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JULY 2020 – FIRE & EMS LAW Newsletter

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15 EMS "Best Practices" Videos By Subject Matter Experts - EMS LAW (THIRD EDITION)
FREE / ONLINE - SOON BE POSTED [search Lawrence Bennett]

For example: EMS Pre-Arrival Notifications To Hospital ED
Randy Johann, EMS Coordinator, Tri-Health Hospitals, with Jessie Woodruff, ED Charge Nurse

For example: ED Preparation For Mass Shooting [including 5th Third Bank Shooting]
Dr. Dustin Calhoun, MD, Division of Emergency Medical Services, University of Cincinnati

EMS LAW (Second Edition) (2018); FREE ONLINE TEXTBOOK: (ISBN: 978-1-949104-03-5)

JULY NEWSLETTER - 19 RECENT COURT DECISIONS REVIEWED

File: Chap. 1, American Legal System

NY: QUALIFIED IMMUNITY – HOT TOPIC FOR CONGESS - NYPD USED TASER TWICE – $30,000 PUNITIVE DAMAGES

On June 26, 2020, in Matthew Jones v. Lieutenant Christopher Treubig, the U.S. Court of Appeals for the Second Circuit [NYC], held 3 to 0, that the U. S. District Court improperly set aside the jury verdict since the Lieutenant's conduct of using taser twice on a suspect held by other officers on the ground was a clear constitutional violation. "In sum, upon a review of the relevant legal authority, we hold that it was clearly established as of April 2015 that a police officer cannot use significant force, such as a taser, against an individual who is no longer resisting or posing a threat to the officers or others."

"Jones lives in an apartment building in East Harlem, New York. On the evening of April 7, 2015, he was descending the stairs of his apartment building to meet his uncle to return a bottle of prescription medication and $70 in cash. As Jones met his uncle in the stairwell, New York Police Department ('NYPD') Officers Michael Vaccaro and Adam Muniz encountered them while patrolling the building. The officers instructed Jones and his uncle to step from the stairwell into the building hallway, and both men complied. Jones then consented to be searched, and the officers found the bottle of medication that Jones was returning to his uncle. According to Jones, Officer Vaccaro said 'jackpot' upon finding the pill bottle, and arrested Jones. J. App'xat 26. At that point, Jones's uncle ran, and the officers handcuffed Jones's right arm as Jones questioned what he did wrong. The officers asserted that Jones then 'tried to turn around' and 'take a swing at' Officer Vaccaro, and Officer Vaccaro conducted a 'sweep kick' in response, bringing Jones to the ground. J. App'x at 49-50. As Jones was on the floor, Officer Vaccaro was on top of him, keeping Jones pinned to the ground face down. Jones's left arm remained uncuffed during the incident, despite the officers' attempts to handcuff it.

> ***
> Lt. Treubig and his partner then arrived on the scene, and Lt. Treubig announced that he was going to use his taser. Jones claimed that he did not hear the warning, and managed to 'force [himself] up off the ground' when he heard someone say, 'hit him.' J. App'x at 28, 42. At that point, Lt. Treubig used his taser against Jones in 'cartridge mode.' [Footnote. 1] J. App'x at 87, 89. When Lt. Treubig deployed the taser the first time, two metal prongs struck Jones in his lower back, and a electric charge cycled through him for five seconds. Jones testified that, as a result, '[he] fell back on the ground with [his] arms sprayed out in the air.' [Footnote 2.] J. App'x at 28.
>
> According to Lt. Treubig, the initial tasing "didn't stabilize [Jones] enough to the point where the officers were able to grab his hands." J. App'x at 84. Lt. Treubig then "[r]eassess[ed] the situation" and depressed the trigger of the taser again, thereby re-cycling the taser and sending another electrical charge into Jones's body. [Footnote 3.] J. App'x at 54, 84. After the second tasing cycle, Jones was handcuffed and brought to the hospital by ambulance. Approximately three minutes passed between the time that Officer Vaccaro radioed for assistance and the time that Lt. Treubig called for an ambulance. Jones was later charged with a controlled substance offense and resisting arrest. He was released without bond, and all charges were ultimately dismissed.

Footnote 1: Lt. Treubig explained 'cartridge mode' as follows: When you want to deploy it you put the "on" switch on. Depress the trigger. The prongs come out of the cartridge and then into the subject and then there's an electrical current that goes through and from the two prongs and it completes a circuit so the electric charges [enter] into the subject's body.

Footnote 2: Although Officer Vaccaro asserted that Jones was still trying to pull his arm under his body to prevent handcuffing, he agreed that Jones was on the ground face down after the first tasing.

Footnote 3: Re-cycling the taser in cartridge mode did not entail deploying the taser a second time because the taser prongs were already in Jones's back; rather, Lt. Treubig only had to press the trigger of the taser again."

Legal Lessons Learned: The "qualified immunity" doctrine has protected not only police officers, but also fire & EMS from personal liability, with many lawsuits being dismissed prior to trial. In litigation in federal court, and in many states, if the trial judge denies the motion to dismiss, there normally can be an immediate appeal by the public employee and employer to the Court of Appeals [in this case a pre-trial motion was apparently not filed].

> Note: Following the death of George Floyd in Minneapolis, Congress is current considering enacting several bills to either amend or virtually eliminate the qualified immunity doctrine. See article, June 19, 2020, "Republican rift opens up over qualified immunity for police."

File: Chap. 1, American Legal System

MI: QUALIFIED IMMUNITY – DENIED UNIV. OF MICH. FOOTBALL GAME - "DRUNK" FAN – PD EXCESSIVE FORCE

On June 24, 2020, in Bryan Richards v. County of Washtenaw, et al. & Justin Berent, the U,S. Court of Appeals for the 6th Circuit (Cincinnati) held (3 to 0) that the arresting officers enjoy qualified immunity for their arresting the fan for assaulting the uniformed medic in football stadium's medical office, but the lawsuit may proceed for excessive force. The 6th Circuit held: "Richards says he was never told he was under arrest and there was not enough time for him to have resisted the officers as they immediately converged on him upon entering the medical area. Berent acknowledges that he did not order Richards to stop before moving in for the arrest; and while Berent stated that he told Richards to 'stop resisting' several times before the officers took Richards to the ground, Richards denies this fact. Richards further testified that, while he was on the ground, he could not comply with any commands to place his hands behind his back as his arms were pinned beneath him."

> "On October 1, 2016, Richards was in Ann Arbor with a group of friends to attend a University of Michigan football game. At the time, Richards was 46 years old, 5'11"tall, and weighed 300 lbs. Prior to the game, he consumed at least five 12-ounce beers between 12:30 PM and 2:45 PM. A little before 3:30PM—the scheduled start time for the game—the group proceeded to the stadium on foot. Richards suffers from arthritis in his left ankle, so he put his arms around his friends for support. Inside the stadium, Richards's friends continued to support him as the group walked to their seats. It was then that UM police officers approached the group and asked Richards if he was drunk. He denied being drunk, but the officers gave him an ultimatum: He could either go to the stadium's emergency medical area or be arrested. Richards agreed to go to the medical area. He was then strapped onto a motorized cart and transported to the medical area, which was located near Gate Nine of Michigan Stadium.
>
> At the medical area, Richards was placed on a gurney with steel railings on both sides. He was offered, but refused, a breathalyzer test. He complied for '[p]robably about 15 minutes' with tests and questions from the medical staff, but then decided to leave. While he was scooting to the end of the gurney, Paramedic Rick Johnson 'shoved' him back, telling him that he could not leave because he was drunk, to which Richards replied, 'I'm not drunk.' Richards continued scooting off the gurney during this exchange, and when he stood up, Paramedic Johnson 'grabbed' his 'right arm by the bicep' and would not let go, even as Richards tried to pull away. After 'probably less than ten seconds' of this, someone—Richards's testimony gives no indication that, until this point, anyone other than Paramedic Johnson and a nurse were in the medical area—grabbed Richards by the left arm, twisting it behind him and bending him over, and someone else then

jumped over Richards's head onto his back, causing Richards to fall to his hands and knees. Richards was later able to identify these two individuals as Officer Berent and Deputy Cratsenburg. While he was on the ground, the officers continued 'jumping' up and down on' Richards until he was flat on the floor with his 'hands pinned underneath' him. The entire incident—from his first encounter with Johnson until he was pinned on the ground—took 'maybe 20, 25 seconds.'"

