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September 2022 – FIRE & EMS LAW NEWSLETTER

[NEWSLETTER IS NOT PROVIDING LEGAL ADVICE.]

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13 RECENT CASES

SEE ONLINE LIBRARY OF CASE SUMMARIES:

Fire& EMS Law – Recent Case Summaries/ Legal Lessons Learned

NEWSLETTERS: If you would like to be added to UC Fire Science listserv, just send him an e-mail. Check out all the Fire- EMS Law Monthly Newsletters.

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

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OH: STOPPED TRAINS BLOCKING AMBULANCES – HONDA PLANT MARYSVILLE – CAN'T ENFORCE, FED. STATUTE

On Aug. 17, 2022, in The State of Ohio v. CSX Transportation, Inc., Slip Opinion No. 2022-Ohio-2832, the Ohio Supreme Court held (5 to 2) that federal law prohibits enforcement of state statute imposing $1,000 fine. In 2018, the state charged CSX on five occasions with violating Ohio R.C. 5589.21 [maximum of five minutes blocking] for blocking roadways for 45 minutes to one hour near the Honda plant, but the trial court judge in Marysville Municipal Court dismissed the charges. The Court of Appeals reversed, and CSX appealed to Ohio Supreme Court which agreed with trial court. "We acknowledge the significant danger to the public that is created when stopped trains obstruct the movement of first responders across railroad tracks. However, the regulation of railroad transportation is a matter of federal law, and the federal government alone has the power to address the threat to public safety caused by blocked crossings. Because R.C. 5589.21 is preempted, it cannot be enforced against CSX. The trial court correctly dismissed the charges in this case."

> In this case, the state charged appellant, CSX Transportation, Inc. ("CSX"), with violating R.C. 5589.21 on five occasions, but the trial court concluded that the Termination Act and the Safety Act preempted Ohio's antiblocking statute and dismissed the charges. The appellate court rejected the argument that federal law preempted R.C. 5589.21 and reversed the dismissal of the charges. However, because R.C. 5589.21 is preempted by federal law, we reverse the judgment of the Third District Court of Appeals and reinstate the trial court's dismissal of all the charges brought against CSX for violating R.C. 5589.21."
>
> [From Dissenting Opinion.] "In Marysville Municipal Court case No. 18CRB440, the state alleged that a stationary CSX train had blocked the intersection of Paver Barnes Road at Shirk Road for at least one hour. In Marysville Municipal Court case No. 18CRB509, the state alleged that a stationary CSX train had blocked the intersection of Bear Swamp Road at Benton Road for at least one hour. In Marysville Municipal Court case No. 18CRB606, the state alleged that a CSX train had blocked Warner Road in Jerome Township for more than one hour. In Marysville Municipal Court case No. 18CRB924, the state alleged that a CSX train had blocked Bear Swamp Road near the intersection of Benton Road for approximately 45 minutes. Finally, in Marysville Municipal Court case No. 18CRB1048, the state alleged that a CSX train had blocked a crossing on State Route 739 near the intersection of Bear Swamp Road for more than one hour. The charging affidavit in that case also cited an instance when Liberty West Road was simultaneously blocked by a stationary CSX train."

Holding:

> "Because R.C. 5589.21 regulates how long a train may remain stopped across a railroad crossing for switching, loading, or unloading operations at an industrial customer's plant or to let another train pass, the statute usurps the exclusive jurisdiction of the board and therefore is preempted by the Termination Act. Compliance with the state statute in any

> practical way would force CSX to move its railroad lines and facilities so that a train may load, unload, or switch cars without blocking a crossing. However, the 'construction, acquisition, operation, abandonment, or discontinuance' of railroad facilities are also matters committed to the board and are not subject to state regulation."

Legal Lesson Learned: This case illustrates the power of railroad lobbyists to influence Congress in passing a statute that preempts state laws.

> Note: See article - Aug. 17, 2022: OH - No More Punishment For Trains Blocking Crossings In Ohio."

See also Ohio Revised Code: Section 5589.21 | Obstruction of roads by railroads.

