’s ruling is also likely to dictate the outcome of a similar dispute pending before the justices in which four different groups of plaintiffs representing those injured in other allegedly Iran-backed attacks are seeking to enforce court judgments by seizing \$17.6 million in assets held by Iranian government-owned Bank Melli.”

Chap. 4 Incident Command; Training; Drones

4-6

TN: GREAT SMOKEY MOUNTAIN FIRE – GATLINBURG NOT WARNED - KILLED 14 – LAWSUIT MAY PROCEED

On Dec. 9, 2019, in [Michael Reed v. United States](#), Senior U.S. District Court Judge Thomas W. Phillips, Eastern District of Tennessee (Knoxville Division), denied the U.S. Government’s motion to dismiss, since Federal Tort Claims Act allows lawsuit since the National Park Services’ “Fire Management Plan has mandatory mitigation actions to protect life and property (duty to warn).

“Section 3.3.2(C) of the FMP [Fire Management Plan] states that ‘[f]irefighter and public safety is the first priority in all fire management activities [,]’ and specifies that ‘Park neighbors, Park visitors and local residents *will be notified of all* planned and unplanned fire management activities that have the potential to impact them.’ [*Id.* at 28 (emphasis added)]. Additionally, Section 4.4.2 of the FMP addresses the issue of public safety, and subsection (F) ‘outline[s] mitigation actions *required* to protect values at risk and to ensure the safety of park staff and visitors as well as the neighboring public.’ [*Id.* at 54-55 (emphasis added)]. Table 13, titled ‘Mitigations for Public Safety Issues,’ then addresses various actions to be taken to protect various groups and resources. [*Id.* at 55]. *** Plaintiffs have cited mandatory directives to support jurisdiction over their claims based on the failure to warn about the Chimney Tops 2 fire, the Court finds that it has jurisdiction over this matter, and Defendant's motion to dismiss for lack of jurisdiction ... will be denied.

4-5

IN: DRONE – WOMAN FINDS DRONE IN HER YARD – ONBOARD VIDEO SHOWS NEIGHBOR CARRYING DRUGS [also filed, Chap. 1]

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

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

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

[See my case analysis for Indiana case of drug carrying drone found in neighbor’s yard.](#)

4-4

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

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

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

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

[See my case analysis for New York's Supreme Court decision of a warehouse fire.](#)

4-3

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

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

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

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

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

[See my case analysis for California case regarding national forest fire and Garden Valley Fire Protection district.](#)

4-2

GA: DRONE VIDEO ADMISSIBLE - SHOWS ARREST DURING DEMONSTRATION WAS LAWFUL

On March 28, 2019, in [John Ruch v. Sergeant Michelle McKenzie](#), U.S. District Court judge Michael L. Brown, US District Court, Northern District of Georgia / Atlanta, granted motion for summary judgment for Sergeant McKenzie, writing: “The video footage shows Plaintiff step off the sidewalk in one location, walk around a group of people watching and filming the fight, and step back onto the sidewalk — directly into the area where Defendant stood protecting the officers making arrests. (Id. at minute mark 3:58.) Contrary to Plaintiff’s allegations, he was not standing still at the time of his arrest. He was moving toward the area Defendant was trying to secure.”

Legal Lessons Learned: Videos can sometimes lead to dismissal of lawsuit.

[See my analysis of case for the Georgia case regarding drone video being admissible in court.](#)

4-1

OH: MJ FOUND IN HOUSE FIRE – DRUG DETECTIVE NEEDED WARRANT – SCENE WAS SAFE

On Aug. 24, 2018, in [State of Ohio v. Albert N. Smith](#), the Court of Appeals for Fifth Appellate District (Licking County) held (3 to 0) that the trial court judge properly granted defendant’s motion to suppress the marijuana and other evidence. “Det. Thomas testified that he was assured the fire was out, and the home was safe for him to enter Det. Thomas also stated that he was not told that any of the evidence was in danger of being damaged by smoke, water or fire. Based on the foregoing, we do not find exigent circumstances existed that required or allowed for a warrantless search of the premises. We therefore find no error in the trial court’s suppression of the evidence collected in this matter.”

Legal Lessons Learned: If the structure fire has been extinguished, and the property deemed safe to enter, FD should continue to secure the property, while PD gets a search warrant.

Chap. 5 Emergency Vehicle Operations

5-10

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

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

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

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

Legal Lessons Learned: Emergency response when lights & siren not used, extreme care must be exercised to prove you drove with “due regard” for the safety of others. For example, [Ohio Revised Code 4511.03, Emergency Vehicles At Red Signal Or Stop Sign](#), provides: “(A) The driver of any emergency vehicle or public safety vehicle, when responding to an emergency call, upon approaching a red or stop signal or any stop sign shall slow down as necessary for safety to traffic, but may proceed cautiously past such red or stop sign or signal with due regard for the safety of all persons using the street or highway.”

[See my case analysis for Texas decision in regards to immunity of Houston police officers.](#)

5-9

NY: VOL. FF INJURED ENGINE ROLLED OVER – CAN NOT SUE VOL. DRIVER OR FD - NO PROOF WILLFUL NEGLIGENCE

On Aug. 13, 2019, in [Robert E. Lee v. Kyle M. Verstraete and Marbletown Volunteer Fire Department, Inc, et al.](#), Superior Court, Wayne County, 2019 NY Slip Op 29270 (N.Y. Sup. Ct., 2019), Acting Supreme Court Justice John B. Nesbitt granted defense motion to dismiss.

“After long thought and careful analysis, the Court grants both defendants motions for judgment dismissing the complaint and denying plaintiff’s motion to amend the same. First, the Court finds, as a matter of law, upon the papers submitted, that plaintiff fails to demonstrate a triable issue whether the conduct of Kyle Verstraete constituted willful negligence or malfeasance.”

Legal Lessons Learned: The injured volunteer firefighter’s only remedy is workers comp. Other lesson - wear your seat belt.

[See my case analysis for the New York Superior Court decision involving injured volunteer firefighter.](#)

5-8

IL: PATIENT INJURED AMBULANCE CRASH - 65 MPH WET HWY – PARAMEDIC REPRIMANDED - QUALIFIED IMMUNITY

On Aug. 6, 2019, in [Jeremy Hicks and Isaiah Sampson \(a minor\) v. City of Fallon, et al.](#), 2019 Ill. App. 5th 180397, the Appellate Court of Illinois, Fifth District, held (3 to 0) that the trial court properly granted summary judgment to the City and the EMS personnel.

Justice Barberis wrote:

“[P]laintiffs argue that Sill's {paramedic} failure to operate the ambulance at a speed below the speed limit violated the City's policies and procedures, per Wild's deposition testimony, that required an ambulance to be operated slower in adverse conditions than it might be otherwise be operated in nonadverse conditions. First, we note that Wild [paramedic] testified that drivers were to maintain slower speeds during adverse weather conditions, although he was unsure whether a specific policy was in place. Moreover, our colleagues in the First District stated that a '[v]iolation of self-imposed rules or internal guidelines *** 'does not normally impose a legal duty, let alone constitute evidence of negligence, or beyond that, willful and wanton conduct.' Wade v. City of Chicago, 364 Ill. App. 3d 773, 781 (2006) (quoting Morton v. City of Chicago, 286 Ill. App. 3d 444, 454 (1997)). Thus, a violation of the City's policy, if one had existed at the time of the accident, would not alone constitute evidence of willful and wanton conduct.”

Legal Lessons Learned: Immunity statute very helpful; but use caution when driving high speeds on a wet highway.

[See my case analysis for Illinois Appellate Court decision regarding speeding ambulance.](#)

5-7

TX: EMT LOST CONTROL AMBULANCE - INJURED ROAD GRADER – MAX LIAB. OF NOT-FOR-PROFIT CO. IS \$100K

On May 23, 2019, in [Jose Roel Garcia v. Jesse Perez and South Texas Emergency Care Foundation, Inc.](#), the Court of Appeals of Thirteenth District, Corpus Christi held (3 to 0).

“Thus, we conclude that Garcia’s argument that STEC is not an emergency service organization because it is not operated by volunteer members is not supported by the statute. Accordingly, we reject this argument.”

Legal Lessons Learned: Helpful to have a statutory cap on liability for volunteer and not-for-profit emergency response organizations. This may also reduce the cost of insurance.

[See my case analysis for Texas Court of Appeals decision of EMT losing control of ambulance.](#)

5-6

LA: EMER. LIGHTS USED, BUT NO SIREN – CHILD NON BREATHER RUN - NO STATUTORY IMMUNITY

On Feb. 22, 2019, in [Nunzio Inzina & Emily Inzina v. Troy Guitreau, et al.](#), the State of Louisiana, Court of Appeal, First District (3 to 0) held that “because the trial court's finding that Mr. Guitreau's emergency lights were insufficient to warn motorists of his approach was not manifestly erroneous, the trial court properly determined that the ‘reckless disregard’ (or ‘gross negligence’) standard does not apply. Mr. Guitreau does not meet the requirements of 32:24(C) and therefore his actions must be assessed under an ordinary negligence standard.”

Legal Lessons Learned: If you are in an accident responding to an emergency, and your siren was on, keep it on when calling dispatch to report the accident – the 911 Dispatch recording will help avoid litigation and liability.

[See my case analysis for State of Louisiana Appeals Court decision regarding use of siren during dispatch run.](#)

5-5

IL: STATE IMMUNITY STATUTE PROTECTS PRIV. & PUBLIC AMBULANCES – ONLY IF PATIENT 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.

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.

[See my case analysis for Illinois Appellate Court decision regarding immunity statute for private and public ambulance companies.](#)

5-4

OH: CHILD KILLED BY LOOSE FIRE HOSE – NO WILLFUL OR WANTON MISCONDUCT / NFPA GUIDELINES

On Jan. 18, 2019 in [Linda H. Ogburn, etc., Appellant, v. City of Toledo](#), Appellee., Court of Appeals of Ohio, Sixth District, Lucas County:

“The evidence contained in the record by way of deposition testimony reveals that the city removed the safety nets on its fire engines to facilitate firefighter safety, based upon incidents in which TFRD firefighters were tripped by the nets when they were attempting to utilize fire hoses. According to TFRD's fire maintenance officer, the nets also slowed down firefighting efforts that are time-sensitive in nature. As a result, TFRD decided to remove the safety nets and install holsters in their place. The holsters that were installed eliminated

the trip hazard presented by the nets, while at the same time facilitating expedient use of the fire hoses. Since the nets were removed and the holsters installed, the city has safely completed over one million runs without a fire hose coming loose from a fire engine. To us, the fact that over one million runs have taken place without incident demonstrates that injury to others does not ordinarily follow from the removal of safety nets and installation of the holsters.”

Legal Lessons Learned: Secure your fire hoses; avoid similar tragedies.

See also March 7, 2017 article: [“Hose Alert: A Firefighter’s Commonsense Solution to a Serious Problem.”](#)

See also Jan. 29, 2010 article from MA: [“Woman struck by flailing fire hose dies.”](#)

See also Sept. 15, 2006 article from PA: [“Jury awards \\$5 million to families in fire hose accident.”](#)

Note: Ohio public employees are protected by indemnification statute they acted in “good faith.” [Ohio Revised Code 2744.07](#): “The political subdivision has the duty to defend the employee if the act or omission occurred while the employee was acting both in good faith and not manifestly outside the scope of employment or official responsibilities. *** Except as otherwise provided in this division, a political subdivision shall indemnify and hold harmless an employee in the amount of any judgment, other than a judgment for punitive or exemplary damages, that is obtained against the employee in a state or federal court or as a result of a law of a foreign jurisdiction and that is for damages for injury, death, or loss to person or property caused by an act or omission in connection with a governmental or proprietary function, if at the time of the act or omission the employee was acting in good faith and within the scope of employment or official responsibilities.”

Likewise, “reckless” driving by fire or EMS can lead to personal liability if case is not settled by the political subdivision. In *Anderson v. Massillon*, involving aerial truck killing elderly driver and his grandson, the Ohio Supreme Court in 2012 held that the aerial driver and the Captain were not entitled to immunity, but the City was immune. [See video from scene.](#)

The Supreme Court held: “[R.C. 2744.02\(B\)\(1\)\(b\)](#) provides a political subdivision with a full defense to liability for injuries caused by the operation of a fire department vehicle while engaged in duty at a fire, proceeding toward a place where a fire is in progress or is believed to be in progress, or answering any other emergency alarm if its operation does not constitute willful or wanton misconduct. [R.C. 2744.03\(A\)\(6\)\(b\)](#) provides immunity to employees of a political subdivision for acts that are not committed in a wanton or reckless manner.”

[Case was settled by the City in 2008 for \\$362,000.](#)

5-3

CA: DRUNK DRIVER RAN INTO FIRE ENGINE – MUST PAY FULL RESTITUTION, EVEN IF FD INSURED

On Jan. 15, 2019, in [The People v. Christian A. Zuniga](#), the Court of Appeal of California, First Appellate District, held 3 to 0 [unpublished opinion], “We have carefully reviewed the entire record in accordance with our *Wende* obligations, and we conclude there are no arguable issues on appeal that require further briefing. (See *People v. Birkett* (1999) 21 Cal.4th 226, 245-247 [victim entitled to restitution in the ‘full amount of the loss caused by the crime, regardless of whether, in the exercise of prudence, the victim had purchased private insurance that covered some or all of the same losses’].)”

Legal Lessons Learned: Great lesson for this drunk driver. The Insurance company may be entitled to a refund, if this defendant ultimately pays full amount.

[See my case analysis for California Appeal Court decision regarding drunk driver running into a fire engine.](#)

5-2

OH: EMER. VEH. OPERATOR ENTITLED TO IMMUNITY – BACKED OVER WALKER – NOT “RECKLESS”

On Oct. 9, 2018, in [Riehm v. Green Springs Rural Volunteer Fire Dept.](#), 2018-Ohio-4075, the Ohio Court of Appeals for Third District (Seneca County), held (2 to 1) that the trial court improperly denied the fire department, and firefighter Seth T. Knieriemen’s motions for summary judgment. “As to Knieriemen individually, he could still be liable if his conduct constituted recklessness. Recklessness implies conduct that is substantially greater than negligence. Knieriemen’s failure to follow standard operating guidelines does not establish a genuine issue of material fact as to whether there was more than negligence here, particularly where he did not see, and perhaps could not have seen, Lorri. Knieriemen’s conduct could certainly be considered negligent, but not substantially greater than negligent. Therefore, we find that the trial court also erred on this issue.”

Legal Lessons Learned: Tragic accidents can be avoided if SOGs are followed, including using a backer.

5-1

MI: AMBULANCE STRUCK DEBRIS IN ROADWAY, EMT INJURED – NOT ENTITLED TO UNINSURED MOTORIST INSURANCE COVERAGE

On Feb. 27, 2018, in Jeremy [Drouillard v. American Alternative Insurance Company](#), the Court of Appeals of Michigan held (2 to 1) that the insurance policy which was purchased by ambulance company does not cover such an accident. “[T]he plain language of the contract provides uninsured motorist coverage to Drouillard [EMT passenger] only if the unidentified pickup truck caused an object to hit the insured ambulance, and not vice versa. Reviewing the pertinent section as a whole, the language cannot reasonably be understood in any other way. Importantly, Drouillard and Schoenberg {EMT driver} both admitted that the building materials were stationary at the time of the accident, and Schoenberg agreed that, as the driver of the ambulance, she struck the materials in the roadway. Therefore, this is not a situation in which a hit-and-run vehicle caused an object to hit the insured ambulance, and Drouillard is not entitled to uninsured motorist benefits under the terms of the policy.”

Legal Lessons Learned: Ask your insurance carrier how they would respond to a similar claim; if they would deny the claim, then get the insurance carrier to amend your policy or find a new carrier.

Chap. 6 Employment Litigation

6-28

PA: PHILADELPHIA FF WITH LUNG CANCER – SMOKER – WILL RECEIVE WORKERS COMP BENEFITS – 2011 STATUTORY PRESUMPTION LAW

On Jan. 3, 2020, in [Wayne Deloatch v. Workers' Compensation Appeal Board \(City of Philadelphia\)](#), the Commonwealth Court of Pennsylvania held (3 to 0) that the firefighter is entitled to benefits.

“During Claimant's firefighting career (20 years), he fought approximately 200-300 fires, including building, house, car, dumpster, trash, grass, and field fires, which exposed him to smoke. *** Claimant did not use the SCBA during exterior firefighting—*i.e.*, outdoor firefighting—or overhaul, which entailed ‘ripping of walls, ceilings, searching for any hidden fire and extinguishing that if it's visible.’... After exposure to each fire incident, Claimant's body would be coated in soot, and Claimant would often find soot in his nasal secretions up to a week after exposure.... Claimant further testified that he stopped smoking cigarettes in 2011, but had a 30 to 35-year-long smoking history... During that period, Claimant recalled smoking only one pack of cigarettes per week.... Firefighters were permitted to smoke in the fire stations, and Claimant worked with smokers during his career as a firefighter. *** For the reasons set forth above, Claimant established that he was entitled to the statutory presumption under Section 301(f) of the Act, being that his lung cancer was caused by the occupation of firefighting. Employer failed to rebut the statutory presumption with substantial competent evidence that Claimant's cancer was caused by something other than his workplace exposure to IARC Group 1 carcinogens linked to lung cancer.

6-27

RI: CRANSTON FF – 20 YRS ON FD - DIED COLON CANCER 2017 – RI SUPREME COURT DENIES WIDOW ACCIDENTAL DISABILITY PENSION

On Dec. 18, 2019 in [Corrine A. Lang as Executrix of Estate of Kevin Land v. Municipal Employees' Retirement System of Rhode Island](#), the Supreme Court of Rhode Island ruled (4 to 1) that the widow was not entitled to an award of accidental disability benefits, reversing the Appellate Division of the Workers' Compensation Court.

“To conclude that the language in § 45-19.1-1 creates a conclusive presumption would not only render the statutory definition of occupational cancer in § 45-19.1-2(d) meaningless and create a right not found within the statute, but would also construe the statute to reach an absurd result. For example, a conclusive presumption that all cancers in firefighters are occupational cancers would mean that a firefighter who smoked four packs of cigarettes a day for decades would receive an occupational cancer disability benefit despite not having proved that his cancer was related to exposure on the job. Similarly, a conclusive presumption would provide occupational cancer benefits to a firefighter who contracted cancer as a result of exposure to pesticides while landscaping in his or her yard. We do not believe the General Assembly would have extended such broad benefits to all firefighters without expressly providing for such in clear and unambiguous language.”

6-26

NY: FDNY FF RESIGNED – PLED GUILTY TO FELONY - LYING TO FBI & DOJ – NO RIGHT TO REINSTATEMENT

On Nov. 8, 2019, in [Stephen Mcanulty v. Fire Department of City of New York](#), NY Supreme Court / Kings County (Judge Katherine A. Levine), the judge held the FDNY had no obligation to rehire the firefighter eight years after he resigned.

“In sum, petitioner has not shown that the FDNY in any way violated lawful procedure, or deviated from the standards set forth in the PRR (55 RCNY Appendix A) § 6.2.1(a) and (b), and POL § 30(1)(e). The court finds that respondent's determination was reasonably based on the facts and law, and was not arbitrary and capricious or an abuse of discretion. Therefore, the petition is denied. This constitutes the decision and order of the court.”

Legal Lessons Learned: FDNY was legally barred from reinstating a convicted felon whose conviction had never been vacated.

[See my case analysis for New York Supreme Court's decision regarding to firefighter reinstatement.](#)

6-25

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

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

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

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

[See my case analysis for the State of Washington Supreme Court decision regarding firefighter with brain cancer seeking disability.](#)

6-24

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

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

Judge Gwin wrote:

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

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

[See my case analysis for Ohio District Court decision in regards filed grievance of demoted fire lieutenant.](#)

6-23

IL: BACK INJURIES - COURT AWARDS “ON DUTY” DISABILITY - CUMULATIVE EFFECT OF FIREFIGHTING

On Sept. 6, 2019, in [Jerry Valadez v. Harvey Firefighter’s Pension Fund, et al.](#), the Appellate Court of Illinois, First Judicial District / 6th Division, held (3 to 0) that the firefighter is entitled to a “on duty” disability. 2019 IL App (1st) 181900-U (Ill. App., 2019).

