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APRIL 2020 – FIRE & EMS LAW Newsletter

[NEWSLETTER IS NOT PROVIDING LEGAL ADVICE.]
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CORONA VIRUS – TESTING EMPLOYEES: See Chap. 9, EEOC guidance.

EMS REPORT WRITING - QUALITY ASSURANCE REVIEWS: Send me an e-mail if wish copies of handouts for Ohio BWC Safety Congress, March 11, 2020 seminar [canceled because of corona virus]. I want to thank three Paramedics for sharing their outstanding QA documents: Tom Wolf, Montgomery Fire Department (twolf@ci.montgomery.oh.us); Jennifer Ploeger, Colerain Township Fire Department (jploeger@colerain.org); Randy Johann, Tri-Health Hospitals (randall_johann@trinealth.com).

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File: Chap. 1, Amer. Legal System; Fire Code Enforcement

OH: 42 VIOLATIONS OHIO FIRE CODE – 110 YR-OLD MINI-MALL, "THE ARCADE" - COURT UPHOLDS CITATIONS

On March 23, 2019, in Tom Cotton v. Patrick Connor, Fire Chief, City of Newark Fire Department, the Court of Appeals for Licking County, Fifth Appellate District, 2020-Ohio-1129, held (3 to 0), that the Ohio Board of Building Appeals, and a Common Pleas trial judge, properly denied the appeal of the building owner. Citations included water flow alarm devices not functioning or disconnected; no fire extinguishers in common hallway; marked exit door with flush bolt locks; holes in fire-rated or resistant construction on floors, walls and ceilings.

> "We concur with the trial court's decision. Between the first inspection date of August 3, 2017, and the first citation date of September 19, 2017, appellant had forty-seven days to correct the violations. As for the second citation, appellant had fifteen days to correct the violations from the last inspection date (March 26, 2018) to the issuance of the citation (April 10, 2018). According to the Timeline and Summary of the Inspections outline, appellee worked with appellant from July 2017 through April 2018 to correct the fire code deficiencies on the subject property. As of the October 30, 2018 hearing date, outstanding violations existed and some of the corrective measures were in question. We do not find testimony from a 'representative from the Building Code Enforcement for the City of Newark' was necessary. Appellant's Brief at 6. Upon review, we find a preponderance of reliable, probative, and substantial evidence to support the trial court's decision. The trial court did not abuse its discretion in affirming the decision of the board of building appeals."

Facts:

> "Newark Downtown Center, Inc. owns real estate in downtown Newark known as The Arcade. Appellant is president of the corporation. The Arcade is made up of interconnected businesses with a glass covered walkway in the center. It covers approximately 70,000 square feet. The Arcade is over one hundred years old and has been deemed an historical site. On September 19, 2017, appellee issued a citation to appellant, listing forty-two violations of the Ohio Fire Code. Appellant filed an appeal with the Ohio Board of Building Appeals (Case No. 17-0197).
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> On March 23, and 26, 2018, Inspector Gossett conducted inspections of the entire building and notified appellant of numerous violations of the fire code. Inspector Gossett returned on April 9, 2018 for a re-inspection; the violations remained noncompliant. As a result, on April 10, 2018, appellee issued appellant a citation listing thirteen additional violations of the fire code with the attendant civil penalties. Appellant was given seven days to complete the listed corrective measures. At the time of the hearing on October 30, 2018, none of the thirteen violations had been corrected.
>
> On April 10, 2018, appellee issued a second citation to appellant regarding the same property, listing thirteen additional violations of the Ohio Fire Code. Appellant filed an appeal with the Ohio Board of Building Appeals (Case No. 18-0069). A hearing on both citations was held on October 30, 2018. The Ohio Board of Building Appeals upheld the citations and imposed monetary penalties."

Holding:

> "In its August 12, 2019 judgment entry affirming the decision, the trial court concluded the following:
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> > 'Appellant has not identified any citations he believes were erroneous or for which the Board did not have reliable, probative, and substantial evidence. Appellant does not appear [to] identify any issues of law or fact for this Court to review in his brief. The brief merely recounts that efforts were made to remedy some of the violations and that appellant and the city had been working together to make

progress on the condition of the property. '[T]he burden of showing that the decision is erroneous rests on the party contesting the decision.' C. Miller Chevrolet, Inc. v. City of Willoughby Hills, 38 Ohio St.2d 298, 302 (1974). Appellant has not identified or demonstrated any error in the Board's decisions.'

We concur with the trial court's decision."

Legal Lessons Learned: Well documented code violations.

See Oct. 14, 2019 article about this property: "Long saga of downtown Newark Arcade property may be near resolution." "A year ago, the Ohio Board of Building Appeals upheld violations from April 10, 2018, and Sept. 19, 2017. For the April violations, the board issued Cotton a one-time penalty of $9,000, and an additional $9,000 per month if all violations were not remedied in 60 days. For the 2017 violations, the board issued a one-time penalty of $6,700 and $6,700 per month if violations remained after 60 days. The 2018 violations included: water flow alarm devices not functioning or disconnected; no fire extinguishers in common hallway; marked exit door with flush bolt locks; holes in fire-rated or resistant construction on floors, walls and ceilings."

File: Chap. 1, American Legal System

NY: ARSON – ADULT / 3 CHILDREN KILLED – CONVICTIONS – BUT CHARGES LATER DROPPED ONE MAN – ATF AGENTS HAVE IMMUNITY

On March 23, 2020, in Robert Butler v. Eric Hesch, et al., U.S. District Court Judge Mae A. D'Agostino, U.S. District Court for Northern District of New York, granted ATF agents' motion to dismiss.

"Plaintiff commenced this action on December 28, 2016, pursuant to 42 U.S.C. §§ 1983 and 1985, and *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*, 403 U.S. 388 (1971), complaining of constitutional and civil rights violations stemming from Plaintiff's arrest and detention.

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In short, Plaintiff's criminal case was fully managed by the federal prosecutors, who independently interviewed all relevant witnesses and then decided to bring charges against Plaintiff. There is no evidence that the ATF Defendants withheld relevant evidence from the prosecutors, or provided false evidence to them, as would be necessary to establish that the ATF Defendants were responsible for initiating or continuing the prosecution. As such, the ATF Defendants are entitled to summary judgment because Plaintiff failed to satisfy the first element of his malicious prosecution claim. *See Battisti v. Rice*, No. 10-cv-4139, 2017 WL 78891, *10 (E.D.N.Y. Jan. 9, 2017) (dismissing the plaintiff's malicious prosecution claim because "[t]here is no evidence that either officer importuned [the prosecutor] to prosecute Plaintiff or that either officer fabricated or withheld evidence from [the prosecutor]") (citation omitted); *Stukes v. City of New York*, No. 13-cv-6166, 2015 WL 1246542, *9 (E.D.N.Y. Mar. 17, 2015)."

Facts:

"This litigation arises out of an appalling, intentionally-set fire that occurred in the early morning hours of May 2, 2013, at 438 Hulett Street, Schenectady, New York. *See* Dkt. No. 87-7 at ¶ 1. Residing on the second floor of the residence at the time of the fire were Jennica Duell and her four young children, David Terry (Duell's ex-boyfriend and father of the four children), Christopher Urban, and Elshaquan Miller. *See id*. at ¶ 2. David Terry and three of the children perished in the fire, while the fourth child survived with devastating burn injuries. *See id*. at ¶¶ 3-4. Jennica Duell was not in 438 Hulett Street at the time of the fire. *See id*. at ¶ 5.

An immediate investigation into the cause and origin of the fire was conducted by Special Agents of the United States Bureau of Alcohol, Tobacco, Firearms and Explosives ('ATF'). *See id*. at ¶ 6. The presence of an accelerant in the front hallway of the residence was quickly confirmed and a conclusion reached that there was cause to believe that the fire was intentionally set. *See id*. at ¶ 7.

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On June 4, 2013, Special Agent Meeks issued a criminal complaint against Plaintiff, charging him with maliciously damaging and destroying, by means of fire and explosive materials, in violation of Title 18, United States Code, Section 844(i). Plaintiff waived a detention hearing and was held until on or about February 7, 2014, when the charge against him was dismissed without prejudice.

Leon, Duell, and Fish were subsequently prosecuted for making false statements to a federal grand jury in connection with the fire at 438 Hulett Street. *See* Dkt. No. 85-3 at ¶¶ 61-62. Leon was convicted after trial by a jury, and sentenced to 120 months' imprisonment. *See United States v. Edward Leon*, No. 14-cr-412 (N.D.N.Y.). Duell and Fish both pled guilty. Duell was sentenced to 135 months' imprisonment and Fish was sentenced to 108 months' imprisonment. *See United States v. Jennica Duell*, No. 14-cr-413 (N.D.N.Y.); *United States v. Bryan Fish*, No. 16-cr-314 (N.D.N.Y.).

Richard Ramsey subsequently recanted his testimony about Plaintiff borrowing his car. *See* Dkt. No. 85-3 at ¶ 63. He was also prosecuted for making false statements to a federal grand jury, pled guilty, and was sentenced to 87 months' imprisonment. *See United States v. Ramsey*, No. 16-cr-314 (N.D.N.Y.)."

Holding:

"In the present matter, the undisputed facts make clear that the decision to charge Plaintiff federally, and the decision whether and when to dismiss the case against him, were made by federal prosecutors and not by the ATF Defendants. Further, the record is devoid of any evidence indicating that the ATF Defendants falsified evidence, fabricated evidence, misrepresented witness testimony, or failed to forward relevant evidence or exculpatory information to the prosecutors. Rather, the record establishes that federal prosecutors were made contemporaneously aware of all witness statements and evidence as it was gathered by the ATF Defendants and others. Moreover, in most instances, apart from the initial interviews, the prosecutors participated in or were at least present for independent interviews of witnesses, and could make their own determinations as to the materiality and credibility of their statements."

