College of Engineering & Applied Science

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

Phone (513) 556-6583

AUGUST 2022 – FIRE & EMS LAW NEWSLETTER

[NEWSLETTER IS NOT PROVIDING LEGAL ADVICE.]

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

16 RECENT CASES

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NEWSLETTERS: Past newsletters can be found at the Fire Science News page. If you would like to be added to UC Fire Science listserv, just send him an e-mail.

TEXTBOOK: Updating 18 chapters of my textbook (2018 to current). FIRE SERVICE LAW (SECOND EDITION), Jan. 2017.

File: Chap. 1 – American Legal System

PA: ARSON – TENANT 3 MONTHS BEHIND ON HIS RENT - EVICTED DAY OF FIRE IN HIS ROOM – CONV. UPHELD

On July 5, 2022, in Commonwealth of Pennsylvania v. Wesley Wise, the Superior Court of Pennsylvania held (3 to 0) in non-precedential decision, that conviction by trial judge after a bench trial [no jury] is affirmed. Circumstantial evidence is sufficient to convict for arson. "Direct evidence is not required. '[P]roof of guilt especially in arson cases, may be established [through] circumstantial evidence.' *Commonwealth v. Counterman*, 719 A.2d 284 (Pa. 1998) (*quoting Commonwealth v. DiNicola*, 468 A.2d 1078, 1081 (Pa. 1983). '[A]rson, by its very nature, is rarely committed in the presence of others, and a refusal to convict on circumstantial evidence alone would be tantamount to an invitation to commit the crime.' *Commonwealth v. Colon*, 399 A.2d 1068, 1073 (Pa. Super. 1979). *** Indisputably, an individual started the fire with an open flame in Wise's bedroom closet; no one except Wise had been in there. Wise, who was evicted as of the day of the fire, left the house carrying a bag; he was the only one who had a reason to start the fire. Not long after he left, the smoke alarm went off; this is evident despite the varying times reflected in the record. Ms. Owens and Mr. Bowe risked their lives and tried to extinguish the fire but had to evacuate, along with Ms. Owens' two young grandchildren. The trial court evidently did not believe Ms. Minnis' testimony that Wise was at her house since early on the day of the fire."

> "Based on this evidence, the trial court found Wise guilty of arson and criminal mischief; he was acquitted of all other charges. On February 11, 2021, the court sentenced Wise to 5 to twelve 12 years' incarceration followed by 3 years' probation for arson and 5 years' concurrent probation for criminal mischief. Wise filed a post-sentence motion, which the court denied.
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> Ms. Berry, who is Mr. Bowe's sister, lived two blocks away from the property. She testified that her two daughters owned the home but that she determined who lived in the residence. Ms. Berry verbally negotiated with [Wesley Wise] about the terms of his occupancy, and [Wise] paid Ms. Berry in food stamps. However, before the fire, they 'started having little arguments' because [Wise] was late on his rent payments. After three (3) months of dilatory payments, Ms. Berry verbally told [Wise] he could no longer reside in the home and must leave the premises by January 12, 2019 (*i.e.*, the day of the fire). Ms. Berry also testified that the fire caused between $ 5000 and $ 7000 in property damage.
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> The Commonwealth lastly presented the testimony of the Fire Marshal, Lieutenant McMichael, whom the parties stipulated is 'an expert in the field of arson investigation.' Lieutenant McMichael prepared an investigative report explaining, *inter alia*, that around fifty (50) firefighters were dispatched to the property around 6:50 p.m. Lieutenant McMichael himself arrived around 7:45 p.m., after the fire was extinguished. His inspection of the property revealed that the fire originated '[i]nside the closet on the northwest corner' of [Wise's] room. In that area, there were no 'competent ignition sources' that inadvertently could have caused the fire. The fire was not caused by the

> heater, the power strip, a heat gun sitting on the table, defective outlets, the radiator, the home's breaker, or any other electrical appliance.
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> After eliminating any other possible cause of the fire, Lieutenant McMichael 'determined it was a fire started by human hand.' The ignition source was 'an open flame' - *i.e.*, a match or a lighter. On the same night as the fire, Lieutenant McMichael called [Wise's] cellular phone and advised him that he was investigating the fire and needed to ask [Wise] some questions, including whether [Wise] was smoking or using candles in his room. [Wise] replied that he was neither smoking nor using candles in the room. Lieutenant McMichael then asked for [Wise's] location so they could speak face-to-face, but [Wise] refused to disclose his whereabouts. Lieutenant McMichael also asked [Wise] whether he started the fire, and according to Lieutenant McMichael, [Wise] replied: 'You can't put this on me, I wasn't there. You can't put it on me. You can't put me in two places at once because I have a good story.'"

Holding:

> "Ms. Owens and Mr. Bowe remained at the scene of the fire. However, Wise refused to return for questioning when asked by Lieutenant McMichael. Further, when Lieutenant McMichael asked Wise if he started the fire, he did not deny it, and became defensive telling him, "you can't put this on me, you can't put me in two places at once. . . . I have a good story." Notably, Ms. Owens, Mr. Bowe, and Ms. Berry all denied starting the fire, but Wise was the only one with a motive.
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> From this evidence, the trial court, as finder of fact, could reasonably infer that Wise was the one who started the fire, doing so before he left the house. This is so despite the inconsistent testimony regarding the timeline of events that day. The cumulative evidence and the inferences that can be drawn therefrom view in the light most favorable to the Commonwealth as the verdict winner were sufficient to sustain Wise's conviction for arson and criminal mischief."

Legal Lesson Learned: Circumstantial evidence may lead to arson conviction.

Chap. 2 – Line Of Duty Death / Safety

File: Chap. 3 – Homeland Security

DC: DRONES – FAA REQUIRES DRONES TO ADMIT SIGNAL – "REMOTE ID" – NOT GOVT "WARRANTLESS SURVEILLANCE"

On July 29, 2022, in Tyler Brennan and ReaceDayQuads LLC v. Stephen Dickson, Administrator and Federal Aviation Administration, the U.S. Court of Appeals for the District of Columbia held (3 to 0) that FAA regulations are lawful. "Petitioners Tyler Brennan, a drone user, and RaceDayQuads the drone retailer Brennan owns (referred to jointly as Brennan), want the

Rule vacated…. Brennan asserts that the Rule's Remote ID requirement amounts to constant, warrantless governmental surveillance in violation of the Fourth Amendment. His request for vacatur of the Rule, amounting to a facial challenge, must fail because drones are virtually always flown in public. Requiring a drone to show its location and that of its operator while the drone is aloft in the open air violates no reasonable expectation of privacy. Brennan hypothesizes that law enforcement authorities could use Remote ID to carry out continuous surveillance of drone pilots' public locations amounting to a constitutionally cognizable search, or that the Rule could be applied in ways that would reveal an operator's identity and location at a home or in an otherwise private place. But he has not shown that any such uses of Remote ID have either harmed him or imminently will do so, thus he presents no currently justiciable, as-applied challenge."

> "Drones are coming. Lots of them. They are fun and useful. But their ability to pry, spy, crash, and drop things poses real risks. Free-for-all drone use threatens air traffic, people and things on the ground, and even national security. Congress recognizes as much. It passed a law in 2016 requiring the Federal Aviation Administration (FAA) to 'develop[] . . . consensus standards for remotely identifying operators and owners of unmanned aircraft systems' and to 'issue regulations or guidance, as appropriate, based on any standards developed…. In response to Congress's call to prioritize the development of capacities to increase airspace awareness and promptly mitigate threats as a means to protect the safety and security of U.S. airspace, the FAA promulgated the Remote Identification (Remote ID) Rule challenged here.
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> Remote ID technology requires drones in flight to emit publicly readable radio signals reflecting certain identifying information, including their serial number, location, and performance information. Those signals can be received, and the Remote ID information read, by smart phones and similar devices using a downloadable application available to the FAA, government entities, and members of the public, including other aircraft operators. The FAA likens Remote ID to a "digital license plate." Remote Identification of Unmanned Aircraft (Final Rule or Remote ID Rule), 86 Fed.Reg. 4390, 4396 (Jan. 15, 2021); FAA Br. at 17. Like a license plate, Remote ID acts as a basic building block of regulatory compliance by attaching a unique, visible, yet generally anonymous identifier to each device in public circulation. Unlike a license plate on the back of a car, however, Remote ID is detectible in real time only when the drone is moving. Also unlike a vehicle's license plate, which can only be read by the naked eye from a few yards away, a Remote ID message can be "read" by people within range of local radio signals yet not near enough even to see the drone itself.
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> The FAA separately obtains certain nonpublic personally identifying information from drone owners as a requisite of their unmanned aircraft registrations, and that information is protected by the Privacy Act, 5 U.S.C. § 552a. A Remote ID message may only be matched to that nonpublic information and used by the FAA or disclosed to law enforcement outside of the FAA 'when necessary and relevant to a[n] FAA enforcement activity,' Privacy Act of 1974; System of Records Notice, 81 Fed.Reg. 54,187, 54,189 (Aug. 15, 2016), and even then it is subject to 'all due process and other legal and constitutional requirements,' Final Rule, 86 Fed.Reg. at 4433. The Rule does not

otherwise authorize private or public actors access to drone owners' or pilots' nonpublic personally identifying information, *id.* at 4433-34, nor does it permit or contemplate storage of Remote ID data for subsequent record searches."

Holding:

"Errant drone flights are not unusual: In 2019, the FAA alone received an average of six reports daily from people who claimed to have witnessed unauthorized drone operations. Proposed Rule, 84 Fed.Reg. at 72,455. The FAA has noted the potential use of drones for illegal activities, including 'carrying and smuggling of controlled substances, illicit drugs, and other dangerous or hazardous payloads; the unlawful invasion of privacy; illegal surveillance and reconnaissance; the weaponization of [drones]; sabotaging of critical infrastructure; property theft; disruption; and harassment.

