College of Engineering & Applied Science

Open Learning Fire Service Program
2850 Campus Way Drive
745 Baldwin Hall
Cincinnati OH 45221-0071

Phone (513) 556-6583

AUGUST 2020 – FIRE & EMS LAW Newsletter

[NEWSLETTER IS NOT PROVIDING LEGAL ADVICE.]
If you would like to receive free newsletter, just send me an e-mail.

Lawrence T. Bennett, Esq.
Program Chair
Fire Science & Emergency Management
Cell 513-470-2744
Lawrence.bennett@uc.edu

NEW PUBLICATIONS – FREE / ONLINE

- **EMS LAW (Third Edition, 2020):** 422 pages, including Best Practices videos by 15 Subject Matter Experts.
- **LEGAL LESSONS LEARNED (Case Summaries, 2018 – Present)**

File: Chap. 1, American Legal System

NY: CA WOMAN SUPPORTS STRONG IMMIGATION – CAN SUE TV COMMENTATOR - FALSE TWEETS TO 1.24 MILLION

On July 15, 2020, in Roslyn La Liberte v. Joy Reid, the U.S. Court of Appeals for Second Circuit (New York City) held that the defamation lawsuit will be reinstated; the defendant, Joy Reid, an MSNBC commentator, sent Tweet to 1.24 million followers, falsely alleging Ms. La Liberte threated 14-year-old Hispanic boy at a Simi Valley Council Meeting. La Liberte received hate mail, including threats of mutilation and recommendations she commit suicide. Court wrote: "In effect, Reid is arguing [in this Appeal] that a plaintiff can sue only the first defamer. If that were so, a post by an obscure social media user with few followers, blogging in the recesses of the internet, would allow everyone else to pile on without consequence. No one's reputation would be worth a thing."

Facts:

"Roslyn La Liberte is a California citizen who avows that she is 'passionate about this country's immigration policies.' (App. at 13.) She took a particular interest in California Senate Bill 54 ('SB 54'), a controversial 2017 law that limits cooperation between local law enforcement and federal immigration authorities. One provision is that state and local law enforcement officers are barred from disclosing (inter alia) an alien's address and date of release from prison. Cal. Gov't Code § 7284.6(a)(1). To register her opposition, La Liberte attended city council meetings in several cities, speaking out at some of them to urge resistance. On June 25th, 2018, La Liberte attended one such meeting in Simi Valley, California, along with hundreds of other people, where she spoke for about two minutes (the 'Council Meeting').

At some point during the Council Meeting, La Liberte was photographed interacting with a fourteen-year-old teenager who appears to be (and is) Hispanic (the 'Photograph'). (See App. at 265.) The Photograph showed La Liberte with her mouth open and her hand at her throat in a gagging gesture.

***

On June 28th, a social media activist named Alan Vargas tweeted the Photograph along with the following caption:

> 'You are going to be the first deported' [and] 'dirty Mexican' [w]ere some of the things they yelled they yelled [sic] at this 14 year old boy. He was defending immigrants at a rally and was shouted down. Spread this far and wide this woman needs to be put on blast.

The Photograph went viral.

The next day, Joy Reid, a personality on the MSNBC cable station, retweeted (i.e., shared) the Vargas tweet to her approximately 1.24 million followers.

***

Later that same day (June 29), Reid posted the Photograph on her Instagram with the following caption:

> He showed up to a rally to defend immigrants . . . . She showed up too, in her MAGA hat, and screamed, "You are going to be the first deported" . . . 'dirty Mexican!' He is 14 years old. She is an adult. Make the picture black and white and it could be the 1950s and the desegregation of a school. Hate is real, y'all. It hasn't even really gone away.

Meanwhile, the teenager in the Photograph stated during an interview with Fox 11 Los Angeles that La Liberte did not yell any racial slurs and that their discussion was 'civil.' (App. at 38, 47.) Still, La Liberte began receiving hate mail, including threats of mutilation and recommendations that she commit suicide.

Legal Lessons Learned: Fortunately, the Court also held that plaintiff is not a "public official" and she does not need to prove defendant posted with actual "malice."

> Note: The 2nd Circuit held that Joy Reed was also not protected by California Anti-SLAPP statute, which helps protect news organizations, reporters, journalists, other from defamation lawsuits.
>
> The 2nd Circuit held: "As a matter of first impression in this Circuit, we hold that California's anti-SLAPP statute is inapplicable in federal court because it increases a plaintiff's burden to overcome pretrial dismissal, and thus conflicts with Federal Rules of Civil Procedure 12 and 56."
>
> Courts have held that Fire Chiefs are "public officials" and must prove actual malice in defamation lawsuits.

File: Chap. 1, American Legal System

PA: CHILD DIED NEIGHBOR'S SWIMMING POOL – INWARD GATES – CODE OFFICIAL WAS NOT EMPLOYEE – STILL HAS GOV'T IMMUNITY

On July 9, 2020, in Anna Oakes, Administratrix of Estate of Pheylan Marine Cline v. Jeff Richardson and Richardson Inspection Services, LLC, the Commonwealth Court of Pennsylvania, held (3 to 0) in an unreported decision that the trial court properly granted summary judgment to the defendants, since Jeff Richardson enjoyed governmental immunity. The Court wrote: For these reasons, we conclude that the trial court correctly determined that Richardson acted on behalf of the Township as an 'employee' and as such is entitled to governmental immunity under the Tort Claims Act."

Facts:

> "Oakes initiated this action by filing a wrongful death and survival action against Richardson, who is the building code inspector for Coolspring Township (Township), Mercer County, where the neighbor's property is situated. Therein, she alleged that Decedent obtained access to the neighbor's deck and above ground swimming pool through gates. The first gate opened inward, toward the deck. The second gate
>
> likewise opened inward, toward the swimming pool. Richardson reviewed the design of the gates and issued a building permit. Oakes claimed that the design and inward operation of the gates violated Pennsylvania's Uniform Construction Code (UCC).
>
> ***
>
> The Township appointed Richardson and his company to serve as its official inspection service for 2007 at its regular meeting, and he has continued to serve in this capacity without any annual renewal process by the Township. The job description included fulfilling the duties of the building code official as defined in the Pennsylvania Construction Code Act (Construction Act). Richardson is required to have 18 certifications by the Department of Labor and Industry and professional liability insurance in the amount of at least $1,000,000. The Township identified Richardson as its building code official on its website. Richardson and his employees have specialized and expert knowledge relied upon by the Township. Richardson received applications for building permits, issued building permits in his sole discretion, conducted inspections of work sites to enforce the UCC, and issued occupancy permits upon satisfactory completion of construction. He did all of this solely on behalf of the Township as its building code official. The Township collected the permit fees, kept up to 20% and paid the balance to Richardson, and issued the building permits to the

applicants. The Township also directed Richardson to issue stop work orders for construction occurring without permits.

***

Although Richardson's relationship with the Township was not exclusive, it is common practice for small municipalities to retain its code officials in this manner, as it is more cost effective than having full-time employees on the payroll providing such services."

Legal Lessons Learned: Tragic death of 20-month old; what is the Code requirement in your community for gates protecting an above-ground swimming pool?

File: Chap. 1, American Legal System

AR: ARSON OF APARTMENTS – FINANCIAL FRAUD INVEST – DEFENDANTS CAN'T DEPOSE TUCSON FD INSPECTOR

On June 30, 2020, in Greg Moore & Patricia Moore v. Sean Garland, et al., U.S. District Court Judge Rosemary Marquez, District of Arizona, upheld the decision of the U.S. Magistrate Judge that two defendants arrested and awaiting trial, cannot use a civil lawsuit under 42 USC 1983 to take the deposition of the Tucson FD arson investigator, even after they received his report, since there is an ongoing financial fraud investigation. Likewise, they cannot subpoena police department records that had been provided to insurance company investigators, or PD documents shared with IRS investigators The District Court Judge agreed with the U.S. Magistrate, and held: "The [Magistrate's] Order notes that the City previously disclosed to Plaintiffs TFD Inspector Loya's fifteen-page report on the Forgeus fire … and holds, contrary to Plaintiffs' arguments, that 'in the context of the law enforcement privilege, the 'release of a document only waives the privilege for the document or information specifically released, and not for related materials.'"