Legal Lessons Learned: ATF and other arson investigators enjoy qualified immunity; the fact that charges were later dropped by prosecutors against a person does not give the individual a right to sue the investigators.

File: Chap. 6, Employment Litigation

TX: TESTICULAR CANCER – FF WORKERS COMP – CITY FAILED TO RAISE DEFENSE THAT FF DIDN'T FILE CLAIM WITHIN 1-YEAR

On March 25, 2020, in City of Dallas v. Gregory D. Thompson, the Court of Appeals, Twelfth Court of Appeals District, Tyler, Texas held (3 to 0) that the firefighter is entitled to workers compensation coverage for his cancer.

"The record supports the ALJ's determination that Dallas did not raise its defense regarding Thompson's failure to file a claim within one year of his injury within a reasonable amount of time after it became available. Therefore, Thompson showed as a matter of law that Dallas waived its one-year defense. Accordingly, the trial court did not err in denying Dallas's motion for summary judgment and granting Thompson's cross-motion for summary judgment."

Facts:

> "Thompson was employed by Dallas as a firefighter. On August 18, 2010, Thompson reported to Dallas that he received a confirmed diagnosis of testicular cancer. He reported that the cause of his injury was exposure to carcinogens during his career as a firefighter. The date of injury is listed as July 31, 2010. Dallas [which is self-insured] filed its 'PLN-1,' or plain language notification, with DWC on August 19, 2010, denying compensability and liability and refusing to pay benefits….
>
> The Administrative Law Judge (ALJ) determined [after a two-day hearing] … that, although Thompson did not file a claim for compensation within one year of the injury as required by the Texas Labor Code, and did not have good cause for failing to do so, Dallas waived this defense because it did not raise the defense within a reasonable time period after it became available….

Holding:

> "Having determined that the trial court properly denied Dallas's motion for summary judgment and properly granted Thompson's cross-motion for summary judgment, we affirm the trial court's partial summary judgment."

Legal Lessons Learned: Many states have now enacted a "statutory presumption" regarding firefighter cancer. See list of 33 states with statutory presumption statutes.

File: Chap. 6, Employment Litigation

IL: MANDATORY RETIREMENT FOR CHICAGO FF – AGE 63 – FF'S AGE DISCRIMINATION CASE DISMISSED

On March 25, 2020, in Gerald Barry v. City of Chicago, U.S. District Court Judge John Robert Blakey, U.S. District Court for the Northern District of Illinois, Eastern Division, granted the City's motion to dismiss. This is his fourth amended complaint; the first three were dismissed because he failed to file an EEOC complaint within 300 days of the alleged discriminatory events.

> "Consistent with this new allegation, the operative complaint alleges that, on April 1, 2018, Plaintiff 'lost the health care coverage that he had from the City of Chicago, resulting in a significant diminishment of his benefits.' [39] at 5. He alleges that the loss of health care benefits is 'consequential to the misapplication of the Mandatory Retirement Ordinance' and that the City's decision to take away his health care coverage violates his rights under the 'Lilly Ledbetter amendment to the Equal Pay Act.'
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> Thus, to state a claim under the ADEA, Plaintiff must at least allege that age was the reason for the challenged adverse employment action. *E.g.*, *Gross v. FBL Fin. Servs., Inc.*, 557 U.S. 167, 180 (2009). And such an allegation is wholly absent here. Plaintiff checked the box marked 'age' on the Court's form employment discrimination complaint, *see* [39] at 3; Case No. 19 C 2275, [1] at 3, but he fails to allege any facts to support an age discrimination claim. He alleges that the loss of health care coverage 'was a violation of his rights under the Lilly Ledbetter amendment to the Equal Pay Act,' [39] at 5; [1] at 5, but he does not say why or how. He alleges that the loss of health care: resulted 'from the discriminatory mandatory retirement on April 16, 2016'; was 'consequential to the misapplication of the Mandatory Retirement

Ordinance'; and was part of a "continual effort of discrimination." [39] at 5; [1] at 5. But he never explains why the forced retirement constituted a discriminatory action or how the City misapplied the MRO.

Note: "As of December 31, 2000, the CFD's compulsory retirement age is 63 for firefighters. There is no current compulsory retirement age for paramedics."

Facts [from Aug. 7, 2018 decision by the court]:

"Plaintiff worked for the Chicago Fire Department until April 16, 2016. [19] at 8. He alleges that Defendant discriminated against him based upon his age starting around January 15, 2015. *Id*. at 2. At that time, Defendant denied Plaintiff "recognition as a cross-trained firefighter-paramedic," *id*. at 7, which prompted Plaintiff to file a grievance, *see id*. at 13. Plaintiff, working with Chicago Firefighters Union Local 2, reached a settlement with Defendant in August 2015. *Id*. at 7, 13-15. That agreement authorized Plaintiff to serve as a paramedic for five years. *Id*. at 7, 14.

On February 16, 2016, Plaintiff was assigned as a paramedic to Ambulance 46. *Id*. at 7. But Defendant then posted Plaintiff to 'other assignments for a two month period,' which Plaintiff claims violated the terms of his union's collective bargaining agreement (CBA). *Id*. Plaintiff states that Defendant reassigned him 'punitively' and to 'harass and deter plaintiff from pursuing his contractual and civil rights.' *Id*. The Firefighters Union filed a grievance against Defendant on March 25, 2016, asking Defendant to end this detail because it violated Plaintiff's contract. *See id*. at 21. The outcome of that grievance remains unclear from Plaintiff's present complaint.

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On April 16, 2016, Defendants retired Plaintiff, purportedly in accordance with the Chicago's mandatory retirement ordinance for firefighters and police officers. *Id*. at 7-8; *see also* Chi. Mun. Code § 2-152-410. Plaintiff argues that Defendant misapplied the ordinance because Plaintiff was a paramedic, not a firefighter, at the time of his forced retirement. [19] at 7.

As a paramedic, Plaintiff's responsibilities included administering emergency medical care and he had no "firefighting functions." *Id*. at 8. Thus, according to Plaintiff, the retirement ordinance did not apply to him, and no equivalent rule mandates retirement for paramedics working in emergency medical services. *See id*. Plaintiff filed a grievance to contest his forced retirement and exhausted the necessary steps for this process, which included mandatory arbitration with Defendant. *Id*. at 7.

The parties' arbitration ended on October 12, 2017, and resulted in a decision in Defendant's favor."

Holding:

"Lilly Ledbetter, a female employee at Goodyear Tire & Rubber Company, sued her employer alleging sex discrimination in violation of Title VII; she claimed that she received negative performance evaluations because of her gender and those evaluations affected her pay. *Ledbetter v. Goodyear Tire & Rubber Co*., 550 U.S. 618 (2007). After the lower courts rejected her claim as time barred, she argued before the United States Supreme Court that each paycheck (reflecting pay at a rate less than her similarly situated male co-workers as a result of negative, discriminatory evaluations) constituted a separate and discrete wrong that triggered a new limitations period. The Supreme Court rejected the argument, 550 U.S. at 621, but then Congress effectively overruled the Court's decision when it passed the Lilly Ledbetter Fair Pay Act of 2009, 42 U.S.C. § 2000e-5(e)(3)(A), which provides that an "unlawful employment practices" occurs when:

> (1) a discriminatory compensation decision or other practice is adopted; (2) an individual becomes subject to a discriminatory compensation decision or other practice; and (3) an individual is affected by application of a discriminatory compensation decision or other practice, including each time

wages, benefits, or other compensation is paid, resulting in whole or in part from such a decision or other practice. [Highlighted by the Court.]

Groesch v. City of Springfield Ill., 635 F.3d 1020, 1024-25 (7th Cir. 2011) (quoting 42 U.S.C. § 2000e-5(e)(3)(A)) (emphasis added). Thus, as Plaintiff correctly notes, the Act provides that the statute of limitations for filing an EEOC charge alleging pay discrimination resets with each paycheck affected by the discriminatory decision. But simply alleging a reduction in benefits or pay is not enough to trigger a reset under the Act. Plaintiff still has to allege that the paycheck reflects a discriminatory compensation decision or discriminatory practice. The ADEA makes it unlawful for an employer to take adverse action against an employee who is forty years or older 'because of such individual's age.' 29 U.S.C. §§ 623(a)(1), 631(a). Thus, to state a claim under the ADEA, Plaintiff must at least allege that age was the reason for the challenged adverse employment action. Plaintiff's allegations may support a claim for breach of contract or a claim seeking to enforce the arbitration award. But they do not support a claim for age discrimination."

Legal Lessons Learned: A city ordinance mandating a retirement age for firefighters does not violate the Age Discrimination in Employment Act of 1967, or the Lilly Ledbetter Fair Pay Act of 2009.

Chap. 6, Employment Litigation

CT: RETIRED FF – WORKER'S COMP FOR HYPERTENSION – NOW CORONARY ARTERY DISEASE IS ALSO COVERED

On March 10, 2020, in John Coughlin v. Stamford Fire Department, et al., the Supreme Court of Connecticut held (7 to 0) that a firefighter who had a compensable workers comp claim approved in 2011, and retired in 2013, is also covered for heart disease detected after his retirement.

"The plaintiff responds that his heart disease claim was timely because it flowed from his compensable claim for hypertension, and neither a plain reading of § 7-433c nor this court's interpretation of that statute requires hypertension and heart disease to be treated as separate diseases when they are causally related. We agree with the plaintiff and, accordingly, affirm the decision of the board.

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It follows that a claim for a heart disease that occurred after an initial compensable claim for hypertension pursuant to § 7-433c may qualify for benefits without the need to file a new notice of claim, as long as there is a causal connection between the two injuries, as required by the act.

