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# Dec. 2021 – FIRE & EMS LAW Newsletter

[NEWSLETTER IS NOT PROVIDING LEGAL ADVICE.]

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## PROF. BENNETT'S WORK IN SCHOLAR@UC:

- **2021: FIRE & EMS LAW – RECENT CASE SUMMARIES / LEGAL LESSONS LEARNED [updated monthly]:** Case summaries since 2018 from monthly newsletters
- **2021: FIRE & EMS LAW – CURRENT EVENTS [updated bi-weekly]**
- **2021: FIRE & EMS OFFICER DEVELOPMENT / LEGAL LESSONS LEARNED / AMERICAN HISTORY [updated each Officer I, II, III class]**

## 17 NEW CASES

# Chap. 1 – American Legal System, incl. Fire Codes, Investigations, Arson (91 recent case summaries posted)

Chap. 1

## ME: HOUSE UNFIT OCCUPANCY – BOILER, OIL FLOOR, BARE WIRES – NO VIOL. FED. DUE PROCESS, HAD APPEAL RIGHTS

On Nov. 18, 2021, in Joseph Jurkenas, et al. v. City of Brewer, et al., U.S. Magistrate Judge John C. Nivison, U.S. District Court, District of Maine, denied the homeowner's motion for summary judgement, holding that their federal due process rights were not violated when there when the Fire Department ordered them out of the house because of the dangerous conditions, and the City later issued them a Notice of Violation and Order of Corrective Action on June 11, 2014. The Notice included their right to appeal to the Zoning Board of Appeals within 30 days; the City reject their late appeal (received July 22, 2014); and homeowners never challenged this in State court. The City Council considered having building destroyed under State "dangerous building" law but tabled a hearing on Oct. 14, 2014, under their longstanding policy to use ongoing inspections to seek homeowner compliance.

> "Even if Plaintiffs could ultimately convince a fact finder that there was no emergency that could justify the eviction, Plaintiffs have not shown there was inadequate post-deprivation process available for them to challenge the unfit for habitation determination because there was an administrative appeal and a cause of action in the state courts under Maine Rule of Civil Procedure 80B.
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> Although Plaintiffs argue that they were not told of their right to appeal from the original unfit for habitation decision and dispute the grounds upon which the City denied their appeal, the failure to provide notice of the right to appeal 'does not render the review remedy constitutionally inadequate' because 'in most civil matters, citizens are expected to ask about the method to protest or appeal an initial administrative action (or to hire a lawyer)' and because Plaintiffs could have challenged the local decision on those grounds in state court…. Plaintiffs have simply not demonstrated that as a matter of law there was no actual emergency nor have Plaintiffs demonstrated as a matter of law that they were due more process under the applicable legal authority.
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> Accordingly, the Court informs Plaintiff that it will consider Defendants' request for summary judgment and that if Plaintiffs wish to respond to Defendants' request, Plaintiffs shall file their response on or before December 9, 2021."

Facts:

> "Plaintiffs Joseph and Patricia Jurkenas lived at a home in Brewer at 227 Wilson Street with Patricia's mother, Marie Pozniak. Marie was hospitalized in December 2012 and, later, was discharged and cared for at the Brewer home…. Plaintiffs assert that beginning in October 2013, they began having difficulties with City officials and local police….

Plaintiffs assert the difficulties centered on the adequacy of care Marie was receiving at home and Plaintiffs' requests for ambulance services.

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On May 24, 2014, the Brewer Fire Department was dispatched to the residence following a report of a possible fire. (Thibodeau Incident Report at 3, ECF No. 59-6.) A smell of rubber or plastics was noticeable outside, and when no one answered knocks at the front door, the Fire Department kicked the door in and entered…. There was smoke throughout the house…. Firefighters assert that when they heard someone calling for help, they moved up the stairs to find Marie Pozniak and Patricia Jurkenas, who were subsequently evacuated from an upper level of the house…. After investigating the source of the smoke, the fire department found the boiler in the basement to be malfunctioning and shut it off by the main breaker in the electrical panel. (Thibodeau Incident Report at 3-4.) After ventilating the house for a time, firefighters discovered oil on the basement floor and exposed electrical wires and open junction boxes in the basement; they then called the Deputy Chief of the town fire department, the town Code Enforcement Officer, and the state Department of Environmental Protection (DEP).

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Deputy Fire Chief Cammack met Defendant Brooks, a Code Enforcement Officer for the City of Brewer, at the house and confirmed there was oil on the basement floor and unsafe electrical installations in the basement. (Cammack Incident Report at 1, ECF No. 59-7.) Power to the home was disconnected at the meter…. The DEP responder estimated five gallons of oil had spread over the brick floor in the basement; the responder placed sorbents on the floor. (DEP Oil and Hazardous Materials Report at 2, ECF Nos. 19-3, 59-8.) After Joseph Jurkenas arrived, he was informed of the oil spill and electrical issues, as well as several other safety concerns that would need to be rectified before power would be restored and occupancy could be resumed…. Defendant Brooks placed a placard on the property designating it as being "Unfit for Habitation, " and directed Plaintiffs to cease occupation of the building immediately.

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On June 5, 2014, Deputy Chief Cammack checked on the operation of a gas generator at the property. (Cammack Incident Report at 1.) After speaking with a man who was present and working for Joseph Jurkenas and after observing that the electrical generator was connected to the electrical system by bare wires inserted into the receptacle on the generator, Deputy Chief Cammack, with two code enforcement officers, shut down the generator and informed the worker that it was not safe to work in the basement with the generator connected to the wiring in the basement. (*Id.* at 1-2.)

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On June 11, 2014, the City issued a Notice of Violation and Order of Corrective Action, (ECF No. 59-3, hereinafter NOV), which was served on Marie Pozniak on June 13, 2014, on counsel for Plaintiffs on June 12, on Patricia Jurkenas on June 14, and on Joseph Jurkenas on June 30. (DSAMF ¶¶ 9-13.)

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On September 5, 2014, DEP re-inspected the house, measured the levels of volatile organic compounds in the basement, determined there was nothing left to cleanup, and notified the City that DEP had no further interest in the site at that time. (DEP Letter to Brewer Code Enforcement Office, ECF Nos. 8-2, 59-17.) The City Council considered action under Maine law (17 M.R.S. § 2851 et seq.) and on September 16, 2014, issued an order that set a public hearing for October 14, 2014, to determine if the City should dispose of the building because it was dangerous. (Smith Affidavit ¶ 17; Hearing Notice, ECF No. 59-14.) The code enforcement office reissued a placard at the property on or around September 18, 2014. (ECF No. 59-19.)

Plaintiffs attempted to comply with the City's notice and order. Plaintiffs removed some refuse in early September, (Dumpster Invoice, ECF No. 59-26), and in a September 19, 2014, letter to code enforcement, Plaintiffs represented that an electrical inspection was scheduled for September 23, 2014. (Letter, ECF Nos. 59-16, 59-20.) Although Plaintiffs were present and prepared for a hearing on October 14, 2014, the City Council tabled the matter and did not hold a hearing, citing the City's longstanding policy to use the state dangerous building statute as a last resort, and the ongoing inspection efforts and interactions between the code enforcement office and Plaintiffs. (Letter, ECF No. 59-15; Smith Affidavit ¶¶ 18-22; PRDSAMF at 15-19.)

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Although the City maintains that Plaintiffs had not remedied every violation, in July 2015, the power was restored, the property was reinspected, the City agreed to issue a temporary certificate of occupancy, and the City removed the unfit for habitation placard. (DSAMF ¶¶ 39-40.)

The code enforcement office deemed the property unfit for habitation again in January 2016 after the tenants damaged the heating system. (DSAMF ¶¶ 41-42.)

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Plaintiffs argue the City violated their procedural due process rights by failing to hold a hearing as required in order to dispose of their property under the Maine dangerous building statute. Pursuant to that law, municipal officers can, "after notice . . . and a hearing, adjudge a building to be a nuisance or dangerous" and dispose of the property, unless the owner or occupants obtain a stay or successfully appeal the local decision in the state courts. 17 M.R.S. § 2851. The record establishes that the City considered disposing of the property pursuant to the state statute, but the City ultimately did not use the process to dispose of the house. Plaintiffs, therefore, are not entitled to summary judgment on their claim that the municipal officers' decision to table the matter violated the state statute and deprived Plaintiffs of their due process rights."

**Legal Lesson Learned: The City properly gave homeowner opportunity to appeal to the Zoning Board of Appeals; there was no requirement that City hold a hearing since they decided not to destroy the home under State "dangerous buildings" statute.**

Note: See Maine "dangerous buildings" statute:
"The municipal officers in the case of a municipality or the county commissioners in the case of the unorganized or deorganized areas in their county may after notice pursuant to section 2857 and hearing adjudge a building to be a nuisance or dangerous, in accordance with subsection 2-A, and may make and record an order, in accordance with subsection 3, prescribing what disposal must be made of that building. The order may allow for delay of disposal if the owner or party in interest has demonstrated the ability and willingness to satisfactorily rehabilitate the building."

Chap. 1

## OH – FALSE ALARM ORDINANCE – ILLEGAL "DOUBLE TAX" - ALARM CO. $250 / YR – RESID. $50, BUS. $100 TWO YRS.

On Nov. 10, 2021, in Andrew White, et al. v. City of Cincinnati, the Ohio Court of Appeals, First Appellate District (Hamilton County), held (3 to 0) in lawsuit brought by companies that install and maintain alarm systems, and users of alarm systems, that the current city ordinance is unconstitutional. Alarm businesses must pay a registration fee of $250 annually. If an alarm business fails to register, the city imposes a $1000 civil penalty for each request for a police response related to an alarm system by an unregistered alarm business or for each request by an alarm user for registration of an alarm system installed by an unregistered alarm business. Alarm users must also register with Police Department before an alarm system is activated. Residential alarm users must pay $50 every two years and nonresidential alarm users must pay $100 every two years. The city imposes a $100 civil penalty on an alarm user for using an unregistered alarm system, but the penalties may be waived if the alarm user completes registration within 21 days of the first notice of a violation. All fees imposed on both alarm businesses and alarm users are non-refundable, nontransferable, and location-specific.

> "[T]he city does not provide the alarm businesses or the alarm users with any services over and above what it already provides for taxpayers in general. Chapter 807 does not entitle alarm business and alarm users to any particular response from the city or give them the right to any particular response. The city has not given anything to them for which it can ask for the assessments in return. The assessments, particularly the registration fees, do not bear a reasonable relationship to protections, benefits or opportunities provided by the city to those paying the assessments.
> Based on this analysis, we hold that the assessments imposed by Cincinnati Municipal Code 807-1-A4 violate the Due Process Clauses of the Ohio and United States Constitutions. We do not hold that the city is prohibited from amending the current ordinance or passing another ordinance regulating alarm systems and false alarms. If it is so inclined, the city must do so in a manner that assures that the assessments constitute a fee rather than a tax."

Facts:

> "Cincinnati Municipal Code 807-1-A4 requires alarm businesses to register with the False Alarm Reduction Unit ('FARU') of the Cincinnati Police Department and provides

penalties for failure to register. Alarm businesses must pay a registration fee of $250 annually. If an alarm business fails to register, the city imposes a $1000 civil penalty for each request for a police response related to an alarm system by an unregistered alarm business or for each request by an alarm user for registration of an alarm system installed by an unregistered alarm business.

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Alarm users must also register with FARU before an alarm system is activated. Residential alarm users must pay $50 every two years and nonresidential alarm users must pay $100 every two years. The city imposes a $100 civil penalty on an alarm user for using an unregistered alarm system, but the penalties may be waived if the alarm user completes registration within 21 days of the first notice of a violation. All fees imposed on both alarm businesses and alarm users are non-refundable, nontransferable, and location-specific.