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As every pilot knows, Congress has authorized the Federal Aviation Administration to regulate the public airspace of the United States. FAA regulation enables safe and efficient shared use of the skies by government, commercial aviation, and private pilots. Most existing aviation rules are inapplicable to drones, but the Rule at issue here is specially fashioned at the behest of Congress to ensure that even drone pilots shoulder the baseline responsibility of reciprocal airspace awareness: At a minimum, drone pilots must enable other pilots and people on the ground who may be affected by their drones to discern their location during flight. Remote ID provides that direct link between the drone and its pilot and enables accountability of drone pilots analogous to that of pilots collocated with manned aircraft. Final Rule, 86 Fed.Reg. at 4419. For the following reasons, we conclude that Brennan has failed to show that the Remote ID Rule violates the Fourth Amendment, and that his procedural challenges likewise lack merit."

Legal Lesson Learned: Drones can be potential terrorist weapon; Remote ID provides important protection.

Note: The Court referenced terrorist events with drones.

"Extremists have increasingly sought to use drones to carry out violent attacks: Terrorists killed several people by detonating a bomb carried by a drone that flew above a military parade in Yemen…. The Islamic State and other terrorist organizations have reportedly modified commercially available drones so they can carry and release munitions and explosives…. A would-be assassin used a drone to target then-President Nicolas Maduro in Venezuela….And British intelligence agencies uncovered a terrorist plan to fly drones into the engines of commercial airplanes as they took off from airports in the United Kingdom….

Footnote 1: Citing Scott Gleeson, Juvenile Was Operating the Drone that Flew Over Fenway Park in Red Sox Game, Police Say, USA TODAY (Apr. 13, 2019),; Lori Aratani, Drone Activity Halts Air Traffic at Newark Liberty International Airport, WASH. POST (Jan. 22, 2019).

Footnote 2: Citing Houthi Drones Kill Several at Yemeni Military Parade, REUTERS (Jan. 10, 2019).

Footnote 3: Citing Don Rassler, The Islamic State and Drones: Supply, Scale, and Future Threats, COMBATING TERRORISM CTR. AT WEST POINT, at iv (July 2018).

Footnote 4: Citing Venezuela President Maduro Survives 'Drone Assassination Attempt', BBC (Aug. 5, 2018).

Footnote 5: Citing Patrick Williams, *Terror Drone Plot FOILED*: Brit Spies Stop Plan to Bring Down AIRLINER, DAILY STAR (Aug. 19, 2018),

File: Chap. 4, Incident Command

CO: FOUR BYSTANDERS VIDEOTAPING POLICE - DUI TRAFFIC STOP – 10th CIRCUIT LAWFUL – ALSO 7 OTHER CIR.

On July 11, 2022, in Abrade Irizarry v. A, Yehia, the U.S. Court of Appeals for the 10th Circuit (Denver, CO) held (3 to 0) that U.S. District Court judge improper dismissed the pro se [had no attorney] lawsuit filed by a "Youtube journalist" against a City of Lakewood police officer, Ahmed Yehia, alleging violation of First Amendment to U.S. Constitution. The lawsuit alleges the officer shinned his flashlight into the camera lens of four males videotaping on their cell phones a DUI traffic stop, positioned himself to block their view, and also got back in his cruiser and drove directly at the videographers, turning on his blast horn. The lawsuit against Officer Yehia will now proceed to pre-trial discovery. "Mr. Irizarry's right to film the police falls squarely within the First Amendment's core purposes to protect free and robust discussion of public affairs, hold government officials accountable, and check abuse of power."

The plaintiff's complaint alleges:

> Mr. Irizarry is a 'Youtube journalist and blogge"'who 'regularly publishes stories about police brutality and conduct or misconduct.'…. On May 26, 2019, he and three other 'YouTube journalists/bloggers' were filming a DUI traffic stop with their cell phones and cameras 'for later broadcast, live-streaming, premiers, and archiving for their respective social medial channel[s].'
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> Officers on the scene contacted Officer Yehia to report that four males were filming the traffic stop. Officer Yehia drove to the scene 'in full regalia in a Marked cruiser, with every single light . . . turned on….' He exited his vehicle and 'intentionally positioned himself directly in front of [Mr. Irizarry] . . . to make sure he intentionally obstructed the camera view of the D.U.I. Roadside sobriety test….' Mr. Irizarry and another journalist, Eric Brandt, 'voiced their disapproval of the intentional obstruction' and 'began to loudly criticize' Officer Yehia….

Officer Yehia shined an 'extremely bright flashlight"' in Mr. Irizarry's and Mr. Brandt's cameras, 'saturating the camera sensors…'

Officer Yehia continued 'harassing' Mr. Irizarry and Mr. Brandt until another officer told him to stop…. Officer Yehia got back into his cruiser, 'drove right at [Mr. Irizarry] and Mr. Brandt, and sped away….' He made a U-turn, 'gunned his cruiser directly at Mr. Brandt, swerved around him, stopped, then repeatedly began to blast his air horn at [the two men]….' Eventually, Officer Yehia was instructed to leave the scene due to his "disruptive and uncontrolled behavior."

Holding:

"Officer Yehia moved to dismiss under Federal Rule of Civil Procedure 12(b)(6), asserting a qualified immunity defense. The district court granted the motion.5 It concluded that the complaint alleged a First Amendment constitutional violation based on prior restraint and retaliation. Although the Tenth Circuit had not previously recognized a First Amendment right to record police officers performing their official duties in public, the court, relying on out-of-circuit decisions, held that the First Amendment guarantees such a right, subject to reasonable time, place, and manner restrictions.

The district court nonetheless held that Officer Yehia was entitled to qualified immunity because Mr. Irizarry had not shown a violation of clearly established law. He "failed to direct the court to a case which demonstrates that Officer Yehia was on notice that . . . standing in front of and shining a flashlight into [Mr. Irizarry's] camera . . . violated Mr. Irizarry's First Amendment rights." Id. at 108. The court therefore dismissed the suit against Officer Yehia with prejudice.

Footnote 3: The district court said that Mr. Irizarry did not state—either in his complaint or his response to the motion to dismiss—that his claim extended to Officer Yehia's conduct behind the wheel. The court therefore addressed only whether Officer Yehia violated Mr. Irizarry's rights by standing in front of him and shining a flashlight into his camera. The district court erred in limiting its analysis. The complaint alleged that all of Officer Yehia's actions, including driving and honking at Mr. Irizarry, violated his First Amendment rights. See App. at 11 ¶ 23 ('[Officer] Yehia's actions constituted substantial interfer[e]nce preventing [Mr. Irizarry] and Mr. Brandt from adequately collecting meaningful which the[y] intended to, or had already been actively [] attempting to publish.'). We understand the complaint's reference to 'collecting meaningful' to mean collecting meaningful video footage.'

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First, as to constitutionally protected activity, the Tenth Circuit has not recognized a First Amendment right to film the police performing their duties in public. We recognize that the right exists and was clearly established when the incident occurred. Because Mr. Irizarry has alleged facts showing he was exercising his First Amendment right to film the police, he has met the first element of his retaliation claim under clearly established law.

> Second, Mr. Irizarry's allegations also show that Officer Yehia's actions against him would chill a person of ordinary firmness from continuing to engage in protected filming activity. Because these actions obviously infringed protected activity and equaled or exceeded those in comparable Tenth Circuit and out-of-circuit cases, Mr. Irizarry has met the second element of his retaliation claim under clearly established law.

Legal Lesson Learned: Fire & EMS likewise cannot prohibit videotaping their conduct at a public location; but you may take reasonable steps to protect the privacy of patients [such as holding up bed sheet when loading into ambulance].

> Note: See July 12, 2022 article on this decision. "10th Circuit Court of Appeals Upholds Public Right to Record Police." https://firstamendmentwatch.org/10th-circuit-court-of-appeals-upholds-public-right-to-record-police/. "The U.S. Court of Appeals for the 10th Circuit, based in Denver, became the seventh federal appeals court to affirm there's a First Amendment right to record the police performing their official duties in public."
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> See also July 8, 2022 article, "Arizona Governor Signs Bill to Restrict Recording Police in Public." "Arizona Gov. Douglas Ducey signed into law a bill that would make it illegal to photograph or record a police officer in public from a distance of eight feet without the officer's permission. Controversial House Bill 2319 says if an individual is asked by the police to quit filming but continues to do so would face a Class 3 misdemeanor and up to 30 days in jail."

File: Chap. 5 – Emergency Vehicle Operations

MI: EMS DRIVER SLOWED DOWN - LIGHTS & SIRENS PRIOR TO RED LIGHT – WITNESS CONFIRMED - IMMUNITY

On July 28, 2022, in Denise Ann Middleton v. Kenneth Arthur Temple and Ogemaw County EMS, the Court of Appeals of Michigan, held (3 to 0) on an immediate appeal by the defense, that the trial court should have granted summary judgment to EMS driver and to County EMS. The plaintiff entered intersection on green light, said she didn't see or hear the ambulance, and drove into left side of the ambulance.

> "On the morning of June 22, 2017, defendant [EMS driver] Temple was transporting a patient to the hospital in an Ogemaw County EMS ambulance. With the ambulance's emergency lights and sirens activated, Temple, driving east, approached an intersection with a red light. According to Temple, he slowed the ambulance to approximately five miles per hour and 'visually cleared the intersection' by looking both ways before proceeding through the red light. Plaintiff was driving her car southbound through the intersection and struck the ambulance on its left side. Plaintiff testified that she had a

green light and that as she was approaching the light, she did not notice any lights or sirens or see any other vehicles yielding to an ambulance. Plaintiff further testified that it was only upon entering the intersection that she saw the ambulance's lights. She then slammed on her brakes in an unsuccessful attempt to avoid the collision. According to plaintiff, the ambulance was 'flying through' the intersection. She could not recall whether she looked in all directions when entering the intersection.

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A nonparty witness who spoke with the police at the time of the accident averred in her affidavit that the ambulance made itself 'clearly visible' to other cars with its lights and sirens, that all other cars pulled over to yield to the ambulance, and that the ambulance slowed down to check for oncoming traffic as it approached the intersection. In an affidavit, a police officer who interviewed witnesses at the accident scene opined that '[h]ad [plaintiff] been paying closer attention to her surroundings, she would have been able to see and hear the ambulance, as everyone else around her did, and she would have been able to yield to the emergency vehicle and avoid the accident.' The officer also 'determined that the ambulance driver did everything correctly under the circumstances and was not negligent in any way.'"