Legal Lessons Learned: Consider installing video cameras in the football stadium medical office.

File: Chap. 1, American Legal System

OH: TWO ARSON INVEST. TESTIFIED CAUSE & ORIGIN – STRONG CASE – TRIAL JUDGE ALLOWED TESTIFY WITHOUT FIRST BEING QUALIFIED AS "EXPERT WITNESSES"

On June 3, 2020, in State of Ohio v. Jauvaughn Penn, the Court of Appeals Ninth Judicial District (Summit County), 2020 Ohio 3158, held (2 to 1) that defendant's jury conviction of aggravated arson and burglary was affirmed. The Court of Appeals (2 judge majority) focused on the strength of the evidence against the defendant, and concluded trial judge did not abuse his discretion in allowing two Akron fire investigators to testify without being first qualified as experts. "[L]ay opinion testimony is admissible so long as it is 'rationally based on the perception of the witness' and 'helpful to a clear understanding of [his] testimony or the determination of a fact in issue.' Evid.R. 701. This Court reviews for an abuse of discretion a trial court's decision to admit lay opinion testimony under Evid.R. 701…. A trial court may be found to have abused its discretion if it rules in an unreasonable, arbitrary, or unconscionable manner. *Blakemore*, 5 Ohio St.3d at 219."

"The State set forth evidence that the fire started in the dining room at the back of C.M.'s [defendant's former girlfriend] house and that authorities were notified of the fire at 3:54 p.m. The evidence showed that Mr. Penn came to the house within ten minutes of the fire, walked to the back, remerged after a few minutes, and instructed his friend to drive away. There was testimony that, directly before he came to the house, Mr. Penn had been served with an ex parte order, forcing him to vacate his home in favor of C.M. Further, there was testimony that he was angry at C.M. for leaving and had planned on stopping her from removing any more possessions from their home." *** As previously noted, Inspector Hoch and Inspector D'Avello investigated the fire herein and testified about various aspects of their investigation. Both testified about the fire's point of origin, the fact that no accelerants were detected, and the outcome of their investigation (i.e., that the fire had been set intentionally). Although Inspector Hoch testified mainly in generalities, Inspector D'Avello offered several specific opinions. He opined that the fire burned for 15 to 30 minutes, that an unattended cigarette could not have caused it, that it was caused by an open flame, and that Mr. Penn started it. Mr. Penn objected numerous times as each investigator testified. He argued that their testimony lacked a proper foundation and that the State was eliciting expert testimony without the investigators having been tendered or qualified as experts. Though the court sustained several of his objections to specific questions, it admitted the foregoing testimony.

Two members of the Akron Fire Department's Fire Investigation Unit testified about the fire. Investigator Andrew Hoch responded to the scene of the fire after it was extinguished and took pictures inside and outside of the house. The pictures showed significant damage to the first floor of the house, with extremely dark charring on floor of the dining room near the back, sliding glass patio door. Fireman Hoch testified that the heaviest area of char usually indicates the point of origin for a fire, so his department concluded that the fire herein originated in the dining room. He testified that samples were taken from that area to test for ignitable liquids, but none were detected. Further, he testified, the department was unable to determine that

there were any accidental explanations for the fire, such as the presence of a faulty electrical outlet. He agreed that a fire of the magnitude that occurred herein could have been caused by an open flame without the use of an accelerant. While he was unable to say who had started the fire, he testified that it had been intentionally set.

Investigator Matthew D'Avello testified that he acted as a follow-up investigator for Investigator Hoch. He was never able to set foot inside the West Miller Avenue house because it was boarded up by the time he arrived there. Nevertheless, he reviewed the pictures Investigator Hoch had taken inside the house, interviewed the neighbor across the street, interviewed C.M., attempted to reach Mr. Penn, and subpoenaed Mr. Penn's cell phone records. Investigator D'Avello testified that fire investigations are often pending for some time and, as an investigation unfolds, investigators can learn additional facts that impact their determination about the cause of a fire. Much like Investigator Hoch, he testified that the darkened, charred area of C.M.'s dining room was the origin point for the fire. He stated that it was impossible the fire had started in either the basement or an upstairs bedroom, given the burn patterns that were present in the dining room. Additionally, he rejected the possibility that the fire had been caused by an unattended cigarette as the burn pattern he observed was distinct from the type of burn pattern that occurs with a slow, smoldering fire. He opined, based on his experience, that the fire had burned for 15 to 30 minutes before it was extinguished. According to the investigator, the only possible ignition source for the fire was an open flame, as the fire department eliminated every other possibility. Investigator D'Avello ultimately opined, based on his entire investigation, that Mr. Penn was the individual who set the fire."

Legal Lessons Learned: Whenever possible, it is best for prosecutors to have the trial court qualify Arson investigators as expert witnesses and provide a written report to the defense prior to trial.

Note: One of three judges on the Court of Appeals wrote a partial dissenting opinion.

"I respectfully dissent in regard to the majority's resolution of the first assignment of error as I would conclude that the trial court abused its discretion when it permitted Mr. Hoch and Mr. D'Avello to give expert testimony at trial. *** Mr. Hoch and Mr. D'Avello expressed definitive opinions on the origin of the fire. These opinions were largely predicated on an understanding of charring levels and burn patterns on the walls. Testimony regarding the origin of a fire based on analysis of charring levels and burn patterns observed during a visual inspection frequently falls within the purview of expert testimony."

File: Chap. 2, LODD / Safety

NY: FIREMAN'S RULE – PD INJURED, FRONT EDGE STEP BROKE – OWNER DEFAULT, CAN'T SUE MORTGAGE CO.

On June 10, 2020, in Joseph B. Maher v. Wells Fargo Financial New York, Inc., et al., 2020 NY Slip Op 03219, the Supreme Court of New York, Appellate Division (Second Judicial Department) held (5 to 0) that the trial court had properly granted summary judgment to the defendant mortgage company and its subs that maintained the property, since they owed no duty of care to the police officer. The Court held: "On May 26, 2011, the plaintiff, a police officer, was in the process of executing a parole arrest warrant, which required him to enter certain property in Hempstead (hereinafter the property). The plaintiff allegedly was injured when, while walking down a flight of stairs, the front edge of one step broke and he fell down the remaining stairs. At the time of the incident, the defendant Charles White owned the property, but had defaulted on his mortgage loan payments in April 2011**. ***** The 'firefighter's rule,' which 'bars recovery in negligence for injuries sustained by a firefighter [or a police officer]

in the line of duty' (Giuffrida v Citibank Corp., 100 NY2d 72, 76), was abolished by General Obligations Law § 11-106, except as to actions against municipal employers and fellow police officers…. *** Here, the defendants established their prima facie entitlement to judgment as a matter of law dismissing the negligence cause of action insofar as asserted against each of them by demonstrating that they did not own or control the subject premises, or assume any duty to the plaintiff, which might serve as a predicate for liability (see Pollard v Credit Suisse First Boston Mtge. Capital, LLC, 66 AD3d at 863)."

> "The plaintiff commenced three separate personal injury actions arising from the incident, and those actions were consolidated by the Supreme Court. As relevant here, the plaintiff asserted causes of action against the defendant Wells Fargo Financial New York, Inc., and Carrington (hereinafter together the mortgage defendants), and the LPS defendants, alleging common-law negligence as codified by General Obligations Law § 11-106, and alleging a violation of General Municipal Law § 205-e. Following the completion of discovery, the mortgage defendants and the LPS defendants (hereinafter collectively the defendants) separately moved for summary judgment dismissing the complaint insofar as asserted against each of them, and the plaintiff cross-moved for summary judgment on the issue of liability against the defendants. In an order dated November 9, 2016, the court granted the defendants' separate motions and denied the plaintiff's cross motions. The plaintiff appeals, and we affirm."

Legal Lessons Learned: The Fireman's Rule has been abolished in New York; also abolished in Florida.