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Cincinnati Municipal Code 807-11 sets forth penalties for repeated false alarms. After the first and second false alarm, FARU will issue a warning but not a penalty. After the third false alarm, it imposes a $50 fee which may be waived if the violator takes an educational class offered by the police. The fees continue to escalate for further false alarms to a maximum of $800 for each false alarm after the tenth.

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Based on this analysis, we hold that the assessments imposed by Cincinnati Municipal Code 807-1-A4 violate the Due Process Clauses of the Ohio and United States Constitutions. We do not hold that the city is prohibited from amending the current ordinance or passing another ordinance regulating alarm systems and false alarms. If it is so inclined, the city must do so in a manner that assures that the assessments constitute a fee rather than a tax.

***

Based on this analysis, we hold that the assessments imposed by Cincinnati Municipal Code 807-1-A4 violate the Due Process Clauses of the Ohio and United States Constitutions. We do not hold that the city is prohibited from amending the current ordinance or passing another ordinance regulating alarm systems and false alarms. If it is so inclined, the city must do so in a manner that assures that the assessments constitute a fee rather than a tax.”

**Legal Lesson Learned: The City may now adopt a new ordinance only setting fines for false alarms.**

Note: See article on this case; Nov. 15, 2021: “Cincinnati burglar arm fee struck down. ‘A giant scam’ says lawyer.”

Chap. 1

# KY: EVIDENCE SUPPRESSED - WELLNESS CHECK - VOL. FF HEADFIRST INTO CAR - NOT "COMMUNITY CARETAKING"

On Nov. 2, 2021, in United States of America v. Michael M. Fairrow, Jr., U.S. District Court Senior Judge Joseph R. McKinley Jr., U.S. District Court for Western District of Kentucky (Owensboro Division) upheld defendant's motion to suppress evidence seized in his car: five bags of methamphetamine and a loaded nine-millimeter handgun in a backpack in the back seat. The Court rejected the government's argument that volunteer firefighter Michael Wahl was lawfully trying to stop the car from leaving under the "Community Caretaking Doctrine."

> "Basically, Wahl lacked facts about Fairrow's medical condition. He jumped through the window so he could figure out more. The Fourth Amendment flatly proscribes this shoot-first-ask-questions-later approach.
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> ***
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> These facts render this case a far cry from United States v. Overton, the most relevant Sixth Circuit precedent. 600 Fed.Appx. 303, 310 (6th Cir. 2014). In Overton, the court held there was no unreasonable seizure when EMS personnel detained a man, who had been unconscious when they arrived on scene, for thirty seconds out of concern for his medical wellbeing. *Id.* at 310-311. The brief seizure to substantiate the man's claims that he was fine was reasonable in furtherance of their medical duties. *Id.* To analogize, a brief seizure here may have been reasonable if the firefighters found Fairrow unconscious, if Fairrow was slurring words, or if they had other specific concerns about Fairrow's medical capacity. But unlike the EMTs in Overton, the firefighters had no reason to question Fairrow's medical capacity. Fairrow was never unconscious, passed the medical screening, and repeatedly said he was fine, yet Wahl aggressively prevented his departure."

Facts:

> "On the afternoon of June 25, 2020, emergency dispatchers in McLean County, Kentucky, received a 911 call about an unconscious man in a black vehicle on a rural two-lane highway…. Dispatchers paged out the call on the countywide radio system, asking for a medical wellness check…. The first two responders were Logan Vaught and Coy Murphy, volunteer firefighters for the town of Beech Grove (a small town in McLean County). They were working together on a chicken farm at the time of the call, so they drove to the scene in one vehicle…. When they arrived, Vaught and Murphy spotted a black vehicle parked on the northbound shoulder of the rural road…. They parked on the southbound shoulder and Murphy, a licensed EMT, approached the black vehicle…. The individual in the black vehicle was Michael Fairrow, the defendant in this case.
>
> Murphy found Fairrow 'alert and oriented' in the black vehicle…. Murphy told Fairrow he was there for a wellness check. Pursuant to his EMT training, Murphy then administered an oral medical screening to check Fairrow's cognitive functioning…. He determined Fairrow was fully alert and was not slurring words… Fairrow told Murphy he felt fine, and he appreciated the medical check…. Murphy had no cause for concern.

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While Murphy administered the medical screening, a brigade of other first responders was in route: more volunteer firefighters, an ambulance, and at least three police officers. Murphy was about to call them off after administering the screening because he saw no reason for further action, but he delayed the call when Fairrow, after the completion of the screening, got out of his car and 'did a little shuffle' to prove he felt fine…. This struck the first responders as "odd and neurotic…." So, Murphy asked Fairrow to stick around until the ambulance arrived, so the ambulance could 'sign off' on Fairrow's condition and 'move[ ] the liability' from Murphy to the ambulance…. Fairrow initially complied. But while they were waiting, Fairrow heard that police officers were also in route. He 'got kind of antsy' and wanted to leave.

Around that time, Michael Wahl, another Beech Grove volunteer firefighter, arrived on scene…. Wahl walked across the road to Fairrow's vehicle and talked to Fairrow while they waited for the ambulance. Wahl thought Fairrow 'seemed nervous' during their conversation…. Wahl repeatedly asked Fairrow to wait for the ambulance, which Fairrow initially did…. But the police officers arrived simultaneous with the ambulance, spooking Fairrow…. He started to drive away.

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Fairrow had a clear path in front of his vehicle when he started to drive away… but there were several firefighters close to the car: Wahl stood near the drivers' side window (in the road), Vaught and Murphy stood near the rear of the car, and a fourth firefighter stood next to the guardrail, near the front passengers' side window….Fairrow's sudden departure alarmed the firefighters-Vaught and Murphy jumped back, and the fourth firefighter stepped away toward the guardrail…. Wahl, however, moved forward. As Fairrow began to drive away, Wahl dove headfirst into Fairrow's rolled-down drivers' side window…. Wahl's entire torso entered Fairrow's car, such that only his legs were sticking out the window. He reached across Fairrow's lap and tried to wrestle the gear shift back into park…. He succeeded, but Fairrow succeeded in wrestling the gear shift back to drive. Wahl wrestled it back into park, and they went back and forth a few times….. He testified that he did this because he wanted to 'stop the car from possibly hitting one of [the firefighters], because at that time I still did not really know the state of [Fairrow's] condition.'

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Simultaneously, the police officers (whose arrival spooked Fairrow) exited their car and walked toward Fairrow's vehicle…. They heard the commotion and looked up- they saw Wahl's feet hanging out the window and the vehicle jerking back and forth…. Recognizing the emergency, the officers sprang into action. They ran back to their police car and pulled it horizontally across the two-lane road to block Fairrow's vehicle from leaving…. They then exited the police car and ran toward Fairrow's vehicle: one officer opened Fairrow's passenger door and jumped in the passenger seat to turn off the engine…. The other officer went

to the driver's side to assist Wahl out of the window and get Fairrow out of the vehicle…. Both officers immediately smelled marijuana … (one officer stating that 'the odor of marijuana just almost hit me in the face' as soon as they got Fairrow out of the vehicle)].

Once the situation subsided and Fairrow had exited, the officers searched the vehicle. The officers determined the marijuana smell gave them probable cause to search the vehicle…. The search revealed five bags of methamphetamine and a loaded nine-millimeter handgun in a backpack in the back seat…. The officers immediately placed Fairrow under arrest….

B. Community Caretaking Doctrine

The Government hangs its hat on a single exception: the community caretaking doctrine. The community caretaking doctrine provides that law enforcement do not need a warrant or probable cause for a search or seizure if they are "engaged in a function that was completely divorced from a criminal investigation." *United States v. Lewis*, 869 F.3d 460, 462 (6th Cir. 2017); *see Cady v. Dombrowski*, 413 U.S. 433, 441 (1973). The doctrine recognizes that 'police officers perform many civic tasks in modern society' unrelated to fighting crime, *Caniglia v. Strom*, 141 S.Ct. 1596, 1600 (2021), and it is inappropriate to require a warrant and probable cause for those civic 'community caretaking' activities.

The community caretaking doctrine, however, is not a blank check for government intrusions into individual liberties. Even if a government official performs a function 'divorced from a criminal investigation,' the search or seizure still violates the Fourth Amendment if it is not reasonable.

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Here, Wahl lacked any specific and articulable facts that Fairrow would be dangerous to himself or others, so his decision to jump headfirst into Fairrow's car was not reasonable. Simply put, the record does not substantiate Wahl's concerns that Fairrow was not safe to drive and would hit first responders on the scene if he attempted to drive from the scene…. ('I jumped through the window to stop the car from . . . possibly hitting one of [the first responders], because at that time I still did not really know the state of [Fairrow's] condition. I didn't know if he was going to be safe to drive or not.')].

***

First, the scene was not so congested that Fairrow's driving posed an obvious threat to other people. Fairrow was on the shoulder of a rural country road. The ambulance and police officers were arriving but remained about thirty yards from Fairrow's vehicle…. The four firefighters were the only people close to Fairrow's vehicle when he tried to drive off. Wahl was on the drivers' side, Murphy and Vaught stood near the back, and a fourth firefighter stood off the passengers' side…. Importantly, however, no one was standing directly in front of the vehicle…. Fairrow had a clear path when he drove forward. The firefighters were

close enough that the sudden movement startled them: the firefighter on the front passenger side stepped backward (toward the guardrail), and Murphy and Vaught jumped backward in surprise…. But Fairrow was not driving toward the passenger side firefighter (who had moved close to the guardrail), nor was he moving in reverse (which would have posed a danger to Murphy and Vaught)-he was moving toward the road, trying to leave. And Fairrow traveled some distance, perhaps as much as twenty feet, before Wahl dove in and stopped the car…. The fact that Fairrow traveled up to twenty feet without hitting anyone suggests that Wahl's concern about him immediately hitting someone, though perhaps honestly held, was not reasonable. The immediate danger that Fairrow would hit the firefighters had subsided. And though there were other people in the area, nothing indicates that Fairrow's attempt to drive away posed an immediate danger to any of them.

Second, Firefighter Wahl's concern about Fairrow's fitness to drive also was not objectively reasonable-the circumstances suggested Fairrow was fine to drive. Murphy, a trained EMT, was the first person on scene-he performed an oral medical screening on Fairrow and spoke with him extensively…. Murphy testified that Fairrow passed the medical screening: he was "alert to person, place, time, and event, " was not slurring words, and told the responders he was fine…. Murphy had no objective reason to doubt Fairrow's fitness. Also, though the original 911 caller believed Fairrow was unconscious, Fairrow rolled down his car window and engaged with Murphy within seconds of Murphy's arrival, casting doubt on the caller's claim."

**Legal Lesson Learned: The "Community Caretaking Doctrine" has been widely applied when there is real danger to emergency responders or to the public. If the volunteer firefighter had smelled strong odor of marijuana, Court may have not suppressed the evidence.**

## Chap. 2 – Line Of Duty Death / Safety (37 cases)

Chap. 2

### KS: FIREFIGHTER HEARING LOSS – ENTITLED TO WORKER'S COMP FOR SIRENS – OTHER LOUD NOISES IN HIS CAREER

On Nov. 19, 2021, in Patrick O'Neal v. City of Hutchinson, the Court of Appeals of Kansas, held (3 to 0) (not designated for publication) that the firefighter was entitled to worker's comp for permanent hearing loss and tinnitus due to repetitive exposure to loud noises during his career. While his initial claim was for a single event with air horn activation inside a fire station (Feb. 23, 2009) was denied, he is entitled to medical coverage for repetitive exposure during his 1994 – 2017 career.

"The City has not met its burden to show the Board erred in granting a compensation award to O'Neal. The City's own expert from the single accident claim provided evidence in support of O'Neal's repetitive injury claim. The evidence is sufficient for a reasonable person to find it supported the Board's compensation award.