Facts:

"The plaintiff was hired by the defendant as a regular member of its fire department on November 26, 1975. While employed as a firefighter, the plaintiff filed a claim for hypertension benefits pursuant to § 7-433c based on a January 28, 2011 date of injury. The plaintiff retired from his position as a firefighter on April 5, 2013, based on his years of service.

On March 22, 2016, the [BWC] commissioner issued a finding and award, concluding that the plaintiff's claim for hypertension was compensable. Following that finding and award, Donald Rocklin, the plaintiff's physician, issued a report dated May 21, 2016, that assigned a 6 percent permanent partial disability rating of the heart for the plaintiff's hypertension, which was acknowledged in a subsequent stipulated finding and award dated August 20, 2016.

In addition, both Rocklin's May 21, 2016 report and supplemental report dated June 29, 2016, diagnosed the plaintiff with coronary artery disease. In those reports, Rocklin concluded that the plaintiff's hypertension

was a significant factor in the development of his coronary artery disease. The plaintiff then pursued compensation for his coronary artery disease, claiming that it flowed from his January 28, 2011 hypertension claim.

Following a hearing on the heart disease claim, the [BWC] commissioner found that the plaintiff was neither diagnosed with coronary artery disease nor filed a claim for that disease under § 7-433c until after he had retired. Citing our decision in Holston v.New Haven Police Dept., 323 Conn. 607, 149 A.3d 165 (2016), and the Appellate Court's decision in Staurovsky v. Milford Police Dept., 164 Conn. App. 182, 134 A.3d 1263 (2016), appeal dismissed, 324 Conn. 693, 154 A.3d 525 (2017), the commissioner concluded that the plaintiff's coronary artery disease and resulting disability were not suffered while the plaintiff was on or off duty as a regular member of a municipal fire department. Furthermore, the commissioner concluded that Rocklin's opinion that the plaintiff was developing coronary artery disease while he was employed by the defendant was not sufficient to make the claim compensable under § 7-433c.

On the basis of the unchallenged medical reports from Rocklin concluding that the plaintiff's hypertension was a significant factor in the development of his coronary artery disease, the [BWC Compensation Review Board] concluded that it was reasonable to infer that the plaintiff's coronary artery disease was the sequela of his accepted§ 7-433c claim for hypertension. Accordingly, the board reversed the decision of the commissioner and remanded the case for further proceedings. This appeal followed."

Holding:

''The plain language of § 7-433c demonstrates that a uniformed member of a paid municipal fire department or a regular member of a paid municipal police department is entitled to benefits under the statute when the officer meets the following requirements: (1) has passed a preemployment physical; (2) the preemployment physical failed to reveal any evidence of hypertension or heart disease; (3) suffers either off duty or on duty any condition or impairment of health; (4) the condition or impairment of health was caused by hypertension or heart disease; and (5) the condition or impairment results in his death or his temporary or permanent, total or partial disability. The statute contains no other requirements to qualify for its benefits.

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In the present case, it is undisputed that the plaintiff's initial claim for hypertension met the five requirements of § 7-433c, was timely, and was compensable. As a result, the plaintiff may submit claims for subsequent injuries that flow from his primary claim for hypertension pursuant to the requirements of the act. In addition, the evidentiary record contains unchallenged medical reports from a qualified expert, [Dr.] Rocklin, concluding that the plaintiff's hypertension was a significant factor in the development of his heart disease. Rocklin's reports, which were credited by both the commissioner and the board, pro-ide a reasonable basis for the board's conclusion that the plaintiff's heart disease was the sequela of his hypertension, which was the injury at issue in his primary claim. This evidence is sufficient to uphold the board's conclusion that the plaintiff is entitled to compensation for his heart disease."

Legal Lessons Learned: A helpful decision that makes lots of sense; clear relationship between hypertension and later having coronary heart disease.

IL: DURING INVESTIGATION 2 ASSISTANT FIRE MARSHALS TRANSFERRED, RESIGNED - 3 LTS. STAYED – NOT AGE DISCRIMINATION

On March 16, 2020, in Theodore Kolin and Mark Steinhagen v. Town of Cicero, et al., the Appellate Court of Illinois, First District, held (3 to 0) Illinois Human Rights Commission properly found that the FD properly transferred the two senior officers [Assistant Fire Marshals] from headquarters during the investigation of sexual harassment by female receptionist, and accepted their resignations as at-will employees. Their alleged conduct was far more serious those of three Lieutenants; and FD wanted to encourage the receptionist to return to work from medical leave in a comfortable, safe environment.

> "The Commission also found the alleged conduct by Kolin and his comparators differed in severity. The allegations against the comparators [3 Lieutenants] were essentially of using rude and disrespectful language. Rand and Harvey allegedly called [receptionist] Del Gadillo a 'rat.' Rand also allegedly greeted her daily with 'Hi, stupid.' Peszynski allegedly sang songs with profane language.
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> In contrast, Kolin was accused of sexual harassment. Kolin allegedly told Del Gadillo to wear sexy jeans and 'tuck' him into bed. Unlike his comparators, Kolin was also named in a federal lawsuit for his alleged harassment. The allegations against Kolin were more serious and distinguishable from his comparators'. The Commission found that Rand, Peszynski and Harvey were not similarly situated employees, and the Commission's finding was not against the manifest weight of the evidence.
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> Steinhagen allegedly brought a women's clothing magazine to work, showed it to Del Gadillo, and told her that she would look good in some of the outfits depicted in the magazines. Steinhagen also allegedly grabbed her thigh near her buttocks and kissed her on the lips without her consent."

Facts:

> "In February 2010, Isabella Del Gadillo (Del Gadillo), a receptionist at CFD headquarters, brought allegations of sexual harassment against multiple CFD employees. She did not initially identify the alleged perpetrators. Del Gadillo first named Kolin in May 2010. She later named Steinhagen in October 2010. Additionally, Del Gadillo accused lieutenants Frank Rand (age 45), Theodore Peszynski (age 46) and Chad Harvey (age 38) of harassment.
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> At the time of their resignations, Kolin (age 60) and Steinhagen (age 56) were employed by respondent as assistant fire marshals in the Cicero Fire Department (CFD). Kolin and Steinhagen worked for CFD for 34 and 26 years, respectively. Assistant fire marshals are at-will employees serving at the pleasure of the Town President. The Town of Cicero Board of Trustees (Board) reappoints assistant fire marshals annually, based on the town president's recommendation. Petitioners consistently received favorable performance reviews.
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> Here, Respondent [FD] asserted that it transferred Steinhagen [and Kolin] from CFD headquarters to create a work environment in which Del Gadillo could feel comfortable, safe, and free of sexual harassment."

Holding:

> "The Commission applied the appropriate standard when it evaluated Petitioners' claims of age discrimination, and its finding that Kolin failed to establish a prima facie case of age discrimination was not clearly erroneous or against the manifest weight of the evidence. The Commission did not error in finding that Respondent articulated legitimate, non-discriminatory reasons for the adverse employment actions and

that Respondent's proffered reasons for its actions were not pretextual because the Commission's rulings were not clearly erroneous or against the manifest weight of the evidence."

Legal Lessons Learned: During an ongoing internal investigation, it may be prudent to transfer some personnel so they are not interacting with the complainant on each shift.

File: Chap.7, Sexual Harassment

TX: "JANE DOE" LAWSUIT DISMISSED - FEMALE FF MUST IDENTIFY HERSELF IN NEW LAWSUIT – CITY, SEVERAL FF DROPPED FROM CASE

On March 10, 2020, in Female Firefighter Jane Doe v. Fort Worth, Texas, et al., U.S. District Court Judge John McBryde, U.S. District Court for Northern District of Texas, Fort Worth Division, ordered that Plaintiff re-file her lawsuit and identify herself. Only one firefighter remains in the case, since 2-year statute of limitations has run on all her other claims. The City is also dismissed from the case.

> "The law is clear that a plaintiff should only be allowed to proceed anonymously in rare and exceptional cases. Doe v. Stegall, **653 F.2d 180** (5th Cir. Unit A 1981); Southern Methodist Univ. v. Wynn & Jaffe, **599 F.2d 707** (5th Cir. 1979). Plaintiff has made no attempt to show that this is such a case, probably because she cannot make the required showing. That plaintiff might suffer personal embarrassment is not enough. Doe v. Frank, **951 F.2d 320**, 324 (11th Cir. 1992). "Indeed, many courts faced with a request by a victim of sexual assault or harassment seeking to pursue a civil action for monetary damages under a pseudonym have concluded that the plaintiff was not entitled to proceed anonymously." Doe ex rel. Doe v. Harris, No. 14-0802, 2014 WL 4207599, at *2 W.D. La. Aug. 25, 2014) (citing cases). Accordingly, the court will require plaintiff to identify herself. Fed. R. Civ. P. 10(a).
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> ***
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> If, as plaintiff contends, she was raped by her co-workers, that was not the result of an intentional choice of City not to provide proper training, especially where plaintiff does not allege that City was ever informed that lack of training was causing its male firefighters to engage in criminal conduct."