> Note: New York General Obligations Law § 11-106 provides in part:
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> "In addition to any other right of action or recovery otherwise available under law, whenever any police officer or firefighter suffers any injury, disease or death while in the lawful discharge of his official duties and that injury, disease or death is proximately caused by the neglect, willful omission, or intentional, willful or culpable conduct of any person or entity, other than that police officer's or firefighter's employer or co-employee, the police officer or firefighter suffering that injury or disease, or, in the case of death, a representative of that police officer or firefighter may seek recovery and damages from the person or entity whose neglect, willful omission, or intentional, willful or culpable conduct resulted in that injury, disease or death."
>
> Florida (2019)
> 112.182 "Firefighter rule" abolished.—
> (1) A firefighter or properly identified law enforcement officer who lawfully enters upon the premises of another in the discharge of his or her duty occupies the status of an invitee. The common-law rule that such a firefighter or law enforcement officer occupies the status of a licensee is hereby abolished.
> (2) It is not the intent of this section to increase or diminish the duty of care owed by property owners to invitees. Property owners shall be liable to invitees pursuant to this section only when the property owner negligently fails to maintain the premises in a reasonably safe condition or negligently fails to correct a dangerous condition of which the property owner either knew or should have known by the use of reasonable care or negligently fails to warn the invitee of a dangerous condition about which the property owner had, or should have had, knowledge greater than that of the invitee.
> History.—s. 1, ch. 90-308; s. 693, ch. 95-147.

File: Chap. 3, Homeland Security

U.S. SUPREME COURT: FAST-TRACK DEPORTATION OF IMMIGRANTS CROSSING BORDER UPHELD

On June 25, 2020, in Department of Homeland Security, et al. v. Vijayakumar Thuraissigiam, the U.S. Supreme Court held (7 to 2) that Congress properly established a system of rapid deportation of aliens caught at the border, unless they can convince an immigration judge they had credible fear of persecution if returned to their home country. In this case, a Sri Lanka farmer was caught by Border Patrol crossing the border at 11 pm; he claimed he had been abducted and beaten in Sri Lanka by unknown men in a white van while working in his fields. One month after his arrest at the border he had a 13-minute hearing before an immigration judge and was ordered deported. He sought a writ of habeas corpus and hearing before a U.S. District Court Judge, which was denied, but U.S. Court of Appeals for 9th Circuit (San Francisco) reversed. Justice Samuel Alito wrote majority opinion: "Every year, hundreds of thousands of aliens are apprehended at or near the border attempting to enter this country illegally. Many ask for asylum, claiming that they would be persecuted if returned to their home countries. Some of these claims are valid, and by granting asylum, the United States lives up to its ideals and its treaty obligations. Most asylum claims, however, ultimately fail, and some are fraudulent. In 1996, when Congress enacted the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA), 110 Stat. 3009–546, it crafted a system for weeding out patently meritless claims and expeditiously removing the aliens making such claims from the country. It was Congress's judgment that detaining all asylum seekers until the full-blown removal process is completed would place an unacceptable burden on our immigration system and that releasing them would present an undue risk that they would fail to appear for removal proceedings.

> "Respondent Vijayakumar Thuraissigiam, a Sri Lankan national, crossed the southern border without inspection or an entry document at around 11 p.m. one night in January 2017. App. 38. A Border Patrol agent stopped him within 25 yards of the border, and the Department detained him for expedited removal…. He claimed a fear of returning to Sri Lanka because a group of men had once abducted and severely beaten him, but he said that he did not know who the men were, why they had assaulted him, or whether Sri Lankan authorities would protect him in the future. Id., at 80. He also affirmed that he did not fear persecution based on his race, political opinions, or other protected characteristics.
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> ***
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> Over the last five years, nearly 77% of screenings have resulted in a finding of credible fear. And nearly half the remainder (11% of the total number of screenings) were closed for administrative reasons, including the alien's withdrawal of the claim. As a practical matter, then, the great majority of asylum seekers who fall within the category subject to expedited removal do not receive expedited removal and are instead afforded the same procedural rights as other aliens.
>
> ***
>
> The asylum officer credited respondent's account of the assault but determined that he lacked a 'credible' fear of persecution, as defined by §1225(b)(1)(B)(v), because he had offered no evidence that could have made him eligible for asylum (or other removal relief). Id., at 83, 87, 89; see §1158(b)(1)(A). The supervising officer agreed and signed the removal order. Id., at 54, 107. After hearing further testimony from respondent, an Immigration Judge affirmed on de novo review and returned the case to the Department for removal. Id., at 97."

Legal Lessons Learned: The seven Justices found that the current system of immigration judges provides due process.

Note: See June 25, 2019 article, "Supreme Court Sides With Trump Administration In Asylum Cases."

U.S. SUPREME COURT: DACA PROGRAM MAY NOT BE TERMINATED UNTIL DHS FOLLOWS APA – 700,000 ALIENS

On June 18, 2020, in Department of Homeland Security v. Regents of the University of California, et al., the U.S. Supreme Court held (5 to 4) in an opinion by Chief Justice John Roberts, that the Trump Administration has not complied with the Administrative Procedures Act [notice of planned action, administrative hearings] in terminating the 2012 U.S. Department of Homeland Security program, established by President Obama. DACA [Deferred Action for Childhood Arrivals] has allowed 700,000 children of aliens to remain in the United States, request work authorization and be eligible for Social Security and Medicare. Chief Justice Roberts wrote: "We do not decide whether DACA or its rescission are sound policies…. We address only whether the agency complied with the procedural requirement that it provide a reasoned explanation for its action. Here the agency failed to consider the conspicuous issues of whether to retain forbearance and what if anything to do about the hardship to DACA recipients. That dual failure raises doubts about whether the agency appreciated the scope of its discretion or exercised that discretion in a reasonable manner. The appropriate recourse is therefore to remand to DHS so that it may consider the problem anew."

> "In the summer of 2012, the Department of Homeland Security (DHS) announced an immigration program known as Deferred Action for Childhood Arrivals, or DACA. That program allows certain unauthorized aliens who entered the United States as children to apply for a two-year forbearance of removal. Those granted such relief are also eligible for work authorization and various federal benefits. Some 700,000 aliens have availed themselves of this opportunity. Five years later, the Attorney General advised DHS to rescind DACA, based on his conclusion that it was unlawful. The Department's Acting Secretary issued a memorandum terminating the program on that basis. The termination was challenged by affected individuals and third parties who alleged, among other things, that the Acting Secretary had violated the Administrative Procedure Act(APA) by failing to adequately address important factors bearing on her decision. For the reasons that follow, we conclude that the Acting Secretary did violate the APA, and that the rescission must be vacated."

Legal Lessons Learned: This is a very "hot topic" that may in the future again be reviewed by the U.S. Supreme Court.

Note: See June 18, 2020 DHS statement:

U.S. DEPARTMENT OF HOMELAND SECURITY
Office of Public Affairs

DHS Statement On Supreme Court Decision on DACA

WASHINGTON- The Department of Homeland Security released the following statements regarding the Supreme Court decision on DACA.

Acting Secretary Chad Wolf: "DACA recipients deserve closure and finality surrounding their status here in the U.S. Unfortunately, today's Supreme Court decision fails to provide that certainty. The DACA program was created out of thin air and implemented illegally. The American people deserve to have the Nation's laws faithfully

executed as written by their representatives in Congress—not based on the arbitrary decisions of a past Administration. This ruling usurps the clear authority of the Executive Branch to end unlawful programs."

Acting Deputy Secretary Ken Cuccinelli: "The Supreme Court's decision is an affront to the rule of law and gives Presidents power to extend discretionary policies into future Administrations. No Justice will say that the DACA program is lawful, and that should be enough reason to end it. Justice Clarence Thomas had it right in dissent: 'Such timidity [by SCOTUS] forsakes the Court's duty to apply the law according to neutral principles and the ripple effects of the majority's error will be felt throughout our system of self-government.'"