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The City's required hearing exams showed in 2002 that O'Neal sustained hearing loss. Given that it required its firefighters to undergo hearing tests every other year until age 40 and then every year thereafter, the City was aware firefighters were at risk for hearing loss from their jobs. O'Neal's 2002 audiogram showed he was sustaining hearing loss, and no alternative explanation was given, except for occasionally using firearms. Dr. Epp testified that at the time of the 2002 test, O'Neal more likely than not had sustained hearing loss from his job, which was stabilizing at the time of the test.
The City was on notice, even before the date of the injury, that O'Neal had suffered hearing loss due to repetitive trauma from his work."

Facts:

"O'Neal worked for the City's fire department from May 1994 until September 2017 and originally filed a claim for hearing loss based on a single accident-a fire truck's air horn going off inside the fire station on February 23, 2009, as O'Neal walked in front of it. O'Neal alleged permanent hearing loss and tinnitus. Dr. Peter Bieri examined O'Neal and, at a deposition on April 11, 2016, testified that O'Neal's hearing loss was from the fire truck incident as O'Neal described it to him.

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Dr. Robert Epp also examined O'Neal on May 10, 2016. During his deposition, Dr. Epp testified it was more likely than not that O'Neal's hearing loss was due to repeated exposure to loud noises over the course of O'Neal's career as a firefighter.

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The Administrative Law Judge (ALJ) found O'Neal had sustained a 2% impairment, but, on appeal by the City, the Board held O'Neal had failed to show the February 23, 2009 accident caused his permanent hearing loss and reversed the award. *O'Neal v. City of Hutchinson*, No. 1, 054, 014, 2017 WL 1330450, at *5 (Kan. Work. Comp. App. Bd. March 7, 2017).

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On December 13, 2019, the ALJ entered an Award finding O'Neal sustained a 2% impairment to his body as a whole from the repetitive trauma. The City appealed to the Board, arguing O'Neal's claim was barred by res judicata, the City never received proper notice, and O'Neal did not provide evidence that he was entitled to a compensation award. The Board entered an order affirming the ALJ's award in part and modifying in part. The Board found O'Neal sustained 0% permanent impairment but awarded him compensation for unauthorized and future medical treatment.

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> The City's required hearing exams showed in 2002 that O'Neal sustained hearing loss. Given that it required its firefighters to undergo hearing tests every other year until age 40 and then every year thereafter, the City was aware firefighters were at risk for hearing loss from their jobs. O'Neal's 2002 audiogram showed he was sustaining hearing loss, and no alternative explanation was given, except for occasionally using firearms. Dr. Epp testified that at the time of the 2002 test, O'Neal more likely than not had sustained hearing loss from his job, which was stabilizing at the time of the test."

**Legal Lesson Learned: Kansas workers comp statutes, like many states, provides medical coverage for hearing loss arising from the job.**

## Chap. 3 – Homeland Security, incl. Active Shooter, Cybersecurity, Immigration (38 cases)

## Chap. 4 – Incident Command, incl. Training, Drones, Communications (18 cases)

Chap. 4

### MI: DISPATCH SENT EMS TO "FIREMEN'S ASSOCIATION" INSTEAD OF VOL. FD – CHILD DIED ASTHMA - IMMUNITY

On Nov. 15, 2021, in Jose Reyes, as Personal Representative for the Estate of Bobby Reves, et al. v. Monroe County and Sonya Sampsel, U.S. District Court Judge Laurie J. Michelson granted summary judgment to Monroe County and 911 Dispatcher Sonya Sampsel. Tragic case where a 14-year old teenager with asthma died when dispatch sent ambulance to the Ash Township Firemen's Association, instead of to Ash Township Fire Station No. 2. Judge recognized that the dispatcher had to make a quick decision with a non-breather. Fed. claim of "state-created-danger" in violation of due process under 14th Amendment of Constitution requires proof of reckless conduct that "shocks the contemporary conscience." State claim of negligence also dismissed - Michigan's Governmental Tort Liability Act shields government employees from claims of negligence unless their conduct was "so reckless as to demonstrate a substantial lack of concern for whether an injury results."

> "In cases where a state actor was forced to make a quick decision, courts have required a plaintiff to show that the state actor intended to cause harm to establish liability under the Due Process Clause. *See County of Sacramento v. Lewis*, 523 U.S. 833, 853 (1998) (providing that 'when unforeseen circumstances demand an officer's instant judgment, ' even the officer's reckless conduct will not shock the conscious); *Jackson Board of Education*, 954 F.3d at 933 ("[The Supreme Court] has added that an actual intent to injure is required when public actors must make hasty decisions, such as during a high-speed chase or a prison riot.'). An intent-to-harm standard makes sense when there is no

time to deliberate; after all, 'the [deliberate indifference] standard is sensibly employed only when actual deliberation is practical.' *Lewis*, 523 U.S. at 851.
Here, Sampsel had virtually no time to deliberate. Jones told Sampsel, 'my son can't breathe.' Sampsel had to act-and quickly. Thus, for Sampsel to be liable under a state-created-danger theory, it appears that Plaintiffs must show that she acted with intent to harm Reyes. And if that is the requisite standard, not a shred of evidence supports holding Sampsel liable under the Due Process Clause. Sampsel did not intend to harm Reyes; she intended to help Reyes."

Facts:

"Ash Township is a small town located about 30 miles southwest of Detroit, Michigan. The township has two fire stations that go by 'Station 1' and 'Station 2.' (*See* ECF No. 16-4, PageID.258.) Station 2 is located on Ready Road…, and, for this opinion, it is helpful to call it the 'Ready Road Station.' In addition to the two fire stations, there is something called the 'Ash Township Fire Fighters Association' located on Horan Street….

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On September 21, 2019, around 9:45 at night, Reyes had an asthma attack…. But this time, his inhaler provided no relief…. And the nebulizer could not be quickly located-after all, Reyes had never needed it…. Jones, recalling that she lived near the Ready Road Station and believing it was staffed with emergency medical services 24-hours a day, decided to bring her 14-year-old son there…. She recalls telling Reyes, '[G]et in the car . . . we'll take you to the ambulance, we'll get there before they can even leave…. As they left the house, Jones called 9-1-1.

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In the dispatch computer system, Sampsel entered information from Jones' call. The system's log reflects, 'Caller Statement: Obviously NOT BREATHING & Unconscious….' Sampsel also entered a dispatch code with a 'Response' of 'EMS 1 / Fire 1….' According to Sampsel, this caused something to pop up on Nagy's screen at the fire desk, and Nagy was then responsible for dispatching an ambulance, a fire truck, or both…. Sampsel also entered the following location in the system: 'ASH TOWNSHIP FIREMENS ASSOCIATION, Venue: CARLETON….'

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Meanwhile, Sampsel was busy helping Jones. Over the next few minutes, Sampsel coached Jones through CPR and tried to calm Jones down because she was, very understandably, extremely distressed. (*See* ECF No. 16-3 at 9:55:31 to 9:59.) As their call continued, Jones wondered why her 9-1-1 call did not prompt those inside the Ready Road Station to simply open the doors and come out to Reyes. At one point Jones told Sampsel, 'Just ask them to come outside.' And at another point, Jones exclaimed, 'I'm right here at the fire station, why can't they hear me?' Sampsel replied, 'I'm sending them there to help you now . . . .') At about 9:57 p.m. (about two minutes after Jones had dialed 9-1-1), Jones, with coaching from Sampsel, began performing CPR on Reyes.

While Jones performed CPR, Sampsel told Jones several times that ‘they're on the way’ or ‘everyone's on their way.’

***

Despite the fact that Sampsel had entered the wrong location into the dispatch system, two firefighters were, fortuitously, on their way to Reyes. Terry Daniels, an Ash Township firefighter, was at home when he received notice of Jones' 9-1-1 call. Following protocol, he first went to the Ready Road Station to grab his gear before heading out to the (incorrect) dispatched location…. And when he got to the Ready Road Station, Daniels unexpectedly saw Jones and Reyes…. He quickly went inside the station to grab gear and a radio and then came out to help Reyes…. And so about 30 seconds after those at the firemen's association had radioed that they could not locate Jones, Daniels clarified over the radio: ‘Our patient is down in front of Station 2, please respond to Ready Road and Sweitzer….’

***

And around this time, at 10:03 p.m., an ambulance was finally dispatched…. The ambulance was dispatched to the correct address: the Ready Road Station…. But the ambulance from Monroe Community would not get to Reyes until 10:11 p.m…. This was 16 or so minutes after Jones had dialed 9-1-1 and around 25 minutes after the start of Reyes' asthma attack. After 20 more minutes, using medicine and equipment that the firefighters did not have, ambulance personnel were able to get Reyes' heart to restart…. But Reyes had suffered severe brain damage by this point. In October 2019, weeks after his asthma attack, Reyes was taken off life support….

***

In all, ‘[Sampsel's] conduct violates the Due Process Clause only if it is so egregious, so outrageous, that it may fairly be said to shock the contemporary conscience.’ *Jackson Board of Education,* 954 F.3d at 933. No. reasonable jury could find that Sampsel's handling of Jones' 9-1-1 call fits that description.”

**Legal Lesson Learned: Fortunately, dispatchers and other emergency responders required to make quick decisions enjoy immunity from Federal and state claims unless conduct is extremely reckless or deemed to “shock the contemporary conscience**.”

## Chap. 5 – Emergency Vehicle Operations (21 cases)

## Chap. 6 – Employment Litigation, incl. Work Comp., Disability, Vet Rights (82 cases)

Chap. 6

# WA: BLADDER CANCER – FF WINS WORKERS COMP. COVERAGE – STATUTORY PRESUMPTION ALL CANCERS

On Nov. 9, 2021, in Stephen T. Bradley v. City of Olympia and Department of Labor And Industries, the Court of Appeals of Washington, Division 2, held (3 to 0) that a Superior Court judge properly determined that the firefighter was entitled to workers comp coverage under the state statute, RCW 51.32.185(1)(a)(iii). The City argued that firefighting "in general" does not cause bladder cancer, but that is not sufficient to rebut the statutory presumption. The statute covers all cancers.

> "(1)(a) In the case of firefighters as defined in RCW 41.26.030(17) (a), (b), (c), and (h) who are covered under this title and firefighters, including supervisors, employed on a full-time, fully compensated basis as a firefighter of a private sector employer's fire department that includes over fifty such firefighters, and public employee fire investigators, there shall exist a prima facie presumption that: (i) Respiratory disease; (ii) any heart problems, experienced within seventy-two hours of exposure to smoke, fumes, or toxic substances, or experienced within twenty-four hours of strenuous physical exertion due to firefighting activities; (iii) cancer; and (iv) infectious diseases are occupational diseases under RCW 51.08.140."

The Court held:

> "DLI denied Bradley's workers' compensation claim, and Bradley filed a petition for review with the Board of Industrial Insurance Appeals (Board). To rebut the RCW 51.32.185(1)(a) presumption, the City presented medical evidence that firefighting activities *in general* do not cause bladder cancer. The Board affirmed DLI's denial, finding that the City had rebutted the statutory presumption. On appeal, the superior court granted summary judgment in favor of Bradley on the grounds that the City's medical evidence could not rebut the RCW 51.32.185(1)(a) presumption.
>
> We hold that an employer cannot rebut the presumption under RCW 51.32.185(1)(a) with evidence that firefighting activities *in general* do not cause bladder cancer. Instead, to avoid summary judgment an employer must present sufficient evidence that the individual claimant's bladder cancer was caused by nonoccupational factors. Here, summary judgment was appropriate because the City failed to present evidence that created a genuine issue of material fact as to whether nonoccupational factors caused Bradley's bladder cancer."

Facts:

> **"**Bradley was born in August 1949. He worked as a firefighter for the City from 1997 until 2014. As a firefighter, Bradley was exposed to diesel exhaust during various firefighting activities. He also was exposed to mild to moderate smoke, fumes, and toxins as well as the exhaust from the fire equipment and emergency vehicles while responding to fire suppression-related calls. After fire-suppression activities, Bradley would have soot on his wrists and around his neck. He also would expel a black substance when coughing or blowing his nose.