Chap. 2 – Line Of Duty Death / Safety
Chap. 3 – Homeland Security, incl. Active Shooter, Cybersecurity, Immigration
Chap. 4 – Incident Command, incl. Training, Drones, Communications
Chap. 5 – Emergency Vehicle Operations
Chap. 6 – Employment Litigation, incl. Work Comp., Disability, Vet Rights

File: Chap. 7, Sexual Harassment

OR: FF TERMINATED SEXUAL HARASSMENT – TEXT MESSAGES, THEFT OF FEMALE UNDERWEAR, ON DUTY SEX

On July 19, 2022, in Larry W. Merrill v. Lane Fire Authority and Stoelk Investigation And Consultation, LLC, U.S. Magistrate Judge Mustafa T. Kasubhai, U.S. District Court of Oregon (Eugene Division) issued Findings And Recommendations that the defense motion for summary judgment be granted. "At bottom, Ms. Hutcheson-Warren reported an inappropriate text message that resulted in an investigation into Plaintiff for sexual harassment. Plaintiff received notice of the investigation. The investigation found serious allegations of misconduct. Plaintiff received detailed notice of the allegations-including allegations unrelated to the text message that served as the investigation's genesis-well in advance of his pre-disciplinary hearing and Plaintiff had ample time to prepare written or verbal responses to those allegations. A hearing was held at which Plaintiff had the right to present his side of the story. At the conclusion of the hearing, Chief Ney determined that termination of Plaintiff was appropriate. On this record, the Court concludes Plaintiff received all the process he was due."

> "Plaintiff worked as an engineer and paramedic for LFA from 2007 until he was terminated on June 29, 2018.
>
> ***
>
> On the morning of May 5, 2018, Hutcheson-Warren texted Plaintiff asking if she could list him as a reference for a job application. … Plaintiff agreed…. Hutcheson-Warren received two additional text messages from Plaintiff…. In response to Hutcheson-Warren's observation that Plaintiff was funny, Plaintiff texted '[s]o are you whit….' A

second message immediately followed: 'And stinking cute and sexy just saying sorry hope it's not to [sic] much or crossing a line…."

Hutcheson-Warren responded that night at 11:29 p.m. with a screenshot of the conversation and wrote: 'Hey Larry. I just wanted to say that I don't appreciate the way you were talking to me earlier. I have fun working with you and I don't want to feel uncomfortable at work. I don't want to see you get in trouble….'

[After a complaint from female firefighter paramedic Hutcheson-Warren about inappropriate e-mails from Plaintiff], LFA's legal counsel retained Defendant [D. Craig Stoelk, Stoelk Investigation And Consultation, LLC] to investigate Hutcheson-Warren's claims of sexual harassment…. Stoelk then contacted Chief Ney to arrange to interview witnesses and conducted twelve interviews, occurring between May 21 and May 31, 2018.

***

Based on the investigation, Stoelk wrote a 40-page report concluding that Plaintiff violated several LFA policies, and 'engaged in behaviors that if reported to law enforcement would constitute criminal acts, including harassment and theft.'

***

[Captain] Colwell told Stoelk that in 2007, Plaintiff had sent an unsolicited photograph of Plaintiff's genitalia to Colwell's wife before they were married. *Id.* at 10. Stoelk subsequently interviewed Colwell's wife. *Id*. at 16-17. She confirmed that, at the time she was a volunteer firefighter for LFA, she received a number of unsolicited text messages from Plaintiff, inquiring 'about how much pubic hair she had,' and subsequently an image 'that depicted a penis.'

***

Stoelk next interviewed Jozwiak, an engineer and firefighter who worked with Plaintiff from 2009 to 2012…. In her interview, Jozwiak alleged that Plaintiff had stolen her underwear from the communal laundry on several occasions…. In 2012, Jozwiak initiated a complaint after hearing from Plaintiff's ex-wife that she had discovered underwear in Plaintiff's bag that matched Jozwiak's missing underwear…. Stoelk subsequently interviewed Plaintiff's ex-wife who explained that Plaintiff admitted to taking Jozwiak's underwear during an argument between her and Plaintiff.

***

Finally, Stoelk interviewed Wilson, a volunteer firefighter who had a consensual sexual relationship with Plaintiff in 2012…. Wilson stated that she had engaged in sexual relations with Plaintiff inside the fire station."