Holding:
"In this case, the trial court erred by determining that there was a question of fact regarding whether Temple 'slow[ed] down as may be necessary for safe operation' of the ambulance. See MCL 257.603(3)(b). The only evidence that plaintiff presented to show that Temple breached the duty of care was plaintiff's deposition testimony that the ambulance was 'flying through' the intersection. This vague, non-contextual assertion, viewed in a light most favorable to plaintiff, was insufficient to create a genuine issue of material fact in regard to whether the ambulance Temple was driving slowed down 'as may be necessary for safe operation' before proceeding through the red light at the intersection. Plaintiff admitted that she did not see the ambulance until she was already in the intersection, which is when the collision occurred. Plaintiff presented no evidence with respect to Temple's conduct as his ambulance approached the intersection *before* plaintiff saw it. On the other hand, Temple and the nonparty witness each stated in affidavits that Temple slowed down before proceeding through the red light."

Legal Lesson Learned: EMS driver slowed down as entering intersection against a red light as required by law; extremely helpful to have civilian witness confirm this to PD.

Note: See Ohio Revised Code - Section 4511.03 | Emergency vehicles at red signal or stop sign.

"(A) The driver of any emergency vehicle or public safety vehicle, when responding to an emergency call, upon approaching a red or stop signal or any stop sign shall slow down as necessary for safety to traffic, but may proceed cautiously past such red or stop sign or signal with due regard for the safety of all persons using the street or highway.

(B) Except as otherwise provided in this division, whoever violates this section is guilty of a minor misdemeanor. If, within one year of the offense, the offender previously has

been convicted of or pleaded guilty to one predicate motor vehicle or traffic offense, whoever violates this section is guilty of a misdemeanor of the fourth degree. If, within one year of the offense, the offender previously has been convicted of two or more predicate motor vehicle or traffic offenses, whoever violates this section is guilty of a misdemeanor of the third degree.

If the offender commits the offense while distracted and the distracting activity is a contributing factor to the commission of the offense, the offender is subject to the additional fine established under section 4511.991 of the Revised Code."

File: Chap. 6 – Employment Litigation

NY: FDNY KNEE INJURY – 7th ON JOB - BUT ARTHRITIS - COURT AWARDS 75% ACCIDENTAL DISAB. RETIREMENT

On July 11, 2022, in David J. Lamar v. Daniel Nigro, the Board of Trustees of the New York City Fire Department, et al., the Supreme Court, New York County held (2 to 0; unpublished opinion) granted the retired firefighter's petition to reverse respondents' determination denying petitioner's application for accident disability retirement ('ADR') benefits [$75%] is granted and he is entitled to benefits retroactive to his date of retirement.

"Petitioner began working as a firefighter for respondents in October 1995 and retired in August 2021. He alleges that prior to his appointment with the FDNY, he passed the physical and mental examinations. Petitioner insists that during his service for the FDNY he sustained line-of-duty injuries to both knees, yet he continued to work as a firefighter until his last line-of-duty injury on March 8, 2018.

Petitioner details the seven incidents in which he injured his knees while on the job. He claims that he did not return to active-duty work after the March 8, 2018 incident. Petitioner observes that the FDNY's Bureau of Health Services eventually found him unfit for fire duty on April 15, 2019. He points to their letter, which noted that on March 8, 2018 'while working at a fire on the fire floor in a cluttered dwelling, his left foot plunged through the burnt floor, he lost his balance, his right leg slipped on debris, he crashed into a wall, and he noted pain in his bilateral knees. MRI of the left knee March 2018 revealed medial meniscus tear, displaced lateral meniscus tear, prior PCL injury, prior MCL injury with scar formation, patellofemoral chondromalacia, patellar tendinitis, ACL degeneration and arthritis of the medial compartment' (NSYCEF Doc. No. 14 at 1). Petitioner later had knee replacements in both knees in 2018. The letter observed that a physical examination of petitioner was completed on April 15, 2019 and that he had a permanent partial disability (*id*. at 2)."

Holding:

"Of course, the Court recognizes that years pass and knees can get worse due to degenerative conditions and that it may be difficult to discern whether a knee ailment is a result of a degenerative condition or the result of a specific trauma (or multiple traumas). However, the Court of Appeals expressly addressed this point in *Matter of Tobin v Steisel* (64 N.Y.2d 254, 485 N.Y.S.2d 730 [1985]). The Court found that "an accident exacerbated an underlying condition, thereby rendering the employee disabled, would be sufficient, if accepted" to entitle an applicant to ADR benefits (*id*. at 259). And so even if petitioner had a degenerative condition, the undisputed facts show that his condition was not so bad that it rendered him incapable of fulfilling his duties as a firefighter and that the 2018 incident - when he fell partially through a floor while fighting a fire- exacerbated the condition and rendered him disabled. Under *Tobin*, petitioner is clearly entitled to ADR benefits.

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Despite the Medical Board's attempts to minimize the 2018 injury, or the numerous knee injuries that petitioner suffered while on the job, the fact is that the Medical Board's offered a conclusory determination that petitioner's injury was solely degenerative. That conflicts not only with the opinion offered by petitioner's doctor but with the doctor's report from the FDNY's Deputy Chief Medical Officer (NYSCEF Doc. No. 14). Dr. Hurwitz's diagnosis of petitioner on April 15, 2019 was 'Status post bilateral total knee replacement 10/30/2018 for *post traumatic knee injuries'* and petitioner 'has a partial permanent disability. He is unfit for fire duty' *(id.* [emphasis added]). While the Court recognizes that neither of these opinions are binding on the Medical Board, the Medical Board's conclusions did not adequately explain why it ignored these opinions, including the opinion of other FDNY medical personnel.

Accordingly, it is hereby

ORDERED that the petition is granted to the extent that petitioner is entitled to accident disability retirement benefits retroactive to the date of his retirement and the Clerk shall enter judgment accordingly in favor of petitioner and against respondents along with costs and disbursements upon presentation of proper papers therefor."

Legal Lesson Learned: Nice to see Court recognizing that "years pass and knees can get worse due to degenerative conditions," but firefighter still entitled to ADR because this was clearly aggravated by a on-the-job injury.

File: Chap. 7 – Sexual Harassment [also filed, Chap. 14]

WI: FEMALE FAILS APPLICANT PHYSICAL FITNESS TEST – NOT CPAT, BUT MEETS EEOC GUIDELINES – TEST UPHELD

On July 20, 2022, in Catherine Erdman v. City of Madison, U.S. District Court Judge William M. Conley dismissed the lawsuit, findings that the Madison Fire Department in their 2014

applicant testing did not violate Title VII of the Civil Rights Act of 1964, even if more female failed compared to fire departments using the CPAT, since the tests were developed by consultants to assess actual job duties and meet the EEOC's Uniform Guidelines on Employee Selection Procedures. Plaintiff's lawsuit claimed that she would have passed CPAT [Madison FD's pass rate for women was 14%; the pass rate for women taking CPAT at Austin, Teas FD was 48%]. Plaintiff failed the "pike pole" which required applicants to stand at least 18 inches back from the ceiling being pulled down with a pike pole to account for safety concerns with test takers standing directly under the ceiling; the pole was long enough to allow applicants of different heights to adjust the hold to account for that differential.

> "A total of 1887 applicants participated in the 2014 recruitment. Of these, 1723 were men, 146 were women, and 18 were not clearly identified by gender…. Four hundred and ninety-nine applicants appeared to take the PAT -- 471 men and 28 women. Of these, 404 applicants -- 395 men, four women, and five not clearly identified -- successfully completed the PAT…. [T]he overall pass rate for women who appeared to take the test (4/28 or 14.29%) was about 17% of the pass rate for men who appeared to take the test (395/471 or 83.86%)…. Conversely -- the women's failure rate -- defined as applicants who met the minimally acceptable score for each of the seven events, but failed to meet the cut-score for at least five of the seven events -- of 1 out of 28 (3.57%), for the test was roughly 120% that of men's failure rate of 14 out of 471 (2.97%)…. Finally, the women's *disqualification* rate -- defined as those who appeared to take the test and did not quit -- of 20 out of 25 (80%) was 748% that of men's disqualification rate of 49 out of 458 (10.69%).
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> Debra Amesqua became the Madison Fire Department Chief in 1996. Following her appointment, Chief Amesqua engaged Landy, Jacobs and Associates ("LJA"), to develop the Department's PAT in 1997… Directed by Amesqua to develop a test that correlated with the tasks on the job, LJA developed the PAT under the Uniform Guidelines on Employee Selection Procedures (1978), 29 C.F.R. § 1607, *et seq*…. In particular, Rick R. Jacobs, Ph.D., an industrial psychologist, was one of the individuals who developed the PAT in conjunction with exercise physiologists. Jacobs had developed physical ability tests for a little more than a decade before taking on the task of developing the PAT at issue here.
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> Following Chief Steven Davis's appointment to replace Chief Amesqua in late 2012 or early 2013, Ergometrics & Applied Personnel Research, Inc. ("EAPRI") was retained by the Madison Fire Department to validate the PAT again. EAPRI's President, Carl Swander, Ph.D., and his team then conducted a "content validation study." Like the earlier studies by LJA, this study was conducted under the Uniform Guidelines, among other professional publications."

Holding:

> "On October 15 and 16, 2018, the court held a trial to the bench on plaintiff Catherine Erdman's claim that the City of Madison, and more specifically its Fire Department, adopted a physical abilities test ("PAT") that has a disparate impact on women in violation of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e, *et seq*. For the reasons explained below, the court now concludes that: (1) plaintiff met her burden of proving that the Fire Department's PAT has an adverse impact on female applicants; (2) defendant met its burden of proving that the PAT is job-related and consistent with business necessity; and (3) plaintiff did not meet her burden of proving that the alternative physical abilities test she identifies, the Candidate Physical Abilities Test ("CPAT"), will serve the Fire Department's legitimate needs. Accordingly, the court will find in defendant's favor.
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> Regardless, defendant proffered credible evidence of numerous burdens associated with adopting the CPAT as an alternative test, including: (1) the need to perform a transferability study; (2) the PAT having been a good predictor of outcome historically, as defined by a high passage rate out of the academy; (3) the Department's comparatively high percentage of female firefighters, leading to a possible inference that the CPAT may have a favorable disparate impact on women but results in the washing out of ultimately unsuccessful applicants after the additional expenditure of time and money at the academy phase; and (4) certain elements of the PAT were designed specifically for Madison, in light of characteristics of the city, the Department's equipment or other considerations, including safety."

