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Dec. 2020 – FIRE & EMS LAW Newsletter

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FREE ONLINE LIBRARY OF CASE SUMMARIES – 18 Chapters (Newsletter cases 2018 – Present):
Updating 18 Chapters in Prof. Bennett's textbook: FIRE SERVICE LAW

DEC. NEWSLETTER - 22 RECENT CASES REVIEWED

File: Chap. 1, American Legal System

NY: HOUSE FIRE - SPONTANEOUS COMBUSTION - OILY RAGS HARDWOOD FLOORS – CONFLICTING EXPERTS - CASE PROCEED

On Nov. 25, 2020, in State Farm Fire & Casualty Company, as Subrogee of Yolanda Clarke v. Real Wood Fabricating, LLC, the Appellate Division of the Supreme Court of the State of New York, held (5 to 0) that the trial court properly denied summary judgment to the plaintiff insurance company and also to defendant Real Wood Fabricating.

> "After paying Clarke over $389,000 for the property damage caused by the fire, plaintiff, as subrogee of Clarke, commenced this action against defendant, alleging that defendant negligently caused the fire by failing to remove combustible floor materials from the garage. Following joinder of issue, plaintiff moved for summary judgment on the complaint, relying on the opinions of Holter and Thomas and the deposition testimony of Clarke and McCarty. Defendant opposed the motion and cross-moved for summary judgment dismissing the complaint, submitting an affidavit of Jason Karasinski, president and owner of Fire Research & Technology Inc., who was retained 'to review the investigation of [the] fire.' Karasinski concluded that the reports prepared by Holter and Thomas were speculative and that their investigations failed to follow the standards promulgated by the National Fire Protection Association (hereinafter NFPA). Supreme Court denied both motions, finding that the conflicting expert opinions presented issues of fact and credibility as to causation. Defendant appeals and plaintiff cross-appeals.
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> "We affirm. The record demonstrates that all three experts were duly qualified by their education, training and experience to conduct a fire scene investigation."

Facts:

> "This action arises out of a fire that occurred on March 17, 2017 at the home of Yolanda Clarke, which was insured by plaintiff. Prior to the fire, Clarke had hired defendant to refinish the hardwood floors in the home.
>
> Miles McCarty — defendant's owner who performed the project — completed the floor refinishing earlier in the day, using gloves and disposable rags to apply the stain. After the project was finished, Clarke and her husband, who had been staying in a hotel during the four-day project, returned home that evening to find the house on fire and the fire department at the scene. At the request of the local fire chief, an investigation was conducted early the next morning by the Division of Homeland Security Engineering Services. The ensuing report, prepared by investigator Erik Holter, concluded that the fire originated in the left rear area of the garage and was caused by the spontaneous combustion of floor refinishing items left therein. Holter concluded that the fire was accidental. Plaintiff retained Kevin A. Thomas from NEFCO Fire Investigations, who investigated the scene four days later and reached the same conclusion.
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> Notably, and in direct contrast, McCarty testified that he removed the four pounds of used rags and gloves from the home and took the items to his shop, where they were spread out to dry prior

to disposal. Given this key factual conflict as to whether McCarty left the rags in the garage or not, plaintiff did not establish defendant's liability as a matter of law."

Legal Lesson Learned: With conflicting expert testimony, the case will go to trial.

Note: Must be very careful with oil rags and spontaneous combustion. The Court noted the report from Kevin A. Thomas from NEFCO Fire Investigations: "Thomas was more specific, concluding 'that the fire occurred as a result of the spontaneous heating and the eventual ignition of stain or thinner soaked rags that were inadvertently left behind by the floor restoration company.."

File: Chap. 1

MA: SPRINKLER LAW – WHEN CITY ADOPTS STATE LAW, UNLICENSED "SOBER HOMES" – 6+ RESIDENTS MUST COMPLY

On Nov. 23, 2020, in Crossing Over, Inc. v. City of Fitchburg, the Appeals Court of Massachusetts upheld (3 to 0) the trial judge's decision upholding Automatic Sprinkler Appeals Board, and the Fire Chief's March 8, 2017 letter requiring sprinklers be installed since home has 8 residents. Case remanded to trail judge concerning whether statute violates federal or state laws discriminating against disabled.

"Crossing Over notes that G. L. c. 148, § 26H, carves out from the obligation to install sprinklers "fraternity houses or dormitories, rest homes or group residences licensed or regulated by agencies of the commonwealth," and suggests that the carve-out means that the Legislature either intended to relieve group homes and lodging houses of the obligation to install sprinklers, or that different treatment should be afforded group homes. Lodging houses for the disabled, Crossing Over argues, should be treated in the same manner. The premise is incorrect. The distinction drawn between the lodging houses and other congregate living arrangements in G. L. c. 148, § 26H, preserves the regulatory authority granted to State agencies and municipalities over licensed group homes, dormitories, or fraternities, but does not generally exempt them from fire safety regulation."

***

Sober homes, however, are not licensed by the Commonwealth. Instead they are subject to a voluntary State accreditation and training program, G. L. c. 17, § 18A, inserted by St. 2014, c. 165, § 37; accreditation is required if the sober home is to receive referrals from State agencies. G. L. c. 17, § 18A (h). Contrast G. L. c. 111, § 73 (providing fines for operation of rest home without license). General Laws c. 148, 26H, thus has the effect of extending the sprinkler statute to lodging houses that are sober homes; other statutes and regulations extend varying levels of fire safety standards to other congregate living arrangements."

Facts:

"On November 4, 2002, the city accepted the provisions of G. L. c. 148, § 26H, which (as described above) requires lodging houses to be equipped with sprinklers. On March 8, 2017, the chief of the fire department sent a letter to Crossing Over to inform it that the fire department had determined that Crossing Over's sober home was a lodging house and that the home was not in compliance with the statute because it did not have automatic sprinklers.

***

Following an unsuccessful attempt to convince the fire department to reverse its determination, Crossing Over timely appealed to the board…. After an evidentiary hearing, the board affirmed the decision of the fire department, stating that '[t]he [b]oard believes that the legislative intent of both [G. L.] c. 148, [§] 26H[,] and c. 40A, [§] 3[,] can be applied in a harmonious manner. The purpose of [G. L.] c. 40A, [§] 3[,] is to protect certain identified persons or groups of persons from discrimination by means of the adoption of local, 'home grown' land and building use restrictions that target said groups differently from other similarly situated groups. . . . [T]he enhanced fire protection requirements of [G. L.] c. l48, [§] 26H[,] is a [S]tate statute, enacted by the Massachusetts Legislature. It is not a creation of a municipal local zoning authority acting pursuant to the [G. L.] c. 40A, [§] 3[,] methodology.'

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Crossing Over timely filed a complaint in the Superior Court alleging violations of G. L. c. 30A, § 14; the Federal Fair Housing Act, 42 U.S.C. §§ 3601, et seq.; the Americans with Disabilities Act, 42 U.S.C. §§ 12101, et seq.; and G. L. c. 151B, § 4. After substantial motion practice, a judge of the Superior Court also concluded that 'G. L. c. 148, § 26H, governs and applies to this [p]roperty which is being used as a lodging house and that the anti-discrimination provision of [the] Zoning Act [contained in G. L. c. 40A, § 3,] does not invalidate the application of the sprinkler law in a sober house sheltering eight disabled persons,' because '[t]he [c]ity's adoption of this [S]tate statute does not then transform it into a local law or ordinance' covered by G. L. c. 40A, § 3."

Legal Lesson Learned: State sprinkler code can be enforced not only against state-licensed facilities, such as rest homes and group mental health facilities, but also to unlicensed "sober houses" voluntarily seeking State accreditation in order to receive patient referrals from State agencies.

Note: The Court described how fire codes nationwide have expanded after tragic fires, including the Triangle Shirtwaist Factory Fire in New York (1911 – 146 died), and the Cocoanut Grove nightclub fire in Boston (1942 – 492 died). [Footnote 5.] Sprinkler codes in Massachusetts were also expanded after tragic fires.

"The Commonwealth's sprinkler laws reflect a patchwork of requirements enacted, seriatim, in response to various tragedies. '[F]ollowing a fire in a luxury high rise hotel that killed nine firefighters,' MacLaurin v. Holyoke, 475 Mass. 231, 245 n.33 (2016), "automatic sprinklers were first required in 1972, in new high rise buildings throughout the Commonwealth, for buildings built after March 1, 1974. See G. L. c. 148, § 26A; St. 1973, c. 395, § 1." Id. at 245. "In 1982, following a deadly fire in Fall River, the commercial sprinkler provision, applicable to new nonresidential buildings of more than 7,500 square feet, and existing such buildings when they underwent 'major alterations,' was adopted." Id., discussing G. L. c. 148, § 26G, inserted by St. 1982, c. 545, § 1. "[I]n 1986, after a major fire in the Prudential Center in Boston, sprinklers

were required in existing, and not just new, high rise buildings across the Commonwealth, G. L. c. 148, § 26A 1/2, with a ten-year phase-in period. St. 1986, c. 633, § 2." (Footnote omitted.) MacLaurin, supra. The sprinkler requirement for lodging houses at issue in this case was enacted within two years of the 1984 Elliot Chambers rooming house fire, a fire in Beverly in which fifteen people died and fourteen more were injured. See G. L. c. 148, § 26H, inserted by St. 1986, c. 265; Ortega, 1984 Beverly Fire Etched into Memory of Witnesses, Boston Globe (July 4, 2014), https://www.bostonglobe.com/metro/2014/07/03/three-decades-later-beverly-rooming-house-fire-that-killed-leaves-legacy-loss-and-reform/PljEbDRo6WmiAs5L84MRNP/story.html [https://perma.cc/VXQ7-R5NF]."

File: Chap. 2, LODD / SAFETY

MI: DEPUTY CHIEF OBTAINED PROTECTIVE ORDER – CIVILIAN NO LONGER ALLOWED 2 STATIONS - MUST FEEL THREATENED

On Nov. 19, 2020, in RS, Petitioner v. AH, Respondent, the State of Michigan Court of Appeals held (3 to 0) that the trial court should not have issued a Personal Protective Order for stalking against the civilian (1-year; expired July 18, 2020) because the Deputy Chief testified that he did not feel emotional distress, just wanted it the harassment stopped.

> "In light of the record, we conclude that petitioner failed to meet his burden of proof for obtaining the PPO. Specifically, in order to demonstrating stalking, MCL 750.411h(1)(d), petitioner had to show harassment that included 'repeated or continuing unconsented contact that would cause a reasonable individual to suffer emotional distress and that actually causes the victim emotional distress.' MCL 750.411h(1)(c). The stalking must actually cause the individual to feel terrorized, frightened, intimidated, threatened, harassed, or molested. MCL 750.411h(1)(d). However, when petitioner was questioned on cross-examination regarding how the Facebook written and video posts impacted him, he testified, 'I didn't give it much thought at all, I just know that this is very odd, and this is very concerning to me that he's posting anything about me, and driving down my street." More importantly, when petitioner was expressly asked whether respondent harassed and threatened him, he replied, "No, I claimed exactly what I stated her[e].'"

Facts:

> "On June 17, 2019, petitioner, a deputy chief with the Detroit Fire Department (DFD), filed a petition for a nondomestic PPO against respondent, a freelance photographic journalist. The petition alleged that, in his professional capacity, petitioner directed fire station E-35 that it was not to allow respondent on the station property or equipment.
>
> On June 17, 2019, [Deputy Chief] alleged that respondent posted a 'challenge' for the men to meet at Sindbads, a local restaurant, on Facebook. Petitioner also represented that respondent posted a video of respondent driving by petitioner's home as well as video of a barrel on fire in the middle of the afternoon in the area behind petitioner's Dearborn home. Petitioner indicated

that he filed an incident report with the Dearborn police, but it was suggested that he pursue a PPO. The ex parte petition was denied, and a hearing was scheduled.

On July 18, 2019, the hearing was held on the PPO request. Petitioner proceeded *in propria persona* [without an attorney] but respondent was represented by counsel. Petitioner testified that he is the deputy chief of DFD. In early June 2019, petitioner was directed by Deputy Fire Commissioner Dave Fornell to 'shut down' activity in which respondent was bringing beer to and hanging out at firehouses as well as riding the rigs and apparatus. Although respondent was not a firefighter, he apparently was friends with some firefighters. Consequently, petitioner instructed the firefighters at two firehouses that respondent was not allowed on the firehouse property or the apparatus.