Facts:

"Plaintiffs in this case, Greg and Patricia Moore, allege that their constitutional rights were violated when the Defendants, Detective Sean Garnand and Sergeant Dain Salisbury, who are both employed by the Tucson Police Department ('TPD'), sought and executed search warrants in connection with an arson investigation into the destruction of the Forgeus Apartments on June 8, 2017…. Plaintiffs bring this action pursuant to 42 U.S.C. § 1983.

***

On November 15, 2019, Defendants Filed a Motion to Quash Plaintiffs' subpoena duces tecum to State Farm Insurance Company ("State Farm"), or in the alternative, for a protective order. (Doc. 52.) Defendants argued that the discovery sought by Plaintiffs from State Farm was outside the scope of discovery pursuant to Fed. R. Civ. P. 26(b)(1) and irrelevant pursuant to Fed. R. Evid. 401….

On March 27, 2020, Magistrate Judge Bowman granted in part the Motion to Quash, finding that the State Farm documents that are the product of State Farm's independent investigation of the fires are relevant and discoverable but that '[r]eports generated by the Tucson Police Department or Tucson Fire Department and any references made to those reports are not discoverable because they fall under the law enforcement investigatory privilege….' However, it further found that 'reports generated by the Tucson Police Department or Tucson Fire Department and any references made to those reports are not discoverable because they fall under the law enforcement investigatory privilege.'

***

The Court finds that the law enforcement privilege has not been waived as to the TPD and TFD documents in the possession of State Farm and that, as stated in its previous Orders on this subject, the law enforcement privilege applies to bar discovery of documents related to the law enforcement investigation of the Forgeus fire. (*See* Docs. 113, 154.) Plaintiffs have not cited any authority showing that the disclosure of documents covered by the law enforcement privilege to a third-party insurance carrier waives the privilege."

***

By Order dated April 6, 2020, Magistrate Judge Bowman granted the Motion to Quash and determined that Plaintiffs were seeking information subject to the law enforcement investigatory privilege. (Doc. 122.) Magistrate Judge Bowman found that the disclosure of documents that were gathered during the investigation of the Forgeus fire and of communications between [PD] and INS Agent Newgren would 'compromise the effectiveness of TPD's investigative techniques.' (*Id*. at 3.) She rejected Plaintiffs' argument that Defendants lacked standing to file a motion to quash a subpoena issued to a third party. (*Id*.) She further found that disclosure of the documents to third-party IRS, another law enforcement body, did not waive the law enforcement investigatory privilege. (*Id*. at 4.)….

The Court finds that Defendants have standing to move to quash the Newgren/IRS subpoena as to documents and testimony regarding the law enforcement investigation of the Forgeus fires. [PD] successfully asserted the law enforcement investigatory privilege over documents and information pertaining to the Forgeus fires (*see* Doc. 113). Rule 26(b)(1) of the Federal Rules of Civil Procedure limits discovery to 'nonprivileged matter that is relevant to any party's claim or defense.' The rule precludes discovery of privileged materials. Although [husband & wife] argue that [PD] waived the law enforcement investigatory privilege when they

disclosed documents to nonparty Newgren/IRS, they have provided no authority for this contention. Finding a waiver of the privilege in this circumstance would undermine the purpose of the privilege and render it meaningless. Therefore, the Court affirms the granting of the Motion to Quash as to any and all documents, testimony, or information in the possession of Newgren and/or IRS that relate to the ongoing investigation of the Forgeus fires."

Legal Lesson Learned: The "law enforcement investigatory privilege" prevents defendants awaiting trial to use a civil lawsuit to obtain ongoing investigation records.

File: Chap. 2, LODD

KY: ARSON – INSURANCE FRAUD – CONVICTED ARSON WITH DEATH – FF LODD AT SCENE, FF HAD MEDICAL HISTORY - CONV. UPHELD

On July 7, 2020, in United States of America v. Steve Allen Pritchard, the U.S. Court of Appeals for Sixth Circuit (Cincinnati) affirmed (3 to 0) the conviction, and his enhanced sentence of 360 months in prison. Court wrote: "Even though Pritchard offered evidence that Sparks's pre-existing medical condition led to his death, the jury found an unbroken chain of causation between the fireand Sparks's heart attack. Just as we did not disturb a jury's finding that the patient's "actions as an addict cannot be said to break the chain of proximate causation[,]" we do not disturb the jury's conclusion that Sparks's medical ailments did not sever the causal link between the fire and his death."

Facts:

"Some men just want to watch the world burn. Others start fires to collect insurance money. Steve Pritchard is the latter. But after playing with fire several times, Pritchard's penchant for profiting from arson took a

deadly turn. Instead of only damaging property, a fire started by Pritchard in June 2011 led to firefighter Charles Sparks' death. While responding to the fire, Sparks suffered a fatal heart attack.

***

This case involves a fire, a firefighter, and a fraudster. First, the fire. At 3:05 AM on June 30, 2011, a 911 caller reported a fire at the Pritchard residence. Eleven minutes later, firefighters, including Assistant Chief Charles Sparks, arrived on the scene. These firefighters found the house engulfed in '[a] lot of fire, a lot of flames….' During the firefighting, Sparks lost consciousness. Personnel at the scene administered CPR to Sparks and called for an ambulance. Although the emergency workers tried to revive Sparks, who was not breathing and did not have a pulse, he never regained consciousness. Eight days later, Sparks died after being taken off life support.

***

Before fighting the fire on June 30, 2011, Sparks suffered from various medical ailments. In 2005, Sparks had a heart attack that required inserting a stint in his coronary artery. Sparks also suffered from coronary disease, hypertension, and diabetes—all of which are risk factors for a heart attack. Around the time of his death, Sparks had not been taking his prescribed heart medication or insulin to treat his diabetes.

***

Pritchard wanted [his girlfriend] Brandi to tell investigators that he had spent the night in Louisville. And that's the same story he gave to the police. Yet Pritchard's alibi did not withstand scrutiny. Cell tower records revealed that Pritchard had not been in Louisville on the night of the fire. The government obtained Pritchard's cell-site location information (CSLI) without a warrant in July 2015, relying on the warrant exception in the Stored Communications Act (SCA).

***

June 30 wasn't the first time Brandi heard about Pritchard's plot. Brandi bought a $50,000 insurance policy for the house six days before the fire. So when Pritchard learned about the insurance policy, he remarked about 'how easy it would be to burn the house down and get the money for it….' At first, Brandi balked at Pritchard's plan, finding it 'ludicrous[.]' To persuade Brandi, Pritchard recounted previous fires that he started to collect insurance money, including burning down a house owned by Tena Gowen, the couple's close friend. He also mentioned setting a car belonging to Whitney Clark, his niece, on fire to collect insurance money. And Pritchard discussed setting his own car on fire, as well as the home of David Newcomb."

Legal Lesson Learned: Arsonist are legally responsible of the death of firefighters responding to the fire.

Note: See NIOSH Fire Fighter Fatality Investigation F2011-16 (September 2011): "On June 30, 2011, a 49-year-old male volunteer fire fighter (FF) responded to a residential structure fire. The FF, wearing full turnout gear and self-contained breathing apparatus (SCBA) on-air, climbed a 14-foot ladder to the second floor and performed exterior and interior fire suppression activities for about 30 minutes. After the fire was brought under control, he started to perform overhaul (mop-up) operations on the second floor when he suddenly collapsed.

Recommendation #1: Provide preplacement and annual medical evaluations to all fire fighters.