Holding:

"Plaintiff's conclusory assertions that the investigation of Plaintiff was not fair and impartial simply because (1) 'it involved nine[-]year[-]old allegations' and (2) that 'Defendant Stoelk improperly accused Plaintiff of criminal acts' also lack merit….

> Significantly, Plaintiff fails to direct the Court to any relevant authority that stands for the proposition that (1) relying on nine-year-old allegations, or (2) how an investigative finding concluding that the subject of the investigation 'ha[d] engaged in behaviors that if reported to law enforcement would constitute criminal acts, including harassment and theft' violate due process."

Legal Lesson Learned: It was a wise move by the FD's Legal Counsel to bring in an outside, professional investigator.

File: Chap. 8, Race Discrimination

FL: BLACK LT's FAMILY PHOTOS DEFACED – CAPT, LT, 4 FF FIRED – FIRE CHIEF PRESS CONFERENCE – NO DEFAMATION

On April 24, 2022, in City of Miami, et al. v. David Rivera, et al., the Florida Court of Appeals, Third District, held (3 to 0) that trial judge improperly denied the defense motion to dismiss the lawsuit. "Chief Zahralban and the City are absolutely immune from suit for Chief Zahralban's written and oral statements relating to the City's termination of the Respondents as the statements were made within the scope of Chief Zahralban's duties as the director of the City's fire-rescue department. As such, the trial court departed from the essential requirements of law by denying Chief Zahralban's and the City's motion to dismiss on absolute immunity grounds. Accordingly, we grant the petition and quash the portion of the order denying the Petitioners' motion to dismiss the defamation counts as they are barred by absolute immunity."

> "The underlying action stems from an incident that occurred at a City fire station in September 2017, where a Black City firefighter discovered that his family photos had been defaced with phallic images and also found a string-shaped like a noose-draped over one of his family photos. Following an investigation by the City of Miami Police Department, the City terminated six firefighters, including the three Respondents.
>
> Following their termination, the Respondents filed suit against the City and Chief Zahralban. The Respondents' amended complaint alleged, among other things, as follows. On the evening of September 8, 2017, during Shift A, Lt. Sese directed a group of eleven or twelve firefighters, including the Respondents, to draw phallic images on the family photos of another lieutenant, Lt. Webster, who was not present at the fire station. On the morning of September 9, 2017, the Respondents' shift ended, and they left the fire station. On September 10, 2017, during Shift B, someone placed the noose over one of the defaced photos, and the Respondents were not present when this occurred and do not know who placed the noose over the defaced photo.
>
> ***
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> The amended complaint references two communications made by Chief Zahralban-a written press release on November 2, 2017, and an oral statement made at a press conference on November 3, 2017. The written press release states, in part, as follows:

> On September 9th, 2017, a member with the City of Miami Fire Rescue was a victim of a hideous, distasteful act of hate in one of our fire stations. This Lieutenant of 17 years with the department, discovered his family photos were defaced with lewd and sexually explicit renderings and a noose draped over one [of] the photos. This was immediately reported to my staff and as a result, I personally responded to the station. Appalled by my observation, I immediately requested the Miami Police Department investigate the matter and temporarily transferred all personnel assigned to that station, per our department policy.
>
> During the investigation, findings determined eleven (11) personnel had some involvement with the incident and they were relieved of duty. Additional evidence discovered identified six (6) of those individuals directly involved and swift administrative action was implemented.
>
> Under my authority, a Captain, a Lieutenant and 4 firefighters were terminated for offenses surrounding egregious and hateful conduct."

Holding

"The Respondents alleged that the second paragraph was false because there were two separate incidents, not one as indicated in the highlighted paragraph, and the Respondents were not, directly or indirectly, involved with the placement of the noose over one of the defaced photos.

***

In Florida, public officials are absolutely immune from suit for defamation as long as their allegedly defamatory statements were made within the scope of their duties.

***

As the director of the fire-rescue department, Chief Zahralban is responsible for personnel decisions of the fire force. *See* § 2-233, City of Miami Code (stating that 'the director of the department of fire-rescue shall administer the affairs of the department, which shall include the immediate direction and control of the fire force ....'). Further, the written and oral statements made by Chief Zahralban relating to the terminations of the Respondents fell within scope of his duties as the director of the fire-rescue department."