***
In September 2016 when he was 67 years old, Bradley was diagnosed with bladder cancer. After his diagnosis, Bradley filed a workers' compensation claim under RCW 51.32.185(1) with DLI, alleging that his firefighting activities caused his bladder cancer. DLI denied his claim.

***
Bradley filed a petition for review of DLI's decision with the Board. In April 2018, an industrial appeals judge (IAJ) held an evidentiary hearing. Bradley generally testified to the facts stated above. He also admitted that he consistently was exposed to secondhand smoke for the first 19 years of his life because both of his parents smoked. In addition, Bradley and his coworker testified about their duties as firefighters.

***
Bradley also relied on deposition transcripts from his medical expert witness Dr. Kenneth Coleman, an emergency medicine and family medicine physician and attorney. He generally testified that medical studies showed that there was a causal link between firefighting and bladder cancer and agreed with statements from medical studies that were read to him. But he also agreed that an epidemiological study that established an association or correlation did not necessarily establish causation.

***
The City presented deposition transcripts to the IAJ from three medical expert witnesses: Dr. Bill Vanasupa, a Board certified urologist and Bradley's treating physician; Dr. Noel Weiss, an epidemiologist and epidemiology professor at the University of Washington; and Dr. Erik Torgerson, a Board certified urologist and medical director of urology at the Swedish Urology Group.

Dr. Vanasupa began treating Bradley's bladder cancer in September 2016. He generally stated that based on the articles he reviewed, he believed that there was an increase in bladder cancer mortality among firefighters, but that the increase was not statistically significant. Dr. Vanasupa stated that it was possible that firefighting caused Bradley's bladder cancer, but there was less than a 50 percent probability of a causal connection. But he admitted that he did not know what carcinogens firefighters in general or Bradley specifically were exposed to during fire suppression activities.

Dr. Vanasupa stated that a history of smoking could cause bladder cancer and that certain genetic predispositions could make bladder cancer more likely in a person. But he acknowledged that Bradley was not a smoker and that there was no history of bladder cancer in his family. Dr. Vanasupa also mentioned radiation exposure as a potential causation for bladder cancer, but he did not suggest that Bradley had been exposed to radiation.

Dr. Weiss testified that based on his review of studies involving firefighters and bladder cancer, his opinion was that it was unreasonable to make the inference that exposure to firefighting activities caused bladder cancer. He testified that there were inconsistent

conclusions among the 30 studies regarding this hypothesis, and that there was a weak association between firefighting activities and bladder cancer. His opinion was that firefighting does not have the capacity to cause bladder cancer, but he could not rule out that possibility.

***
Dr. Torgerson testified that he believed that firefighting was not an occupation that had an association with bladder cancer. He admitted that he had no knowledge about the extent to which Bradley was exposed to carcinogens as a firefighter or what Bradley's duties were as a firefighter. Dr. Torgerson testified that Bradley was a nonsmoker who had no family history of kidney or bladder cancer, or any genitourinary cancer.

***
The IAJ entered a proposed decision and order affirming DLI's order [denying the FF's claim]…. The Board adopted the IAJ's decision and order and denied Bradley's petition for review.

***
The superior court granted Bradley's summary judgment motion after reviewing the entire certified appeal board record. The court awarded Bradley reasonable attorney fees and remanded to DLI to allow Bradley's claim.

***
The Industrial Insurance Act (IIA), Title 51 RCW, governs workers' compensation claims. RCW 51.32.180 states that any worker who contracts an occupational disease in the course of employment is entitled to certain workers' compensation benefits. An 'occupational disease' is a disease that 'arises naturally and proximately out of employment.' RCW 51.08.140. In general, the worker bears the burden of proving an occupational disease when asserting a workers' compensation claim….

However, RCW 51.32.185(1)(a)(iii) and (3)(b) establish a presumption that bladder cancer is an occupational disease for firefighters. This presumption can be rebutted by the preponderance of the evidence. RCW 51.32.185(1)(d). 'Such evidence may include, but is not limited to, use of tobacco products, physical fitness and weight, lifestyle, hereditary factors, and exposure from other employment or nonemployment activities.' RCW 51.32.185(1)(d). Whether an employer has rebutted the RCW 51.32.185(1) presumption generally is a question of fact.

***
The City presented medical evidence that firefighting in general does not cause bladder cancer. The City argues that this evidence is sufficient to create a question of fact as to whether Bradley's bladder cancer was caused by nonoccupational hazards, which *Spivey* [Spivey v. City of Bellevue, 2017, stated was required to rebut the RCW 51.32.185(1) presumption. The City claims that if firefighting in general does not cause bladder cancer, Bradley's cancer must have been caused by nonoccupational hazards rather than by his firefighting activities.

> We reject this argument. By adopting the presumption that a firefighter's bladder cancer is an occupational disease, the legislature already has determined that there is at least some causal connection between firefighting activities and bladder cancer. In other words, RCW 51.32.185(1)(a) is designed to foreclose the argument that firefighting activities cannot cause bladder cancer."

**Legal Lesson Learned: Great decision reflecting why a statutory presumption is extremely helpful in firefighter cancer claims.**

## Chap. 7 – Sexual Harassment, incl. Pregnancy Discrimination, Gay Rights (38 cases)

Chap. 7

### MA: FEMALE PROMOTED TO CAPT – NO. 2 ASSESSMENT CENTER – THEN "DEEPLY FLAWED" INTERVIEW FIRE CHIEF / CITY OFFICIALS

On Nov. 18, 2021, in Tracy Blanchette v. City of Methuen and Matthew Tulley, the Commonwealth of Massachusetts Civil Service Commission held (5 to 0) that firefighter Tracy Blanchette should have been promoted when a second Captain position came open, instead of firefighter Matthew Tulley, and rejected the City's argument that she was not promoted because of a poor interview 14 months earlier during first Captain opening. During that first promotion opportunity, a comprehensive Assessment Center ranked Blanchtte No. 2, but during the post-Assessment interviews of the four finalists by Fire Chief, Assistant Fire Chief, HR and Mayor's Chief of Staff, she was ranked No. 4. Civil Service Commissioner Cynthia A. Ittleman wrote a lengthy scathing decision, focusing on (1) Fire Chiefs prior friendship and 8-10 years working off-duty in Matthew Tully's electrical business, and (2) the post-Assessment Center interviews were never recorded by video or audio (at HR's recommendation).

> "[The City of] Methuen has failed to establish by a preponderance of credible evidence that it had reasonable justification to promote a male MFD firefighter to Fire Captain from an eligible list created after a comprehensive Assessment Center in which he ranked below the Appellant, a female firefighter with greater experience. Rather, the evidence shows that Methuen's decision was based on the use of a highly subjective and flawed interview process intended to nullify the results of the Assessment Center in order to effectuate a predetermined decision to select a candidate favored by the Fire Chief as a matter of personal, not professional, preference, as well as to not disturb the MFD's male-dominated culture. This selection process was not conducted on a level playing field and violates basic merit principles of civil service law."

Facts:

“As of 2019, its fire department, the MFD, had one chief and one assistant chief, four deputy chiefs, two captains, 16 lieutenants, and 77 privates. A private, also known (and referred to herein) as Firefighter, is the lowest rank in the Methuen Fire Department. All but the Chief and Assistant Chief are unionized employees.

***

Approximately six weeks after the Captain’s assessment center exam, the promotional Eligible List issued; candidates Michael Fluet and Blanchette were ranked #1 and #2, respectively, and Tulley and Timothy Smith tied for the #3 slot.

***

On November 14, 2017, the City conducted an internal post-assessment center interview of Fluet, Smith, Blanchette, and Tulley. The interview panel consisted of: [Fire Chief] Sheehy, [Assistant Chief William] Barry, [HR Anne] Randazzo, and [Mayor’s Chief of Staff] Phil DeCologero.

***

The interviews conducted on November 14, 2017, were neither audio- nor video-recorded, despite the City’s capability to do so. [Tr1@236 (Sheehy).] HR Director Randazzo was well aware of civil service procedural recommendations related to promotional interviews, but knowingly decided not to record the interviews in this case. [Tr3@263.]

***

Assistant Chief Barry developed fifteen (15) questions and gave them to Sheehy, Randazzo, and DeCologero on the morning of the interviews.20 Either technical firefighting knowledge or insider knowledge of the operations of the MFD was necessary to answer adequately almost all of these questions. Sheehy and Barry instructed Randazzo and DeCologero as to what they were looking for in terms of answers to questions that were specific to MFD.

***

Each candidate in the internal interview process for the rank of captain was asked the same fifteen (15) questions and their answers were scored contemporaneously on a scale of one (1) to ten (10). At the conclusion of the interviews, the panelists got together and added their scores together for each candidate. A ranking of candidates was developed from these scores.

***

| Candidate | Total |
|---|---|
| Tulley | 570 |
| Fluet | 554 |
| Smith | 530 |
| Blanchette | 445 |

***

The panelists decided to recommend Fluet to the appointing authority, Mayor Zanni, for promotion to captain because he was a lieutenant and had been in that position for over seven years, was more senior in the MFD than Tulley, had ranked first after the assessment center exercises, and he 'gave a decent interview' despite his #2 ranking on that component by the panel.

***

In January of 2019, Captain Mike Hamel announced his retirement…. On January 7, 2019, newly-elected Mayor James Jajuga ('Mayor Jajuga'), authorized a certification from which to promote one fulltime permanent fire captain…. Blanchette (now ranked first on the eligible list after Fluet's promotion), Smith, and Tulley each certified that they were willing to accept the promotion…. The City did not conduct another internal interview but rather relied upon the one conducted 14 months earlier, in November of 2017.

***

Sheehy, Randazzo, and W. Barry had a discussion and decided to recommend promotion of Tulley and to bypass Blanchette, allegedly because of her poor interview performance over a year earlier.

***

This Commission has affirmed that appointing authorities may conduct post-certification interviews, even when the eligible list is established by an assessment center, so long as the interviews are conducted in good faith, in a fair and transparent manner, and are not held as part of some pre-determined effort to bypass a higher-ranked individual. Samuel Richesson v. City of Worcester, 31 MCSR 257 (2018). This Commission, however, has never approved of reliance upon unrecorded post-certification interviews conducted more than 12 months prior to a vacancy as the sole justification to bypass the highest-ranked candidate on a promotional eligibility list."

**Legal Lesson Learned: Video or audio record the post Assessment Center interviews. The City may now appeal this decision to a court of law.**

Note: See article on the decision: Nov. 24, 2021: "Civil Service Commission sides with Mass. female FF-EMT passed over for promotion."

See also lawsuit: Nov. 11, 2020: "Mass. FF-EMT files gender discrimination lawsuit, says she was passed over for promotion."

## Chap. 8 – Race / National Origin Discrimination (34 cases)

## Chap. 9 – Americans With Disabilities Act (21 cases)

## Chap. 10 – Family Medical Leave Act, incl. Military Leave (12 cases)

## Chap. 11 – Fair Labor Standards Act (32 cases)

Chap. 11

### VA: FLSA - VIRGINIA BEACH FD SETTLEMENT – EMS CAPTAINS WILL BE "NON-EXEMPT" - BACK PAY 3 YEARS

On Sept. 14, 2021, in David Bust, et al. v. Virginia Beach, Virginia, U.S. District Court for Eastern District of Virginia (Norfolk Division), eight EMS Captains settled their 2020 lawsuit with the city. The settlement included agreement by the City to re-classify EMS Captains as non-exempt effective Aug. 26, 2021, and back pay from November 25, 2017.