Facts:

> ""Plaintiff alleges she had an epileptic seizure and crashed her car on Dec. 27, 2017, and was taken off duty by the FD, and forced into early medical retirement on July 31, 2018. City also dismissed from the lawsuit.
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> ***
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> On November 27, 2019, plaintiff filed her complaint in this action…. On January 23, 2020, she filed her first amended complaint. Doc. 16. The amended complaint is an extremely prolix sixty-two page document. Plaintiff alleges that she, a female firefighter, was subject to sexual discrimination, harassment, and retaliation. She sues City under Title VII of the Civil Rights Act of 1964 (as amended), 42 U.S.C. §§ 2000e to 2000e-17 ("Title VII"), and all of the defendants under 42 U.S.C. § 1983 for violation of her right to equal protection under the United States Constitution.
> ***
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> Plaintiff has not identified herself in her pleadings beyond saying that she was a firefighter employed by City. Under section II of her amended complaint, titled "Motion for Pseudonym," plaintiff asks that the court permit her to proceed using a pseudonym. Doc. 16 at 2. She has not, however, filed a motion so to proceed. See Local Civil Rule LR 5.1(c); LR 7.1.

***

All defendants seek dismissal of plaintiff's claims on the ground of limitations. The applicable period of limitations is two years. King-White v. Humble Indep. Sch. Dist., **803 F.3d 754**, 759 (5th Cir. 2015) . Although the court does not normally grant such motions, where the pleading makes clear that the claims are barred, dismissal is appropriate. Jones v. Alcoa, Inc., **339 F.3d 359**, 366 (5th Cir. 2003).
Plaintiff concedes that all of her claims against L…… are barred, except for the claim regarding an incident in December 2017, set forth at Doc. 16, ¶ 119. Doc. 29 at 16. Plaintiff further concedes that most of Gutierrez's alleged offensive conduct occurred in 2017. Id. at 17. She does not dispute that the claims against him are barred by the two-year limitations period, arguing instead that a five-year period applies. Id.
Plaintiff apparently concedes that her claims against J……. and B…… are barred by limitations and says that she is choosing not to pursue them. Doc. 32. She has agreed to the dismissal of those claims with prejudice."

Holding:

"The court ORDERS that the motions of G……., S…….., B……., J……., and City be, and are hereby, granted, and that plaintiff's claims against said defendants be, and are hereby, dismissed.
The court ORDERS that the motion of L…… to dismiss be, and is hereby, granted in part, and plaintiff's claims against L……. except as to the December 2017 incident be, and are hereby, dismissed."

Legal Lessons Learned: A plaintiff should only be allowed to proceed anonymously in rare and exceptional cases. [I have deleted names of the defendants in this case, since Plaintiff hasn't identified herself.]

File: Chap. 7, Sexual Harassment

IL: JOKES ABOUT FF BEING "GAY" [HE IS NOT] – CASE DISMISSED – 3 OCCASIONS - NOT AN "OBJECTIVELY" HOSTILE WORK ENVIRONMENT

On March 9, 2020, in Justine Bakker v. Mokena Fire Protection District, U.S. District Court Judge Harry D. Leinenweber, U.S. District Court for Northern District of Illinois, Eastern Division, granted the FD's motion to dismiss.

The Seventh Circuit set a high bar to establish an objectively hostile work environment. Courts 'assume employees are generally mature individuals with the thick skin that comes from living in the modern world.'

Swyear, 911 F.3d at 881. Employers 'generally do not face liability for off-color comments, isolated incidents, teasing, and other unpleasantries that are, unfortunately, not uncommon in the workplace.' *Id*. Jokes that are 'crude' and 'immature' do not create employer liability, even though the jokes are 'boorish,' inappropriate, and in poor taste.

***

The set of facts stated in Bakker's Complaint provides no possible path to employer liability. Accordingly, the Title VII claim must fail. Further, because the December 2015 and July 2018 incidents are time-barred and because the August 2018 incident alone cannot establish liability, the Title VII claims must be dismissed with prejudice."

Facts:

"Justin Bakker ('Bakker') was a firefighter paramedic for the Mokena Fire Protection District ('Mokena'), a municipal corporation that provides emergency and fire services to Mokena, Frankfort, Orland Park, and Homer Glen. (Compl. ¶¶ 4, 11, Dkt. No. 1.) He alleges that on three occasions, between December 2015 and August 2018, supervisors made comments to him that constituted continuous acts of sexual harassment and

discrimination. Bakker alleges that the Defendant targeted him by calling his sexual orientation into question. Bakker is heterosexual. (Compl. ¶¶ 34, 35).
First, in December 2015, Bakker's supervisor, Assistant Chief Cirelli ('Cirelli'), overheard that Bakker planned to rent his house to another firefighter. In response, Cirelli said, 'Well at least someone will be getting some action in that house. Well at least someone will be getting some action with a girl, at least.' (Compl. ¶¶ 12, 13.) Bakker complained to his union representative; a week later, during a meeting, Mokena's fire chief assured Bakker that Cirelli's behavior was unacceptable and said it would not happen again. (Compl. ¶¶ 15-17.)

Second, on July 4, 2018, during Mokena's July Fourth parade, firefighters discussed Mokena's first Queer Pride parade. (Compl. ¶ 18.) They also discussed special uniform shirts the firefighters would receive for cancer month and for supporting the military. (Compl. ¶¶ 18-20.) During this discussion, Mokena's President of the Board of Trustees, William Haas ('Haas'), said to Bakker in front of his colleagues that Haas was 'going to get [Bakker] a rainbow-colored shirt and that [Bakker] would wear it with all kinds of pride.' (Compl. ¶ 21.) Bakker again contacted his union representative and later saw Haas meet privately with Mokena's fire chief, but no further action was taken. (Compl. ¶¶ 22-24.)

Finally, on August 21, 2018, Bakker and nine colleagues attended a training session regarding fire alarm panels used in retirement homes. (Compl. ¶¶ 25, 26.) The fire marshal, Mark Sickles ('Sickles'), taught the session. (Compl. ¶ 25.) Sickles said that the department attaches a sheet of paper on the front of the panel explaining how the fire department uses the panel. (Compl. ¶ 27.) Because there were apparently different pieces of paper posted for different panel users—retirement home staff, the alarm company, and the fire department—Bakker suggested that it might be easier to understand if the different pieces of paper were different colors. (Compl. ¶ 28.) In response, Sickles said, 'How about we change the color to pink just for you, you like that color don't you,' and told Bakker to 'shut up.' (Compl. ¶¶ 29, 30.) Several hours later, Sickles, the Mokena fire chief, Bakker, and Bakker's union representative met to discuss this comment. (Compl. ¶ 31.) Sickles admitted to his remark and apologized for it. (Compl. ¶ 32.) Bakker alleges that he informed the fire chief that he believed he was being targeted 'immediately after' this incident and that these three incidents called his sexual orientation into question. (Compl. ¶ 34.).

***
On June 5, 2019, Bakker filed a Charge of Discrimination with the Equal Employment Opportunity Commission ('EEOC') against Mokena, alleging sex discrimination and sexual harassment. (EEOC Compl., Ex. A to Compl., Dkt. No. 1.) On June 24, 2019, the EEOC dismissed Bakker's claim, entitling him to file an action in this Court within 90 days. (EEOC Dismissal, Ex. B to Compl., Dkt. No. 1.) *See also* 42 U.S.C. § 2000e-5(f)(1). Bakker filed the action in this Court on August 19, 2019, alleging sex discrimination under Title VII of the Civil Rights Act of 1964 and intentional infliction of emotional distress."

Holding:
"'Section 2000e-5(e)(1) requires that a Title VII plaintiff file a charge with the Equal Employment Opportunity Commission (EEOC) either 180 or 300 days 'after the alleged unlawful employment practice occurred.'" *Morgan*, 536 U.S. at 104-05 (2002) (citing 42 U.S.C. § 2000e-5). Bakker submitted his EEOC charge on June 5, 2019. Accordingly, any instance of a discriminatory act or unlawful employment practice before 300 days earlier, August 9, 2018, is time-barred unless Bakker can establish that the three incidents were part of a continuing violation.

***
Bakker's Complaint alleges three incidents over the course of two and a half years. All three incidents involved the same type of inappropriate conduct, but each incident involved a different manager. And although the latter two incidents occurred within the space of about a month, about two and a half years

separated the first and second incidents. This is too long a gap to support a continuing violation. *See Selan v. Kiley*, 969 F.2d 560, 567 (7th Cir. 1992) ('Almost two years passed between [incidents]. This considerable separation weighs heavily against finding a continuing violation.'). Accordingly, the December 2015 incident cannot be included as a continuing violation. Finally, the July and August 2018 incidents involved different managers and, although they were similar situations, the occurrence was not relatively frequent, and this weighs against allowing the July 2018 incident to count as a continuing violation. Thus, the Court finds the December 2015 and July 2018 incidents time-barred.

***

Next, the Court considers whether the August 2018 incident is independently actionable. To succeed on a hostile work environment claim, a plaintiff must show: (1) he was subject to unwelcome harassment; (2) the harassment was based on sex; (3) the harassment was so severe or pervasive as to alter the conditions of employment and create a hostile or abusive working environment; and (4) there is a basis for employer liability. *Gates v. Bd. of Educ. of the City of Chicago*, 916 F.3d 631, 636 (7th Cir. 2019). Here, the third element is dispositive.

The test for this third element—whether harassment was severe enough to create a hostile work environment—has two components: a subjective and an objective test. *Rodgers v. Western-Southern Life Ins. Co.*, 12 F.3d 668, 674 (7th Cir. 1993). If a plaintiff 'does not subjectively perceive the environment to be abusive, the conduct has not actually altered the conditions of the victim's employment, and there is not a Title VII violation.' *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 21-22 (1993). To determine whether 'a particular work environment is objectively offensive, [courts] must consider the severity of the conduct, its frequency, whether it is merely offensive as opposed to physically threatening or humiliating, and whether it unreasonably interfered with an employee's work performance.' *Swyear v. Fare Foods Corp.*, 911 F.3d 874,

881 (7th Cir. 2018). Bakker's Complaint alleges that Bakker was so affected by the harassment that he took medical leave, and the Defendant does not challenge the subjectivity ground. Thus, the Court focuses only on the objective test.