Legal Lesson Learned: This alternative test passed EEOC "Uniform Guidelines on Employee Selection Procedures (1978), 29 C.F.R. § 1607, *et seq."*

File: Chap. 8 – Race Discrimination

MA: RESIDENCY ORDINANCE NOT ENFORCED – 2 BLACK OFFICERS LIVE CITY – CASE PROCEED, NOT CLASS ACTION

On July 14, 2022, in Marc Savage and Randolph Blake v. The City of Springfield, et al., U.S. Magistrate Judge Katherine A. Robertson denied plaintiffs' motion for class action, but their individual lawsuit claims will now procced to pre-trial discovery. Marc Savage [now retired District Chief} had been on FD for 39 years, and lifelong resident of the city; Randolph Blake [now Captain] has been on FD for 30 years and a life-long resident of the city. The U.S. Magistrate Judge declined to certify class action. "[T]he court finds that Plaintiffs' calculation of fifty putative class members is insufficiently supported." U.S. Magistrate Judge also referenced the Massachusetts Superior Court decision in denying the class action: "Giving these rulings the preclusive effect to which they are entitled, this court cannot strike any Fire Department employee from the City's payroll and there is no basis for freezing promotion eligibility lists until the time that such a purge has taken place."

On March 8, 2021, the U.S. Magistrate Judge held that their lawsuit may proceed because of the FD's repeated failure to enforce the residency ordinance when making promotions.

> "Defendants' motion [to dismiss] is denied insofar as it seeks dismissal of Plaintiffs' Title VII claim against Springfield for discrete acts of discrimination occurring on or after October 26, 2016 for Savage and on or after May 4, 2017 for Blake, and insofar as it seeks dismissal of Plaintiffs' hostile work environment claim.
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> The court has already held that 'Plaintiffs' allegations about [Fire Commissioner Bernard J.]Calvi's knowledge and his directive to Savage 'to leave the legal issue of residency outside of the department" are sufficient to raise an inference that Calvi may have condoned or acquiesced in the SFD's alleged violations of Plaintiffs' constitutional rights to Equal Protection….' Thus, Defendants are not entitled to dismissal of Plaintiffs' Equal Protection claim against Calvi." Read more about Savage v. City of Springfield vai Casetext: Smarter Legal Research.

Note: Then Captain Marc Savage and others filed a lawsuit in 2016 in state court about non-enforcement of the city's 1995 residency ordinance and its adverse impact on minority firefighters who live in the city [87.5% compliance rate for blacks, 85.2% for Hispanics, and 50% for whites]. Massachusetts Superior Court judge ruled on Dec. 28, 2021 that the city must enforce most of the ordinance, but held that individuals hired as firefighters prior to the effective date of the ordinance [March 17, 1995] were wholly exempt from the residency requirement, including subsequent promotions. In 2020, Marc Savage was promoted to District Chief.

Holding:

> "[T]there is reason to doubt that the court can enter injunctive or declaratory relief that would be appropriate for the class as a whole because Plaintiffs seek injunctive or declaratory relief that would conflict with the Superior Court's rulings concerning the residency ordinance. As relief, Plaintiffs seek an order from this court directing the City to 'comply with the residency ordinance by striking from the payroll all persons currently in violation of the city's residency ordinance;' and 'freez[ing] all promotion eligibility lists for position levels of Captain and above until compliance with the residency ordinance is achieved by the City….'
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> [Retired District Chief Marc] Savage, a lifelong resident of the City, was hired by the Springfield Fire Department on February 6, 1978 …. In March of 2014, Savage sat for a Deputy Fire Chief examination along with one other applicant, Glenn Guyer ('Guyer'), who was hired in 1987, and never lived in the City, despite being promoted to Lieutenant in 2000 and Captain in 2006…. Guyer refused to sign an agreement to move to Springfield within a year of his appointment to the Deputy Chief position but was allowed to accept the promotion anyway, and his employment was not terminated when he persisted in his refusal to move to the City after the year had elapsed….
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On the same date in March 2014 that Savage and Guyer took the Deputy Fire Chief examination, six applicants took the identical examination for the position of District Chief…. Savage's score on the examination was sufficient to qualify him for a District Chief position …. There were several District Chiefs in violation of the residency ordinance at the time and had the City enforced the ordinance, there would have been at least six other District Chief positions to which Savage could have been promoted ….

According to Savage, [Fire Commissioner Joseph] Conant acknowledged in his presence that he was continuing an already established policy of not enforcing residency requirements because the City had demonstrated that it was not a priority; that, as the Fire Chiefs Association President, he argued to the City that residency should not be enforced against the District Chiefs because of the long history of non-enforcement; and that his hands were tied because it was the responsibility of the City's Human Resources Department to enforce residency, not his….

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[Captain Randolp] Blake, also a lifelong resident of Springfield, was hired by the Fire Department on April 10, 1989…. In 2018, Blake passed a Captain's examination, appearing second on the list behind Lieutenant Michael Kneeland ('Kneeland'), a white firefighter who was hired in July 2002 and had never lived in Springfield… Defendants selected Kneeland over Plaintiff for promotion to Captain…. Blake was the only individual on the certification list of firefighters who had passed the examination who was in full compliance with the residency law; the individual third on the list was another white firefighter, who did not live in the City….

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According to Blake, had the City enforced the residency ordinance as well as applicable Civil Service rules in March of 2018, two Captains positions would have opened for which he could have competed …. Blake also states that eight or more District Chiefs were in violation of the residency ordinance at the time, and if their employment had been terminated in compliance with the residency ordinance, a total of four positions would have been created per termination, creating a total of thirty-two promotional opportunities….

Read more about the Marc Savage and Randolph Blake v. The City of Springfield &Calvi case via Fastecase site.

Legal Lesson Learned: Residency ordinances can be difficult to enforce, particularly when Collective Bargaining Agreements have different provisions.

Note: For example, in 2018 the District Fire Chiefs union agreed that newly promoted District Chief must move into the city within one year of promotion. See also May 15, 2018 article, "Divided Springfield City Council approves long-contested district fire chiefs contract with residency clause." See Also May 14, 2018 Press Article from District Chief Vince Neffinger, President of the Springfield Fire Chiefs Association. "Time is now to approve contract for Springfield district fire chiefs (Guest viewpoint)."

Note: In Ohio, the Ohio General Assembly in 2016 enacted a statute that set aside all city residency requirements. In 2019, it was upheld by Ohio Supreme Court. Lima v. State. Firefighters and police can be required to reside in the county or the adjoining county. Ohio Revised Code, Section 9.481 | Residency requirements prohibited for certain employees.

File: Chap. 8 – Race Discrimination

IL: WHITE FF "REVERSE DISCRIMINATION" CASE DISMISSED – 3rd SHIFT CAPTAIN ROTATED 2 MORE DRIVERS TRUCK 19

On July 12, 2022, in David Stieglitz v. City of Chicago, the U.S. Court of Appeals for Seventh Circuit (located in Chicago) held (3 to 0) that trial court properly dismissed his lawsuit; his Captain (Black) wanted two additional drivers (Black) rotating on Truck 19 during his third shift. Plaintiff was the only white firefighter on his shift; firefighters paid $2.18 per hour bonus on shifts when they are assigned as drivers. Plaintiff filed an internal complaint, and Internal Affairs determined that 35 Chicago firefighters, including plaintiff, lacked required training certification to drive this truck per new General Order, and FD ordered that he not drive without the certification. He was suspended for only seven shifts (he only lost $350 in driver bonuses) when FD later decided he was "grandfathered" and didn't need the certification.

> "Stieglitz must show, however, that if he were not White, he would have been the sole regular driver of Truck 19 during his shifts. See *Ortiz*, 834 F.3d at 765. The evidence he proffered falls well short of such a showing. Stieglitz's claim comes down to his belief that he lost chances to drive because he is not Black. But he needs more than a 'personal belief[],' even if genuine, to create a factual dispute over whether he was the victim of race discrimination. *Abrego v. Wilkie*, 907 F.3d 1004, 1014 (7th Cir. 2018)."

Holding:

> "Furthermore, the City came forth with a neutral explanation for the driver rotation at the Chicago Avenue firehouse. [Captain] Clay explained that using a rotation was consistent with his own training and was a way to provide scheduling flexibility and make sure all firefighters learned the local geography and got driving experience. Stieglitz insists that these reasons are pretextual because Clay never told him that the rotation was implemented 'to make . . . more efficient and productive firefighters. But Clay was not required to share his reasoning with his subordinate, and his decision not to do so does not demonstrate that his reason is false. Owens v. Chicago Bd. of Educ., 867 F.3d 814, 815 (7th Cir. 2017). Stieglitz's inference about Clay's true motive-that he favored members of his own race-does not qualify as evidence that Clay lied. 'Speculation is no substitute for evidence at the summary judgment stage.' Bass v. Joliet Pub. Sch. Dist. No. 86, 746 F.3d 835, 841 (7th Cir. 2014)."

Legal Lesson Learned: To prove race discrimination, a white firefighter needs more than mere "inference" that Captain favored Black firefighters as drivers. It is, frankly, hard to believe this lawsuit was ever filed,

Note: Listen to Oral Argument before 7th Circuit – the judges were particularly questionable of plaintiff's claim.