File: Chap. 3, Homeland Security

FL: "LONE WOLF" DEFENDANT HELD WITHOUT BOND - 23-YR-OLD – PISTOL, SILENCER, DRONE - WANTED TO KILL AT LEAST 50

On July 1, 2020, in United States of America v. Muhammed Momtaz Al-Azhari, U.S. District Court Judge Tom Barber, Middle District of Florida (Tampa Division), upheld the decision of U.S. Magistrate Judge denying defendant's motion to revoke detention order. The Court wrote: "According to the [FBI] complaint, Defendant was preparing himself for a deadly attack in support of ISIS by obtaining weapons and tactical gear. He scouted potential targets, including a local beach and law enforcement buildings. He told a confidential informant that he did not want to kill just four or five people, but at least fifty. These allegations, and the evidence supporting the allegations, weigh heavily in favor of detention."

Facts:

> "This matter is before the Court on Defendant's "Motion to Revoke Detention Order…." On May 27, 2020, United States Magistrate Judge Elizabeth A. Jenkins held a detention hearing and preliminary examination and concluded that detention is warranted…. Subsequently, on June 2, 2020, Judge Jenkins entered an order of detention pending trial, finding that detention is warranted because there are no conditions of release - financial or otherwise - that would reasonably assure Defendant's future appearance in court and the safety of the community.
>
> ***
>
> Defendant Muhammed Momtaz Al-Azhari has been charged with attempting to provide material support or resources to a designated foreign terrorist organization, in violation of 18 U.S.C. § 2339B. According to the allegations of the complaint, Defendant - a 23-year old American citizen - acquired weapons and other equipment (including a military-style bullet-proof vest, laser pointer, GPS tracking device, camera drone, backpack with charging cable, and face mask, as well as car fuel trap solvent filter which can be used to make silencers) for the purpose of carrying out attacks on individuals in this community in support of the foreign terrorist organization known as the Islamic State of Iraq and al-Sham ("ISIS"). In his interactions with an FBI confidential source, Defendant expressed his hatred of the United States, his support of ISIS, and his admiration for Omar Mateen, the individual who carried out the Pulse nightclub shootings in Orlando, Florida in 2018. He consumed ISIS propaganda and made statements including 'I want to join ISIS' and 'I am ISIS' on several different occasions.
>
> ***
>
> Defendant was observed by law enforcement driving to various sites, including the Pulse nightclub in Orlando, the FBI field office in Tampa, and Honeymoon Island in Pinellas County. According to the FBI agent affidavit supporting the complaint and testimony at the detention hearing, Defendant's visits to these sites, acquisition of weapons, and other conduct, along with his statements, are consistent with an extremist ideology that encourages 'lone-wolf terrorist attacks against individuals in the United States.'
>
> ***
>
> Defendant has self-reported a history of mental health issues, which was corroborated by a family member. He does not appear to have a history of substance abuse. However, his mental health history weighs in favor of detention because it demonstrates both a risk of flight and an extreme risk of danger to the community.
>
> ***
>
> Although Defendant has familial ties to the Tampa community, *Defendant has lived in Syria, Dubai, and Saudi Arabia for most of his life*. He was born in California in 1997, but he lived with his family in Syria, Dubai, and Saudi Arabia between 2001 and 2018. He has only resided in Tampa since October 2019, after

relocating from California. Defendant's lack of significant ties to this community and his ties to foreign countries present a risk of flight and weigh in favor of detention.

***

At the time of the offense and his arrest, Defendant was on release pending trial for a state law offense. On May 1, 2020, Defendant was arrested in Tampa on a state charge for carrying a concealed weapon. His bond conditions prohibited him from possessing or acquiring firearms. Yet, the Government has provided evidence to show that a few weeks later, Defendant purchased a pistol, silencer, and ammunitions clips from a confidential informant. Although his criminal history in the United States appears limited to this state law offense, Defendant was previously convicted of terrorism-related offenses in Saudi Arabia. Defendant's criminal history weighs heavily in favor of detention."

Legal Lesson Learned: Thankfully a confidential informant told FBI about the defendant's purchase of firearm, silencer and ammo.

File: Chap. 5 – Emergency Vehicle Operations

NY: FDNY AMBULANCE RESPONDED TO MVA – BACKED INTO VEHICE – CLAIM NOT FILED WITHIN 90 DAYS

On July 15, 2020, in case In the Matter of Johanny M. Lugo et al. v. City of New York**,** the Supreme Court of the State of New York, Appellate Division, Second Judicial Department, upheld (5 to 0) the trial court judge's decision dismissing her request to file a late claim. Court wrote: "Here, the police accident report stated that the EMS vehicle caused "no damage" to the petitioner's vehicle, and did not indicate that there was any connection between the petitioner's alleged injuries and any negligent conduct on the part of the operator of the EMS vehicle. Thus, the petitioner failed to establish that the police accident report provided actual notice of the facts constituting the petitioner's claim that she sustained serious injuries as a result of the City's negligence…."

Facts:

"On January 4, 2017, the petitioner allegedly was injured in a motor vehicle accident when, while operating her vehicle, it was struck by another vehicle. An emergency medical services vehicle (hereinafter EMS vehicle), owned by the City of New York, responded to the scene and, as it was backing up, struck the petitioner's vehicle. A police accident report was prepared by a police officer who responded to the scene.

***

General MunicipalLaw§50-e requires that, prior to commencing an action sounding in tort against a municipality or public corporation, a notice of claim be served upon the municipality or public corporation within 90 days after the date that the claim arise."

Legal Lesson Learned: **Courts will enforce municipal ordinances requiring timely, written notice of a tort claim.**

Note: FDs should consider adopting a policy that whenever a FD vehicle is involved in an accident, even when apparently "no damage," require a photo be taken, confirm with motorist "no injury," and document in a written FD report.

File: Chap. 5, Emergency Vehicle Operations

TX: FIRETRUCK ACCIDENT AT INTERSECTION– FF DIDN'T STOP RED LIGHT / FD POLICY – NOT RECKLESS – GOVT IMMUNITY

On May 28, 2020, in The City of Kingsville v. Ermelinda Dominguez, the Court of Appeals, Thirteenth District of Texas (Corpus Christi – Edinburg), reversed the trial court and ordered the lawsuit dismissed since the firefighter was not driving recklessly, when on an EMS run with lights and siren, he followed an ambulance through a red light at reasonable speed. The Court wrote: "[T]he fact that Mendiola violated department policy by not coming to a complete stop prior to entering the intersection is not evidence of recklessness. See Hudson, 179 S.W.3d at 700–01; see also City of Laredo v. Varela, No. 04-10-00619-CV, 2011 WL 1852439, *3–5 (Tex. App.—San Antonio May 11, 2011, no pet.) (mem. op.) (holding that an officer's failure to adhere to policy requiring emergency vehicles to come to complete stop did not raise fact issue as to whether officer acted with reckless disregard for the safety of others). We conclude that the undisputed facts do not demonstrate that Mendiola committed an act that he knew or should have known posed a high degree of risk of serious injury but did not care about the result.SeePerez,511 S.W.3d at 236. Rather, by travelling at a speed below the speed limit, activating his siren and emergency lights and confirming that the cross-traffic was yielding, Mendiola was not acting with reckless disregard to others. Because the jurisdictional record fails to raise a fact issue regarding recklessness, the City retains its immunity from suit pursuant to the TTCA's [Texas Tort Claims Act] emergency response exception."

