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# Jan. 2021 – FIRE & EMS LAW Newsletter

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**Updating 18 Chapters in Prof. Bennett's textbook: FIRE SERVICE LAW (2017)**

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## NEWSLETTER - 22 RECENT CASES REVIEWED

Jan. 2021 – FIRE & EMS LAW Newsletter ..... 1
Updating 18 Chapters in Prof. Bennett's textbook ..... 1
**File: Chap. 1, American Legal System, Fire Codes, Fire Investigations ..... 4**
IL: ARSON INVEST. (7 KILLED) - FIRE MARSHAL WAS EXPERT, FIRE REAR PORCH – NO ACCELERANT, BUT DEF. RECORDED ..... 4
**File: Chap. 3, Homeland Security ..... 7**
FL: INDICTMENT NOT DISMISSED - 23-YR OLD AMERICAN – WEAPONS, DRONE, CASING FBI OFFICE - "I WANT TO JOIN ISIS" ..... 7
**File: Chap. 3, Homeland Security / also Chap. 18, Legislation ..... 8**
DC: FEDERAL GRANT RECEPIENTS – SOME CHINESE TELECOMMUNICATION EQUIPMENT PROHIBITED ..... 8

**File: Chap. 4, Incident Command** ..... **9**

OH: STUDENT DIED, VAN SEAT FOLDED ONTO HIM – 911 DISPATCH, PD COULDN'T LOCATE – LAWSUIT PROCEED ..... 9

**File: Chap. 6, Employment Litigation** ..... **11**

OH: BC SUSPECTED OF PRESS "LEAK" - FIRE CHIEF LACKED EMS CE – HE COULD NOT PROVE RETALIATION BY CITY ..... 11

**File: Chap. 6, Employment Litigation** ..... **13**

IL: LIVE FIRE DRILL – FF FALLS FROM ROOF – DISAB. PENSION, BUT NOT LIFE-TIME MEDICAL, NOT RESP. TO "EMERGENCY" ..... 13

**File: Chap. 6, Employment Litigation [also Chap. 16, Discipline]** ..... **15**

MA: INTERNAL INVESTIGATION – EMPLOYEES PROVIDE INFO – CONDITIONALLY PROTECTED FROM DEFAMATION ..... 15

**File: Chap. 6, Employment Litigation** ..... **17**

WV: EMT INJURED SHOULDER - FIRED 16 MO. LATER FOR FALSIFICATION DOC. – JURY DECIDED NO RETALIATION ..... 17

**File: Chap. 7, Sexual Harassment** ..... **18**

MI: JURY FINDS NO SEX HARASSMENT, NO RETALIATION – FF 29-DAY SUSP - POSTED CELL PHONE PHOTO OF HOUSE FIRE ..... 18

**File: Chap. 7, Sexual Harassment** ..... **20**

NY: FF FIRED – SEMEN INSIDE PANTS BELONGING TO FEMALE FF – ARBITRATOR, COURTS UPHOLD FIRING ..... 20

**File: Chap. 10, FMLA** ..... **20**

U.S. DOL: TELEMEDICINE – EMPLOYEES MAY CONSULT DOCTOR ONLINE FOR FMLA – IF VIDEO CONFERENCES STATE APPROVED ..... 20

**File: Chap. 10, FMLA; also Chap. 11, FLSA** ..... **21**

U.S. DOL: ELECTRONIC POSTING CAN'T REPLACE FLSA / FMLA POSTERS – UNLESS ALL EMPLOYEES WORK ONLINE ..... 21

**File, Chap. 11, Fair Labor Standards Act** ..... **22**

OH: FIRE CHIEF POLICY - NO OVERTIME – BACK PAY / DOUBLED – DAMAGES CALCULATED AFTER 40 HOURS (NOT 53 HRS) ..... 22

**File: Chap. 11, FLSA** ..... **23**

VA: BATTALION CHIEFS – DUTIES SHOW THEY ARE "EXECUTIVE" EMPLOYEES – "EXEMPT" UNDER FLSA FROM OVERTIME PAY ..... 23

**File: Chap. 13, EMS** ..... **26**

MA: EMS RUN REPORT DOCUMENTED VICTIM'S "EXCITED UTTERANCES" – ADMISSIBLE IN HUSBAND'S ASSAULT TRIAL ..... 26

**File: Chap. 13** ..... **27**

IL: ASTHMA PATIENT INTUBATED, BUT IN ESOPHAGUS –EMS FOLLOWED TRAINING ASSESSING PATIENT – CITY IMMUNITY ..... 28
**File: Chap. 13, EMS; also Chap. 18, Legislation ..... 30**
DC: NEW FED. LAW - PATIENTS PROTECTED "SURPRISE MEDICAL BILLS" – INCLUDING AIR CARE, NEGOTIATE WITH INSURER..... 30
**File: Chap. 13, EMS ..... 32**
NY: EMT WINS SUMMARY JUDGMENT - BACK INJURY, SLIPPED ON ICE – RESTAURANT HOSED SIDEWALK COLD WINTER DAY ..... 32
**File: Chap. 13, EMS ..... 33**
PA: HIPAA VOIOLATION - FD SHARED FF'S WORK. COMP BACK INJURY CLAIM – "PROTECTED HEALTH INFORMATION" (PHI)..... 33
**File: Chap. 13, EMS ..... 36**
NJ: 85-YR-OLD PATIENT – EMS LIFTED HER TO STRETCHER – DOC. PATIENT PAIN LEFT ARM – IMMUNITY, "GOOD FAITH" ..... 36
**File; Chap. 15, CISM ..... 37**
WV: FF WITH PTSD – 20 YRS ON THE JOB – DENIED WORKERS COMP – STATE LAW REQUIRES THERE BE PHYSICAL INJURY ..... 37
**Chap. 16, Discipline..... 38**
MA: INTERNAL INVEST. OF TREASURER - EMPLOYEES PROVIDE INFO – PROTECTED FROM DEFAMATION – NO SPITE OR ILL WILL ..... 38
**File: Chap. 16, Discipline ..... 39**
OH: FF FIRED - FACEBOOK POSTS, TURNOUT GEAR, BAD GRANT DATA – TOWNSHIP CAN FIRE WITHOUT FIRE CHIEF RECOMM. ..... 39

File: Chap. 1, American Legal System, Fire Codes, Fire Investigations

# IL: ARSON INVEST. (7 KILLED) - FIRE MARSHAL WAS EXPERT, FIRE REAR PORCH – NO ACCELERANT, BUT DEF. RECORDED

On Dec. 30, 2020, in The People of the State of Illinois v. Marion Andre Comier, the Appellate Court of Illinois, First Judicial District (Third Division), 2020 IL App (1st) 170500, held (3 to 1) that the defendant was properly convicted by jury of 7 murders and sentenced to life in prison [property owner]. The Court held that the trial judge properly allowed the Fire Marshal to testify about his opinion on how the fire started, even if no accelerant was detected, since he knew the defendant had admitted starting the fire when defendant was recorded on a "wire" secretly warn by the girlfriend of the property owner.

> "Kushner's testimony concerning the nature and sources of his training, his methodology, industry standards, and the evidence upon which he relied in this case provided sufficient evidence that the underlying facts, data, and opinions were reasonably relied upon by experts in his field. "The opposing party has the responsibility to challenge on cross-examination the sufficiency or reliability of the expert's opinion" (*id.*), which defendant did in this case. Accordingly, we conclude that there existed an adequate foundation for Kushner's expert opinion and the trial court did not abuse its discretion in admitting Kushner's testimony.
>
> ***
>
> Regarding the conflicting evidence as to industry standards concerning 'negative corpus' at the time of the fire and at the time of trial, defendant's expert admitted that the determination by the State's fire investigators that the fire started on the rear porch and that the specific area of origin was somewhere near the couch complied with NFPA 921 but testified that the conclusion that the ignition source was an open flame, that an ignitable liquid was used, and that the fire was incendiary (man-made) were not reached in compliance with industry standards because those opinions were based solely on the negative corpus approach, and it was not based on any physical evidence, in violation of NFPA 921 and the standards in the relevant scientific community. We note the trial court found Kushner did rely on 'some physical evidence.' Regardless, '[a]ny weakness in the basis of an expert's opinion goes to the weight of the testimony; it should not affect its admissibility if the facts, data, or opinions are reasonably relied upon by experts in the relevant field.' *People v. Lind*, 307 Ill. App. 3d 727, 739 (1999)."

Facts:

> "The charges stemmed from a February 14, 2014, fire in an apartment building in Cicero, Illinois, which killed seven victims who resided in an attic bedroom of a second-floor apartment in the building. The victims who died in the fire included Sallie Gist and Byron Reed; their two children, three-year-old Rashon Reed, and three-day-old Brian Reed; Sallie's siblings, 16-year-old twins, Elijah Gist and Elisha Gist; and Tierra Davidson, a friend of the family who had stayed the night.
>
> ***
>
> Myers, who owned the building, was tried separately and convicted of first-degree murder for soliciting someone to burn down his building so that he could collect the insurance proceeds.

***
Defendant was charged with actually setting the fire, and the evidence against him included inculpatory statements made by defendant and Myers that were captured by police through a consensual overhear recording performed by Myers's girlfriend, Bonita Robertson.

***
The matter continued to trial. Robertson testified that in late 2009 to February 2010, she was living with Myers, with whom she had a romantic relationship. Robertson testified that Myers's health was deteriorating, and she considered herself Myers's caregiver, helping keep track of his multiple medications. Robertson also considered herself Myers's business partner, helping him collect rents and manage financial aspects of the multiple rental properties Myers owned. Robertson testified that she was aware of Myers's financial situation. In early 2010, Myers was having financial difficulties; he had approximately $7000 in property taxes on the buildings he owned coming due, as well as approximately $18,000 in taxes owed to the Internal Revenue Service (IRS).

***
Two days after the fire, Robertson contacted police and eventually spoke with an assistant state's attorney. The police asked Robertson if she would be "willing to wear a wire," and she agreed. On February 18, 2010, Robertson signed the necessary paperwork for a consensual overhear. The consensual overhear captured several conversations between Robertson, Myers, and defendant, which were played for the jury at trial.

> "ROBERTSON: Now, Larry [Myers] told me he offered you about 3,000.
>
> DEFENDANT: Bulls***, he's lying.
>
> ROBERTSON: Okay, what did he offer you?
>
> DEFENDANT: He offered me 15. He's lying.
>
> ROBERTSON: 15,000?
>
> DEFENDANT: Yeah."

***
On cross-examination, [Fire Marshall] Kushner admitted that he based his opinion that the fire was incendiary and that it was started with an incendiary liquid with an open flame solely on the statement to police that gasoline was used to start the fire. The defense asked Kushner about the ‘negative corpus’ approach in fire investigation. According to Kushner, the ‘negative corpus’ method requires the fire investigator to consider all matters before jumping to conclusions and involves eliminating all other possible causes leaving only one possible cause as the cause of a fire. Kushner testified that at the time of trial, as opposed to the time of the fire, the use of the negative corpus approach was not the standard among fire investigators. Instead, the standard at the time of trial was to back up any findings with physical evidence, if possible, although statements by witnesses could be used to form an initial hypothesis as to the cause of a fire.

Kushner agreed that no physical evidence existed that this fire was started with a liquid and an open flame. On redirect, Kushner testified he used the scientific method in his investigation. Kushner testified he used the witness statement in the process of gathering data, analyzing the data, and making a determination. Kushner testified that his opinion was based on his fire scene examination, witness information, training, and experience.

***

Defendant called Paul Bieber as an expert witness in the field of fire origin and cause determination. Bieber testified that the National Fire Prevention Association (NFPA) codes and standards contain the standards for fire investigation. Bieber testified that the 2011 version of the NFPA explicitly rejects the negative corpus approach, and that the proper relevant standard for fire investigation is stated in NFPA 921. Bieber agreed that NFPA 921 allows a fire investigator to rely on witness statements to develop a hypothesis as to how a fire started but testified that it does not allow a fire investigator to make a final conclusion as to how a fire started based only on a witness statement. Instead, the investigator's conclusion as to how a fire started must be based on physical evidence from the fire scene. Bieber opined that the determination by the State's fire investigators that the fire started on the rear porch and that the specific area of origin was somewhere near the couch complied with NFPA 921. However, the conclusion that the ignition source was an open flame, that an ignitable liquid was used, and that the fire was incendiary were not reached in compliance with NFPA 921 or industry standards because those opinions were based solely on a process of elimination of other possible causes—*i.e.*, the negative corpus approach—and not based on any physical evidence. Bieber opined that the cause of the fire in this case was 'undetermined.'"