File: Chap. 5, Emergency Vehicle Operations

IL: PRIVATE AMBULANCE – RAN RED LIGHT WHEN DRIVING TO NON-EMERGENCY TRANSPORT - NO IMMUNITY

On June 18, 2020, in Roberto Hernandez v. Lifeline Ambulance, LLC, et al., the Supreme Court of State of Illinois, held (4 to 3) that the private ambulance driver and his employer are not protected under the state's EMS immunity statute when the ambulance driver, on a non-emergency run without lights or siren, ran a red light and injured the driver of another vehicle. The ambulance had been dispatched to pick up a patient for nonemergency medical transport from Symphony at Aria Post Acute Care in Hillside to Villa Park Home Dialysis in Villa Park. The Court's majority held: "The issue presented is whether section 3.150 of the Emergency Medical Services Systems Act (EMS Act) (210 ILCS 50/3.150 (West 2016)) provides immunity from liability—to an ambulance owner and its driver—stemming from a motor-vehicle accident caused by the negligent operation of the ambulance while en route to pick up a patient for nonemergency transportation. We answer this question in the negative, holding that defendants are not immune from liability under the circumstances of this case."

> "Plaintiff, Roberto Hernandez, suffered bodily injuries on March 11, 2016, when a private ambulance owned by Lifeline Ambulance, LLC (Lifeline), and driven by Joshua M. Nicholas ran a red light at the intersection of Grand Avenue and Lake Shore Drive in Chicago and collided with plaintiff's vehicle. Plaintiff filed a three-count, first amended complaint against defendants in the circuit court of Cook County, seeking to recover damages for his injuries based on the negligence of the driver (count I), the willful and wanton misconduct of the driver (count II), and the doctrine of respondeat superior (count III). Plaintiff's complaint alleged that, at the time of the collision, defendant Nicholas was not operating the vehicle with his lights and siren engaged. Plaintiff further alleged that Nicholas was not proceeding in the ambulance in response to an emergency and that nobody on board was in the process of providing emergency or nonemergency medical services at the time of the collision.
>
> ***
> Defendants argue that the mere act of driving to a pickup location for a nonemergency transport is "preparatory conduct that is integral" to providing medical care. We disagree.

Legal Lessons Learned: EMS driving running a red light for a non-emergency transport should be held responsible, along with his company, for his negligent conduct.

> Note: Three dissenting Justices disagreed:
>
> "In the case at bar, at the time of the accident, Nicholas was rendering nonemergency medical services in the normal course of conducting his duties. Nicholas was in the process of responding to a dispatch to transport a patient to a health care facility. Driving to the patient was preparatory for and integral to delivering the

medical service. Further, the accident occurred before transporting the patient to a health care facility and during defendant's driving in response to the dispatch. Therefore, absent willful and wanton misconduct, section 3.150(a) of the EMS Act immunizes defendants for their alleged negligent acts or omissions while providing nonemergency medical services."

File: Chap. 6, Employment Litigation

OH: FF SUES MAYOR – FIRST AMEND. RIGHT POST YARD SIGNS – UPSET CITY INSPECTOR DIDN'T FIND DEFECTS NEW HOME

On June 22, 2020, in Scott Solarz v. James Gaven & City of Olmstead Falls, U.S. District Court Judge Christopher A Boyko, U.S. District Court for Northern District of Ohio (Eastern Division), denied the Mayor's motion to dismiss based on qualified immunity, but did dismiss the City on basis of governmental immunity. as a defendant. Court wrote: "On May 14, 2019, Plaintiff attended a City Council meeting [he lives in City of Olmstead Falls, and is a firefighter with City of Rocky River]. Allegedly, Plaintiff and Defendant Graven had a heated exchange over the improper inspection [of his home in 2016] and the refusal to provide Plaintiff with reimbursement [for cost of arbitration with builder]. Plaintiff felt the Mayor treated him disrespectfully and caused him to suffer public humiliation. In June of 2019, Plaintiff created three-yard signs - one was placed in his yard and the others in his two friends' yards. The signs read: 'VETERANS AND FIRE FIGHTERS AGAINST NO HONOR MAYOR GRAVEN.' *** According to the Complaint, in an effort to punish Plaintiff and to force him to remove the signs, Defendant Graven … contacted the Mayor of the City of Rocky River, the Fire Chief for the City of Rocky River, and Plaintiff's union president on or about June 29, 2019. *** Throughout the Complaint, Plaintiff alleges that Graven acted in his official capacity and/or under color of state law…. A mayor is a "person" who is constitutionally subject to liability under § 1983. *Monell v. Department of Social Services*, 436 U.S. 658 (1978). *** The Court concludes that, without some factual elucidation, it cannot find that Defendant Graven is entitled to qualified immunity."

"In July of 2016, Plaintiff moved into a new home in Olmsted Falls. Plaintiff soon discovered issues with the foundation and driveway of his home. A City inspector failed to recognize the defects and concluded that the premises complied with the City code. Plaintiff and the builder became embroiled in a contract dispute. The construction contract mandated arbitration and Plaintiff was ultimately required to pay the arbitration costs. Because Plaintiff believed that the City inspection was deficient, his attorney contacted the City Law Director seeking reimbursement of the arbitration charges. The Mayor and the Law Director denied Plaintiff's request.

***

On June 28, 2019, Defendant Graven came to Plaintiff's home unannounced and uninvited. Defendant was met by Plaintiff's fifteen-year-old daughter. Allegedly, Defendant was angry and that made the daughter nervous. Defendant gave her his business card and instructed her to have her father call him.

According to the Complaint, in an effort to punish Plaintiff and to force him to remove the signs, Defendant Graven, in his official capacity, instructed his City's Law Director to contact Plaintiff's employer. Defendant contacted the Mayor of the City of Rocky River, the Fire Chief for the City of Rocky River, and Plaintiff's union president on or about June 29, 2019.

On July 3, 2019, Defendant Graven's wife filed a criminal complaint against Plaintiff with the Olmsted Falls Police Department. The police called Plaintiff and told him about the Mayor's wife's complaint, but assured him that they found it to be baseless.

Plaintiff alleges that Defendant Graven requested the City of Olmsted Falls Fire Chief to restrict Plaintiff's access to the fire station and to the Olmsted Falls fire fighters there.
On July 5, 2019, Plaintiff received a letter from Graven's private attorney threatening Plaintiff and his two friends with legal action for defamation.
After these 'bullying tactics,' and fearing for his and his family's economic and personal well-being, Plaintiff removed the lawn signs.
Plaintiff alleges that Defendants violated his constitutional rights by exercising political authority over him as a citizen of Olmsted Falls, and by using the agencies of municipal government (police, fire and law departments) to intimidate him and to restrict his constitutional speech."

Legal Lessons Learned: Firefighters enjoy First Amendment rights to post yard signs involving personal matters; only limited rights concerning fire department matters.

Note: City of Olmstead Falls was dismissed from lawsuit since this case did not involve any City policy or ordinances, based on the U.S. Supreme Court decision in Monell v. Department of Soc. Svcs., 436 U.S. 658 (1978), where the New York City Board of Education forced pregnant teachers to take medical leave before such leave was required for medical reasons. The U.S. Supreme Court held that NYC can be sued for damages for their unconstitutional policy, which the city wisely dropped.

File: Chap. 7, Sexual Harassment

U.S. SUPREME COURT: HOMESEXUAL AND TRANSGENDER EMPLOYEES COVERED BY TITLE VII

On June 15, 2020, in Gerald Lynn Bostoc v. Clayton County, Georgia, (plus two other combined cases), held (6 to 3) that an employer cannot fire or otherwise discriminate against someone simply for being a homosexual or transgender. Justice Neil Gorsuch wrote: "Sometimes small gestures can have unexpected consequences. Major initiatives practically guarantee them. In our time, few pieces of federal legislation rank in significance with the Civil Rights Act of 1964. There, in Title VII, Congress outlawed discrimination in the workplace on the basis of race, color, religion, sex, or national origin. Today, we must decide whether an employer can fire someone simply for being homosexual or transgender. The answer is clear. An employer who fires an individual for being homosexual or transgender fires that person for traits or actions it would not have questioned in members of a different sex. Sex plays a necessary and undisguisable role in the decision, exactly what Title VII forbids."