Justice Harris wrote opinion, overturning the Administrative Board:

“Although the Board agreed with Dr. Pelinkovic and Dr. Gleason that plaintiff was permanently disabled, it disagreed with their determination that the October 21, 2015, incident, or the cumulative effects of acts of firefighting, contributed to his disability. Instead, they credited Dr. Graf’s opinion that plaintiff’s condition is solely the result of his preexisting lower back issues.

Dr. Graf’s decision to place great weight on plaintiff’s MRIs, with no consideration of whether plaintiff’s extrication of a victim weighing over 300 pounds and another over 200 pounds could have aggravated his preexisting condition, renders his opinion unreliable.”

Legal Lessons Learned: Overturning Administrative Board decision is rare; the firefighter made an excellent record with testimony of two treating physicians.

[See my case analysis for Illinois Appellate Court in regards to “on duty” disability for firefighter.](#)

6-22

PA: CAN’T RETIRE AT AGE 50 –CITY AND UNION IN CBA ESTABLISHED MINIMUM AGE AT 55

On March 25, 2019, in [Joseph C. Bongivengo v. City of New Castle Pension Plan Board and The City of New Castle](#), the Commonwealth Court of Pennsylvania held (3 to 0): “This ruling also disposes of Bongivengo’s argument that the City violated Section 607(e) of Act 205 because it did not engage in collective bargaining before it implemented the new age and years of service requirements. As noted above, the City and the Union did collectively bargain for

the age and years of service requirement, as first reflected in the 1992 CBA and subsequently in every CBA thereafter.”

Legal Lessons Learned: City and Union agreement controls minimum retirement age.

[See my case analysis for Pennsylvania Commonwealth Court’s decision regarding minimum retirement age.](#)

6-21

OH: FF CANCER - LUMBAR SPINE LYMPHOMA – CITY CONTESTED – FF FILED FOR COSTS / ATTY FEES, CITY LATE IN RESPONDING, MUST PAY

On May 23, 2019, in [Robert T. Rodgers v. City of Rocky River, et al.](#), 2010 Ohio 2006 (Ohio App, 2019), the Ohio Court of Appeals for Cuyahoga County (3 to 0), upheld the trial court’s order that City reimburse the firefighter for his costs and attorney fees of \$3,734.45.

“[W]e note that the plain language of R.C. 4123.512(F) authorizes the award of attorney fees and costs against ‘the employer’ who contests an injured worker’s right to participate in the workers’ compensation system after an injured worker’s right to participate is established. The statute does not differentiate between public and private employers, unlike in R.C. 4123.01(B) where the legislature provided different definitions of “employers” — public (political subdivisions) and private. This demonstrates that the legislature had the ability to establish immunity for political subdivisions or public employers from an award of attorney fees and costs, but elected not to do so.

Legal Lessons Learned: City failed to timely appeal award of costs and attorney fees; no statute protects city from liability for court cost and attorney fees.

[See my case analysis for Ohio Appeals Court decision of city reimbursing injured firefighter.](#)

6-20

IL: FF KIDNEY CANCER – WORK. COMP. GRANTED – EXPERT WITNESS CAUSED BY JOB, NOT OBESITY & HYPERTENSION

On May 10, 2019, in [City of Peoria v. Illinois Workers’ Compensation Commission \(Bryan Grant\)](#), the Appellate Court of Illinois, Third District, Workers Comp Division, held (5 to 0) that the firefighter’s cancer was caused by the job.

“By finding that the petitioner’s workplace exposures to carcinogenic gases caused his kidney cancer, the Illinois Workers’ Compensation Commission did not make a finding that was against the manifest weight of the evidence.”

Legal Lessons Learned: Many states, including Illinois, have now enacted a statutory presumption on FF cancer. But some employers are contesting claims, particularly if FF has poor health history.

[See also this article on 2017 case involving Illinois firefighter who suffered a heart attack.](#) “In this case, the petitioner was an obese smoker, mildly diabetic, and with a family history of heart disease.”

The Court further quoted the bill sponsor as saying, “[s]o don’t think it’s conclusive that simply because you have lung cancer, you’re going to get compensation of the Worker’s Compensation Act. What we’re saying

is, we'll get you to the hearing. Then the other side can bring in evidence that you smoked for thirty (30) years and therefore, it wasn't a result of the actions taken at work." *Id.* at 82. *Johnston v. Illinois Workers' Comp. Comm'n*, 2017 IL App (2d) 160010WC.

See my case analysis of Illinois Appellate Court decision regarding workers compensation for firefighter with kidney cancer.

6-19

NJ: FF's BACK INJURY - PLASTIC CHAIR COLLAPSED - PRIOR BACK ISSUES – NOT "ACCIDENTAL" DISABILITY, ONLY "ORDINARY" DISAB.

On May 10, 2019, in [Terrence Crowder v. Board of Trustees, Police & Firemen's Retirement System](#), the Superior Court of New Jersey, Appellate Division, held (2 to 0) that Deputy Chief was not entitled to 72.7% accidental disability retirement, only "ordinary" disability retirement (43.6%).

"The 2008 incident was not the direct cause of Crowder's disability. Rather, as the ALJ correctly found, Crowder's preexisting degenerative condition, which was aggravated by the 2008 incident, was the essential significant or the substantial contributing cause of his disability."

Legal Lessons Learned: Aggravating a pre-existing degenerative condition does not meet the requirements of the state statute. Suggestion - get rid of plastic chairs in the station.

See this article on the case, "[Former Camden firefighter loses court fight over disability retirement benefits.](#)" (May 14, 2019).

"According to the state Treasury's website, an ordinary disability retirement pays 43.6 percent of an employee's salary averaged over his or her last three years of service. In contrast, an accidental disability retirement pays 72.7 percent of the base salary at the time of the 'traumatic event.'"

[See my case analysis of New Jersey Superior Court decision regarding state statute for firefighter back injury.](#)

6-18

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.

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.

[See my case analysis of New York Supreme Court decision regarding FDNY applicant.](#)

6-17

PA: FIREFIGHTER TRIED TO RETIRE AT AGE 50 – BUT CITY AND UNION IN CBA SET THE MINIMUM AGE AT 55 – STATE MIN. OF 50 NOT APPLY

On March 25, 2019, in [Joseph C. Bongivengo v. City of New Castle Pension Plan Board](#) and The City of New Castle, the Commonwealth Court of Pennsylvania held (3 to 0): “This ruling also disposes of Bongivengo’s argument that the City violated Section 607(e) of Act 205 because it did not engage in collective bargaining before it implemented the new age and years of service requirements. As noted above, the City and the Union did collectively bargain for the age and years of service requirement, as first reflected in the 1992 CBA and subsequently in every CBA thereafter.”

Legal Lessons Learned: Firefighters represented by a union are bound to the terms of the CBA, including minimum age until eligible to retire.

[See my case analysis of Commonwealth Court of Pennsylvania regarding firefighters retirement age.](#)

6-16

MI: FIRE CHIEF RESIGNED, TOWNSHIP ISSUED PRESS RELEASE - NOT DEFAMATION OR “FALSE LIGHT”

On Feb. 26, 2019, in [Richard Marinucci v. Charter Township of Northville, et al.](#), State of Michigan Court of Appeals, held (3 to 0) in an unpublished decision, “Further, plaintiff offers no evidence to show that informing the public that he had resigned was unreasonable or highly objectionable. Although plaintiff contends that the statements made to the media placed him in a false light, plaintiff does not explain how the statements negatively affected him.”

Legal Lessons Learned: When a Fire Chief resigns, the employer may report this fact to the press. Avoid financial situations where there may be an “appearance of impropriety.”

[See my case analysis of Michigan’s Court of Appeals decision regarding press released of retired fire chief.](#)

6-15

KS: WORKERS COMP – 2008 & 2010 BACK INJURIES –COVERED SINCE FILED CLAIM 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.”

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.

[See my case analysis of Kansas Appeals Court decision regarding worker compensation claims of injured firefighter.](#)

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.”

[See my case analysis of worker compensation decision.](#)

6-14

OH: FIRE CHIEF'S AGE / ADA LAWSUIT DISMISSED – DIDN'T FILE WITH EEOC – MUST EXHAUST ADMINISTRATIVE REMEDIES

On Dec. 6, 2018, in [Jay W. Keller v. City of Bucyrus](#), 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.”

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 webpage about filing a complaint with the Equal Employment Opportunity Commission](#):

“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.”

[See my case analysis of Ohio’s district court judge decision of FD written policy regarding personnel on leave.](#)

6-13

PA: HOSPITAL EMPLOYEE RECORDS HACKED; EMPLOYEES MAY SUE HOSPITAL [also filed, Chap. 13]

On Nov. 21, 2018, in [Barbara A. Dittman, et al. v. UPMC d/b/a The University of Pittsburgh Medical Center, et al.](#), the PA Supreme Court ruled (4 to 3), the lawsuit was reinstated against the hospital. “We hold that an employer has a legal duty to exercise reasonable care to safeguard its employees’ sensitive personal information stored by the employer on an internet-accessible computer system.”

Legal Lessons Learned: This is an important decision that will now proceed to trial or settlement. Hopefully this decision will prompt employers in PA, and other states, including Fire & EMS agencies, to review their electronic data safeguards with IT experts.

[See my case analysis of Pennsylvania’s Supreme Court ruling of personal data of employees being hacked.](#)

6-12

U.S. SUPREME COURT: AGE DISCRIMINATION ACT APPLIES PUBLIC AGENCIES – EVEN LESS 20 EMPLOYEES

On Nov. 6, 2018, in [Mount Lemmon Fire District v. Guido, et al.](#), the U.S. Supreme Court (8 to 0) held: “that state and local governments are ‘employer[s]’ covered by the ADEA regardless of their size” [while private employers are only covered if have 20 or more employees].

Legal Lessons Learned: The two former Captains may now proceed with their lawsuit. Fire & EMS departments, when conducting layoffs, should carefully document their rationale for any layoffs not involving the “last hired.”

[See my case analysis of US Supreme Court decision regarding public agencies discriminating based on age.](#)

See [9th Circuit decision based on a court case in the State of Arizona:](#)

“John Guido and Dennis Rankin were both hired in 2000 by Mount Lemmon Fire District, a political subdivision of the State of Arizona. Guido and Rankin served as full-time firefighter Captains. They were the two oldest full-time employees at the Fire District when they were terminated on June 15, 2009, Guido at forty-six years of age and Rankin at fifty-four.”

Note: Ohio has enacted the [Ohio Data Protection Act, effective Nov. 2, 2018 \(to be in Ohio Revised Code 1354.01-05\)](#), which provides companies with an affirmative defense to lawsuits involving release of personal information, if the company has a written cybersecurity program that conforms to the NIST Cybersecurity Framework. See [Sept. 20, 2018 article, “New Ohio law incentivizes businesses that comply with cybersecurity programs.”](#)

6-11

TN: FIRE CHIEF FIRED – AT-WILL EMPLOYEE –COUNTY CAN'T GRANT CIVIL SERVICE PROTECTION

On Oct. 19, 2018, in [William Smallwood v. Cocke County Government](#), the U.S. Court of Appeals for 6th Circuit (Cincinnati, OH), held (3 to 0) in an unpublished opinion, that the District Court properly granted summary judgment to the County. “Regardless of whether Smallwood’s termination was politically motivated, as Fire Chief, he could be terminated for political reasons.”

Legal Lessons Learned: At-will employees may be terminated without a hearing.

6-10

NY: AMBULANCE BACK STEP NOT LOWERED - FF ENTITLED TO ACCIDENTAL RETIREMENT BENEFITS [also filed, Chap. 13]

On Sept. 6, 2018, [In The Matter Of Gregg A. Loia v. Thomas P. Di Napoli, State Comptroller](#), the NY Supreme Court, Appellate Division (Third Judicial Department) held (3 to 0) the injured firefighter is entitled to accidental retirement benefits since the back step of the ambulance had not been lowered by EMS personnel, and he suffered an “accident” on the “malfunctioning piece of equipment that was designed, under normal circumstances, to promote safety.”

Legal Lessons Learned: Fire & EMS personnel should document any on the job injury (including, in this case, photos of the ambulance step) and obtain statements from others on the scene. It is unfortunate that a dispute over disability retirement benefits has been in litigation since 2012.

6-9

MD: PARAMEDIC WTH DEGENERATIVE KNEE TEARS – JURY FOUND WORK RELATED – COURT UPHOLDS

On Aug. 30, 2018, in [Baltimore County v. Michael Quinlan](#), the Court Of Special Appeals Of Maryland, held (3 to 0) that his menisci tears are work related. The Court wrote: “In sum, Mr. Quinlan met the statutory requirements of LE § 9-502(d)(1) by establishing at trial that the degenerative menisci tears were an occupational disease through testimony that showed That repetitive kneeling and squatting is (1) a regular part of a paramedic’s job and (2) a risk factor for developing menisci tears, which Dr. Cochran explained are ‘part of the continuum of osteoarthritis. ‘.... This was sufficient evidence for the jury to determine that, ‘but for the work-related activities [,]’ his condition would not have developed.... We will not second guess the jury’s fact finding on appeal.”

Legal Lessons Learned: Expert testimony particularly critical for claims involving degenerative knee or other similar conditions.

6-8

LA: FREE SPEECH CASE NOT DISMISSED - TWO PARAMEDICS FIRED AFTER LETTER TO BOARD ABOUT MGT [also filed, Chap. 13]

On July 18, 2018, in [Patrick Alan Benfield & Brian Warren v. Joe Magee, et al.](#), U.S. District Court Judge Elizabeth Foote, Western District of Louisiana, held that a lawsuit by two paramedics fired by Desoto Parish EMS may proceed to trial. They were fired after Warren wrote a letter to a member of the Desoto Parish Police Jury (they appoint the Board of Commissioners of the Desoto Parish EMS). The Judge ruled: “The motion [to dismiss] is DENIED as to Warren’s free speech claim because the facts alleged establish that his letter was protected speech.”

Legal Lessons Learned: First Amendment free speech cases are increasing being permitted to go to the jury. Fire & EMS Departments should thoroughly document reasons for termination, including employees who serve “at will.”

6-7

WY: VOLUNTEER FIREFIGHTERS MAY BE IN UNION – STATE STATUTE [also filed, Chap. 18]

On July 6, 2018, in [IAFF Local 5058 v. Gillette / Wright / Campbell County Fire Protection Joint Powers Board, and IAFF Local 5067 v. Teton County and Town of Jackson](#), the Wyoming Supreme Court held (5 to 0) that the two new unions were not properly elected, and the Fire Districts did not need to negotiate collective bargaining agreements, because the “volunteer” and “pool” firefighters all receive pay for making runs.

“The district courts in both cases held that the Wyoming Collective Bargaining for Fire Fighters Act’s definition of ‘fire fighters’ includes volunteers because they are ‘paid members of . . . regularly constituted fire department[s].’ Consequently, the district courts concluded that IAFF Local 5058 and IAFF Local 5067, which were formed by and consist of only full-time, career fire fighters, were not properly constituted bargaining units under the Act. We affirm.

Legal Lessons Learned: Drafting of legislative language is very important, along with creating a clear “legislative history” to avoid any question about whether volunteer and part-time firefighters can be covered in a collective bargaining agreement.

6-6

NJ: BOROUGH CANNOT ENFORCE \$5,000 PENALTY – PROB. POLICE OFFICER JOINS ANOTHER PD

On June 21, 2018, in [Borough of Madison v. Kevin Marhefka](#), the Superior Court of New Jersey / Appellate Division (2 to 0) held “As the Borough's complaint sought only to collect that unenforceable \$5000 penalty, the complaint was properly dismissed with prejudice regardless of whether the penalty was negotiated with the PBA.”

Legal Lessons Learned: Penalties for resigning to take a new job are often challenged, and difficult to enforce, as compared to reimbursement for training costs and equipment. Some states impose training costs on the new public employer, such as [NJ \(2013 statute\)](#).

40A:14-178 Liability for training costs; terms defined.

1. a. Whenever a person who resigned as a member of a county or municipal law enforcement agency is

appointed to another county or municipal law enforcement agency, the police department of an educational institution pursuant to P.L.1970, c.211 (C.18A:6-4.2 et seq.), a State law enforcement agency or the New Jersey Transit Police Department pursuant to section 2 of P.L.1989, c.291 (C.27:25-15.1) within 120 days of resignation, and that person held a probationary appointment at the time of resignation or held a permanent appointment for 30 days or less prior to resignation, the county or municipal law enforcement agency, educational institution or State law enforcement agency appointing the person, or the New Jersey Transit Corporation, is liable to the former county or municipal employer, as appropriate, for the total certified costs incurred by the former employer in the examination, hiring, and training of the person.

6-5

VA: THROAT CANCER – RETIRED FF GETS WORKERS COMP – BUT NOT HEALTH INSURANCE

On June 7, 2018, in [Eddie R. Jones, Sr. v. Commonwealth of Virginia](#), the VA Supreme Court (7 to 0) held: “Throat cancer is properly considered an occupational disease which arose out of Jones’s employment. He is entitled to and has been awarded benefits under the Workers’ Compensation Act. However, the occupational disease did not result in a disability while Jones was still carrying out his duties as a firefighter. Therefore, he is not entitled to insurance benefits under Code § 9.1-401(B), because he does not meet the definition of a ‘disabled person’ under the Act.”

Legal Lessons Learned: At least 34 states have now enacted statutory presumptions, with wide variety of coverages. This case illustrates the importance of clear statutory language about disability benefits when cancer is detected after retirement.

See these resources:

[IAFF “Winning and Improving Presumption Laws” article.](#)

National League of Cities: [Assessing State Firefighter Cancer Laws and Current Firefighter Cancer Research](#)
First Responder Center for Excellence: [Occupational Cancer Legislation](#)

6-4

PA: BREAST CANCER – RETIRED FF GETS MEDICAL COVERAGE BACK TO DATE OF RETIREMENT

On June 1, 2018, in [City of Pittsburg and UPMC Benefit Management Systems, Inv. v. Workers Compensation Appeal Board \(Flaherty\)](#), the Commonwealth Court of Pennsylvania upheld (3 to 0) the Board, “holding that Anne Marie Flaherty (Claimant) gave notice to Employer within 21 days of when she knew or should have known that her cancer was work-related. Because Claimant gave notice within 21 days, she was entitled to benefits from September 10, 2004, the date she left work due to her injury, as opposed to September 23, 2011, the date she filed her claim petition.”

Legal Lessons Learned: Timely notice of claim is important, even with statutory presumption.

6-3

U.S. SUP. COURT – ENFORCES ARBITRATION AGREEMENTS – EMPLOYEE CAN’T SUE [also filed, Chap. 17]

On May 21, 2018, in [Epic Systems Corp. v. Lewis](#), the U.S. Supreme Court (5 to 4), 584 U.S. ____ (2018), in a decision written by newly appointed Justice Gorsuch, held:

“Should employees and employers be allowed to agree that any disputes between them will be resolved through one-on-one arbitration? Or should employees always be permitted to bring their claims in class or collective actions, no matter what they agreed with their employers? As a matter of policy these questions are surely debatable. But as a matter of law the answer is clear. In the Federal Arbitration Act, Congress has instructed federal courts to enforce arbitration agreements according to their terms—including terms providing for individualized proceedings.”

Legal Lessons Learned: This decision is one of the most important businesses cases before the Court. Many employers, including private ambulance companies, will now be encouraged to have new hires sign an arbitration document.

[AFL-CIO President Richard Trauma was quoted](#), “Five justices on the Supreme Court decided that it is acceptable for working people to have their legal rights taken away by corporations in order to keep their jobs.”