**Legal Lesson Learned: Fire Marshal did rely on some physical evidence, as well as the secretly taped confession of the defendant.**

Note: The girlfriend of the owner [Bonita Robertson], wore a wire provided by police, and recorded following about why accelerant wasn't detected by arson dog.

ROBERTSON: They said they didn't smell any accelerants like gas or any of that.

DEFENDANT: And I, and I know, and I know why, I know why they didn't.

ROBERTSON: Why?

***

DEFENDANT: Cause I put oil with the gas. That's why.
***
ROBERTSON: So that the dogs couldn't pick it up?

DEFENDANT: There you go, and, and it burnt too bad for them to find anything.

ROBERTSON: But you started it on the back porch?

DEFENDANT: And it went up, Bonita. I don't want to talk about this. *** Everybody just say they don't know, okay, just leave it like that. That's what you do. Don't worry, okay. They didn't find nothing and that's great. They think the electrical box did it."

File: Chap. 3, Homeland Security

## FL: INDICTMENT NOT DISMISSED - 23-YR OLD AMERICAN – WEAPONS, DRONE, CASING FBI OFFICE - "I WANT TO JOIN ISIS"

On Dec. 15, 2020, in United States of America v. Muhammed Momtaz Al-Azhari, U.S. District Court Judge Tom Barber, U.S. District Court, Middle District of Florida (Tampa Division), denied defense motion to dismiss the indictment. The indictment adequately charged that he was attempting to provide support to Foreign Terrorist Organization

> "In his motion to dismiss the indictment, Defendant argues that Count One fails to state an offense because it does not allege that Defendant attempted to place himself under the FTO's direction and control, which he contends is an essential fact required by 18 U.S.C. § 2339B(h).
>
> ***
>
> At least three district courts have considered this issue and have ruled that § 2339B(h) is a definition that is not required to be pled in the indictment. *See United States v. Ludke*, No. 16-CR-175, 2018 WL 2059556, at *2 (E.D. Wis. May 2, 2018); *United States v. Shafi*, 252 F. Supp. 3d 787, 795 (N.D. Cal. 2017); *United States v. Pugh*, No. 15-CR-116 (NGG), 2015 WL 9450598, at *8 (E.D.N.Y. Dec. 21, 2015). Another district court ruled that it is an affirmative defense, which does not need to be pled. *See United States v. Ahmed*, No. 15-49 (MJD/FLN), 2015 U.S. Dist. LEXIS 171561 (D. Minn. Sept. 1, 2015). The Court is unaware of any binding or persuasive authority that would require the Government to plead § 2339B(h) as an element of the offense. As such, the motion to dismiss is denied as to this ground."

Facts:

> "According to the allegations of the complaint, Defendant - a 23-year old American citizen - acquired weapons and other equipment (including a military-style bullet-proof vest, laser pointer, GPS tracking device, camera drone, backpack with charging cable, and face mask, as well as car fuel trap solvent filter which can be used to make silencers) for the purpose of carrying out attacks on individuals in this community in support of the foreign terrorist organization known as the Islamic State of Iraq and al-Sham ("ISIS"). In his interactions with an FBI confidential source, Defendant allegedly expressed his hatred of the United States, his support of ISIS, and his admiration for Omar Mateen, the individual who carried out the Pulse nightclub shootings in Orlando, Florida, in 2018. He also allegedly consumed ISIS propaganda and made statements including "I want to join ISIS" and "I am ISIS" on several different occasions.
> Defendant was observed by law enforcement driving to various sites, including the Pulse nightclub in Orlando, the FBI field office in Tampa, and Honeymoon Island in Pinellas County. According to the FBI agent affidavit supporting the complaint and testimony at the detention hearing, Defendant's visits to these sites, acquisition of weapons, and other conduct, along with

his statements, are consistent with an extremist ideology that encourages 'lone-wolf terrorist attacks against individuals in the United States.'

***

The Court is unaware of any binding or persuasive authority that would require the Government to plead § 2339B(h) as an element of the offense. As such, the motion to dismiss is denied as to this ground."

**Legal Lesson Learned: Lone-wolf terrorists may be indicted for attempting to provide material support to ISIS.**

Note: See May 27, 2020, U.S. Department of Justice Press Release on defendant's arrest. "Al-Azhari, who has a criminal history that includes prior terrorism charges in Saudi Arabia, attempted to purchase multiple firearms over the course of the investigation, before acquiring a Glock pistol and a silencer. He also expressed admiration for Pulse nightclub shooter Omar Mateen and spoke of his desire to carry out a similar mass casualty shooting. Additionally, Al-Azhari researched and scouted potential targets in the Tampa area, including Honeymoon Island. He also rehearsed portions of an attack and the statements that he would make during or in connection with such an attack. FBI agents arrested Al-Azhari on May 24, 2020, after he took possession of weapons to be used in an attack."

File: Chap. 3, Homeland Security / also Chap. 18, Legislation

## DC: FEDERAL GRANT RECEPIENTS – SOME CHINESE TELECOMMUNICATION EQUIPMENT PROHIBITED

On Aug. 13, 2020, the Office of Management And Budget issued its Guidance for Grants and Agreements, implement new Federal Acquisition Regulations (FAR).

Federal grant recipients, including Fire & EMS Departments, need to follow these new Federal Acquisition Regulations.

For example, a University recently sent out this notice:

Re: Prohibited Equipment

Federal law * now prohibits [University] from purchasing, using or supporting certain telecommunications and video surveillance services or equipment as a condition of receiving federal funds. Specifically, [University] cannot purchase or use such services or equipment from the following companies (or their associated subsidiaries and affiliates:

1. Huawei Technologies Company
2. ZTE Corporation
3. Hytera Communications Corporation for security or public safety
4. Hangzhou Hikivision Digital Technology Company for security or public safety
5. Dahua Technology Company for security or public safety

> Further, these technologies may not be connected to [University] network. If you have personally purchased goods or services from these vendors, you may not use them to do [university] business, regardless of your location, including internationally. You should cease use of these services or equipment immediately.

On Aug. 13, 2018, Congress passed the John S. McCain National Defense Authorization Act For Fiscal 2019, Section 889: **PROHIBITION ON CERTAIN TELECOMMUNICATIONS AND VIDEO SURVEILLANCE SERVICES OR EQUIPMENT.** The statute includes following:

> (b) PROHIBITION ONLOAN AND GRANT FUNDS. — (1) The head of an executive agency may not obligate or expend loan or grant funds to procure or obtain, extend or renew a contract to procure or obtain, or enter into a contract (or extend or renew a contract) to procure or obtain the equipment, services, or systems described in subsection (a).
>
> ***
>
> (3) COVERED TELECOMMUNICATIONS EQUIPMENT OR SERVICES
> "The term ''covered telecommunications equipment or services'' means any of the following: (A) Telecommunications equipment produced by Huawei Technologies Company or ZTE Corporation (or any subsidiary or affiliate of such entities). (B) For the purpose of public safety, security of government facilities, physical security surveillance of critical infrastructure, and other national security purposes, video surveillance and telecommunications equipment produced by Hytera Communications Corporation, Hangzhou Hikvision Digital Technology Company, or Dahua Technology Company (or any subsidiary or affiliate of such entities). (C) Telecommunications or video surveillance services provided by such entities or using such equipment. (D) Telecommunications or video surveillance equipment or services produced or provided by an entity that the Secretary of Defense, in consultation with the Director of the National Intelligence or the Director of the Federal Bureau of Investigation, reasonably believes to be an entity owned or controlled by, or otherwise connected to, the government of a covered foreign country."

**Legal Lesson Learned: Fire & EMS Department who receive federal grant recipients need to follow these new regulations.**
Note: See this Aug. 13, 2020 article, "Here's What NDAA Section 889 Really Means for Federal Grants."

File: Chap. 4, Incident Command

## OH: STUDENT DIED, VAN SEAT FOLDED ONTO HIM – 911 DISPATCH, PD COULDN'T LOCATE – LAWSUIT PROCEED

On Dec. 16, 2020, in Rob Plush, Individually and Administrator of Estate of Kyle Plush, and Jill Plush v. City of Cincinnati, Harry Black, et al., the Court of Appeals for First Appellate District (Hamilton County), held (3 to 0) that while the City enjoy governmental immunity, the lawsuit may proceed

against former City Manager, dispatchers, and police [1 Dissent on police]. The City has confirmed it will defend and indemnify these personnel.

> "We find that Ron and Jill Plush' s … claims squarely attack the city of Cincinnati's … provision of emergency medical or rescue services, which is shielded by governmental immunity. Therefore, we reverse the denial of appellants' motion to dismiss as to the city and its employees in their official capacities. However, the complaint sufficiently alleges at least reckless conduct to preclude immunity as to the individual defendants. Therefore, appellants' motion to dismiss was properly denied as to Harry Black, Amber Smith, Stephanie Magee, Edsel Osborn, and Brian Brazile, in their individual capacities."

Facts:

> "On April 10, 2018, Kyle Plush parked his van in the sophomore parking lot at Seven Hills School. Kyle attempted to retrieve some items from the rear of the van when the back seat folded up on him. The back seat pinned Kyle against the back door, rendering him unable to move the seat or his body. The seat also reduced Kyle's ability to breathe.
>
> Kyle used the Siri function on his cell phone to place two 911calls. Defendant Magee took the first call at 3:14 p.m. When Magee answered the call, Kyle was banging and yelling for help. Kyle told Magee, "I am trapped in my van. * * * I'm in desperate need of help. * * * I am going to die soon." Magee identified Kyle's location as 5471 Red Bank Road before the call disconnected at 3:17 p.m. Magee called back but received Kyle's voicemail message. Defendants Cincinnati Police Officers Osborn and Brazile arrived on the scene at 3:26 p.m. Without exiting from their patrol vehicle, the officers searched the south end of the sophomore parking lot and several other parking lots on the opposite side of the street. But they failed to search the north end of the sophomore lot where Kyle was parked. The officers called Kyle's cell phone and received his voicemail message. The officers then spoke with an off-duty deputy, who was directing traffic. The deputy said he had not seen anything.
>
> ***
> At 3:34 p.m., while the officers were still on the scene, Defendant Smith took the second 911call. Smith heard Kyle again ask for help and say he was in the Seven Hills parking lot. Nonetheless, Smith activated the TTY function as if it were a silent call. Smith then ended the call. Smith called back and heard Kyle's voicemail message. She attempted to record the call and enter it as an advised run, but the CAD system froze. Smith then looked up previous runs for Kyle's number and located the first call handled by Magee. Despite seeing the first call, Smith never notified her supervisor or informed the officers of the second 911 call.
>
> ***
> The officers subsequently cleared the scene at 3:37 p.m.
>
> Later that evening, plaintiffs-appellees Ron and Jill Plush used the 'Life 360' app to locate Kyle's cell phone. They identified Kyle's location and drove to Seven Hills School. At approximately 8:56 p.m., Ron discovered Kyle trapped in the van. With help from a school employee, Ron removed Kyle and unsuccessfully attempted CPR. Kyle had died from 'mechanical asphyxiation.'

After reviewing the complaint, and taking all of the factual allegations as true, we find that the Plushes sufficiently alleged at least reckless conduct by the individual defendants. According to the complaint, the city's emergency communication system had several systemwide failures from 2016 to 2018. The complaint alleges that the ECC staff regularly experienced slowdowns of the CAD system, which delayed the transfer of data and the response to 911 calls, and freezes of the CAD system. According to the complaint, there were at least nine systemwide shutdowns between June 2016 and March 2017, which resulted in more than seven hours of no 911 emergency services. The complaint alleges that [former City Manager Harry] Black knew about the pattern of systemwide failures and took no steps to resolve the problem."

**Legal Lesson Learned: Tragic event; hopefully most modern dispatch system can now locate 911 caller within a few feet.**

Note: See this article. "How Does Location Work for 911?"

**"**On an Enhanced 9-1-1 system, calling 9-1-1 on a cell phone can yield different results. This is because the location information is provided by your cell phone carrier and each carrier is different. When you call on a cell phone, your location is determined by a combination of network triangulation and trilateration to gain an approximate location. By approximate location, we mean within 300 meters of the nearest cell phone tower. That's about three football fields.If your police department or sheriff's office is on a Next Generation 9-1-1 network, which emphasizes more modern technology, and if they use device-based hybrid location accuracy, DHL, (technology similar to that used by ride-sharing apps), they may be able to pinpoint your location within 15 meters."