"Gerald Bostock worked for Clayton County, Georgia, as a child welfare advocate. Under his leadership, the county won national awards for its work. After a decade with the county, Mr. Bostock began participating in a gay recreational softball league. Not long after that, influential members of the community allegedly made disparaging
comments about Mr. Bostock's sexual orientation and participation in the league. Soon, he was fired for conduct 'unbecoming' a county employee.

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Donald Zarda worked as a skydiving instructor at Altitude Express in New York. After several seasons with the company, Mr. Zarda mentioned that he was gay and, days later, was fired.

***

Aimee Stephens worked at R. G. & G. R. Harris Funeral Homes in Garden City, Michigan. When she got the job, Ms. Stephens presented as a male. But two years into her service with the company, she began treatment for despair and loneliness. Ultimately, clinicians diagnosed her with gender dysphoria and recommended that

she begin living as a woman. In her sixth year with the company, Ms. Stephens wrote a letter to her employer explaining that she planned to 'live and work full-time as a woman' after she returned from an upcoming vacation. The funeral home fired her before she left, telling her 'this is not going to work out.'"

Legal Lessons Learned: This is a "landmark" decision. Fire & EMS Departments should review their non-discrimination policies to include sexual orientation and gender identity.

File: Chap. 8, Race Discrimination

NY: FDNY - AFRICAN AMERICAN, MUSLIM – CLAIMED HOSTILE WORK ATMOSPHERE – ONLY "PETTY SLIGHTS"

On June 26, 2020, in Gordon Springs v. City of New York, et al., U.S. District Court Judge Alvin K. Hellerstein granted the City's motion to dismiss. "Springs fails to adequately plead a hostile work environment, because the FAC [First Amended Complaint] does not sufficiently claim a causal connection between Springs's protected characteristics and most of the contested acts and, as to the remaining acts, the alleged acts of hostility do not rise above the level of 'petty slight or trivial inconvenience.'

"To begin with, the several alleged acts that Springs suggests were retaliatory for his complaining of discrimination rather than discriminatory on the basis of a protected trait—coworkers being unwilling to swap shifts; the FDNY placing him on light duty; and Davi yelling at him—lack any causal connection with protected conduct….

Of the remaining acts, only two have a borderline colorable link to a protected trait: DiStefano questioning Springs about his hair; and unnamed members of Engine 67 cooking pork. Two others—Springs not being provided with a mailbox or getting his photo placed on the Engine 67 wall—rely solely on the claim that a Caucasian member of Engine 67 received a mailbox and had his photo placed on the wall. *See* FAC at ¶¶ 40-45. This is too thin a reed upon which to build a plausible causal chain.

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As we have seen, Springs cannot rely *solely* on the fact that he is African American or Muslim to convert any and all slights into discriminatory conduct."

Legal Lessons Learned: To state a claim for a hostile work the plaintiff must allege "that the workplace is permeated with discriminatory intimidation, ridicule, and insult that is sufficiently severe or pervasive to alter the conditions of ... employment and create an abusive working environment."

Note: Read Judge's comments about the "pork incident."

"The alleged pork incident is equally if not more trivial. The full extent of that allegation is that unidentified firefighters in Engine 67 'cooked a meal and made hamburgers in the same pan used to cook bacon' even though they had 'full knowledge' that Springs is Muslim and therefore 'unable to eat pork or cook with pork.' FAC at ¶¶ 48-50. That's it. Springs does not say whether this was the only pan in Engine 67; whether any firefighters made comments to accompany their cooking with pork suggestive of animus; whether Springs, in the moment, said anything to his coworkers to remind them of his dietary restrictions, *see id*. at ¶ 49 (noting that Springs had advised 'all firefighters' that he was Muslim '*[p]rior to* this meal') (emphasis added); or even whether Springs was present at the time the cooking took place. But even stretching to its limit the duty to read the FAC in the light that is most favorable to Springs, it seems that at worst he would

have been required to clean this pan in order to cook in it himself, or perhaps would have been required to notify a superior in Engine 67 that, in the future, his meals would need to be prepared separately. Again, this incident may have been insensitive, but it did not impose anything more than a petty slight or inconvenience."

File: Chap. 8, Race Discrimination

TX: FEMALE, AFRICAN AMERICAN FF LAWSUIT FOR HOSTILE WORK ATMOSPHER – NOT FREQUENT, PERVASIVE

On June 9, 2020, in Carla West v. City of Houston, Texas, the U.S. Court of Appeals for the Fifth Circuit (New Orleans) held (3 to 0) that the U.S. District Court Judge properly granted summary judgment to the City. The Court wrote: "West seeks to impose Title VII liability on her employer because her coworkers passed gas at the dinner table; infrequently slept in their underwear at the station; made the occasional racially insensitive joke; and brought adult magazines to the station. That is not severe or humiliating under the governing standards."

> ""West, an African American woman, began her tenure with the Houston Fire Department in 1994 when she enrolled in Houston's Fire Academy. She failed the Academy's graduation test, which she now alleges was administered in a discriminatory manner, and was fired. The Department eventually rehired West. And two years after failing the Academy's graduation exam, she passed and joined the Department as a firefighter. While working for the Department, West trained to become a paramedic. After completing her training, the Department promoted West to the role of engineer/operator paramedic at Station 9.
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> ***
> At Station 9, West took issue with her fellow firefighters' behavior. Her colleagues would tell jokes to one another that she found inappropriate, including jokes about 'men's testicles.' They passed gas, burped, and occasionally grabbed their private parts at the dinner table. They brought adult magazines to the station and left them in common spaces. They also posted inappropriate pictures on the station walls, including some racially derogatory photographs. West also twice complained about seeing her coworkers sleeping at the station in their underwear. And in one instance, one of West's subordinates threw a medical bag at her. In response to these behaviors, West isolated herself from her coworkers. *** In addition to finding fault in her coworkers and subordinates, West alleged that her station superiors denied her overtime opportunities because of her race and sex.*** First, West cannot show that her harassment was frequent or pervasive. She admits that a number of the complained-of actions were isolated or infrequent—such as when a subordinate threw a bag at her (once), when she discovered her fellow firefighters asleep in their underwear (twice), and when she saw her coworkers grab themselves at the dinner table (occasionally). ***Finally, West has not shown that the harassment interfered with her work performance. She pointed to no evidence that her coworkers' actions 'destroy[ed]' her 'opportunity to succeed in the workplace.' Weller v. Citation Oil & Gas Corp., 84 F.3d 191, 194 (5th Cir. 1996). In fact, she did not even allege that her fellow firefighters' actions 'unreasonably interfere[d]' with her work performance. Harris, 510 U.S. at 23."

Legal Lessons Learned: Hostile work atmosphere requires proof of "severe or humiliating" atmosphere.

> Note: The U.S. Supreme Court in Faragher v. City of Boca Raton, 524 U.S. 775 (1998) made it clear that Title VII of the Civil Rights Act of 1964 does not impose a "general civility code" on employers. Faragher, 524 U.S. at 788 (quoting Oncale, 523 U.S. at 80).

File: Chap. 9, Americans With Disabilities Act

NY: CIVILIAN FIRE PROTECTION INSPECTOR – ASTHMA, OFFICE ONLY WORK - NOT PROMOTED FIELD POSITION

On July 18, 2020, in John Skariah v. The City of New York, et al., 2020 NY Slip Op 31890(U), Judge Lyle E. Frank, Supreme Court of State of New York (County Part 52) granted the City's motion for summary judgment. Plaintiff has been civilian employee with FDNY since 1992, and was promoted in 1997 to Associate Fire Protection Inspector I. Plaintiff is from India and in 1998 he was given a raise and promoted from Associate Fire Inspector I to the position of Deputy Chief Inspector as part of a 1998 Equal Employment Opportunity Commission ('EEOC') Settlement Agreement. "Plaintiff submitted a doctor's note to FDNY stating 'P[atient] is under my care for asthma. Due to his condition it is advisable for him to work in the office and not in the field. *** Even if plaintiff could establish a prima facie claim, in response, defendants have proffered a legitimate nondiscriminatory reason for why plaintiff was not promoted, that is the disability he suffered for why a reasonable accommodation was required."