File: Chap. 8 – Race Discrimination

TX: PROBATIONARY FF FIRED – FAILED TESTING AT STATION 8 – NO PROOF WHITE TREATED MORE FAVORABLY

On July 12, 2022, in The City of Houston v. Madison T. Garner, the City took an immediate appeal, and the Court of Appeals of Texas, Fourteenth District, held (3 to 0) that trial court should have granted defense motion for summary judgment. Plaintiff graduated from the Training Academy, and while at Station 8 he had another year as probationary firefighter and failed the Turnout Performance Standard. He claimed there were about five other probationary FF at Station 8, but failed to provide any evidence that "those outside his protected class [white FF] were treated more favorably." He also complained of various incidents at Training Academy and at Station 8 that create a hostile work atmosphere, but taking all into consideration, he has not shown that the acts were "sufficiently severe or pervasive to alter the conditions of [his] employment and create an abusive working environment." For example, while at the Training Academy his training Captain had him move a pallet of bricks about 40 feet for punishment for not having shaved close enough; but "another individual who was not African American was also told to move bricks at the same time as Garner for not shaving as well."

> "On September 27, 2016, Assistant Fire Chief Kevin Alexander ('Alexander') wrote a letter to the Executive Assistant Fire Chief, Richard Mann ('Mann'), recommending Garner's termination. Alexander's letter stated that Garner 'has demonstrated a pattern of failure during his evaluation periods and has failed to successfully meet the minimum requirements outlined in the Houston Fire Department's Probationary Firefighter Guideline which is a minimum requirement of his employment.' Alexander further wrote that Garner 'Failed to successfully pass Performance Standard 1 (Turnout Evolution) in the allotted time'; 'Initially failed Phase 2 final examination and had to retest, which he successfully passed'; 'Failed to successfully complete the MES EMT Credentialing process'; and 'Failed Phase 3 final examination requiring a retest.' Finally, Alexander noted that these facts indicated a violation of a 'Department/City' policy, which provides that 'A recommendation for termination may be submitted to the Fire Chief at any time the Probationary Firefighter demonstrates a pattern of failure during evaluation periods.'
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> Footnote 1: "In his petition, Garner states that he was terminated 'a week before finishing his 15-month probationary period.' However, the record indicates that Garner was terminated on October 13, 2016, and that his probationary period ended approximately one year later, on October 20, 2017."

Holding:

> "Garner complains of incidents at both the Training Academy and at Station 8 as bases for his hostile-work-environment claim. While at the academy, Garner complains that he was ordered by Captain Zapata to move a pallet of bricks from one area to another area about forty feet apart because Garner did not shave his facial hair close enough. In his deposition, Garner testified that he was required to have a clean shave of his facial hair so that his mask could seal, per HFD's policy; that Captain Zapata did not believe he was clean shaven on that particular day; and that he was ordered to move the pallets as a result. Garner testified that after the incident when he was asked to move the bricks, he presented Captain Zapata with documentation of a skin condition that prevented him from shaving close to his skin, and that another individual who was not African American was also told to move bricks at the same time as Garner for not shaving as well.
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> ***
> Finally, Garner alleged that Zapata tried to derail Garner's graduation from the academy by falsely claiming that Garner needed more volunteer hours the day before the graduation.
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> ***
> As to Garner's time at Station 8, he complains of the following incidents: Captain Paige and Captain Everett told Garner that 'due to [Garner's] education he was not a good fit for the Fire Department and he should seek employment elsewhere in areas of employment that were more suited for his educational background.
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> ***
> Garner was once asked to work out in full gear, outdoors, during a heat advisory, and Captain Paige told him it was retribution for a comment Garner made about Garner having more energy than the other firefighters at Station 8; his evaluations were not processed like everybody else's; Captain Paige purposefully rated Garner below a minimum passing score; and Captain Paige told Garner he failed the Turnout Performance Standard."

Legal Lesson Learned: No proof that White probationary FF treated more fairly.

Chap. 9 – Americans With Disabilities Act

Chap. 10 – Family Medical Leave Act, incl. Military Leave

Chap. 11 – Fair Labor Standards Act

Chap. 12 – Drug-Free Workplace, inc. Recovery

File: Chap. 13 – EMS

MN: MEDIC FIRED AFTER ER DOC REPORTED MISCONDUCT - NO MALICE BY MD – NO CASE – "VEXATIOUS LITIGANT"

On July 26, 2022, in Peter Grigg v. Andy Coil, the Montana Supreme Court held (5 to 0), that lawsuit by Peter Grigg, who was fired by Eagle EMS after being informed of his misconduct by Dr. Andy Coil, emergency room physician, was properly dismissed. The lawsuit alleges: "[Dr.] Coil verbally abused, harassed, and threatened him in front of emergency room patients, family, and staff, as well as in Grigg's ambulance, and continued to harass and threaten him 'throughout the month of May 2020.' Grigg's Affidavit claimed he filed incident reports with [Doctor Coil's] employer, St. Peter's Healthcare, and the Montana Board of Medical Examiners, to which [Dr.] Coil 'retaliated by placing tort on my employer,' causing Grigg to be terminated by his employer on June 2, 2020."

VEXATION LITIGANT – 11 APPEALS - FIRED BY ANOTHER EMS PROVIDER

> "Quite simply, Grigg's Petition and Affidavit in this case are a mess of conclusory statements, allegations, and legal conclusions…. In addition, we also note that at least one of the allegations in Grigg's complaint—that he 'has been unable to work his chosen profession, paramedic, since [Coil's] actions'—is not 'well-pled,; because it is simply false and is contradicted both by a filing made by Grigg in this case, which noted Grigg was last employed as a paramedic in January of 2021, several months after he was fired by Eagle EMS, and previous litigation before this Court regarding his termination from Beaverhead Emergency Medical Services on January 29, 2021. Grigg is no stranger to litigation, having filed eleven appeals before this Court since 2020, and has previously been cautioned "to refrain from filing duplicative, burdensome lawsuits or risk being declared a vexatious litigant." In re Marriage of Grigg, No. DA 22-0252, Order (Mont. May 24, 2022). Here, once again, Grigg has filed a lawsuit entirely devoid of merit and placed the burden of responding, both in the District Court and on appeal, on a party to whom Grigg has no cognizable legal claims."

Holding:

> "Grigg's Petition in this case makes a conclusory allegation that Coil 'ordered' Grigg 'to violate the federal HIPPA [sic] law,' and that Grigg was fired for refusing. Grigg's Petition and Affidavit provide no clarity on how Coil could "order" him to violate HIPAA or how Coil somehow ordering Grigg to violate HIPAA was calculated to cause Grigg damage in his business. In addition, Grigg's complaint expressly alleged Coil was 'negligent in his knowledge of the HIPPA [sic] law[.]' An assertion of negligence cannot support a tortious interference claim, which requires malice, Taylor, 170 Mont. at 56, 550 P.2d at 154, therefore Grigg has failed to state a claim.'
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> ***
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> Because [Dr.] Coil is a stranger to Grigg's contract with his [private EMS] employer, Grigg's complaint was actually one for tortious interference. In order to establish a claim of tortious interference with contractual or business relations, 'it must be shown that the defendant's acts (1) were intentional and willful, (2) were calculated to cause damage to

the plaintiff in his or her business, (3) were done with the unlawful purpose of causing damage or loss, without right or justifiable cause on the part of the actor, and (4) that actual damages and loss resulted.' *Grenfell v. Anderson*, 2002 MT 225, ¶ 64, 311 Mont. 385, 56 P.3d 326 (citing *Bolz v. Myers*, 200 Mont. 286, 295, 651 P.2d 606, 611 (1982)). 'The element of malice . . . meaning the intentional doing of a wrongful act without justification or excuse, is an essential element of an action for interference with contract. Such malice is not presumed and cannot be inferred from the commission of a lawful act." *Taylor v. Anaconda Fed. Credit Union*, 170 Mont. 51, 56, 550 P.2d 151, 154 (1976).

Legal Lesson Learned: Plaintiff is fortunate that in American legal system, "pro se" plaintiffs are not normally help liable for filing a meritless case.

File: Chap. 13 – EMS

OH: MOTORCYCLE ACCIDENT – PATIENT FLOWN LEVEL 1 TRAUMA - NOT DRIVEN LEVEL III – FOLLOWED PROTOCOL

On July 22, 2022, in Cynthia Tillman, Administrator of the Estate of Eric P. Tillman v. Kelly M. Mantz, et al., the Court of Appeals of Ohio, Sixth District (Erie), 2022-Ohio-2527, held 3 to 0 that the trial court properly granted summary judgment to the EMS personnel and to North Central EMS (NCEMS). The plaintiff in this case, was flown by a Life Flight ambulance to Level III trauma center in Toledo and survived. Eric Tillman was flown by second Life Flight ambulance to the trauma center where he died. The plaintiff's lawsuit includes affidavit of Jeff Durgin, M.D, who criticized EMS for not transporting Eric Tillman by ambulance to a Level I trauma center 15 minutes away, and for not taking vitals every 15 minutes prior to transport. [EMS run report showed one set of vitals taken: 5:25 p.m. at scene; two IVs started at 5:30 p.m.; set of vitals recorded 5:34 p.m.; transferred care to Life Flight 5:56 p.m.].

> "On April 9, 2017, Cynthia Tillman, and her husband, Eric, both sustained serious injuries as a result of a "t-bone" collision with the vehicle of Kelly Mantz at the intersection of State Route 113 and State Route 61 in Erie County. Mantz failed to yield at the intersection and pulled into the path of the Tillman's motorcycle, traveling around the posted speed of 55 m.p.h. Both the driver, Eric Tillman, and his passenger, Cynthia Tillman, were thrown from the motorcycle. The deputy who arrived first at the scene recognized a motorist who had stopped for the accident as a nurse-practitioner. He asked for her opinion regarding the couple's condition, and she indicated the couple's injuries could be life-threatening. The deputy conveyed this information to the sheriff's department dispatcher. Fisher-Titus Affiliated Services, d.b.a. North Central EMS (NCEMS) sent two ambulances to the scene. Paramedic Dana Brown and EMT-basic Amanda Hanneman received the call around 5:11 p.m., and Brown requested a Life Flight helicopter while en route, based on the report of an "auto vs. motorcycle" accident and his knowledge of the traumatic injuries that often result. Brown and Hanneman arrived on scene within minutes. Brown attended to Eric Tillman, while Hanneman attended to Cynthia Tillman. At Brown's request, Hanneman requested a second

helicopter. The NCEMS protocol did not require a call to medical control for permission prior to a request for Life Flight."