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The set of facts stated in Bakker's Complaint provides no possible path to employer liability. Accordingly, the Title VII claim must fail. Further, because the December 2015 and July 2018 incidents are time-barred and because the August 2018 incident alone cannot establish liability, the Title VII claims must be dismissed with prejudice."

Legal Lessons Learned: It's great to have fun on duty; but jokes about sexual orientation are not appropriate.

File: Chap. 8 – Race Discrimination

FL: FIRED LT. SETTLEMENT – REHIRED, BUT NOT TO TRAINING DIV. – RETIREMENT $ NOT REPAID – $36,663 JURY VERDICT SET ASIDE

On March 27, 2020, in Orange County, FL v. Stacey Mclean, the District Court of Appeal of the State of Florida, Fifth District, held (3 to 0) that trial judge should have granted county's motion for a directed verdict and set aside the jury's verdict. Internal investigation in 2013 of improper recording hours worked – 56 disciplined; in 2014, County fired 3 African-American males, including Plaintiff (Lt. in Training Division). He sued in 2015 for race discrimination; County settled lawsuit, returned him to work [but no openings in Training Division] and paid him back wages. State Board of Administration [retirement fund] ordered him to re-pay retirement funds he withdrew in

2014; he refused and was forced him to retire or FD would be dropped from the retirement fund. He sued and jury awarded him $36,663.

> "Here, the trial evidence established that the County met its burden. The County showed that it had a legitimate reason to comply with the SBA's order when it required McLean to retire after he failed to reimburse his FRS account so as to not jeopardize its own continued participation in the FRS. Second, the County demonstrated that there were no vacancies or openings in the Training Division at the time McLean was reinstated.
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> McLean's explanation that he expected to return to the Training Division, despite the County having no obligation under the settlement agreement to do so, without more, did not rise to an evidentiary level to allow the jury to decide whether the County's reason here was pretextual."

Facts:

> "McLean began working as a firefighter with the Orange County Fire Rescue Department ('Fire Rescue') in 1989, eventually rising to the rank of lieutenant. He was working in the Training Division of Fire Rescue in November 2013 when an investigation was instituted by the County regarding a number of its employees, including McLean, concerning allegations that these employees were misusing County property and improperly reporting or recording the number of hours that they had been working. Of the fifty-six employees disciplined as a result of this investigation, the County only terminated the employment of McLean and two other African-American males.
>
> McLean sued the County in 2015 for discrimination under the FCRA. McLean contended that this disparate treatment in being terminated from employment for committing the same or similar acts as the other investigated employees whose employment was not terminated was due to both his race and sex.
>
> In June 2016, McLean and the County settled this first lawsuit. In exchange for McLean executing a release of any and all of his claims and dismissing the suit with prejudice, the County agreed to set aside its termination of McLean's employment and to replace it with a written warning letter. McLean would be reinstated to his previous status as a lieutenant in Fire Rescue. The County also agreed to pay McLean what was referred to in the settlement agreement as his Florida Retirement System ('FRS') back wages, together with his non-FRS back wages. It also agreed to pay a specified sum of money o McLean for compensatory damages and for attorney's fees and costs. Lastly, the County agreed to provide McLean with personal and sick leave benefits that he would have accrued during the twenty-seven-month period from when his employment was first terminated by the County until he was reinstated.
>
> After the first suit concluded, McLean went back to work as a lieutenant with Fire Rescue. However, he was not returned to the Training Division of Fire Rescue. The settlement agreement did not require that McLean be returned to the Training Division; and, at the time of his reinstatement, there were no vacancies in that division."

Holding:

> "We agree with the County that McLean failed to present competent evidence that he filed an administrative complaint with the FCHR [Florida Civil Rights Act] or the EEOC…. Accordingly, because there was no disputed issue for the jury to resolve regarding whether McLean complied with the condition precedent of exhausting his administrative remedies under the FCRA, the trial court should have granted the County's motion for directed verdict."

Legal Lesson Learned: When negotiating a return-to-work agreement, consider including a provision regarding the position to which the employee will be returning.

File: Chap. 8, Race Discrimination

U.S. SUPREME COURT: BLACK-OWNED MEDIA COMPANY DENIED CONTRACT - MUST PROVE "BUT FOR" RACE WOULD HAVE RECEIVED

On March 23, 2020, in Comcast Corp. v. National Association Of African American-Owned Media, et al., the U.S. Supreme Court unanimously held (9 to 0) that the plaintiff, Entertainment Studios, must prove that race was the but-for cause of its injury—in other words, that Comcast would have acted differently if Entertainment Studios were not African-American owned.

In opinion by Justice Neil Gorsuch, the Court held:

> "All the traditional tools of statutory interpretation persuade us that §1981 follows the usual rules, not any exception. To prevail, a plaintiff must initially plead and ultimately prove that, but for race, it would not have suffered the loss of a legally protected right…. The Ninth Circuit has yet to consider that question because it assessed ESN's pleadings under a different and mistaken test. To allow that court the chance to determine the sufficiency of ESN's pleadings under the correct legal rule in the first instance, we vacate the judgment of the court of ap-peals and remand the case for further proceedings consistent with this opinion."

Facts:

> "This case began after negotiations between two media companies failed. African-American entrepreneur Byron Allen owns Entertainment Studios Network (ESN), the operator of seven television networks—Justice Central.TV, Comedy.TV, ES.TV, Pets.TV, Recipe.TV, MyDestina-tion.TV, and Cars.TV. For years, ESN sought to have Comcast, one of the nation's largest cable television conglomerates, carry its channels. But Comcast refused, citing lack of demand for ESN's programming, bandwidth constraints, and its preference for news and sports programming that ESN didn't offer.
>
> With bargaining at an impasse, ESN sued. Seeking billions in damages, the company alleged that Comcast systematically disfavored '100% African American-owned media companies.' ESN didn't dispute that, during negotiations, Comcast had offered legitimate business reasons for refusing to carry its channels. But, ESN contended, these reasons were merely pretextual. To help obscure its true discriminatory intentions and win favor with the Federal Communications Commission, ESN asserted, Comcast paid civil rights groups to advocate publicly on its behalf. As relevant here, ESN alleged that Comcast's behavior violated 42 U. S. C. §1981(a), which guarantees, among other things, '[a]ll persons . . . the same right . . . to make and enforce contracts . . . as is enjoyed by white citizens.'"
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> After three rounds of pleadings, motions, and dismissals, the district court decided that further amendments would prove futile and entered a final judgment for Comcast.
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> The Ninth Circuit reversed. As that court saw it, the district court used the wrong causation standard when assessing ESN's pleadings. A §1981 plaintiff doesn't have to point to facts plausibly showing that racial animus was a "but for" cause of the defendant's conduct. Instead, the Ninth Circuit held, a plaintiff must only plead facts plausibly showing that race played 'some role' in the defendant's decision making process. 743 Fed. Appx. 106, 107 (2018)…. "

Holding:

> "Congress passed the Civil Rights Act of 1866 in the after-math of the Civil War to vindicate the rights of former slaves. Section 1 of that statute included the language found codified today in §1981(a), promising that "[a]ll per-sons . . . shall have the same right . . . to make and enforce contracts, to sue, be parties, [and] give evidence . . . as is enjoyed by white citizens." 42 U. S. C. §1981; Civil Rights Act of 1866, 14 Stat. 27.
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> ***
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> The larger structure and history of the Civil Rights Act of1866 provide further clues. Nothing in the Act specifically authorizes private lawsuits to enforce the right to contract. Instead, this Court created a judicially implied private right of action, definitively doing so for the first time in 1975. See Johnson v. Railway Express Agency, Inc., 421 U. S. 454, 459 (1975); see also Jett v. Dallas Independent School Dist., 491 U. S. 701, 720 (1989).
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> What does ESN offer in reply? The company asks us to draw on, and then innovate with, the "motivating factor" causation test found in Title VII of the Civil Rights Act of1964. But a critical examination of Title VII's history reveals more than a few reasons to be wary of any invitation to import its motivating factor test into §1981…. In the Civil Rights Act of 1991, Congress provided that a Title VII plaintiff who shows that dis-crimination was even a motivating factor in the defendant's challenged employment decision is entitled to declaratory and injunctive relief. §107, 105 Stat. 1075. A defendant may still invoke lack of but-for causation as an affirmative defense, but only to stave off damages and reinstatement, not liability in general. 42 U. S. C. §§2000e–2(m), 2000e– 5(g)(2)(B); see also Desert Palace, Inc. v. Costa, 539 U. S. 90, 94–95 (2003)."

Justice Ruth Ginsburg wrote a Concurring Opinion:

> "The Court holds today that Entertainment Studios must plead and prove that race was the but-for cause of its injury—in other words, that Comcast would have acted differently if Entertainment Studios were not African-American owned. But if race indeed accounts for Comcast's conduct, Comcast should not escape liability for injuries inflicted during the contract-formation process. The Court has reserved that issue for consideration on remand, enabling me to join its opinion."

Legal Lessons Learned: Important decision on race discrimination.

See March 23, 2020 article: Why Ginsburg Joined Ruling Civil Rights Advocates Decry as 'Terrible'.

File: Chap. 9, ADA

EEOC: COVID19 PANDEMIC MEETS THE "DIRECT THREAT" STANDARD - MAY TEST EMPLOYEES – SOME FDs NOW SCREENING EVERY SHIFT

On March 21, 2020, the federal Equal Employment Opportunity Commission issued updated guidance:

> "The EEOC is updating this 2009 publication to address its application to coronavirus disease 2019 (COVID-19). Employers and employees should follow guidance from the Centers for Disease Control and Prevention (CDC) as well as state/local public health authorities on how best to slow the spread of this disease and protect workers, customers, clients, and the general public. The ADA and the Rehabilitation Act do not interfere with employers following advice from the CDC and other public health authorities on appropriate steps to take relating to the workplace. This update retains the principles from the 2009 document but incorporates new information to respond to current employer questions. For readers' ease the COVID-19 updates are all in bold."