Facts:

> "In her live pleading, Dominguez alleged that [firefighter] Oscar Mendiola, while operating a City fire truck, failed to yield the right of way at a signal light which resulted in a collision with Dominguez's vehicle. Dominguez alleged that the City's immunity from suit was waived by the TTCA because the claim involved personal injury and property damages caused by the negligent operation or use of a motor-driven vehicle.
>
> ***
>
> Mendiola was driving a City fire truck southbound on Fourteenth Street in Kingsville, Texas, in response to a medical emergency. The fire truck's siren and emergency lights were both activated. Mendiola was travelling behind an ambulance, which proceeded through the intersection with Caesar Avenue. As Mendiola approached the intersection, he 'scanned' the traffic to make sure it was safe for him to proceed. Mendiola observed that all vehicles at the intersection were stopped. He specifically recalled that Dominguez's vehicle, which was facing eastbound on Caesar Avenue, was stopped. Mendiola maneuvered the fire truck into the turn lane so he could get around a stopped vehicle in his lane. Mendiola then proceeded into the intersection, believing that all traffic was yielding in response to his siren and emergency lights. As he entered the intersection, Mendiola saw Dominguez's vehicle moving from his right. Mendiola steered the fire truck to the left and applied the brakes, but he was unable to avoid colliding with Dominguez's vehicle.
>
> ***
>
> Mendiola believed he was travelling around twenty-five miles per hour as he entered the intersection. The posted speed limit at the location was thirty-five miles per hour. Mendiola acknowledged in his deposition testimony that the City's Fire Department guidelines required that he come to a complete stop at all stop signs and red lights.
>
> ***
>
> The policy underlying this 'emergency response exception' to the TTCA's limited waiver of immunity is 'to balance the safety of the public with the need for prompt responses to police, fire, and medical emergencies.' City of Amarillo v. Martin, 971 S.W.2d 426, 429 (Tex. 1998); City of San Angelo Fire Dep't. v. Hudson, 179 S.W.3d 695, 699 (Tex. App.—Austin 2005, no pet.). 'Imposing liability for a mere failure in judgment could deter emergency personnel from acting decisively and from taking calculated risks' and would 'allow

for judicial second guessing of the split-second and time-pressured decisions emergency personnel are forced to make.' Hudson, 179 S.W.3d at 699."

Legal Lessons Learned: FDs should consider including in their emergency vehicle policy those situations where one apparatus is following another through a controlled intersection.

File: Chap. 6, Employment Litigation

NY: FF WITH BAD HIP –– CLAIMED ON DUTY INJURY CAUSED – DEGENTIVE HISTORY - GETS ONLY "ORDINARY" PENSION

On July 15, 2020, in the case of In the Matter of Robert Giuliano v. New York Fire Department Pension Fund, et al., the Supreme Court of the State of New York, Appellate Division, Second Judicial Department, upheld (5 to 0) the trial court's decision denying the firefighter's application for accidental disability retirement benefits; while he and his surgeon claimed likely caused by on the job injury, MRI showed degenerative history. Court wrote: "The Medical Board's findings differ from those of the petitioner's surgeon, who found that it was likely that the petitioner's condition was causally related to work injuries and that the petitioner may have exacerbated a pre-existing condition. However, '[w]here conflicting medical evidence and medical reports are presented to the Medical Board, it is solely within the province of the Medical Board to resolve such conflicts.'"

Facts:

"On August 12, 2014, the petitioner allegedly injured his right hip while working as a firefighter with the New York Fire Department. An MRI taken on August 28, 2014, revealed bilateral hip osteoarthritis, degenerative bilateral labrum tears, with paralabral cyst formation on both sides and bilateral hip joint effusions. On August 27, 2015, the petitioner underwent right hip resurfacing surgery. On April 20, 2016, the petitioner applied for accidental disability retirement benefits (hereinafter ADR).

The Subchapter II Medical Board of the respondent New York Fire Department Pension Fund (hereinafter the Medical Board) evaluated the petitioner and reviewed medical records and determined that, although the petitioner was disabled due to his right hip injury, this disabling condition was causally related to chronic degenerative joint disease, not a work-related injury. The Medical Board determined that there was no evidence in the petitioner's medical records that 'the new injury exacerbated a preexisting condition.' Thus, the Medical Board recommended that the petitioner be granted an ordinary disability retirement. On November 21, 2017, the Board of Trustees of the New York Fire Department Pension Fund (hereinafter the Board of Trustees) adopted the recommendation of the Medical Board and denied the petitioner's application for ADR in a tie vote."

Legal Lesson Learned: Appellate courts will generally follow the findings of a Medical Board, supported by medical documentation.

File: Chap. 6, Employment Litigation

RI: FISCAL EMERGENCY – FIRE & POLICE RETIREES MUST NOW ENROLL IN MEDICARE - CITY MUST PAY GAP COVERAGE

On June 30, 2020, in Manuel Andrews, Jr. et al. v. James Lombardi, Treasurer of the City of Providence, Rhode Island, the Supreme Court of Rhode Island held (5 to 0) that the 2011 state statute authorizing municipalities to

require retirees at age 65 to go on Medicare Part A was lawful, but the City of Providence must also pay for retiree supplemental benefits under Medicare Parts B & D, as the City had agreed in a settlement with some of the retirees. The Court wrote: "We are convinced nevertheless that the controversy ought to be resolved by awarding the plaintiffs the same remedies for health care as provided in the 2011 lawsuit's settlement agreement approved in the 2013 Final and Consent Judgment. It is nothing more than what the City has agreed to provide for the opt-in retirees and indeed is contemplated in the 2011 Medicare Ordinance, which allows for the City's payment of 'Medicare supplement or gap coverage' when 'otherwise provided by ordinance or contract.'"

Facts:

"On January 11, 2011, then Providence Mayor Angel Taveras appointed a Municipal Finances Review Panel (MFRP) to review the City's budget for fiscal years ending June 30, 2011 and June 30, 2012.On February 28, 2011, the MFRP released a reportwhich concluded that the City faced a $69.9 million structural budgetary deficit for fiscal year ending June 30, 2011. The report concluded this deficit would increase to $109.9 million for fiscal year ending June 30, 2012. With respect to the City's retiree health care plan, the MFRP concluded that, as of June 30, 2009, the City had an unfunded accrued actuarial liability of $1.497 billion.

***

In 2011, the General Assembly enacted G.L. 1956§ 28-54-1(the "Medicare Enrollment Statute"), which went into effect on June 29, 2011.The statute states as follows:

> 'Every municipality, participating or nonparticipating in the municipal employees' retirement system, may require its retirees, as a condition of receiving or continuing to receive retirement payments and health benefits, to enroll in Medicare as soon as he or she is eligible, notwithstanding the provisions of any other statute, ordinance, interest arbitration award, or collective bargaining agreement to the contrary…. '

***

Less than one month later, on July 19, 2011, the City Council passed Chapter 2011-32, Ordinance No. 422(the 2011 Medicare Ordinance), amending Chapter 17, Article VI of the Providence Code of Ordinances, which went into effect the same day [requiring fire & police retirees to switch to Medicare at age 65.]

***

Many police and firefighter retirees filed suit challenging the ordinance, and most settled with the City following court-ordered mediation. The settlement agreement required the police and firefighter retirees to enroll in Medicare upon eligibility at age sixty-five, but it also required the City to pay fees associated with late enrollment to Medicare for some retirees as well as various supplemental options to Medicare, thereby bringing the overall health coverage closer to what it had been under the previous plans for the police and firefighter retirees prior to the new City ordinance.

However, sixty-seven retirees opted out of the settlement (the plaintiffs) and pursued their civil claims through a bench trial. The trial justice ultimately found in favor of the City on all of the plaintiffs' claims, and the plaintiffs appealed from the final judgment.

***

The trial justice placed great emphasis on the testimony of Margaret Wingate, the City's Manager of Benefits, who administered what she characterized as a 'hybrid plan….' As Ms. Wingate herself testified, however, the hybrid plan pertained only to those retirees who had opted into the settlement.

***

We are also mindful that our decision marks but another chapter in the protracted dispute between the City of Providence and its retired firefighters and police officers. In addition, we see little to be gained by further litigation on the issue of health care benefits for these plaintiffs. We find no error in the trial justice's pronouncements that the 2011 Medicare Ordinance was passed for a significant and legitimate public purpose, that the City did not consider the change to retirees' health care benefits on par with other policy alternatives, and that the change was reasonable under the circumstances. It is our opinion, however, that she misconceived the evidence with respect to the health care benefits that the plaintiffs were receiving from the City and that this error informed her findings that the plaintiffs would continue to receive equivalent health care coverage."

Legal Lesson Learned: State can enact a statute authorizing municipalities to require retirees to switch to Medicare coverage, but litigation may lead to settlements and Court decisions requiring the "gap" insurance is also paid by the municipality.