File: Chap. 6, Employment Litigation

## OH: BC SUSPECTED OF PRESS "LEAK" - FIRE CHIEF LACKED EMS CE – HE COULD NOT PROVE RETALIATION BY CITY

On Dec. 23, 2020, in Sean DeCrane v. Edward J. Eckart, et al., U.S. Senior District Court Judge Christopher A. Boyko, U.S. District Court, Northern District of Ohio (Eastern Division), denied the retired Battalion Chief's motion for reconsideration of the May 13, 2020 dismissal of his lawsuit claim retaliation. He claimed the City thought he was a Press leaker and started a City "Office of Integrity Control" investigation of the Training Division, which he then managed.

"In its Opinion and Order [May 13, 2020], the Court quoted the entirety of Plaintiff's argument…. Plaintiff argued as follows:

> The City engaged in a years-long pattern of retaliation against DeCrane, fueled by [Assistant Safety Director] Eckart's and Mayor Jackson's irritation with DeCrane's protected activity, both real and suspected. Jackson made clear his feelings about the McGinnis leak, leading Defendants to then act against DeCrane with impunity. The City's failure to train most officials on employees' First Amendment rights contributed to the retaliatory activity as well. And the retaliation's length – in terms of time and the

measures taken – demonstrates the City's deliberate indifference to DeCrane's rights. (ECF DKT #151, p.27).

Aside from these declarations, Plaintiff offered no citations (not even in a footnote) to any previously-detailed facts to illustrate a policy, a final policy-maker (particularly as relates to Defendant Eckart), deficient training, nor tolerance of, or indifference to, constitutional violations.

Facts:

[From May 13, 2020 decision.] "In early 2013, the Division of Fire conducted interviews for the position of Fire Chief. Plaintiff, Daryl McGinnis and Patrick Kelly were interviewed for the promotion. On January 11, 2013, Eckart called and informed Plaintiff that McGinnis was selected. Plaintiff responded that he respected the decision, but added that he was concerned because McGinnis was deficient in the necessary training hours. Eckart and Mayor Frank Jackson followed up with McGinnis, who assured them both that he had the required continuing education training. McGinnis was sworn in as Fire Chief on January 18, 2013.

Individual firefighters entered their own continuing education training hours in the Division of Fire's internal system known as SharePoint. The posted information was accessible to all members of the Division of Fire.

On July 16, 2013, a *Cleveland.com* reporter made a public records request for 'all of Fire Chief Daryl McGinnis' fire and EMT training records since 2000.' When Eckart questioned McGinnis this time, McGinnis admitted the deficiency. McGinnis was removed as Chief and he retired shortly thereafter." https://casetext.com/case/decrane-v-eckart-7

Facts from Dec. 23, 2020 decision:

"The Court did not rule against Plaintiff solely because Defendants Chumita and Votypka [City's Office of Integrity Control] were 'only following orders.' The evidence shows that they were instructed by Eckart to conduct an investigation into possible falsification of records and improper logging of data regarding Academy training classes during the time that Plaintiff was the Director. It is undisputed, however, that [Christopher] Chumita and [James] Votypka could not issue charges but could only make recommendations.

Chumita and Votypka testified under oath that they did not know who went to the media with Fire Chief McGinnis's training deficiencies. They denied having any intent to force Plaintiff out of the Division of Fire by conducting their investigation. Plaintiff failed to present countervailing evidence to satisfy his burden of showing these Defendants' actions were motivated to any degree by Plaintiff's protected speech.

Therefore, the Court finds no basis for altering or amending its ruling in favor of Defendants Chumita and Votypka on Plaintiff's First Amendment Retaliation Claim."

**Legal Lesson Learned: The U.S. Supreme Court has placed a heavy burden on plaintiffs suing cities and other municipalities for deprivation of federal Constitutional rights under 42 USC 1983.**

**Need to prove that a city policy or a city "final policy maker" is indifferent to constitutional violations.**

Note: See these Press articles about the Cleveland FD.
Aug. 14, 2013: "Cleveland Fire Chief to Retire Friday."
Oct. 31, 2016: "Retired Cleveland Fire Division battalion chief files First Amendment-retaliation suit against City & senior public-safety officials."

File: Chap. 6, Employment Litigation

# IL: LIVE FIRE DRILL – FF FALLS FROM ROOF – DISAB. PENSION, BUT NOT LIFE-TIME MEDICAL, NOT RESP. TO "EMERGENCY"

On Dec. 14, 2020, in Sean T. Heneghan v. City of Evanston, the Appellate Court of Illinois, First District (First Division), held (3 to 0; unpublished decision) that the City properly denied the firefighter life-time health benefits since he was not responding to an emergency when he and his partner were performing ventilation, the saw malfunctioned, he retrieved an ax from the ground, lost his balance when peeling off roof cover with the ax and severely injured both feet when he fell off the roof. The Illinois statute provides for life-time insurance or firefighters and family who are killed or suffer catastrophic injury responding to "what is reasonably believed to be an emergency."

> "Plaintiff argues that he was responding to what he reasonably believed to be an emergency when the saw failed during the exercise. We are not persuaded by this argument.
> The failure of the saw was certainly an unforeseen development and could reasonably be regarded as an emergency. If the vent covers were not removed, then the firefighters inside the structure would be in imminent danger from fire and explosions. However, plaintiff was able to climb from the roof, retrieve his axe, return to the roof, and pry open the first vent cover. The emergency that plaintiff describes was the failure of the saw and his belief that the vent covers could not be opened. That emergency ended once plaintiff was able to successfully pry open this first cover with his axe.
>
> ***
> Once he had a suitable replacement for the saw, he was able to continue with the rest of the exercise. He could not reasonably believe that his fellow firefighters were still in imminent danger after finding a replacement tool. He also would have known that it was possible the open the remaining vent with his axe. More importantly, he was not injured because of his actions addressing the saw's failure."

Facts:

> "Plaintiff was a full-time firefighter for the City. On June 10, 2016, plaintiff participated in a voluntary live fire exercise held at the Northeastern Illinois Public Safety Training Academy (NIPSTA) in Glenview, Illinois. His participation in this exercise was part of a firefighter training course, and his attendance was approved by the Division Chief. Plaintiff's testimony before the Board is the only eyewitness testimony of the incident contained in the record.

***
The exercise was carried out using a structure made of shipping containers and meant to simulate a residence. The intent of the exercise was ‘to make it as realistic as possible to fighting an actual fire’ by recreating the conditions that firefighters encounter in emergency situations. The exercise involved several teams of firefighters working together to forcibly enter the structure and put out a live fire.

Plaintiff was in the roof ventilation team with another firefighter. There were other groups inside the structure putting out the live fire. Plaintiff's role in the exercise was to ventilate the roof for the firefighters inside the structure, while standing on a pitched roof and wearing a self-contained breathing apparatus. During the exercise, the live fire generated smoke and combustible particles. The teams combatting the live fire relied on plaintiff to ventilate the structure, letting heat, combustible gas, and smoke being generated by the fire to escape. Ventilating the structure helps to extinguish the fire by lowering the structure's internal temperature and increasing visibility for the firefighters fighting the live fire.

***
The pitched roof had two pre-cut holes covered with plywood. These ventilation covers were positioned vertically next to each other along the pitched roof, with one near the peak of the roof and one near the roof's edge.

Plaintiff was first instructed to pry up the cover near the peak of the roof. This cover was tightly affixed to the roof. Plaintiff's teammate was instructed to use a saw to cut open ventilation holes in the plywood covers. However, the saw failed, and plaintiff was instructed to open the ventilation holes with his axe. Plaintiff retrieved his axe from the ground, climbed back onto the roof, and began using his axe to chop open the plywood covers. This caused the plywood covers to start ‘lifting up,’ and the instructor directed Plaintiff to pry up the vent covers with the pick head of his axe.

After he removed the first cover, he was directed to pry up the cover near the roof's edge. This cover was easy to remove and gave no resistance. However, plaintiff's momentum caused him to lose his balance and fall approximately twelve feet to the ground.
At the time of plaintiff's fall, he was wearing 75 pounds of gear and firefighting equipment, including a self-contained breathing apparatus, and holding an axe. Plaintiff was not provided with fall protection. He landed feet-first on the gravel below the roof, suffering bilateral calcaneal fractures as a result. Plaintiff was taken to the ER and had 8-9 screws inserted into each heel. Plaintiff's injuries required multiple surgeries, including an open reduction internal fixation, a subtalar fusion, and physical therapy, and left him with permanent pain and disabilities. He has permanent disabilities, causing him to be physically unable to work as a firefighter and will require a future fusion surgery and on-going life care.

***
On August 14, 2018, plaintiff applied for benefits pursuant to the Act with the City. Section 10 of the Act provides the continuation of employer-sponsored health insurance coverage for public safety employees, and their families, who are either killed or catastrophically injured in the line of duty. 820 ILCS 320/10(a) (West 2016). A firefighter is eligible for benefits under the Act if he

or she is killed or catastrophically injured while responding 'to what is reasonably believed to be an emergency.' 820 ILCS 320/10(b) (West 2016).

***

[W]e conclude that plaintiff's catastrophic injury was not a consequence of the failure of the saw during the exercise. Plaintiff is conflating two separate developments during the exercise to create one ongoing emergency. The failure of the saw was certainly an unforeseen development and could reasonably be regarded as an emergency. If the vent covers were not removed, then the firefighters inside the structure would be in imminent danger from fire and explosions. However, plaintiff was able to climb from the roof, retrieve his axe, return to the roof, and pry open the first vent cover. The emergency that plaintiff describes was the failure of the saw and his belief that the vent covers could not be opened. That emergency ended once plaintiff was able to successfully pry open this first cover with his axe."

**Legal Lesson Learned: Terrible injury, but facts clearly show did not occur during an "emergency."**

Note: The Court referenced that Illinois case law does support life-time medical coverage during a training exercise if there is a true emergency. Gaffney v. Board of Trustees of Orland Fire Protection District, 2012 IL 110012, May 29, 2012, Illinois Supreme Court:

"Gaffney was injured during a live fire training exercise on the third floor of a building. Gaffney wore full fire gear for the exercise, and his battalion chief instructed him to treat the exercise as an actual emergency. As the crew was moving the fire hose from the second floor to the third floor, it became entangled. The smoke from the fire left no visibility. Gaffney followed the hose back down to the second floor and discovered that it was hooked around a loveseat. When Gaffney flipped the loveseat backward, he injured his shoulder. The court held that Gaffney's training exercise became an emergency when the hose became entangled. *Id*. ¶ 66. This unforeseen development involved imminent danger and required an urgent response because it left the crew 'stranded on the stairwell to the third floor of the burning building with no visibility and no water to put out the fire.'"

File: Chap. 6, Employment Litigation [also Chap. 16, Discipline]

## MA: INTERNAL INVESTIGATION – EMPLOYEES PROVIDE INFO – CONDITIONALLY PROTECTED FROM DEFAMATION

On Dec. 10, 2020, in Diane Lawless v, Cheryl Estrella, the Massachusetts Court of Appeals held (3 to 0) that the trial court properly granted summary judgment and dismissed the lawsuit filed by the former Town Treasurer against a Senior Clerk who provided investigators with a 6-page e-mail documenting misconduct by the Treasurer.

"We conclude that an opinion based on disclosed, nondefamatory facts is not defamatory and that many of the allegedly defamatory statements constitute such opinions. Further concluding that an employee has a conditional privilege to provide information concerning another employee upon the request of a supervisor and that the plaintiff failed to raise a genuine issue of material fact that would allow a jury to find that this privilege was abused regarding the other statements, we affirm."

Facts:

"The defendant drafted a detailed, six-page e-mail, and sent it to the selectman, the town administrator, and the board's administrative assistant, on April 3, 2015 (e-mail). In deposition testimony, the defendant stated that she submitted her written statement specifically in response to the selectman's request. In the e-mail, the defendant shared her observations of the plaintiff's job performance, stating that the plaintiff spent significant time 'socializing on the phone ... and shopping online,' and would frequently disparage the town, its residents, and colleagues. She described the plaintiff as 'creating an uncomfortable, abusive and hostile work environment,' and as being 'belligerent, threatening, overbearing and [engaging in] psychological harassment.' She further portrayed the plaintiff as someone who acted abrasively and rudely, and suggested the plaintiff may have engaged in dereliction of her duties, if not unlawful conduct."