DIRECT THREAT:

During employment: The ADA prohibits employee disability-related inquiries or medical examinations unless they are job-related and consistent with business necessity. Generally, a disability-related inquiry or medical examination of an employee is job-related and consistent with business necessity when an employer has a reasonable belief, based on objective evidence, that:

1. An employee's ability to perform essential job functions will be impaired by a medical condition; or
2. An employee will pose a direct threat due to a medical condition.

A **"direct threat"** is "a significant risk of substantial harm to the health or safety of the individual or others that cannot be eliminated or reduced by reasonable accommodation. If an individual with a disability poses a direct threat despite reasonable accommodation, he or she is not protected by the nondiscrimination provisions of the ADA.

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DIRECT THREAT AND PANDEMIC INFLUENZA, COVID-19, AND OTHER PUBLIC HEALTH EMERGENCIES

Based on guidance of the CDC and public health authorities as of March 2020, the COVID-19 pandemic meets the direct threat standard. The CDC and public health authorities have acknowledged community spread of COVID-19 in the United States and have issued precautions to slow the spread, such as significant restrictions on public gatherings. In addition, numerous state and local authorities have issued closure orders for businesses, entertainment and sport venues, and schools in order to avoid bringing people together in close quarters due to the risk of contagion. These facts manifestly support a finding that a significant risk of substantial harm would be posed by having someone with COVID-19, or symptoms of it, present in the workplace at the current time. At such time as the CDC and state/local public health authorities revise their assessment of the spread and severity of COVID-19, that could affect whether a direct threat still exists."

Legal Lessons Learned: Fire & EMS departments, with the concurrence of their Medical Director, should consider taking the temperature of crews on each shift. Note: The author of this Newsletter serves on the SW Ohio EMS Protocol Committee; two UC Health physicians on the committee sent out an update on March 27, 2019, including the following:

> "Symptomatic Prehospital Provider Many Departments have already initiated screening of employees at the start of every shift. Providers with fever (100.0 or higher) and/or symptoms should not work. Symptomatic providers are a priority for COVID-19 testing. The Department's Employee Health and/or the provider's PCP should be able to arrange testing. The UC Health 'Drive-Through' testing center may be able to help (open M-F 10-4, must call 41-VIRUS to make appointment). Test results may take 4-5 days."

File: Chap. 11, FLSA

U.S. DEPT. OF LABOR: BONUS PAYMENTS FOR LENGTH OF SERVICE – IF GUARANTEED, MUST INCLUDE IN "REGULAR RATE OF PAY"

On March 26, 2020, the U.S. Department of Labor, Wage & Hour Division, issued Opinion Letter FLSA 2020-3.

> "Based on the facts you have provided, the City's longevity payments made to employees pursuant to the 1981 Resolution are not excludable as 'payments in the nature of gifts' under Section 207(e)(1)…. Thus, longevity payments to eligible employees are *required* by the 1981 Resolution…. Rather, such longevity pay required by law must be included in the regular rate…. If, on the other hand, the City's Resolution said that

"eligible employees of the City *may* be entitled to longevity pay" of up to a maximum amount … the payments could still be excluded from the regular rate…."

Facts:

"This letter responds to your request for an opinion concerning whether payments made by the City of* Alabama (City), pursuant to a resolution of the City's Board of Commissioners, to fulltime employees at Christmas time based on their length of service must be included in the employees' regular rate when calculating overtime pay under the Fair Labor Standards Act (FLSA)….

In January 1981, the City's Board of Commissions passed a resolution (1981 Resolution) providing that: 'All eligible employees of the City ... shall be entitled to receive an incentive award in the form of longevity award.' An employee is eligible if he or she works full time and has 'been on the regular general fund payroll for a period of not less than five (5) full years.' The resolution further provides that each eligible employee "shall receive" a longevity award in the amount of $2 per month for each whole year of the employee's tenure. You state that, currently, the longevity award is paid every two weeks, but the City is contemplating paying out the award in a one-time lump sum each year around Christmas time."

Holding:

"Thus, longevity payments to eligible employees are *required* by the 1981 Resolution…."

Legal Lessons Learned: Under this opinion letter, employees of this city who are paid on an hourly basis will now be entitled to a higher hourly rate of pay based on the guaranteed annual longevity bonus. See the regulation:

29 U.S.C. § 207(e)(l)

(e) "Regular rate" defined

As used in this section the "regular rate" at which an **employee** is employed shall be deemed to include all remuneration for employment paid to, or on behalf of, the **employee**, but shall not be deemed to include—

(1) sums paid as gifts; payments in the nature of gifts made at Christmas time or on other special occasions, as a reward for service, the amounts of which are not measured by or dependent on hours worked, production, or efficiency….

File: Chap. 13, EMS

FL: SUICIDE BY HANGING – DEPUTY SHERIFF ORDERED CPR STOPPED, INCLUDING EMS – LAWSUIT TO CONTINUE, NO QUALIFIED IMMUNITY

On March 25, 2020, in Jolene Waldron v. Gregory Spicher, Deputy, the U.S. Court of Appeals for Eleventh Circuit (Atlanta), held (3 to 0) that the trial court properly denied Deputy Sheriff's motion to dismiss the case based on qualified immunity. The lawsuit may proceed, but mother of the deceased has very difficult burden to proving to a jury that the Deputy was not only reckless, but that he intended to cause death of her son.

"Several minutes later, a fire truck and an ambulance arrived. Three paramedics—later identified as David Warren, Christensen, and Grisales—attempted to attend to Ybarra, but Spicher only allowed Warren to do so to 'confirm the patient's status.' Warren testified that Spicher told him to 'not touch the patient very much because this was . . . a crime scene.' Warren noted that Ybarra was 'severely cyanotic and unresponsive' and his neck was elongated. He assessed Ybarra with a Glasgow Coma Score of one in eyes, verbal, and motor, which was consistent with a deceased person's score. Warren hooked up Ybarra to a heart monitor and noted a heart rate of 24 beats per minute, which he testified indicated organized electrical activity in the heart inconsistent with death. Warren called for Spicher to retrieve Lieutenant Christensen, but Spicher was on the phone and did not hear him, so Warren shouted louder, which finally brought Christiansen over. The two

immediately recontinued CPR and began 'manual C-spine immobilization,' which was meant to hold Ybarra's spine in line. Ybarra was then transported to the hospital, where he died a week later.

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In this opinion, we have held that…Waldron cannot demonstrate that Spicher violated clearly established substantive due process rights without proving more than that Spicher acted with deliberate indifference or recklessness. But we have also held that, if the jury should find that Spicher acted for the purpose of causing harm to Ybarra, Waldron would have proved a violation of clearly established substantive due process rights."

Facts:

"On November 14, 2014, Anthony Ybarra, Jr., attempted to commit suicide by hanging himself from a tree outside his house with belts and ropes. Though it is unclear how long Ybarra was hanging before he was discovered, it is likely that at least several minutes elapsed before he was ultimately discovered by Waldron and her other children. When Waldron discovered her son, she began screaming and attempted to bring him down.

One of her neighbors, Ronald Timson, a former emergency medical technician ('EMT'), heard her screams and rushed over to help. Waldron and Timson had difficulty cutting the ropes and belts that Ybarra had hung himself with, but were eventually able to do so. Timson examined Ybarra and detected a 'faint, faint pulse' on Ybarra's carotid artery and felt that Ybarra 'was not cold.' Because of Ybarra's 'nonwhite' skin, Timson was unable to tell if Ybarra was cyanotic and saw some faint bruising around his neck. He immediately began performing CPR on Ybarra…. Meanwhile, Waldron called her boyfriend's mother, Karen VanEs, a nurse, at approximately 4:04 PM, who arrived at the Waldron residence several minutes later.At the time that VanEs had arrived, Timson had been performing CPR for several minutes. When she arrived, VanEs joined him.

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Upon his arrival, [Deputy Sheriff Spicher] directed both VanEs and Timson to stop performing CPR. When no one acceded to his request, he ordered them to stop again. Timson stepped away and VanEs stopped, but she checked Ybarra's left radial artery and felt a 'weak beat.' She protested to Spicher that 'there was a heartbeat, to which he replied, 'Well, that's because you're performing CPR.' At that point, she removed her hands and said, 'But I'm not doing CPR.' She then stood up and walked away. Spicher subsequently called in a 'Signal 7,' which meant that 'there is a deceased individual at the scene' and that emergency units need not 'rush' to the scene. [Internal investigation found] Deputy Gregory Spicher's actions to be 'Violation of Operations Directive 1068.04(A), Dereliction of Duty is SUBSTANTIATED.]"

Holding:

"Having decided that—on the facts we necessarily assume—Spicher's actions, if merely reckless or deliberately indifferent, would not rise to the level of culpability necessary to state a violation of clearly established substantive due process rights, we nevertheless hold that Spicher's actions would rise to that necessary level if the jury should find that Spicher acted for the purpose of causing harm to Ybarra…. Although Spicher asserts that he reasonably believed Ybarra was already dead and beyond any possible help and although that would of course be evidence of an absence of intent to harm Ybarra, that remains a question for the jury."

Legal Lessons Learned: Terrible conduct by Deputy Sheriff, but plaintiff must now prove Deputy intended to harm the victim. Hopefully this case settles prior to jury trial.