Note: [see Jan. 15, 2019 U.S. Supreme Court decision in New Prime, Inc. v. Oliveira](#), **Holding:** A court should determine whether the Federal Arbitration Act’s Section 1 exclusion for disputes involving the “contracts of employment” of certain transportation workers applies before ordering arbitration; here, truck driver Dominic Oliveira’s independent contractor operating agreement with New Prime Inc. falls within that exception. **Judgment:** [Affirmed](#), 8-0, in an opinion by Justice Gorsuch on January 15, 2019. Justice Ginsburg filed a concurring opinion. Justice Kavanaugh took no part in the consideration or decision of the case.

6-2

MD: COLLECTIVE BARGAINING – COUNTY MUST BARGAIN OVER CHANGE IN HEALTH INSURANCE BENEFITS

On March 28, 2018, in [O’Brien Atkinson, et al. v. Anne Arundel County](#), the Court of Appeals of Maryland, held (3 to 0) that the County cannot unilaterally change health benefits; case is remanded to trial court. “We leave it to the parties and trial court, applying the balancing test on remand, to ascertain the scope of collective bargaining rights over health insurance benefits as mandated under §§ 811 and 812 of the Charter.”

LEGAL LESSONS LEARNED: The County Charter mandated collective bargaining and arbitration.

6-1

RI: "DISABLED" FF IS VIDEOTAPED WEIGHT LIFTING – DISABILITY PENSION BENEFITS TERMINATED [also filed, Chap. 16]

On Feb. 21, 2018, in [John Sauro v. James Lombardi, in his capacity as Treasurer of the City of Providence, et al.](#), the State Supreme Court held, “we conclude that the decision of the trial justice declaring that the plaintiff’s pension benefits should be reinstated and he should be placed on a waiting list to resume active service was erroneous, overlooked material evidence, and was clearly wrong.”

LEGAL LESSONS LEARNED: Accidental disability pension benefits are for those with a continuing work-place injury; cases like this can lead to public perception of pension fraud.

See this [TV story and undercover video of retiree lifting weights.](#)

Chap. 7 Sexual Harassment; Pregnancy Discrimination

7-10

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

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

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

Legal Lessons Learned: Fire & EMS departments, like other employers, have an obligation to investigate claims of sexual harassment; individuals being investigated may obviously feel uncomfortable, but that does not support a claim of hostile workplace. Note: [On Sept. 4, 2019 the 5th Circuit filed replacement opinion](#), but with same conclusion – lawsuit properly dismissed.

[See my case analysis of Texas US Court of Appeals decision regarding the resignation of fire chief after sexual harassment investigation.](#)

7-9

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

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

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

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

[See my case analysis of a Pennsylvania magistrate’s decision regarding hostile workplace case dismissed for Philadelphia female firefighter.](#)

7-8

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

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

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

“Specifically, Plaintiffs’ motion seeks the student’s complaint, the OIG Report, witness statements, documents detailing the allegations, and documents that reflect the outcome of the investigation into the student’s allegation.

Plaintiffs argue that these documents are relevant to compare how Defendant treats male versus female sexual misconduct complainants. *** Here, the Complaint’s [Monell \[Monell v. Dep’t of Social Services, 436 U.S. 658 \(1978\)\]](#) claim alleges, in part, that Defendant had a discriminatory policy or practice of failing to adequately investigate and discipline its employees accused of sexual misconduct.

Legal Lessons Learned: Courts favor pre-trial discovery. The U.S. Supreme Court in Monell held that municipalities can be liable under § 1983 for deprivations pursuant to official policy or entrenched practices. [Monell v. Department of Social Services, 436 U.S. 658 \(1978\)](#).

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

[See my case analysis of the Illinois female medics suing the City’s fire department for sexual assault and harassment.](#)

7-7

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.”

Legal Lessons Learned: The lawsuit will now proceed to trial; Federal juries have returned some very large verdicts. [See complaint of the US District Court of Nebraska between Troy Hurd and the City of Lincoln.](#) See article about the case, [“Female firefighter’s discrimination case against the City of Lincoln can go forward.”](#)

[See my case analysis of the female firefighter of the City of Lincoln’s hostile workplace lawsuit.](#)

7-6

AL: PREGNANT EMT- SEEKS “LIGHT DUTY” - EEOC SUPPORTING HER APPEAL TO 11TH CIRCUIT

On Feb. 11, 2019, in [Kimberly Michell Durham v. Rural / Metro Corporation](#), the Equal Employment Opportunity Commission has filed an amicus brief with the 11th Circuit (Atlanta), arguing:

“The PDA [Pregnancy Discrimination Act] does not categorically bar employers from maintaining a policy of accommodating only a subset of employees, including those employees with on-the-job injuries. See [U.S. Supreme Court’s 2015 decision in *Young v. UPS*] 135 S. Ct. at 1349-51. However, *Young* allows that a jury may find that an employer’s policy of accommodating only some employees is a pretext for pregnancy discrimination.” [Page 31]

Legal Lessons Learned: This is an important case for the fire service, and may eventually reach the U.S. Supreme Court.

[See my case analysis of the pregnant Alabama EMT seeking light duty during pregnancy.](#)

Note: Numerous civil rights groups, including a Better Balance, The National Women’s Law Center and the National Employment Law Project, have [filed amicus briefs urging the 11th Circuit to reverse the Federal District court’s decision](#). See also Feb. 22, 2019 article, [“11th Circuit Pregnancy Bias Case Tests 2015 Supreme Court Ruling.”](#)

7-5

IL - 12 FEMALES FAILED FITNESS TESTING IN CHICAGO FD PARAMEDIC RECRUIT SCHOOL MAY SUE

On Jan. 14, 2019, in [Jennifer Livingston, et al. v. City of Chicago](#), U.S. District Court Judge Sara L. Ellis, held: “Because the Non-Filing Plaintiffs can rely on the single-filing rule to bring their claims based on the charges filed by other plaintiffs in this case, the Court denies the City’s motion to dismiss.”

Legal Lessons Learned: Physical fitness tests, whether during Recruit School or prior to hiring, that have an adverse impact on females, should be validated by an expert.

[See EEOC guidance](#), “Use of tests and other selection procedures can also violate the federal anti-discrimination laws if they disproportionately exclude people in a particular group by race, sex, or another covered basis, unless the employer can justify the test or procedure under the law.”

[See EEOC June 13, 2018 press release](#): “CSX Transportation to Pay \$3.2 Million To Settle EEOC Disparate Impact Sex Discrimination Case... According to the EEOC's lawsuit, CSXT conducted isokinetic strength testing as a requirement for workers to be hired for various jobs. The EEOC said that the strength test used by CSXT, known as the ‘IPCS Biodex’ test, caused an unlawful discriminatory impact on female workers seeking jobs as conductors, material handler/clerks, and a number of other job categories. The EEOC also charged that CSXT used two other employment tests, a three-minute step test seeking to measure aerobic capacity and a discontinued arm endurance test, as a requirement for selection into certain jobs, and that those tests also caused an unlawful discriminatory effect on female workers.”

[See my cases analysis regarding the 12 Illinois female fire recruits suing the recruit school.](#)

7-4

AL: PREGNANT EMS – NOT ENTITLED TO LIGHT DUTY, COMPANY POLICY ONLY IF INJURED ON THE JOB

On Oct. 9, 2018, in [Kimberly Michelle Durham v. Rural/Metro Corporation](#), Case No. 4:16-CV-01604-ACA, U.S. District Court Judge granted summary judgment to the employer. Three male EMTs had been granted light duty for injuries to their backs while lifting patients. The court held, “Rural/Metro contends that Ms. Durham must offer substantial evidence of employees placed on light duty assignment who were injured off the job in order to survive summary judgment. This court agrees.”

Legal Lessons Learned: Some are urging Congress to broaden the Pregnancy Discrimination Act; see also [EEOC Enforcement Guidance On Pregnancy Discrimination](#).

7-3

MI: FEMALE CAPTAIN NOT SELECTED AS FIRE CHIEF – LACK OF INCIDENT COMMAND

On Aug. 30, 2018, in [Ona Lee Aguilar v. City of Saginaw and IAFF Local 102](#), the State of Michigan Court of Appeals held 3 to 0 (in unpublished opinion) upheld the dismissal of her lawsuit by trial court. “Aguilar is one of a small number of female employees of the Saginaw Fire Department (SFD) and has dealt with harassment and hostility over the years as she worked her way up the ranks in a male-dominated field. Aguilar’s suit, however, was based solely on the city’s 2013 failure to name her as acting or interim fire chief and its 2014 failure to hire her as the city’s permanent fire chief. The evidence supports that Aguilar’s union discriminated against her and those parties reached a settlement. Although the evidence also supports that Aguilar continues to work in a hostile environment, Aguilar has not created a triable question of fact on her discrimination claims. Accordingly, we are bound to affirm.”

Legal Lessons Learned: Lack of experience in Incident Command is a legitimate, nondiscriminatory reason for not selecting an applicant for Fire Chief.

7-2

LA: SEXUAL HARASSMENT COMPLAINT PROMPTLY INVESTIGATED – OFFENDER WARNED

On June 5, 2018, in [Shelita Tucker v. United Parcel Service, Inc.](#), the U.S. Court of Appeals for the 5th Circuit, held (3 to 0) in an unpublished opinion that the federal district judge properly granted summary judgment to UPS:

“We agree with the district court that Tucker failed to discharge her burden to raise a fact issue in this regard. UPS's remedial actions stopped the sexual harassment, and McCaleb neither spoke to nor touched Tucker again. Although McCaleb's presence at work made her feel uncomfortable, Tucker said she was still able to perform her duties.”

Legal Lessons Learned: Fire & EMS employers should likewise get statements, investigate and take prompt corrective action.

7-1

FL: FEMALE CANDIDATE FOR FIRE CHIEF NOT SELECTED – NOT GENDER DISCRIMINATION, BOTH CANDIDATES HIGHLY QUALIFIED

On Jan. 19, 2018, in [Shari Hall v. Marion County Board of County Commissioners](#), the District Court of Appeal of State of Florida, 5th District, held that: “Appellant failed in her burden of proving the county offered pretextual reasons, and thus failed to establish a case of gender discrimination using circumstantial evidence.” Case was remanded so Court can next dispose of retaliation claim.

Legal Lessons Learned: Two well-qualified qualified candidates for Fire Chief; no proof of gender discrimination. Caution when current Chief tells subordinate that they are likely the next Chief.

Chap. 8 Race Discrimination

8-10

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

On Oct. 24, 2019, in [Franklin Edwards v. City of Selma](#), U.S. District Court Judge Jeffrey U. Beaverstock, U.S. District Court for the Southern District of Alabama (Northern Division) granted summary judgment for the City.

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

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

[See my case analysis of Alabama captain suing City of Selma for “demographic promotion process”.](#)

8-9

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

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

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

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

[See my case analysis of Georgia Fire Chief candidate’s suing City of Americus for not being chosen chief.](#)

8-8

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

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

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

[On June 21, 2019, here other claims of race and gender discrimination were dismissed.](#)

Legal Lessons Learned: EMS protocols must be followed, and suspension / remediation training is an appropriate corrective action. [Also filed, Chap. 13, EMS.]

[See my case analysis of Louisiana District Court regarding black EMS captain's discrimination case.](#)

8-7

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

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

Senior Judge Smith wrote:

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

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

Legal Lessons Learned: The promotion process used by Kansas City was well constructed and well documented. If a firefighter believes that a promotion process was improperly conducted, or racially discriminatory, promptly file an internal complaint so the matter can be investigated, or file an EEOC charge: **“Time Limits For Filing A Charge:** The anti-discrimination laws give you a limited amount of time to file a charge of discrimination. In general, you need to file a charge within 180 calendar days from the day the discrimination took place. The 180 calendar day filing deadline is extended to 300 calendar days if a state or local agency enforces a law that prohibits employment discrimination on the same basis.

[See my case analysis of Missouri case of black firefighter resignation after promotion.](#)

8-6
U.S. SUP. CT: MURDER DEFENDANT GETS NEW TRIAL (HIS 7TH) - PROSECUTOR REPEATEDLY REMOVED BLACKS FROM JURY

On June 21, 2019, in [Flowers v. Mississippi](#), the U.S. Supreme Court (7 to 2), overturned the defendant’s conviction of murdering four people, and remand the case for re-trial (he has previously been tried six times for the murders).

Justice Brett Kavanaugh wrote majority opinion:

“Four critical facts, taken together, require reversal. First, in the six trials combined, the State employed its peremptory challenges to strike 41 of the 42 black prospective jurors that it could have struck—a statistic that the State acknowledged at oral argument in this Court. Tr. of Oral Arg. 32. Second, in the most recent trial, the sixth trial, the State exercised peremptory strikes against five of the six black prospective jurors. Third, at the sixth trial, in an apparent effort to find pretextual reasons to strike black prospective jurors, the State engaged in dramatically disparate questioning of black and white prospective jurors. Fourth, the State then struck at least one black prospective juror, Carolyn Wright, who was similarly situated to white prospective jurors who were not struck by the State.”

Legal Lessons Learned: The U.S. Supreme Court will not allow prosecutors to use peremptory strikes to unfairly exclude black jurors.

[See my case analysis of US Supreme Court ruling of case where prosecution removed black jurors.](#)

8-5
FL: DOCTOR COMPLAINED ABOUT MEDICAL CLEARANCE OF FF – NOT PROTECTED FIRST AMENDMENT SPEECH

On March 1, 2019, in [Nancy King v. Board of County Commissioners, Polk County](#), the U.S. Court of Appeals for the 11th Circuit (Atlanta) held (3 to 0) that U.S. District Court judge properly granted summary judgment to Polk County. “She did not engage in speech protected by the First Amendment, however, because she spoke as an employee and not as a private citizen.”

Legal Lessons Learned: Public employees have limited First Amendment rights; reverse discrimination not proven.

[See my case analysis of Florida doctor complaint of medical clearance of firefighter.](#)

8-4

MI: DETROIT – CITY WIDE LAYOFFS - 11 FF LAWSUIT AGAINST UNION DISMISSED, FOLLOWED CBA

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.”

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

[See my case analysis of Michigan firefighter lawsuit against union.](#)

8-3

MD: AIRPORT HIRED LATINO AS FIRE CHIEF - AFRICAN-AMERICAN'S LAWSUIT MAY PROCEED

On Jan. 19, 2018, in [Gregory C. Lawrence v. Maryland Aviation Administration](#), U.S. District Court for District of Maryland, Judge Richard D. Bennett denied the motion to dismiss filed by the Maryland Aviation Administration. “Plaintiff alleges that despite his experience and "stellar qualifications" for the position, he was not hired; instead, plaintiff alleges, "[t]he person hired was a Latino male, substantially less qualified for the position than Mr. Lawrence.”

Legal Lessons Learned: Title VII claim may now proceed to pre-trial discovery.

8-2

U.S. SUPREME COURT: AFFIDAVIT FROM JUROR WHO VOTED FOR DEATH SENTENCE - PRISONER HEARING

On Jan. 19, 2018, in [Gregory C. Lawrence v. Maryland Aviation Administration](#), U.S. District Court for District of Maryland, Judge Richard D. Bennett denied the motion to dismiss filed by the Maryland Aviation Administration. “Plaintiff alleges that despite his experience and "stellar qualifications" for the position, he was not hired; instead, plaintiff alleges, "[t]he person hired was a Latino male, substantially less qualified for the position than Mr. Lawrence.”

LEGAL LESSONS LEARNED: Title VII claim may now proceed to pre-trial discovery; Court relied on plaintiff's history with the Airport FD, including lawsuit which led to his initial hiring, plus his termination and then second lawsuit resulting in his reinstatement.

8-1

NY: FDNY'S FORMER EEOC OFFICER SUES FOR RACE DISCRIMINATION – LAWSUIT MAY PROCEED

On Jan. 2, 2018, in [Lyndelle T. Phillips, Esq. v. The City of New York, et al](#), U.S. District Court Senior Judge Jack B. Weinstein, held that the City's motion to dismiss is denied and her lawsuit may proceed. "After observing plaintiff during her extended examination by the court, defendants' motion for summary judgment on plaintiffs Section 1981 claim is denied. A jury could find her to be a credible witness who took her job at the FDNY seriously and performed satisfactorily. Discrimination, and not poor job performance, a jury could conclude, was the reason for her termination by the FDNY.

Legal Lessons Learned: The lawsuit may proceed. The judge referenced the Vulcan Society case.

Note: [In March, 2014, the City settled the lawsuit with the Vulcan Society for \\$98 million.](#)

Chap. 9 Americans With Disabilities Act

9-7

FL: FIREFIGHTER LATE FOR MANY SHIFTS – CLAIMED DISABILITY – PROPERLY FIRED – ESSENTIAL JOB FUNCTION TO BE ON TIME

On Nov. 13, 2019, in [Darrell C. Hartwell v. Richard Spencer, Secretary of U.S. Navy](#), the U.S. Court of Appeals for 11th Circuit (Atlanta) held (3 to 0) in an unpublished decision, that U.S. District Court properly granted summary judgment to the U.S. Navy.

“Hartwell contends that his medical conditions impair his time management skills and the medication that he takes causes morning drowsiness, making it impossible for him to consistently report for work by 7:00 a.m. The only accommodation he requested was to allow him to come to work up to an hour late without prior notice. A few days before he was fired, Hartwell provided a note from his doctor stating that Hartwell’s condition was permanent, but that his symptoms could be ‘minimized’ ‘with long term individual counseling and medication.’ In other words, with or without the accommodation he requested, Hartwell expected to continue his pattern of frequent tardiness indefinitely. The pivotal issue on appeal, therefore, is whether punctuality is an essential function of the job of a firefighter/EMT. *** We agree with the district court that reporting to work on time was an essential function of Hartwell’s job as a firefighter/EMT. Because Hartwell could not perform this function with or without his requested accommodation, he is not “otherwise qualified” within the meaning of the Rehabilitation Act, and the district court correctly granted the defendant’s motion for summary judgment on this claim.

Legal Lessons Learned: The Court properly recognized the essential job function of a firefighters – to show up for work on time.

[See my case analysis of the US Court of Appeals in Georgia ruling of job functions.](#)

9-6

PA: PAINFUL TO SHAVE – POLICE DEPT. REQUIRED MEDICAL CERT. EACH 60 DAYS – LAWSUIT REINSTATED FOR ADA BREACH

On Aug. 8, 2019, in [Joseph H. Lewis, Jr. v. University of Pennsylvania](#), the U.S. Court of Appeals for Third Circuit (Philadelphia), held (3 to 0) that a U.S. District Court incorrectly dismissed his ADA lawsuit.

Chief Judge Smith wrote:

“This is an employment discrimination appeal arising out of Plaintiff Joseph Lewis’s previous employment with the University of Pennsylvania Police Department. Lewis suffers from a skin condition, pseudofolliculitis barbae (PFB), which has led to issues giving rise to his discrimination claims. ***

Lewis submitted a request for accommodation, requesting to ‘not shave face or neck....’ Penn was then on notice of Lewis’s claimed disability and the fact that he wanted accommodation, such that Penn had a duty to engage with Lewis in good faith. It is not clear that Penn did so. According to Lewis, Penn issued a flat denial without making any effort to communicate with him regarding his needs.

Where there is evidence that the employer did not act in good faith to identify an accommodation, ‘we will not readily decide on summary judgment that accommodation was not possible and the employer’s bad faith could have no effect.’ Taylor, 184 F.3d at 31.”

Legal Lessons Learned: The PD will now have to justify its business reasons for no beards, and its 60-day medical certifications. [See Aug. 12, 2019 article on this case, “Third Circuit Revives Beard-Related Discrimination Claims Against UPenn.”](#)

There has been race discrimination litigation in fire service about not shaving because of this skin condition, pseudo folliculitis barbae (PFB). For example, see 2018 lawsuit by four FDNY firefighters:

See also [D.C. Fire Department case: March 25, 2015 article: “Fireman’s Beard Bias Claims Given a Trim.”](#) – “Kennedy says that the discrimination against his race and disability kept him from advancing his firefighting career because of his beard growth, but U.S. District Judge Christopher Cooper dismissed parts of the action Friday after finding that ‘PFB does not constitute a disability under the prevailing ... interpretation’ of the Americans with Disabilities Act.