The conditional privilege is lost only if it is shown that spite or ill will was the primary purpose of the publication… Where, as here, the information was requested in the course of a workplace investigation, and provided in response to an otherwise legitimate inquiry, the plaintiff has not demonstrated a dispute of material fact that the allegedly defamatory statements were published to primarily serve a purpose beyond the purpose protected by the conditional privilege, that purpose being to provide the town officials with information relevant to the plaintiff's job performance.

Judgment affirmed."

**Legal Lesson Learned: Internal investigations of a public official will often involve co-workers providing statements. The "conditional privilege" is an important protection of these co-workers**.

Note: The Court of Appeals referenced a Fire Department case where a co-worker also enjoyed protection from defamation lawsuit under the "conditional privilege." Kevin Barrows v. Wareham Fire District (Mass Court of Appeals; Oct. 12, 2012).

File: Chap. 6, Employment Litigation

# WV: EMT INJURED SHOULDER - FIRED 16 MO. LATER FOR FALSIFICATION DOC. – JURY DECIDED NO RETALIATION

On Dec. 7, 2020, in Terri Smith v. Kanawha County Emergency Ambulance Authority, the State of West Virginia Supreme Court of Appeals, held (3 to 2) that after a four-day jury trial the jury held for the employer, and the Court of Appeals held there were no errors in the jury instructions. The Court also held there was no need to schedule oral argument by counsel (2 Justices disagreed). The Court did not describe the document that was allegedly falsified.

> "There is no dispute that petitioner sustained an on-the-job injury or that she instituted proceedings under the Workers' Compensation Act. However, the jury was asked to determine whether the filing of that workers' compensation claim was a 'significant factor in the employer's decision to discharge' and found that it was not.
> The jury had the opportunity to observe the witnesses during their testimony and examine all of the evidence presented. The jury's finding that petitioner's filing of a workers' compensation claim was not a significant factor in her termination satisfies this Court's previously established standard, as petitioner was required to show that it was a significant factor in order to establish a prima facie case of discrimination. Syl. Pt. 1, *Powell*, 184 W.Va. at 701, 403 S.E.2d at 718. Therefore, we will not overturn the jury's verdict in favor of respondent on this ground."

Facts:

> Petitioner was an emergency medical technician with respondent when she was injured at work on December 31, 2014. On January 2, 2015, she filed a workers' compensation claim for the injury, which was deemed compensable on January 12, 2015. She was awarded temporary total disability benefits ('TTD'), effective January 1, 2015. Petitioner had two shoulder surgeries as a result of the injury. Her employment with respondent was terminated by letter dated April 28, 2016, while she was still receiving TTD. In that letter, she was informed that her termination was due to her falsification of documents during her employment.
>
> Only after litigation was ongoing did petitioner learn what document she allegedly falsified, and she denied the allegation. Again failing to cite to the record, petitioner asserts that she presented expert testimony to refute the contention that she had
> signed or submitted the forged document. Without citing any authority, petitioner argues that the employer must establish that it was 'not because of workers' compensation that he terminated the employee. . . .'
>
> ***
> The case proceeded to a four-day jury trial in September of 2019, at the conclusion of which the jury found that petitioner's filing of a workers' compensation claim was not a significant factor in respondent's decision to terminate her employment. The jury found for respondent on all counts, and the circuit court entered its resulting judgment order on September 26, 2019. Petitioner appeals from that order.
>
> ***

Petitioner has failed to show that the circuit court abused its discretion in failing to ask the jury to respond to the special interrogatories propounded by petitioner. For these reasons, we affirm the circuit court's judgment order."

**Legal Lesson Learned: Under West Virginia statute, the employee must prove that the workers' compensation claim was a "significant factor in the employer's decision to discharge" the employee.**

Note: See Jan. 25, 2017 article: "Ambulance service worker blames multiple defendants for injuries." *** "According to the complaint, on Dec. 31, 2014, as a result of the defendants' negligence, Smith was seriously injured while lifting an obese patient she was required to transport from the Charleston Area Medical Center. The plaintiff alleges the defendants failed to provide sufficient staff and other resources to safely lift the obese patient."

File: Chap. 7, Sexual Harassment

## MI: JURY FINDS NO SEX HARASSMENT, NO RETALIATION – FF 29-DAY SUSP - POSTED CELL PHONE PHOTO OF HOUSE FIRE

On Dec. 29, 2020, in Amy Rygwelski v. City of Flint, et al., the State of Michigan Court of Appeals, held (3 to 0) that the trial court properly upheld the jury decision of no harassment or retaliation. She filed complaint of sexual harassment after one minor incident with fellow firefighter; was reassigned to another station, and later received a 29-day suspension after the department learned that, while on a fire run, she used her cell phone to take a picture of the rising sun while a house burned in the foreground, posted on social media.

"If the jury were to believe that plaintiff fabricated her claim of sexual harassment, then plaintiff was not engaged in a protected activity. Reporting a fabricated account of harassment would not be an activity protected by the act, because a plaintiff could not possibly be acting upon a good-faith or reasonable belief of unlawful activity. And because a question of fact existed with respect to whether the sexual harassment actually occurred, reasonable jurors could have differed with respect to whether plaintiff engaged in protected activity. Accordingly, the trial court did not err when it denied plaintiff's motion for a directed verdict."

Facts:

"Plaintiff worked for the defendant City of Flint (Flint) as a firefighter since 2006. She and defendant Sam Clayton (Clayton), a 21-year veteran of the fire department, worked at the same fire station. The firefighters typically worked 24-hour shifts. On the morning of November 2, 2017, plaintiff was finishing her shift when Clayton arrived early for his shift. The two met in the firehouse kitchen and, according to plaintiff, Clayton approached her from behind, put his hand on the front side of her abdomen, pushed his body against hers, and said, 'Good Morning, Amy.' Plaintiff also alleged that Clayton smelled like alcohol. Clayton, on the other hand, asserted that he had merely met the plaintiff in the kitchen and exchanged pleasantries; he denied ever touching her or having consumed alcohol that morning.

Footnote 1: Plaintiff is Caucasian. Clayton and [Fire Chief Raymond] Barton are both African-American. Plaintiff alleged, among other things, that defendants made adverse employment decisions based on her race. Specifically, plaintiff alleged that she was told 'she could not be in certain areas/events getting media coverage because 'you cannot be the face of the Fire Dept.' On November 3, 2017, plaintiff reported the alleged incident to her supervisors, which led to an internal investigation. While the investigation was pending, plaintiff and Clayton were reassigned to different fire stations on the order of defendant Chief Raymond Barton (Barton). [Later] plaintiff received a 29-day suspension after the department learned that, while on a fire run, she used her cell phone to take a picture of the rising sun while a house burned in the foreground, and posted the picture to social media.

Plaintiff later claimed that Clayton had also retaliated against her by intentionally interfering with her union membership, allegedly with the help of department supervisors, by making baseless claims that she had violated union policies. This claim was based on Clayton having reported to the firefighters' union, in March 2018, that plaintiff was concurrently working for both the Flint Fire Department and the Bishop Airport Fire Department (which Clayton believed violated union conflict-of-interest policies). During these proceedings, plaintiff resigned from her position as a union vice president.

Moreover, even if there was no genuine issue of material fact regarding whether plaintiff had engaged in protected activity, ultimately, plaintiff was not penalized by the union, or her employer, as a result of Clayton's complaint. The union trial board concluded that plaintiff had not violated union bylaws and dismissed Clayton's charge. There was testimony that the union president requested that plaintiff voluntarily resign from her leadership role in the union, and that plaintiff did so; in fact, Kowalesky testified that there was really no reason for plaintiff to have resigned her position with the union. In light of the fact that plaintiff resigned her union position voluntarily and Clayton's complaint was dismissed, reasonable minds could differ regarding whether Clayton's complaint, even if it was an employment action, resulted in any adversity to plaintiff.

The law provides that a person shall not retaliate or discriminate again a person because the person has opposed a violation of the Michigan Civil Rights Act, otherwise known as the Act, or because the person has made a charge, filed a complaint, testified, assisted, or participated in an investigation, proceeding, or hearing under the Act.

The plaintiff has the burden of proving the following elements: (a) that she opposed a violation of the Civil Rights Act, made a charge, filed a complaint, or testified, assisted, or participated in an investigation, proceeding, or hearing under the Act; (b) that was known by the defendants, (c) that defendants took an employment action adverse to the plaintiff; and (d) there was a causal connection between the protected activity and the adverse employment action. To establish a causal connection, plaintiff must demonstrate that her participation in the protected activity was a significant factor in the defendant's adverse employment action. [See M Civ JI 105.01 and M Civ JI 105.04A.]."

**Legal Lesson Learned: Plaintiff failed to prove her allegations to the jury.**

File: Chap. 7, Sexual Harassment

## NY: FF FIRED – SEMEN INSIDE PANTS BELONGING TO FEMALE FF – ARBITRATOR, COURTS UPHOLD FIRING

On Dec. 23, 2020, In The Matter Of Arbitration Between City of Utica, and Local 32, IAFF (on Behalf of Richard J. Forte), the Supreme Court of the State of New York, Appellate Division (Fourth Judicial District), 2020 NY Slip Op 07783, held (5 to 0) that trial court properly denied his motion to vacate arbitration award in favor of the City.

> "Respondent contends that the arbitrator improperly found him guilty of committing uncharged conduct, i.e., sexual harassment, and determined that termination was the appropriate penalty for that uncharged conduct. We reject that contention.
> Respondent was charged in the notice of disciplinary charges with, inter alia, conduct unbecoming a member of the Utica Fire Department 'insofar as [he] knowingly and intentionally damage[d] property belonging to a fellow firefighter' by 'intentionally, knowingly, and unlawfully, with the intent to damage property, deposit[ing] [his] semen onto the inside crotch area of a pair of pants belonging to' a fellow firefighter."

Facts:

> "The record establishes that the arbitrator determined that respondent was guilty of that charge, and concluded that termination was the appropriate penalty. Thus, contrary to respondent's contention, the arbitration award is based on a finding that he committed conduct that was alleged in the notice of disciplinary charges (*see generally Matter of Murray v Murphy*, 24 NY2d 150, 157 [1969]; *Matter of Licciardi v City of Rochester*, 87 AD3d 1381, 1383 [4th Dept 2011]). We have considered respondent's remaining contentions and conclude that none warrants modification or reversal of the order."

**Legal Lesson Learned: Terrible set of facts.**

> Note: This case has been subject of lots of negative Press.
> July 21, 2020: "Court: Former Utica firefighter not entitled to payment." "Richard Forte was found guilty last September of charges related to a January 2018 incident, during which he ejaculated on a pair of pants owned by a female firefighter. He was sentenced last December to 60 days in the county jail."
> Sept. 25, 2019: "Ex-Utica firefighter found guilty on all charges."
> April 4, 2019: "Utica firefighter fired after sexual harassment claim."

File: Chap. 10, FMLA

## U.S. DOL: TELEMEDICINE – EMPLOYEES MAY CONSULT DOCTOR ONLINE FOR FMLA – IF VIDEO CONFERENCES STATE APPROVED

On Dec. 29, 2020, the U.S. Department of Labor / Wage & Hour Division, issued a Field Assistance Bulletin regarding use of telemedicine.

"WHD's experience is that health care providers are now often using telemedicine to deliver examinations, evaluations, and other healthcare services that would previously have been provided only in an office setting. Given this experience, and continuing the policy adopted in response to the COVID-19 pandemic, WHD will consider a telemedicine visit with a health care provider as an in-person visit under 29 C.F.R. §825.115, provided specified criteria are met. To be considered an "in-person" visit, the telemedicine visit must include:

- an examination, evaluation, or treatment by a health care provider;
- be permitted and accepted by state licensing authorities; and,
- generally, should be performed by video conference.

Communication methods that do not meet these criteria (e.g., a simple telephone call, letter, email, or text message) are insufficient, by themselves, to satisfy t he regulatory requirement of an 'in-person' visit."