> "Furthermore, plaintiff's repeat contention that he does not have a disability, and such was only perceived by the FDNY, is also absent of any evidentiary support. To the contrary, the record is clear that plaintiff requested and received an accommodation as a result of his disability. Moreover, plaintiff was advised on how to remove such classification if he desired.
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> Plaintiff also alleges retaliation over his repeated EEOC complaints; however he fails to allege knowledge of these complaints by any of his supervisors, nor does he identify the link between the timing of his complaints and any alleged retaliatory conduct. Plaintiff has failed to allege either any adverse employment actions, or that any employment actions were taken under discriminatory circumstances. He has also failed to provide any evidence that defendant's non-discriminatory reasons for the actions taken were pretextual."

Legal Lessons Learned: When employee advises employer they have a disability – in this case Asma requiring office position only, the employee's lawsuit for not being promoted to positions requiring fieldwork will be dismissed.

File: Chap. 9, Americans With Disabilities Act / also Chap. 13, EMS

NY: HOSPITAL FIRED PROB. EMT – AMBULANCE CHECKS, CO-WORKER COMPLAINTS - APPENDICITIS NOT DISABILITY

On June 1, 2020, in Christopher Vargas v. The St. Luke's-Roosevelt Hospital Center, U.S. District Court Judge J. Pail Oetken, U.S. District Court for Southern District of New York, granted the Hospital's motion for summary judgment; the hospital had fired the probationary part-time EMT for not completing ambulance equipment checks, and complaints from co-workers. Prior to being fired to told his manager he had recently had appendix removed, but the hospital had already made termination decision. The Judge wrote: "Here, the parties agree that '[a]s a result of his appendicitis, [Vargas] was hospitalized for only one day, able to return to work after one week, and able to work at 'full physical activity' after two months.' … Vargas's doctor further instructed him he could not engage in heavy lifting during the period in which he was to refrain from 'full physical activity.' … Such a short-term impairment, absent long-term impact, is insufficient to qualify as substantially limiting a major life activity, as required to qualify as a disability under the ADA. *** Summary judgment is also warranted on an independent ground: there is no genuine dispute that the decision to terminate Vargas was made before his employer was aware of his appendectomy. The parties agree that Mendoza decided to terminate Vargas in late May or the first few days of June due to his co-workers' complaints and his performance problems… ("At some point in late May or the first

few of days of June 2015, Mendoza decided that Vargas should not pass probation and that he should be terminated because of the co-worker complaints and Vargas's poor performance."). The parties also agree that Defendants did not become aware of Vargas's appendectomy until June 5, 2015…. Because the decision to terminate Vargas was made before Defendants were aware of his appendectomy, the evidence fails to support a causal relationship necessary to prevail on either a failure to accommodate or discrimination claim under the ADA.

> "As a part-time employee, Vargas was required to serve a four-month probationary period…. However, Mendoza, his supervisor, mistakenly believed it was a three-month probationary period…. This probationary period is intended to determine whether the new employee should continue to work at the hospital…. Under the collective bargaining agreement between the Union and the Hospital, employees can be terminated during the probationary period without just cause.
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> During the period of Vargas's employment, EMTs were required to sign a check-out list verifying that all the items listed were on the ambulance…. On April 22, 2015, Vargas received a warning from Mark Ayuyao, one of his supervisors, for failing to accurately complete the check-out list….Four days later, on April 26, 2015, Vargas received a second warning from Ayuyao for once again failing to accurately complete the check-out list…. While working as an EMT, Vargas worked with other experienced EMTs…. Three of these EMTs were Jimmy Henry, Lea Vazquez, and Barbara Karagiannis….Each of those individuals complained to Mendoza, the EMS Operations Manager, that Vargas was lazy, provided poor patient care, and came to work without his equipment…. Statements made by these EMTs about working with Vargas included 'I felt like I was working alone' and 'I felt like I had to both drive the ambulance and provide patient care.'"

Legal Lessons Learned: Probationary employee not covered under the Collective Bargaining Agreement; ADA does not apply to short-term illness such as appendicitis.

> Note: Congress in 2008 broadened the coverage under Americans With Disabilities Act, overturning two U.S. Supreme Court decisions, Sutton v. United Air Lines, Inc., 527 U.S. 471 (1999), and Toyota Motor Manufacturing, Kentucky, Inc. v. Williams, 534 U.S. 184 (2002). The EEOC has promulgated administrative rules that guide the analysis of whether a temporary impairment is sufficiently severe to qualify as a disability under the ADA. 29 C.F.R. § 1630.2(j)(1)(ix) (app.). Those regulations state that "if an individual has a back impairment that results in a 20-pound lifting restriction that lasts for several months, he is substantially limited in the major life activity of lifting, and therefore covered under the first prong of the definition of disability."

File: Chap. 12, Drug-Free Workplace

PA: PHILADELPHIA NEW "SAFE INJECTION SITE" PROGRAM – INJUNCTION DURING COVID-19 & NATIONWIDE PROTESTS

On June 24, 2020, in United States of America v. SAFEHOUSE, U.S. District Court Judge George Austin McHugh, U.S. District Court for Eastern District of Pennsylvania, ordered that the injection program in South Philadelphia be stayed. "Although the Government has failed to show that it will suffer harms that cannot be prevented or fully rectified by a successful appeal, the ongoing challenges posed by COVID-19 and the deep social currents and introspection following the tragic killing of Mr. Floyd make this the wrong moment for another change in the status quo. Accordingly, the Government's request for a stay will be granted."

Safehouse's attempt to open without meaningful dialogue with the surrounding neighborhood was met with organized opposition supported by various elected officials, and the COVID-19 pandemic came to overshadow the opioid epidemic, understandably becoming the almost singular focus of local authorities. In view of those events, the Government's motion to stay might almost be viewed as moot. But as Philadelphia begins to reopen, and with 963 opioid overdose deaths in Philadelphia in 2019, it is conceivable that Safehouse might yet seek to open before review by the Court of Appeals.

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Mr. Benitez [Jose Benitez, President and Treasurer of Safehouse] went on to concede that his staff would have no power to stop 'the police or DEA [if they] tried to make an arrest at the site of a user,' even if staff might try to negotiate with the relevant authorities so that an arrest did not threaten any other constituency. ECF 127, at 167:24-168:20. The Government remains free to arrest and charge users of narcotics if it chooses to exercise its prosecutorial discretion and employ law enforcement resources in that way.

Nor does the fact that Safehouse provides a site where users of unlawful narcotics can inject under medical supervision as part of a public health initiative in any way deny the judgment reached by Congress. To the contrary, the need to inject under observation underscores the deadly potential of the banned substances. And though the Government scores a semantic point when it observes that 'safe injection' is an oxymoron when it comes to heroin, cocaine, and nonprescribed uses of Fentanyl, if one looks beyond wordplay, it cannot be disputed that Safehouse's efforts are focused on the safety through supervision of the user, not the safety of the act of injection.

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In response to this and related arguments, the City of Philadelphia Health Commissioner, Dr. Thomas Farley, notes that Safehouse's operational plan was created in collaboration with his office, which consulted with experts in the field of opioid abuse. ECF 151, at 4-5. Commissioner Farley also emphasizes that 'both the American Medical Association and the Pennsylvania Medical Association are in favor of overdose prevention sites.' Id. at 6."

Legal Lessons Learned: The Court has wise issued an injunction preventing the opening a "safe injection site" during the COVID-19 pandemic.

Note: See June 25, 2020 article, "Judge Halts Opening of Safe Injection Site, Citing COVID-19 Pandemic and Protests" - A federal judge has hit pause on efforts to open the nation's first so-called safe injection site, where heroin users would be able to inject the drug under medical supervision, citing Philadelphia's "frayed" nerves in the midst of a global pandemic and mounting protests for social justice reform.