See also [1993 decision by 11th Circuit involving the Atlanta FD](#): “The City defends the policy, contending that the respirator masks used by firefighters cannot safely be worn by bearded men. The district court granted summary judgment for the City and the firefighters have appealed. For the reasons set forth below, we affirm the judgment of the district court.”

[See my case analysis of Pennsylvania police department’s facial hair policy/ requirements.](#)

9-5

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

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

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

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

[See my case analysis of Virginia firefighters with PTSD lawsuit against the Chesterfield Fire & EMS.](#)

9-4

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

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

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

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

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

[See my case analysis of Texas paramedic with injury lawsuit.](#)

9-3

WI: INJURED ANKLE – GIVEN “LIGHT DUTY” BUT TENNIS SHOES NOT ALLOWED – LAWSUIT MAY PROCEED

On Feb. 27, 2019, in [Keith Daniel v. City of Minneapolis](#), the Supreme Court of MN held (5 to 2), “To give effect to the plain language of the workers’ compensation act and the human rights act, we hold that an employee can pursue claims under each act because each act provides a distinct cause of action that redresses a discrete type of injury to an employee.”

Legal Lessons Learned: FD dress policies, including policies on “station shoes” may need to be modified to “reasonably accommodate” a firefighter on light duty for an ankle injury. This case will now go to a jury trial, unless settled.

See also article about case, [“Former Minneapolis firefighter will be able to sue for disability discrimination, high court rules.”](#)

[See my case analysis of Minneapolis Supreme Court ruling of firefighter’s workers compensation lawsuit.](#)

9-2

LA: BACK INJURY, RETIRING FF FAILED TO TIMELY FILE FOR DISABILITY BENEFITS

On Nov. 21, 2018, in [Brian Mule v. St. Bernard Parish Fire Department](#), the Court of Appeal, 4th District held (3 to 0) that Office of Workers Compensation trial judge properly ruled that the employee was not entitled to supplemental benefits: “Mr. Mule waited more than seven years after this May 22, 2009 injury to pursue his claim for indemnity benefits. The OWC, having reviewed the record, exhibits and listening to the testimony of Mr. Mule and Ms. Bradbury, held that Mr. Mule did not establish that he was lulled into not filing a claim within the prescriptive period under the totality of the circumstances.”

Legal Lessons Learned: Fire & EMS personnel, injured on the job and facing disability retirement, should consult with a workers comp. expert regarding filing requirements for workers comp indemnity benefits.

9-1

CO: DEPUTY SHERIFF WITH DIABETES – INSULIN DEPENDENT – U.S. DOJ SETTLES LAWSUIT

On May 15, 2018, the [U.S. Department of Justice issued a Press Release](#) about the agreement with the City and County of Denver:

“The Justice Department today announced that it reached an agreement with the City and County of Denver, Colorado, (Denver) to resolve its lawsuit alleging that the Denver Sheriff Department discriminated against a long-time Deputy Sheriff on the basis of his disability, insulin-dependent diabetes. The Justice Department’s complaint alleges that Denver failed to engage in an interactive process with the employee to determine an appropriate accommodation, failed to reasonably accommodate his disability, and then terminated him, in violation of the Americans with Disabilities Act (ADA). Under the agreement, Denver will revise its reasonable accommodation policies and procedures, and will conduct training on the ADA for Sheriff Department supervisors, command staff, and human resources personnel. In addition, Denver will pay \$100,000 in compensatory damages to the employee.”

Legal Lessons Learned: Fire & EMS departments must also “engage in an interactive process” when an employee appears to have a disability, including exchange of medical information between employee’s physician and the department’s doctor.

Chap. 10 Family Medical Leave Act

10-2

U.S. DEPT. LABOR – HEALTHY PERSON DONATING ORGAN ENTITLED TO FMLA LEAVE

On Aug. 28, 2018, the [U.S. Department of Labor issued Opinion No. FMLA2018-2- A](#). “This letter responds to your request for an opinion letter concerning whether organ-donation surgery can qualify as a ‘serious health condition’ under the Family and Medical Leave Act of 1993 (FMLA). As discussed below, we conclude that it can.”

Legal Lessons Learned: Helpful to have an Opinion Letter that may encourage others to be organ donors.

10-1

OH: DAYTON FD RECRUIT – REVOKED FROM CLASS AFTER KNEE INJURY – NO FMLA VIOLATION [also filed, Chap. 14]

On Feb. 9, 2018 in [Shawn N. Geisel v. City of Dayton, et al.](#), Ohio Court of Appeals for Second Circuit (Montgomery County) held (3 to 0) that the FD had the authority to remove him from the recruit class and ‘demote’ him back to EMT. “We do not mean to imply that Geisel could not reapply for the position, but only that his appointment to Firefighter Recruit was a self-contained opportunity that did not entail a right to be reappointed or to continue as a recruit until he could complete the training program.”

LEGAL LESSONS LEARNED: Dayton Civil Services rules treat a FF recruit as a probationary employee; when injured in recruit school, can be “demoted” back to EMT-B and placed on light duty.

Chap. 11 Fair Labor Standards Act

11-8

NY: FDNY - BACK PAY FOR EMS – HRS WORKED BEFORE / AFTER SHIFT – WILLFULL VIOLATION – 3-YRS BACK PAY, DOUBLED - \$14.4 MILLION

On Dec. 23, 2019, in [Chaz Perry, et al. v. City of New York](#), U.S. District Court Judge Vernon S. Broderick, Southern District of New York, granted plaintiff's motion for final judgment on behalf of 2,519 current and former EMS, and also Fire Safety Inspectors below the rank of lieutenant. A jury found the FDNY willfully violated FLSA by allowing EMS and Inspector to work early or after shift while not "on the clock." Federal judge awarded backpay for three years for willful violation (not just two years) of \$7,238,513.00, as well as an equal amount of \$7,238,513.00 in liquidated damages.

"Because the jury in this case has already determined that Defendants committed a willful violation of the FLSA, I reject Defendants' request to deny liquidated damages in this case."

11-7

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

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

Presiding Judge Christopher J. McMillan wrote:

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

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

(G) As used in this section and section [505.601](#) of the Revised Code:

(1) "Part-time township employee" means a township employee who is hired with the expectation that the employee will work not more than one thousand five hundred hours in any year.

[See my case analysis of Georgia case of firefighter's case regarding full time work status.](#)

11-6

FLSA: DOL OPINION LETTER – WHEN EMPLOYEE IS BOTH FF / POLICE OFFICER SAME PUBLIC AGENCY – CALCULATING OVERTIME

On Aug. 8, 2019, the [U.S. Department of Labor issued Opinion Letter FLSA2019- 11](#), confirmed that if working for same public agency, then the total hours worked are aggregated when determining overtime pay.

“If an employee works for separate and distinct employers, each employer may disregard work performed by the employee for the other employer when determining its responsibility under the Fair Labor Standards Act (FLSA). 29 C.F.R. § 791.2. However, where the employee performs “fire protection activities” for the fire department and “law enforcement activities” for the police department of the same public agency, as you state is the case here, the hours are aggregated.”

Legal Lessons Learned: When in doubt about paying overtime, [review FLSA opinion letters](#). If still not clear, call DoL Wage and Hour Division and consult with experienced Legal Counsel.

[See my case analysis of US Department of Labor’s calculation of overtime working both fire and police department.](#)

11-5

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.”

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.”

[See my case analysis of the State of Washington’s district court case regarding FLSA employee exemption.](#)

11-4

U.S. DEPT. OF LABOR: PROPOSED NEW RULE – ITEMS NOT INCLUDED IN “REGULAR RATE OF PAY”

On March 28, 2019, the [U.S. Department of Labor \(Department\) announced a proposed rule to amend 29 CFR part 778](#) to clarify and update regular rate requirements under section 7(e) of the Fair Labor Standards Act (FLSA).

“The FLSA generally requires overtime pay of at least one and one-half times the regular rate of pay for hours worked in excess of 40 hours per workweek. Regular rate requirements define what forms of payment employers include and exclude in the “time and one-half” calculation when determining workers’ overtime rates. Under current rules, employers are discouraged from offering more perks to their employees as it may be unclear whether those perks must be included in the calculation of an employees’ regular rate of pay. The proposed rule focuses primarily on clarifying whether certain kinds of perks, benefits, or other miscellaneous items must be included in the regular rate. Because these regulations have not been updated in decades, the proposal would better define the regular rate for today’s workplace practices.

The Department proposes clarifications to the regulations to confirm that employers may exclude the following from an employee’s regular rate of pay:

- the cost of providing wellness programs, onsite specialist treatment, gym access and fitness classes, and employee discounts on retail goods and services;
- payments for unused paid leave, including paid sick leave;
- reimbursed expenses, even if not incurred “solely” for the employer’s benefit;
- reimbursed travel expenses that do not exceed the maximum travel reimbursement permitted under the Federal Travel Regulation System regulations and that satisfy other regulatory requirements;
- discretionary bonuses;
- Benefit plans, including accident, unemployment, and legal services; and
- Tuition programs, such as reimbursement programs or repayment of educational deb

The proposed rule also includes additional clarification about other forms of compensation, including payment for meal periods, ‘call back’ pay, and others.

Legal Lessons Learned: This new rule will hopefully provide more clarification for Fire & EMS Departments and avoid litigation about “regular rate” of pay.

See, for example, [DoL Advisory Opinion FLSA2018-5 \(Jan. 5, 2018\)](#) regarding a Fire Department’s calculation of “regular rate of pay” concerning annual bonuses, such as certification pay, education pay, and longevity pay.

[See my case analysis of US Department of Labor new rule regarding regular rate of pay.](#)

11-3

NC: FLSA – NONPROFIT, PRIVATE VOL. FD – NOT ELIGIBLE OVERTIME EXEMPTION – NOT “PUBLIC AGENCY”

On Nov. 8, 2018, the [U.S. Department of Labor issued Opinion Letter FLSA 2018-24](#), concluding: “Based on the facts you have provided, the nonprofit, privately owned fire departments that you describe are not public agencies within the meaning of Section 7(k) and are therefore not entitled to its partial overtime exemption.”

Legal Lessons Learned: When in doubt, it is helpful to seek an “official” Opinion Letter; helps avoid litigation. These North Carolina nonprofit FDs must therefore continue to pay overtime to employees working over 40 hours in a work week. They don’t enjoy the “7(k) exemption” which allows public-sector FDs, for example, to pay overtime after 212 hours in a 28-day pay period (after 53 hours in a work week).

[See my analysis of the case of US Department of Labor's opinion of FLSA for non-profit fire departments.](#)

[See IAFF Manual \(page 8\)](#); court cases involving 7k exemption.

11-2

NY: MEAL ALLOWANCES FOR FDNY EMS – MUST BE INCLUDED IN CALCULATING “REGULAR RATE OF PAY”

On March 26, 2018, in [Chaz Perry et al. v. City of New York](#), U.S. District Court for Southern District of New York, Federal District Judge Vernon S. Broderick held that the City must include meal allowances when calculating the “regular rate” of pay for overtime, just as City does for night shift differential pay. In this lawsuit by over 2,600 FDNY paramedics, EMTs and Fire Inspectors, other claims in the lawsuit, including compensable work performed before and after Plaintiffs’ shifts, will go to trial.

Legal Lessons Learned: Overtime pay is calculated by not only your hourly rate, but also other bonuses received, such as paramedic bonus and night shift differential.

[See U.S. Department of Labor, Fact Sheet No. 23, and regulations.](#)

11-1

U.S. DOL: FD CONTRACTS WITH PRIVATE COMPANY FOR EMS – EMT CAN'T VOLUNTEER IF PERFORMING SAME SERVICES

On Jan. 5, 2018, the [U.S. Department of Labor issued Opinion Letter FLSA 2018-16](#), re-affirmed a 2009 Opinion Letter: “You [ask] whether the EMTs paid by the VFC’s contractor may continue to ‘volunteer’ as EMTs for the VFC without being compensated in accordance with the FLSA. The answer to this question depends on whether the VFC is considered to be an employer of the paid staff members. If the VFC is in fact deemed to be an employer (along with the contractor) of the paid staff members, the EMTs could not ‘volunteer’ to the VFC the same services that they perform for pay for the contractor.

Legal Lessons Learned: FLSA Opinion Letters are helpful, but as in this matter are not always definitive. Fire & EMS Departments are also encouraged to meet “face to face” with Wage & Hour staff and get their informal feedback, and consider retaining Legal Counsel experienced with FLSA issues.

Chap. 12 Drug-Free Workplace

12-3

IL: PARAMEDIC USING SQUAD FENTANYL – HOSPITAL FOUND PIN HOLES IN VIALS – CONVICTION UPHeld

On Dec. 6, 2019, in [United States v. Jason Laut](#), the U.S. Court of Appeals for the 7th Circuit (Chicago), held (3 to 0) that in a nonprecedential disposition that his jury conviction was affirmed.

“Specifically, the government stated that Laut had tampered with fentanyl vials ‘57 times in 2014, 28 times in 2015; and repeatedly referred to the ‘85 tampered vials.’ Also, when describing the 2015 tampering, the government stated that pharmacists discovered the tampered vials ‘after Jason Laut’s tampering had already been caught once ... but he got away with it.’ *** The jury found Laut guilty on all 38 counts.

Legal Lessons Learned: Conduct training of all personnel on tampering, and share hospital procedure inspecting returned vials, and reporting incidents to drug enforcement agencies. Read [Controlled Substance Security, “Considerations When Tampering Occurs”](#).

[See my case analysis of Illinois US Court Appeals regarding paramedic using squad fentanyl.](#)

12-2

NY: COURT REFUSES TO DROP DUI CHARGES AGAINST POLICE OFFICER / EMT – NOT “INTEREST OF JUSTICE”

On Aug. 13, 2019, in [The People Of The State Of New York v. Shreeganes Meade](#), 2019 NY Slip Op 51419(U), N.Y. Crim. Ct., 2019, trial judge Kate Paek, Criminal Court of the City of New York, denied the defense motion to dismiss the two misdemeanor counts “in the interest of justice.”

The judge held:

“The defendant asserts that he will face discipline, including possible termination from the NYPD, if he is convicted of a misdemeanor DWI offense. He also states that he will face removal from the New York State Guard and could lose his license to work as an Emergency Medical Technician. Defense counsel asserts that these consequences would not only impact the defendant personally, but would deprive the community of the defendant's service in those roles. The court is mindful of these potential collateral consequences, but finds that they do not mandate dismissal in this case.”

Legal Lessons Learned: The job consequences of an emergency responder being convicted of driving while intoxicated can be very severe. The case will now go to a jury, unless the police officer elects to have a “bench trial” or pleads guilty.

[See my case analysis of New York Criminal Court decision of DUI charges against Police Officer/EMT.](#)

MD: FF TERMINATED FOR ALCOHOL – GIVEN SECOND CHANCE – PRE-TERMINATION HEARING

On Oct. 19, 2018, in [Darryl K. Lewis, Jr. v. City of Baltimore Civil Service Commission, et al](#), the Circuit Court for Baltimore City, held (3 to 0) in unreported decision that the firefighter was provided due process, affirming the Hearing Officer's findings: "The Hearing Officer's Recommendation states, 'Procedural due process was afforded in that Lewis received notice of the underlying charges and an opportunity to be heard at a pre-termination hearing. He received sufficient notification of the outcome of that hearing and was advised of his right to this investigation.'"

Legal Lesson Learned: "After Care Contracts" and other forms of last chance agreements are enforceable, and procedural due process rights were followed in this case.

Note: Consider in such agreements a requirement that the employee enroll in a continuing care program, such as AA. The SW Ohio Critical Incident Stress Management Team has a group of recovering firefighters helping other firefighters, [EMERGENCY RESPONDERS IN NEED](#).

Chap. 13 EMS

13-41

GA: EMT – OBJECTED WHEN TOLD TO FALSIFY PATIENTS CAN'T WALK – LATER FIRED, DIDN'T INFORM DIR. 2nd EMS JOB – NO RETALIATION

On Jan. 3, 2020, in [Jamie Nesbitt v. Chandler County, GA, d.b.a. Chandler County Ambulance Service](#), the U.S. Court of Appeals for the 11th Circuit (Atlanta) held 3 to 0 that the U.S. District Court judge properly dismissed the EMT's False Claims Act lawsuit claiming retaliation. He was fired for having an undisclosed second job working for a private ambulance company; no proof that "but for" his being a whistleblower he would have been fired.

"According to Nesbitt, when Greer became the deputy director he started pressuring the EMTs to write in their report narratives that patients were unable to walk, even if they could. That way Medicare would pay for more trips. Nesbitt believed that Greer was asking him to commit fraud, so he began complaining to Greer himself and other County officials. *** The County had a policy prohibiting EMTs from working side jobs without the approval of the ambulance service director. Greer was not the director, David Moore was. Nesbitt assumed that Moore somehow knew about his other job, but there's no evidence that Moore did know about it, much less that he approved it."

13-40

FL: HIGH SCHOOL FOOTBALL – HEAT EXHAUSTION / DIED - COACH DELAYED CALLING 911 – NO LIABILITY, LACK REQUISITE CONTROL

On Jan. 2, 2019, in [Laurie Alice Giordano v. The School Board of Lee County, Florida and James Delgado](#), U.S. District Court Judge John E. Steele, U.S. District Court, Middle District of Florida (Fort Myers Division), granted defendants motion to dismiss.

"Mere compulsory attendance at a public school does not give rise to a constitutional duty of protection under the Due Process Clause because public schools generally lack the requisite control over children to impose such a duty of care upon these institutions

13-39

TX: POTHOLE - MOTORCYCLIST INJURED – DIDN'T INFORM CITY OF POTHOLE - EMS RUN RPT. NOT "ACTUAL NOTICE" – CASE DISMISSED

On Dec. 31, 2019, in [City of Houston v. Elvin D. Miller](#), the Court of Appeals for the First District of Texas, held (3 to 0) that the trial judge should have dismissed this lawsuit.

"Accordingly, we hold that Miller has not demonstrated that the City was subjectively aware of its fault in producing or causing his injuries such that it had actual notice of his claims prior to the jurisdictional deadline for giving notice of his claims."

13-38

LA: PARAMEDIC LETTER TO BOARD – NEED POLICY CHANGES – FIRED 19 MOS. LATER – FALSIFYING TRAINING RECORDS – NO RETALIATION

On Dec. 17, 2019, in [Patrick A. Benefield; Brian Scott Warren v. Joe D. Magee](#), the U.S. Court of Appeals for the 5th Circuit (New Orleans) held (3 to 0) that Benefield’s “Free Speech” claim may proceed in U.S. District Court in Louisiana.

“The issues, therefore, are (1) whether Warren’s speech was on a matter of public concern and (2) whether his June 2015 letter was a substantial or motivating factor for his firing. We agree with Magee [EMS Manager] that Warren failed to allege a sufficient causal connection between his letter and his firing.... Warren sent his letter in June 2015 and was fired in January 2017—a 19-month gap.... Thus, the timing, by itself, between Warren’s speech and his firing is not close enough to permit a plausible inference that Warren’s firing was causally connected to his speech.”

13-37

WV: DRAG RACING / SON EJECTED – MOTHER RN / FLIGHT NURSE - PD STOPS HER CARE SON; MEDICS DIDN'T TAKE PULSE – CASE PROCEED

On Dec. 5, 2019, in [Amy Brown, individually and Administratrix of the Estate of James Brady Leonard v. Mason County Commission, Gallia County Board of Commissioners, et al.](#), U.S. District Court Judge Robert Chambers, Southern District of West Virginia (Huntington Division), the lawsuit against the Deputy Sheriff may proceed.