**Legal Lesson Learned: Fire & EMS Department should consider updating their Employee Handbook with this new advice.**

File: Chap. 10, FMLA; also Chap. 11, FLSA

## U.S. DOL: ELECTRONIC POSTING CAN'T REPLACE FLSA / FMLA POSTERS – UNLESS ALL EMPLOYEES WORK ONLINE

On Dec. 29, 2020, the U.S. Department of Labor / Wage & Hour Division issued Field Assistance Bulletin regarding posters that are required in workplaces, including the Fair Labor Standards Act (FLSA), the Family and Medical Leave Act (FMLA), Section 14I of the FLSA (Section 14I), the Employee Polygraph Protection Act (EPPA), and the Service Contract Act (SCA).

"In most cases, these electronic notices supplement but do not replace the statutory and regulatory requirements that employers post a hard-copy notice. Whether notices are provided electronically or in hard-copy format, it is an employer's obligation to provide the required notices to all affected individuals.

***

If a statute and its regulations require a notice to be continuously posted at a worksite, in most cases, WHD will only consider electronic posting an acceptable substitute for the continuous posting requirement where (1) all of the employer's employees exclusively work remotely, (2) all employees customarily receive information from the employer via electronic means, and (3) all employees have readily available access to the electronic posting at all times. This ensures the electronic posting satisfies the statutory and regulatory requirements that such postings be continuously accessible to employees. Where an employer has employees on-site and other employees teleworking full-time, for example, the employer may supplement a hard-copy posting requirement with electronic posting and the Department would encourage both methods of posting."

**Legal Lesson Learned: Fire Department need to keep posters on the wall.**

File, Chap. 11, Fair Labor Standards Act

# OH: FIRE CHIEF POLICY - NO OVERTIME – BACK PAY / DOUBLED – DAMAGES CALCULATED AFTER 40 HOURS (NOT 53 HRS)

On Dec. 21, 2020, in David Vance v. Village of Highlands, OH, U.S. District Court Judge James S. Gwin, U.S. District Court for Northern District of Ohio, held given the deposition testimony of the Fire Chief that the FD never paid overtime to any firefighter, despite what the FD Employee Manual provided. The former firefighter is entitled to back pay and liquidated damages (double the back pay) for all hours he worked beyond 40 hours, not 53 hours [216 hours / 28-day pay period exemption in Sec. 207(k)], since FD never established a 28-day "work period."

> "At his deposition, Defendant's fire chief explained that the fire department followed a policy of never paying overtime. Defendant now accepts that it must pay overtime. The parties stipulate that Plaintiff is entitled to the overtime Defendant did not pay together with liquidated damages.
>
> ***
> The Court agrees with Plaintiff that the 29 U.S.C.§207(k) exemption should not apply in this instance. Defendant did not establish a 28-day work period as the §207(k) exemption required. There may have been a policy on the books, but Defendant made no effort to apply it to Plaintiff."

Facts:

> "Defendant Highland Hills Village employed Plaintiff Vance as a firefighter. Plaintiff filed this action claiming that Defendant failed to pay him overtime in violation of the Fair Labor Standards Act (FLSA).
>
> The parties waived a jury trial under Federal Rule of Civil Procedure 38(d) and stipulated the undisputed facts in this case, as well as damages. The parties seek resolution from the Court on a final remaining question: Does the FLSA's §207(k)exception apply to Plaintiff?
>
> Defendant argues that its employee manual establishes a "qualifying 28-day pay period" that applied to Plaintiff. Defendant's employee manual states in pertinent part: "In the case of safety forces with a twenty-eight (28) day overtime cycle, overtime will be paid in the first pay period following the calculation after the twenty-eight day cycle."
>
> Plaintiff disagrees that Defendant Highland Hills qualifies for the 29 U.S.C. §207(k)exception. Despite the manual's language, Plaintiff says that Highland Hills lost the ability to use the § 207(k)formula because Highland Hills never paid overtime in the first pay period following the supposed twenty-eight day cycle. Instead, Highland Hills never paid any overtime.
>
> Further, Plaintiff Vance's payroll records show that Defendant did not calculate overtime on a 28-day schedule (presumably because it did not calculate overtime at all). Plaintiff also cites to

the Defendant's Fire Chief's deposition testimony that the manual's 28-day policy did not or was not applied to Plaintiff.

The Court agrees with Plaintiff that the 29 U.S.C.§207(k) exemption should not apply in this instance. Defendant did not establish a 28-day work period as the §207(k)exemption required. There may have been a policy on the books, but Defendant made no effort to apply it to Plaintiff."

**Legal Lesson Learned: FD's legal counsel wisely stipulated violated FLSA and avoided expense of trial. FD will most likely now review payroll records and pay back pay to other firefighters.**

File: Chap. 11, FLSA

## VA: BATTALION CHIEFS – DUTIES SHOW THEY ARE "EXECUTIVE" EMPLOYEES – "EXEMPT" UNDER FLSA FROM OVERTIME PAY

On Dec. 4, 2020, in Shean Emmons, et al. v. City of Chesapeake, the U.S. Court of Appeals for the Fourth Circuit (Richmond, VA) held (3 to 0) that the Battalion Chiefs are "managers" and "executive" employees under the FLSA.

"The appellants in this case are Battalion Chiefs who have sued their employer, the City of Chesapeake Fire Department (CFD), for non-compliance with the overtime pay requirement of the Fair Labor Standards Act (FLSA).

***

We disagree. Section 541.3(b) does not categorically except the plaintiff BCs from the FLSA's system of exemptions, because the BCs are, first and foremost, managers within the CFD, not frontline firefighters. Nor do the plain terms of the FLSA's exemptions fail to apply. The BCs are executive employees under the FLSA, and it is on this basis that we affirm the district court's grant of summary judgment in favor of the CFD."

Facts:

"The Chesapeake Fire Department consists of 449 employees spread across five operational divisions…. The CFD maintains an effective organization through the use of a well-defined, hierarchical command structure. The most basic distinction within this hierarchy is that between 'chief officer'and everyone else. The 'chief officer' category comprises, in order of rank, the Fire Chief, the Deputy Fire Chief, the Division Chiefs, and finally, the BCs. Only sixteen CFD employees hold a chief officer position and, of these sixteen, ten are BCs in the Fire Operations Division. Among the non-chief officers, there is a further bifurcation between Company Officers, who have attained the rank of either captain or lieutenant, and firefighters, who range in their ranks from 'master' to 'trainee.'

This command structure allocates between three and four BCs to each of the CFD's three fire battalions. Each battalion consists of five fire stations and their personnel. The upshot of this structure, in terms of command, is that each BC bears responsibility for between six and seven

Company Officers and, indirectly, for the thirty-one to forty-six firefighters under them. Each BC works seven 24-hour shifts every twenty-one days.

The in-station duties that BCs must perform are extensive. Most of these duties fall under one of five heads: staffing; supervision; administration; budgeting; or hiring. In the context of the Fire Operations Division, ‘staffing’ refers to the process of solving, each and every day, the problem of ensuring an appropriate match between key pieces of emergency response equipment, like a battalion's fire engines, and the firefighters qualified to operate them. Staffing can require shifting both firefighters and equipment among units and even among stations. It also requires close attention to shifting leave schedules and to variations in operational needs and operational readiness.

In making these staffing decisions, however, BCs are not constantly reinventing the wheel. Rather, they execute an official CFD staffing policy. This staffing policy contains a detailed set of directives that provides for several common contingencies. For example, the staffing policy indicates that Engines 6, 10, 11, and 13 must be staffed by a minimum of four firefighters, and that, if such staffing is not initially available and no fill-ins can be scheduled on those Engines, other four-member Engines should be reduced to three, so that the needed staff can be reassigned. Which members to pull from which other Engines, though, is left to the BC's discretion. As this example suggests, the execution of the staffing policy is anything but robotic. It requires the prudent decision-making of BCs with a keen understanding of the firefighters under their command and their battalion's ‘operational needs…’ It also requires awareness of the impact of staffing decisions, which can implicate overtime pay, on the CFD budget.
Also within the sphere of BCs' staffing duty is the duty to review and decide on requests for leave. As above, an official CFD leave policy sets the broad contours of BCs' decision-making, without eliminating the important role of BC discretion. BCs, who must be ever-mindful of their battalion's staffing necessities, exercise this discretion over matters such as whether to grant leave requested after the official deadline, whether to permit sick leave on the basis of "extenuating circumstances…" and how to schedule their own leave time.

A BC's supervisory responsibilities consist in evaluating the performance of the firefighters under his command, training them, and, when necessary, administering or recommending discipline. As for evaluations, BCs evaluate Company Officers individually on their overall performance during a given year. They also meet with the Company Officers regularly to discuss how said Officers handled particular emergency responses; the purpose of these station visits is to identify areas of strength and weakness and to provide the ‘coaching and feedback’ necessary for improvement…. Looking further down the chain of command, BCs also review Company Officer evaluations of lower-ranking firefighters, monitor the progress of new recruits, and assess the mental preparedness of their entire battalions for emergency response….

The BCs also manage the training of those under their authority. The training matrix—a table describing what types of training are required of every CFD employee, based on his rank and assignment—and the training schedule come to the BCs as a given, from higher up in the CFD. BCs do, however, possess the discretion to add training drills to the schedule, based, for example, on their impressions from one of the aforementioned station visits. BCs attend drills to

ensure their satisfactory performance and to evaluate the performance of individual firefighters. If a drill is not performed with sufficient skill or effort, a BC may require its repetition.

The BCs also exercise disciplinary authority. This authority extends to addressing infractions of departmental regulation through verbal counseling or reprimand, or through the issuance of a form disciplinary letter. To sanction misconduct through suspension, demotion, or termination, however, a BC must first gain the approval of individuals higher up in the CFD. Disciplinary recommendations that BCs do submit are often but not always adopted. *See* J.A. 361 (BC Ackiss testifying he could not 'recall a time when [his disciplinary] recommendation[s] were not approved') ….

Finally, BCs make hiring and advancement recommendations to their superiors. BCs sometimes make these recommendations pursuant to their participation in hiring panels, on which at least one Division Chief or BC customarily sits. They make others outside of the panel setting, such as, for example, when BCs identify officers well-suited to serve as Acting Battalion Chiefs. The BCs recommendations on advancement to Acting Battalion Chief, it should be noted, have all been adopted without exception.
In addition to all of their in-station duties, BCs have a role to play in the CFD's direct emergency response. Of all the emergencies to which the CFD responds, BCs themselves are dispatched, on average, only to approximately one out of every ten. The ten percent of incidents to which BCs are dispatched tend to be complex, and include such emergencies as: commercial fires, residential structure fires, aircraft accidents, cardiac arrest events, and flammable liquid spills or leaks. In contrast, captain-rank Company Officers are dispatched to approximately thirty-three percent of all calls, and lieutenant-rank Company Officers are dispatched to sixty-nine percent.

***
[29 C.F.R ]Section 541.700 states that determination of an employee's primary duty ought to include consideration of the following four factors: '[1] the relative importance of the exempt duties as compared with other types of duties; [2] the amount of time spent performing exempt work; [3] the employee's relative freedom from direct supervision; and [4] the relationship between the employee's salary and the wages paid to other employees for the kind of nonexempt work performed by the employee.'

***
The managerial nature of the BC's role can be seen even more clearly in light of his emergency-response-related authority. Aside from what has just been mentioned above, a BC may remove himself from service without the permission of superiors, not for a few minutes, but for a few hours. Conversely, he may unilaterally decide to add himself to any call. And finally, it is his prerogative, if arriving at a scene where a Company Officer already has command, simply to leave, even if the incident remains ongoing. These are not the kind of powers vested in furtherance of frontline firefighting duties. They are, instead, exactly the kind of powers one would expect to be vested in an individual who must decide not only how best to direct others, but also where his own leadership abilities can do the most good; in other words, to an individual whose emergency response duties are managerial.

***

> The BCs' unique position in the CFD command structure further underscores the significance of their in-station managerial duties. Of all 449 of the CFD employees, there are only six officers who outrank BCs. Unlike BCs, these superior officers do not work 24-hour shifts; they do not train alongside the Company Officers and the line firefighters; they are further removed from on-the-ground emergency response; and they are burdened with many other responsibilities. The captains directly beneath BCs, however, typically lack anything close to the BCs' experience and expertise. The BCs are, therefore, uniquely situated in the CFD command structure. They are the only officers capable of discharging the necessary staffing and supervisory duties both effectively and efficiently, without which the CFD's entire operation would suffer.
>
> ***
>
> We recognize that the FLSA can seem an arcane law, one which is difficult for both local governments and public employees to decipher. But there is an underlying thread of rationality to the statute and its regulations, which is that hourly workers who are the bulk of many a workforce are covered, but that those who operate in managerial capacities are not. *Ramos v. Baldor Specialty Foods, Inc*., 687 F.3d 554, 654 (2d Cir. 2012) (stating that the broad purpose of the executive exemption is 'to distinguish managerial employees from non-managerial employees'). On the facts in the record before us, the Battalion Chiefs of the Chesapeake Fire Department fall plainly in the managerial category. The judgment of the district court is accordingly affirmed."