> "Under the Settlement Agreement, the City will pay a total of $200,000.00 (two hundred thousand dollars) to resolve the Plaintiffs' FLSA and VGPA claims. Ex. 1, ¶ 2.1. The Settlement Amount will be divided and distributed as follows: (1) one check in the amount of $80,000.00, payable to Plaintiffs' counsel, McGillivary Steele Elkin LLP, representing a negotiated amount of reimbursed attorneys' fees and expenses; and (2) a set of payroll checks payable to individual Plaintiffs, totaling a pre-tax amount of $120,000.00, which shall be distributed to individual Plaintiffs in accordance with the pre-tax amounts set forth in Exhibit A to the Settlement Agreement, to which the City shall be entitled to apply all applicable deductions and withholdings for each individual Plaintiff. Id., ¶ 2.2. In addition, the City agreed to re-classify Plaintiffs in the position of EMS Captain as non-exempt, effective August 26, 2021. Id., ¶ 2.1. These amounts and terms are agreed to among the Parties to compromise, settle, and satisfy the Released Claims described in paragraph 3.1 of the Settlement Agreement, and all attorneys' fees and expenses related to the Released Claims. Significantly, Plaintiffs and their counsel determined the method used to calculate the pro rata amounts to be paid to each Plaintiff for the Back Pay Amount. Id., ¶ 2.6."

Facts:

> "At the time of settlement, the Parties had exchanged in significant discovery as to the issue of liability. Specifically, the Parties exchanged written discovery including interrogatories, requests for production of documents, and requests for admissions, and also exchanged over 7,500 documents. Ex. 2, ¶ 22. In addition, the Defendants took the depositions of all eight Plaintiffs, and Plaintiffs took the depositions of three Fed. R. Civ. P. 30(b)(6) witnesses and one fact witness. Id. As such, the parties were in a position to "fairly evaluate the liability and financial aspects of [the] case." Lomascolo, 2009 U.S. Dist. LEXIS 89136 at *31. This factor, therefore, weighs in favor of settlement approval.
>
> ***
>
> Given the various arguments on each side supporting each side's position, it is unclear how the Court or a jury would decide these issues and whether a jury trial would be necessary. At the time of settlement, both Parties had filed and fully briefed motions for

summary judgment, and both Parties would likely appeal an adverse decision following summary judgment and/or a trial on any disputed liability issues.

***

Plaintiffs' Counsel are locally and nationally recognized leaders in the field of wage and hour law.

***

Plaintiffs contend that the City has wrongfully misclassified them as exempt from the overtime requirements of the FLSA, and contend both the record evidence and Fourth Circuit case law—namely, Morrison v. County of Fairfax, 826 F.3d 758 (4th Cir. 2016) —support their position. Defendant, on the other hand, contends that Plaintiffs are properly classified as exempt and that other Fourth Circuit case law—Emmons v. City of Chesapeake, 982 F.3d 245 (4th Cir. 2020) - supports its position. Given the Parties' arguments and pending cross-motions for summary judgment with respect to three different job assignments (field captain, lifeguard captain, and logistics captain), as well as the Fourth Circuit case law on exemptions, appeal would be likely regardless of this Court's decision on the Parties' cross-motions and/or following a jury trial on liability, which would result in delay and additional expense.
Accordingly, settlement now for $120,000 in backpay to be paid within 30 days of court approval of the Settlement and a change in Plaintiffs' exemption status going forward, effective August 26, 2021, is a fair and reasonable outcome for Plaintiffs.

***

Given the Parties' significant monetary settlement over a three-year statute of limitations and the change in exemption status, coupled with the City's strong arguments that it has satisfied the good faith defense to liquidated damages, a settlement without liquidated damages is reasonable.

***

Based on the foregoing dispute, a settlement that pays a full three years of back pay (i.e., back to November 25, 2017) and extends up to August 26, 2021, is a favorable outcome for the Plaintiffs as part of the negotiated settlement."

**Legal Lesson Learned: Settlements are encouraged to avoid "liquidated damages" (back pay doubled) under FLSA. Fire & EMS department, when in doubt about classification of officers under FLSA, are encouraged to consult with experienced FLSA attorneys and the U.S. Department of Labor, Wage & Hour Division.**

Note: See article on the settlement. Nov. 16, 2021: "VA Beach Settles 'White Collar' FLSA Lawsuit with EMS Captains."

# Chap. 12 – Drug-Free Workplace, inc. Recovery (14 cases)

Chap. 12

## OK: STATE AG SUES OPIOID MANUFACTURERS – MARKETING DRUGS - $465M VERDICT SET ASIDE – J&J

On Nov. 9, 2021, in State ex rel. Attorney General of Oklahoma v. Johnson & Johnson, the Supreme Court of the State of Oklahoma (5 to 1) overturned $465 million judgment won by the State. In 2019, state District Judge Thad Balkman ruled in a bench trial supporting the State's argument that J&J created a "public nuisance" through its marketing of prescription pain pills.

> "To address this problem, the State of Oklahoma ex rel. Mike Hunter, Attorney General of Oklahoma ("State"), sued three prescription opioid manufacturers and requested that the district court hold opioid manufacturers liable for violating Oklahoma's public nuisance statute. The question before the Court is whether the conduct of an opioid manufacturer in marketing and selling its products constituted a public nuisance under 50 O.S.2011, §§ 1 & 2. We hold that the district court's expansion of public nuisance law went too far. Oklahoma public nuisance law does not extend to the manufacturing, marketing, and selling of prescription opioids."

Facts:

> "On June 30, 2017, the State sued three opioid manufacturers--J&J (and its related entities), Purdue Pharma L.P. (and its related entities), and Teva Pharmaceuticals USA, Inc. (and its related entities) alleging the companies deceptively marketed opioids in Oklahoma. The State settled with the other opioid manufacturers and eventually dismissed all claims against J&J except public nuisance. The district court conducted a 33-day bench trial with the single issue being whether J&J was responsible for creating a public nuisance in the marketing and selling of its opioid products. The district court held J&J liable under Oklahoma's public nuisance statute for conducting 'false, misleading, and dangerous marketing campaigns' about prescription opioids. The district court ordered that J&J pay $465 million to fund one year of the State's Abatement Plan, which consisted of the district court appropriating money to 21 government programs for services to combat opioid abuse. The amount of the judgment against J&J was not based on J&J's percentage of prescription opioids sold. The district court also did not take into consideration or grant J&J a set-off for the settlements the State had entered into with the other opioid manufacturers. Instead, the district court held J&J responsible to abate alleged harms done by all opioids, not just opioids manufactured and sold by J&J.
>
> ***
>
> The issue before this Court is whether the district court correctly determined that J&J's actions in marketing and selling prescription opioids created a public nuisance. We hold it did not. The nature of the nuisance claim pled by the State is the marketing, selling, and overprescribing of opioids manufactured by J&J. This Court has not extended the public nuisance statute to the manufacturing, marketing, and selling of products, and we reject the State's invitation to expand Oklahoma's public nuisance law.

> In reaching this decision, we do not minimize the severity of the harm that thousands of Oklahoma citizens have suffered because of opioids. However grave the problem of opioid addiction is in Oklahoma, public nuisance law does not provide a remedy for this harm."

**Legal Lesson Learned: Numerous states have sued drug manufacturers and drug retail stores; the Oklahoma Supreme Court decision applies only to Oklahoma.**
See article on this decision: Nov. 9, 2021: "Oklahoma's Supreme Court tossed out a landmark $465 million opioid ruling."

But see other Court decisions: Nov. 23, 2021: "3 of America's biggest pharmacy chains have been found liable for the opioid crisis."

> "A federal jury on Tuesday found three of the nation's biggest pharmacy chains, CVS, Walgreens and Walmart, liable for helping to fuel the U.S. opioid crisis — a decision that's expected to have legal repercussions as thousands of similar lawsuits move forward in courts across the country."

Nov. 1, 2021: **"A California court says drug companies aren't liable for the state's opioid crisis.**

> "A state judge in California ruled late Monday that four drug companies can't be held liable for that state's opioid epidemic. Communities had hoped for tens of billions of dollars in compensation to help ease the addiction crisis. Attorneys representing four California counties argued the drug companies Allergan, Endo, Johnson & Johnson and Teva used false and misleading marketing to push up the sale of prescription opioids."

## Chap. 13 – EMS, incl. Community Paramedicine, Corona Virus (99 cases)

Chap. 13

### VA: POLICE & PARAMEDICS DENIED "GOOD FAITH IMMUNITY" – MENTAL – FORCE HEAD INTO PILLOW / DIED

On Nov. 15, 2021, in Angela L. Lawhorn, Administrator of the Estate of Joshua L. Lawhorn v. Alexander Mayes, et al., the U.S. Court of Appeals for the Fourth Circuit (Richmond, VA) held that the paramedics, like the police officers in this case, are not entitled to good faith immunity and the lawsuit will proceed.

> "This appeal arises from a tragic incident that led to the death of Joshua Lawhon, an unarmed mentally ill man. Invoking 42 U.S.C. § 1983 and Virginia state law, Lawhon's mother, as administrator of his estate, brought this action against the police officers and paramedics whose assertedly improper actions cost her son his life. Defendants moved to dismiss the case on the grounds of qualified immunity and state law immunity. The district court refused to do so regarding Defendants' conduct after they secured Lawhon

in handcuffs and the Defendants now appeal. We affirm on the basis of its well-reasoned opinion.

***

The paramedic-Defendants similarly raise a good faith immunity defense under Virginia's Good Samaritan statute. However, as the district court determined, 'this statute only shields those who 'in good faith render[] emergency care or assistance.' *Id*. The complaint asserts that the paramedics 'failed' to provide Lawhon with emergency care or assistance. Thus, the statute cannot immunize the paramedics at this stage of the litigation. 'The parallel state law claim[s] of . . . battery [are] subsumed within the federal excessive force claim and so go[] forward as well.' *Rowland v. Perry*, 41 F.3d 167, 174 (4th Cir. 1994)."

Facts:

"On January 16, 2018, two officers from the Richmond City Police Department responded to a call from Joshua Lawhon's roommate, Shaunna Tunstall. Tunstall expressed concern for Lawhon's well-being because he had fallen and injured himself. Lawhon had a history of paranoid schizophrenia and informed the officers he had taken too much of a certain medication that day. The police officers urged him to go to the hospital voluntarily for evaluation, but he refused. When two paramedics arrived, they asked Lawhon a series of questions to evaluate his state of mind. He answered the questions correctly but became increasingly agitated. When the paramedics prepared to leave, Tunstall urged them to take Lawhon and expressed a concern that he could kill himself if he remained at home. However, she did not convey any fear that he could pose a danger to others.

***

According to the complaint, the police officers and paramedics then 'carried out a ruse' by pretending to allow Lawhon to go find the cigarette he had requested. As Lawhon walked toward the other room to do so, Officer Edwards grabbed him from behind, forced him into the prone position - on his stomach with his hands behind his back - and with the assistance of the other police officer and the two paramedics, handcuffed him. The Defendants then applied varying degrees of force to his body while Lawhon remained handcuffed in the prone position for nearly six minutes, with his face pushed into a pillow on the floor for most of that time. During the last three minutes, Lawhon was motionless and silent. When the Defendants finally rolled Lawhon off his stomach and onto his back, he remained unresponsive. It was later determined that he suffered 'irreversible hypoxic brain injury due to cardiac arrest and/or asphyxia.' Two days later, he was declared brain dead.

***

The paramedic-Defendants similarly raise a good faith immunity defense under Virginia's Good Samaritan statute. However, as the district court determined, 'this statute only shields those who 'in good faith render[] emergency care or assistance.'"

**Legal Lesson Learned: When police use force to restrain a patient, it is particularly important that EMS thoroughly document their actions at that scene, including both in assisting the patient and the police.**

Chap. 13

## LA: OIL WELL EMPLOYEE – STROKE – TPA PROPERLY NOT GIVEN – "LAST KNOWN WELL TIME" BEYOND 4.5 HOURS

On Nov. 12, 2021, in Daniel Ramirez v. Talos Guld Coast Offshore LLC, et al., Chief U.S. District Court Judge Lee H. Rosenthal, U.S. District Court, Southern District of Texas (Houston Division) granted summary judgment to Talos, since there was no negligence by the Offshore Oil Company, the paramedic on the oil rig, the paramedic on the helicopter which flew him to the hospital, or the physicians who treated him.