Holding:

"The [Ohio trauma] protocols [Ohio Revised Code 4765.40(A)(2) and (D), and Ohio Adm. Code 4765-14-05(A)], require a determination of an appropriate facility based on several factors. In other words, first responders must make a choice in order to comply with the triage protocols. Appellants' challenge, accordingly, is not about a violation of the protocols, but rather, about the choice pursuant to those protocols in determining Eric Tillman needed helicopter transport to a Level I trauma center. Furthermore, while appellants contend Brown and others had no discretion in this regard, or no choice, they provided no legal authority to support this position.

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Appellants support their assertions with the expert affidavit of Jeff Durgin, M.D., who opined that a reasonably prudent paramedic or EMT would have taken vital signs at least once every 15 minutes, and the standard of care required the NCEMS team to transport Mr. Tillman to the Level III trauma center for stabilization. Dr. Durgin had no opinion regarding Brown's role in contributing to Life Flight's delay in transport, but he concluded that the emergency services provided were done so 'in a manner consistent with willful misconduct,' leading to the death of Mr. Tillman.

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At best, Dr. Durgin's affidavit provides evidence of breach of the applicable standard of care by Brown and others in treating Mr. Tillman. The pertinent question, however, is whether the acts constituting breach can be construed for summary judgment purposes as demonstrating willful or wanton misconduct…. Negligent acts do not become willful or wanton acts 'by virtue of sheer volume.' Id. Additionally, willful and wanton acts do not differ from negligence by degree, but by definition."

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Appellants must also demonstrate something more that negligence to demonstrate willful or wanton misconduct of NCEMS employees, in order to impute that misconduct to NCEMS. Because the record, construed in appellants' favor, demonstrates negligence, at best, appellants failed to demonstrate an exception to immunity based on willful or wanton misconduct. Accordingly, Brown and NCEMS are entitled to immunity under R.C. 4765.49(A) and (B), and the trial court properly granted summary judgment. We find appellants' sole assignment of error not well-taken."

Legal Lesson Learned: Helpful decision on EMS following trauma protocol.

Note: See helpful resources on Ohio trauma protocol. "Trauma System Overview."

> "The Ohio Trauma System is designed to get severely injured patients to the 'right hospital, in the right manner, in the right amount of time.' These three factors increase the patient's chances of survival while minimizing chances of

suffering severe disabilities and death. Trauma is the leading cause of death for people between the ages of 1 and 44 years and is a leading cause of death and disability among all age groups. Research studies of other state trauma systems have shown a person's chances of dying or suffering a severe disability drop sharply if they are injured in a state with an organized trauma system like the Ohio Trauma System."

File: Chap. 13 – EMS

MI: CARDIAC - MONITOR CALLED FOR CPR – NO CPR GIVEN, PATIENT DIED – "GROSS NEGLIGENCE" CASE TO PROCEED

On July 21, 2022, in Angela Hodges, Personal Representative of the Estate of Patrick Antonio Clemons-Hodges v. City of Detroir, Julian Holts and Michael Morgan, et al., the Court of Appeals of Michigan, held (3 to 0; unpublished opinion) that the trial court properly denied the City's motion for summary judgment. The City took an immediate appeal and asserted that the trial court erred when it refused to grant the City governmental immunity from claims arising from the gross negligence of paramedics it employs. Court of Appeals held, "We disagree and affirm."

> "In the early morning hours of January 4, 2019, 30-year-old Patrick Antonio Clemons-Hodges thought he was suffering a heart attack. He called emergency services, and defendants Julian Holts and Michael Morgan were dispatched to Clemons-Hodges' home at around 4:00 a.m. to assist him. Upon their arrival, however, they did not immediately take Clemons-Hodges' vital signs, and instead encouraged him to stand up and walk because they believed he was too large for them to lift. Clemons-Hodges did so with the help of a walker. When Clemons-Hodges eventually laid down on a gurney, he slumped over and became unresponsive. Morgan and Holts proceeded to load Clemons-Hodges into the ambulance, connected him to a cardiac-monitoring device, and drove to DMC Sinai Grace Hospital. Along the way, the cardiac monitor alerted that CPR and other life-saving measures should be started immediately, but the data recorded by the device showed that no such treatment was performed before arriving at the hospital. Clemons-Hodges was pronounced dead at the hospital after resuscitation efforts failed."

Holding:

> "The City argues on appeal that it is immune from plaintiff's claims under the governmental tort liability act (GTLA), MCL 691.1401 *et seq.*, and the emergency medical services act (EMSA), MCL 333.20901 *et seq.* We disagree.
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> The GTLA provides, in relevant part:
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> (1) Except as otherwise provided in this act, a governmental agency is immune from tort liability if the governmental agency is engaged in the exercise or discharge of a governmental function . . .
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> * * *

(4) This act does not grant immunity to a governmental agency or an employee or agent of a governmental agency with respect to providing medical care or treatment to a patient, except medical care or treatment provided to a patient in a hospital owned or operated by the department of community health or a hospital owned or operated by the department of corrections and except care or treatment provided by an uncompensated search and rescue operation medical assistant or tactical operation medical assistant. [MCL 691.1407(1), (4).]

By its plain terms, MCL 691.1407(1) provides broad immunity for governmental units, like the City, engaged in a governmental function unless an exception to that immunity is provided for in the act. Plaintiff is seeking to hold the City liable for medical care that its employees, Holts and Morgan, provided to Clemons-Hodges while Clemons-Hodges was a patient. Such a claim clearly falls into the medical-care exception to governmental immunity provided in MCL 691.1407(4) and so the immunity provided in MCL 691.1407(1) is inapplicable. In short, the GTLA 'does not grant immunity' to the City in this case because MCL 691.1407(4) applies.

Footnote 4: The City briefly argues that the GTLA and the EMSA conflict, but it does not sufficiently develop the argument to warrant addressing it. See Mitcham v City of Detroit, 355 Mich. 182, 203; 94 N.W.2d 388 (1959) (explaining that a party abandons an issue on appeal by failing to sufficiently brief it). Moreover, there is no apparent conflict between the EMSA and the GTLA in their current forms. MCL 691.1407(4) provides that *the GTLA* does not grant immunity for governmental agencies "with respect to providing medical care or treatment to a patient," while MCL 333.20965(1) provides that *the EMSA* grants immunity for emergency medical workers and their governmental units except in cases of gross negligence."

Legal Lesson Learned: This lawsuit will now proceed to pre-trial discovery on thr allegation of "gross negligence."

Note: Some states have "Willful or Wanton Misconduct" standard. For example, Ohio Revised Code: Section 4765.49 | Emergency medical personnel and agencies – immunity. "(A) A first responder, emergency medical technician-basic, emergency medical technician-intermediate, or emergency medical technician-paramedic is not liable in damages in a civil action for injury, death, or loss to person or property resulting from the individual's administration of emergency medical services, unless the services are administered in a manner that constitutes willful or wanton misconduct."

File: Chap. 13 – EMS

NY: FDNY MEDICS SUSP - AUSTRALIAN TV FILMED ON COVID EMS RUNS – 1st AMEND. RETALIATION PROCEED

On July 8, 2022, in President Oren Barzilay, President of Uniformed EMTs, Paramedics, and Fire Inspectors, Local 2507, et al. v. City of New York, et al., U.S. District Court Judge Lewis J. Liman, U.S. District Court for Southern District of New York, held that "Plaintiffs are entitled to a jury trial on their § 1983 claims for First Amendment retaliation against all Defendants and on their related free-speech claim under the New York State Constitution against the City on a theory of respondeat superior. *** Here, there is credible evidence that suggests Defendants restricted or suspended the individual Plaintiffs for a permissible reason, but there is also evidence from which a reasonable jury could find that the Defendants did so simply because they were employees who engaged in protected speech. The role of the Court is not to weigh that evidence and determine which is the more likely scenario. That must be left to the jury. *** On the record before it, the Court cannot conclude as a matter of law that the FDNY was justified by the governmental interest it asserts in taking action against Bonilla, Nunez, or Pfeiffer based on these comments, which are the only parts of their protected speech that could even arguably give rise to a concern about revealing PHI, or based on the mere fact that they interacted with the media to make these comments."

> "Commencing in 2019, Local 2507 launched a publicity campaign to address the wage disparity of its members and the difficulties faced by Union members in their performance of EMS services in and around New York City…. With the onset of the COVID-19 pandemic in March 2020, the campaign expanded to address the stress placed on members working during the pandemic and the lack of personal protective equipment ("PPE") available to EMS during the pandemic…. At the request of [Union President] Barzilay, [paramedics] Pfeiffer and Bonilla agreed to participate in a series of press videos and articles in April 2020 about the COVID-19 pandemic and how it was being handled by the FDNY…. Nunez also agreed to be interviewed by the Australian Broadcasting Corporation ("Aus. BC") at the request of [Executive Board Member John] Rugen…. In early April 2020, Local 2507 received a request from a reporter at Aus. BC for help in reporting on the workday burdens of FDNY EMTs and paramedics. The reporter asked for help following FDNY EMTs and paramedics at work, and Local 2507 agreed to provide that assistance.
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> On April 20, 2020, Aus. BC published a video/article entitled 'Behind Enemy Lines New York….' Pfieffer and Nunez were featured in the video that accompanied the article; the video showed EMS members walking down a residential hallway and entering an apartment, with Pfeiffer and Nunez in their EMS uniforms performing patient care…. The video also showed the patient being removed from the residential building and placed into an ambulance and Nunez making a telephone call, and it was accompanied by an overlay text describing the patient, the patient's physical condition, the interior of the apartment, the treatment being provided to the patient, and the reporter's interpretation of the events. [Watch the Facebook video.]
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> On April 26, 2020, shortly after the referrals [to FDNY Department of Investigations], Rugen, Pfeiffer, Nunez, and Bonilla were notified that they were restricted from performing patient care/field-related duties and from driving any FDNY vehicles until

further notice…. Upon receiving notification by DOI that it would not be investigating the matter, Velez directed Kodzoman to lift the restriction placed on Nunez, Bonilla, and Pfeiffer…. On June 17, 2020, following the Saunders interview with Rugen, the restrictions on Pfeiffer, Nunez, and Bonilla were lifted and they were informed that they could resume performing patient care/field related duty and driving Department vehicles."