**Legal Lesson Learned: The Court was extremely thorough in describing the duties of the Battalion Chiefs; this decision will undoubtedly be referenced in future court decisions throughout the Nation.**

File: Chap. 13, EMS

## MA: EMS RUN REPORT DOCUMENTED VICTIM'S "EXCITED UTTERANCES" – ADMISSIBLE IN HUSBAND'S ASSAULT TRIAL

On Dec. 31, 2020, in Commonwealth v. Chayanne Toledo, the Commonwealth of Massachusetts Appeals Court held (3 to 0) that trial judge properly allowed EMS patient care report, quoting with wife's comments at scene, allowed in evidence as record of her "excited utterances" even though she refused to testify at trial relying on the husband-wife privilege.

> "First, in light of the evidence that Sally was crying, agitated, and in pain when she spoke with the EMTs, the judge's ruling that her statements during the examination qualified as excited utterances was not an abuse of discretion."

Facts:

> "In the early morning on March 17, 2019, Valle [neighbor in duplex] heard knocking on his back door. When he opened the door, he saw Sally and her son. Sally was 'bent over' and 'bleeding.' Sally entered the apartment and, once inside, she fell to the floor 'crying' and 'screaming in pain.' Berroa [neighbor's friend] heard the screams and got out of bed. He saw Sally on the floor and called 911. Stephanie spoke with Sally, who reported that her 'boyfriend' had 'hit her.'

Soon after the 911 call, the police and emergency medical technicians (EMTs) from Trinity EMS, Inc., arrived at the scene. One of the officers, Albert Betances, spoke with the defendant, who was standing outside the residence. The defendant was intoxicated. He was wearing a T-shirt despite the chilly weather and his face appeared bruised. In response to Betances's questions, the defendant said he did not know where his wife was. He also stated that the bruises were from injuries that he received in a car accident. At one point, the defendant attempted to leave, but Betances detained him, and eventually he was arrested at the scene.

At the same time, Sally was evaluated by the EMTs, who observed 'visible contusions,' including a 'swollen right eye [and] lip,' 'bruising . . . on her ribs,' and 'bruising around her neck,' and there was 'visible blood on her face.' The EMTs questioned Sally about her injuries. Sally was crying and said that her 'boyfriend' had 'pulled [her] out of bed' and 'punched, . . . hit, [and] choked [her] to the point of unconsciousness.' Sally was taken to the hospital, where she received treatment for her injuries.

Sally asserted her marital privilege and did not testify at trial. As a result, the Commonwealth sought to introduce Sally's statements to the EMTs as excited utterances. The judge issued a preliminary pretrial ruling that the statements were admissible based on the Commonwealth's offer of proof. Later, during the trial, the judge found that the statements qualified as excited utterances because 'a very short time period passed' between the time of the event and the time the statements were made. '[Sally] was crying, in obvious pain, and clearly still under the influence of the events that had precipitated the police being called at the time that the statements were made to the EMT[s].' The judge further concluded that the statements were nontestimonial even though the ongoing emergency had ended because they were elicited by the EMTs for the purpose of medical evaluation and treatment, and Sally would not have anticipated that her statements would be used in a criminal prosecution.

We review the judge's ruling for an abuse of discretion, see Commonwealth v. Wilson, 94 Mass. App. Ct. 416, 423 (2018), and conclude that the judge did not err. First, in light of the evidence that Sally was crying, agitated, and in pain when she spoke with the EMTs, the judge's ruling that her statements during the examination qualified as excited utterances was not an abuse of discretion. See id. Second, contrary to the defendant's assertion, the statements were not testimonial and therefore their admission did not violate the defendant's right of confrontation under the Sixth Amendment to the United States Constitution and art. 12 of the Massachusetts Declaration of Rights. As the judge correctly determined, the statements were elicited for the purpose of medical treatment and it matters not that the police were on the scene."

**Legal Lesson Learned: Best practice to include in EMS Patient Care Report the actual words of the victim.**

# IL: ASTHMA PATIENT INTUBATED, BUT IN ESOPHAGUS –EMS FOLLOWED TRAINING ASSESSING PATIENT – CITY IMMUNITY

On Dec. 28, 2020, in Sally Gray, as Administrator of the Estate of Amanda Gary v. The City of Calumet City, the Appellate Court of Illinois, First District (First Division), 2020 IL App (1st) 191812, held (4 to 0, unreported decision) that the trial court properly granted summary judgment to the City; plaintiff argued that in assessing intubation, medics did not document O2 SAT from pulse ox, but FD training officer confirmed better methods of assessing placement of ET tube.

> "[D]eputy fire chief Peter Bendinelli, who was in charge of the fire department's emergency medical services training from 2009 to 2017, opined that pulse oximeter readings were not important in assessing an intubation. He gave two reasons: First, the readings might be inaccurate. Second, even if accurate, a drop in blood oxygen levels might be caused by patient heart failure rather than an error in intubation. Thus, rather than relying on a pulse oximeter, Bendinelli would consider lung and abdominal sounds, chest rise and fall, $CO_2$ monitoring, the presence of condensation on the breathing tube, and the color of the patient's skin. Bendinelli trained ambulance crews in accordance with this protocol.
>
> To defeat summary judgment, plaintiff would have had to present evidence that the City either knew [Deputy fire chief] Bendinelli's training imperiled patients or that the City failed to recognize this danger through recklessness. *Affatato v. Jewel Cos.*, 259 Ill. App. 3d 787, 800 (1994). Plaintiff presented no such evidence. On the contrary, all three of Amanda's treating physicians corroborated Bendinelli's statement that pulse oximeter readings can be inaccurate. In light of their testimony, plaintiff has not presented an issue of fact as to whether Bendinelli's training reflects an utter indifference to patients' safety.

Facts:

> "On October 12, 2014, 31-year-old Amanda Gary suffered a severe asthma attack. Her mother, plaintiff Sally Gary, called 911. Paramedics from the Calumet City Fire Department administered treatment to Amanda and brought her to the hospital. Amanda died 10 days later. Sally, as administrator of Amanda's estate, brought a wrongful death suit against Calumet City, alleging that improper treatment by the City's paramedics proximately caused her daughter's death.
>
> In her amended complaint, plaintiff alleged that the responding paramedics made a series of errors that led to her daughter's death. First, although Amanda's blood oxygen levels were dangerously low when the paramedics arrived on the scene, the paramedics unnecessarily delayed intubating her for 14 minutes. Second, when they finally did intubate her, they inserted the breathing tube into her esophagus rather than her trachea. Third, they failed to monitor Amanda's blood oxygen level after intubation and, therefore, failed to discover the tube was placed incorrectly.
>
> In support of her complaint, plaintiff submitted a healing arts malpractice affidavit by Dr. John Ortinau pursuant to section 2-622 of the Code of Civil Procedure (735 ILCS 5/2-622 (West 2014)). Dr. Ortinau opined that the aforementioned errors constituted deviations from the standard of care and that they contributed to a prolonged state of hypoxia (*i.e.*, absence of sufficient oxygen to maintain bodily functions), which led to Amanda's death.

On October 12, 2014, at approximately 10:30 p.m., Amanda was at home when she suffered an asthma attack. Sally called 911, and paramedics Ryan Banks and Chris Pierce responded to the scene. Banks observed that Amanda was in severe respiratory distress; she was wheezing and unable to speak in complete sentences. He gave her a breathing mask and administered albuterol. Pierce placed a pulse oximeter—a device that measures a patient's pulse and the amount of oxygen saturation in their blood—on Amanda's finger. Amanda had a blood oxygen level of 54%. (A healthy person normally has a blood oxygen level above 96%.) Amanda commented that the number was low, then fell unconscious.

According to Banks and Pierce, when a patient falls unconscious, it indicates that not enough oxygen is reaching her brain, and it is important to supply her with oxygen as soon as possible. However, they decided not to intubate Amanda in the house for multiple reasons: her mother was nearby and 'really anxious'; a child was screaming; and it was dark and difficult to see. Instead, Banks gave Amanda some assisted respirations with a bag valve mask, and then he and Pierce brought her to the ambulance. She was still breathing on her own at this time.

At the ambulance, before the paramedics intubated Amanda, they spent five minutes establishing an intraosseous line (*i.e.*, into bone marrow) through which they administered Versed, a paralytic drug. Pierce explained that, even with an unconscious patient, Versed must be administered prior to intubation if the patient has a gag reflex, because otherwise the patient might vomit and then aspirate the vomit.

Pierce then performed the intubation. Because Amanda's trachea was swollen from her asthma, he had to use force to insert the breathing tube. He stated that he was sure he placed the tube in her trachea and not in her esophagus. He estimated that it took around 12 minutes from the time she fell unconscious to the time she was intubated. Banks, observing the intubation, saw the tube pass through Amanda's vocal cords, an indication that the tube was in the right place.

After a patient is intubated, paramedics consider multiple factors to determine whether the intubation has been performed correctly: lung sounds, lack of abdominal sounds (which would indicate placement in the esophagus), chest rise and fall, $CO_2$ readings, and pulse oximeter readings. Banks and Pierce heard only 'diminished' lung sounds, but they did not hear any abdominal sounds, and the $CO_2$ detector reflected a positive change. Banks also observed Amanda's chest rising and falling. Thus, they concluded that the intubation was a success.

However, Banks and Pierce did not record any pulse oximeter readings from Amanda after the initial 54% reading in her home. Banks stated that the pulse oximeter '[p]robably' fell off her finger in the house but, in any event, they would not have used that pulse oximeter in the ambulance; they would have used the one attached to the cardiac monitor. But no such readings were listed in their incident report, and Banks did not independently recall if they obtained any such readings.

Once the intubation was complete, Pierce called St. Margaret North Hospital to inform them that a critical patient was incoming. The drive to the hospital took three to four minutes. At the hospital, the paramedics transferred care to emergency room personnel. Both Banks and Pierce

did not believe Amanda was in pulseless cardiac arrest at the time. Pierce specifically recalled she had a pulse when they brought her out of the ambulance.

Within a minute of Amanda's arrival, Dr. Cole and Dr. Mussman observed she had no pulse and was in cardiac arrest. She was not making any breath sounds, and there were audible sounds over her stomach, indicating that the breathing tube was in her esophagus. Thus, the doctors removed the tube and reintubated her at 11:05 p.m.

Dr. Cole opined that Amanda was improperly intubated prior to arrival, because her lack of pulse indicated that she had not been properly oxygenated.
[D]eputy fire chief Peter Bendinelli, who was in charge of the fire department's emergency medical services training from 2009 to 2017, opined that pulse oximeter readings were not important in assessing an intubation. He gave two reasons: First, the readings might be inaccurate. Second, even if accurate, a drop in blood oxygen levels might be caused by patient heart failure rather than an error in intubation. Thus, rather than relying on a pulse oximeter, Bendinelli would consider lung and abdominal sounds, chest rise and fall, $CO_2$ monitoring, the presence of condensation on the breathing tube, and the color of the patient's skin. Bendinelli trained ambulance crews in accordance with this protocol.

On August 9, 2019, the trial court granted the City's motion for summary judgment, stating that '[t]his is precisely the type of case that falls within the EMS Act.' The court found it particularly significant that 'the paramedics did check multiple times and in multiple ways to ensure that the intubation was done correctly.' In light of this fact, the court stated the paramedics' failure to obtain pulse oximeter readings 'does not amount to negligence, let alone willful and wanton.' The court also declined to consider Dr. Ortinau's affidavit as competent evidence, since Dr. Ortinau formed his opinion prior to any discovery and the record did not reflect that he maintained his opinion after reviewing the entire discovery."