Shortly thereafter, petitioner was informed by other DFD employees that respondent posted a letter on his Facebook page known as Southeast Michigan Fire and Weather. The letter stated:

> [A]ttention [petitioner]. I am pretty sure you will see this. First of all, I'm flattered you think about me so much. I'll throw this out there, since you like to run around behind my back, talking about me, calling me the eastside serial killer. Why don't we chat? Sin[d]bads at 9:15 p.m. Sunday night. I'll even buy your first drink if you are man enough to show. I will meet you by valet booth. I'll assume since the valet has spotted you there, you know where - where I'm referring to.

Petitioner believed that letter was posted June 13, 2019. He learned of a second Facebook post purportedly by respondent that stated:

> I accidentally deleted the post, attention [petitioner]. I know [you] will read this or hear about it. That being said, I know the things you say behind my back. You have taken a lot from me, but you can't hurt me anymore. All you can do is stop me from going to firehouses to see my friends. But, you can't stop them from coming to see me. Why don't you be a man, meet me at Sin[d]bads valet booth this Sunday at 9:15 p.m. at the valet booth. We can go in, grab a drink, or food on me, and chat. This is in no way implying any form of physical altercation, unless of course, you're afraid of a little buff.
>
> I will assume you know where it is * * * seeing as the valets have spotted you there while I'm at work. I'm done being picked on by you. I'm only a civilian. Shame on you to use your powers to bully me.

Petitioner also played two videos for the court that he thought were recorded by respondent. [Not clear how the Deputy Chief got copies of these videos on his cell phone]. As described by petitioner, the first video showed respondent driving in Dearborn, near petitioner's home. However, petitioner learned from the Dearborn police that respondent lived in St. Clair Shores. The video also showed a barrel on fire in an alley 'almost directly behind [petitioner's] house.' The second video showed respondent waiting for petitioner at Sindbads, captioned with: "I am a man of my word."

[At the PPO hearing] When asked if petitioner was alleging that respondent harassed and threatened him, petitioner replied, 'No, I claimed exactly what I stated her[e].' Petitioner had no indication that respondent had ever approached him in public or private and stated, 'Not that I'm aware of. I'd like to keep it that way, that's why I'm here.' Petitioner was unaware if respondent

violated the order regarding his presence at the firehouses, stating that he trusted his officers to follow the order.

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Respondent [civilian] testified that he is a freelance journalist. He takes photographs and videos of accidents, crime scenes, and fires, and sells them to news organizations. Approximately two years before the PPO proceeding, the firefighters' union sent respondent photographs of petitioner at a bar, while on duty, with a city vehicle, and asked respondent to release them to the press. Respondent did not know petitioner's title at the time, but he knew petitioner's name and that petitioner was depicted in the photographs with 'a chief's vehicle and a city car.' According to respondent, the men had not met at that time, but they met about a year later (a year before the instant case) at the scene of a fire that respondent was photographing. Respondent did not have any personal contact with petitioner after that meeting, but respondent, respondent's wife, and respondent's mother saw petitioner driving in respondent's neighborhood.

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Respondent also admitted to being near petitioner's home and filming the burning barrel, but denied starting the fire. Earlier that day, respondent 'had a[n] interview with a different fire department.' A vehicle followed respondent to the interview, and the same vehicle followed him when he left. Respondent drove to the Dearborn area to see whether it was petitioner following him. Respondent saw petitioner near the barrel in the alley, but he kept driving because petitioner 'makes [him] very uncomfortable.' When respondent drove back around the block, the barrel was on fire, so he stopped and filmed the fire from his vehicle. Respondent had never been near petitioner's home before, nor did he ever return. He did not leave his vehicle and never entered petitioner's property. Respondent believed petitioner set the barrel aflame on purpose, knowing respondent would film it.

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The trial court granted petitioner's request for a PPO. The court noted that a PPO can be issued to restrain stalking and cyber stalking. The court stated that 'this is exactly what the [PPO] statute addresses' because respondent made multiple posts online about petitioner, even though the posts did not contain threatening language. Rather, the court noted that 'there was [sic] some really odd occurrences in this case,' because respondent was near petitioner's house when a barrel caught fire. On July 18, 2019, the court issued the PPO that prohibited respondent from stalking petitioner or posting a message online about petitioner for one year.

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Rather, petitioner testified that he filed an incident report with the police regarding respondent's written and video Facebook posts, and he was advised by the Dearborn police and members of DFD's fire command to file a PPO. However, a lack of evidence to warrant a criminal charge does not equate with the issuance of a stalking PPO. Petitioner readily admitted that respondent's Facebook posts were merely of 'concern' and expressly denied feeling harassed and threatened. Under the circumstances, the trial court erred in issuing the PPO."

Legal Lesson Learned: The Deputy Chief could have also asked County Prosecutor to bring criminal charges against the stalker under the Michigan "cyber stalking" statute.

Michigan 750.411h: Stalking; definitions; violation as misdemeanor; penalties; probation; conditions; evidence of continued conduct as rebuttable presumption; additional penalties.
(2) An individual who engages in stalking is guilty of a crime as follows:
(a) Except as provided in subdivision (b), a misdemeanor punishable by imprisonment for not more than 1 year or a fine of not more than $1,000.00, or both.
(b) If the victim was less than 18 years of age at any time during the individual's course of conduct and the individual is 5 or more years older than the victim, a felony punishable by imprisonment for not more than 5 years or a fine of not more than $10,000.00, or both.
(3) The court may place an individual convicted of violating this section on probation for a term of not more than 5 years. If a term of probation is ordered, the court may, in addition to any other lawful condition of probation, order the defendant to do any of the following:
(a) Refrain from stalking any individual during the term of probation.
(b) Refrain from having any contact with the victim of the offense.
(c) Be evaluated to determine the need for psychiatric, psychological, or social counseling and if, determined appropriate by the court, to receive psychiatric, psychological, or social counseling at his or her own expense.

File: Chap. 3, Homeland Security

IL: EXTRADICTION - U.S. CITIZEN TO BE RETURNED TO IRELAND – LEFT IRISH BAR, CRASHED LEXUS KILLED TWO

On Nov. 3, 2020, In The Matter Of The Extradition Of Francis Carr, U.S. Magistrate Judge Beth W. Zantz, orders that Mr. Carr, who is held without bail in Chicago jail, may be extradited back to Ireland to face felony charges. The 1984 treaty between US and Ireland allows for extradition if the conduct is a felony [punishable more than one year] in both countries, even if in U.S. there must be proof of "gross negligence" for involuntary manslaughter or reckless homicide and in Ireland just ordinary negligence.

> "For all of the reasons above, the Court therefore determines that the United States-Ireland treaty requires only dual criminality for an offense to be extraditable, meaning that just the ***charged conduct*** must be criminal and punishable by a year or more in prison in both jurisdictions.
>
> Here, that requirement is met, as Carr concedes …. Carr allegedly drove in such a grossly negligent manner—at a high rate of speed and doing donuts—that he caused a crash and the deaths of his two passengers…. In Ireland, the offense of dangerous driving causing death of two victims is punishable by up to 10 years in prison…. And in the United States, Carr's conduct could be charged as a felony under United States federal or Illinois state law, as involuntary manslaughter under 18 U.S.C. §1112 (maximum penalty of
> 8 years in prison), or as reckless homicide while driving a motor vehicle, 720 ILCS 5/9-3(a); 730 ILCS 5/5-4.5-40(a) (maximum penalty of 5 years in prison), respectively."

Facts:

"In June 2017, in Ireland, Carr crashed his car into a pillar, resulting in the deaths of his two passengers…. According to witnesses, Carr drove his car away from the lot of a local pub at a high speed and then, approximately ten minutes later, other witnesses heard what sounded like a car doing donuts, followed by a crash…. A witness went to the scene of the crash and pulled Carr out of the driver's side of his Lexus…. A police officer who arrived on the scene observed a black Lexus positioned 'at a right angle to the road, with the passenger side of the vehicle, crushed against a farmyard block wall ….' One of the passengers died upon impact, and the other passenger died several hours later from injuries suffered in the crash…. Scene witnesses pointed to Carr, who was sitting on house steps across the street, as another person who had been in the car…. Carr told a paramedic that he was driving and said that he 'had killed all his friends….'] He was later taken to the hospital for treatment of his injuries, but no tests were done to establish the level of any alcohol in his system.

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On January 30, 2019, pursuant to the extradition treaty between Ireland and the United States, Ireland submitted a formal request through diplomatic channels for Carr's arrest and extradition…. An Assistant Legal Adviser for the Department of State has declared that the treaty between the United States and Ireland is in full force and effect, and that the offense for which extradition is sought is extraditable under Article II of the treaty…. On July 20, 2020, this Court issued an arrest warrant, and Carr was taken into custody on July 22…. In a written opinion on August 18, 2020, the Court ordered Carr detained without bail pending the outcome of these proceedings, and the District Court subsequently affirmed that detention upon Carr's appeal.

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Carr concedes that, if the Court applies only this one-step dual criminality analysis, then that standard has been satisfied in this case and the charged crime here would therefore be extraditable, because Carr's alleged conduct is punishable by a year or more in prison in both countries.… But he maintains that this particular treaty's language imposes an ***additional*** requirement beyond dual criminality—that is, the charged offense's ***legal elements***, not just the alleged acts involved, must be punishable as a felony in both the United States and Ireland…. Thus, he argues that, because the Irish offense of dangerous driving provides for a mens rea lower than 'gross negligence'—which is what is required for involuntary manslaughter or reckless homicide in the United States and Illinois, 18 U.S.C. §1110(b); 730 ILCS 5/5-4.5-40(a)—the charged crime in Ireland would be a misdemeanor in the United States, and therefore is not an extraditable offense under the treaty.

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Additionally, both the President and the Senate recognized at the time of the treaty's ratification in 1984 that the treaty was incorporating a commonly used, one-step dual criminality approach, and tellingly mentioned no step or requirement past that. The President's letter transmitting the treaty to the Senate for ratification describes Article II as adopting 'the modern practice of permitting extradition for any crime punishable under the laws of both contracting Parties for a minimum period' and as 'also follow[ing] the practice of recent United States extradition treaties in indicating that ***the dual criminality standard should be interpreted liberally*** in order to effectuate the intent of the Parties that fugitives be brought to justice. . . .'"

Legal Lesson Learned: Treaties are to be interpreted liberally; defendant remains in jail until extradited back to Ireland.

File: Chap. 4, Incident Command, Training

NY: FDNY TRAINING APARTMENT BLDG BEING REHABED – STILL FEW RESIDENTS, DOORS FORCED OPEN – CASE DISMISSED

On Nov. 25, 2020, in Henry Brown, et al. v. Fire Department of City of New York, the City of New York, et al., U.S. District Court Judge Lashann Dearcy Hall, U.S. District Court for Eastern District of New York, granted the City's motion to dismiss; there was no proof that the City was on notice of any deficiencies in the FDNY's training conducted April – June, 2016 in the 23-unit apartment building (five plaintiffs still lived in the building). The training exercises included breaking down doors and entering apartments, and led to two incidents of forcible, warrantless entry into Plaintiffs' apartments.

> "Here, Plaintiffs allege that City Defendants failed to train FDNY officers how to 'properly distinguish occupied from vacant apartments in the context of emergency entry training exercises.' (Am. Compl. ¶¶ 53, 113.) The complaint contains two allegations of constitutional violations: the warrantless entries by FDNY Officers into Plaintiff Moyer's apartment on May 17, 2016, and Plaintiff Henry Brown's apartment on May 21, 2016.… However, there are no allegations that indicate that City Defendants were on notice that the training of FDNY officers was deficient. Plaintiff Moyer did call the police after the FDNY allegedly entered her home because she thought they had been robbed…. However, there is no plausible inference that her call to the police to report a robbery put the City Defendants on notice that the training of FDNY officers was deficient. Plaintiff Henry Brown filed a complaint at the local fire house and complained to Brooklyn Community Board #8 after the alleged unlawful entrance into his home….. However, any such complaints, which were made after the alleged warrantless entries into Plaintiffs' homes, could not be said to have put the City Defendants on notice of training deficiencies prior to the alleged unconstitutional conduct."