Holding:

"Under the *Pickering* balancing test [Pickering v. Board of Education, 391 U.S. 563 (1968)], 'defendants may . . . escape liability if they can demonstrate that . . . the plaintiff's expression was likely to disrupt the government's activities and that the harm caused by the disruption outweighs the value of the plaintiff's expression." *Skehan v. Vill. of Mamaroneck*, 465 F.3d 96, 106 (2d Cir. 2006), *overruled on other grounds by Appel v. Spiridon*, 531 F.3d 138, 140 (2d Cir. 2008).

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For much the same reasons as Rugen's speech was on a matter of public concern, so was the speech of Nunez, Pfeiffer, and Bonilla. They each spoke about the emotional toll that responding to the pandemic was having on their lives. They discussed the fear they faced about potentially passing on the virus to their loved ones and how that has caused them to adjust their behaviors. And they spoke about how people were reacting to COVID illnesses and about their views on individuals staying home to "ride [] out" their illnesses instead of going to the hospital with a mild case of COVID. Dkt. No. 56-3. The speech addressed the general impact of COVID on emergency workers. As explained with respect to Rugen, whether their speech was motivated by personal grievances as opposed to a desire to educate the community about a matter of public concern is not dispositive, as "a person who is 'motivated by a personal grievance' can still 'be speaking on a matter of public concern.'" *Bourne*, 2017 WL 1138125, at *5 (quoting *Sousa*, 578 F.3d at 173-74).

Legal Lesson Learned: The U.S. Supreme Court's *Pickering* "balancing" decision has led to lots of litigation about right of EMS, fire and police officers to "go public" with concerns.

Note: Court discussed this Fire Marshal decision.

"In *Specht* [Specht v. City of New York, No. 20-4211 (2d Cir. 2021),] the Second Circuit held that a fire marshal's internal email to other fire marshals concerning the course of a fire investigation and pressure from supervisors to prematurely terminate his work and file a false report regarding the cause for the fire constituted "internal workplace grievances, not matters of public concern." 15 F.4th at 601. However, the Circuit held that the marshal's complaint to the New York City Department of Investigation, his Notice of Claim with the City, his meeting with representatives from the District Attorney's office, and his communications with the local press about his investigation and his supervisors' demands all touched on matters of public concern since his reports "to outside agencies . . . implicate[d] matters of public importance" and "relate to possible governmental malfeasance, public safety, as well as to the public fisc." *Id.* at 601-02. Further, the Circuit found that the fire marshal's refusal to file a false report

> touched on matters of public concern because, just like his reports to outside agencies, the action "pertain[ed] to . . . potentially serious governmental misconduct." *Id.* at 602. Finally, the Circuit held that the marshal's reports to outside agencies and refusal to file a false report did not occur in his capacity as an employee because neither was "part-and-parcel" of his duties, *Id.* at 604 (internal quotation marks omitted); his actions more accurately described a citizen refusing to violate the law and reporting on government misconduct to the public, *Id.* Thus, the fire marshal's speech constituted protected First Amendment activity."

File: Chap. 14 – Physical Fitness [also filed, Chap. 7]

WI: FEMALE FAILS APPLICANT PHYSICAL FITNESS TEST – NOT CPAT, BUT MEETS EEOC GUIDELINES – NO CASE

On July 20, 2022, in Catherine Erdman v. City of Madison, U.S. District Court Judge William M. Conley dismissed the lawsuit, findings that the Madison Fire Department in their 2014 applicant testing did not violate Title VII of the Civil Rights Act of 1964, even if more female failed compared to fire departments using the CPAT, since the tests were developed by consultants to assess actual job duties and meet the EEOC's Uniform Guidelines on Employee Selection Procedures. Plaintiff's lawsuit claimed that she would have passed CPAT [Madison FD's pass rate for women was 14%; the pass rate for women taking CPAT at Austin, Teas FD was 48%]. Plaintiff failed the "pike pole" which required applicants to stand at least 18 inches back from the ceiling being pulled down with a pike pole to account for safety concerns with test takers standing directly under the ceiling; the pole was long enough to allow applicants of different heights to adjust the hold to account for that differential.

> A total of 1887 applicants participated in the 2014 recruitment. Of these, 1723 were men, 146 were women, and 18 were not clearly identified by gender…. Four hundred and ninety-nine applicants appeared to take the PAT -- 471 men and 28 women. Of these, 404 applicants -- 395 men, four women, and five not clearly identified -- successfully completed the PAT…. [T]he overall pass rate for women who appeared to take the test (4/28 or 14.29%) was about 17% of the pass rate for men who appeared to take the test (395/471 or 83.86%) …. Conversely -- the women's failure rate -- defined as applicants who met the minimally acceptable score for each of the seven events, but failed to meet the cut-score for at least five of the seven events -- of 1 out of 28 (3.57%), for the test was roughly 120% that of men's failure rate of 14 out of 471 (2.97%)…. Finally, the women's *disqualification* rate -- defined as those who appeared to take the test and did not quit -- of 20 out of 25 (80%) was 748% that of men's disqualification rate of 49 out of 458 (10.69%).
>
> ***
> Debra Amesqua became the Madison Fire Department Chief in 1996. Following her appointment, Chief Amesqua engaged Landy, Jacobs and Associates ("LJA"), to develop the Department's PAT in 1997… Directed by Amesqua to develop a test that correlated with the tasks on the job, LJA developed the PAT under the Uniform Guidelines on

Employee Selection Procedures (1978), 29 C.F.R. § 1607, *et seq*…. In particular, Rick R. Jacobs, Ph.D., an industrial psychologist, was one of the individuals who developed the PAT in conjunction with exercise physiologists. Jacobs had developed physical ability tests for a little more than a decade before taking on the task of developing the PAT at issue here.

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Following Chief Steven Davis's appointment to replace Chief Amesqua in late 2012 or early 2013, Ergometrics & Applied Personnel Research, Inc. ("EAPRI") was retained by the Madison Fire Department to validate the PAT again. EAPRI's President, Carl Swander, Ph.D., and his team then conducted a "content validation study." Like the earlier studies by LJA, this study was conducted under the Uniform Guidelines, among other professional publications."

Holding:

"On October 15 and 16, 2018, the court held a trial to the bench on plaintiff Catherine Erdman's claim that the City of Madison, and more specifically its Fire Department, adopted a physical abilities test ("PAT") that has a disparate impact on women in violation of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e, *et seq*. For the reasons explained below, the court now concludes that: (1) plaintiff met her burden of proving that the Fire Department's PAT has an adverse impact on female applicants; (2) defendant met its burden of proving that the PAT is job-related and consistent with business necessity; and (3) plaintiff did not meet her burden of proving that the alternative physical abilities test she identifies, the Candidate Physical Abilities Test ("CPAT"), will serve the Fire Department's legitimate needs. Accordingly, the court will find in defendant's favor.

***

Regardless, defendant proffered credible evidence of numerous burdens associated with adopting the CPAT as an alternative test, including: (1) the need to perform a transferability study; (2) the PAT having been a good predictor of outcome historically, as defined by a high passage rate out of the academy; (3) the Department's comparatively high percentage of female firefighters, leading to a possible inference that the CPAT may have a favorable disparate impact on women but results in the washing out of ultimately unsuccessful applicants after the additional expenditure of time and money at the academy phase; and (4) certain elements of the PAT were designed specifically for Madison, in light of characteristics of the city, the Department's equipment or other considerations, including safety."

Legal Lesson Learned: This alternative test passed EEOC "Uniform Guidelines on Employee Selection Procedures (1978), 29 C.F.R. § 1607, *et seq.*"

Chap. 15 – CISM, incl. Peer Support, Employee Assistance

File: Chap. 16 – Discipline

TX: LT. FIRED, REINSTATED AFTER 4 YRS – HIS INCOME DURING SUSPENSION MORE THAN FF - PARTIAL BACK PAY

On July 28, 2022, in Fabian Scott Butler v. City of Big Springs, Texas, the TX Eleventh Circuit Court of Appeals reversed a trial court that which had agreed with City that Lt. Butler was not entitled to any back pay. Court of Appeals held that Butler is entitled to back pay for any FD pay periods where his outside income was less than he would have made on FD.

> "Appellant was indefinitely suspended from the Big Spring Fire Department on April 17, 2015. Appellant was retroactively reinstated to employment with the fire department on September 23, 2019, with his reinstatement date effective May 1, 2015. At some point after the four-year suspension began, and before his reinstatement, Appellant found other employment and, overall, earned more in wages, salary, and unemployment compensation benefits than he would have earned working for the Big Spring Fire Department."

Lt. Butler was terminated [FD terminology was "suspended for indefinite period"] on April 17, 2015 after he responded on EMS run to the Federal Correction Institute (FCI) at Big Spring. The FD said Lt. Butler was rude and unprofessional after he was not let through security because he did have his ID. He appealed to a Hearing Officer who held a hearing in August 2015 and reduced his indefinite suspension to a one-week suspension. Lt. Butler testified he had 9 years on FD; no prior suspensions; is African American eligible for promotion to Deputy Chief.
Read the Channel News 9 article.

> "The hearing officer determined that the incident occurring at FCI was not so extreme that it justified an indefinite suspension. He then examined Butler's disciplinary record involving eleven incidents occurring over approximately a five-year period. The hearing officer determined that, out of the previous eleven incidents, Butler was only formally disciplined on two occasions. As for the remainder of the incidents, the hearing officer characterized them as 'counselings which warn against future violations (for arguing or hostility or rudeness); notations that similar complaints would not be tolerated; that additional corrective action could result; and even one that sends [Butler] home for the rest of his shift." Aug. 9, 2018, Court of Appeals of Texas, Eastland.

The City appealed, won the appeal on Aug. 9, 2018; the Court of Appeals of Texas, Eastland held:

> "The trial court subsequently entered a final judgment vacating the hearing examiner's decision and remanding the matter back to the hearing examiner with instructions to reopen the evidence 'with regard to the proper penalty for the violation of the Rules and Regulations of the Big Spring Fire Department.' Butler challenges the trial court's summary judgment in a single issue. We affirm."