> "Ramirez argues that Talos's negligent delay in sending him to the hospital precluded him from getting the tPA treatment, which would have avoided the permanent effects of his stroke. Talos argues that 'the period to give tPA expired before [Ramirez] even woke up on the [platform]….' '[T]he treating physicians at WJMC . . . testified that they would never have administered a tPA to [Ramirez]' even if he somehow could have reached the hospital the minute he woke up…. Talos's conduct had no bearing on whether Ramirez could receive tPA treatment. In short, Talos neither caused nor contributed to the reason Ramirez did not get tPA.
>
> ***
>
> Ramirez was not administered tPA on the helicopter or at the hospital, however, because everyone who treated Ramirez believed that his 'last known well time' was around 7:00 p.m. to 7:30 p.m., when Ramirez went to sleep, and not 1:30 a.m., when Ramirez woke up. That put Ramirez over four and a half hours-outside the window to receive tPA."

Facts:

> "Daniel Ramirez, a subcontractor on an oil and gas platform in the Gulf of Mexico, had a medical emergency in the middle of the night on May 19, 2019. Ramirez was flown by helicopter from the platform to the West Jefferson Medical Center in Louisiana, where he was diagnosed with and treated for an ischemic stroke. The hospital did not administer Ramirez tissue plasminogen activator (known as tPA), a treatment that can dissolve blood clots in patients suffering an ischemic stroke. The stroke left Ramirez with permanent neurological problems.
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> ***
>
> The problem with tPA is that it is potentially lethal if administered to ischemic stroke patients more than four and a half hours after the stroke patient's 'last known normal' or 'last known well' time. For some patients, if more than three hours have passed, tPA can be lethal. The 'last known well time' is the last time the patient was known to be without signs or symptoms of a stroke. If tPA is administered outside this narrow time frame, it can cause bleeding in the brain and death.

***

Ramirez alleges that if he had been administered tPA on May 19, 2019, he would have avoided any permanent neurological problems from the stroke. Ramirez alleges that he was not administered tPA because he arrived at the West Jefferson Medical Center over four and a half hours after his 'last known normal time,' and was therefore ineligible to receive the treatment. Ramirez alleges that his 'last known normal time' was approximately 12:45 a.m. on May 19, 2019, when he woke up on the platform 25 miles offshore feeling unwell. Ramirez did not arrive at the hospital until 5:38 a.m. on May 19, 2019."

**Legal Lesson Learned: There was no negligence by the employer or anyone else in treatment of the patient.**

Chap. 13

## IL: EMS POSTED PHOTOS SNAPCHAT – PATIENT'S SEVERED HAND / ARM - FED. CASE DISMISSED, SUE IN STATE COURT

On Nov. 2, 2021, in Omero Ortiz v. Anthony Renteria, Christopher Calhoun, Town of Cicero, and Metro Paramedic Services, Inc., U.S. District Court Judge Gary Feinerman, U.S. District Court for Northern District of Illinois (Eastern Division) granted the Town of Cicero's motion to dismiss and also dismissed the paramedics and their employer from the Federal lawsuit. Plaintiff sued for violation of Due Process under 14th Amendment, alleging the paramedics violated his "right to medical privacy," but they never disclosed the patient's name. When the paramedics posted photos of the patient's severed left hand and left arm on Snapchat, they included a comment, "Feeling Blessed" along with several emojis. The plaintiff now has one year to file lawsuit in State court.

> "Cicero does not argue that the public interest justified Renteria and Calhoun's publication of the photographs of his injuries on Snapchat. Thus, the question whether Ortiz states a due process medical privacy claim turns on whether the photographs disclosed his private medical information. To support his view that they did, Ortiz observes 'that he suffered a horrific accident that caused him great bodily harm, in which his arm was amputated from his body,' and contends that Renteria and Calhoun's posting of the photographs violated 'his fundamental right to privacy of his medical condition, i.e.[, ] the unintentional amputation of his arm….' Ortiz's submission is unpersuasive. First, the fact that Ortiz was harmed in a 'horrific accident' is not private medical information because it is not *medical*. Rather, it concerned a traumatic event-akin to a traffic accident, or a shooting-and the consequences of that event-akin to a broken arm caused by a traffic accident, or a bullet wound caused by a shooting.
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> Second, at least on the facts alleged, the fact that Ortiz lost his left arm is not private medical information because it is not *private*. As the Seventh Circuit has explained, 'the existence and extent of constitutional protection for confidential information [turns on] the type of information involved and the reasonable expectation that that information

would remain confidential,' and 'medical information may be a form of protected confidential information because of its intimate and personal nature….' That Ortiz lost his left arm may be medical information, but it is not private medical information, as it is a readily observable condition. Ortiz does not allege that he considers his lost arm *itself*-as opposed to the fact that he lost his arm in a fireworks accident-to be private, nor does he allege that he *could* keep private the fact of his lost arm or even that he has any desire to do so."

Facts:

"On July 4, 2020, Ortiz was lighting fireworks when one accidentally exploded…. The explosion resulted in the amputation of Ortiz's left hand from his arm and his left arm from his body…. Cicero paramedics Renteria and Calhoun soon arrived, placed Ortiz onto a gurney, and put him into an ambulance…. Before the ambulance left for the hospital, Renteria and Calhoun took photographs of Ortiz's severed hand and the left side of his body without his consent, and then posted the photographs on Snapchat accompanied by the caption, 'Feeling blessed,' and several emojis….

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Ortiz brings two § 1983 claims. The first alleges that Defendants' conduct violated his substantive due process rights under the Fourteenth Amendment's Due Process Clause…. A substantive due process claim 'is limited to violations of fundamental rights.' *Palka v. Shelton*, 623 F.3d 447, 453 (7th Cir. 2010). In opposing dismissal of his claim, Ortiz forswears reliance on the 'conscience shocking' branch of substantive due process doctrine and instead relies exclusively on the submission that Defendants violated his right to medical privacy.

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First, the fact that Ortiz was harmed in a 'horrific accident' is not private medical information because it is not *medical*. Rather, it concerned a traumatic event-akin to a traffic accident, or a shooting-and the consequences of that event-akin to a broken arm caused by a traffic accident, or a bullet wound caused by a shooting.

Second, at least on the facts alleged, the fact that Ortiz lost his left arm is not private medical information because it is not *private*. As the Seventh Circuit has explained, 'the existence and extent of constitutional protection for confidential information [turns on] the type of information involved and the reasonable expectation that that information

would remain confidential,' and 'medical information may be a form of protected confidential information because of its intimate and personal nature.'*Denius*, 209 F.3d at 957. Such 'intimate and personal' information can include a person's HIV status, *see Anderson v. Romero*, 72 F.3d 518, 523 (7th Cir. 1995), use of prescription drugs, *see Schaill v. Tippecanoe Cnty. Sch. Corp.*, 864 F.2d 1309, 1322 n.19 (7th Cir. 1988), or transgender status, *see Grimes*, 455 F.Supp.3d at 638."

**Legal Lesson Learned: EMS departments should have a policy prohibiting photographs of patients except for those needed to show mechanism of injury or other medical reason, with copy only provided to hospital and the department.**

Note: Nov. 2, 2021: "Los Angeles County approves $2.5 million settlement for two families over Kobe Bryant crash photos."

Chap. 13

## MN: PATIENT WITH GUN SHOT TO HOSPITAL - PAT DOWN REVEALS FIREARM – SEARCH LAWFUL "ADMIN. ACTION"

On Oct. 1, 2021, in United States of America v. Dywan Lamar Conley, U.S. Magistrate Judge Beck R. Thorson issued a Report And Recommendation to deny the defendant's motion to suppress the firearm as evidence in his upcoming trial.

"Therefore, this Court concludes that because the HCMC protection officers were working with an administrative purpose when they held Defendant down to assist medical personnel in administering treatment and to protect medical personnel, their actions are subject to the Fourth Amendment."

Facts:

"In the early morning of April 15, 2021, Defendant was shot in the leg by a gun. He was dropped off near the emergency room entrance of the Hennepin County Medical Center ('HCMC') in a pickup truck by a man who Defendant reportedly had asked to 'run him to the hospital….' At that time, Deputy Dziekan was working as part of the Hospital Sherriff's Enforcement Unit ('H-SEU') at HCMC when he received a radio call from EMS dispatch that a gunshot wound victim had arrived at the hospital…. Ambulance staff directed Deputy Dziekan to the ambulance bay of HCMC where he and his partner Deputy Jacob discovered the parked pickup truck and EMS staff assisting Defendant onto a gurney…. As Defendant moaned in pain, EMS staff rolled Defendant into HCMC's stabilization room, a traumatic medical emergency room where patients receive immediate emergency care for cases that are often life-threatening…. When Deputy Dziekan walked into the stabilization room, he found the medical staff attempting to give Defendant medical care while Defendant sat upright on a hospital bed…. In Defendant's left thigh was a bullet hole from where he had just been shot.

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At one point, an HCMC protection officer (hospital security employed by HCMC) placed a hand on Defendant's chest and began to push him back onto the bed…. Defendant kicked back and yelled…. Some medical staff backed out of the way as two additional HCMC protection officers approached the bed and, with the help of the third HCMC protection officer who had put his hand on Defendant's chest, held Defendant down…. (Defendant yelled, 'I don't want to! Ah! No! No! . . . I don't want to! No! No! Y'all can't make me do nothing….' As he yelled, the nurse who had been drawing syringes injected Defendant in his right leg with two shots…. During this time, an HCMC protection officer told Defendant that medical staff 'are trying to help you….' The doctor standing nearby also told Defendant, 'we are going to help you, bud . . . we're going to help you, I promise….'

The HCMC protection officers continued to hold Defendant as medical staff began to administer treatment. As they did, one of the HCMC protection officers pressing against Defendant's jacket using his elbow and right forearm suddenly looked up and called for Deputy Dziekan, who was now standing at Defendant's bedside. Deputy Dziekan asked, 'What do you need?'The HCMC protection officer responded, 'Dziekan, come around.' Deputy Dziekan walked around to the head of the hospital bed closer to the HCMC protection officer…. The HCMC protection officer then waved to draw Deputy Dziekan closer. Deputy Dziekan leaned in closer. The HCMC protection officer, in a low voice, told Deputy Dziekan that Defendant was 'strapped.' Deputy Dziekan understood this to mean Defendant had a gun…. Deputy Dziekan immediately ran to the side of the bed…. He yelled for people to back up. Deputy Dziekan yelled again, 'Where's the gun, dude?' as he began to search the right side of Defendant's body and jacket…. Medical staff hurried out of the room at the news that Defendant had a gun…. Within seconds, Deputy Dziekan found a loaded .38 revolver in Defendant's jacket pocket….  He then continued to search Defendant's pockets as his partner, Deputy Jacob, searched Defendant's left side pockets…. During the search, Deputy Dziekan uncovered additional items, including the following: ammunition within the gun; mobile telephones and accessories; a knife; suspected crack cocaine (approximately .4 grams without packaging); and two blue tablets.

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Here, the HCMC protection officers acted by restraining Defendant to assist medical personnel in administering treatment and to protect medical personnel. This was not the type of 'independent purpose' contemplated by *Inman* but instead an administrative purpose like the actions performed by the HCMC paramedics in *Buckley*."