File: Chap. 7, Sexual Harassment

NY: FEMALE FF ON RUN – MALE FF MASTERBATED INTO PANTS SHE HAD LEFT AT STATION – NO PAY AWAITING ARBITRATION

On July 17, 2020, in the case In The Matter Of Thomas Cacone v. City of Utica, the Supreme Court of State of New York, Appellate Division, Judicial Department, held (5 to 0) that trial court improperly ordered the FD to put the firefighter on paid leave awaiting the arbitration more than 30 days; the arbitration was delayed because the firefighter sought disciplinary records of another firefighter who apparently did similar misconduct. Court wrote: We agree with respondents that petitioner is not entitled to reinstatement or back pay because petitioner was solely responsible for the delay."

Facts:

"While petitioner was working at the fire station one day, he masturbated and ejaculated onto the 'inside crotch area' of a pair of pants belonging to an unsuspecting female firefighter who was away from the station responding to a call. Several firefighters who had access to the pants voluntarily provided a buccal swab and were cleared by DNA testing. Petitioner refused to provide a buccal swab until he was compelled to do so by court order. Subsequent DNA testing confirmed that the semen belonged to him. Respondents brought charges against him pursuant to Civil Service Law § 75, and suspended him without pay for 30 days. Petitioner demanded arbitration pursuant to a collective bargaining agreement, and a hearing commenced. At the close of respondents' case, petitioner demanded the disciplinary file of respondent John Kelly, who had been disciplined for engaging in similar sexual misconduct at work while employed by the UFD. Respondents refused to produce the file on the ground that personnel records of firefighters are confidential pursuant to Civil Rights Law § 50-a, and may not be released without a court order unless the firefighter consents to their release, which Kelly did not. The arbitrator then adjourned the hearing so that petitioner could apply for a court order, and respondents suspended petitioner without pay for an additional period of time pending the resumption of the hearing.

***

Civil Service Law § 75 provides that a public employee may be suspended without pay for a maximum of 30 days while awaiting a hearing on disciplinary charges (*see* § 75 [3]). Although an employee suspended without pay for a longer period under those circumstances is generally entitled to receive back pay, he or she

waives any claim to back pay if a delay in the disciplinary hearing beyond the 30-day maximum is 'occasioned by' his or her own conduct.

***

Petitioner's attorney is an experienced practitioner familiar with Civil Rights Law § 50-a. As such, petitioner's attorney either knew or should have known that, in order to secure production of the file, section 50-a required that he obtain either Kelly's consent or a court order. Indeed, respondents publicly announced in multiple press releases several months before the arbitration that Kelly's file was confidential pursuant to section 50-a."

Legal Lessons Learned: The conduct described is totally unacceptable.

File: Chap. 8, Race Discrimination

CT: FF ALLEGED RACE DISCRIM – TWO INCIDNTS - NO ALLEGATION RACE "PERMEATED OVERALL WORKING ENVIRONMENT"

On June 29, 2020, in Tony Milledge v. City of Hartford, et al., U.S. District Court Judge Jeffery Alker Meyer, District of Connecticut, dismissed the lawsuit by African American firefighter with 20 years on Hartford FD. He filed complaint alleging two incidents, but lacking specific on how these incidents were related to race. The Court wrote: "What is lacking, however, are facts to suggest that any of the alleged abuse was *because of* Milledge's race. Milledge does not recite any statements by the two supervisors to suggest that they picked on him because of his race. Nor does Milledge allege facts to suggest that race considerations generally permeated the overall working environment at the fire department—for example, that supervisors at the fire department made any remarks or engaged in any conduct reflecting race-based animus or stereotypical assumptions about race." The Court will allow him to file an amended complaint: "If Milledge chooses to file an amended complaint, the amended complaint should not only state additional facts to support an inference of discriminatory motive but also to show that the alleged acts of abuse created a hostile work environment."

Facts:

"Milledge is an African-American male who has more than 20 years of service as a firefighter for the City of Hartford…. According to Milledge, he was subject to race discrimination in two separate incidents that occurred in March 2018.

****

In the first incident, 'plaintiff was on a call and Chief Tenney, a younger Caucasian supervisor, began harassing the plaintiff, yelling and screaming at him inches from his face…' The complaint says nothing more about this first incident.

***

In the second incident, 'plaintiff was on another call and was physically assaulted by Chief Jim Erickson, a Caucasian supervisor….' The complaint says nothing more about this second incident.

***

For Title VII claims of race discrimination, a complaint must allege enough facts to allow for a plausible inference that the employer took adverse action against an employee and that the employer did so because of

the employee's race. No matter how strongly a plaintiff may believe he has been victimized for improper discriminatory reasons, he must allege facts suggesting this to be so. As the Second Circuit has made clear, 'the facts alleged in the complaint must provide at least minimal support for the proposition that the employer was motivated by discriminatory intent.' *Vega v. Hempstead Union Free Sch. Dist.*, 801 F.3d 72, 85 (2d Cir. 2015).

***

Milledge alleges that the defendants "have never tolerated such abuse of Caucasian firefighters by their superior officers." Doc. #1 at 3 (¶ 10). But because Milledge does not allege any of the surrounding factual context for the acts of abuse against him, it is impossible to evaluate whether Caucasian firefighters were ever in similar situations and whether the two supervisors at issue treated Caucasian firefighters more favorably than Milledge. As a general rule, when a plaintiff seeks to raise an inference of discrimination by means of comparing how he was treated to how the employer treated others, the plaintiff must allege facts to show that he was similarly situated in all material respects to the individuals with whom he seeks to compare himself. *See Brown v. Daikin Am. Inc.*, 756 F.3d 219, 230 (2d Cir. 2014). Milledge has not done so.

***

Milledge also alleges that two lieutenants rebuffed him when he complained about one of the incidents of abuse. But because Milledge does not allege that he told the lieutenants that the supervisor's abuse was based on race, the fact that the lieutenants rebuffed his complaint does nothing to suggest that racial considerations had anything to do with the lieutenants' rejection of his claim.

***

Ultimately, Milledge suggests that race discrimination may be inferred simply from the fact that he is of a different race than the two supervisors who yelled at him and assaulted him. But a claim for discrimination is not made plausible simply because the person who has engaged in an adverse action is of a different race than the plaintiff. 'Law does not blindly ascribe to race all personal conflicts between individuals of different races,' because '[t]o do so would turn the workplace into a litigious cauldron of racial suspicion.' *Hawkins v. PepsiCo, Inc.*, 203 F.3d 274, 282 (4th Cir. 2000). Thus, '[t]he mere fact that [supervisors] were of a different race than [plaintiff] . . . is insufficient to permit an inference of discrimination,' because '[u]nder a contrary rule, federal anti-discrimination laws would be implicated every time an employee suffered an adverse employment action at the hands of a supervisor of a different race, religion, sex, national origin, or, conceivably in some cases, age or disability status.' *Coulton v. Univ. of Pennsylvania*, 237 F. App'x 741, 747-48 (3d Cir. 2007)."

Legal Lesson Learned: FDs can help avoid litigation by conduct prompt, thorough internal investigations of all complaints (after receipt of written complaint).

File: Chap. 9, FMLA

IL: LT. TOOK FMLA LEAVE FOR A MONTH – FIRED AFTER FD INVESTIGATION - FAILURE TO PAY HIS SHARE OF SHIFT'S MEAL FUND

On July 9, 2020, in Melvin H. Brown v. UChicago Argonne LLC, U.S. District Court Judge Gary Feinerman, Northern District of Illinois, Eastern District (Chicago) granted summary judgment to the employer. The Court wrote: Brown's position that Argonne inadequately investigated Weber's dinner fund complaint is, even if supported by the record, insufficient to establish pretext given the absence of evidence suggesting that Argonne did not sincerely believe that Brown had abused his authority in failing to reimburse Weber."

Facts:

"Brown began work as a firefighter at the Argonne Fire Department in April 1997…. In 2010, he was promoted to Lieutenant and assigned to the Department's First Battalion…. In April 2016, George Hyland became the Department's Fire Chief.