**Legal Lesson Learned: Follow EMS protocols when confirming intubation was properly placed and document your confirmation.**

File: Chap. 13, EMS; also Chap. 18, Legislation

## DC: NEW FED. LAW - PATIENTS PROTECTED "SURPRISE MEDICAL BILLS" – INCLUDING AIR CARE, NEGOTIATE WITH INSURER

On Dec. 21, 2020, as part of the 5,500-page COVID-19 relief bill, Congress also enacted a new statute to protect patients from "surprise medical bills."

The House Ways & Means Committee described the protections in the House bill, "Consumer Protections Against Surprise Medical Bills Act of 2020 Summary."

> "The bill protects patients from surprise medical bills for out-of-network services. Providers (including facilities) will be prohibited from balance billing patients for surprise services. Patients cannot be charged more than the in-network cost-sharing amount."

The Association of Air Medical Services described the new provisions:

"AAMS has learned that the year-end spending and COVID relief package includes the balance billing solution that has been under intense negotiation since Dec. 11th. An AAMS Statement on the legislation can be found here, at the Association of Air Medical Services (AAMS) website. *

The legislation includes air ambulance provisions and is expected to pass both House and Senate as the Congress makes its final votes of 2020. The provisions in the bill effecting air ambulances are as follows:

- Prohibition on balance billing patients.
- Open negotiation process between insurer and provider.
- Independent Dispute Resolution (IDR) process that still considers the insurers median-in-network rate; however, arbiters cannot consider non-negotiated rates, such as those set by Medicare.
- Data collection on the costs or providing air ambulance services as well as on air ambulance quality and claims data submitted by insurers.
- The establishment of an air ambulance advisory committee through the Department of Health and Human Services and the Department of Transportation to examine issues related to air ambulance clinical capabilities, vehicle types, and triage criteria.

A Congressional summary of the balance billing section **describes it this way:**
*Section 105. Ending surprise air ambulance bills. Section 105 states that patients are held harmless from surprise air ambulance medical bills. Patients are only required to pay the in-network cost-sharing amount for out-of-network air ambulances, and that cost-sharing amount is applied to their in-network deductible. Air ambulances are barred from sending patients surprise bills for more than the in-network cost-sharing amount. It also provides for a 30-day open negotiation period for air ambulance providers and payers to settle out-of-network claims. If the parties are unable to reach a negotiated agreement, they may access the binding arbitration, which is the same as outlined in Section 103, with additional factors to account for the cost of providing air ambulance service in rural and frontier areas.*

*AAMS Statement on Balance Billing Solution

"The Association of Air Medical Services, on behalf of its over 300 members operating over 1,400 helicopter and fixed-wing air ambulances nationwide, applauds the action taken by Congress today to remove patients from disputes between insurers and air ambulance providers. However, AAMS remains concerned that certain aspects of the independent dispute resolution process may favor insurers and we hope to work with Congress and the various federal agencies to implement a fair and equitable process for billing disputes. We also fully support the data collection and analysis requirements of the bill, and believe this additional level of transparency will inform future legislative and regulatory efforts as they relate to billing and reimbursement. AAMS will continue to work on behalf of its members and the patients they serve to ensure the best outcomes for both. We also continue to support the work of the Air Ambulance Patient Billing Advisory Committee and hope this process will strongly consider their recommendations."

Below is a statement from AAMS President and CEO Cameron Curtis:

> "Air ambulances offer a lifeline, sometimes the only lifeline, to patients in need of critical care. While we remain concerned about certain aspects of this bill, now is the time to come together as a health care community and support the dedicated EMS professionals, both air and ground, that are serving on the front lines. As Americans face the ever-increasing severity of the COVID-19 pandemic and the ensuing public health emergency, air medical services have provided over 20,000 COVID-19 related transports to the most severely sick and injured patients, often from remote and rural areas to high levels of care."

**Legal Lesson Learned: There has been litigation throughout the United States by patients who were "surprised" by Air Care billing and other "out of network" medical service providers. Hopefully this new statute will eliminate these surprise bills.**

Note: You can read the NO SURPRISE ACT (starting page 1629); Air Ambulance provisions (starting at page 1836).

File: Chap. 13, EMS

## NY: EMT WINS SUMMARY JUDGMENT - BACK INJURY, SLIPPED ON ICE – RESTAURANT HOSED SIDEWALK COLD WINTER DAY

On Dec. 17, 2020, in Michael Benny v. Concord Partners 46th Street LLC, 2020 NY Slip Op 07665, the Appellate Division of the Supreme Court of the State of New York, held (5 to 0) that the trial court improperly denied plaintiff's motion for summary judgment. The Court orders partial summary judgment in favor of the EMT; his degree of negligence in not avoiding the ice must next be determined.

> "The evidence plaintiff submitted in support of his motion shows that defendants-tenants Havana Central NY 2 LLC d/b/a Havana Central Restaurant & CafÉ (Havana) and Tintol LLC d/b/a Clubhouse CafÉ (Tintol) created the dangerous condition when their employees hosed the sidewalk on a cold winter day (*see Mercer v City of New York*, 88 NY2d 955, 956 [1996]). Defendants-owners Concord Partners 46th Street LLC (Concord) and Elo Equity, LLC, had a non-delegable duty to maintain the sidewalk and had notice that the restaurant employees had created a dangerous condition, because Concord's property manager and Elo's superintendent had observed the restaurants' employees hosing the sidewalk."

Facts:

> "Supreme Court, New York County (Tanya R. Kennedy, J.), entered on or about April 15, 2019, which denied plaintiff's motion for summary judgment on liability, unanimously reversed, on the law, without costs, and the motion granted.
>
> In this personal injury action, plaintiff alleges that he slipped on an icy condition on the sidewalk and injured his back in an attempt to not fall, during his employment as an emergency medical technician (EMT), while transporting a patient from the sidewalk to the ambulance.
>
> In moving for summary judgment on the issue of liability, plaintiff argued that he was not negligent under the 'danger invites rescue' doctrine. 'Under the 'danger invites rescue' doctrine,

there exists a duty of care toward a potential rescuer where a culpable party has placed another person in a position of imminent peril which invites a third party, the rescuing plaintiff, to come to the aid of the imperiled person' (*Velazquez v New York City Health & Hosps. Corp.*, 65 AD3d 961, [1st Dept 2009] [internal quotation marks, brackets and citations omitted]). 'The doctrine applies where a potential rescuer reasonably believes that another is in peril, which determination is made on the facts and circumstances of each case' (*id*. [internal quotation marks, brackets, and citations omitted]). Contrary to plaintiff's argument, he failed to show that the doctrine applies here. There is no evidence that plaintiff was unable to see and avoid the slippery condition on the basis that the patient was endangered if she was not transported immediately to the hospital.

Although plaintiff was unable to show that the rescue doctrine applies, he was entitled to partial summary judgment on the issue of defendants' liability. To obtain partial summary judgment, a plaintiff does not have to demonstrate the absence of his own comparative fault (*see Rodriguez v City of New York*, 31 NY3d 312, 323 [2018]). Moreover, plaintiff is not required to show that "defendants' negligence was the sole proximate cause of the accident to be entitled to summary judgment" (*Fernandez v Ortiz*, 183 AD3d 443, 444 [1st Dept 2020]).

In opposition, defendants did not raise a question of fact with respect to the issue of their liability. Defendant restaurants admit that the evidence shows that their employees hosed the sidewalk with water before the incident occurred. Furthermore, defendants' argument that there are triable issues of fact on the basis that plaintiff should have sought an alternative route to safely care for the patient relates to the issue of comparative negligence and, therefore, does not preclude summary resolution of the issue of their liability (*see Derix v Port Auth. Of N. Y. & N. J.*, 162 AD3d 522 [1st Dept 2018])."

**Legal Lesson Learned: Watering down sidewalk on cold winter day is "inviting litigation." Even if EMT is covered by workers comp, he is entitled to sue for pain and suffering.**

File: Chap. 13, EMS

## PA: HIPAA VOIOLATION - FD SHARED FF'S WORK. COMP BACK INJURY CLAIM – "PROTECTED HEALTH INFORMATION" (PHI)

On Dec. 15, 2020, in William Maude v. City of Philadelphia, U.S. Magistrate Judge Lynne A. Sitarski, U.S. District Court for Eastern District of Pennsylvania, ruled that the firefighter's Expert [from University of Pittsburg Medical Center] may testify that the information shared meets definition of "protected health information," but he cannot testify this was an actual violation of HIPAA – that's up to the jury.

"To allow Andrews to opine that Defendant violated its policies and HIPAA regulations incorporated in his employment agreement usurps the jury's responsibility to determine whether a breach occurred.

Andrews' other HIPAA conclusions challenged by Defendant are permissible. Andrews opines that the information contained in Plaintiff's workers' compensation referral form meets HIPAA's

definition of 'protected health information' because it 'is individually-identifiable and relates to a medical condition, treatment or payment for healthcare.' (Def.'s Mot. To Exclude Ex. E 12). He notes that HIPAA covers 'all protected health information,' regardless of the form in which it is contained, and that at no time did Plaintiff authorize the dissemination of his information outside the necessary chain of command…. He also opines that there was no other basis for disclosure and that 'HIPAA establish[es] a floor, not a ceiling for the applicable standard of care . . . .'"

Facts:

"On October 3, 2017, while working as a firefighter for the Philadelphia Fire Department (PFD), Plaintiff aggravated an existing back injury. (Def.'s Mot. To Exclude 4). At Plaintiff's request, his supervisor completed a referral form for evaluation of the injury for workers' compensation and submitted it directly to a third-party medical clinic, WorkHealth. (*Id*.). However, WorkHealth rejected the referral because referrals from aggravation injuries must be submitted by the fire department's Human Resources (HR) office. (*Id*.).

WorkHealth informed HR of the issue. (*Id*.). Shauna Bracy, an HR manager, emailed PFD Deputy Chief Davidson Plaintiff's referral form and asked that he remind supervisors that HR must submit referrals for any injuries other than initial ones. (*Id*. Ex. D 3-4, ECF 38-4). Davidson forwarded Bracy's email and Plaintiff's attached referral form to other Chiefs within the chain of command, but the email and form were later circulated to subordinate lieutenants and captains who had no need for accessing the form. (*Id*. Ex. D; Pl.'s Resp. 2).

Plaintiff claims that as a result of the improper disclosure of his workers' compensation form and the medical information contained therein, he suffered reputational damage within the PFD and related emotional and physical harm. (Sec. Am. Compl., ECF No. 11). He asserts a state law claim for breach of his employment contract (Count I) and federal claims for violation of the Americans with Disabilities Act (Count II) and his substantive due process rights (Counts III and IV). (*Id*.).

The parties engaged in discovery, and Plaintiff retained James H. Andrews as an expert witness. (Def.'s Mot. To Exclude Ex. E, ECF No. 38-5). Andrews is a Program Coordinator and Visiting Lecturer at the Johnstown Campus of the University of Pittsburgh School of Social Work and the former Manager of Quality Improvement at the University of Pittsburgh Medical Center's Western Psychiatric Institute and Clinic. (*Id*. Ex. E 18). He has taught and lectured extensively, primarily on topics related to social work. (*Id*. Ex. E 21-29).

On December 9, 2019, Andrews produced an expert report in this matter. (*Id*. Ex. E). He opined that "there was significant failure to comply with City policy & procedure standards and privacy and confidentiality regulations during the management of Mr. Maude's personal health information." (*Id*. Ex. E 12). He concluded that the unnecessary dissemination of Plaintiff's medical information "clearly violated" Defendant's privacy and confidentiality regulations and Plaintiff's employment agreement, as well as Health Insurance Portability and Accountability Act (HIPAA) regulations. (*Id*.) He further found that "no ADA need" existed for the dissemination of Plaintiff's information and that the dissemination had caused Plaintiff's claimed injuries. (*Id*.).

> Defendant has moved to exclude Andrews for five reasons: (1) he is not qualified to opine on HIPAA regulations or municipal privacy and confidentiality policies; (2) his opinions are not reliable or based on specialized knowledge; (3) they are irrelevant; (4) they may mislead or confuse the jury and cause unfair prejudice; and (5) they present legal conclusions. (Def.'s Mot. To Exclude 6-13). For the reasons that follow, I find that Andrews qualifies as an expert and that his opinions are reliable, relevant and not misleading or confusing. However, I agree with Defendant that his testimony should be limited to avoid reaching ultimate issues for the jury."