**Legal Lesson Learned:  Hospital security personnel may search a patient for "administrative purpose."**

Chap. 13

# CA: PATIENTS CARDIAC / STROKE ISSUES – CANNOT FORCE EMS TAKE TO HOSP. WERE THEIR MDs HAVE PRIVILEGES

On Nov. 1, 2021, in Davin Warren, et al., v. County of Sacramento, the California Court of Appeals, Third District (Sacramento) held (3 to 0; unpublished decision) that the trial court properly granted summary judgment to the County. While sympathetic that they have suffered numerous cardiac incident and are at significant risk of stroke, they had no right under California law to force the ambulance to take them only to University of California Davis Medical Center where their treating physicians had medical privileges. The Medical Director of the County EMS determined that Mercy San Juan Hospital had a higher certification for stroke care than UC Davis, and they have been properly transported to Mercy San Juan last three emergency transports. They always have right to arrange their own transport to UC Davis.

> "Does the right to privacy include the individual's right to determine which hospital emergency room an ambulance will take the person to during a medical emergency? The trial court in this case found no such right of privacy exists and entered a judgment against plaintiffs and appellants David Warren and Kathryn C. Warren.
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> [W]e conclude that the right to privacy does not encompass a right to direct an ambulance to the emergency room of one's choice during a medical emergency. We shall affirm the judgment."

Facts:

> "Sacramento County has authorized the Sacramento County Emergency Medical Services Agency (SCEMSA) "to administer and control the provision of emergency ambulance services, including emergency ambulance services, and to impose affirmative service obligations to be performed by licensees, guaranteeing the adequacy and efficiency of emergency ambulance services to the County, including any incorporated portion thereof." (Sac. County Code, ch. 4, § 4.18.000.) Respondent Dr. Hernando Garzon, the medical director of the SCEMSA, oversees policies regarding the delivery of emergency ambulance services. (Sac. County Code, ch. 4, § 4.18.005.) Among these policies is Sacramento County Emergency Medical Services (EMS) 5000 series, which addresses transportation and patient destination. Policies such as these are periodically reviewed by the SCEMSA Joint Medical Oversight and Operational Oversight Committees, which are comprised of various experts from local prehospital and hospital emergency care systems.
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> In late 2015 and early 2016, appellants brought their concerns about the ambulance destination policy to Dr. Garzon's attention. Appellants, a married couple who reside in Sacramento County are both over the age of 70, have suffered numerous cardiac incidents and are at significant risk of stroke. Pursuant to 5050.13, during their ST-Elevation Myocardial Infarction (STEMI) emergencies, ambulances transport them to the nearest qualified hospital, Mercy San Juan Medical Center (Mercy San Juan), rather than to the only hospital where their treating physicians have medical privileges, University of California Davis Medical Center (UC Davis). Appellants asked Dr. Garzon and

SCEMSA to create an informed consent exception to 5050.13 so that they could be transported by ambulance to UC Davis during STEMI emergencies. Dr. Garzon declined and found Mercy San Juan had a higher certification for stroke care than UC Davis. His review of appellants' last three emergency transportations found they were appropriately sent to the nearest treatment facility. In addition, there was no support for changing the policy in either of the review committees.

Appellants presented their proposed amendment to 5050.13 to the Sacramento County Board of Supervisors on August 7, 2017. The Sacramento County Board of Supervisors declined to review the proposal, finding it was not within their jurisdiction.

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Following a review of the pleadings, the trial court found appellants failed to demonstrate that a patient has a constitutional right to privacy entitling them in a medical emergency to require emergency personal to transport them to the hospital of their choice. The trial court further found the right to refuse medical care cases were inapplicable, and, under the rational basis standard, appellants could not prevail. Finding that appellants failed to establish the existence of any justiciable controversy affecting the right to privacy, the trial court concluded that appellants lacked standing to bring their facial challenge seeking declaratory relief that 5050.13 is unconstitutional. The trial court entered judgment in favor of respondents, found appellants failed to demonstrate an actionable right to privacy, and dismissed the action with prejudice.

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Where an ambulance takes a person in a medical emergency is a medical decision that does not implicate one's personal integrity or the corresponding right to refuse medical treatment. The policy at issue here does not compel a person to be placed in an ambulance and forced to go to a hospital against that person's will, as a person may always refuse ambulance service and go to another hospital on his or her own accord. It is thus unlike surgery or another form of medical treatment without the patient's consent. (See *Conservatorship of Wendland* (2001) 26 Cal.4th 519, 531.) This decision likewise does not implicate one of the important decisions which implicate the right to privacy.

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Time is particularly scarce in medical emergencies. A policy mandating that a person in a medical emergency be transported to the nearest appropriate medical facility reduces travel time for ambulances while getting patients most quickly to the appropriate place for treatment. This serves both the person being transported and those awaiting an ambulance, who might otherwise lose crucial time waiting for an ambulance to become available because it was transporting a patient to a more distant facility because it was that patient's place of choice. The SCEMSA policy thus withstands constitutional scrutiny."

**Legal Lesson Learned: In a medical emergency, EMS have right to take a patient to the most appropriate hospital.**

# Chap. 14 – Physical Fitness, incl. Heart Health (5 cases)

Chap. 14

## VA: PSYCHIATRIST (AGE 67) COULD NOT PASS PHYSICAL AGILITY TEST - JOB IN FED. PRISON – CASE TO PROCEED

On Nov. 17, 2021, in Jane D. Dicocco, MD v. Merick B. Garland, Attorney General, U.S. Department of Justice, the U.S. Court of Appeals for the 4th Circuit (Richmond, VA) holds (2 to 1) that the psychiatrist may proceed with her case under Title VII of the Civil Rights Act, but cannot sue Federal government under the Age Discrimination in Employment Act of 1967 (ADEA), because Congress never authorized Federal government to be sued for "adverse impact" on employees age 40 or older. Note: The Bureau of Prisons "Physical Abilities Test" includes: "Employees taking the test must drag a seventy-five-pound dummy at least 694 feet for three minutes, climb a ladder to retrieve an object within seven seconds, complete an obstacle course in fifty-eight seconds, run a quarter mile and handcuff someone within two minutes and thirty-five seconds, and climb three flights of stairs in forty-five seconds while wearing a twenty-pound weight belt. Employees receive scores for the five components, which are aggregated and measured against a passing composite score."

> "Dr. DiCocco alleged that she suffered financial and job-related injuries in fact that are fairly traceable to the government's action and likely to be redressed by a favorable ruling…. So she has Article III standing. But we must still dismiss her ADEA claim because the ADEA provision applicable to federal-sector employees does not provide a disparate-impact cause of action. So her claim does not fall within the government's waiver of sovereign immunity. We decline, however, to address arguments for rejecting her remaining Title VII claim under Rule 12(b)(6). We therefore affirm the district court's dismissal of the ADEA claim but remand the Title VII claim for further proceedings."

Facts:

> "In July 2014, Dr. Jane DiCocco accepted a job as a psychiatrist with the Bureau of Prisons ("BOP") at the Federal Correctional Complex in Petersburg, Virginia. At that time, Dr. DiCocco was sixty-seven years old.
> As a condition of her hiring, Dr. DiCocco-like all new BOP employees regardless of age, position, or gender-had to take and pass the Physical Abilities Test.
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> The first time Dr. DiCocco took the test, she failed. Under BOP policy, she could retake the test within twenty-four hours, but she declined, "fearing that in her exhausted physical condition, she would be unable [to] complete it in a satisfactory time during the second attempt." J.A. 7. She was then "informed that unless she resigned, her employment with BOP would be terminated for failure to pass the [test] within the required times." *Id.* She chose to resign.
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> ***

We hold that Dr. DiCocco has standing but that the ADEA's federal-employer provision does not include claims for disparate-impact liability. Finally, we remand the Title VII claim for consideration by the district court.

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The ADEA "unequivocally" waives the government's immunity from suit for claims under § 633a(a). *Gomez-Perez*, 553 U.S. at 491; *see* 29 U.S.C. § 633a(c) ('Any person aggrieved may bring a civil action in any Federal district court of competent jurisdiction for such legal or equitable relief as will effectuate the purposes of this chapter.'). So we are left to determine whether Dr. DiCocco has asserted a claim that falls within the terms of that waiver. She has not.

The ADEA's federal-sector provision, § 633a(a), provides: 'All *personnel actions* affecting [federal] employees or applicants for [federal] employment who are at least 40 years of age . . . *shall be made free from any discrimination based on age*.' 29 U.S.C. § 633a(a) (emphasis added). Our task is to determine whether this provision encompasses disparate-impact claims.

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In doing so, we are guided by the Supreme Court's interpretation of similar provisions. *See Smith v. City of Jackson*, 544 U.S. 228, 234-40 (2005) (plurality opinion); *Gomez-Perez*, 553 U.S. 474. Considering the framework provided by these two cases, we conclude that the language of § 633a(a) does not create a disparate-impact cause of action.

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The ADEA's federal-sector provision was enacted in 1974, long before the 1991 amendments to Title VII codified disparate-impact liability for federal employers."

Dissent: Judge Henry Floyd wrote strong dissent: In 1964, when Congress enacted the Civil Right Act, it applied only to non-Federal employees, but in 1972 Congress amended Title VII by passing the Equal Employment Opportunity Act of 1972 and extending Title VII's prohibitions to the federal government.

"Diverging from our sister circuits and overruling our prior precedents, the majority holds that the ADEA does not afford a disparate-impact cause of action for federal employees. In my view, the ADEA does not tolerate this holding under the traditional tools of statutory interpretation and our precedents. *** Essentially, disparate-impact claims attack '[employment] practices that are fair in form, but discriminatory in operation.' *** Judicial decisions have consequences. Today, the majority officially sanctions the federal government's ability to utilize employment policies and practices that adversely impact older workers. This result is not supported by the text, history, structure, or purposes of the ADEA. And it does not honor the precedents from our Court and, more importantly, the Supreme Court. I respectfully dissent in part and would remand Dr. DiCocco's disparate-impact claim under the ADEA for additional proceedings."

**Legal Lesson Learned: Fire & EMS Departments may impose physical fitness requirements as a condition of hire of emergency responders, such as passing CPAT test. But requiring all employees, including secretaries and mechanics, to pass such a test would be a violation of Title VII.**

> Note: CPAT testing:
> "The Fire Service Joint Labor-Management Task Force successfully developed the Wellness-Fitness Initiative in 1997 to address the need for a holistic and non-punitive approach to wellness and fitness in the fire service."

## Chap. 15 – CISM, incl. Peer Support, Employee Assistance (12 cases)

## Chap. 16 – Discipline, incl. Code of Ethics, Social Media, Hazing (60 cases)

Chap. 16

### PA: VOL. FF MET 14-YR OLD AT STATION – SEXUAL RELATIONS FOR YEAR – JURY CONV - 8-16 YRS JAIL

On Nov. 22, 2021, in Commonwealth of Pennsylvania v. Christopher Anthony Taylor, Superior Court of Pennsylvania, held (3 to 0; "non-precedential decisional") the Court of Appeals agreed with a trial court judge who denied his petition for Post-Conviction Relief. On appeals he claimed ineffective assistance of counsel, but the trial court properly allowed into evidence the firefighters many e-mails with the minor, leading to his conviction of statutory sexual assault, aggravated indecent assault-less than 16 years of age, indecent assault-less than 16 years of age, unlawful contact with a minor-sexual offenses, involuntary deviate sexual intercourse-less than 16 years of age, and corruption of minors.

> "In his first claim, Taylor argues that his trial counsel rendered ineffective assistance by failing to object to the authenticity of the email communications between himself and the victim. Brief for Appellant at 12-13. Taylor asserts that, at trial, he testified that he did not recognize the emails…. Additionally, Taylor claims that the only authentication of the emails was that the victim had provided them to the police, who performed no examination of the victim's or Taylor's respective computers…. Taylor acknowledges that trial counsel objected to the emails at trial, but contends that the objection was generic and did not specifically challenge the authenticity of the emails…. Accordingly, Taylor has failed to establish his claim of ineffective assistance of counsel.