Facts:

> "Plaintiffs are rent-regulated tenants of 161 Buffalo Avenue ('the Building'), a 23-unit apartment building in Brooklyn, New York…. The Building is owned and operated by Defendant Iris Holdings Group, a corporate entity directed and managed by Defendants Blumenfrucht and Kirschenbaum…Plaintiffs are all African American, or in the case of Plaintiff Bryant, Afro-Costa Rican, and reside in rent-controlled or rent-regulated apartments….
> On February 16, 2016, Building Defendants purchased the Building from its former owner…. At some point thereafter, Plaintiffs became the only remaining tenants left in the Building…. After assuming ownership of the Building, Building Defendants pressured Plaintiffs to vacate their apartments…. Specifically, Building Defendants made buyout offers, threatened rent increases, and threatened to refrain from making any repairs on the building…. Furthermore, the Building was to be leased to Defendant Samaritan Daytop Village, Inc. ('Samaritan'), a nonprofit organization that provides supportive housing for its clients, who include veterans and individuals with substance abuse issues…. Building Defendants warned Plaintiffs that after a period of construction, 'this place will be rented out to homeless people, and that won't be

pleasant to live with people like that, so you're going to want to move.' These incoming supportive housing tenants, according to Plaintiffs, would be 'primarily people of color... possessing handicaps….') Nevertheless, Plaintiffs remained in the Building, and Building Defendants began renovations….

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At some point before April 2016, Building Defendants allegedly contracted with the FDNY to allow the FDNY to conduct training exercises inside the Building while it was occupied by Plaintiffs…. The alleged agreement between Building Defendants and the FDNY was made pursuant to FDNY Regulation 22.5.7, which permits the FDNY to conduct training exercises in occupied private buildings…. The FDNY used the Building as a practice facility over a period of approximately three months, from April to June 2016…. The training exercises included breaking down doors and entering apartments, and led to two incidents of forcible, warrantless entry into Plaintiffs' apartments. On May 17, 2016, Plaintiff Moyer returned to her apartment to find that her door frame had been broken down and her apartment was entered without a warrant…. Plaintiff Moyer, assuming she had been robbed, called the police to report a robbery…. And, on May 21, 2016, Plaintiff Henry Brown returned home to find that his front door had been broken down and his home entered without a warrant….. After the warrantless entries in his home, Plaintiff Henry Brown notified the local fire department house and community board….

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Plaintiffs also allege that the FDNY Officers conducting exercises in the Building were not adequately trained to distinguish occupied apartments from vacant apartments, or supervised when taking actions that entailed a risk that they may enter occupied apartments.

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Here, Plaintiffs complain that '[Building Defendants] jointly engaged with Defendants FDNY, the City of New York and Unidentified Fire Department Officers in the activities that lead [sic] to the violations of Plaintiffs' constitutional rights.' (Am. Compl. ¶ 117.) However, the alleged joint engagement is supported only by the allegation that the Building Defendants contracted with the FDNY and the City of New York to use the Building as a practice facility from April to June 2016…. This allegation is simply not enough. Plaintiff has offered no specific allegations to support an inference that Landlord-Defendant 'shared a common goal to violate the plaintiff's rights.' *Betts*, 751 F.3d at 85. Again, all that Plaintiffs allege is that there was a contract between the FDNY and the Building Defendants to use the building as a training site, in accordance with FDNY regulations…. While Plaintiffs allege that the contract between the Building Defendants and the FDNY resulted in unlawful warrantless entries into tenants' apartments … , there are no allegations that such unconstitutional behavior was required by, contemplated, or the natural consequence of the contract.

***

Furthermore, a pattern of similar constitutional violations by untrained employees is generally necessary to demonstrate deliberate indifference. *Connick*, 563 U.S. at 61-62. 'A training program is not inadequate merely because a few of its graduates deviate from what they were taught.' *Jenkins*, 478 F.3d at 95. And while there is no 'magic number' of instances of

unconstitutional conduct that will suffice to permit the inference of a pattern, courts in the Second Circuit have found that two incidents did not support an inference of a policy or custom under *Monell*. *Norton v. Town of Islip*, 12-CV-4463, 2016 WL 264930, at *7 (E.D.N.Y. Jan. 21, 2016) (collecting cases), *aff'd*, 678 F. App'x 17 (2d Cir. 2017). The two instances of warrantless entry here do not make a pattern."

Legal Lesson Learned: No constitutional violations, but training in a partially occupied apartment building presenting some obvious "challenges" for training officers and the participating firefighters.

File: Chap. 4, Incident Command, Training

NY: PAPER MILL FIRE – DECK GUN – DISCHARGED OVER TOP OF HYDROELECTRIC FACILITY – NO LIABILITY FOR DAMAGE

On Nov. 25, 2020, in Stevens & Thompson Paper Company, Inc. v. Middle Falls Fire Department, Inc., et al, the Appellate Division of the Supreme Court of the State of New York, held (5 to 0) that the trial court properly granted summary judgment to the FD and the Village of Greenwich, and the Town of Greenwich under the governmental immunity doctrine.

> "The key issue is therefore whether the fire department defendants' purportedly negligent acts — choosing to use the deck gun and aim it in a direction that caused a rain to fall around the powerhouse — were discretionary in that they arose from 'the exercise of reasoned judgment which could typically produce different acceptable results' (*Tango v Tulevech*, 61 NY2d 34, 4).
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> ***
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> Moreover, although the selected direction of the deck gun caused a rain or mist to fall upon the powerhouse when it was in use, the firefighters had no reason to anticipate that this would affect the interior of the powerhouse. A surveillance video of the area shows wet ground, but no flooding, and it appears that water that drained into an outdoor catch basin as designed then seeped into the powerhouse through a masonry joint. Further, although one could reasonably question the efficacy of the firefighters' efforts to reorient the deck gun once they learned of that problem, the efficacy of those efforts are irrelevant given that their activities caused no further seepage into the powerhouse."

Facts:

> "In the early morning hours of April 6, 2014, a large fire with the hallmarks of arson broke out at a vacant paper mill in the Town of Greenwich, Washington County. Plaintiff previously owned the paper mill and still owned an adjacent hydroelectric facility (hereinafter the facility) that relied upon water from an intake canal branching off from the Battenkill River. Defendant Middle Falls Fire Department, Inc. (hereinafter MFFD) responded to the fire and mutual aid was summoned from, among others, defendant Village of Greenwich. As there were no fire hydrants to supply the firefighters with water, Village firefighters stationed a fire engine near the facility to pump water from the intake canal. The pump was in continuous operation so that firefighters would have water whenever needed and, when the water was not needed, a deck gun on the engine shot the water into a ravine where it would flow back into the Battenkill River. The

stream of water from the deck gun passed over the facility, however, and caused what was essentially rainfall over its powerhouse. The facility's uninterrupted power supply shut down when water seeped into the powerhouse — prompting complaints to firefighters regarding the water discharge from the deck gun — and the facility was later found to have sustained significant mechanical damage that forced it offline for a prolonged period.

***

Moreover, although the selected direction of the deck gun caused a rain or mist to fall upon the powerhouse when it was in use, the firefighters had no reason to anticipate that this would affect the interior of the powerhouse. A surveillance video of the area shows wet ground, but no flooding, and it appears that water that drained into an outdoor catch basin as designed then seeped into the powerhouse through a masonry joint. Further, although one could reasonably question the efficacy of the firefighters' efforts to reorient the deck gun once they learned of that problem, the efficacy of those efforts are irrelevant given that their activities caused no further seepage into the powerhouse.

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[Footnote 3.] Plaintiff's employee testified that he baled out the catch basin and that no more water seeped through the masonry joint after he complained about the problem. Subsequent water infiltration from the intake canal occurred because a power outage — resulting either from the initial water infiltration or the employee's actions in restarting the uninterrupted power supply after it had gotten wet — caused equipment to go out of alignment and damage a seal.

***

Plaintiff complains that alternatives to using the deck gun were not considered and that the potential hazards of its use were overlooked, but '[a] fire department is not chargeable with negligence for failure to exercise perfect judgment in discharging the governmental function of fighting fires' (*Harland Enters. v Commander Oil Corp*., 64 NY2d 708, 709 [1984]; *see Kenavan v City of New York*, 70 NY2d 558, 569-570 [1987]; *Helman v County of Warren*, 114 AD2d 573, 573-574 [1985]). Even when viewed in the light most favorable to plaintiff as the nonmoving party (*see Lau v Margaret E. Pescatore Parking, Inc*., 30 NY3d 1025, 1027 [2017]), the foregoing demonstrates that the decisions relating to the deck gun resulted from the exercise of reasoned judgment that, as a result, rendered the fire department defendants immune from liability for ordinary negligence (*see Rodriguez v City of New York*, 189 AD2d 166, 175-176 [1993]; *Helman v County of Warren,* 114 AD2d at 573-574)."

Legal Lesson Learned: Discretionary acts by fire department are protected by governmental immunity.

Chap. 5, Emergency Vehicle Operations

MI: NON-EMERGENCY TRANSPORT – BLACK ICE, AMBULANCE ROLLED OVER DITCH – NO IMMUNITY, NON-EMERGENCY

On Nov. 24, 2020, in Charles C. Willis v. Community Emergency Medical Service, Inc. and Eric J. Norris, the State of Michigan Court of Appeals, held (3 to 0; unpublished decision) that lawsuit against the ambulance company and the EMT driver is reinstated, overturning trial judge's decision that there were no material facts showing negligence. The Court of Appeals found that there is a dispute whether EMT was driving too fast for weather conditions, with ice on the ground and a mix of rain, snow, and sleet; Court also held the immunity statute for EMS does not apply to non-emergency transports.

> "[W]e conclude that the trial court erred in granting defendants' motion for summary disposition pursuant to MCR 2.116(C)(10). Specifically, the trial court erred by failing to view the evidence in the light most favorable to plaintiff and to draw all reasonable inferences in his favor, and by weighing credibility. Plaintiff may not be able to establish his claim for negligence ultimately, but he has at least raised a genuine issue of material fact regarding whether the accident at issue occurred because Norris was negligent by driving too fast for the weather conditions. Accordingly, we reverse that portion of the trial court's order granting defendants' motion for summary disposition pursuant to MCR 2.116(C)(10)."

Facts:

> "On December 28, 2015, after spending two and a half months in William Beaumont Hospital in Troy, undergoing numerous medical procedures, plaintiff, Charles C. Willis, was being transported by ambulance to Beaumont Hospital in Grosse Pointe when the ambulance in which he was riding slid off the road and flipped onto its side.
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> ***
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> The transport was deemed a priority 3 nonemergency transport, which did not entail using overhead lights or sirens and which required Norris to honor all traffic regulations. Once plaintiff was ready to depart, Norris and Salo put him on a gurney and wheeled him into the ambulance. Norris said that plaintiff was in a 'semi-Fowler position,' which means that he was not lying flat, but was in as much of a sitting position as comfort allowed. Plaintiff was strapped down and the gurney was locked into place in the ambulance. Plaintiff testified that he could see out the ambulance's back windows.
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> ***
>
> Weather conditions were not unusual for a late-December evening in Michigan. Norris testified that there was ice on the ground and a mix of rain, snow, and sleet. Plaintiff testified that the "night was wet with a little bit of slushiness, not enough to make the roads dangerous, but if you changed lanes, it would create a mist . . . ."
>
> ***
>
> When Norris walked around to the back and observed the post-crash damage, plaintiff testified that Norris said, 'Holy F**k. I'm going to lose my job.' Asked what injuries he believed he suffered in the accident, plaintiff said 'A compression fracture back, spine. A compression spine.'
>
> ***
>
> Norris testified that there was a 'decent amount' of traffic on the road and he remembered changing lanes, but not how many times, and he said that the vehicle did not slip while he was changing lanes. Plaintiff testified otherwise. Plaintiff said that every time Norris drove through the slush as he was changing lanes, he experienced 'a little bit of a shimmy.' He was concerned

with how fast they were going and he thought he may have asked the person in the back how good the vehicle handled in those conditions. Plaintiff testified that he did not remember much about Norris's exiting Hall Road to merge onto I-94. Describing the moment of the accident, plaintiff said the ambulance went past what we would call a shimmy and went to the left. And whatever correction was made, it came back and went even further to the right, which then swung violently to the left. I'm not sure how many fishtails, if you want to call them that or whatever that we did. All of a sudden, it just must have turned sideways. I think it turned sideways, but whatever. We started rolling. I thought I was going to die. It came to a rest some—on its—somewhat on its side in a ditch.

***

Norris described the accident somewhat similarly. According to him, he took the exit ramp to I-94, and as he accelerated to merge onto I-94, he 'hit black ice.' Then, [t]he back end of the vehicle started sliding out towards the middle. I tried to over correct and straighten it back up and then it slid back over to the ditch. I started heading over to the ditch and we stopped and it just fell on its side, on my side, on the driver's side.

***

Defendants rely on *Griffin v Swartz Ambulance Serv*, unpublished per curiam opinion of the Court of Appeals, issued November 29, 2018 (Docket No. 340480), as support for their position that their transport of plaintiff constituted 'treatment of a patient' under the EMSA. Unpublished opinions of this Court have no precedential effect, but may be considered persuasive. MCR 7.215(C)(1). However, we do not find *Griffin* persuasive. Rather, we believe it to be wrongly decided and factually distinguishable from the case at bar."