File: Chap. 16, Discipline

TN: FF OFF DUTY, POINTED FIREARM AT TWO MEN AT POLITICAL RALLY – FIRED - GIVEN "LOUDERMILL HEARING" BY FIRE CHIEF

On March 18, 2020, in Paul Zachary Moss v. Shelby County Civil Service Merit Board, the Supreme Court of Tennessee, at Jackson, held (5 to 0) that the FD provided due process to the firefighter, reversing the decision by the TN Court of Appeals. In addition to the November, 2013 aggravated assault with firearm, the Fire Chief during the pre-termination *Loudermill* hearing also inquired about police records which showed that in March 2011, police arrested Mr. Moss on charges of public intoxication and possession of a firearm while under the influence of alcohol. Police records also showed that in October 2012, a police officer responded to a domestic violence call during which Mrs. Moss stated that Mr. Moss had assaulted her.

> "Based on the pre-termination *Loudermill* notice, the questions during the *Loudermill* hearing, and the contents of the termination letter, we conclude that Mr. Moss had sufficient notice that his conduct during the November 2013 altercation and his answers about the 2011 and 2012 incidents were reasons for his termination. Mr. Moss received adequate notice of the factual allegations against him and had an opportunity to prepare for his hearing before the Board. His contention that the Fire Department violated his due process rights lacks merit."

Facts:

> "On November 1, 2013, Paul Zachary Moss, while off duty from his job as a firefighter with the Shelby County Fire Department, went to a political rally at his wife's request. Police arrested Mr. Moss at the rally after he argued and scuffled with Thomas Mason Ezzell, Jr. and Earl N. Mayfield, Jr. A grand jury indicted Mr. Moss on two counts of aggravated assault.
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> [At Shelby County Civil Service Merit Board] Mr. Mayfield testified that on November 1, 2013, he and a group of six to eight acquaintances were displaying American flags and an anti-Obama banner from an overpass over I-240 in Memphis during a political rally. Mr. Ezzell wore an 'Obama' mask during the rally. After the event, Mr. Moss approached the rally participants in a parking lot, yelling at them, and appeared to be under the influence of alcohol or drugs.
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> On February 24, 2015, the Shelby County Criminal Court accepted Mr. Moss's *Alford* [footnote1] guilty plea to one count of aggravated assault arising out of the altercation involving Mr. Ezzell and dismissed the count involving Mr. Mayfield. The Criminal Court placed Mr. Moss on judicial diversion.
>
> > Footnote 1: In an *Alford* or best interest plea, a defendant enters a guilty plea and concedes that the prosecutor's evidence would likely result in a guilty verdict but the defendant does not admit to committing the criminal act. North Carolina v. Alford, 400 U.S. 25, 37 (1970).
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> On March 2, 2015, Fire Department Deputy Chief Dale H. Burress gave Mr. Moss a written *Loudermill [*footnote 3] notice informing him of the possibility of major disciplinary action, including termination, because Mr. Moss had violated:
>
> > I:RR-0164005: General Rules of Conduct; Page 1, Line 5 (E) states: Disciplinary Action, including discharge, may be taken for, but shall not be limited to the following causes: (e) That the employee has been convicted of a felony.

II.AD-0807001: Notification of Arrest; Page 1 (last two sentences state): Disciplinary action may be taken against an employee, as a result of evidence presented, that is in violation of Shelby County Policies - 3 -procedures or regulations. Such disciplinary action may be separate and apart from pending or final court decisions.

Footnote 3: In Cleveland Board of Education v. Loudermill, 470 U.S. 532 (1985), the United States Supreme Court held that public employees, who may be fired only for cause, have a

right to notice and an opportunity to respond to charges against them. Under the Shelby County Civil Service Merit Act of 1971, Mr. Moss was a classified Shelby County employee and could be terminated only for just cause. See 1971 Tenn. Priv. Acts, ch. 110.

The notice advised Mr. Moss that he could meet with Deputy Chief Burress on March 30, 2015, to present, orally or in writing, any reasons why discipline should not be imposed.

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On March 30, 2015, Fire Department Chief Alvin D. Benson and Deputy Chief Burress met with Mr. Moss in what is known as a *Loudermill* hearing. They asked Mr. Moss several questions about the November 2013 altercation. Mr. Moss told them that Mr. Ezzell confronted him first, but acknowledged that after Mr. Ezzell began to walk away, Mr. Moss attempted to continue the conversation. Mr. Moss admitted that he pointed his gun at Mr. Ezzell and Mr. Mayfield during the physical struggle that followed, but denied that he had been drinking. Chief Benson and Deputy Chief Burress also asked Mr. Moss about other instances involving alcohol, weapons, or assaults that required police involvement. Mr. Moss admitted that the police had arrested him before for possession of a firearm, but denied that alcohol had been involved. Mr. Moss also denied that he had assaulted a woman. But police records showed that in March 2011, police arrested Mr. Moss on charges of public intoxication and possession of a firearm while under the influence of alcohol. Police records also showed that in October 2012, a police officer responded to a domestic violence call during which Mrs. Moss stated that Mr. Moss had assaulted her.

***

Chief Benson expressed his conclusion that Mr. Moss was the primary aggressor in the altercation, had been drinking, had a firearm, and was 'emboldened.' He described Mr. Moss's conduct as irresponsible, careless, and reckless. In addition, Mr. Moss's conduct jeopardized the lives of 'two aging decorated military veterans [and] the lives of everyone at the scene.' The letter concluded by stating: '[c]onsidering the elements of this case and the preponderance of the evidence,' Chief Benson terminated Mr. Moss's employment for violating the Fire Department's standards of personal conduct and behavior."

Holding:

"Based on the pre-termination *Loudermill* notice, the questions during the *Loudermill* hearing, and the contents of the termination letter, we conclude that Mr. Moss had sufficient notice that his conduct during the November 2013 altercation and his answers about the 2011 and 2012 incidents were reasons for his termination. Mr. Moss received adequate notice of the factual allegations against him and had an opportunity to prepare for his hearing before the Board. His contention that the Fire Department violated his due process rights lacks merit."

Legal Lessons Learned: The FD wisely issued the firefighter a written notice of potential violations of FD policies, and provided a *Loudermill* meeting with the Fire Chief and Deputy Chief.

File: Chap. 16, Discipline

IN: FF REPEATEDLY LATE FOR WORK & ABSENT WITHOUT LEAVE – PROGRESSIVE DISCIPLINE – TERMINATION UPHELD

On March 6, 2020, in Kevin D. Jones v. City of Muncie Fire Merit Commission, the Court of Appeals of Indiana, held (3 to 0) that the trial court properly upheld the Commission.

> "We, therefore, conclude that there was substantial, relevant evidence presented to support the decision by the Commission to terminate Johanns's employment. The evidence presented was sufficient to lead a reasonable person to support the conclusion to terminate the employment of Johanns, and the decision was not arbitrary and capricious. The trial court did not err in upholding the Commission's decision. *** The Commission found that Johanns's overall performance as a firefighter was poor, that he neglected his duties as a firefighter, disobeyed orders, and was absent without leave and concluded that Johanns's employment should be terminated."

Facts:

> "Johanns joined the Muncie Fire Department ('the Department') as a firefighter on May 2000 and served the required one-year probation period, ending May 22, 2001.Throughout his employment as a firefighter, he struggled to comply with the applicable rules and regulations. On numerous occasions between January 1, 2004 and December 31, 2008, Johanns reported late to work and was given verbal and written reprimands. Between January 1, 2010 and December 31, 2010, Johanns reported late to work and called in sick after the scheduled time to do so numerous times and was again given both verbal and written reprimands.
>
> ***
>
> In 2012, Johanns was a driver for the Department. On multiple occasions, he had difficulty locating the addresses to which the firefighters were dispatched or emergency calls; failed or refused to listen to directions provided by other firefighters; narrowly avoided traffic accidents; and caused his fire truck to be late to emergency calls. In addition, at various times, Johanns had difficulty hooking his truck to water and pump apparatus.
>
> ***
>
> In March 2017, he was suspended without pay for five calendar days and for seven calendar days for being absent without leave.
>
> ***
>
> In addition, at various times from January 1, 2018 to April 1, 2018, Johanns failed to report for duty by the designated time and failed to contact [Battalion Chief Clevenger.
>
> ***
>
> On May 18, 2018, the Fire Chief for the City of Muncie ('the Chief'), Eddie Bell, filed a Verified Disciplinary Complaint against Johanns. Hearings were held by the Commission on October 17, 2018 and December 20, 2018. On January 10, 2019, the Commission decided to terminate Johanns's employment."

Holding:

> "Judicial review of administrative decisions is very limited. Gray v. Cty. Of Starke, 82 N.E.3d 913, 917 (Ind. Ct. App. 2017), trans. denied. We give deference to the expertise of the administrative body. Id. Discretionary decisions of administrative bodies, including those of merit commissions, are entitled to deference absent a showing that the decision was arbitrary and capricious, or an abuse of discretion, or otherwise not in accordance with law."

Legal Lessons Learned: The FD followed progressive discipline, and documented the poor performance issues.

File: Chap. 16, Discipline

AR: PROB. FF – WARNED OF POOR JOB PERFORMANCE – FIRED – VERY WELL DOCUMENTED – NO RETALIATION FOR HIS WORK COMP CLAIM

On March 5, 2020, in Michael Burroughs v. City of Tucson, the U.S. Court of Appeals for the Ninth Circuit (San Francisco), held (3 to 0) in an unpublished decision that the trial court properly granted summary judgment to the City. He was repeated informed of his "Job In Jeopardy" status after barely graduating from the Training Academy. For example: "On or about October 19, 2015, Plaintiff was given TFD's Performance Evaluation for Probationary Firefighter. Plaintiff's evaluation indicated that he needed improvement on eight (8) out of seventeen (17) categories for which he was provided feedback." He was terminated on November 10, 2015 [don't know when he filed Workers Comp claim.]