Legal Lesson Learned: The conduct defacing family photos is completely unacceptable.

Note: See these press reports:

Nov. 3, 2017: "More Miami firefighters may be fired in hanging of noose over black colleague's family photo, officials say."

Nov. 6, 2017: "City of Miami demands media stop showing photos of 6 officers fired in racist incident."

FL: BLACK PROBIE FF – FIRED - MET WITH CITY MANAGER WITHOUT CHAIN OF COMMAND – CASE DISMISSED

On Aug. 18, 2022, in Cindy Naraine v. City of Hollywood, U.S. District Court Judge Rodolfo R. Ruiz II, U.S. District Court for Southern District of Florida, granted the City's motion for summary judgment. "Importantly, the Court notes the following undisputed facts. Plaintiff never witnessed any act of discrimination against any employee of the Fire Department…. Plaintiff was never subject to a racist remark while working at the Fire Department…. Nobody ever said anything disparaging to Plaintiff based on her race…. Plaintiff was never the subject of a sexist comment while working at the Fire Department…. Neither Chief Jurado nor Deputy Chief Garcia ever made a disparaging comment about Plaintiff…. Neither Chief Jurado or Deputy Chief Garcia ever discussed disciplining an employee for racial reasons…. In sum, the undisputed facts sharply undermine any notion that the 'real' reason Plaintiff was fired was discriminatory in nature."

> "Plaintiff is a black female…. Plaintiff was initially hired by the City of Hollywood ('City' or 'Defendant') as an Administrative Assistant II in the City's Information Technology ('IT') Department…. On January 27, 2019, Plaintiff began work at the Hollywood Fire Rescue & Beach Safety Department.
>
> ***
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> As a new employee of the Fire Department, Plaintiff was subject to a one-year probationary period, beginning on January 27, 2019…. On January 16, 2020, during the one-year probationary period, Plaintiff resigned in lieu of being terminated…. Prior to her termination, the City had no performance issues with Plaintiff.
>
> ***
>
> On November 7, 2019, Plaintiff and her domestic partner, Nicholas Gasbarro (also a city employee) attended a meeting with City Manager Wazir Ishmael…. Plaintiff and Gasbarro have minor children…. At the time of the meeting, Plaintiff was on-duty, and in her fire uniform…. The purpose of the meeting was to request work hour accommodations for Gasbarro to address Plaintiff and Gasbarro's childcare needs…. The next morning, Gasbarro sent an email to the City Manager, thanking him for 'giving us [meaning himself and Plaintiff] the opportunity to discuss the hardship we as a family and employees of the City are facing….' Plaintiff did not request permission from anyone in the Fire Department to attend the meeting, did not inform anybody that she would be attending the meeting, and instead asked a field training officer if she could take a 'work break….'
>
> ***
>
> Shortly after the meeting took place, Chief Jurado became aware of the meeting…. He ordered Deputy Chief Analdy Garcia to investigate…. On November 21, 2019, Plaintiff was called to a meeting with Deputy Chief Garcia, Fire Marshall Del Campo, and Deputy Fire Marshall Castano to determine Plaintiff's involvement in contacting the City Manager…. It is the City's position that Plaintiff denied having any contact with the City Manager to Deputy Chief Garcia on two separate occasions…. Plaintiff contends that she

answered the questions she was asked truthfully…. In her deposition, Plaintiff admitted that she attended the meeting, but since it was her partner's meeting, she sat quietly"

Holding:

"Here, the record contains legitimate, nondiscriminatory reasons for the adverse employment actions taken by the City against Plaintiff (*i.e.*, her termination). The City articulates two clear reasons for Plaintiff's termination: her violation of the chain of command and her subsequent denial of the conduct at issue…. In short, Plaintiff was part of a meeting with the City Manager, in which Plaintiff and her partner discussed accommodations for childcare…. After the meeting occurred, and after she was asked questions about that meeting, she allegedly omitted sharing (or, in other words, was not forthcoming) that she had attended the meeting with her partner…. Based on these two alleged violations of workplace rules, the City has produced a 'clear and reasonably specific' non retaliatory basis for its actions, and the burden shifts back to Plaintiff to show pretext."