Legal Lesson Learned: The state's immunity statute protects EMS only for "treatment" of a patient.

File: Chap. 5, Emergency Vehicle Operations

TX: AMBULANCE LEFT RUNNING AT SCENE – STOLEN, INJURED MOTORISTS – ANTI-THEFT DEVICE NOT REQUIRED – NO CASE

On Nov. 25, 2020, in The City of San Antonio v. Suzanne L. Smith and Claudia Acevedo, the Fourth Court of Appeals, San Antonio held (3 to 0) that the trial court should have dismissed the lawsuit against the City; while an anti-theft device may be helpful when leaving an ambulance running at 3 am, the City enjoys government immunity. The plaintiffs had included an affidavit from Robyn McKinley, a firefighter and paramedic in Memphis, Tennessee, who specifically advocated for the use of an anti-theft device manufactured by a company called Tremco. This device apparently is designed to make it difficult to put a vehicle into gear even though the vehicle has been left running."

> "In the present case, Appellees allege that the ambulance was not equipped with a specific anti-theft device that may have prevented it from being stolen even though it was left running. They argue that the City thus used or provided property (the ambulance) that lacked an integral safety feature (a particular anti-theft device), thus bringing their claims within the "use or condition of personal property" waiver pursuant to *Lowe* and *Robinson*. The City counters that Appellees' claims do not fall within that waiver because the ambulance *was* equipped with anti-theft devices—door locks and an alarm—and Appellees' contention that it should also have been equipped with a different device is not cognizable under the integral safety component theory. *See Bishop*, 156 S.W.3d at 584 (theory applies "only when an integral safety component is entirely lacking rather than merely inadequate"). We agree with the City.
>
> ***
>
> [Footnote 3.] Insofar as Appellees challenge the City's decision not to equip its ambulances with the particular anti-theft device they favor, which they contend is a safety feature, we note that 'decisions about installing safety features are discretionary decisions for which the [City] may not be sued.' *Tex. Dep't of Transp. v. Ramirez*, 74 S.W.3d 864, 867 (Tex. 2002)."

Facts:

> "At approximately 3:00 am the morning of September 30, 2017, two paramedics with the San Antonio Fire Department responded to a 911 call at an apartment complex near Fredericksburg Road. The call was a 'Code 3,' indicating an emergency warranting the use of the ambulance's lights and siren while in transit. Michael Miller, the paramedic who drove the ambulance, parked it in an alley behind the apartment complex to reduce the likelihood of it being struck by passing vehicles. He left the ambulance's emergency lights on to warn passersby of its presence, and left it idling so that the lights would not drain the vehicle's battery. Miller and the second paramedic, John Tamez, left the ambulance unlocked so that they could make a swift departure in the event they needed to quickly transport a critical patient. Neither Miller nor Tamez had heard of an idling ambulance being stolen while the paramedics attended to a patient, and neither thought anything about the location in which they left the ambulance indicated a risk of such a theft. Miller and Tamez proceeded to a second-story apartment, where they assessed the condition of the patient and determined that he could safely be transported to the hospital by taxi rather than by ambulance. While they were preparing a taxi voucher, they heard 'chatter' on their radio concerning their ambulance and received a call from dispatch asking where they were.

Apparently the vehicle's GPS system had alerted dispatch that it was on the move, but the paramedics had not reported that they had left the scene of the call. The two then discovered that the ambulance was missing. They later learned that an unknown person had stolen the ambulance and driven it at a high rate of speed down Fredericksburg Road, where it collided with two cars, one occupied by Suzanne Smith and the other occupied by Claudia Acevedo. Both were injured.

***

Smith filed suit against the City, alleging that its immunity was waived under the Texas Tort Claims Act ('TTCA') because her injuries arose from the operation or use of a motor vehicle or were caused by a condition or use of tangible personal property. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 101.021. Smith alleged that the City was negligent in allowing the ambulance to be left unattended and running, in violation of section 545.404 of the Texas Transportation Code, and in failing to use an anti-theft device that would have prevented the theft of a vehicle left unattended and running.

***

A municipality is afforded governmental immunity for actions arising out of the performance of its governmental functions, absent a clear and unambiguous legislative waiver of immunity. *Worsdale v. City of Killeen*, 578 S.W.3d 57, 62 (Tex. 2019); *see Wasson Interests, Ltd. v. City of Jacksonville*, 559 S.W.3d 142, 146 (Tex. 2018). The TTCA contains a non-exclusive list of functions that are deemed to be governmental and provides a waiver of immunity for certain tort claims arising out of the performance of such functions. TEX. CIV. PRAC. & REM. CODE ANN. §§ 101.021, 101.0215; *see Wasson*, 559 S.W.3d at 147. Section 101.0215 specifically identifies 'operation of emergency ambulance service' as a governmental function for which a municipality has governmental immunity, unless waived. TEX. CIV. PRAC. & REM. CODE ANN. § 101.0215(a)(18). And section 101.021 identifies the circumstances in which that immunity is waived. TEX. CIV. PRAC. & REM. CODE ANN. § 101.021. As applicable to this case, those waivers are the 'operation or use of a motor vehicle' waiver and the 'use or condition of tangible personal property' waiver. Appellees asserted both in their joint response to the City's plea to the jurisdiction.

***

The City asserts in its first issue on appeal that this waiver does not apply because Appellees' injuries did not arise from the operation or use of the ambulance by a City employee. *See Ryder Integrated Logistics, Inc. v. Fayette Cty.*, 453 S.W.3d 922, 927 (Tex. 2015) ("a government employee must have been actively operating the vehicle at the time of the incident"). Rather, it is undisputed that the ambulance was being operated and used at the time of the accident by a thief.

***

Appellees' argument, like that made in *Friend*, is that the City failed to use a particular type of equipment among a broadly defined class of property—anti-theft devices—that may have been employed. *See Friend*, 370 S.W.3d at 373. It is also like the argument made in *Clark* in that Appellees essentially urge that the particular anti-theft device with which they believe the ambulance should have been equipped would have been more effective in preventing theft than the locks and alarm with which the ambulance actually was equipped. *See Clark*, 923 S.W.3d at 585. In short, the assertion is not that an integral safety component was entirely lacking, but

rather that it was inadequate. This is insufficient to bring the case within the narrow parameters of *Lowe* and *Robinson*. *See Bishop*, 156 S.W.3d at 584."

Legal Lesson Learned: Theft of ambulances left running at the scene are increasingly common; if possible, lock the doors and take a second set of keys.

Note: Plaintiff's expert suggested Tremco anti-theft device. See their ad:

- Vehicles Can Be Left Unattended While Running
- Allows Emergency Lighting & Other Electronics to Operate
- Provides More Security at The Scene Of An Accident
- Inexpensive & Easy to Install – Plug N Play.

Chap. 6, Employment Litigation

MO: MANDATORY AGE 65 RETIREMENT – CITY POLICE DEPT - LAWFUL UNDER FEDERAL ADEA FOR POLICE / FIRE

On Nov. 16, 2020, in Michael Caruso v. St. Louis, Missouri, U.S. Magistrate Judge Shirley P. Mensah, U.S. District Court, Eastern District of Missouri (Eastern Division), granted the City's motion to dismiss; the City has a mandatory age 65 for its police officers, and while occasionally they will grant a one-year extension, there is no requirement to do so. This is authorized under the federal ADEA, Age Discrimination in Employment Act amendments in 1986; see also EEOC guidance:

> "Defendant concedes Plaintiff was terminated because of his age but argues Plaintiff's discharge fell within an exemption in the ADEA that allows state and local governments to set a mandatory retirement age for police officers provided certain requirements are met. Specifically, under 29 U.S.C.§ 623(j), state and local governments are allowed to set mandatory retirement ages for firefighters and law enforcement officers if the following two requirements are met: First, the discharge must have been pursuant to a state or local law requiring mandatory retirement by a certain age; and, second, the discharge must be pursuant to a bona fide retirement plan that is not a subterfuge for impermissible age discrimination. 29 U.S.C. § 623(j)(1)-(2). To satisfy the first requirement, the mandatory retirement law must *either* have been in effect on March 3, 1983 *or* must have been enacted after September 30, 1996; and, if the latter, the discharge must occur no earlier than age fifty-five. *See Correa-Ruiz v. Fortuno*, 572 F.3d 1, 9 (1st Cir. 2009) (construing 29 U.S.C. §623(j)(1)(A) and (B)(ii) to mean the discharge must have been 'pursuant to a mandatory retirement plan that *either* was in effect on March 3, 1983 *or* was enacted after September 30, 1996. The only-age related limitation on the latter option is that the discharge occurs no earlier than age fifty-five.').

Facts:

> Plaintiff Michael Caruso was employed by Defendant as a police officer with the Metropolitan Police Department, City of St. Louis ("Department"). He began his employment with the Department on December 20, 1976. He was promoted to the rank of major in January 2013 and was subsequently promoted to Lieutenant Colonel. On August 17, 2016, Plaintiff filed a lawsuit against Defendant alleging discrimination based on his gender and race (hereinafter '2016 Discrimination Lawsuit'). The Discrimination Lawsuit settled on or before August 6, 2017.

***

Plaintiff turned 65 on June 30, 2019. Defendant had the ability to extend Plaintiff's employment even after he turned 65. As such, in the months leading up to his birthday, Plaintiff submitted multiple requests to Defendant for his employment to be extended beyond his 65th birthday. His requests went unanswered until June 28, 2019, when he was called into a meeting with the chief of police and told his request was denied and that he was 'out of here.'

The Director of Public Safety for Defendant made disparaging comments about Plaintiff's age, said Plaintiff needed to go, and that the Director needed to move some of the younger guys up. On June 29, 2019, Plaintiff was notified that his employment would end at 5:00 p.m. that day.

***

Plaintiff alleges he was fired due to his age and in retaliation for filing the 2016 Discrimination Lawsuit against Defendant. Other employees of Defendant requested that their employment be extended beyond their 65th birthdays, and Defendant granted their requests and either did not terminate those employees or gave the other employees different positions within the City of St. Louis.

***

Plaintiff also contends that neither the ADEA exemption in § 623(j) nor Mo. Rev. Stat. § 86.250 are applicable to justify his termination because he was terminated before he turned 65. However, Plaintiff's First Amended Complaint alleges that he was notified that his employment would end at 5:00 pm on the day before he turned 65. This means Plaintiff's employment continued until close of business on his last day at age 64, and on his first day at age 65, he was in mandatory retirement. Because Plaintiff's employment ended and retirement began when he reached age 65, Defendant's conduct is in conformance with the requirement in Mo. Rev. Stat. §86.250(2) that PRS members who attain the age of 65 'be retired forthwith.'"

Legal Lesson Learned: Federal ADEA statute, amended 1986, authorizes mandatory retirement ages for police and fire.

Note: See Congressional testimony, March 12, 1986, on the proposed exemptions to the ADEA for police and fire. "Air traffic controllers, for instance, must retire at age 56, foreign service officers at age 65, and Federal firefighters and law enforcement officers, including employees of the FBI, Secret Service, and Federal Prison System, must retire at the age of 55.

Chap. 6, Employment Litigation

NJ: PENSION SURVIVOR BENEFITS – ONLY IF FEMALE WAS MARRIED TO MALE FF OR "SAME SEX DOMESTIC PARTNER"

On Nov. 5, 2020, in The Matter Of Board Of Trustees Of The Police And Firemen's Retirement System Of New Jersey – Denial Of Dolores Ortega's Right To Receive Survivor Benefits, the Superior Court of

New Jersey Appellate Division, held (3 to 0; unpublished decision) that Ms. Ortega did not qualify for survivor benefits because she was not the member's widow.

> "Contrary to appellant's contention, the statutory and regulatory scheme did not discriminate against her on the basis of her gender. Because she and Koncsol were of opposite sexes, they were free to marry, which would have enabled her to qualify for the survivor benefit. On the other hand, same-sex couples could not marry when the Act went into effect and, therefore, the Legislature wanted to provide a mechanism limited to them in the Act to ensure that these individuals would have the same right to this benefit as an opposite-sex couple. Thus, there was 'a clear and rational basis' underlying the Legislature's decision to 'mak[e] certain health and pension benefits available to dependent domestic partners only in the case of domestic partnerships in which both persons are of the same sex . . . .' N.J.S.A. 26:8A-2(e)."