**Legal Lesson Learned: "Protected health information" under HIPAA is a broad term and Fire Departments and municipalities must carefully limit who reviews workers comp and other employee PHI.**

File: Chap. 13, EMS

# NJ: 85-YR-OLD PATIENT – EMS LIFTED HER TO STRETCHER – DOC. PATIENT PAIN LEFT ARM – IMMUNITY, "GOOD FAITH"

On Dec. 11, 2020, in Rose Bengel and Henry Bengel v. Holiday City At Berkley Fire Aid Squad, Inc., et al., the Superior Court of New Jersey, Appellative Division, held (2 to 0; unreported decision) that the trial court properly held the EMS personnel enjoyed immunity under state law, since they acted in "good faith."

> "Plaintiffs' assertion that defendants' paperwork containing a conflicting account of what occurred at the Bengel home bespeaks falsification and, in turn, the absence of good faith in providing first aid to Rose, constitutes rank speculation.
>
> ***
>
> Notably, contrary to plaintiffs' account, the judge found that in transferring Rose from her wheelchair to the stretcher, 'Phillips . . . wrapped his arms around [Rose's] mid-section' and Kobus and Phillips 'gently placed [Rose] on the stretcher.'"

Facts:

> "After assessing Rose's medical condition, the first responders began to transfer Rose from her motorized wheelchair to a stretcher in order to transport her to the hospital. To that end, Phillips went behind Rose to lift her onto the stretcher, while Kobus picked up Rose's feet. Together, the two lifted Rose and placed her on the stretcher in a seated position. While on the stretcher, Kobus took Rose's vitals, which included an assessment of her oxygen level, pulse, and blood pressure. Thereafter, the first responders transported Rose via ambulance to the emergency room at Community Medical Center in Toms River.
>
> ***
>
> During his deposition, Henry Bengel, Jr., Rose's son, testified that he was at his parents' home when the first responders arrived. *** Henry stated as Phillips and Kobus simultaneously lifted Rose, Rose 'let out a loud scream,' prompting Henry to tell the first responders, '[y]ou're hurting her.' After Rose was placed on the stretcher, she told Henry the first responders had hurt 'her left arm.' Henry stated none of the first responders expressed any emotion after his mother screamed and failed to mention the injury to the emergency room personnel. Henry testified that after his mother was admitted to the hospital, he, in fact, informed 'the emergency room [personnel] to check [Rose's] shoulder because she was injured coming in with the [first responders].'
>
> ***
>
> During his deposition, Henry was specifically questioned about the 'call sheet' completed by the first responders on February 1, 2016 and provided to the hospital when they delivered Rose to the emergency room. The call sheet recorded the information pertinent to the encounter, including the patient's medical condition. In the section entitled 'Assessment/Treatment & Procedures,' the call sheet stated: 'Son states: Home health aid[e] stated patient has pink eye, thrush, wheezing since coming hom[e] yesterday from [r]ehab. Pain in left arm. Benicar only med this morning. Discharged yesterday from nursing home since Dec 15.' Henry was adamant that prior to the injury inflicted by the first responders, Rose 'had no pain in her left arm' and denied telling the first responders otherwise.

***

Individual volunteer first aid squad members also have a separate and independent basis for immunity under N.J.S.A. 26:2K-29, which provides:

> No EMT-intermediate, licensed physician, hospital or its board of trustees, officers and members of the medical staff, nurses or other employees of the hospital, or officers and members of a first aid, ambulance or rescue squad shall be liable for any civil damages as the result of an act or the omission of an act committed while in training for or in the rendering of intermediate life support services in good faith and in accordance with this act.

For the foregoing reasons, we find that the decision of the Board of Review is not in clear violation of any constitutional or statutory provision, nor is it clearly the result of erroneous conclusions of law, nor is it based upon a material misstatement or mischaracterization of the evidentiary record. Therefore, the decision of the Board of Review is affirmed."

**Legal Lesson Learned: EMS properly documented in patient care report that patient reported pain in the left arm; showed they were acting in "good faith."**

File; Chap. 15, CISM

## WV: FF WITH PTSD – 20 YRS ON THE JOB – DENIED WORKERS COMP – STATE LAW REQUIRES THERE BE PHYSICAL INJURY

On Dec. 11, 2020, in John Angle v. City of Huntington, the State of West Virginia Supreme Court of Appeals, held (5 to 0) that under state statute he was not entitled to workers comp for his PTSD.

> "All of Mr. Angle's symptoms, and the requested diagnoses, were caused by nonphysical means and did not result in any physical injury or disease. Pursuant to West Virginia Code § 23-4-1F, the claim was properly denied.
> ***
> West Virginia Code § 23-4-1F provides that:
>> no alleged injury or disease shall be recognized as a compensable injury or disease which was solely caused by nonphysical means and which did not result in any physical injury or disease to the person claiming benefits. It is the purpose of this section to clarify that so-called mental-mental claims are not compensable under this chapter."

Facts:

> "Mr. Angle, a firefighter, asserts that he developed post-traumatic stress disorder and compassion exhaustion disorder as a result of his over twenty years of work. The June 15, 2018, Employees' and Physicians' Report of Injury indicates he developed post-traumatic stress disorder with physical manifestations as a result of years of employment as a firefighter. The physician's section diagnosed occupation-related post-traumatic stress disorder. The claims administrator rejected the claim on August 15, 2018.

***

In a November 27, 2018, deposition, Mr. Angle testified that he filed a workers' compensation claim for post-traumatic stress disorder and compassion exhaustion disorder caused by witnessing deaths and other disturbing incidents as a firefighter. He stated that the opioid epidemic multiplied the number of calls to which he responded. He estimated that he goes on about 4,000 calls a year. Mr. Angle testified that he experiences difficulty sleeping, nightmares, irritability, mood swings, and a lack of compassion. He stated that he has been treated by Deborah Stultz, M.D., a psychiatrist. He denied any prior diagnosis of post-traumatic stress disorder. On cross-examination, Mr. Angle denied any particular physical injury that caused his post-traumatic stress disorder.

***

After review, we agree with the reasoning and conclusions of the Office of Judges as affirmed by the Board of Review. Mr. Angle alleges that he developed post-traumatic stress disorder and compassion exhaustion disorder as a result of years of work as a firefighter. He testified that he developed difficulty sleeping, nightmares, irritability, mood swings, and a lack of compassion, in the course of and resulting from his employment, yet he also denied that any particular injury caused his post-traumatic stress disorder. All of Mr. Angle's symptoms, and the requested diagnoses, were caused by nonphysical means and did not result in any physical injury or disease. Pursuant to West Virginia Code § 23-4-1F, the claim was properly denied."

**Legal Lesson Learned: Some states have now enacted statutes allowing PTSD coverage without physical injury.**

Note: Feb. 13, 2020: "Ohio House passes bill expanding first responders workers' compensation for PTSD. The legislation would allow first responders to seek workers' compensation even if they don't have a physical condition that led to PTSD."

See also: "Nine states (California, Connecticut, Idaho, Louisiana, Nevada, New Hampshire, New Mexico, Oregon, and Texas) have passed legislation addressing benefits for first responders with PTSD in 2019. In 2018, 2 states (Florida and Washington) passed legislation expanding benefits for first responders with PTSD."

Chap. 16, Discipline

## MA: INTERNAL INVEST. OF TREASURER - EMPLOYEES PROVIDE INFO – PROTECTED FROM DEFAMATION – NO SPITE OR ILL WILL

On Dec. 10, 2020, in Diane Lawless v. Cheryl Estrella, the Massachusetts Court of Appeals held (3 to 0) that the trial court properly granted summary judgment and dismissed the lawsuit filed by the former Town Treasurer against a Senior Clerk who provided investigators with a 6-page e-mail documenting misconduct by the Treasurer.

"We conclude that an opinion based on disclosed, nondefamatory facts is not defamatory and that many of the allegedly defamatory statements constitute such opinions. Further concluding that an employee has a conditional privilege to provide information concerning another employee upon the request of a supervisor and that the plaintiff failed to raise a genuine issue of material fact that would allow a jury to find that this privilege was abused regarding the other statements, we affirm."

Facts:

"The defendant drafted a detailed, six-page e-mail, and sent it to the selectman, the town administrator, and the board's administrative assistant, on April 3, 2015 (e-mail). In deposition testimony, the defendant stated that she submitted her written statement specifically in response to the selectman's request. In the e-mail, the defendant shared her observations of the plaintiff's job performance, stating that the plaintiff spent significant time 'socializing on the phone ... and shopping online,' and would frequently disparage the town, its residents, and colleagues. She described the plaintiff as 'creating an uncomfortable, abusive and hostile work environment,' and as being 'belligerent, threatening, overbearing and [engaging in] psychological harassment.' She further portrayed the plaintiff as someone who acted abrasively and rudely, and suggested the plaintiff may have engaged in dereliction of her duties, if not unlawful conduct."

The conditional privilege is lost only if it is shown that spite or ill will was the primary purpose of the publication… Where, as here, the information was requested in the course of a workplace investigation, and provided in response to an otherwise legitimate inquiry, the plaintiff has not demonstrated a dispute of material fact that the allegedly defamatory statements were published to primarily serve a purpose beyond the purpose protected by the conditional privilege, that purpose being to provide the town officials with information relevant to the plaintiff's job performance.

Judgment affirmed."

**Legal Lesson Learned: Internal investigations of a public official will often involve co-workers providing statements. The "conditional privilege" is an important protection of these co-workers.**

Note: The Court of Appeals referenced a Fire Department case where a co-worker also enjoyed protection from defamation lawsuit under the "conditional privilege." Kevin Barrows v. Wareham Fire District (Mass Court of Appeals; Oct. 12, 2012).

File: Chap. 16, Discipline

## OH: FF FIRED - FACEBOOK POSTS, TURNOUT GEAR, BAD GRANT DATA – TOWNSHIP CAN FIRE WITHOUT FIRE CHIEF RECOMM.

On Nov. 25, 2020, in Karl D. Gerhart v. Union Township Board of Trustees, the Court of Appeals of Ohio, Fourth Appellate District (Ross County), 2020 Ohio 5615, held (3 to 0) that the firefighter was properly fired by the Township under Ohio Revised Code, even if the FD's manual calls for the Fire Chief to recommend termination.

"[Defendant] thus argues that the disciplinary manual required the chief to recommend to the board of trustees his removal.
R.C. 505.38 provides for the removal of firefighters in accordance with R.C. 733.35. R.C. 733.35 provides that a firefighter may be removed if he 'has been guilty, in the performance of his official duty, of bribery, misfeasance, malfeasance, nonfeasance, misconduct in office, gross neglect of duty, gross immorality, or habitual drunkenness.'

In the case sub judice, the board of trustees' cited reasons for terminating appellant tracks the language contained in R.C. 733.35, i.e., misfeasance, malfeasance, and misconduct in office."

Facts:

In April 2018, the Union Township Board of Trustees held a hearing to consider appellant's removal as a township firefighter. Rex Cockrell stated that he has been a member of the Union Township Fire Department for approximately twenty-six years, and that he served as an assistant chief for approximately twelve years. Cockrell stated that in 2015, he stepped down from his role as an assistant chief due to appellant's behavior. Cockrell explained that appellant 'was extremely defiant against any leadership in the department' and 'had zero respect for authority.'

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Cockrell conducted "numerous investigations" into appellant's behavior after residents called to complain that appellant posted material on Facebook that disparaged the fire department. Cockrell further explained that appellant failed to properly dispose of department property. Appellant believed that the department 'store[d] too much stuff' and stated that the department needed 'to get rid of all this crap,' so appellant threw away some 'turnout gear' by placing it in a dumpster.

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Cockrell also explained an incident when appellant allowed a firefighter, who had not been trained in CPR and first aid, to respond to a call that "went out as a code." Cockrell stated that the firefighter gave the individual in need of medical assistance CPR and the family at the scene reported that the firefighters 'didn't appear to know what they were doing.'

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Karen Gossman, the fiscal officer for Union Township, stated that appellant submitted a grant application with 'misstated' financials. Gossman explained that the fire department had approximately $400,000 in reserve, but the grant application stated that the fire department had $2,000."

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Furthermore, assuming, arguendo, that appellees terminated appellant for one of the reasons listed in the disciplinary manual, and that the chief therefore was required to recommend appellant's removal to the board of trustees, appellant did not cite authority to support the proposition that the failure to comply with a fire department's disciplinary manual when terminating a firefighter requires a determination that the termination is invalid."

**Legal Lesson Learned: The evidence presented to the Township Trustees supported his termination.**