***

Pertinent here, Brown also contends that he was fired [on June 6, 2017] for taking FMLA leave. On February 12, 2017, Brown was admitted to the hospital and diagnosed with medication-induced rhabdomyolysis, a malady involving the breakdown of muscle fibers…. On March 15, 2017, Brown's physician informed Argonne that he could return to work on March 20, and Brown did so that day.

***

Argonne submits that it fired Brown not for taking FMLA leave, but instead because an 'investigation revealed that he had abused his authority by failing to reimburse a subordinate Firefighter (Chris Weber) for the cost of meals (theft), engaged in intimidation, and provided factually inaccurate information during Argonne's investigation….' Brown regularly participated in the First Battalion's 'dinner fund' or 'meal fund….' Ordinarily, the battalion would discuss in the morning what its members wanted for dinner that evening and would decide which firefighter would obtain the meal, and then all participants would give money to that firefighter.

***

In August 2016, Weber joined the First Battalion and volunteered to do much of the meal shopping. Id. at ¶ 57. At some point, Weber reported to Chief Bamonti that Brown had failed to make several contributions to the meal fund…. Weber then sent an email to Brown seeking repayment of $52, although Weber later admitted his notes reflected that Brown actually owed $59…. Brown did not respond to Weber's email."

Legal Lesson Learned: FMLA statute includes protection against retaliation, but employee must still prove that the discipline imposed was in fact retaliation.

Note: Fire Department at Argonne National Laboratory, which is managed by the University of Chicago.

File: Chap. 11, FLSA

GA: COMP TIME – FIREFIGHTERS SUED FD FOR DENIAL LEAVE - SETTLED, 14 FF PAID $1000 EACH - NEW FD POLICY – ATTY FEES

On July 16, 2020, in Robert Milie, et. al. v. City of Savannah, U.S. District Court Judge R. Stan Baker, Southern District of Georgia, the Court pursuant to the settlement agreement approved attorneys' fees. Court wrote: For the reasons set forth below, the Court finds the following across-the-board reductions of Plaintiffs' requested hours to be appropriate: a thirty percent (30%) reduction to the hours billed in Plaintiffs' initial fee petition …; a sixty percent (60%) reduction to the hours billed in Plaintiffs' first supplemental request…; and a one-hundred percent (100%) reduction to the hours billed in the second supplemental request….."

Facts:

"Plaintiffs brought claims against the City of Savannah to challenge the City's deprivation of their right to use 'accrued compensatory time' under the FLSA. (Doc. 1, pp. 4-5.) Plaintiffs alleged that the City often denied their requests to use their accrued time under the justification that approval would 'require [an] overtime [payment] to another employee.' (Id. at p. 5.) Plaintiffs argued that this conduct violated Section

207(o)(5) of the FLSA, which provides that 'an employee of a public agency who has accrued compensatory time off . . . 'shall be permitted to use such time within a reasonable period after making [a] request . . . .'" (Id. at p. 7.)

***

The parties were eventually able to negotiate a settlement agreement (hereinafter the 'Agreement'), and on August 2, 2018, the parties filed a Joint Motion to Approve FLSA Settlement, (doc. 41). In the Agreement, the parties agreed on a new fire department policy that addressed the use of compensatory time. (See doc. 41-1; doc. 43-1, p. 3.) The policy delineated how and when firefighters were to properly submit requests to use compensatory time and dictated the circumstances under which a request could be denied. (Doc. 43-1, pp. 3-4.) The City also agreed to pay each of the remaining fourteen Plaintiffs 'the equivalent of two overtime shifts,' amounting to a little over $1,000 each ($15,625.44 total), and Plaintiffs were allowed to retain all of their previously accrued compensatory time for future use.

Legal Lessons Learned: Comp time requests can sometimes lead to disputes; helpful to have a clear process in the CBA or FD policy.

Note: While researching this case, found this disturbing article about named plaintiff.
October 12, 2018, SAVANNAH, GA (WTOC) - The president of the Savannah Professional Firefighters Association has been arrested and is awaiting extradition to Colorado. Robert Milie is in the Chatham County Jail on an extradition hold. The hold is for a sexual assault charge, according to the El Paso County Sheriff's Office in Colorado.

File: Chap. 13, EMS

TX: PARAMEDIC IN BACK OF AMBULANCE – SEVERELY INJURED - OVERWEIGHT TRUCK DUMPED LOAD – MENTAL ANGUISH

On June 4, 2020, in Julio Edwin Martinez; Lone Star Disposal (Texas), LLC; and Lone Star Disposal, L.P. v. Jennifer Kwas, the Court of Appeals for the First District of Texas held (3 to 0) that the civil jury verdict in favor of Paramedic Kwas is affirmed: $1.1 million, including $700,000 for future pain and mental anguish, and $250,000 in punitive damages for gross negligence of Lone Star. A paramedic for 26 year, the mental anguish led her to resign as a medic. The Court wrote: We conclude that the evidence presented at trial supports a conclusion that the jury could have formed a firm belief or conviction that Lone Star was grossly negligent in its training and supervision of its drivers, including Martinez." https://www.txcourts.gov/media/1447243/181085f-1.pdf

Facts:

"She indicated that she resigned because she had anxiety 'every day' that she had to step foot in an ambulance and because she was 'mentally messed up going to work.' She testified that when she began working in La Porte as a paramedic, her 'goal was to be chief,' but she worked at the time of trial in business development at an imaging facility. She testified, 'I know that I've given up 26 years of what I've done. I don't think that's right.' She testified that, although she had considered herself physically and mentally strong, she felt that she had lost some of that belief, stating, '[I]f I was as strong as I was, I would still be working as a paramedic.'

***

Martinez [dump truck driver] testified that he did not know how much weight he was hauling on the day of the crash. He stated that Lone Star told him not to haul overweight loads, but it never provided him with any means to weigh his loads or with any additional training on the matter.

***

Martinez testified that he knew the weight of a truck impacted its ability to stop and turn. He testified that he had a lot of experience driving 'roll-off' dump trucks, which involved a separate container that would be loaded with material. After loading, the container would be pulled or rolled onto the bed of the dump truck and hauled. Martinez testified that he believed it was safe to haul a load as long as his truck could pull the roll-off container onto the bed of the truck.

***

[Paramedic] Kwas stated that when the crash occurred, she felt the ambulance 'jerk' because she was unrestrained at the time, caring for a patient. She testified that she 'felt some kind of contact' and then she felt another contact, which she thought must have been 'the concrete coming on the box of the ambulance' and that was when she 'flew into the back of the stretcher.' Kwas testified that she sustained serious injuries to the left side of her chest, requiring treatment at a trauma center. She testified that she experienced a lot of pain and that it was four to six months before she was able to begin returning to her normal activities. She also stated that she experienced sleeplessness and anxiety because of the accident. She ultimately decidedshe could no longer work as a paramedic in an ambulance because of the stress and anxiety caused by the accident."

Legal Lesson Learned: The unrestrained paramedic suffered terrible physical and mental injury; see article on restraint systems for EMS in the back of the box.

Note: Several new restraint products now on the market. For example, see this: "IMMI Launches Per4Max Restraint for EMS Providers (May 3, 2019): An estimated 4,500 ambulances are involved in accidents every year, but 84% of emergency medical technicians do not wear their seat belts because they restrict movement while treating a patient.* IMMI's Per4Max allows them to reach, stretch, and even stand up in their restraint if necessary. Patient safety is also improved when EMTs buckle up. They remain restrained in an accident and not thrown around the interior of the vehicle, possibly injuring the patient further."