Facts:

> "PFRS member Gordon Koncsol worked as a firefighter with the City of Perth Amboy. Koncsol retired from this position in November 1994 and received a PFRS pension. At that time, Koncsol was married, but he divorced his former wife in December 1994.
>
> In December 2009, Koncsol submitted a Division 'Designation of Beneficiary' form naming appellant as his primary beneficiary for his pension benefit, as well as for his group life insurance benefit. The form stated that appellant was Koncsol's domestic partner.
>
> ***
>
> [Footnote 2.] Koncsol listed his children as the contingent beneficiaries for his pension benefit.
>
> ***
>
> [2004 NJ statute.] However, a non-state employer 'may adopt a resolution providing that the term 'widow' as defined in [N.J.S.A. 43:16A-1(24)(b)] shall include domestic partners as provided in' the Domestic Partnership Act (the Act), N.J.S.A. 26:8A-1 to -13. Ibid. In enacting the Act in 2004, the Legislature made clear that it discern[ed] a clear and rational basis for making certain health and pension benefits available to dependent domestic partners only in the case of domestic partnerships in which both persons are of the same sex and are therefore unable to enter into a marriage with each other that is recognized by New Jersey law, unlike persons of the opposite sex who are in a domestic partnership but have the right to enter into a marriage that is recognized by State law and thereby have access to these health and pension benefits.
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> ***
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> On appeal, appellant raises the same contentions she unsuccessfully pressed before the Board. Appellant again argues that the Board should have been equitably estopped from denying her request for a survivor benefit, and she asserts it is unfair that a same-sex domestic partner might be eligible for this benefit, while she is not because she and Koncsol were an opposite-sex couple. Appellant also contends that the Board should have "liberally interpreted" the governing statutes and regulation to make her eligible for a survivor benefit. We disagree.
>
> As discussed above, the applicable statutes and regulation clearly state that only domestic partners who are of the same sex are eligible for the survivor benefit. There is nothing in the record to indicate that appellant relied to her detriment on any incorrect information provided to her by the Division."

Legal Lesson Learned: It would have been helpful if the state retirement Board had promptly notified the firefighter, when he submitted his change of beneficiary, that he had to marry Dolores Ortega.

File: Chap. 6, Employment Litigation

DE: WHISTLEBLOWER CASE DISMISSED – FIRE CHIEF CONVICTED, TO PRISON, BUT MONEY STOLEN NOT CITY FUNDS

On Oct. 29, 2020, in Thomas Hayman, Jr. v. City of Willington, et al., U.S. District Court Judge Vivian L. Medinilla granted the City's motion to dismiss federal Whistleblower lawsuit for his termination for alleged retaliation, since the theft of money by the Fire Chief was not from the City. The money was from "Gallant Blazers Organization," where Fire Chief was President of this professional development group that helped minority firefighters in Wilmington. See April 26, 2019 article: "Former Wilmington fire Chief Anthony Goode gets prison time for theft."

> "Accordingly, to state a claim under the Whistleblower Protection Act, Plaintiff must show that any alleged retaliation was for reporting: (1) a violation of financial management or accounting standards; (2) that the violation was related to funds or assets under the control of his employer; and (3) that the violation was due to an act or omission of his employer or an agent thereof. Plaintiff fails to satisfy prongs two and three.
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> ***
>
> Following an investigation, public records reflect that the DOJ brought criminal charges including criminal racketeering and theft against Goode, who subsequently pled guilty to theft of $50,000 or more and unlawful use of a payment card. In 2019, he was sentenced to one year in prison followed by a period of probation and repay the Gallant Blazers more than $62,000." [Footnote 3.]

Facts:

> "Plaintiff Thomas Hayman, Jr. (Plaintiff) is a former firefighter who worked City of Wilmington Fire Department until his termination in 2016. In October of 2015, Plaintiff reported a complaint with the Department of Justice (DOJ) against the Chief of the fire department, Anthony Goode. At the time, the former Chief was also acting in his capacity as the president of the Gallant Blazers, Inc. or Gallant Blazers Organization (GBO), a professional development group that helps minority firefighters in Wilmington. Plaintiff reported to the DOJ that Goode committed financial misconduct against GBO. After reporting Goode's misconduct, Plaintiff alleges that the City of Wilmington, Wilmington Fire Department (Defendant), along with others, 'maliciously' brought forth charges against him to terminate his position in retaliation for the complaint against Goode. Plaintiff was terminated on September 19, 2016.
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> ***
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> On October 26, 2020, Plaintiff appeared *pro se* [no attorney]. He also did not file a response [to City's motion to dismiss]. Plaintiff indicated his efforts to retain counsel were unsuccessful and

that he was "ignorant" of the need to respond in writing to the motion because he believed the hearing would provide the forum from which to respond. Over Defendant's objections, the Court decided to allow Plaintiff to present his oral argument in the absence of any written pleading. *Pro se* litigants "are expected to comply with the rules of this Court," although the Court may hold them "to a less exacting standard when reviewing their pleadings." However, "the Court will accommodate *pro se* litigants only to the extent that such leniency does not affect the substantive rights of the parties." Having heard oral arguments, the matter is ripe for review.

***

Defendant asserts that any alleged financial misconduct of funds by Goode were not under the control of the City of Wilmington's Fire Department and therefore, the Whistleblower Protection Act cannot serve as a basis for Plaintiff's claim. Defendant also asserts that Goode was not acting as an agent for Defendant when the alleged financial misconduct took place and instead was acting as the president of GBO. Plaintiff argued that the Whistleblower Protection Act applied because he was retaliated against by his employer, Goode, for filing a complaint with the DOJ while Goode was also acting as president of GBO.

***

Plaintiff arguably alleges a violation of financial management or accounting standards as he states that Goode committed financial misconduct. Plaintiff however, fails to allege that the funds used by Goode were under the control of his employer and in fact appears to state the opposite as he alleges that Goode's misconduct was for use of funds related to a third-party, GBO.

***

Therefore, because Plaintiff has not alleged that Goode's violation related to use of Defendant's funds nor that Goode was acting as an agent of Defendant at the time of the misconduct, Plaintiff has failed to state a claim under the Whistleblower Protection Act."

Legal Lesson Learned: It is unfortunate that the firefighter did not retain legal counsel. Note: If there were any federal funds involved in the theft, plaintiff could have filed a civil whistleblower claim under seal, and then U.S. Attorney's Office in Delaware and FBI could help pursue his civil action. "In FY2019, qui tam whistleblowers received $272 million in rewards." ***Department of Justice Report Shows Whistleblowers Consistently Rewarded through Qui Tam Lawsuits.***

The State of Delaware also has a whistleblower protection statute. It provides, in part:
"A court, in rendering a judgment in an action brought under this chapter, shall order, as the court considers appropriate, reinstatement of the employee, the payment of back wages, full reinstatement of fringe benefits and seniority rights, expungement of records relating to the disciplinary action or discharge, actual damages, or any combination of these remedies. A court may also award, as part of a judgment in an action brought under this chapter, all or a portion of the costs of litigation, including attorneys' fees, if the court determines that such an award is appropriate."

File: Chap. 6, Employment Litigation

MI: DEPUTY SHERIFF REPORTED MISUSE DRUG FORFEITURE FUNDS – 1st AMEND. ONLY IF SPEAKING AS "PRIVATE CITIZEN"

On Oct. 9, 2020, in Garrett DeWyse v. William L. Federspiel, Heather Beyerlein, and County of Saginaw, et al., the U.S. Court of Appeals for 6th Circuit (Cincinnati), held (3 to 0; unreported decision) the trial court judge properly dismissed the First Amendment retaliation lawsuit by Deputy who reported to County Finance Director possible misuse of drug forfeiture funds. The Deputy was in charge of Property & Evidence Room and was reporting on an item related to his official duties; he was not "speaking" as a private citizen reporting on an item of great public concern.

> "In reaching this outcome, we do not question DeWyse's motivation, nor do we condone disciplining public employees for raising concerns about government mismanagement or corruption. See Mayhew, 859 F.3d at 466. But in this public employment setting, laudable intent alone is not enough to secure First Amendment protection. See Haddad, 910 F.3d at 249–50. As DeWyse's communications fell within the scope of his employment and were made pursuant to his assigned duties, he spoke as a public employee, meaning his speech is unprotected."

Facts:

> "Saginaw County Detective John Butcher seized $22,583 in cash from Pierre Najjar during a narcotics investigation. When Najjar agreed to pay the Saginaw County Sheriff's Department the money seized from him in lieu of entering formal civil forfeiture proceedings, Butcher delivered the money to Garrett DeWyse, the Department's property and evidence room manager.
>
> A few weeks later, Butcher asked DeWyse to release $2,000 of those funds to pay for confidential informants and controlled-substance buys. Believing the request was improper, DeWyse refused. But following Lieutenant Randy Pfau's order to DeWyse to release the money, DeWyse did so. Over the next year, Butcher returned to the property room to make similar withdrawals from the Najjar funds until they were depleted. For each disbursal, both DeWyse and Butcher signed a 'chit sheet' documenting the date and amount withdrawn.
>
> As the funds became depleted, Pfau, Butcher, DeWyse, and Koren Reaman, the Finance Director in the Controller's Office, met to discuss Butcher's use of the funds.
>
> Sometime later, Sheriff William Federspiel asked DeWyse to compile information for an annual report to the State of Michigan related to the Department's 2015 civil forfeiture activities. The Department's Undersheriff, who ordinarily would have prepared the report, was out sick.
>
> While compiling information for the report, DeWyse came to believe the Najjar funds had been mishandled. From his own research, DeWyse understood that civil forfeiture funds must 'be deposited with the treasurer' or 'the general municipality.' Yet the Najjar funds, to his mind, were 'off the books,' meaning they would not be accounted for in the annual report. DeWyse became 'afraid that being a part of this process' would 'reflect poorly on [him],' as the report 'would not balance"' out the forfeiture data. He also came to believe that Butcher's actions were illegal.

DeWyse arranged a meeting with Reaman. During the meeting, DeWyse disclosed that the Najjar funds had been completely withdrawn. DeWyse did not describe to Reaman the process by which Butcher had withdrawn the funds because he knew Reaman was already aware that the Department was using the funds for controlled buys. DeWyse alleges that he was reprimanded for speaking with Reaman about the Najjar funds. His punishment included being demoted from his role in the property room as well as a verbal admonishment by Federspiel. DeWyse eventually left the Department for a position with a different police agency.

First Amendment Retaliation.

To state a First Amendment retaliation claim, DeWyse must show that (1) his speech wa constitutionally protected; (2) the County took adverse action against him that would deter a person of ordinary firmness from continuing to engage in that speech; and (3) a causal connection exists between the first two elements. See Gillis v. Miller, 845 F.3d 677, 683 (6th Cir. 2017). Because DeWyse was a public employee at the time he engaged in the speech at issue, to establish the threshold requirement that his speech was protected, he must also demonstrate that (1) he spoke on a matter of public concern; (2) he spoke as a private citizen rather than as an employee pursuant to his official duties; and (3) his speech interest outweighs the government's interest, as an employer, in promoting efficient public service through its employees. Mayhew, 856 F.3d at 462. Whether an employee engaged in constitutionally protected speech is a question of law. Id.at 464."

Legal Lesson Learned: If the Deputy Sheriff had gone to his union, County Prosecutor, FBI or County Commissioners, then his "speech" may have been protected.

Note: The 6th Circuit judges in this case described a recent decision where public employee was protected by 1st Amendment.

> "Our recent decision, Mertins v. City of Mount Clemens, 817 F. App'x 126 (6th Cir. 2020), does not counsel otherwise. There, a city finance department employee discovered the city was overbilling residents for utilities….Yet when the employee raised the issue with her supervisors, she was subjected to reprimands and harassment… The employee then raised these same concerns with her union, local prosecutors, the FBI, and city commissioners. Id. At the same time, she continued to face discipline from her supervisors. Id. The employee eventually filed a First Amendment retaliation claim against her supervisors, and we later reversed the district court's grant of summary judgment for the defendants." [June 5, 2020 decision of 6th Circuit]
>
> Many states have enacted whistleblower protection statutes. For example: Ohio Revised Code 4113.52, "Reporting violation of law by employer or fellow employee."
>
> > "(1) (a) If an employee becomes aware in the course of the employee's employment of a violation of any state or federal statute or any ordinance or regulation of a political subdivision that the employee's employer has authority to correct, and the employee reasonably believes that the violation is a criminal offense that is likely to cause an imminent risk of physical harm to persons or a hazard to public health or safety , a felony, or an improper solicitation for a contribution, the employee orally shall notify the employee's supervisor or other responsible officer of the employee's

employer of the violation and subsequently shall file with that supervisor or officer a written report that provides sufficient detail to identify and describe the violation. If the employer does not correct the violation or make a reasonable and good faith effort to correct the violation within twenty-four hours after the oral notification or the receipt of the report, whichever is earlier, the employee may file a written report that provides sufficient detail to identify and describe the violation with the prosecuting authority of the county or municipal corporation where the violation occurred, with a peace officer, with the inspector general if the violation is within the inspector general's jurisdiction, or with any other appropriate public official or agency that has regulatory authority over the employer and the industry, trade, or business in which the employer is engaged."