“Taken as true, the conduct [by County Deputy Sheriff] alleged here is certainly more than ‘merely annoying’ or ‘uncivil.’ A jury could very well determine that physically restraining a mother attempting to provide medical assistance to her son is utterly intolerable in a civilized community. *See Travis*, 504 S.E.2d at 425. It would be similarly reasonable for a jury to determine that Bryant acted recklessly, that his actions caused Plaintiff to suffer emotional distress, and that her distress was so severe that no reasonable person could be expected to endure it. It follows that Plaintiff has pleaded sufficient facts to state a claim for relief under an [Intentional Infliction of Emotional Distress] theory.

Gallia County EMS is not entitled to dismissal. As discussed in the preceding section, Plaintiff alleges that Elliott and Turner—both Gallia County EMS responders—did not check Leonard’s pulse, his breathing, or his body for injuries, and that they pronounced him dead without following proper procedures.”

13-36

OH: EMS RUN REPORT – DRIVER ADMITTED DRINKING WINE – TWO MEDICS TESTIFIED IN VEHICULAR HOMICIDE TRIAL

On Nov. 15, 2019, in *State of Ohio v. Kathy J. Smith*, the Court of Appeals of Ohio, Second Appellate District (Greene County) held (3 to 0) that defendant’s appeal is denied, and she must continue to serve her seven-year sentence for aggravated vehicular homicide.

“On appeal, Smith argues that her statements to the paramedics about drinking were analogous to the written record of those statements in the EMS run sheet. But regardless of whether the run sheet itself might or might not qualify by statute as a ‘medical record,’ we are unpersuaded that the Fourth Amendment precluded

Meadows from speaking to the paramedics without a warrant and hearing what Smith told them about consuming alcohol. The trial court correctly found that Smith was not in law-enforcement custody when she made her voluntary statements in response to the paramedics' questions. We note too that Smith's statements were not entitled to a statutory privilege.”

Legal Lessons Learned: EMS should record on EMS Run Report comments by patients about drinking alcohol prior to the accident, and other culpable admissions.

[See my case analysis of Ohio Court of Appeals decision of vehicular homicide trial.](#)

13-35

IN: OPERATOR PRIVATE AMBUL. CO. INDICTED – DIALYSIS PATIENT TRANSPORTS – IMPROPERLY BILLED MEDICARE

On Nov. 15, 2019, in [United States v. Basil Ubanwa](#), U.S. District Court of Northern District of Indiana, Chief Judge Theresa L. Springmann denied defense motion to dismiss the indictment.

“[FBI] Agent Pawelko testified as follows: Based on—based on the people we had spoken to and the things we've reviewed, it does appear that, number one, the majority of people that Northwest was transporting during the time of our investigation were patients being transported to and from dialysis, which is a form of - it's a nonemergency transportation. And so far, what we've seen does support the allegation that they are transporting patients who do not qualify for this type of transportation. There's many indicators that these patients are capable of being transported to dialysis and other places by different means.

Carlos Trevino, an Emergency Medical Technician and employee of Northwest Ambulance, was then called to testify before the Grand Jury. Ex. C, pp. 2, 5-6, ECF No. 25-3. In essence, Trevino testified that the Defendant directed his employees to alter and fabricate documents so that Medicare would reimburse Northwest Ambulance for transporting patients who did not qualify for ambulance transportation. *See, e.g., id.* at 12, 24-27, 44-45, 52. The Prosecutor also discussed various patients that Northwest Ambulance had transported, and Trevino offered his opinion on whether those patients qualified for transport under the applicable Medicare regulations. *Id.* at 29, 31, 34. The Prosecutor also asked Trevino the following question: "how many millions of dollars was paid out by Medicaid for the transportation of [the] patients?" *Id.* at 54. Trevino responded that he did not know. *Id.* The Prosecutor then asked a follow up question: "Would it surprise you to know it's 3 or 4 million dollars?" *Id.* Trevino answered, "That is surprising, yes." *Id.*

Legal Lessons Learned: [Federal government continues widespread investigation of Medicare fraud](#). “First established in March 2007, Strike Force teams currently operate in the following areas: Miami, Florida; Los Angeles, California; Detroit, Michigan; Houston, Texas; Brooklyn, New York; Baton Rouge and New Orleans, Louisiana; Tampa and Orlando, Florida; Chicago, Illinois; Dallas, Texas; Washington, D.C.; Newark, New Jersey/Philadelphia, Pennsylvania; and the Appalachian Region.”

[See my case analysis of Indiana US District Court decision of private ambulance company improperly billing Medicare.](#)

13-34

NY: UNCONSCIOUS PATIENT – 37 MIN. DELAY - PD RE-DIRECTED TO ANOTHER PATIENT – PATIENT DIED - LAWSUIT MAY PROCEED

On Nov. 7, 2019, in [Michael Mannino, as Administrator of the Estate of Carmen Mannino v. The City of New York](#), Supreme Court of New York, New York County (Part 5), Justice Verna L. Saunders, denied the City's motion for summary judgment.

“Moreover, it is clear from the facts presented that reasonable minds may differ as to whether the dispatcher made the appropriate inquiries in order to dispatch the most suitable unit to plaintiff's home; whether the thirty-seven minutes that elapsed between Mr. Mannino's first 911 call and FDNY's ultimate arrival to his home constitutes a breach of duty where Mr. Mannino called 911 three times and was never informed that there was a delay due to the initial ambulance being stopped by NYPD; and finally, whether plaintiff's reliance on the statements of the dispatcher was reasonable where on three separate occasions he informed the 911 of dispatch of his wife's condition and each time was told that ‘they will take care of it.’ The City's assertion in reply, that plaintiff did not report to the dispatcher his wife's “deteriorating” condition is without merit as it is the dispatcher who elicits relevant information through questioning. Furthermore, the information provided to the dispatcher over the course of the multiple 911 calls resulted in plaintiff's priority increasing with each call, with the final call being given top priority and an ALS unit assignment.

Legal Lessons Learned: If an ambulance is re-directed on another run, dispatch should inform the 911 caller of the delay.

[See my case analysis of New York's Supreme Court decision of ambulance procedures.](#)

13-33

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

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

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

On June 21, 2019, here [other claims of race and gender discrimination were dismissed.](#)

Legal Lessons Learned: EMS protocols must be followed, and suspension / remediation training is an appropriate corrective action. [Also filed, Chap. 8, Race Discrimination.]

13-32

OK: EMS HELD BACK FROM PD SHOOTING FOR 12 MINUTES – CONFIRM SCENE SECURE - QUALIFIED IMMUNITY

On Sept. 6, 2019, in [Briena Crittenden, as personal representative of estate of Joshua P. Crittenden v. City of Tahlequah, Officer Randy Tanner, et al.](#), the U.S. Court of Appeals for the 10th District (Denver) held (3 to 0) that U.S. District Court judge properly granted summary judgment to the police officers and the City.

Circuit Judge Michael R. Murphy wrote:

“There is no precedent supporting the notion that police officers have an affirmative duty to provide immediate medical care in situations such as the instant case. See *Wilson v. Meeks*, 52 F.3d1547, 1556 (10thCir.1995), abrogated on other grounds by *Saucier v. Katz*, 533 U.S.194 (2001). In *Wilson*, after a police officer shot a man holding a gun, other officers handcuffed the victim before medical help arrived. *Id.* The officers did not provide medical care or first aid before EMS arrived. *Id.* The victim’s estate alleged the officers interfered with EMS by refusing to remove the handcuffs upon request. *Id.* This court, applying the Fourteenth Amendment deliberate indifference standard, held that neither the handcuffing nor the refusal to remove the handcuffs amounted to a constitutional violation. *Id.* Further, *Wilson* refused to hold that the Due Process Clause establishes an affirmative duty on police officers to provide medical care (even something as basic as CPR), in any and all circumstances, or to render first aid.”

Legal Lessons Learned: Police enjoy qualified immunity, particularly where EMS is held back while scene is secured. EMS should document reasons for delay, and subsequent medical care provided.

[See my case analysis of Oklahoma’s Court of Appeals decision of qualified immunity for police and EMT.](#)

13-31

GA: SOFT RESTRAINTS - MANIC EPISODE - POLICE VIDEOS SHOW NEED FOR RESTRAINTS - QUALIFIED IMMUNITY

On Aug. 29, 2019, in [Kimberly Ellison v. Kenneth Hobbs, et al.](#), the U.S. Court of Appeals for the 11th District (Atlanta), held (3 to 0) in an unpublished decision, that U.S. District Court judge had properly granted summary judgment to all EMS and Police.

The court held:

“[C]ontrary to Ellison’s contentions, the use of soft restraints is a tool available to Paramedic Gasaway and EMT Howard in performing their job-related functions. See *Davenport*, 906 F.3d at 940. Thus, because Paramedic Gasaway’s and EMT Howard’s actions were not outside their ‘arsenal’ of powers, they acted within their discretionary authority.”

Legal Lessons Learned: Thanks to officer’s video cameras, both the U.S. District Court judge, and the Court of Appeals, had a “minute by minute” view of what occurred in getting this patient [who is a practicing attorney] out of her apartment and to the hospital.

[See my case analysis Georgia US Court of Appeals case concerning qualified immunity of EMT’s.](#)

13-30

IL: STROKE PATIENT WHO RAN OUT HOME – EMS TACKLED ON DRIVEWAY - LAWSUIT PROCEED, FACTS IN DISPUTE

On Aug. 28, 2019, in [Douglas Johnson v. City of East Peoria, et al.](#), U.S. District Court judge James E. Shadid, Central District of Illinois, Case No. 17-cv-1212-JES-JEH, denied motion for summary judgment by the City and several paramedics; pre-trial discovery may now proceed unless they take an immediate appeal.

Judge Shadid wrote:

“Between the bottom of the stairs and the front door, Plaintiff’s pants began to fall down and Defendant Sauder attempted to pull them up. (Docs. 37 at 8, 42 at 10). Plaintiff turned at least the top half of his body in a manner Defendants Riggerbach and Sauder state they found aggressive. (Docs. 37 at 8, 42 at 10). He then ran out the front door, down the front steps, and into the driveway, falling three times as he ran. *** What happened next is disputed in large part, but the parties agree that Defendant Sauder bear-hugged Plaintiff, both Defendant Sauder and Plaintiff ended up on the ground, and Defendants Duckworth, Riggerbach, and Sauder, along with Knaus, restrained Plaintiff on the ground.

However, Plaintiff is correct that the state-created danger theory is not duplicative of his other claims. See *Monfils v. Taylor*, 165 F.3d 511, 515–517 (7th Cir. 1998) (recognizing the existence of a substantive due process claim for a state-created danger)...Therefore, Plaintiff’s due process claim survives summary judgment on the state-created danger theory alone.”

Legal Lessons Learned: On an EMS run where there is a struggle with the patient, thoroughly documents on EMS run report the actions taken by each medic. This will help avoid “facts in dispute” in any subsequent civil lawsuit, and any prosecution for assault.

[See my case analysis of Illinois District Court case of lawsuit against EMS who tackled patient.](#)

13-29

MI: GURNEY TIPPED – LAWSUIT TO PROCEED - EMS DIDN'T TELL HOSPITAL OR DOCUMENT – X-RAYS SHOWED NECK FRACTURES

On Aug. 27, 2019, in [Estate of Ralph Brown, by Victoria Brown, Personal Representative v. Sean Wolan and Jeffrey Vescio](#), the Michigan Court of Appeals, held (2 to 1) in an unpublished opinion, that the trial court judge properly denied the two paramedics’ governmental immunity motion to dismiss.

The 2-judge majority held:

“The failure to report the incident has additional import on the issue of whether the conduct of the defendants was grossly negligent. They had an undisputed duty to make such a report. Indeed, Vescio acknowledged in his deposition that the incident should have been reported. Vescio testified that Wolan was responsible for documenting the ambulance run and communicating information to the ER staff. Wolan explained that he did not report or document the incident because he did not believe the decedent had been injured. To the contrary, Everlove [expert witness] testified that the reporting of the incident, regardless of the paramedics’ assessment of injury, was crucial to patient care at the hospital. Additionally, the veracity of Wolan’s testimony regarding his belief that there was no injury is belied by his partner Vescio’s description of the incident in his e-mail to his supervisors where he reported that, ‘the patient [was] hanging sideways reaching out while remaining belted onto the stretcher.’ A rational juror thus could believe that the EMTs did not assess the patient and failed to even report the incident to those charged with the patient’s medical care or record the incident in the

transport record that would have been used by the hospital staff to inform patient care decisions. On this record, a reasonable juror could determine that the EMTs showed ‘a substantial lack of concern for whether an injury results.’ Defendants’ failure in regards to reporting cannot be considered accidental.”

Legal Lessons Learned: When “things go bad” on a run, inform hospital and supervisors and document on EMS run report.

[See my case analysis of Michigan’s Court of Appeals decision of lawsuit of EMS worker tipping over occupied gurney.](#)

13-28

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

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

“We likewise reject Sapp’s broader argument that no reasonable trier of fact could have found from the evidence presented that what Osborne saw was a firearm (i.e., not a toy).

Osborne, who had decades of experience with guns, testified in considerable detail about the gun that he saw, including its color, that it was a revolver, similar to one he owned, and had a ‘trap door’ feature consistent with small caliber pistols. Transcript Vol. II at 232, 235. He also said that, when he saw it, he did not think it was a toy and, in fact, was afraid for his safety when Sapp appeared to be reaching for it.”

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

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

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

[See my case analysis of Indiana’s Court of Appeals decision of medic’s possession of a fire arm.](#)

13-27

CA: FLIGHT PARAM. KILLED HELICOPTER CRASH – ONLY WORKERS COMP - CAN’T SUE HELICOPTER CO. - “SPECIAL EMPLOYEE”

On May 24, 2019, in [Brooke Juarez v. Rogers Helicopters, Inc., et al.](#), the Court of Appeals for California, Fifth Appellate District, held (3 to 0) in an unpublished decision, the trial court properly granted summary judgment to the helicopter company; the deceased paramedic was a “general employee” of American Airborne company, and a “special employee” of Rogers Helicopter, and therefore workers compensation was the sole remedy for the wife of the deceased paramedic.

“In sum, based on the facts and circumstances of this case, since SkyLife was Juarez’s special employer, SkyLife’s general partners, American Airborne and Rogers Helicopters, are also Juarez’s special employers. As such, respondents are all immune from tort liability and the trial court properly granted summary judgment in their favor.”

Legal Lessons Learned: Flight paramedics may be considered “dual employees” in many states; and workers comp. is their sole remedy for injury or death in those states.

See article on the crash, The Fresno Bee: [“When his helicopter went down, the family sued over his death. A judge says they can’t.”](#)

See trial court’s summary judgment decision for [“Juarez et al. v. Rogers Helicopters, Inc. et al.”](#)

See this article about air care helicopter crashes: [“EMS Helicopter Crashes Raise Complex Liability Issues.”](#)

“Of course, if the crash was caused by a defect in the helicopter, the crew case may proceed against the helicopter manufacturer. But there are legal challenges to be overcome there as well. A federal statute of repose known as the General Aviation Revitalization Act, or GARA, bars claims against the manufacturer if the helicopter is older than 18 years. And beneath their shiny paint, most of the helicopters now in service date back to the 1970s. (In case you’re wondering, GARA protects not just US helicopter manufacturers, but foreign helicopter manufacturers too.)”

[See my case analysis of California’s Court of Appeals case in regards to the death of a flight paramedic in crash.](#)

13-26

KY: DRIVER / POSS. STROKE - REFUSED TREATMENT - PD TOOK HIM TO McDonalds – KILLED WALKING HWY – QUALIF. IMMUNITY

On May 24, 2019, in [Lisa K. Williams v. City of Georgetown, KY, et al.](#), the U.S. Court of Appeals for 6th Circuit, in an unpublished opinion, held (2 to 1).

“This case presents tragic facts without a legal remedy. *** Although it is true that ‘an officer’s duty exists even after the custodial relationship has ended,’ Davis, 143 F.3d at 1025, it does not extend in perpetuity. Plaintiff admits that the officers concluded Burns was not a danger to himself or others. Calling an ambulance and giving Burns a ride to McDonald’s does not strike us as the deliberate indifference described in Davis. 143 F.3d at 1027; see also Salyers, 534 F. App’x at 460. There was no constitutional violation.”

Legal Lessons Learned: Fire & EMS Departments should have a written policy about patient refusals that includes handling situations where the individual cannot be safely left at the scene (such as MVA, with no ride home).

See [Policy on “High Risk” and “Low Risk” refusals.](#)

[See my case analysis of Kentucky’s US Court of Appeals case for a patient’s death after refusing treatment from EMS.](#)

13-25

CA: CHILD CHOKING, MOTHER CALLED 911 - ONLY SPOKE SPANISH – IMMUNITY - NO REQ. THAT DISPATCHERS MUST SPEAK SPANISH

On May 20, 2019, in [Dylan Tellez v. City of Pomona](#), the Court Of Appeal of California, Second Appellate District / Division One held (3 to 0) in an unpublished decision, that the lawsuit against the City of Pomona was properly dismissed by the trial court.

“That one person fails on an occasion to understand another is an everyday occurrence between even the best intentioned. And it appears from Dylan’s allegations that the police officers’ decision not to wait for an ambulance saved his life. A city cannot be held liable simply for failure to provide translators in its 911 call centers....”

Legal Lessons Learned: 911 Centers do not have to employ Spanish-speaking dispatchers. There are translation services available for dispatch centers.

See for example: “[How to Break the 9-1-1 Language Barrier.](#)” LanguageLine system is built into the CAD system, so the ECO just has to push a button to be connected. The LanguageLine is used in call centers statewide and falls under the New Mexico Department of Finance and Administration.”

13-24

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.”

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.

[See my case analysis of US Supreme Court of New York’s case of EMT suing restaurant for icy walkway.](#)

13-23

MI: PRIVATE AMBULANCES – COUNTY ORDINANCE THAT CO. MUST GET THEIR APPROVAL – FED. JUDGE WILL NOT DECLARE THIS LAWFUL

On March 25, 2019, in [Saginaw County v. State Emergency Medical Service, Inc.](#), U.S. District Court Judge Terrence B. Berg, again denied the County’s request for a declaratory judgment that its ordinance is lawful and not a restraint of trade under Sherman Antitrust Act. “Plaintiff sought a declaration that their ambulance plan was legal and not in violation of the Sherman Act, among other statutes. But they did not plead adequate facts to show that this is true. The Court made no finding whatever on the question of whether Saginaw County’s plan ran afoul of the

Sherman Act, it simply concluded that, on the facts as alleged, the Court could not declare as a matter of law that the plan does not violate the Act.”

See also [article on this decision in Antitrust News](#).

Legal Lessons Learned: Competition among private ambulance companies is generally good for patients.

[See my case analysis of Michigan’s District Court decision regarding the approval of operating a private ambulance company.](#)

13-22

HHS OPINION: CLINIC PROVIDE FREE HOME VISITS – CHF / COPD PATIENTS – NOT FED. ANTI-KICKBACK

On March 6, 2019, the [HHS Office of Inspector General issued Advisory Opinion No. 19-03](#).

“Requestor [clinic] has developed a program to provide free, in-home follow-up care to certain patients who it certifies are at higher risk of admission or readmission to a hospital. Under the Current Arrangement, Requestor offers in-home care to patients with congestive heart failure (‘CHF’) who qualify for participation, and under the Proposed Arrangement, Requestor would expand the program to qualifying patients with chronic obstructive pulmonary disease (‘COPD’). According to Requestor, the goals of both Arrangements are to increase patient compliance with discharge plans, improve patient health, and reduce hospital inpatient admissions and readmissions.

Legal Lessons Learned: Community Paramedicine programs are rapidly expanding throughout the Nation.