Legal Lesson Learned: Chain of command is important concept in a paramilitary organization.

Chap. 8, Race Discrimination

CT: BLACK FF – ANONYMOUS CALLS, LOCKER BROKEN INTO - ISOLATED INCIDENTS - NOT HOSTILE WORKPLACE

On Aug. 16, 2022, in Tony Milledge v. City of Hartford, U.S. District Court Judge Jeffrey A. Meyer, U.S. District Court for District of Connecticut granted the City's motion for summary judgement. The Court wrote: "The problem for Milledge is that the only evidence of racial animus he has offered is the string of racist anonymous calls he received. But Milledge has not shown that 'a specific basis exists for imputing the conduct that created the hostile environment to the employer.' *Schaper v. Bronx Lebanon Hosp. Ctr.*, 408 F.Supp.3d 379, 397 (S.D.N.Y. 2019) (quoting *Schwapp v. Town of Avon*, 118 F.3d 106, 110 (2d Cir. 1997)). Because Milledge has not offered any evidence to show that these anonymous calls were made by or at the behest of his fellow firefighters, there is simply "no evidence that [Hartford] had any control over or permitted the anonymous caller[s] to make such calls." *Katzev v. Retail Brand All., Inc.*, 2010 WL 2836159, at *4 (S.D.N.Y. 2010); *see also Tyson v. Dep't of Energy & Env't Prot.*, 2021 WL 4895898, at *1 (D. Conn. 2021) (dismissing hostile work environment claim involving allegations that someone put a hangman's noose by plaintiff's workspace where there was no allegation that the employer knew or was responsible). *** Nor does Milledge claim to have reported other anonymous misconduct such as his 2019 locker break-in to his supervisors or human resources. Consequently, even assuming that Milledge was subject to a racially hostile work environment, there is no genuine fact issue to show that the City was aware of, yet negligent in failing to remedy, the misconduct of its employees."

"Rather, as detailed below, Milledge fails to adduce evidence that he was treated differently than others who were similarly situated to him during each interaction:

- Milledge was denied promotions in 2006, 2009, and 2014, while lesser-qualified white firefighters were promoted. But Milledge has not offered any evidence as to who made these employment decisions and on what basis, nor has he shown that he was more qualified than the white firefighters who were promoted.
- When Milledge's mother died in 2008, the Human Resources director denied his request for FMLA leave. Although Milledge is unaware of white firefighters being denied leave under similar circumstances, he has not offered any evidence that a similarly situated white firefighter was in fact granted FMLA leave following the death of a parent.
- In 2012 or 2013, Milledge was forbidden from leaving the fire station to get food, while white firefighters were allowed to do so. But Milledge had been previously suspended after testing positive for drug use, and he has not offered any evidence that white firefighters who had previously tested positive for drugs at work were not subject to the same restrictions.
- In 2015, Chief Brady required Milledge to complete random drug-testing, but only after Milledge left the firehouse for an extended period of time in violation of his direct supervisor's order. Milledge does not know what drug testing was required of other firefighters and has not offered any evidence that white firefighters who disobeyed orders and left during work hours after previously testing positive for drugs were not subject to similar testing requirements.
- Chief Kerr made Milledge do ladder training in August 2017 that was especially difficult for him because of his previous injuries. But Milledge has not contested the City's evidence that such training was required of all firefighters, and consequently he has not shown that racial animus motivated Chief Kerr's decision to require him to complete such training.
- In September 2017, Chief Kerr reprimanded Milledge for using the handicapped bathroom when he was not handicapped, and Chief Costello told Milledge he would be fired if he did not get off the phone at work. In neither case does Milledge offer evidence of similarly situated comparators facing more preferential treatment or any other grounds to conclude that his supervisors chastised him due to his race rather than his misbehavior at work.
- In March 2018, Milledge had abrasive encounters with Chief Tenney and Chief Errickson. But by Milledge's own account, these altercations stemmed not from racial animus but rather from his EEOC complaint against Chief Brady. Milledge did not bring a retaliation claim against the City for the acts of these supervisors purportedly in response to his report against Brady in 2015."