File: Chap. 13, EMS

MD: EMS GAVE NARCAN TO UNCONSCIOUS 21-YR-OLD –STAUTORY IMMUNITY, NO GROSS NEGLIGENCE – NO HARM

On June 16, 2020, in Octavia T. Coit v. Nicole Nappi, et al., the Court of Special Appeals of Maryland (unreported decision), held that the Paramedic, the EMT, and Baltimore County were all properly dismissed from this lawsuit by the trial judge. The Court ruled: "Paramedic Nappi and EMT Jackson are entitled to statutory immunity based on the Good Samaritan Act and the Fire & Rescue Companies Act because their conduct was neither willful nor grossly negligent. Baltimore County is entitled to governmental immunity under the [LGTCA]because there is no basis for

any direct claims against it. *** [Plaintiffs] contend that the administration of Narcan was unnecessary because there was no specific indication that Mr. Coit was experiencing an opioid overdose. The Court understands and appreciates Mr. Coit's family's concern over a misperception that he was using drugs. The evidence demonstrates, however, that, regardless of how unnecessary the administration of Narcan may have been, there are no applicable contraindications for someone who did not overdose on opioids, and that Narcan does not otherwise harm someone to whom it is administered. Even if Paramedic Nappi and EMT Jackson were, in some way, negligent in their assessment and treatment of Mr. Coit, which the Court is not suggesting, there is not sufficient evidence of gross negligence regarding their post-arrival conduct."

> "Appellants] also claim that Paramedic Nappi and EMT Jackson were 'lackadaisical' when they arrived at Mr. Watkins' residence. [Appellants]characterize their conduct as 'abandoning' Mr. Coit. There is no evidentiary basis for that. [Appellants]also attempt to highlight a snippet of Paramedic Nappi's deposition testimony, in which she stated, 'We don't run.'[][Appellants']reliance on that statement to attempt to generate evidence of willful conduct or gross negligence ignores the context for that statement. Paramedic Nappi explained that not running to calls for service is a matter of safety for emergency medical service providers, and is intended to maximize their effectiveness as first responders. Essentially, emergency medical service providers are not able to render aid if they become injured or incapacitated while responding. The evidence in the record demonstrates that Paramedic Nappi and EMT Jackson arrived at the scene of an emergency in response to a call in the early morning hours less than 7 minutes after receiving the call from a dispatcher. There is no genuine dispute regarding that evidence. [Appellants'] reference at the hearing to a policy-based expectation of a 90-second 'turn-out time' for emergency medical service providers does not provide a basis for gross negligence. Even if Paramedic Nappi and EMT Jackson were, in some way, negligent in their response to the call for service, which the Court is not suggesting, there is not sufficient evidence that their pre-arrival conduct was willful or grossly negligent.
>
> There is also insufficient evidence that Paramedic Nappi's and EMT Jackson's post-arrival conduct was willful or grossly negligent. Although the Court recognizes that seconds may seem like minutes during an emergency, the evidence demonstrates that, upon entering the basement of Mr. Watkins' home, Paramedic Nappi and EMT Jackson promptly assessed and treated Mr. Coit. They checked for a pulse, observed agonal respirations, placed an oxygen mask on Mr. Coit, prepared an intravenous line and began administering fluids, began transcutaneous cardiac pacing to address Mr. Coit's heart rate, administered Narcan, and administered Atropine. Treatment and assessment of Mr. Coit's condition continued after Mr. Coit was removed from the house and taken to the medic unit for transport to Northwest Hospital. He was intubated with an endotracheal intubation tube. Further assessment resulted in noting the absence of mechanical capture with transcutaneous pacing and agonal electrical rate without a pulse. Emergency medical service providers began administering CPR and administered Epinephrine during transport to Northwest Hospital. Upon arrival at Northwest Hospital, Paramedic Nappi reported to emergency department personnel regarding what treatment had been provided and the status of Mr. Coit's condition."

Legal Lessons Learned: Finding unconscious 21-year-old in basement, one can understand why EMS used Narcan.

File: Chap. 13, EMS / also Chap. 9, Americans With Disabilities Act

NY: PROB. EMT FIRED BY HOSPITAL – POOR AMBUL. CHECKS, COMPLAINTS – APPENDICITIS NOT A "DISABILITY"

On June 1, 2020, in Christopher Vargas v. The St. Luke's-Roosevelt Hospital Center, U.S. District Court Judge J. Pail Oetken, U.S. District Court for Southern District of New York, granted the Hospital's motion for summary judgment; the hospital had fired the probationary part-time EMT for not completing ambulance equipment checks, and complaints from co-workers. Prior to being fired to told his manager he had recently had appendix removed; hospital had already made termination decision. The Judge wrote: "Here, the parties agree that '[a]s a result of his appendicitis, [Vargas] was hospitalized for only one day, able to return to work after one week, and able to work at 'full physical activity' after two months.' … Vargas's doctor further instructed him he could not engage in heavy lifting during the period in which he was to refrain from 'full physical activity.' … Such a short-term impairment, absent long-term impact, is insufficient to qualify as substantially limiting a major life activity, as required to qualify as a disability under the ADA. *** Summary judgment is also warranted on an independent ground: there is no genuine dispute that the decision to terminate Vargas was made before his employer was aware of his appendectomy. The parties agree that Mendoza decided to terminate Vargas in late May or the first few days of June due to his co-workers' complaints and his performance problems. Pl. 56.1 ¶ 59 (citing RM Tr. 27) ("At some point in late May or the first few of days of June 2015, Mendoza decided that Vargas should not pass probation and that he should be terminated because of the co-worker complaints and Vargas's poor performance."). The parties also agree that Defendants did not become aware of Vargas's appendectomy until June 5, 2015. *Id*. ¶ 68 (citing RM Tr. 27; Mendoza I Decl. ¶ 2(a)). Because the decision to terminate Vargas was made before Defendants were aware of his appendectomy, the evidence fails to support a causal relationship necessary to prevail on either a failure to accommodate or discrimination claim under the ADA.

> "As a part-time employee, Vargas was required to serve a four-month probationary period…. However, Mendoza, his supervisor, mistakenly believed it was a three-month probationary period…. This probationary period is intended to determine whether the new employee should continue to work at the hospital…. Under the collective bargaining agreement between the Union and the Hospital, employees can be terminated during the probationary period without just cause.
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> During the period of Vargas's employment, EMTs were required to sign a check-out list verifying that all the items listed were on the ambulance…. On April 22, 2015, Vargas received a warning from Mark Ayuyao, one of his supervisors, for failing to accurately complete the check-out list….Four days later, on April 26, 2015, Vargas received a second warning from Ayuyao for once again failing to accurately complete the check-out list…. While working as an EMT, Vargas worked with other experienced EMTs…. Three of these EMTs were Jimmy Henry, Lea Vazquez, and Barbara Karagiannis…. Each of those individuals complained to Mendoza, the EMS Operations Manager, that Vargas was lazy, provided poor patient care, and came to work without his equipment…. Statements made by these EMTs about working with Vargas included 'I felt like I was working alone' and 'I felt like I had to both drive the ambulance and provide patient care.'"

Legal Lessons Learned: Probationary employee not covered under the Collective Bargaining Agreement; ADA does not apply to short-term illness such as appendicitis.

> Note: Congress in 2008 broadened the coverage under Americans With Disabilities Act, overturning two U.S. Supreme Court decisions, Sutton v. United Air Lines, Inc., 527 U.S. 471 (1999), and Toyota Motor Manufacturing, Kentucky, Inc. v. Williams, 534 U.S. 184 (2002). The EEOC has promulgated administrative rules that guide the analysis of whether a temporary impairment is sufficiently severe to qualify as a disability under the ADA. 29 C.F.R. § 1630.2(j)(1)(ix) (app.). Those regulations state that "if an individual has a back impairment that results in a 20-pound lifting restriction that lasts for several months, he

is substantially limited in the major life activity of lifting, and therefore covered under the first prong of the definition of disability."