See also other Ohio statutes:
"Ohio has a general whistleblower protection statute that protects whistleblowers who report suspected felonies, crimes that may cause physical harm, and crimes that may produce a hazard to the public health or safety. Also, several other Ohio statutes contain anti-retaliation provisions. Employees who engage in protected activities under laws in the following subject areas are protected from retaliation: abuse or neglect of residents at health-care facility, discrimination, minimum wage, wage discrimination, and workers' compensation."

File: Chap. 8, Race Discrimination

AL: AFRICAN AMERICAN FF – CUT LOCK OFF ANOTHER SHIFT'S CABINET, THREATENED FF – SUSP / NO PROMOTION – NO CASE

On Nov. 23, 2020, in Aaron Mitchell v. City of Newport, et al., U.S. District Court Judge L. Scott Coogler, U.S. District Court for Northern District of Alabama (Western Division), granted the City's motion for summary judgment, finding the Fire Department offered nondiscriminatory explanations for suspending him. He was suspended in 2017, and later failed promotion exam for Sergeant, and in 2018 he was not permitted to apply for promotion to Lieutenant.

"Even if Mitchell had established a prima facie case, Defendants again offered nondiscriminatory explanations for suspending him: he threatened a colleague, he cursed a colleague, and he destroyed a colleague's property. (Doc. 57 at 46.) Because Mitchell offered no new evidence or arguments suggesting these explanations are pretext for retaliation, summary judgment is due to be granted."

Facts:

"[In 2017] the Department again suspended Mitchell, this time for threatening colleagues and destroying property. Mitchell's station used a 'house funds' system. (Doc. 58-1 at 231.) 'That means [firefighters] gave their own money to buy condiments for the fire station so [they could] eat and have coffee, peanut butter, just staples for' the station. (*Id.*) On November 3, 2017, Mitchell couldn't find his shift's coffee can. (*Id.* At 232-33.) He searched the station, saw the missing coffee in another shift's locked cabinet, found a pair of bolt cutters, cut the cabinet's lock, and he took back the allegedly-stolen coffee can. (*Id.* At 238-42.) Two days later,

firefighter Todd Payne approached Mitchell and asked if he cut the lock. (*Id*. At 248.) And matters spiraled out of control when Mitchell admitted to it. (*Id*. At 247-50.) Payne demanded Mitchell reimburse him $17 for the lock; Mitchell threatened to give Payne 'a $17 ass whooping.' (*Id*. At 256.) Payne warned Mitchell that he'd told Chief Marshall about the cut lock; Mitchell accused Payne of 'running and telling his daddy.' (*Id*. At 251.) Mitchell also told Payne to 'quit acting like a pussy' and to 'quit acting like a little bitch.' (*Id*. At 252.) The Department investigated and suspended Mitchell for two days without pay. (Doc. 57 at 29.)

Battalion Chief Pate issued several findings in a written suspension report. (*Id*. At 28-29.) First, he found Mitchell 'deliberately damaged and/or destroyed another employee's personal property.' (*Id*.) Second, he found 'Mitchell used vulgarities and/or profanity multiple times inside and outside the station.' (*Id*.) And third, he found Mitchell 'threatened bodily harm" to other firefighters. (*Id*.) Pate said these findings justified Mitchell's suspension. (*Id*.).

Mitchell appealed the 2017 suspension to the City Administrator, claiming unfairness. (Doc. 58-1 at 333, 336.) During the lock-cutting argument, firefighter Cameron Shipley (Caucasian) had allegedly asked Mitchell, 'What if we go out there and bust the windows out of your car, would we be wrong for that?'(*Id*. At 273.) According to Mitchell, Shipley's question was threatening, and it wasn't fair to punish his threats without also punishing Shipley's. The City Administrator rejected Mitchell's fairness argument and upheld the suspension. (*Id*. At 342-343.)

Mitchell sought two promotions after his 2017 suspension. He applied to become a sergeant, but he failed the required examination. (*Id*. At 367-71.) (*Id*. At 370-71.) And, around October 10, 2018, he tried to apply for a lieutenant position, but Chief Marshall didn't allow him to sit for the lieutenant exam. (*Id*. At 373-77.)

Even if Mitchell established a prima facie case (which he didn't), Defendants' proffered a nondiscriminatory explanation for the November 2017 suspension. (Doc. 57 at 39-41.) They suspended Mitchell because he threatened colleagues, called colleagues 'pussies,' and accused a colleague of 'acting like a little bitch.' (*Id*.) These nondiscriminatory explanations satisfy Defendants' burden under the second *McDonnell Douglas* step. *Cf. Cooper v. S. Co*., 390 F.3d 695, 725 (11th Cir. 2004) (quoting *Perryman v. Johnson Prods. Co*., 698 F.2d 1138, 1142 (11th Cir. 1983) ('At this stage of the inquiry, the defendant need not persuade the court that its proffered reasons are legitimate; the defendant's burden is merely one of production, not persuasion.)."Because no reasonable jury could find in Mitchell's favor, Defendants' motion for summary judgment (Doc. 56) is due to be **GRANTED."**

Legal Lesson Learned: The FD investigated and documented their findings, as well as prior discipline.

File: Chap. 9, Americans With Disabilities Act

FL: FDNY CHANGED GROOMING POLICY – REQUIRES CLEAN SHAVE – NOW ON APPEAL – JACKSONVILLE FF LAWSUIT

Nov. 25, 2020, "Black firefighters sue over Jacksonville policy requiring crews to be cleanshaven." It referenced a lawsuit by FDNY firefighters.

The City of New York lost their case on Jan. 29, 2020, and has filed an appeal to the U.S. Court of Appeals for Second District. On July 2, 2020, the plaintiff firefighters filed their reply brief in the U.S. Court of Appeals for Second Circuit.

On Jan. 29, 2020, in Salik Bey, et al. v. City of New York, Daniel Nigro, et al., 437 F. Supp. 3rd 2222, Senior U.S. District Court Judge Jack B. Weinstein, U.S. District Court for Eastern District of New York ordered FDNY to return to their former grooming policy (Aug. 2015 – Dec. 2017) which allowed facial hair in the chin, cheek and neck area if it did not cause leakage around the mask's seal. Under the new policy: "If Plaintiffs shaved all facial hair in the chin area, they would maintain their status as full duty firefighters; otherwise, they would be placed on light duty."

> Judge Weinstein's decision:
> "Defendants admit that no heightened safety risk to firefighters or the public was presented by the accommodation previously in effect. Two and a half years passed without incident, and Plaintiffs continued to perform their jobs satisfactorily. The FDNY's decision to abandon the prior accommodation was not based on any actual safety risks to firefighters or the public. Rather, driving the calculus was bureaucracy. Defendants cite no case law indicating that such bureaucratic considerations are a viable undue hardship defense; the court declines to so find."

Facts:

> "Salik Bey ('Bey'), Clyde Phillips ('Phillips'), Steven Seymour ('Seymour') and Terrel Joseph ('Joseph') (collectively, 'Plaintiffs') are African American men who were employed as firefighters by the Fire Department of the City of New York ('FDNY' or 'Department') when the relevant events began… They suffer from Pseudofolliculitis Barbae ('PFB')—a physiological condition that causes disfigurement of the skin in the hair-bearing areas of the chin, cheek, and neck.
>
> ***
>
> "Pseudofolliculitis Barbae is a skin condition that affects approximately 45% to 85% of African American men. Am. Compl. ¶¶ 22-23, ECF No. 19. It is exacerbated by shaving with a razor down to the skin. *Id.* The medical assessment of Plaintiffs' expert, Dr. Marc Serota, recounts their experience with the condition:
>
> > Mr. Bey states he has had [PFB] since he began shaving. Treatment has included avoiding razor blades for shaving. Prior treatment has included topical clindamycin 1% lotion and topical salicylic acid washes...
>
> There are two regimes relevant to the case: one from August 2015 to December 2017 when firefighters could have maintained facial hair in the chin, cheek and neck area if it did not cause leakage around the mask's seal ('prior accommodation'); and one now in effect where a full duty firefighter must shave with a razor down to the skin or be given desk work ('present non-accommodation').

***

Because of their skin condition, Plaintiffs sought a medical accommodation from the Department, allowing them to maintain closely-cropped facial hair, uncut by a razor. Am. Compl. ¶¶ 34-35, ECF No. 19. Before the requests were granted, Plaintiffs were subjected to a "Fit Test". A Fit Test is a standard test designed by OSHA to 'ensure[ ] that the face piece of the SCBA gets the proper seal so that ... what the member is breathing is the air from the tank and not anything that may be contaminated.' Commissioner Daniel Nigro Deposition ('Nigro Dep.') at 29:14-19, ECF No. 48-14.

Observing no leakage from the FDNY-approved mask when it was worn by individuals like Plaintiffs with closely-cropped facial hair, the requested accommodation was granted by the FDNY. Bey's accommodation was granted on August 27, 2015; Phillips' on August 3, 2015; Seymour's on August 28, 2015; and Joseph's on January 3, 2018. Def. Statement of Facts ¶¶ 30-33, ECF No. 38.

Subsequent Fit Tests administered by the Department concluded that the medical accommodation did not compromise the safety or productivity of any individual plaintiff. By Defendants' admission, the accommodation was fully applicable for two and a half years before the present non-accommodation regime. There were no reports that it increased the risks to firefighters or civilians:

> The Court: [D]uring that two and a [half] year period, there was no greater risk than there would have been had the Department required a clean shave.
>
> [Attorney for Defendants]: Your Honor, I believe, based on, based on federal regulations, the research conducted by the Fighter Department, there was a greater risk.
>
> The Court: In what way? Was there anybody who was at risk according to your records?
>
> [Attorney for Defendants]: There [were] no safety incidents reported, Your Honor, as a result of the accommodations, no.
> December 16, 2019 Summary Judgment Evidentiary Hearing ("Evidentiary Hearing") at 14: 21-15-5.

***

Having established that PFB is an ADA-qualifying disability, remaining is the question of whether a reasonable trier of fact could find that the FDNY refused to provide a reasonable accommodation. The court answers yes.

***

On the evidence produced, a reasonable trier of fact would find that the accommodation previously in effect posed no undue hardship on the fire department:

> Q: In terms of hardship, the fact that these individuals were permitted to grow some facial hair as a result of their accommodations before they were revoked, did that cause any hardship on the department, the fact that they were permitted to grow some facial hair and be full duty firefighters?

> [Commissioner]: Not that I'm aware of.
> Q: It doesn't cost the fire department anything to let these individuals maintain some facial hair, correct?
>
> [Commissioner]: Well, it would only cost us something if they subsequently had a problem at a fire and either – the ultimate problem of being affected by a toxic atmosphere, that would affect us. So I think we were – felt we were protecting ourselves and the members from that potential.
>
> Q: My question to you is then, these firefighters that were receiving accommodations, them growing some facial hair, did that cost the department anything?
>
> [Commissioner]: Did it? No.

***

Defendants' undue hardship defense is foiled by OSHA's own interpretation of RPS. By a letter dated May 9, 2016, OSHA interpreted the relevant RPS provision as clearing the way for Plaintiffs to maintain facial hair that does not protrude under the respirator seal:

> The Respiratory Protection standard, paragraph 29 CFR 1910.134(g)(1)(i)(A), states that respirators shall not be worn when facial hair comes between the sealing surface of the facepiece and the face or that interferes with valve function. *Facial hair is allowed as long as it does not protrude under the respirator seal, or extend far enough to interfere with the device's valve function*. Short mustaches, sideburns, and small goatees that are neatly trimmed so that no hair compromises the seal of the respirator usually do not present a hazard, and, therefore, do not violate paragraph 1910.134(g)(1)(i).
> May 9, 2016 OSHA Interpretative Letter at 2, ECF No. 48-15 (emphasis added).