File: Chap. 15, CISM, Mental Health

NJ: FF FAILED PSYCHOLOGICAL EXAM FOR CAREER POSITION – FORMER MARINE – MEDICAL DISCHARGE WITH PTSD – APPEAL DENIED

On June 12, 2020, in Frank Rivera v. Township of Cranford, the Superior Court of New Jersey, Appellate Division, held (unpublished opinion) that the jury's decision in favor of the Township is affirmed. The Court wrote: "Plaintiff's superiors denied ever hearing about any issues stemming from plaintiff's military service or any medical diagnoses or treatment. There is no evidence to support the conclusion that the persons responsible for deciding whether to appoint plaintiff as a career firefighter–Dolan and the Township Committee–had either engaged in making or had heard the negative comments."

Facts:

"Counsel stated the only facts before the jury were that the psychologist did not recommend the hiring of plaintiff because of his performance on the evaluation –the failure to answer the questions with honesty, the unwillingness to answer numerous categories of questions and plaintiff's defensive and belligerent demeanor during the evaluation.

***

In 2004, plaintiff began volunteering at the Township Fire Department as part of the Explorer program, which allows minors to learn about firefighting. The Fire Department consists of career paid firefighters and unpaid volunteer call firefighters. Both categories of firefighters are appointed by the Township Committee. In 2006, the Township Committee appointed plaintiff as a volunteer call firefighter. A call firefighter is not required to undergo a psychological evaluation prior to appointment. They cannot drive fire trucks, operate aerial equipment, operate the water pump or ladder, or respond to ambulance or medical transport calls. A call firefighter is not assigned a shift or required to work a minimum number of hours. They respond to calls when they choose to do so. In contrast, a career firefighter must work two twenty-four hour shifts each week.

***

In January 2008, plaintiff enlisted in the United States Marine Corps and took a four-year leave of absence from the Fire Department. He served in the Marine Corps until August 2012 at which time he was 'honorably discharged for medical reasons.' During his military service, plaintiff served in several overseas locations, including Kuwait and Iraq. He was disciplined twice for minor infractions and received alcohol counseling. During his service, plaintiff was diagnosed with post-traumatic stress disorder (PTSD) and traumatic brain injury (TBI). He underwent therapy through the Veterans Administration (VA) in 2012 and 2013 for his medical and psychological issues, and receives disability compensation from the VA.

***

When plaintiff returned home in 2012, he resumed serving as a call firefighter in the Township. He never told anyone at the Township or the Fire Department about the reason for his medical discharge from the Marines, or that he was diagnosed with PTSD or TBI.

***

Before the evaluation takes place, the Institute for Forensic Psychology (IFP) requests background information from the Fire Department about the candidate concerning "school, work, interpersonal, family, legal, financial, substance use, [and] mental health." The Fire Chief emails IFP the background information based upon his personal knowledge of the candidate. If the candidate satisfies all of the hiring requirements, the Township Committee finalizes the appointment by majority vote."

Legal Lessons Learned: PTSD is a difficult burden. Question: Would you allow the firefighter in this case to later take another psychological exam?

Note: See this article: Tips on how to pass your Firefighter Psychological Test (June 24, 2019): First, consider answering the questions briefly and honestly with the best of your ability. Secondly, before you answer any questions from the interviewer, take time to think and come up with the correct answer. Thirdly, don't rush with your answers, be calm consider the questions for some time, take a deep breath and offer your solutions.

File: Chap. 16, Discipline

NY: CAREER FF / UNION SECRETARY FIRED FOR PUNCHING VOL. FF IN FACE – COMBINATION FD - LAWSUIT DISMISSED

On July 10, 2020, in Brian McNamara v. The City of Long Beach, et al., U.S. District Court Senior Judge Denis R. Hurley, Eastern District of New York (Central Islip, NY) granted summary judgment to the City. The Judge found that the formal misconduct charges were proved in a three-day hearing before the City Manager, and plaintiff failed

to show that his activities as Union secretary, including articles he published, or that he was generally disliked by volunteer firefighters, was reason he was terminated. The Court wrote: Plaintiff picked up an audio recorder and went to the firehouse, where further altercations ensued, including the previously mentioned incident with Jacobi. Such behavior is unbecoming in any profession, and it is not surprising that Defendants would react adversely to it. Thus, for the foregoing reasons, Plaintiff has failed to show a material issue of fact as to a causal relationship between his allegedly protected speech or union membership and his termination."

Facts:

"The City utilizes a 'combined department' model for its fire protection service, which consists of both paid...and volunteer units…. Members of the volunteer unit supervise and command paid firefighters at emergency scenes but do not control the 'key terms and conditions of paid firefighters' employment….' Relations between the paid and volunteer units has 'been marked by rivalry and conflict….'

***

Defendants contend that Plaintiff began displaying signs of 'insubordinate and emotionally-unstable behavior, and had been critiqued or disciplined by his supervisors as a result' on June10, 2010 … and further recites that Plaintiff engaged in such behavior on August 27, 2011 and was issued formal charges and specifications on December 6, 2011…. Additionally, in March 2013, Plaintiff was charged with off-duty misconduct 'after he was arrested and charged with stalking a former co-worker,' John Ritter.

***

May 10, 2014 Incident

On May 10, 2014, Plaintiff attended a 'Fire Department installation and awards dinner' at The Sands in Lido Beach, New York…. Plaintiff was initially 'excluded from the invitation list, due to his open contempt for the volunteer fire department, and [its] chief, in particular…." Plaintiff was ultimately allowed to attend on the condition that he 'not embarrass the department….'

Plaintiff consumed five beers at the awards dinner…¨After dinner, the City provided a bus to transport LBFD members back to Long Beach, including to the 'all-volunteer firehouse in Long Beach known as the Indiana (a/k/a 'West End') Fire House, where an after-party was scheduled to take place….' Plaintiff was not 'explicitly invited to this after-party…." Plaintiff attempted to board the bus in The Sands parking lot but his 'access was blocked by a volunteer firefighter, ex-Chief Rick DiGiacomo….'

Another volunteer firefighter, Captain Jake Jacobi ('Jacobi'), told plaintiff he could not enter the bus…. A verbal altercation ensued and Jacobi pushed Plaintiff 'in the chest 'but not hard….'" '[T]he feuding parties were separated' and Lieutenant Christopher Gromley drove Plaintiff home….

Once home, Plaintiff changed out of his uniform into plain clothes and placed a digital audio recorder into his pocket…. Plaintiff walked over to the Indiana Firehouse, 'where he knew or reasonably should have known where DiGiacomo and Jacobi would be located…. Plaintiff took the audio recorder because of the 'friction' between himself and the volunteers earlier in the night, and 'in case something happened, [he] didn't want to be ganged up on and a lie be told by five separate volunteers making up the same lie....'

Plaintiff entered the 'Den' in the Indiana Firehouse and 'immediately walked to the location where Jacobi 'happened to be' which was at the bar….' As Plaintiff confirmed in his response to Defendants' Rule 56.1 Statement, '[o]nce inside the Indiana Firehouse a verbal altercation (triggered by plaintiff's presence) quickly spiraled into a physical altercation, which involved plaintiff punching Jacobi in the face…..'

Deputy Fire Chief Joseph Miller, who is also a Nassau County Police Sergeant, witnessed the event and 'attempted to prevent the verbal altercation from escalating into a [further] physical altercation by 'grabbing' plaintiff and pulling him towards the staircase to exit the Den….' A second round of verbal and physical hostilities ensued on the stairway, during which DiGiacomo called Plaintiff a coward and Plaintiff responded 'I'm not a coward! I came here and I'm a coward? (*Id*. ¶ 68.).

***

There is no dispute that Plaintiff had a pattern of misconduct separate from his allegedly protected speech or union membership, which served as a substantial motivating factor for his termination. Though his misconduct dates back to June 2010, most relevant to this action is Plaintiff's behavior at and following the installation and awards dinner on May 10, 2014, which included repeated verbal and physical altercations over the course of the night. Plaintiff admitted to having five beers at the dinner and not being comfortable driving home that night. After an initial altercation with volunteer firefighters on the bus after the dinner, Plaintiff went home. Instead of staying home and ending the altercation."

Legal Lessons Learned: Violent assault on a fellow firefighter, whether volunteer or career, is completely unacceptable.