Facts:

> The [v]ictim, K.M. [(the 'victim')], took the stand and testified that, while in eighth grade, she became a member of the Dillsburg Citizen's Hose Company #1 in March of 2010. Victim met [Taylor, a 24-year-old adult male] through the fire company. [Taylor] obtained the [v]ictim's phone number and the two began talking and texting regularly.

[Taylor] began by asking the [v]ictim demographic questions and queried her about her interest in the fire department. [Taylor] was informed that the [v]ictim was 14 [years old]. Nonetheless, [Taylor] asked her about her sexual experiences and whether she would like to hang out. [Taylor] asked the [v]ictim if she was willing to participate in sexual activity with him and she agreed. The [v]ictim testified that they began engaging in sexual acts around June of 2010 in [Taylor]'s home. [The victim] testified that, during one incident[, Taylor] was nude on his bed and told her that she could try something if she wanted to. [The victim] then performed oral sex on [Taylor]. After this [incident], [the victim] and [Taylor] began having sex daily. [She] testified that, during the course of their sexual relationship, [Taylor] wore a condom approximately ten times before dispensing with them. [The victim] testified that [Taylor]'s penis has a blemish on the left side. She also testified that [Taylor] is uncircumcised.

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The victim testified that their sexual relationship lasted about a year-and-a-half. [She] told one friend, N.W., about her sexual liaisons with [Taylor]. N.W. later testified about a conversation that she believed occurred around Christmas time of the girls' ninth grade years. N.W. testified that [the victim] related to [N.W.] that [the victim] was having a sexual relationship with [Taylor]. The [two] later discussed [the victim] observing other women's vehicles parked at [Taylor's] home.

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Sergeant John Schreiner of the Carroll Township Police, testified that cell phone records [, from the victim's three phones, were obtained. The CD of records obtained from AT&T contained 4, 000 pages of records. These records revealed more than 50 phone calls between [Taylor] and the [v]ictim…. [T]he phone records contained some 4, 021 pages, detailing some 115, 243 items…. PCRA Court Opinion, 2/24/21, at 3-5 (citations omitted).

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On March 6, 2013, following a jury trial, Taylor was convicted of one count each of statutory sexual assault, aggravated indecent assault-less than 16 years of age, indecent assault-less than 16 years of age, unlawful contact with a minor-sexual offenses, involuntary deviate sexual intercourse-less than 16 years of age, and corruption of minors.

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Based upon the foregoing, we conclude that the PCRA court properly denied Taylor's PCRA Petition, and we affirm its Order."

**Legal Lesson Learned: This former volunteer firefighter now has lots of time in prison to think about his conduct.**

Chap. 16

# NJ: FF PROPERLY FIRED – PLED GUILTY AGGRAVATED ASSAULT IN BAR - 364 DAYS JAIL – FD LEARNED NO SHOW

On Nov. 16, 2021, In The Matter Of Joseph Downar, The City of Newark Fire Department, the Superior Court of New Jersey, Appellate Division, held (3 to 0) (unpublished decision) that the Civil Service Commission properly upheld the Fire Department's decision to terminate the firefighter after a disciplinary hearing on March 15, 2018, for his conviction of third-degree aggravated assault, and failure to notice the Fire Department of his arrest, indictment, conviction and prison sentence. The FD had no knowledge of the incident until Dec. 12, 2017, the day he began serving his jail term, and he union advised the department.

> "Downar was charged with failure to report his arrest, indictment, conviction, and sentence to management. The Department did not have a written policy, rule, or regulation requiring notification in place when the assault occurred. However, on January 4, 2017, the very day that Downar was arrested, the Department promulgated a written policy that became effective immediately, which required firefighters to report 'contact with any police agency as a victim, witness, or suspect (criminal or traffic complaints) . . . via an administrative submission . . . to their immediate supervisor upon their first day reporting back to duty.' Downar does not dispute that the policy was the subject of roll call training and was conspicuously posted, and yet claims he was unaware he had to report the incident to his superiors. The ALJ found that testimony incredible.
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> Downar had no prior disciplinary history and received good performance reviews. He argues that removal was disproportionate to the offense, his first disciplinary infraction, and that the failure to apply progressive discipline was reversible error. We disagree.
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> Even though committed while off-duty, the aggravated assault, coupled with the failure to report the incident, subsequent criminal prosecution, conviction, and sentence, and his resulting inability to perform duties during his jail term, constituted egregious misconduct. Here, the Commission's decision was supported by substantial credible evidence and was not arbitrary, capricious, or unreasonable despite the absence of prior disciplinary infractions. Removal does not shock our sense of fairness. Accordingly, we discern no basis to overturn the Commission's decision."

Facts:

> "On July 30, 2016, Downar and Michael Avila were patrons of the Darby Road Restaurant in Scotch Plains. They did not know each other. Downar was intoxicated. At one point a conversation regarding sports became heated. When Downar became loud, Avila decided to end the conversation and told Downar 'let's agree to disagree and I'm going to sit here and finish my drink.' Downar then punched Avila on the side of his face causing his head to hit the wall. Avila suffered a zygomatic arch fracture (fractured cheekbone), a laceration on his forehead, and a concussion. Avila was taken to a hospital.
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> ***

On January 4, 2017, police arrested Downar for third-degree aggravated assault, N.J.S.A. 2C:12-1(b)(7). Downar was indicted for that charge on June 13, 2017. He pled guilty to third-degree aggravated assault on October 2, 2017 and was sentenced on December 8, 2017 to a three-year probationary term, conditioned upon serving a 364-day jail term, undergoing a substance abuse evaluation, and following all treatment recommendations.

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Downar did not report the incident, his arrest, the assault charge, the indictment, his conviction, his sentence, or other aspects of the criminal prosecution to the Department, which had no independent knowledge of the incident or its consequences until December 12, 2017, the day he began serving his jail term.

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A disciplinary hearing was held on March 15, 2018. Downar pled not guilty to the charges. A March 16, 2018 Final Notice of Disciplinary Action (FNDA) sustained each of the charges and removed Downar effective December 8, 2018. The FNDA recited Article 58, Paragraph 1 and Article 59, Paragraphs 1 and 2 and noted that Downar was found guilty of third-degree aggravated assault and ordered to serve a 364-day jail term, but failed to notify the Department of his arrest, indictment, and incarceration.

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Downar claims that in practice, firefighters did not report incidents involving the police or pending charges to management. His witnesses testified to that practice. The Administrative Law Judge (ALJ), who observed and heard the testimony, found those witnesses unpersuasive. We accord deference to the credibility determinations of the factfinder and decline to substitute our judgment for that of the ALJ. In any event, the alleged prior practice of not reporting contact with police or pending criminal charges is irrelevant given the policy adopted by the Department on January 4, 2017, that requires firefighters to notify their immediate superior in writing of criminal complaints or contact with police as a suspect. The questionable practice that Downar continues to rely upon, in other words, was soundly rejected by the remedial policy."

**Legal Lesson Learned: Fire & EMS Departments should adopt SOG requiring personnel to report arrests, convictions and jail sentences.**

Note: See the Civil Service Commission decision of April 15, 2020.

# Chap. 17 – Arbitration, incl. Mediation, Labor Relations (10 cases)

Chap. 17

## NJ: "RULE OF THREE" – NO. 1 ON LIST BYPASSED – NO. 2 PROMOTED DEPUTY CHIEF – NO PROOF FIRE CHIEF / CITY WAS ANTI-UNION

On Nov. 3, 2021, In The Matter Of Jason Ryan, Hamilton Township Fire District Number 2, the Superior Court of New Jersey, Appellate Division, held (2 to 0; unpublished decision) that Jason Ryan, while having the highest promotion exam score, failed to present evidence that the Board of Fire Commissioners and the Fire Chief bypassed him because he was a union steward and Vice President for the New Jersey Firefighters' Mutual Benevolent Association (Local No. 284). The Board has previously promoted union officers, and in 2008 Ryan was promoted to Captain, bypassing a candidate ahead of him on the eligibility list. The Board sent him a detailed "Statement of Reasons" letter that reviewed the reasons for selecting Sullivan, as required under the New Jersey "Rule of Three" statute.

> "Petitioner did not meet his initial burden because he failed to present any evidence that he was bypassed because of his union involvement. Indeed, the only evidence petitioner offered was his characterization of several incidents and resulting discipline. These incidents, however, are insufficient to demonstrate the Board or the Commission was motivated by anti-union animus.
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> And, as the Commission noted, the Board had recently promoted two union-affiliated firefighters.
>
> Moreover, the Commission correctly concluded the Board had provided legitimate, non-discriminatory reasons for bypassing petitioner. Although [Blair] Sullivan had a slightly lower test score, the Commission explained why he was the 'best candidate for the position based on his fitness, merit, experience, service to the District, and passion for the Deputy Fire Chief Position.'"

Facts:

> "The Board of Fire Commissioners (Board) for the District interviewed three candidates for the Deputy Fire Chief position. At the time, petitioner ranked first on the eligible list for promotion to the position. After two interviews, the Board appointed Blair Sullivan to the position. Sullivan was ranked second on the eligible promotion list.
> Petitioner appealed the decision to the Commission. He asserted the Board bypassed him for improper reasons and gave a detailed explanation for why he should have been promoted. Primarily, petitioner contended he was passed over because of his involvement in union activities as shop steward and vice president for the FMBA. He referred to his participation in negotiations regarding personnel discipline and the District consolidation process. Petitioner raised four specific incidents in support of his allegations.

The Board responded to petitioner's appeal in a comprehensive letter, concluding the 'appointment of [Sullivan] to Deputy Fire Chief [was] procedurally and substantively compliant and, therefore, should not be disturbed.' Although petitioner had the highest exam score, the Board "recognized that the role of the Deputy Fire Chief is to serve as a "managerial executive" under the direction of the Fire Chief,' and to 'assist in management and discipline of the Fire Department, to execute the directives of the [Board], and to manage and lead the Fire Department in the absence of the Fire Chief.' In considering those points, the Board found Sullivan, 'who scored second highest on the deputy fire chief examination[, ] . . . was the better fit for the position and would be a better complement or 'right hand person' to the Fire Chief.'

***

The Board stated it had no 'bias or animosity against its members who champion the Union's rights.' In its letter, the Board also meticulously discussed the incidents petitioner had raised in his appeal, finding them 'irrelevant and of no legal moment' to the Board's decision to bypass petitioner.

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Finally, the Board noted that when petitioner was appointed Fire Captain in 2008, he bypassed a candidate who was ranked ahead of him on the eligible list. Therefore, although petitioner asserted "he [was] the victim of an improper bypass . . . [petitioner] himself was the beneficiary of a list bypass at one time." For the reasons outlined in its letter, the Board denied the appeal.

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Under the Rule of Three, after the Commission certifies a list of at least three candidates, the appointing authority has the discretion to select any of the top three candidates; there is no presumption in favor of the highest-ranked candidate. N.J.S.A. 11A:4-8; *see also* N.J.A.C. 4A:4-4.8(a)(3). The purpose of the rule is 'to limit, but not to eliminate, discretion in hiring.' *Foglio*, 207 N.J. at 46. 'While ensuring that competitive examinations winnow the field of candidates, the Rule of Three does not stand as 'an immutable or total bar to the application of other important criteria' by a government employer.' *Ibid.* (quoting *Terry v. Mercer Cnty. Bd. of Chosen Freeholders*, 86 N.J. 141, 150 (1981)).

If the appointing authority selects a lower-ranked candidate, it is required to provide a 'statement of the reasons 'why the appointee was selected instead of a higher ranked eligible [candidate].'" *Ibid.* (citing N.J.A.C. 4A:4-4.8(b)(4)). This requirement is intended to 'ensure[] that only merit and fitness are factors in appointments, and that no impermissible reason is used for bypassing an eligible on a list.'"

**Legal Lesson Learned: The Board wisely prepared a detailed "Statement of Reasons" for selecting No. 2 person as the Deputy Fire Chief.**

## Chap. 18 – Legislation (7 cases)