***

Alleged by Plaintiffs is that they were ‘disabled’ and their rights were violated by Defendants when the FDNY rescinded an appropriate accommodation exempting Plaintiffs from the Department's standards for personal grooming (‘Grooming Policy’)…. On the theory and facts of the ‘failure to accommodate’ and disability discrimination claims under the Americans with Disabilities Act ("ADA"), Plaintiffs are entitled to summary judgment against Defendants and to reinstatement of the accommodation previously in effect.

***

Defendants now argue that that same accommodation—permitting Plaintiffs to maintain closely-cropped facial hair uncut by a razor—is an undue hardship because it would require the FDNY to be "[non]compliant with the requirements of OSHA and NIOSH and the guidelines set forth by the NFPA." Def. Mem. of Law at 29, ECF No. 39. The court is not persuaded.

***

Plaintiffs' motions for summary judgment on the failure to accommodate claim and disability discrimination claim under the ADA are granted. The medical accommodation previously in

effect for full duty FDNY firefighters is ordered reinstated…. This order and judgment is stayed for ten days to permit Defendants to seek a longer stay from the Court of Appeals."

Legal Lesson Learned: The FDNY case will now be decided by the U.S. Court of Appeals for the Second Circuit. The Jacksonville FD case will proceed to pre-trial discovery.

File: Chap. 13, EMS

NY: COVID-19 – U.S. SUPREME COURT INJUNCTION [5 T0 4] - GOV. CUOMO'S LIMITS ON RELIGIOUS GATHERINGS

On Nov. 25, 2020, in Roman Catholic Diocese of Brooklyn v. Cuomo and Agudath Israel v. Cuomo, the U.S. Supreme Court (5 to 4) issued an emergency injunction on the Governor's 10-person ("Red Zones") and 25-person ("Orange Zones") occupancy limits.

> "Respondent is enjoined from enforcing Executive Order 202.68's 10- and 25-person occupancy limits on applicant pending disposition of the appeal in the United States Court of Appeals for the Second Circuit and disposition of the petition for a writ of certiorari, if such writ is timely sought.
>
> In a red zone, while a synagogue or church may not admit more than 10 persons, businesses categorized as 'essential' may admit as many people as they wish. And the list of "essential" businesses includes things such as acupuncture facilities, camp grounds, garages, as well as many whose services are not limited to those that can be regarded as essential, such as all plants manufacturing chemicals and microelectronics and all transportation facilities."

Legal Lessons Learned: The 5 "conservative" members of the Court issued the injunction, over the dissent of 4 other Justices.

> Note: Majority decision by Justices Samuel Alito; Amy Coney Barrett; Neil Gorsuch; Brett Kavanaugh; Clarence Thomas
> Dissenting: Chief Justice John Roberts; Justices Steve Breyer; Elana Kagan; Sonia Sotomayor

File: Chap. 13, EMS

GA: ISLAND RESIDENTS SUE COUNTY – POOR EMS SERVICE – EXPERT'S REPORT ADMISSIBLE – RELIABLE / HELPFUL

On Nov. 23, 2020, in Melvin Banks, Sr., et al. v. McIntosh County, U.S. Magistrate Judge Benjamin W. Cheesbro, U.S. District Court for South District of Georgie, denied the County's motion to exclude the expert testimony and report of Dr. William Fales, since he has extensive experience in EMS.

> "In other words, Dr. Fales' opinions concern how and when various healthcare assets are deployed and utilized on a system-wide basis, not the adequacy of specific forms of medical care

or treatment. Dr. Fales' recommendations highlight this distinction. For example, Dr. Fales recommends Sapelo Island First Responders should have a dedicated vehicle (Recommendation B7) and the fireboat used by McIntosh County EMS should be moved from one location to another (Recommendation C3). Doc. 273-1 at 50.

Recommendation A3 provides that the McIntosh County EMS should use Wiregrass 911 to adopt a formal 911 system. Doc. 273-1 at 48. Recommendation A4 provides the County should adopt a tiered response plan for the Sapelo Island EMS Response Plan based on patient acuity. Id. Recommendation C1 provides McIntosh County should develop a form EMS Response Plan for Sapelo Island. Id. At 49. Recommendation C2 also provides McIntosh County EMS should work in collaboration with Wiregrass 911. Id. Recommendation C6 provides McIntosh County should develop a training program for first responders serving Sapelo Island to ensure effective EMS. Id. Recommendation C7 provides McIntosh County EMS should established a quality improvement program. Id. At 50. Recommendation C9 provides McIntosh County EMS should apply for a federal grant to help better serve both the County as a whole and the Island. Id."

Facts:

"This case arises out of a dispute between the residents of Sapelo Island (and others with connections to the Island) and Defendants. Doc. 29. Plaintiffs allege Defendant McIntosh County discriminates against them by providing inadequate services, including emergency medical services ('EMS'). Id. At 79. In support of their claims regarding EMS, Plaintiffs intend to rely on the testimony of an expert witness, Dr. Williams Fales. Doc. 273. Dr. Fales provided a 50-page report (the 'Report') discussing effective EMS systems generally and the McIntosh County and Sapelo Island EMS systems specifically. Docs. 273-1, 339-1.

***

Plaintiffs retained Dr. Fales as an expert witness in emergency medicine and hired him to opine on effective EMS systems and disparities between EMS services available on Sapelo Island and mainland McIntosh County. Doc. 339 at 1. Dr. Fales is currently a professor in the Department of Emergency Medicine at Western Michigan University Homer Stryker M.D. School of Medicine and has over 40 years of experience in EMS. Doc. 339-1 at 53-54. Along with teaching, Dr. Fales has served as the EMS Medical Director for Kalamazoo County Medical Control Authority, State Medical Director for the Michigan Department of Health and Human Services Bureau of EMS, Trauma and Preparedness, he has written extensively on emergency medicine and EMS systems, and he has previously testified as an expert. Id. At 52-68.

Defendant characterizes Dr. Fales' Report as only offering recommendations to the County as how to better serve Sapelo Island, rather than providing any opinion on deficiencies in the Sapelo Island EMS services. Doc. 273 at 1. As noted above, in Sections 4 and 5, Dr. Fales offers 26 recommendations to improve EMS both on Sapelo Island, some of which involve improvements to McIntosh County's EMS generally (i.e., recommendations for improving McIntosh County's EMS throughout the county, not just on Sapelo Island). Doc. 273-1 at 35-47. Additionally, the Report contains Sections on effective EMS systems generally and a description of the EMS, past and current, on Sapelo Island and in McIntosh County. Id. At 17-34. Defendant does not appear to challenge these Sections.

Defendant McIntosh County filed a Motion to Exclude Dr. Fales' testimony, arguing his expert opinions are inadmissible because the conclusions are not sufficiently reliable and the testimony is not helpful under Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S 579 (1993), and Federal Rule of Evidence 702. Doc. 273 at 5, 9. Defendant, however, does not at this time raise any challenge to Dr. Fales' qualifications under Daubert.

But Dr. Fales' testimony concerns systems for the allocation, prioritization, and provision of healthcare services and management of such systems, not specific medical treatment or diagnoses. In other words, Dr. Fales' opinions concern how and when various healthcare assets are deployed and utilized on a system-wide basis, not the adequacy of specific forms of medical care or treatment."

Legal Lessons Learned: The case may now proceed to trial. Dr. Fales has apparently never visited Sapelo Island; hopefully he will prior to trial.

Note: Sapelo Island looks like a lovely place. Click here to be redirected to the Explore Georgia site.

"Sapelo is a state-managed barrier island, the fourth largest in the chain of coastal Georgia islands between the Savannah and St. Marys rivers. Accessible only by passenger ferry, Sapelo provides a number of public access recreational, educational and lodging opportunities. The Georgia Department of Natural Resources (DNR) manages the island. DNR operates the ferry service and serves as state liaison for the Sapelo Island National Estuarine Research Reserve, the University of Georgia Marine Institute, and the civilian Hog Hammock community, permanent home to about 70 full-time residents, many of whom are descended from the antebellum slaves of Sapelo's plantations."

File: Chap. 13, EMS

OH: COVID-19 TEMPORARY STATUTE – EMS AUTHORIZED WORK IN HOSPITAL ED AND IN OTHER HOSPITAL AREAS

On Nov. 23, 2021, the Governor of Ohio signed into law House Bill 151, provides in part:

"(B) Beginning on the effective date of this section and until July 1, 2021, and not withstanding any provision of the Revised Code, a first responder, emergency medical technician-basic, emergency medical technician-intermediate, and emergency medical technician-paramedic may perform emergency medical services in any setting, including in any area of a hospital, if the services are performed under the direction and supervision of one of the following:1) A physician;(2) A physician assistant designated by a physician;(3) An advanced practice registered nurse designated by a physician.(C) A first responder, emergency medical technician-basic, emergency medical technician-intermediate, and emergency medical technician-paramedic is not liable in damages in a civil action for injury, death, or loss to person or property resulting from the individual's administration of emergency medical services, unless the services are administered in a manner that constitutes willful or wanton misconduct." [page 20].

Legal Lesson Learned: The new law will be helpful to many hospitals; Ohio EMS should keep their FD Medical Director informed of duties performed outside the ED.

Note: See memo from State Medical Director:

> "Typically, EMS medical directors and most emergency physicians are well versed in the parameters within the Ohio EMS scope of practice. However, this may not be the case with other healthcare providers or physicians who specialize in other medical specialties. Each Ohio EMS provider is responsible for their individual Ohio EMS certification and to ensure that their actions are within the authorized Ohio EMS scope of practice for their respective level of certification. **If any healthcare provider requests the provision of emergency medical services that are beyond the Ohio EMS scope of practice, it is the responsibility of the Ohio EMS provider to decline to perform skills or provide services that are not authorized by the State Board of Emergency Medical, Fire, and Transportation Services.**" [Emphasis in original.]

File: Chap. 13, EMS

NY: PLAINTIFF PASSED OUT AT CONCERT – REFUSES EMS HELP – ORIENTED TIMES 3 - FALLS ON HIS FACE – CASE DISMISSED

On Nov. 19, 2020, in Anthony Fornabaio, et a. v. Beacon Broadway Company, Inc.; Transcare Corporation, et al., the Appellate Division of the Supreme Court of New York, held (3 to 0) that when a competent adult patient refuses EMS help, his lawsuit against the concert provider and Transcare, the EMS provider should be dismissed.

> "Any duty Beacon or Transcare owed to plaintiff to assist him in exiting the theater terminated when he refused such assistance. It is well settled that a competent adult has the right to determine the course of his or her own medical treatment, including declining treatment *(Matter of Fosmire v Nicoleau*, 75 NY2d 218, 226 [1990]). Plaintiff does not dispute that he refused assistance in standing or ambulating. Further, the testimony was that the EMT technician assessed plaintiff as alert and oriented as he left his seat to exit the theater. Given this, the complaint should have been dismissed in its entirety as to defendants Beacon and Transcare (*see Branda v MV Pub. Transp., Inc.*, 139 AD3d 636, 637 [1st Dept 2016])."

Facts:

> "Plaintiff Anthony Fornabaio and his wife were attending a concert at defendant Beacon's venue. Shortly after the concert began, plaintiff passed out in his seat, regained consciousness with his wife shaking him awake, and immediately passed out again. The Beacon security supervisor and a Transcare EMT responded via a radio call to where plaintiff was seated. Plaintiff was described as slumped in his seat with his eyes closed. Questions posed by the EMT technician determined that plaintiff was 'completely conscious,' and alert and oriented times three. She advised him, however, that because it was too loud inside the theater, she was unable to check his blood pressure and to check his pulse, it was necessary that they go outside the theater.
>
> The testimony was that while multiple offers were made to plaintiff to assist him in standing and in walking from the theater, he refused, stating that it was embarrassing and that he wanted to walk on his own. While plaintiff ultimately stood on his own and walked unassisted up the aisle to the landing at the rear of the seating area, with Beacon security and the EMS worker following

and with other Beacon personnel making sure the aisle was clear, when plaintiff reached the landing, he again lost consciousness and fell forward, striking his face on the floor."

Legal Lesson Learned: Key facts – person was "alert" and "oriented times three" – led to dismissal of this case.

File: Chap. 15, CISM

TX: PARAMEDIC WITH PTSD – DENIED "ON-DUTY" DISABILITY PENSION – 75% Of SALARY - CONFLICING PSYCHOLOGISTS

On Nov. 17, 2020, in Gregory Green v. Houston Firefighters' Relief And Retirement Fund, the State of Texas in the Fourteenth Court of Appeals, held (3 to 0) that trial court correctly upheld the Board to deny on-duty disability pension for paramedic with 17-years of experience, given conflicting opinions of two mental health professionals. Plaintiff may be eligible for a non-duty disability pension; on-duty disability pensions are 75% of average salary if not capable of any gainful future employment; or 50% if can't perform firefighter duties.