[See my case analysis of US Department of Health & Human Service opinion regarding clinics providing free home visits.](#)

13-21

PA: ATTEMPTED MURDER CONV. UPHELD - EMT TESTIFIED ABOUT VICTIM’S COMMENTS ABOUT WHO SHOT HIM

On Feb. 22, 2019, in [Commonwealth of Pennsylvania v. Gregory Mack](#), the Superior Court of PA held (3 to 0) that the jury conviction is affirmed. One of the issues on appeal was veracity of the EMT who testified at the criminal trial:

“Moreover, at trial, the emergency medical technician (EMT) who transported the victim to the hospital testified that the victim told him that his friend shot him; on appeal, Appellant claims the testimony was invalid and lacked veracity because the EMT did not make a record of the conversation or subsequently inform the police of it.”

Legal Lessons Learned: EMS should document a victim’s statement concerning who shot him, either on the EMS run report or on a supplemental report. This helps avoid issues on appeal.

[See my case analysis of the Superior Court of Pennsylvania’s case regarding an EMT’s testimony of a victim’s comments regarding his injury.](#)

13-20

OH: DUI - BLOOD DRAW BY NURSE UNCONSCIOUS DRIVER LAWFUL - PD NO TIME FOR SEARCH WARRANT

On Feb. 12, 2019 in [State of Ohio v. Richard Barnhart, Jr.](#), Court of Appeals of Ohio, Fourth Appellate District – Meigs County, held (3 to 0) that trial court properly allowed into evidence the results of the blood draw. The Court write: “[B]ased upon the totality of the circumstances, we conclude that the blood sample obtained from Appellant, which was taken while he was unconscious at the hospital and being prepared for transfer to another facility, was both lawful and constitutionally valid pursuant to Ohio’s Implied Consent statute, as well as both the consent and exigent circumstances exceptions to the warrant requirement.”

Legal Lessons Learned: Implied consent statutes are an important part of highway safety.

[See my case analysis of the Ohio Court of Appeals case of a lawful blood draw of unconscious driver.](#)

13-19

WA: PATIENT WITH CHEST PAIN REFUSED TRANSPORT - FORCIBLY TAKEN TO HOSPITAL – NO QUALIFIED IMMUNITY

On Jan. 11, 2019, in [El-Fatih P. Nowell v. Trimmed Ambulance, LLC, et al](#), U.S. District Court Judge Robert S. Lasnik (Seattle, WA), denied EMS defendants’ motion for summary judgments on most of the allegations of “involuntary detention and transport to a medical facility.”

Legal Lessons Learned: When EMS are faced with the difficult decision on whether to forcibly transport a patient, consider first calling the hospital emergency department and getting medical clearance to transport.

[See my cases analysis for the State of Washington's District Court ruling for EMS forcibly transporting patient.](#)

13-18

OH: 911 DISPATCHES FOR DRUG OVERDOSES –NOT HIPPA PROTECTED UNLESS DISCLOSES PHI

On Dec. 14, 2018, in [Rachel L. Dissell v. City of Cleveland](#), the Ohio Court of Claims appointed a Special Master to advise the Court on request for records by a reporter for the The Plain Dealer newspaper. The Special Master concluded that Computer Aided Dispatch records, including addresses where EMS responded, be released under Ohio Public Records Act. “Upon consideration of the pleadings and attachments, I recommend that the court order respondent to provide requester with a copy of the EMS/Fire CAD event summary records, as submitted under seal.”

Legal Lessons Learned: In producing CAD or other records on EMS calls, be very careful to exclude any “Protected Health Information.” If in doubt, advise requester that info is HIPAA protected and will only be revealed to Court under seal.

[See my cases analysis for the Ohio Court of Claims ruling of drug overdoses and HIPPA laws.](#)

13-17

PA: HOSPITAL EMPLOYEE RECORDS HACKED; EMPLOYEES MAY SUE
HOSPITAL [also filed, Chap. 6]

On Nov. 21, 2018, in [Barbara A. Dittman, et al. v. UPMC d/b/a The University of Pittsburgh Medical Center, et al.](#), the PA Supreme Court ruled (4 to 3), the lawsuit was reinstated against the hospital. “We hold that an employer has a legal duty to exercise reasonable care to safeguard its employees’ sensitive personal information stored by the employer on an internet-accessible computer system.”

Legal Lessons Learned: This is an important decision that will now proceed to trial or settlement. Hopefully this decision will prompt employers in PA, and other states, including Fire & EMS agencies, to review their electronic data safeguards with IT experts.

Note: Ohio has enacted the [Ohio Data Protection Act, effective Nov. 2, 2018 \(to be in Ohio Revised Code 1354.01-05\)](#), which provides companies with an affirmative defense to lawsuits involving release of personal information, if the company has a written cybersecurity program that conforms to the NIST Cybersecurity Framework. See [Sept. 20, 2018 article, “New Ohio law incentivizes businesses that comply with cybersecurity programs.”](#)

13-16

OH: PUBLIC RECORDS REQUEST – INCLUDING EMS INJURED ON JOB –
CITY’S DELAY UNREASONABLE, PAY \$8,812 ATTORNEY FEES

On Nov. 14, 2018, in [Cleveland Association Of Rescue Employees – Local 1975 v. City of Cleveland](#), the Ohio Court of Appeals for Cuyahoga County, held (3 to 0) held that the City must reimburse CARE \$8,812.50 in attorney fees. “This court finds that the city’s failure to respond to the records request by releasing the requested records in this case was unreasonable. The city’s two-month delay in producing some of the records and more than five-month delay in producing all the requested records constitutes a failure to respond within a reasonable time.”

Legal Lessons Learned: Public records act statutes require prompt response; political subdivision should promptly produce readily available records, such Fire & EMS job descriptions and certifications.

13-15

KY: STERNUM RUB ON PATIENT WHO HAD BECOME UNRESPONSIVE –
CAN’T SUE EMS FOR ASSAULT

On Oct. 9, 2018, in [Troy K. Scheffler v. Alex Lee, et al.](#), the U.S. Court of Appeals for 6th Circuit (Cincinnati, OH) held (3 to 0) that the U.S. District Court had properly granted summary judgment and dismissed the lawsuit against EMT Michael Carroll. “Scheffler consented to medical care by asking to be taken to the hospital and by willingly entering the ambulance with the EMTs, and there is no indication that Scheffler withdrew or limited that consent. Carroll performed the sternum rub as part of that care.”

Legal Lessons Learned: Thoroughly document reasons for a sternum rub, or other medical procedures.

13-14

NY: FF FELL WHEN AMBUL. BACK STEP NOT LOWERED – ACCIDENTAL DISAB. CLAIM UPHELD [also filed, Chap. 6]

On Sept. 6, 2018, [In The Matter Of Gregg A. Loia v. Thomas P. Di Napoli, State Comptroller](#), the NY Supreme Court, Appellate Division (Third Judicial Department) held (3 to 0) the injured firefighter is entitled to accidental retirement benefits since the back step of the ambulance had not been lowered by EMS personnel, and he suffered an “accident” on the “malfunctioning piece of equipment that was designed, under normal circumstances, to promote safety.”

Legal Lessons Learned: Fire & EMS personnel should document any on the job injury (including, in this case, photos of the ambulance step) and obtain statements from others on the scene. It is unfortunate that a dispute over disability retirement benefits has been in litigation since 2012.

13-13

NJ: PARAMEDIC STUDENT WAS GIVEN 6-MONTH EXTENSION TO COMPLETE CLINICALS – NO FURTHER EXTENSIONS

On Sept. 4, 2018, in [The Matter Of Denial Of Waiver For Alberto Sanchez](#), the Superior Court of New Jersey, Appellate Division, held (2 to 0 in unpublished opinion) that State EMS Board properly refused to grant an extension of total training time. “Despite obtaining an extension [of six months to complete clinicals], Sanchez failed to timely complete his clinical training by not participating in at least five cardiac arrest resuscitations and not successfully performing at least five defibrillations and synchronized cardioversions. N.J.A.C. 8:41A-2.6(a)(9) and (10). He only participated in three cardiac arrests, and failed to complete any defibrillations or cardioversions. *** The OEMS denied the waiver [of 36-month total training time] request on March 6, 2017, because under N.J.A.C. 8:41A -2.4, his training could not be extended beyond February 6, 2017– thirty-six months of his starting date – and there were public health concerns if he was allowed more time.”

Legal Lesson Learned: Courts are generally very reluctant to overturn decisions of State agencies, such as EMS Boards, regarding the protection of health of the public.

13-12

OK: VERY EXPENSIVE TRANSPORT BY HELICOPTER – PATIENTS CAN'T SUE, FED. STATUTE

On Aug. 31, 2018, in [Susan Schenberger, Lacy Stidman and Johnny Trent v. Air Evac EMS, Inc. and Air Evac EMS, Inc.](#), the U.S. Court of Appeals for the 10th Circuit, held (3 to 0) that the lawsuit was properly dismissed: “Like the district court in this case, we have previously recognized that [Airline Deregulation Act] preemption may sometimes produce harsh results for potential plaintiffs seeking redress for perceived unfair treatment by air-ambulance carriers. *See Cox*, 868 F.3d at 906-07. Yet, we felt constrained to observe that ‘[s]uch policy considerations . . . are beyond the purview of [the courts]’ and ‘must be addressed to Congress.’ *Id.*; *see also Ferrell v. Air EVAC EMS, Inc.*, ___ F.3d ___, No. 17-2554, 2018 WL 3886688, at *3 (8th Cir. Aug. 16, 2018) (‘We may not refuse to apply ADA preemption merely because we do not believe it would be sound public policy to enforce the statute Congress enacted.’).”

Legal Lessons Learned: Air ambulance rates, like many other medical charges, can indeed be very expensive, but the remedy is with Congress.

13-11

NY: ALLERGIC REACTION TO DOG BITE – PATIENT DIED – EMD PROTOCOL WAS NOT FOLLOWED, NO GOV'T IMMUNITY

On August 16, 2018, in [Christine Lynch v. Town of Greenburg and Greenburg Police Department Emergency Medical Service](#), the NY Supreme Court, County of Westchester (Judge Lawrence E. Ecker), denied the defendants' motion for summary judgment. "In fact, despite being told that the decedent was having an allergic reaction to the dog, Marcello acknowledged that he did not consider whether the attack was an allergic attack, versus another form of asthma incident. He also specifically stated that he never considered giving the decedent any medication to address an allergic reaction." The Court also noted poor affidavit from EMS Supervisor: "Despite acknowledging that 'this action sounds in medical malpractice' ..., defendants do not submit a physician's or EMT expert affirmation specifically addressing the precise medical treatment rendered to the decedent. Instead, defendants rely upon the affidavit of an EMT Supervisor who offers generalized, conclusory statements to the effect that EMS protocols permit EMTs to exercise discretion, without ever addressing any of the specifics of defendants' actions in this case. In fact, the specific protocols are not discussed or explained, the actual medical actions taken by the first responders are not delineated or compared to protocols, specific examples of acts of discretion by the first responders are not provided, and there is no express support for the medical care that was given."

Legal Lessons Learned: Follow EMS protocol, or explain on EMS run report why the protocol was not followed.

13-10

IN: SEDATIVE FOR NAKED PATIENT RUNNING IN STREET – DIED - QUALIFIED IMMUNITY FOR EMS

On Aug. 14, 2018, in [Billie Thompson v. Lance Cope](#), 7th Circuit, the Court held (3 to 0), "The paramedic is entitled to qualified immunity on the excessive force claim. Case law did not (and does not) clearly establish that a paramedic can violate a patient-arrestee's Fourth Amendment rights by exercising medical judgment to administer a sedative in a medical emergency." Indianapolis police called EMS to help with person found naked, running in street, high on amphetamines, and combative. EMS administered a sedative; patient died 8-days later.

Legal Lessons Learned: Qualified Immunity protects police, fire, EMS personnel from personal liability.

See also U.S. Supreme Court's Jan. 7, 2019 decision, in [City of Escondido, California v. Mart Emmons](#), (9 to 0), in a per curiam decision [not authored by a specific Justice], reversed the 9th Circuit without the need to even hear oral argument. The Court held: "As to Officer Craig, the Ninth Circuit also erred. As we have explained many times: 'Qualified immunity attaches when an official's conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.'"

[See my case analysis for the Indiana Circuit Court's decision of the immunity for EMS workers who sedate a naked patient.](#)

13-9

OH: DYING DECLARATION BY VICTIM IN BACK OF AMBULANCE ADMISSIBLE IN MURDER TRIAL [also filed Chap. 1]

On July 25, 2018, in [State v. Fred Taylor](#), 2018-Ohio-2921, the Ohio Court of Appeals for Summit County, upheld (3 to 0) his conviction of felony murder of Javon Knaff.

“Mr. Knaff’s repeated statements concerning the fact that he was dying, coupled with the severity of his condition, demonstrate his awareness of his impending death at the time that he stated, ‘Fred shot [me].’ Consequently, this statement was admissible as a dying declaration.”

Legal Lessons Learned: Document on your EMS run report the actual words spoken by the patient; a “dying declaration” is admissible in evidence. Recording the comments on your run report can help prosecution reach a plea agreement.

13-8

LA: FREE SPEECH CASE NOT DISMISSED - TWO PARAMEDICS FIRED AFTER LETTER TO BOARD ABOUT MGT [\[also filed, Chap. 6\]](#)

On July 18, 2018, in [Patrick Alan Benfield & Brian Warren v. Joe Magee, et al.](#), U.S. District Court Judge Elizabeth Foote, Western District of Louisiana, held that a lawsuit by two paramedics fired by Desoto Parish EMS may proceed to trial. They were fired after Warren wrote a letter to a member of the Desoto Parish Police Jury (they appoint the Board of Commissioners of the Desoto Parish EMS). The Judge ruled: “The motion [to dismiss] is DENIED as to Warren’s free speech claim because the facts alleged establish that his letter was protected speech.”

Legal Lessons Learned: First Amendment free speech cases are increasing being permitted to go to the jury. Fire & EMS Departments should thoroughly document reasons for termination, including employees who serve “at will.”

13-7

KY: EMT WHISTLEBLOWER – ALLEGED TRANSPORTS NOT MEDICALLY NECESSARY – BUT FAILED TO PROVIDE SPECIFICS

On June 21, 2018 in [United States of America ex rel. Jessica N. Stripe v. Powell County Fiscal Court](#), U.S. District Court Judge Karen Caldwell, Lexington, Kentucky, dismissed a “whistleblower” lawsuit by an EMS employee.

“Stipe was employed in a care provider role as an EMT and she does not allege that her job involved any work related to billing or that it gave her detailed or specialized knowledge of PCFC's billing practices.... Accordingly, Stipe lacks the specialized knowledge necessary to invoke the exception to Rule 9(b).”

Legal Lessons Learned: Whistleblowers alleging fraudulent “up charging” must include in their complaint specific information about particular EMS runs where Medicare was overbilled. With specifics, the U.S. Attorney can launch an investigation of the complaint that has been filed under seal.

[See U.S. Department of Justice report](#): “Of the \$3.7 billion in settlements and judgments reported by the government in fiscal year 2017, \$3.4 billion related to lawsuits filed under the qui tam provisions of the False Claims Act. During the same period, the government paid out \$392 million to the individuals who exposed fraud and false claims by filing a qui tam complaint.”

VA: AMMONIA CAPSULES FOUND IN NOSE OF DECEASED JAIL INMATE - LAWSUIT AGAINST NURSE, OTHERS MAY PROCEED

On May 31, 2018, in [Benjamin M. Andrews, Administrator of Estate of Zachary Tuggle v. Sheriff C.T. Woody, et al.](#), a U.S. District Court Judge for Eastern District of Virginia (Richmond Division), issued two memorandum, holding (1) jail nurse and other jail personnel will not be granted summary judgment; and (2) that defense expert report of Dr. William J. Brady will not be admitted.

Legal Lessons Learned: EMS in this case properly documented to unusual conditions they observed.

The U.S. Supreme Court has instructed judges to carefully screen reports of proposed “experts.” [Daubert v. Merrell Dow Pharms. Inc., 509 U.S. 579 \(1993\)](#); [Kumho Tire Co. v. Carmichael, 526 U.S. 137 \(1999\)](#).

Federal Rules of Evidence were adopted to further clarify review of proposed expert written reports:

(B) *Witnesses Who Must Provide a Written Report*. Unless otherwise stipulated or ordered by the court, this disclosure must be accompanied by a written report—prepared and signed by the witness—if the witness is one retained or specially employed to provide expert testimony in the case or one whose duties as the party's employee regularly involve giving expert testimony. The report must contain:

- (i) a complete statement of all opinions the witness will express and the basis and reasons for them;
- (ii) the facts or data considered by the witness in forming them;
- (iii) any exhibits that will be used to summarize or support them;(iv) the witness's qualifications, including a list of all publications authored in the previous 10 years;
- (v) a list of all other cases in which, during the previous 4 years, the witness testified as an expert at trial or by deposition; and
- (vi) a statement of the compensation to be paid for the study and testimony in the case.

OH: 911 “GOOD SAMARITAN” LAW – DRUG OVERDOSE, CAN AVOID PROSECUTION IF CALL 911, GET TREATMENT [also filed, Chap. 18]

On May 18, 2018, in [State of Ohio v. Andrew Melms](#), the Court of Appeals For Second District (Montgomery County), held (3 to 0) that an overdose victim, arrested with six gel caps of fentanyl, was not eligible for immunity; he was in jail and did not enroll in treatment within the 30-day limit set under the new Ohio statute enacted in 2016. The Court urged the Ohio General Assembly to modify the law: “Granted Melms seemingly was an ideal candidate for immunity, but for the clear and unambiguous 30-day window set forth by the legislature. The remedy lies with the legislature to either eliminate the 30-day restriction or to provide for the exercise of judicial discretion, particularly in those cases of the most vulnerable, often indigent, incarcerated individuals who are unaware of the time limit until after counsel is appointed on the drug offense. In our view, an immediate legislative fix is warranted so that this legislation achieves its laudable goals.”

Legal Lessons Learned: The “911 Good Samaritan” immunity statute is to encourage drug users and their associates to call 911 for an overdose, and to promptly seek treatment (can receive immunity only twice).

Note: 911 Dispatchers are required to inform overdose patients about the new law:

R.C. 128.04 provides as follows:

- (A) Public safety answering point personnel who are certified as emergency service

telecommunicators under section 4742.03 of the Revised Code shall receive training in informing individuals who call about an apparent drug overdose about the immunity from prosecution for a minor drug possession offense created by section 2925.11 of the Revised Code.

(B) Public safety answering point personnel who receive a call about an apparent drug overdose shall make reasonable efforts, upon the caller's inquiry, to inform the caller about the immunity from prosecution for a minor drug possession offense created by section 2925.11 of the Revised Code.

13-4

MI: DYING DECLARATION BY VICTIM TO PARAMEDIC – ADMISSIBLE IN MURDER TRIAL

On April 19, 2018, in [State of Michigan v. Christopher Tank](#), the State of Michigan Court of Appeals, upheld the jury conviction (3 to 0), holding “there was no plain error in admitting the victim’s dying declaration identifying defendant as his assailant.”

Legal Lessons Learned: Dying declarations are admissible; include victim’s exact words in “quotes” in the EMS run report.

13-3

MI: CPR – NO NEED TO PERFORM WHEN PATIENT CLEARLY DEAD - LIVIDITY, NO PULSE

On April 12, 2018, in [Eusebio Saldana v. Nathan Smith and Sanilac County Sheriff’s Office](#), the State of Michigan Court of Appeals held (3 to 0; unpublished decision) that the police officer “exercised his discretion based on his experience and training in identifying Michael's condition and acting according to those conclusions.”

Legal Lessons Learned: Michigan statutes protect police & EMS from liability, unless proof of gross negligence.

13-2

OH: DRUNK DRIVER - URINE / BLOOD TESTS IN EMERGENCY ROOM BY ORDERS OF PHYSICIAN - NO 4TH AMENDMENT VIOL. BY PD

On March 26, 2018, in [John W. Gold v. City of Sandusky, et al.](#), U.S. Magistrate Judge for the U.S. District Court, Northern, OH, issued a Memorandum Opinion and Order dismissing the civil rights lawsuit filed against the City, police officers, and ER medical staff, holding: “To the extent Plaintiff argues the officers violated his Fourth Amendment rights in the insertion of the catheter or in taking his blood, such a claim fails for the reasons stated above. That is, there is no evidence the catheter was placed, or blood drawn, at the request of the police. Rather, it was medical personnel who made the decision and performed the action.”