File: Chap. 15, CISM & Mental Health

SC: PARAMEDIC ON BAD MVA RUN – PTSD / PANIC ATTACKS – TOLD HOSP. CAN NO LONGER DO JOB, TERMINATED

On June 25, 2020, in Stephen E. Sanders v. McLeod Health Claredon, U.S. District Court Judge David C. Norton, U.S. District Court of South Carolina, Charleston Division, granted the hospital's motion for summary judgment; on August 10, 2017, he responded MVA involving logging truck and an SUV, where SUV driver was trapped by logs and died. Court wrote: "[T]here is evidence in the record that Sanders could not perform the essential functions of his job at the time of his August 18, 2017 discharge. Sanders testified in his deposition that shortly after the August 10th accident, he began experiencing 'severe . . . emotional problems', including "anxiety, depression [and] panic attacks …. As a result, Sanders noted that he 'couldn't stay around' his place of work… As the first element of a prima facie case of disability discrimination, Sanders must show that he was a qualified individual with a disability at the time of his firing. There is no dispute that Sanders suffered from PTSD, a disability under the ADA, at the time of his discharge. The court's inquiry thus focuses on whether Sanders was a "qualified individual." Under the ADA, "the term 'qualified individual' means an individual who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires." 42 U.S.C. § 12111(8). The court agrees with the R&R that summary judgment is warranted on this basis because there is no evidence in the record that Sanders could perform the essential functions of his job at the time of his firing.

"Upon the EMS team's arrival, paramedic and shift supervisor Stephanie Hughes ('Hughes') assessed the scene and reported to Sanders that the driver of the SUV, who was pinned in his vehicle beneath the overturned trailer of the logging truck, sustained 'an injury incompatible with life', meaning that the team's mission was one of 'recovery' rather than 'rescue'. Nevertheless, after hearing that the SUV driver was breathing and responding to stimuli, Sanders climbed beneath the overturned trailer to deliver emergency medical care and attempt a rescue. After a short period of time, tow trucks arrived on the scene and began lifting logs off of the SUV. Sanders continued to administer emergency medical care to the SUV driver, despite instructions from his EMS team and Clarendon County Fire Department ('CCFD') Captain Ed Gamble ('Gamble') to abandon the accident scene, which Gamble determined to be unstable and unsafe.

Although the specific facts surrounding the altercations between Sanders and other emergency responders at this time are disputed, it is clear that the conflict went on for a significant amount of time, and Sanders admits that the confrontations included 'stress-related' words.

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[The paramedic testified in his deposition he could not return to his job as EMS transport coordinator.]

"Moreover, Sanders testified that his mental illnesses would prevent him from returning to his job at McLeod:

Q: Have you applied for any position since your separation from employment with McLeod?

A. No.

Q. Why not?

> A. Well, part of the PTSD and the anxiety and what have you is being around people. There's no way I could — it scares me to think that I could treat a patient right now because I have zero confidence. It scares me to — I don't even like to hear the ambulance or the sirens come by. It makes me very anxious. I can't be around people.
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> The [U.S. Magistrates' Report & Recommendation to U.S. District Court judge] also noted that Sanders received disability benefits after his termination from McLeod and failed to 'directly reconcile his disability benefits with his ADA claim."

Legal Lessons Learned: If the paramedic had asked the hospital for a leave of absence or other reasonable accommodation, and the hospital refused, this lawsuit might not have been dismissed.

File: Chap. 17, Arbitration

NJ: FD REORGANIZED - 4 NEW LT. POSITIONS – REVERSED ARBITRATOR – NOT ENTITLED TO "ACTING CAPTAIN" PAY

On June 25, 2020, in Borough of Carteret v. Firefighters Mutual Benefit Association, Local 67, the Superior Court of New Jersey, Appellate Division held (2 to 0; unpublished decision) that the trial judge improperly upheld the Arbitrator's award of "acting Captain" back pay to the four Lieutenants. Under the Collective Bargaining Agreement in effect when the Lieutenants were hired, senior firefighters who filled in for Captains were paid the Captains hourly rate. When the Union filed the Grievance, the four new Lieutenants have been working for the past four years on the Lieutenant's pay ($1,500 per year above FF pay) and never requested "Acting Captain" pay when fulfilling a Captain's shift duties. The Court held, "It is not insignificant the arbitrator rejected the Borough's 'past practice' argument and gave virtually no consideration to the lieutenants performing their job duties, including acting in the place of a fire captain in his or her absence, for four years without a request for any pay beyond that to which they were entitled under the Borough's salary ordinance."

> **"**According to the Chief, the lieutenant positions, which became effective in January 2013, were to be compensated at a rate slightly higher than that of a firefighter but lower than that of a captain. Lieutenants were to assume a greater supervisory role at fires, enhance the chain of command, and fill in for unavailable fire captains. The Chief also testified the Borough and FMBA had extensive discussions about the new lieutenant position between 2012 and 2013. He asserted the parties agreed if the Borough created four new lieutenant positions, FMBA would waive any acting captain's pay.
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> Having reviewed the record under the foregoing standard, we conclude the arbitrator's construction of the Disputed Clause is not reasonably debatable and therefore must be vacated. To arrive at the construction she did, the arbitrator in effect engrafted terms concerning lieutenants onto the Disputed Clause, terms that are contrary to the Disputed Clause's plain language and were unintended by the parties when they negotiated the CNA."

Legal Lessons Learned: If FD is reorganizing with new Lieutenant positions, negotiate an amended Collective Bargaining Agreement so that the City, the Union and all personal have a clear agreement on the pay and duties of the new Lieutenants, and whether they are eligible for "Acting Captain" pay.

File: Chap. 18, Legislation

TX: AIR AMBULANCE – WORKERS COMP – FED. AIRLINE DEREGULATION ACT NOT REQUIRE PAY FULL CHARGES

On June 26, 2020, in Texas Mutual Insurance Company, et al. v. PHI Air Medical, LLC, the Texas Supreme Court held (7 to 2) that workers comp insurance companies in Texas are only required to pay using the Texas "general reimbursement standards" and the federal Airline Deregulation Act does not provide require Texas to change their reimbursement standards. "This is a case about federalism. When joining our Union, each State retained fundamental aspects of its sovereignty. This sovereignty includes the police power to provide a compensation system for injured workers. Although the Federal Government can preempt a State's exercise of sovereignty by enacting an inconsistent federal law on a subject within its constitutionally enumerated powers, it has no power to order that State to regulate the subject in a particular way."

> "As the insurers point out, requiring full reimbursement could have serious consequences for the Texas workers' compensation system. According to the insurers, almost $50 million in Texas air ambulance charges were already in dispute by January 2019, and PHI's operating profit margin on its full billed charges ranges from 185% to 282%. In Wyoming, which has held that only limits on reimbursement are preempted, the legislature is considering either expanding Medicaid in order to control such charges or making injured workers responsible for the balance of their bills. The ADA was passed to deregulate the airline industry, not to upend the bargain struck in adopting a workers' compensation scheme. As we have explained, there is no reason to interpret the ADA to have that effect.
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> Until 2012, when this dispute arose, insurers had been reimbursing PHI for its services at 125% of the Medicare rate for air ambulance services, citing the Division's fee guideline for providers other than hospitals and pharmacies. *See* 28 Admin. Code § 134.203(d)(1). But in 2012, PHI and other air ambulance providers began filing fee disputes with the Division, seeking to recover the full amount of their billed charges. This particular suit represents a fraction of the air ambulance fee disputes pending agency review: it concerns thirty-three transports that PHI provided between 2010 and 2013 to patients covered by workers' compensation insurance. No contract between PHI and the insurers of those thirty-three patients (petitioners here) sets a predetermined reimbursement amount."

Legal Lessons Learned: The federal Airline Deregulation Act contains no reimbursement requirement for air ambulances.

> Note: The two dissenting Justices opinion:
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> **"**And Congress, when it decided to deregulate air carrier prices [1978 Airline Deregulation Act], did so with the understanding that its deregulation would allow air carriers to set their own prices—not the state or those who pay air carriers consistent with state guidelines. *** After the insurers paid PHI based on the reimbursement scheme, PHI sought a medical fee dispute resolution before the Division, which ultimately concluded that reimbursement should be 'fair and reasonable,' amounting to 125 percent of Medicare service rates. The administrative law judge determined on appeal that the "fair and reasonable" rate was 149 percent of Medicare service rates. The administrative law judge then ordered the insurers to pay an amount consistent with this newly determined "fair and reasonable" amount. Under both approaches—125 or 149 percent—the amount owed was less than the amount PHI charged. After the adjustment, the requisite payment foreach transport would be between $9,989 and $28,000