> "Michael Burroughs appeals the adverse summary judgment in favor of the City of Tucson on his claims of disability discrimination in violation of Title I of the Americans with Disabilities Act,42 U.S.C.§§12111–12117 ("ADA"), and retaliation for exercising his workers' compensation rights in violation of the Arizona Employment Protection Act, A.R.S.§23-1501(A)(3)(c)(iii). We have jurisdiction under 28 U.S.C.§1291, and we affirm.
>
> When Burroughs hurt his back at the fire academy, a City physician evaluated his injury, diagnosed him with a 'lumbar strain,' and released him back to work without restriction. Another City physician reached the same conclusion two days later when Burroughs complained of difficulty sitting. And finally, after yet another medical evaluation deeming him fit for duty, Burroughs graduated from the fire academy and started working at his first station. Faced with these medical opinions based on physical examinations, Burroughs's only contrary evidence is his own conclusory self-assessment. Not quite a genuine factual dispute."

Facts:

> "We are uncertain when Burroughs filed his workers' compensation claim. Indeed, aside from the supervisor's injury report, the pages of which bear headers 'Wkr Comp Form 100-A' and 'Wkr Comp Form 100-B,' the record contains no evidence of Burroughs having filed such a claim.

[Following TIMELINE is from Oct. 16, 2018 order by U.S. Magistrate Judge Bruce Macdonald, granting summary judgment to the City – deleted references to deposition transcripts and quotes.]

- "Plaintiff Michael Burroughs worked as a full-time firefighter for Raytheon's Fire Department for approximately three (3) to four (4) years.
- On April 17, 2015, Plaintiff began working as a firefighter for Tucson Fire Department ('TFD') when the City of Tucson took over the Raytheon Fire Department.
- Prior to the takeover, TFD personnel met with Raytheon firefighters, including Plaintiff, regarding what was happening with Raytheon's Fire Department, providing the option of trying to become TFD employees, and discussing the physical tests that the firefighters would have to pass.

- Plaintiff recalled TFD personnel discussing what the physical fitness test would consist of, and that passing was a requirement for 'mov[ing] on.'

- On September 16, 2014, Plaintiff participated in the Candidate Physical Ability Test, but failed due to not completing it in the amount of time allotted…. On September 30, 2014, Plaintiff again participated in the Candidate Physical Ability Test and passed.

- On April 20, 2015, Plaintiff began the twelve-week training at the Academy. Captain Vera Wuerfel was the lead training captain. Captain Ed Lopez, Jr. was also a training captain at the Academy.

- Captain Wuerfel testified that the only counseling session with Plaintiff that she really remembered was talking to him about some of the issues that he was having, including an inability to complete drills and his poor attitude. Captain Wuerfel asked Plaintiff if there was something going on that he wanted them to know, and he responded that he was thinking about quitting the academy Plaintiff began to cry and explained that the academy was too hard for him; his wife was not letting him see his child; and he was having personal issues. Captain Wuerfel noticed Plaintiff was not completing his drills, he had a poor attitude, and was not as motivated as when he first came into the Academy.

- On June 22, 2015, approximately two (2) months into the Academy, Plaintiff was flipping a tire when he 'went to stand up with it and flip it, and [he] got this shooting pain down both of [his] legs and pain in [his] back, and [he] fell to the ground ' Plaintiff recalls Paramedic Berndt, Captain Wuerfel, and then the rest of his class coming to his aid. Plaintiff further recalls that he was given a bag of ice, he was put on the golf cart, and then he was taken to the City physician for evaluation.

- Plaintiff was evaluated by Dr. Marjorie Eskay-Auerbach and diagnosed with a 'lumbar strain.' Dr. Eskay-Auerbach released Plaintiff back to work without restriction.

- On or about June 24, 2015, Captain Wuerfel prepared a Special Counseling memorandum to address the issues Plaintiff was having, and provide him the opportunity to change his behavior prior to any actual discipline…. Plaintiff did not remember the Captains telling him that he 'needed to improve' in the areas of 'TFD core values of teamwork and professionalism,' but conceded that he was told he was not performing to standards.

- On June 25, 2015, Captain Wuerfel recommended that Plaintiff be terminated, '[a]fter he snapped at a co-worker and snapped at [her], the totality of disciplinary stuff that went on and the fact that he snapped at a training officer and was aggressive in his tone[.]' Captain Wuerfel spoke with Chief Fischback regarding the recommendation, indicating that it was appropriate '[b]ased on [Plaintiff's] past performance and the fact that he violated one of our rules which was basically being aggressive with an instructor[—][n]ot only me but his teammate.'

- Captain Wuerfel testified that her request for termination was denied, because she had not previously given Plaintiff a 'job in jeopardy' for snapping at his classmate. Captain Wuerfel further testified that because she had not given Plaintiff 'special counseling,' he was not given the opportunity to change his behavior, so administration asked her to change the termination into a 'job in jeopardy.'

- Chief Fischback requested that Captain Wuerfel to make the job in jeopardy last throughout Plaintiff's probationary year, because the class was so close to graduating, there was insufficient time to evaluate Plaintiff further. Plaintiff was told that he was on 'job in jeopardy' status before he

finished the Academy. Plaintiff acknowledges the status was due to two incidents that occurred toward the end of the academy.

- Plaintiff was assigned to Station 16 when he finished the Academy. Captain Greene kept daily notes on Plaintiff's performance. Captain Greene noted Plaintiff 'ha[d] no experience in swift water rescue and need[ed] a lot of work and training[;] . . . [needed to be] more aggressive around the station and on E[mergency]M[edical]S[ervice] calls[;] . . . [was] asking the other firefighters questions from his module instead of looking them up in his book[;] . . . struggled with cutting a vent[ilation] hole[;] . . . did not know how to connect into the EBSS (emergency breathing support system) during a rescue drill[;] . . . could not start the saw[;] . . . struggled knowing where all the tools and equipment were located on LD16[;] . . . [became] exhausted and dizzy and was unable to drill[;] . . . and could not don an airpack under 45 seconds.'

- Captain Greene discussed Plaintiff's physical performance, telling him that he 'just needed to get better at [his] conditioning[.]' While assigned to Station 16, Plaintiff saw a Peer Fitness Trainer one time, and 'he may have' given Plaintiff advice on how to improve his physical conditioning. Plaintiff testified that his understanding of physical conditioning is physical fitness level. Id. Plaintiff was never under work restrictions during his time at Station 16.

- On September 15, 2015, Plaintiff was assigned to Station 5. Plaintiff understood that he was still on job-in-jeopardy status when he was assigned to Station 5. When Plaintiff started at Station 5, Captain Glenn Fleck met with Plaintiff and the engine crew and explained to Plaintiff the expectations regarding his performing duties, as well as that they wanted him to succeed.

- Captain Fleck's notes included observations, including but not limited to: struggling with his Self-Contained Breathing Apparatus (SCBA) on several occasions; becoming tired and frustrated, stating 'I can't do it,' and then stopped trying; difficulty making a hose connection because he was tired; and slow getting station chores and cleaning done and failing to meet standards for performing routine station duties.

- On September 26, 2015, during a drill had poor search technique; difficulty advancing a charged transverse hose; and difficulty dragging out the 'victim.' On that same date, Captain Fleck noted that Plaintiff 'would have difficulty performing task [sic] under pressure and fire conditions.' On September 26, 2015, Plaintiff 'potentially caused an exposure to a paramedic while on a call this evening[;] [h]e had blood on his gloves and was removing them[,] . . . snapped off his glove splattering blood on the face of a nearby paramedic.

- On September 28, 2015, Plaintiff responded to 'an early morning code arrest at a rehab facility[,]' and had some difficulty with techniques during the call; Captain Fleck noted that Plaintiff 'did not meet standard in performing EMS skill.' On October 2, 2015, Captain Fleck noted that while on scene with a patient trapped in a vehicle, he 'didn't have enough confidence in [Plaintiff's] abilities to perform the extrication when it mattered, so [Captain Fleck] had [Plaintiff] observe.'

- On or about October 19, 2015, Plaintiff was given TFD's Performance Evaluation for Probationary Firefighter. Plaintiff's evaluation indicated that he needed improvement on eight (8) out of seventeen (17) categories for which he was provided feedback. Id. The evaluation also contained a narrative portion in which Plaintiff was given specific feedback related to his failure to meet standards and was notified that '[i]f [he] fail[ed] to meet standards or slid[] backwards into [his] old work habits, dismissal may still be an option.'

- On November 3, 2015, Burroughs responded to a Full Alarm for smoke coming from an apartment at Ft. Lowell Road and Palo Verde Street. Plaintiff was given orders to follow a senior firefighter, Sean Palese. Plaintiff 'vaguely' remembers this incident, and testified that he followed Senior Firefighter Palese into the apartment complex, but not into the apartment. Plaintiff was trained to stay with his partner and not go off on his own.

- That same date, Captain Fleck spoke with Senior Firefighter Palese and Captain Maibauer about the November 3, 2015 incident. Also on that date, Captain Fleck authored a Memorandum to Chief Blume for Recommendation for Termination of Probationary FF Michael Burroughs. Prior to authoring the memorandum, Captain Fleck spoke with Chief Blume about the incident, which

  Captain Fleck considered a 'severe safety issue,' and that Plaintiff was still not performing up to standards. Chief Blume agreed with Captain Fleck's assessment.

- Plaintiff was terminated on November 10, 2015, his next shift following the November 3, 2018 fire call. Plaintiff was told that he failed probation, and understood that he was a probationary firefighter and if he did not meet standards he would be terminated."

Legal Lessons Learned: The FD did a great job documenting the poor work performance.