LEGAL LESSONS LEARNED: Blood and urine may be obtained in ER for medical reasons, without patient consent; police may obtain a search warrant for use in criminal case.

OH: AMBULANCE IN MVA – EMT DRIVER SPEEDING, PASSING IN NO PASSING ZONE, NO LIGHTS & SIREN [also filed, Chap. 5]

On Jan. 2, 2018, in [Folmer v. Meigs County Commissioners, et al.](#), 2018-Ohio- 31, 4th Appellate District (Meigs County), the Court held that the EMS driver may have been negligent when transporting a patient traveling over 20 mph above posted speed limit, with no lights or siren, and attempted to pass vehicle in no passing lane, hitting oncoming vehicle. While the lawsuit may proceed against Meigs County EMS, the EMS driver enjoys immunity from personal liability since plaintiff did not alleged he “acted with malicious purpose, bad faith, or recklessness under R.C. 2744.03(A)(6)(b).”

Legal Lessons Learned: If transporting without lights and siren, then EMS driver must obey speed limit and no passing zone. The EMS driver was fortunate the plaintiff did not allege he was driving in “wanton or reckless manner.

Chap. 14 Physical Fitness

14-2

NY: FDNY RECRUIT DIED DURING PHYSICAL EXERCISES – HEART CONDITION [also filed, Chap. 2]

On April 10, 2018, in [Sherita Sears v. The City of New York](#), the Appellate Division of the Supreme Court of State of New York (5 to 0) denied the death claim, holding: “Plaintiff is not entitled to recover under GML § 205–a, as the injuries decedent sustained were not the type of occupational injury that Labor Law § 27–a was designed to protect, but rather, arose from risks unique to firefighting work (Williams v. City of New York, 2 N.Y.3d 352, 368, 779 N.Y.S.2d 449, 811 N.E.2d 1103 [2004]).”

Legal Lessons Learned: The New York statute requires proof of “neglect, omission, willful or culpable negligence.”

[New York Consolidated Laws, General Municipal Law - GMU § 205-a](#). Additional right of action to certain injured or representatives of certain deceased firefighters “In addition to any other right of action or recovery under any other provision of law, in the event any accident, causing injury, death or a disease which results in death, occurs directly or indirectly as a result of any neglect, omission, willful or culpable negligence of any person or persons in failing to comply with the requirements of any of the statutes, ordinances, rules, orders and requirements of the federal, state, county, village, town or city governments or of any and all their departments, divisions and bureaus, the person or persons guilty of said neglect, omission, willful or culpable negligence at the time of such injury or death shall be liable to pay any officer, member, agent or employee of any fire department injured, or whose life may be lost while in the discharge or performance at any time or place of any duty imposed by the fire commissioner, fire chief or other superior officer of the fire department, or to pay to the wife and children, or to pay to the parents, or to pay to the brothers and sisters, being the surviving heirs-at-law of any deceased person thus having lost his life, a sum of money, in case of injury to person, not less than ten thousand dollars, and in case of death not less than forty thousand dollars, such liability to be determined and such sums recovered in an action to be instituted by any person injured or the family or relatives of any person killed as aforesaid.”

14-1

OH: DAYTON FD RECRUIT – REMOVED FROM CLASS AFTER KNEE INJURY – NO FMLA VIOLATION [also filed, Chap. 10]

On Feb. 9, 2018 in [Shawn N. Geisel v. City of Dayton, et al.](#), Ohio Court of Appeals for Second Circuit (Montgomery County) held (3 to 0) that the FD had the authority to remove him from the recruit class and ‘demote’ him back to EMT. “We do not mean to imply that Geisel could not reapply for the position, but only that his appointment to Firefighter Recruit was a self-contained opportunity that did not entail a right to be reappointed or to continue as a recruit until he could complete the training program.”

Legal Lessons Learned: Dayton Civil Services rules treat a FF recruit as a probationary employee; when injured in recruit school, can be “demoted” back to EMT-B and placed on light duty.

Chap. 15 Critical Incident Stress Management

15-4

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.

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.

[See my case analysis for the New York Appellate's decision regarding a firefighter with PTSD.](#)

15-3

IL: PTSD –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.”

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

See also [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.

[See my case analysis for Illinois Appellate Court in case of paramedic with PTSD and disability pension.](#)

15-2

MN: PTSD – NEW STATUTORY PRESUMPTION THAT PTSD IS WORKPLACE

[Effective Jan. 1, 2019, the new state statute, “post-traumatic stress disorder](#) was reclassified as an occupational disease for first responders. That includes police officers, firefighters, paramedics, emergency medical technicians, and nurses who provide emergency medical services outside of a medical facility.”

Legal Lessons Learned: Several states have enacted similar statutes. See [“Update: Workers’ Comp Coverage for Firefighters.”](#)

See also this report, [“Post Traumatic Stress Disorder May Become a Presumptive Condition for First Responders”](#):

- So far in 2018, of 103 state bills dealt with workers compensation provisions for first responders and only 6 bills past passed “true occupational presumption for PTSD.” [Washington State](#), Florida, Vermont, Hawaii, New Jersey, and New Hampshire enacted inclusion of the PTSD presumption into their workers’ compensation legislation.
- In 2017, Colorado passed a bill recognizing PTSD as compensable under workers compensation. Then the state passed a bill allowing the treatment of PTSD using medical marijuana.
- South Carolina created a \$500,000 fund to help fund first responders out of pocket medical costs related to the treatment of PTSD.
- Texas passed an act that eases the burden for first responders filing PTSD claims, requiring the lower standard of proof: “preponderance of evidence” and without the need to declare medical impairment.
- New York included PTSD references in the 2018 budget that would allow first responders to claim personal injury based on “extraordinary work-related stress” [Hanson & Watson, “Addressing the Emergence of PTSD Presumption: Issues and Solutions” pdf].

See also Jan. 17, 2019 article from Massachusetts: [“Critical incident intervention for first responders bill signed into law.”](#)

[See my analysis of Minnesota’s updated state statute regarding PTSD in the workplace.](#)

15-1

NJ: PTSD – POLICE OFFICERS MUST PROVE EXPERIENCED “TERRIFYING” & “UNEXPECTED” EVENT

On June 5, 2018, in [Christopher Mount v. Board of Trustees, Police and Fireman’s Retirement System](#), the New Jersey Supreme Court (7 to 0) held in two cases (1) that police officer who observed three teenagers burned to death in MVA may have a claim; but (2) police hostage negotiator has no claim when SWAT Team killed the assailant. “Although the shooting was clearly devastating to Martinez -- an officer exemplary for his professionalism and compassion in highly stressful circumstances -- it was not “undesigned and unexpected....”

Legal Lessons Learned: PTSD accidental disbenefit ability claims, with no physical injury, are particularly difficult for courts interpreting state statutes.

Chap. 16 Discipline

16-22

TN: SOCIAL MEDIA – NASHVILLE PD OFFICER’S FACEBOOK POSTS - PD KILLING DRIVER MN - “GROSSLY UNPROFESSIONAL” - FIRING UPHELD

On Dec. 20, 2019, in [Anthony Venable v. Metropolitan Government of Nashville and Davidson County](#), Chief Judge Waverly D. Crenshaw, Jr., U.S. District Court, Middle District of Tennessee (Nashville Division) granted Nashville’s motion for summary judgment and dismissed the lawsuit by the former police officer, finding his Facebook comments “grossly unprofessional.”

“In addition to the “not bring discredit” language, the MNPD policy contains an explanation of why police officers are held to a higher standard, and why inappropriate conduct can be detrimental to the department. An ordinary person, exercising ordinary common sense, could understand that Venable’s inflammatory Facebook comments, where he drew upon his law enforcement background, would reflect negatively on the MNPD and constitute a violation of the Conduct Unbecoming policy. Any doubt about this is eliminated by warning statements of other participants that his comments were ‘grossly unprofessional,’ and could get him ‘in serious trouble.’

16-21

OH: LT. DEMOTED / SUSPENDED – UPHELD BUT TOWNSHIP MINUTES ON REASON FOR GOING INTO EXEC. SESSION NEED CLARIFICATION

On Dec. 9, 2019, in [Douglas Bode v. Concord Township](#), the Ohio Court of Appeals for the Eleventh District (Lake County) upheld the demotion of part-time Lieutenant to part-time firefighter / paramedic, and his suspension for six months, but found technical violation of Open Meeting Act since minutes of the Township public meeting did not reflect the reason for going into executive session.

“We determine the Board committed a technical violation of Ohio’s Open Meetings Act (the ‘OMA’) so that an injunction ordering the Board to comply with the OMA is appropriate, but we do not invalidate Mr. Bode’s suspension and demotion approved by the Board. *** Here, it is undisputed that the meeting minutes were deficient in identifying the purpose of the executive session with regard to Mr. Bode. No reason for entering executive session was stated; therefore, the Board has failed to comply with R.C. 121.22(G)(1).

16-20

OR: SHORTLY AFTER UNION FORMED - FD STARTED USING PRIVATE INVESTIGATOR, SUPERVISOR NOTES – UNFAIR LABOR PRACTICE

On Dec. 5, 2019, in [Crook County Firefighters Association, IAFF Local 5115 v. Crook County Fire & Rescue](#), the Oregon Employment Relations Board found that the Fire Department “committed an unfair labor practice” after the Local was formed in September, 2017.

“To briefly summarize: after the employees organized, the District started using a private, third-party investigator to investigate some, but not all, complaints or concerns about employee conduct, and started using supervisory notes to more comprehensively and formally document employee conduct, and coaching and counseling. When employees expressed concerns about the potentially negative employment implications of the District’s actions, or perceived differences in how Association supporters were being treated, and asked

for explanations, the chiefs, on multiple occasions, expressly attributed the employer's actions to 'the union.' Given the parties' history, including the fact that the employees had only recently organized, Association-represented employees could reasonably fear that exercising their PECBA-guaranteed rights would result in undesired changes (i.e., increased formality and documentation), as well as heightened scrutiny and less favorable judgments from their supervisors.”

Legal Lessons Learned: New disciplinary processes implemented shortly after a union has been formed can lead to an “unfair labor practice” complaint. [Under Oregon statutes](#), it is an unfair labor practice to: “(a) Interfere with, restrain or coerce any employee in or because of the exercise of any right guaranteed under ORS [243.650](#) (Definitions for ORS 243.650 to 243.782) to [243.782](#) (Representation by counsel authorized).”

[See my case analysis for Oregon Employment Relations Board decision regarding unfair labor practices.](#)

16-19

LA: FF “BILL OF RIGHTS” VIOLATED – FF INTERVIEWED BY SENIOR FD OFFICER AFTER ARREST FOR ROAD RAGE

On Dec. 4, 2019, in [Jonathan Farrelly v. Jefferson Parish East Bank Consolidated Fire District](#), the Fifth Circuit Court of Appeals held (3 to 0) that FD violated the Firefighter Bill of Rights.

“Without the presence of counsel, Farrelly was asked to discuss facts relating to a pending criminal prosecution. While the Firefighter Bill of Rights provides that statements made during the course of an administrative investigation shall not be admissible in a criminal proceeding, Farrelly was not informed of these rights at the time of the meeting. La. R.S. 33:2181(B)(7). He was not advised whether his disclosures to his employers could adversely affect his impending criminal case. He may have felt that he had to answer the questions of his superiors as Department Rules and Regulation, Article X Section 3:06 states ‘[a]ny member who, when so directed by authority, refuses to answer questions or render statements, material, etc. relevant to any Department investigation shall be subject to disciplinary action.’ Furthermore, when the Department seeks information regarding conduct that results in an arrest, the details of the conduct can be confirmed through the police report.”

Legal Lessons Learned: When the FF returned to work, he should have only been interviewed by his immediate supervisors, who in turn could advise the senior officers what they had learned. [See the Louisiana statute: FIRE EMPLOYEE'S RIGHTS:](#)

(2) "Interrogation" includes but is not limited to any formal interview, inquiry, or questioning of any fire employee by the appointing authority or the appointing authority's designee regarding misconduct, allegations of misconduct, or policy violation. An initial inquiry conducted by the fire employee's immediate supervisors shall not be considered an interrogation.

[See my case analysis for Louisiana Court of Appeals decision regarding Bill of Rights of firefighter case.](#)

16-18

MI: FF COMPLAINED PORN, OSHA VIOLATIONS – FIRED FOR MISCHARGING TIME - “RETALIATION” CLAIM REINSTATED

On Nov. 22, 2019, in [Peter Hudson v. City of Highland Park, Michigan, Derek Hillman; Makini Jackson](#), the U.S. Court of Appeals for the 6th Circuit (Cincinnati) held (3 to 0) that lawsuit should be reinstated against Fire Chief Dereck Hillman.

“As to [Fire Chief Dereck] Hillman, Hudson’s claim stands on firmer ground. While the question is close, his amended complaint contained enough plausible allegations to move to the discovery stage of the case. For five years, Hudson openly criticized his co-workers’ behavior because he felt it hampered their ability to fight fires. Hillman knew about these comments (some concerned his behavior) and tolerated other firefighters’ dereliction of duty (some of them missed calls to respond to fires). As time passed, Hudson put his complaints into action. A year before his discharge, he filed a complaint with the Occupational Safety and Health Administration, alleging that the firefighters’ cavorting led to deficiencies in the station’s equipment. Hillman, at some point, told another firefighter that he had grown tired of Hudson’s complaints. Hillman eventually found a way to get rid of Hudson: He had falsified his timecard. Hillman fired him on that basis, even though he knew another firefighter had done the same thing. Hudson tells us why: ‘[Hillman] objected to Hudson’s religious convictions and wanted to stop Hudson [’s] outspokenness against the immorality of Hillman and the firemen.’ Id.at 15. Considering these allegations as a whole, it’s fair to say that they meet the notice pleading requirements of plausible allegations that Hillman fired Hudson because of his speech.”

Legal Lessons Learned: Federal courts will carefully review claims of “retaliation” when firefighter is fired after an internal complaint, or OSHA complaint, has been submitted by the firefighter.

[See my case analysis for the Michigan US Court of Appeals case regarding of firefighter retaliation.](#)

16-17

TX: FF’S INTERNAL COMPLAINTS ABOUT FIRE CHIEF - NOT PROTECTED FIRST AMENDMENT – NOT “PUBLIC CONCERN”

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

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

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

Legal Lessons Learned: Firefighters and other public employees have limited First Amendment rights, unless speech relates to items of “public concern.” An example on an item that would be covered – public comments on proposed tax levy. [See the U.S. Supreme Court’s decision in Pickering v. Board of Education, 391 U.S. 563 \(1968\)](#)

(establishing the so-called “balancing test”), where the Court reversed the termination of a teacher who sent letter to local newspaper about proposed school board tax levy: “Appellant Marvin L. Pickering, a teacher in Township High School District 205, Will County, Illinois, was dismissed from his position by the appellee Board of Education for sending a letter to a local newspaper in connection with a recently proposed tax increase that was critical of the way in which the Board and the district superintendent of schools had handled past proposals to raise new revenue for the schools. *** In these circumstances, we conclude that the interest of the school administration in limiting teachers' opportunities to contribute to public debate is not significantly greater than its interest in limiting a similar contribution by any member of the general public.

[See my case analysis of Texas Court of Appeal’s case regarding a firefighter’s internal complaints and his First Amendment Rights.](#)

16-16

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

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

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

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

[See my case analysis of Texas Court of Appeal’s case of an employee fired due to abuse of sick leave.](#)

16-15

IL: RESIDENCY – FF FIRED – PAST THREE YEARS DID NOT RESIDE IN VILLAGE – MAIL DROP LOCATION IS NOT RESIDENCY

On May 29, 2019, in [John Cannici v. Village of Melrose Park](#), the Appellate Court of Illinois, First District, 2019 IL App (1st) 181422-U, held (3 to 0) that the fire fighter was properly terminated for violating residency ordinance.

“The Board did not indicate that it found fault with Cannici’s earlier arrangement where he lived in the [Melrose Park] Norwood house for a majority of the week and would spend his weekends at the Orland Park house. Although this arrangement included physical absence from the Norwood house for ‘some’ of the time, this was not a violation of the residency ordinance as he still lived in the Norwood house for the majority of

his time and treated it as his primary home or abode. However, when he leased the Norwood house to the Cichons, he no longer used the Norwood house as his primary home and spent practically no time in the Norwood house, except the time spent picking up his mail.”

Legal Lessons Learned: Some states, such as Ohio, have enacted statutes that have set aside municipal residency requirements.

See article, [“Ohio Supreme Court rules against city residency requirements,” June 10, 2009, Ohio Supreme Court opinion:](#)

“R.C. 9.481(B)(1) states that ‘no political subdivision shall require any of its employees, as a condition of employment, to reside in any specific area of the state.’ The issue in this case is whether R.C. 9.481 was enacted pursuant to the authority granted to the General Assembly by Section 34, Article II of the Ohio Constitution. If it was so enacted, its provisions override any conflicting law of a political subdivision, including residency requirements imposed by municipalities pursuant to the Home Rule Amendment, Section 3, Article XVIII of the Ohio Constitution. We hold that R.C. 9.481 was enacted pursuant to the authority granted by Section 34 and that the local laws before us in this case therefore cannot stand.”
Ohio communities can adopt ordinance requiring firefighters and police officers to live in the county, or an adjacent county.

[9.481 Residency requirements prohibited for certain employees.](#)

(b) To ensure adequate response times by certain employees of political subdivisions to emergencies or disasters while ensuring that those employees generally are free to reside throughout the state, the electors of any political subdivision may file an initiative petition to submit a local law to the electorate, or the legislative authority of the political subdivision may adopt an ordinance or resolution, that requires any individual employed by that political subdivision, as a condition of employment, to reside either in the county where the political subdivision is located or in any adjacent county in this state.

[9.61 Residency not required for fire chief.](#)

(B) Nothing in the Revised Code requires, or shall be construed to require, that the fire chief of a firefighting agency reside in the territory of the firefighting agency.

[See my case analysis of Illinois Appellate Courts’ case regarding fired firefighter’s listed residency.](#)

16-14

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 statements 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.

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

[See, for example, Lansing Fire Department advice 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?

[See my case analysis of Florida District Court of Appeals case for officer admissible statement in investigative case.](#)

16-13

KS: IAFF ATTORNEY HELPED FF IN GRIEVANCE - NOT HIS PERSONAL COUNSEL

On March 25, 2019, in [Randall Austin Ester v. Christopher Buell, et al.](#), U.S. Magistrate Judge Gwynne E. Birzar, U.S. District Court for Kansas, denied plaintiff's motion to have IAFF Local 64 attorney disqualified from representing IAFF in his racial discrimination lawsuit. The Magistrate held, "The totality of the evidence, viewed in conjunction with the caselaw, weighs against formation of an attorney-client relationship. Written documents identify Mr. Brown as 'attorney for the union.'"

Legal Lessons Learned: IAFF Local's attorney is not personal attorney for grievant.

[See my case analysis for Kansas US District Court's decision regarding IAFF local attorney assisting firefighter in grievance dispute.](#)

16-12

MA: NEPOTISM - FIRE CHIEF'S NIECE AND BROTHER ON FD - RESIGNED PENDING AN INVESTIGATION

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."

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.](#)

[See my cases analysis for Massachusetts US District Court ruling regarding nepotism of fire chief.](#)

16-11

NJ: STATE POLICE LAB OFFICER INDICTED; FALSELY CERTIFIED HE HAD CALIBRATED DUI EQUIPMENT

On Nov. 13, 2018, in [State v. Eileen Cassidy](#), the New Jersey Supreme Court held: “The Court considers the admissibility of breath test results produced by Alcotest machines not calibrated using a thermometer that produces temperature measurements traceable to the standards set by the National Institute of Standards and Technology (NIST)... The Special Master determined that the State had not shown that other states’ practices revealed general acceptance of the reliability of Alcotest results without the use of a NIST-traceable thermometer. Because the Special Master’s findings are supported by substantial credible evidence in the record, the Court adopts them.”