File: Chap. 16, Discipline

KY: FF MET 17-YEAR-OLD AT FIRE STATION – CONVICTED HAVING SEX WITH MINOR - TOOK VIDEOS AND PHOTOS

On July 7, 2020, in United States of America v. William Michael Fields, U.S. District Court Chief Judge Danny C. Reeves, Eastern District of Kentucky, denied the defendant's motion for judgment of acquittal, or a new trial. The Court wrote: "Based on the foregoing, there was ample evidence from which the jury could have concluded that, on March 17 and 23, 2019, Fields employed, used, persuaded, induced, or coerced the minor victim to engage in sexually explicit conduct for the purpose of producing a visual depiction of that conduct and that the visual depiction was produced or transmitted using materials that were mailed, shipped, or transported in or affecting interstate commerce by any means, including computer." https://casetext.com/case/united-states-v-fields-198

Facts:

"While the United States did not present evidence that Fields physically forced or directed the victim to take any particular action, the government did present evidence indicating that Fields exerted power or authority over her. Fields was a 36-year old constable, firefighter, and teacher of emergency medical technician classes. Testimony indicated that Fields used his position to form a relationship with and influence the victim, a 17-year old girl, who was heavily interested in pursuing a career these fields. Accordingly, the jury reasonably could have inferred that, if the victim took the pictures and/or videos, she did so at the defendant's direction.

***

The victim became acquainted with Fields in early 2019 when visiting a friend at the fire station in Bourbon County, Kentucky. She also knew Fields through his involvement in Cynthiana Police Explorers—a program for children, like the victim, who were interested in careers in law enforcement. Fields sent the victim a text message on March 17, 2019, asking her to meet him. Fields met with the victim that night and gave her alcohol, which she consumed as Fields drove her to an ambulance storage facility in Paris, Kentucky. After arriving at the ambulance storage facility, the two walked around and looked at vehicles for a few minutes.

Then, Fields called the victim over to the back of an ambulance and the two had sexual intercourse. Fields asked the victim if he could take a video of the sexual activity. The victim gave Fields her phone, which he used to make video recordings of the encounter. The victim discovered the videos on her phone the next morning, and also saw on Snapchat that the defendant had sent the videos to himself.

***

The victim also testified that, on March 23, 2019, she had been hanging-out at the fire station where she sat on Fields' lap and he gave her a police radio. Later that evening after she had returned home, Fields sent her a text message asking her to come back to the fire station. She complied and the two went to an EMT training facility, where they had sexual intercourse. Fields video-recorded the encounter on the victim's phone. It is undisputed that the victim was 17-years-old at the time of both events.

***

Fields contends that the Court erred in instructing the jury on the definition of 'uses' because the 'United States failed to introduce any evidence whatsoever that Fields directed anyone else to photograph or take video of the minor engaging in sexually explicit conduct.' [Record No. 64-1] However, Fields' defense strategy was that the minor victim took the videos and/or photos of her sexual encounters with Fields. Based on the position of the victim's body, which was visible in the videos, it appeared unlikely (if not impossible) that she could have taken the subject videos. However, [defense counsel] Spedding suggested, through his cross-examination of Dr. Michael Littrell, that the victim may have taken the videos with the assistance of a 'selfie-stick' or tripod."

Legal Lesson Learned: A firefighter having sex with a minor can be convicted of a federal offense if a video or photos is posted on Internet.

Note: See U.S. Department of Justice Press Release on this case: "Former Harrison County Constable Convicted of Using a Minor To Produce Sexually Explicit Images and Videos" (June 2, 2020):

"Fields will appear for sentencing on September 4. He faces a minimum of 15 years and a maximum of 60 years in prison. However, the Court must consider the U.S. Sentencing Guidelines and the applicable federal sentencing statutes before imposing a sentence. This case was brought as part of Project Safe Childhood, a nationwide initiative to combat the growing epidemic of child sexual exploitation and abuse launched in May2006 by the Department of Justice."

File: Chap. 16, Discipline

NJ: PENSION FRAUD – FF SENTENCED 7 YEARS IN PRISON – MARSHAL ARTS INSTRUCTOR – VIDEO OF COMPETITION

On June 30, 2020, in State of New Jersey v. Shane Streater, the Superior Court of New Jersey, Appellate Division, held (2 to 0) that jury's conviction of the former Camden, NJ firefighter is affirmed. The prosecution called as witnesses two medical doctors who had submitted letters in support of his disability; they told the jury that after watching the video they were never informed of his martial arts activities. The Court wrote: "Here, the State adduced abundant evidence of defendant's fraud, including the testimony of three doctors who examined him and stated defendant's actions on the videotape of his martial arts competition were inconsistent with defendant's complaints of pain and disability."

Facts:

"Defendant applied for an accidental disability retirement pension in 2009, following two on-the-job accidents in 2007 and 2008… Defendant submitted reports from two doctors, Drs. John Gaffney and Ralph Cataldo, in support of the application, and the Board of Trustees (the Board) of the Police and Firemen's Retirement System (PFRS) had defendant evaluated by a third doctor, Dr. Lawrence Barr. In February 2010, the Board denied defendant's application for an accidental disability pension but awarded him ordinary disability retirement benefits because of the condition of his lumbar and cervical spine, effective June 1, 2009.

***

In the interim, defendant appealed the Board's denial of his application for accidental disability benefits, and the matter was forwarded to the Office of Administrative Law (OAL) as a contested case. Douglas Smarr, an investigator for the Department of Law and Public Safety's Debt Recovery Section, was assigned to defendant's case. Smarr found that defendant was listed as an instructor at Diamond Mixed Martial Arts gyms in Philadelphia and Egg Harbor Township.

***

During a computer search, Smarr found a video of defendant competing at a Grapplers Quest Mixed Martial Arts tournament on June 12, 2010….

***

Although the exact date is unclear from the record, Dr. Barr reviewed the martial arts competition video and, in a February 2012 supplemental addendum to his earlier reports, the doctor changed his opinion regarding defendant's disability. Dr. Barr wrote that having watched defendant 'in active competition in an open fighting match,' defendant was 'more than capable of working as a firefighter[]'and is 'not totally and permanently disabled.' [The Medical Board watched the video, revoked the pension, and referred the case to the New Jersey Attorney General for prosecution.]

***

Defendant's opponent in the competition video, Daniel Boyle, testified before the jury. He narrated the various moves displayed on the video and described his training routine before a competition. According to Boyle, the Advanced Absolute division, in which he and defendant competed, required a greater skill level and permitted the use of maneuvers that were too dangerous for lesser skill levels.

***

Dr. Gaffney testified about his prior examinations of defendant and opinions regarding defendant's neck and back injuries. The doctor viewed the competition video and concluded defendant's performance in 2010 was "obviously inconsistent" with the limitations and pain that defendant claimed he was experiencing in 2009 and 2011. Dr. Cataldo testified regarding his evaluation of defendant in 2010. After watching defendant's competition video in court, the doctor had no doubt defendant's performance was 'inconsistent' with his reports regarding level of pain and physical limitations at the time of the examination.

Dr. Barr also testified about his evaluation of defendant. He said that if he had known about defendant's ability to carry out the activities seen on the video; he would not have opined that defendant was disabled.

***

Defendant did not testify, but Diamond testified that defendant trained and taught at the gym before he was injured. Although defendant was listed as an instructor on the gym's website, Diamond said that was 'for marketing,' as defendant 'wasn't actually working [at the gym] at the time[.]' Defendant obtained his black belt in Brazilian jiu jitsu in 2010, after what Diamond testified was a 'verbal test.' Diamond was shocked to

learn defendant had entered the 2010 competition because such activities were inconsistent with what defendant said about his physical limitations."

Legal Lessons Learned: The 7-year prison sentence certainly "sends a message."

Note: Trial Court judge also ordered the defendant to pay $82,488.22 in restitution.
See newspaper coverage:
Watch the YouTube video and TV story (March 18, 2015);
"Ex-N.J. firefighter convicted of stealing disability pension while earning black belt" (April 12, 2016).