> "The evidence before the Board and subsequently before the trial court was in direct conflict. [Dr. Ashley] Woolbert opined that Green experienced disability to the degree that he could not perform any full-time work. [Dr. Edwin] Johnstone, on the other hand, opined that Green's only limitation in performing full-time work was the physical limitation of his shoulder. In a substantial evidence review the agency's action will be sustained if the evidence is such that reasonable minds could have reached the conclusion that the agency must have reached to justify its actions. *Texas Health Facilities Com'n*, 665 S.W.2d at 453. Because the evidence was conflicting, the Board could have determined after reviewing Johnstone's reports that Green did not qualify under the Act for on-duty disability. *See id*. (If there is evidence to support either affirmative or negative findings on a specific matter, the decision of the agency must be upheld)."

Facts:

> "Appellant Gregory Green sought pension benefits from appellee the Houston Firefighters' Relief and Retirement Fund ("the Fund"). After the Fund denied Green's request, he appealed that decision to the trial court. *See* Tex. Rev. Civ. Stat. Ann. Art. 6243e.2(1) § 12(a). The trial court denied Green's requested relief and this appeal followed.
>
> ***
>
> On November 2, 2016, Green, a 17-year paramedic with the Houston Fire Department, applied for disability pension benefits with the Fund. Green sought on-duty disability benefits pursuant to section 6I of article 6243e.2(1), which provided benefits if the Fund's board "determine[d] that a member is not capable of performing any substantial gainful activity because of the member's on-duty disability." Tex. Rev. Civ. Stat. Ann. Art. 6243e.2(1) § 6I. Green's application was accompanied by a certification and diagnosis from Dr. Ashley Woolbert, Green's treating physician. On November 29, 2016, Green was terminated from the Houston Fire Department due to medical disability.

***

Woolbert submitted a letter with Green's application in which she stated that she was treating Green for Major Depressive Disorder and Chronic Post-Traumatic Stress Disorder. Woolbert stated that Green was responding to outpatient treatment and had been gradually improving until experiencing a traumatic event while on a paramedic call on May 22, 2016. On that date Green was dispatched to a scene in which an individual had been brutally beaten and killed. Woolbert described the event as Green being 'exposed to [the] body of [a] man who was violently beaten to death[.]' Woolbert stated that this exposure triggered acute stress disorder resulting in suicidal ideation. Green was subsequently admitted to a hospital 'as a direct result of the mental health effects from this event. Woolbert also attached a letter in which she stated, 'At this time due to [Green's] current medical condition, recommended intensive treatment program, and side effects from medications it is not recommended that patient maintain full time employment.' Woolbert spent more than 40 hours treating Green over the course of one and a half years and noted that his symptoms worsened since the traumatic event on May 22, 2016, 'and eventually led to symptoms which became life threatening.'

In response to Green's application for on-duty disability, the Board asked Dr. Edwin Johnstone to perform a psychiatric disability/fitness evaluation on Green. Johnstone interviewed Green and reviewed medical records and official documents provided by the Board, including medical records from the Veterans Administration.

To complete its review the Board asked Johnstone to answer certain questions. Johnstone responded to the Board's questions as follows:

> What is the current medical condition and prognosis? 'Despite the content of documents from care providers, I am unable to be certain whether or not Mr. Green actually has the conditions that have been diagnosed. It appears to me that he has a personality disorder marked by persistent interpersonal clashes in a variety of settings. His story to me strongly suggests that he, at least in the past couple of years, has resorted to making exaggerated and dramatized comments to manipulate other persons into believing that he is desperately disturbed so that he can gain attention and gain benefits of being thought to be disabled. His stories of consistently excellent performance are not verifiable in the documents I saw. It is common for persons with deceptive motives to present themselves as higher performers than they really were in school and at work. They commonly report heroic events that never occurred, or academic degrees they never earned.'

In Johnstone's report he noted that he conducted a two-hour interview with Green and reviewed medical records and official documents provided by the Board. Johnstone noted that Green acknowledged that they had adequately discussed every major aspect of Green's life.Because the evidence was conflicting, the Board could have determined after reviewing Johnstone's reports that Green did not qualify under the Act for on-duty disability. *See id*. (If there is evidence to support either affirmative or negative findings on a specific matter, the decision of the agency must be upheld)."

Legal Lesson Learned: Given the conflicting experts' reports, Courts will uphold decisions of Boards.

File: Chap. 16, Discipline

OK: FIRE CHIEF FIRED – WRITTEN WARNING, 1-YR LATER NEVER WORKED FF SHIFT, OTHER ISSUES - FIRED FOR "GOOD CAUSE"

On Nov. 4 2020, in Stephen Parmenter v. City of Nowata, Oklahoma, U.S. District Court Judge Terence C. Kern, U.S. District Court for the Northern District of Oklahoma, granted the City's motion for summary judgment. The Fire Chief worked for a Chartered City which empowered the City Manager to terminate heads of department and others "at will." In Aug. 2017, the City Manager issued written reprimand documenting numerous personnel issues; the Manager also added a requirement the Chief work one shift per week, which he never did for following year.

> "Moreover, even assuming 11 O.S. §19-104 applies to Parmenter's claim, the undisputed record establishes that he was fired for 'good and sufficient cause.' On August 31, 2017, he received a formal, documented reprimand listing numerous issues and also ordering him to work at least one regular shift per week as a firefighter. Accordingly, he was aware that any further infractions could lead to disciplinary action—including termination—against him. For well over a year after the written reprimand, Carrick continued to address items listed in the written reprimand. During that time, and in contravention of the reprimand, he failed to work a single fire shift. Moreover, after meeting with fire department employees, Carrick learned of other issues—including that department morale was abysmal due to favoritism of one employee over the others, and that employees were trading shifts without documenting the trades, and then directly compensating each other for covered shifts.
>
> The undisputed record supports the City's position that Parmenter's termination was for 'good and sufficient cause.'"

Facts:

> "Plaintiff is the former Fire Chief for the City of Nowata…. Melanie Carrick ('Carrick') is the City Manager of Nowata. Ex. 1. The City of Nowata's City Charter provides that the City Manager has the power and duty 'to appoint and remove all Heads of Departments, and all subordinate officers and employees of the City.' Doc. 23, Ex. 9, City Charter Section Twenty-Six; Ex. 10, City Code Section 2-302.
> The City of Nowata's Personnel Manual states that all City employees are 'at will,' and can be fired with or without notice. *Id*., Ex. 11, Personnel Manual, §§1-1, 1-3, 2-5, 9-1, 9-2).
>
> ***
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> On August 31, 2017, Carrick gave Plaintiff an Employee Warning Notice for:
>
> > Altering of employee time sheets, falsification of [his]own time sheet, Interfered with the City's relationship with the Harmon Foundation, providing false information to supervisor, hindering the accounting process by holding checks that need to be deposited and not turning them in for deposit in a timely manner, allowing multiple employees to take comp time that they had not accrued, issuance of comp time not in accordance with City personnel manual, fostering and allowing to continue an environment of low morale in department, creating feelings of fear and retribution or retaliation in employees in the department creating a harassing, hostile and threatening work environment for employees, non-compliance with hiring policy, holding volunteer pay until dues are paid, scheduling part-time workers more than part time hours.

The same day, Carrick also instructed Plaintiff that he was to work at least one regular shift per week as a firefighter. *Id*., Ex. 1; Ex. 2, Parmenter Dep. at 87:20-23. As of August 31, 2017, Plaintiff was aware that any further infractions could result in disciplinary action against him, including termination. *Id*., Ex. 1; Ex. 2, Parmenter Dep. at 94:13-24.

Carrick continued to communicate with Plaintiff about the issues noted in the reprimand 'throughout a year or a year and a half' before his termination. *Id*., Ex. 2, Parmenter Dep. at 95:11-96:3. Beginning in March 2018, Carrick and Plaintiff had at least two discussions about Plaintiff's job, and even discussed changes to the job description to accommodate Plaintiff. *Id*., Ex. 2, Parmenter Dep. at 97:2-101:24; Ex. 3, Fire Chief Job Description Annotated.

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In May 2018, Plaintiff, Carrick and City Attorney John Heskett met for an hour-and-a-half or longer to discuss the fire chief job description and Plaintiff's duties. *Id*., Ex. 2, Parmenter Dep. at 105:1-106:25l; Ex. 3, Fire Chief Job Description, Annotated.

At no time from August 2017 to the date he was terminated did Plaintiff fulfill his duty to work one fire shift a week. *Id*., Ex. 2, Parmenter Dep. at 87:20-88:1; 116:18-22.

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In March 2019, the issues about which Plaintiff had previously been counseled resurfaced. Exs. 4-5, 7, Carrick Memoranda of Reference; Ex. 6, McElhaney Statement. Specifically, EMS employees complained to Carrick that Plaintiff ignored their requests about scheduling accommodations and gave special privileges, including excessive overtime, to the single paramedic employed by the department. Ex. 4. Carrick also learned from employees that, in contravention of fire department policy, they were allowed to cover shifts for each other without documenting the hours on their time sheets, and were paid for those hours by the employee they covered for. *Id*. at 2; Exs. 5, 7.

On April 8, 2019, Carrick terminated Plaintiff's employment. *Id*., Ex. 8, Termination Letter.

***

Parmenter contends that pursuant to 11 O.S. §29-104, he possessed a property interest in his position as Fire Chief. That statute provides:

> The chief and members of all paid municipal fire departments shall hold their respective positions unless removed for a good and sufficient cause as provided by applicable law or ordinance.

However, Oklahoma law further provides:

> Whenever a charter is in conflict with any law relating to municipalities in force at the time of the adoption and approval of the charter, the provisions of the charter shall prevail and shall operate as a repeal or suspension of the state law or laws to the extent of any conflict.

11 O.S. §13-109. Accordingly, because the Nowata's City Charter provides that all City employees are at will and may be fired with or without notice, its provision prevails over 11 O.S. §19-104."

Legal Lesson Learned: The City Manager thoroughly documented the employment concerns; she also provided "due process" to the "at will" Fire Chief.

File: Chap. 16, Discipline

NJ: RECUIT FIRED AFTER GRADUATING - CHIEF KNEW HE HAD ALTERED INSURANCE CARD NEW RESIDENCE - REINSTATED

On Oct. 19, 2020, In The Matter Of Christopher D'Amico, City of Plainfield Fire Department, the Superior Court of New Jersey (Appellate Division) held (3 to 0) that the Civil Service Commission properly reinstated the firefighter. The Fire Chief knew of the altered card and has allowed the firefighter to enter recruit school.

> "After reviewing the City's exceptions, the Commission agreed with the ALJ. It held D'Amico provided his true address on the card and the addition of correct information on the document did not indicate a lack of character or morals to be a firefighter. Even if it were, the Commission concluded the City was aware of the altered document in May 2017, before D'Amico was hired and attended the fire academy. In addition, because D'Amico was on the job for only three or four hours at the time he was terminated, the Commission concluded the City had the burden of proving D'Amico was guilty of the charges. Based on its findings, the Commission reinstated D'Amico, and awarded him back pay, benefits, and seniority status."

Facts:

> To become a City firefighter, applicants are required to prove residency. D'Amico submitted several documents supporting his Plainfield residency, including a roller hockey alliance insurance card (card). D'Amico modified the card to include his actual residential address in Plainfield. According to D'Amico, he revised the card because he did not have additional proof of residency when he was asked for further documentation as part of the pre-employment review process. The City's hiring committee recommended against hiring D'Amico based on his alteration of the card submitted with his employment application.
>
> However, the City's Fire Chief decided to hire D'Amico. D'Amico attended the fire academy starting in June 2017. A citizen questioned the residency of several cadets attending the fire academy at that time. As a result, D'Amico's residency was re-examined in July 2017.During the July re-examination, D'Amico again admitted to altering the card. Ultimately, the concerned citizen's non-residency allegation regarding D'Amico was deemed to be unfounded.
>
> While the City suggests we independently review the facts presented to the ALJ and make our own inferences based on that evidence, we decline to do so. Whether we might have reached a different result is contrary to the well-established standard for review of agency determinations on appeal. We only review whether the agency's final decision was arbitrary, capricious, unreasonable, or lacked sufficient credible evidence in the record."

Legal Lesson Learned: Recruit was fortunate to have a Fire Chief who supported him. If city needed more proof of your residency, ask for additional time to prove you moved into the city.

Note: This case was featured in trade press. "NJ Firefighter Fired Three Hours Into First Day Can Stay on Job, Court Rules" (Nov. 2, 2020).