Legal Lessons Learned: False certifications can lead to unwarranted convictions, and criminal charges. EMS personnel must likewise follow EMS protocols, or patient injury or death may occur; false EMS run reports can also lead to termination of employment and even criminal charges.

[See my analysis of the case for New Jersey Supreme Court case of state police lab officer supplying false DUI information.](#)

16-10

TN: FF REINSTATED - SCUFFLE AT OFF-DUTY RALLY / FIREARM - REINSTATED – CHARGES NOT PROVEN

On Oct. 10, 2018, in [Paul Zachary Moss v. Shelby County Civil Service Board](#), the Court of Appeals of Tennessee (at Jackson) held (3 to 0) that the Civil Service Board is reversed, and firefighter is reinstated to Shelby County Fire Department. “Appellant contends that the decision upholding his termination should be reversed due to a violation of his due process rights. We agree and reverse.... Further, [Mr. Moss on appeal noted] that the ‘two charges asserted in the *Loudermill* notice were proven to be without factual basis as Chief Benson and Chief Burress both acknowledged that Mr. Moss gave notice of being taken to the Memphis Police Department on the night of the events and Mr. Moss had not been convicted of a felony.’”

Legal Lessons Learned: Due process requires proof of the specific charges; if the FD had also included a charge of “conduct unbecoming” this case may have had a different result.

16-9

TX: FREE SPEECH - PD OFFICER LAWSUIT MAY PROCEED - FIRED ORGANIZING POLICE ASSOCIATION [\[also filed, Chap. 1\]](#)

On Aug. 31, 2018, in [Marcus Mote v. Debra Walthall](#), the U.S. Court of Appeals for 5th Circuit held (3 to 0) that Police Chief Debra Walthall is not entitled to qualified immunity, and Officer Mote's lawsuit against her may proceed. Officer Mote sought before he was fired to organize police officers with the City of Corith, TX into a "Corith Police Officers Association" [no collective bargaining rights under TX law], affiliated with the Texas Municipal Police Association. The Court wrote, "The First Amendment protects the right of all persons to associate together in groups to 'advanc[e] beliefs and ideas.' Put another way, 'the [F]irst [A]mendment protects the right of all persons to associate together in groups to further their lawful interests.' When groups gather together for this purpose, 'it cannot be seriously doubted' that they comprise associations protected by the First Amendment. *** We conclude that Mote's right to speak in furtherance of forming the CPOA was clearly established as an integral part of his association rights. *** We agree with the district court that Mote's association and speech rights to engage in the activities he alleged were clearly established. We therefore DISMISS the appeal."

Legal Lessons Learned: Very strong opinion concerning free speech rights of public employees. Fire & EMS departments should adopt a "Social Media" policy that recognizes free speech rights, but cautions members to not publicly discuss internal matters.

16-8

FL: TWO DISPATCHERS FIRED – DID NOT ALERT POLICE OF "HIGH HAZARD" PERSON – POLICE OFFICER KILLED

On June 13, 2018, in [Darryl Newman, Gwendolyn Forehand v. Consolidated Dispatch Agency](#), the U.S. Court of Appeals for the 11th District (Atlanta, GA), held (3 to 0) in an unpublished opinion:

"We are unpersuaded by the Appellants' argument that their termination was arbitrary because there was no CDA [the Agency] protocol requiring them to check the 'premises hazard' tab, they were never warned of a requirement to look at 'premises hazards,' and no other PSCOs had been fired for failure to access the tab. Even if clicking on the tab was discretionary, the Appellants were nevertheless required to gather and disseminate pertinent information, pertinent information was available to them, and they failed to access it. They were aware of this responsibility based on their two decades of experience, and they knew how to access the 'premises hazard' tab. Moreover, there is no evidence that any other PSCO's failure to open the tab resulted in the death of a first responder."

Legal Lessons Learned: Fire, EMS and Police must be warned of high hazard locations. Please share this case with your 911 Dispatch agency, and confirm they have a protocol in place and it is followed 100% of time.

[See news report and TV video of this terrible scene: "Police identify gunman, Florida deputy killed in shootout."](#)

16-7

PA: DOT EMPLOYEE FIRED FOR FACEBOOK POSTS ON BAD SCHOOL BUS DRIVERS – REINSTATED [also filed, Chap. 1]

On June 12, 2018, in [Rachel L. Carr v. Commonwealth of Pennsylvania / Department of Transportation and Civil Service Commission](#), the Commonwealth Court of Pennsylvania held (3 to 0) that the employee’s FACEBOOK posts about local school bus drivers were “inappropriate” but were protected since it “touched on a matter of public concern.” The Court wrote: “After a thorough review of the record and a conscientious analysis of the factors articulated by the United States Supreme Court, we conclude that the Department’s generalized interest in the safety of the traveling public does not outweigh Carr’s specific interest in commenting on the safety of a particular bus driver. While Carr’s comments are undoubtedly inappropriate, such comments still receive protection under the First Amendment.”

Legal Lessons Learned: Fire & EMS Departments should have a Social Media Policy that clearly advises personnel that their “Free Speech rights” are limited when discussing FD internal matters.

16-6

TX: CAPTAIN SUPENDED FOR NOT SUBMITTING DOCTOR’S REPORT – REVERSED, FD FAILED TO DISCIPLINE IN 180 DAYS

On April 17, 2018, in [Steven Dunbar v. City of Houston](#), the State of Texas in the Fourteenth Court of Appeals, held that the Captain’s 10-day suspension is reversed. The “Department was aware of the violation not later than August 2014, and thus, his suspension more than 180 days later is void.”

Legal Lessons Learned: Texas statute requiring discipline within 180 days must be strictly followed; the clock begins to run when the department FIRST becomes aware of the violation.

16-5

TN: FIREFIGHTER FIRED FOR MAKING SEXUALLY HARASSING PHONE CALLS ON DUTY – NO RETALIATION

On March 23, 2018, in [Joseph Sweat v. City of McMinnville](#), the Court of Appeals of Tennessee At Nashville, held (3 to 0) that the trial court properly dismissed the firefighter’s lawsuit, since he was unable to prove that the City’s proffered reasons for the discharge was pretextual, including: “Although Plaintiff never acknowledged that he made sexually harassing phone calls, he admitted in his deposition that at one time, firefighters kept a ‘list on the desk of the fire station’ containing the names of single women that they had gotten off the internet, and that he called one of these women ‘to talk.’”

LEGAL LESSONS LEARNED: FD may impose discipline, even if the firefighter is one of the 27 firefighters who signed memo about safety issues.

16-4

RI: FF VIDEOTAPED WEIGHT LIFTING – DISABILITY PENSION BENEFITS TERMINATED [also filed, Chap. 6]

On Feb. 21, 2018, in [John Sauro v. James Lombardi](#), in his capacity as Treasurer of the City of Providence, et al., the State Supreme Court held, “we conclude that the decision of the trial justice declaring that the plaintiff’s pension benefits should be reinstated and he should be placed on a waiting list to resume active service was erroneous, overlooked material evidence, and was clearly wrong.”

Legal Lessons Learned: Accidental disability pension benefits are for those with a continuing work-place injury; cases like this lead to public perception of pension fraud.

[See TV story and undercover video of retiree lifting weights.](#)

16-3

WA: CAPTAIN FIRED, INTERNAL E-MAILS ON RELIGION – LAWSUIT REINSTATED, NO FD POLICY

On Jan. 25, 2018, in [Jonathan J. Sprague v. Spokane Valley Fire Department, et al.](#), the Supreme Court of the State of Washington, held (5 to 4) that “Sprague has met his initial burden to show that SVFD’s restrictions on his speech violated the First Amendment. On remand, the burden will shift to SVFD to show by a preponderance of the evidence that it would have reached the same decision as to respondent’s employment termination even in the absence of the protected conduct.”

Legal Lessons Learned: FDs should have a written electronic communications policy, including prohibition on e-mails that can be disruptive to workplace.

[See article on the case, “Washington Court Rules Fire Department Violated Firefighter’s Free Speech.”](#)

16-2

IN: STATE BOARD REVOKES DEPUTY CHIEF’S FF CERTIFICATES – CHILD EXPLOITATION & PORN CONVICTION

On Jan. 17, 2018, in [State Of Indiana Board Of Firefighting And Personnel Standards v. John T. Cline](#), the Court of Appeals of Indiana held that the Board’s decision to revoke his certifications as a Firefighter was affirmed, since he failed to file a timely appeal. “To effect statutory compliance, Cline was required to file the agency record or file a motion for an extension of time by May 9, 2016. He did not do so and the trial court should have dismissed the petition for judicial review.”

Legal Lessons Learned: In filing an appeal, deadlines must be met unless there are extenuating circumstances.

IL: SOCIAL MEDIA POSTS - DEPUTY FIRE CHIEF FIRED AFTER "POLITICAL COMMENTARY" ON FACEBOOK

On Jan. 11, 2018, in [Richard Banske v. City of Calumet City](#), U.S. District Court, Northern District of Illinois (Case No. 17C5263), Judge Harry D. Leinenweber granted City's motion to dismiss. "[A] policymaking employee may be discharged 'when that individual has engaged in speech on a matter of public concern in a manner that is critical of superiors or their stated policies.' Hagan, 867 F.3d at 826 (quoting Kiddy-Brown v. Blagojevich, 408 F.3d 346, 358 (7th Cir. 2005)). *** Without well pled factual allegations, the Court is left to guess whether Banske's at-issue speech touches upon a subject of public concern. This the Court will not do. The Complaint fails to establish that Banske engaged in constitutionally protected speech, so it fails to state a claim upon which relief may be granted."

Legal Lessons Learned: Fire, EMS, police and other public employees have only limited First Amendment rights under the "balancing test" of [U.S. Supreme Court's decision in Pickering v. Board of Education, 391 U.S. 563 \(1968\)](#).

Pickering decision: "Appellant Marvin L. Pickering, a teacher in Township High School District 205, Will County, Illinois, was dismissed from his position by the appellee Board of Education for sending a letter to a local newspaper in connection with a recently proposed tax increase that was critical of the way in which the Board and the district superintendent of schools had handled past proposals to raise new revenue for the schools. *** In sum, we hold that, in a case such as this, absent proof of false statements knowingly or recklessly made by him, a teacher's exercise of his right to speak on issues of public importance may not furnish the basis for his dismissal from public employment. *** Footnote 3: It is possible to conceive of some positions in public employment in which the need for confidentiality is so great that even completely correct public statements might furnish a permissible ground for dismissal."

Chap. 17 Arbitration / Mediation

17-2

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

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

“According to Local 628, the City, by offering a paramedic training course to its firefighters, violated article 33 of the CBA, which contains various provisions concerning the EMS Program, including a provision stating that the ‘EMS Program shall mean the level of services provided as of the date of this Agreement.’ Contrary to the City’s contention, a reasonable relationship exists between Local 628’s grievance and the general subject matter of the CBA.

Where, as here, the relevant arbitration provision of the CBA is broad, providing for arbitration of any grievance ‘involving the interpretation or application of any provision of this Agreement,’ a court ‘should merely determine whether there is a reasonable relationship between the subject matter of the dispute and the general subject matter of the CBA.’”

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

[See my case analysis for New York Supreme Court decision regarding grievance of training firefighter/paramedic and the arbitration process.](#)

17-1

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

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

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

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

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

“In May 1997, CFD Internal Affairs Division (‘IAD’) Executive Assistant Mark Edinburg learned of the existence of a videotape of an unauthorized retirement party held on April 12, 1990, at the CFD firehouse known as Engine 100. The videotape depicted firefighters drinking alcoholic beverages inside the firehouse; leaving the firehouse in fire trucks to respond to fire calls; some participants making offensive racial, gender and ethnic slurs; and some engaging in other conduct such as exposing their bare buttocks and genitals. Edinburg viewed the videotape on May 9, 1997. *** This

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

[See my case analysis for Illinois Appellate Court case regarding purging of disciplinary records.](#)

17-2

NY: MINIMUM MANNING PER SHIFT - ARBITRATION - 15 FF / SHIFT – 8 CAPTAINS DEMOTED IN 2015

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....”

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

Note: 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.”](#)

[Feb. 1, 2019: NY - Watertown Firefighters Win Legal Victory](#)

[See my case analysis for the New York Supreme Court’s decision regarding arbitration for firefighter shifts.](#)

17-1

U.S. SUPREME COURT: ARBITRATION BINDING ON ACCOUNTANT – EMPLOYEE THEREFORE CAN'T SUE

On May 21, 2018, in [Epic Systems Corp. v. Lewis](#), the U.S. Supreme Court (5 to 4), 584 U.S. ____ (2018), in a decision written by newly appointed Justice Gorsuch, held:

“Should employees and employers be allowed to agree that any disputes between them will be resolved through one-on-one arbitration? Or should employees always be permitted to bring their claims in class or collective actions, no matter what they agreed with their employers? As a matter of policy these questions are surely debatable. But as a matter of law the answer is clear. In the Federal Arbitration Act, Congress has instructed federal courts to enforce arbitration agreements according to their terms—including terms providing for individualized proceedings.”

Legal Lessons Learned: Many employers, including private ambulance companies, will now be encouraged to have new hires sign an arbitration document.

[AFL-CIO President Richard Trauma was quoted](#), “Five justices on the Supreme Court decided that it is acceptable for working people to have their legal rights taken away by corporations in order to keep their jobs.”

Note: [see Jan. 15, 2019 U.S. Supreme Court decision in New Prime, Inc. v. Oliveira](#), **Holding:** A court should determine whether the Federal Arbitration Act’s Section 1 exclusion for disputes involving the “contracts of employment” of certain transportation workers applies before ordering arbitration; here, truck driver Dominic Oliveira’s independent contractor operating agreement with New Prime Inc. falls within that exception. **Judgment:** [Affirmed](#), 8-0, in an opinion by Justice Gorsuch on January 15, 2019. Justice Ginsburg filed a concurring opinion. Justice Kavanaugh took no part in the consideration or decision of the case.

Chap. 18 Legislation

18-4

PA: PHILADELPHIA FF WITH LUNG CANCER – SMOKER – WILL RECEIVE WORKERS COMP BENEFITS – 2011 STATUTORY PRESUMPTION LAW

On Jan. 3, 2020, in [Wayne Deloatch v. Workers' Compensation Appeal Board \(City of Philadelphia\)](#), the Commonwealth Court of Pennsylvania held (3 to 0) that the firefighter is entitled to benefits.

“During Claimant's firefighting career (20 years), he fought approximately 200-300 fires, including building, house, car, dumpster, trash, grass, and field fires, which exposed him to smoke. *** Claimant did not use the SCBA during exterior firefighting—*i.e.*, outdoor firefighting—or overhaul, which entailed ‘ripping of walls, ceilings, searching for any hidden fire and extinguishing that if it's visible.’... After exposure to each fire incident, Claimant's body would be coated in soot, and Claimant would often find soot in his nasal secretions up to a week after exposure.... Claimant further testified that he stopped smoking cigarettes in 2011, but had a 30 to 35-year-long smoking history... During that period, Claimant recalled smoking only one pack of cigarettes per week.... Firefighters were permitted to smoke in the fire stations, and Claimant worked with smokers during his career as a firefighter. *** For the reasons set forth above, Claimant established that he was entitled to the statutory presumption under Section 301(f) of the Act, being that his lung cancer was caused by the occupation of firefighting. Employer failed to rebut the statutory presumption with substantial competent evidence that Claimant's cancer was caused by something other than his workplace exposure to IARC Group 1 carcinogens linked to lung cancer.

18-3

RI: CRANSTON FF – 20 YRS ON FD - DIED COLON CANCER 2017 – RI SUPREME COURT DENIES WIDOW ACCIDENTAL DISABILITY PENSION [also filed, Chap. 6]

On Dec. 18, 2019 in [Corrine A. Lang as Executrix of Estate of Kevin Land v. Municipal Employees' Retirement System of Rhode Island](#), the Supreme Court of Rhode Island ruled (4 to 1) that the widow was not entitled to an award of accidental disability benefits, reversing the Appellate Division of the Workers' Compensation Court.

“To conclude that the language in § 45-19.1-1 creates a conclusive presumption would not only render the statutory definition of occupational cancer in § 45-19.1-2(d) meaningless and create a right not found within the statute, but would also construe the statute to reach an absurd result. For example, a conclusive presumption that all cancers in firefighters are occupational cancers would mean that a firefighter who smoked four packs of cigarettes a day for decades would receive an occupational cancer disability benefit despite not having proved that his cancer was related to exposure on the job. Similarly, a conclusive presumption would provide occupational cancer benefits to a firefighter who contracted cancer as a result of exposure to pesticides while landscaping in his or her yard. We do not believe the General Assembly would have extended such broad benefits to all firefighters without expressly providing for such in clear and unambiguous language.”

18-2

WY: STATE STATUTE, VOLUNTEER FF WHO GETS PAID PER RUN ENTITLED TO BE IN THE UNION [also filed, Chap. 6]

On July 6, 2018, in [IAFF Local 5058 v. Gillette / Wright / Campbell County Fire Protection Joint Powers Board, and IAFF Local 5067 v. Teton County and Town of Jackson](#), the Wyoming Supreme Court held (5 to 0) that the two new unions were not properly elected, and the Fire Districts did not need to negotiate collective bargaining agreements, because the “volunteer” and “pool” firefighters all receive pay for making runs.

“The district courts in both cases held that the Wyoming Collective Bargaining for Fire Fighters Act’s definition of ‘fire fighters’ includes volunteers because they are ‘paid members of . . . regularly constituted fire department[s].’ Consequently, the district courts concluded that IAFF Local 5058 and IAFF Local 5067, which were formed by and consist of only full-time, career fire fighters, were not properly constituted bargaining units under the Act. We affirm.”

Legal Lessons Learned: Drafting of legislative language is very important, along with creating a clear “legislative history” to avoid any question about whether volunteer and part-time firefighters can be covered in a collective bargaining agreement.

18-1

OH: 911 “GOOD SAMARITAN LAW” – AVOID PROSECUTION IF CALL 911 - TREATMENT IN 30 DAYS [also filed, Chap. 13]

On May 18, 2018, in [State of Ohio v. Andrew Melms](#), the Court of Appeals For Second District (Montgomery County), held (3 to 0) that an overdose victim, arrested with six gel caps of fentanyl, was not eligible for immunity; he was in jail and did not enroll in treatment within the 30-day limit set under the new Ohio statute enacted in 2016. The Court urged the Ohio General Assembly to modify the law: “Granted Melms seemingly was an ideal candidate for immunity, but for the clear and unambiguous 30-day window set forth by the legislature. The remedy lies with the legislature to either eliminate the 30-day restriction or to provide for the exercise of judicial discretion, particularly in those cases of the most vulnerable, often indigent, incarcerated individuals who are unaware of the time limit until after counsel is appointed on the drug offense. In our view, an immediate legislative fix is warranted so that this legislation achieves its laudable goals.”

Legal Lessons Learned: The “911 Good Samaritan” immunity statute is to encourage drug users and their associates to call 911 for an overdose, and to promptly seek treatment (can receive immunity only twice).

Note: 911 Dispatchers are required to inform overdose patients about the new law:

R.C. 128.04 provides as follows:

(A) Public safety answering point personnel who are certified as emergency service telecommunicators under section 4742.03 of the Revised Code shall receive training in informing individuals who call about an apparent drug overdose about the immunity from prosecution for a minor drug possession offense created by section 2925.11 of the Revised Code.

(B) Public safety answering point personnel who receive a call about an apparent drug overdose shall make reasonable efforts, upon the caller's inquiry, to inform the caller about the immunity from prosecution for a minor drug possession offense created by section 2925.11 of the Revised Code.