On September 23, 2019, Lt. Butler was reinstated on the fire department, with his seniority date retroactive to May 1, 2015. [Not clear how he came to be rehired.]

Holding:

> "To faithfully adhere to both the doctrine of mitigation and the language of the Texas statute, it is most appropriate to calculate an award of full compensation by a review of earnings and a loss of earnings per pay period. Here, Appellant is entitled to an award of back pay as authorized in Section 143.053(f)(1) to be calculated per regular pay period. In any pay period where the wages earned during suspension were less than what he would have earned in his position with the City, Appellant is entitled to the deficit. There is no offset statutorily authorized from any other pay period." To faithfully adhere to both the doctrine of mitigation and the language of the Texas statute, it is most appropriate to calculate an award of full compensation by a review of earnings and a loss of earnings per pay period. Here, Appellant is entitled to an award of back pay as authorized in Section 143.053(f)(1) to be calculated per regular pay period. In any pay period where the wages earned during suspension were less than what he would have earned in his position with the City, Appellant is entitled to the deficit. There is no offset statutorily authorized from any other pay period.

Legal Lesson Learned: Progressive discipline; the offense needs to be extremely serious to terminate a career firefighter who has never previously been suspended.

> Note: Not clear why the fire department rehired the plaintiff on Sept. 23, 2019. A search of Federal Court records reflects that on Sept. 4. 2015, the Plaintiff filed a lawsuit against the fire department in U.S. District Court, Northern District of Texas (Abilene Division), and on October 17, 2017 a jury held for the fire department. Case Title Butler v. City of Big Spring.pdf.

File: Chap. 16 – Discipline

MA: BACKGROUND CHECK – FD APPLICANT ARREST 7 YRS PRIOR HIT GIRLFRIEND – NO CONV / CAN SUE REPORT CO.

On July 7, 2022, in Gerald Meuse v. National P.I. Services, LLC et al., U.S. District Court judge Allison D. Burroughs, U.S. District Court for the District of Massachusetts, held that the plaintiff may file an amended complaint against the defendant Consumer Reporting Agency (CRA) under the "seven-year lookback" limits in the federal Fair Credit Reporting Act, and also prohibitions on use of arrest records under Massachusetts laws. "Section 1681c(a)(2) provides that CRAs must exclude from consumer reports '[c]ivil suits . . . and records of arrest that, from the date of entry, antedate the report by more than seven years[.]' The Amended Complaint asserts that Defendant violated § 1681c(a) by 'disclos[ing] [in the October 2019 Report] that in 2011 Plaintiff was arrested….' Thus it plainly alleges the inclusion of information-his arrest-prohibited by § 1681c(a)(2). Therefore, the Court finds that Plaintiff has plausibly alleged a violation of § 1681c(a)(2)."

"In September 2019, Plaintiff applied for a firefighter position with the City of Everett Fire Department (the 'Fire Department') in Everett, Massachusetts…. As part of the application process, the Fire Department procured a background screening report (the 'Report') about Plaintiff from Defendant…. In the Report, Defendant disclosed that in November 2011 Plaintiff was arrested and charged by the Norfolk Virginia Police with assaulting his former girlfriend ('Ms. Mays') and violating a restraining order, and also that the charges were later dropped…. The Report also stated that when [Consumer Reporting Agency's] investigator asked Plaintiff if he had been arrested by the Norfolk Police or 'put hands on' Ms. Mays, he denied both…. Because the charges against Plaintiff were ultimately dismissed, the incident did not result in a conviction.

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Due at least in part to the criminal history contained in the Report, the Fire Department bypassed Plaintiff for the firefighter position…. Plaintiff appealed the hiring decision to the Civil Service Commission of the Commonwealth of Massachusetts ('CSC') in March 2021…. The CSC appeal is still under advisement…. Plaintiff alleges that, regardless of the outcome of the CSC appeal, he has incurred economic losses as well as emotional distress and damage to his reputation as a result of the information improperly disclosed in the Report."

Holding:

"Taking the allegations in the proposed amended complaint as true, as is required at this phase of litigation, Defendant, as an agent of Plaintiff's prospective employer, asked Plaintiff to provide information about a charge and arrest for which no conviction resulted… At the motion to dismiss stage, this is sufficient to plead a violation of chapter 151B, § 4(9). Thus Plaintiff's proposed amendment to add a cause of action under Mass. Gen. Laws. ch. 151B, § 4(9) is GRANTED."

Legal Lesson Learned: Fire & EMS departments may hire consumer reporting agency to conduct a background check on an applicant; the report must comply with federal and state laws about arrests without convictions.

Note: Some states prohibit prospective employers from asking applicants about arrest records where there was no conviction. The Court reviewed Massachusetts law.

"Chapter 151B, § 4(9), in part, prohibits 'discriminat[ion] against any person by reason of his or her failure to furnish such information through a written application or oral inquiry or otherwise regarding: (i) an arrest, detention, or disposition regarding any violation of law in which no conviction resulted.' The statute also prohibits an employer, or their agent, from requesting any information regarding an arrest that did not result in a conviction. *Id.* The statute does not, however, prohibit employers from obtaining information about criminal charges from another source. Indeed, the Supreme Judicial Court of Massachusetts has held that Chapter 151B, § 4(9) was intended 'to protect employees from such requests from their employers and not to proscribe employers from seeking such information elsewhere.' *Bynes v. School Comm. of Boston,* 411 Mass. 264, 268 (Mass. 1991)."

Under Ohio law:
"Ohio employers are required to **provide advance, written notice** of their intent to conduct pre-employment background checks. The FCRA also requires employers to secure their applicants' written consent before conducting employment background checks. If a background check reveals negative information in Ohio, employers must adhere to the two-step adverse action process before a final hiring decision is made.
***
Public employers must follow the **state's ban-the-box law**. The Department of Administrative Services issued policy HR-29 in 2015. This law prohibits public-sector employers from asking questions about criminal history information during the early phases of the hiring process.

Under ORC § 2953.32, eligible offenders may petition the court to have certain criminal records sealed or expunged. Employers **are not allowed to ask applicants or employees** about sealed, expunged, pardoned, or erased records." Read more about Ohio Background Check: A Complete Guide (2022) via iprospectcheck site.

File: Chap. 17 – Arbitration

OH: CBA IMPASSE – FACT-FINDING, ARBITRATION, COURT - 16 EMS CAPTAINS WIN 2% PAY INCREASE BACK TO 2016

On July 21, 2022, in City of Cleveland v. Communication Workers Of America, Local 4340, the Court of Appeals of Ohio, Eighth District (Cuyahoga County), 2022-Ohio-2498, held 3 to 0 that trial court properly upheld the arbitrator's decision; 12 EMS Captains entitled to 2% pay increase for 2016-2019 period based on fact-finders' Final Report.

> "The union is the exclusive bargaining representative for the city's 16 full-time emergency medical technician supervisors, known as Captains, in the Cleveland Division of Emergency Medical Services. The city and the union have been parties to a series of collective bargaining agreements ("CBA") negotiated under Ohio's Public Employees' Collective Bargaining Act, R.C. Chapter 4117.
>
> R.C. Chapter 4117 creates a process for the negotiation of a CBA and the resolution of any bargaining impasse. If the parties reach an impasse, as happened in the case at bar, the matter proceeds to a fact-finding procedure pursuant to R.C. 4117.14, which involves a third-party neutral person, a "fact-finder," who conducts an evidentiary hearing and issues a report with recommended terms. Fact-finding culminates in a final, written CBA that the parties execute and implement."

Holding:

> "[The trial court judge found that the arbitrator's decisions on the issues of contract formation and arbitrability were supported by the record, statute, and by SERB's dismissal of the parties' ULP claims."

***

We agree with the sound reasoning of the trial court. The arbitrator's conclusions that the 2016-2019 CBA entitled the Captains to pay increases effective April 1, 2017, and uniform allowance increases back to April 1, 2016, were based on the wage and uniform allowance terms of the fact-finding report and the parties' bargaining history and was guided by established principles of contract law and arbitral labor law. The arbitrator, in resolving the parties' disagreement on when the wage increases were effective under the fact-finding report concluded that 'Specific Effective Dates' were omitted terms in the report. To address the omitted terms, the arbitrator correctly relied on the Restatement (Second) of Contracts and arbitral law to guide his analysis. The arbitrator, to interpret the effective dates of the new wage schedule and uniform allowance increases, examined the factfinder's recommendations and the record of the fact-finding to discern intent. The arbitrator interpreted the 2016-2019 CBA based on the fact-finder's recommendations and the record.

***

The CBA at issue in this case was to be effective from April 1, 2016, through March 31, 2019 ("2016-2019 CBA"). The fact-finding report that established the terms of the CBA was issued on March 1, 2019. The union voted to approve the fact-finder's recommendations. On March 14, 2019, the State Employment Relations Board ("SERB") notified the parties that the fact-finding report was accepted and that negotiations for the 2016-2019 CBA were settled. The city's counsel prepared a draft of the 2016-2019 CBA incorporating the accepted fact-finding recommendations. The union alleged that the city's draft of the 2016-2019 CBA differed significantly from the union's interpretation of the fact-finder's wage recommendations and would not execute the CBA.

***

On February 15, 2021, the arbitrator issued his opinion and award, sustaining the union's grievance in part….

The arbitrator summarized his conclusions, as follows:
[A] reasonable interpretation of the Final Report, and the record that preceded it, results in the following:

> (1) Effective April 1, 2016, no wage increase for the Captains, consistent with the negotiating results of the other City bargaining units.
> (2) Effective April 1, 2017, the New Wage Schedule is implemented. Thereafter, the 2% wage increase is applied at each step of the New Wage Schedule.
> (3) Effective April 1, 2018, the 2% wage increase is applied to each step of the New Wage Schedule. The agreed upon $3,000 Equity
> (4) Adjustment is to be added to each step of the New Wage Schedule, after the application of the 2% wage increase.

> Regarding the uniform allowance, citing the fact-finder's written recommendation, the arbitrator noted the allowance increase was to be effective 'during the term of the new contract' [April 1, 2016, to March 30, 2019].

Legal Lesson Learned: The Ohio Revised Code provides for fact-finding for resolution of bargaining impasse; the Courts will generally uphold.