Holding:

> "To prevail on a hostile-work-environment claim under Title VII, a plaintiff first must show that "the hostile conduct occurred because of a protected characteristic." *Tolbert v. Smith*, 790 F.3d 427, 439 (2d Cir. 20 1 5).[50] The plaintiff must also show that "the workplace is permeated with discriminatory intimidation, ridicule, and insult that is sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment." *Littlejohn v. City of New York*, 795 F.3d 297,

> 320-21 (2d Cir. 2015). "This test sets a high bar as the plaintiff must show not only that he subjectively perceived the environment to be abusive, but also that the environment was objectively hostile and abusive." *Sealy v. State Univ. of New York at Stony Brook*, 834 Fed.Appx. 611, 615 (2d Cir. 2020).
>
> ***
>
> Even had Milledge shown evidence of racial animus on the part of these supervisors and coworkers, none of their conduct rises to the level of objectively severe and pervasive harassment as required to substantiate a hostile workplace environment claim. *See Littlejohn*, 795 F.3d at 320-21. 'Isolated incidents generally will not suffice to establish a hostile work environment unless they are extraordinarily severe.' *Zheng-Smith v. Nassau Health Care Corp.*, 2021 WL 4097316, at *3 (2d Cir. 2021). Accordingly, I will grant summary judgment for the City as to Milledge's claim of a racial hostile working environment."

Legal Lesson Learned: "Isolated incidents" generally will not establish hostile work atmosphere.

File: Chap. 9, ADA

CA: REASONABLE ACCOMODATION - STESS RELIEF - MALE FF TRANSFERRED – DIVIDERS IN SLEEPING QUARTERS

On Aug. 19, 2022, in Felipe Marcial v. County of Los Angeles, the California Court of Appeals, Second District (Fourth Division) held (3 to 0) that trial court properly granted summary judgment for the City. "Thus, upon his return to work in 2018 [after shoulder injury], Marcial requested a transfer to a non-USAR station (specifically, FS 80). LACOFD granted Marcial's request. Marcial admits he received a reasonable accommodation: 'FS 80 put up dividers in the sleeping quarters even without me requesting them. Unlike all the years previously, FS 80 took my situation seriously and finally made efforts to accommodate me. While there are not separate showers, unlike FS 103, there is a wall with a door and lockable area so that the shower can be locked and prevent anyone from seeing in. With accommodation I was able to perform my job duties.' On this record, we conclude Marcial not only received a reasonable accommodation, but the exact accommodation he sought (i.e., a transfer to FS 80 and privacy in the living quarters)."

> "Plaintiff and appellant Felipe Marcial has been a firefighter for the Los Angeles County Fire Department (LACOFD) since 1996.
>
> ***
>
> In 1998, Marcial was assigned to Fire Station (FS) 8 in West Hollywood. At FS 8, Marcial experienced a 'highly sexually charged working environment,' which included male firefighters communicating in 'lewd, obscene and overly sexual manners with certain females who were passing by the station[,]' and 'certain firefighters would 'hook up' with these females inside of the firehouse.' Although Marcial found this working

environment to be inappropriate, he initially attempted to fit in by ''play[ing] along to get along.' Marcial asserts, however, that he was unable to tolerate the 'sexually charged working atmosphere' and the stress was spilling over into his personal life and affecting his marriage.

***

Thus, in 2000, Marcial requested to be transferred from FS 8 to FS 103. FS 103 is a station for firefighters who are specially trained and certified for urban search and rescue (USAR). LACOFD granted Marcial's request and assigned him to FS 103, where he remained for 17 years (until 2017). FS 103 is an older fire station that has a common sleeping area for both men and women firefighters, a common changing room, and common showers.

Marcial found the environment at FS 103 to be just as 'unprofessional and debaucherous' as at FS 8. Marcial complained to his coworkers and supervisors about the inappropriate conduct, but nothing was done in response to his complaints.

***

In 2017, Marcial learned that a female firefighter had been granted a transfer to FS 103, which concerned him because even though they would be working different shifts, they might overlap at times and have to share 'non-gender-separated facilities.' He therefore requested to be transferred to FS 136, the only other USAR fire station, which had gender-privacy accommodations. Another firefighter (Quintin Humphries), however, received the open position at FS 136. Humphries agreed to trade positions with Marcial, but LACOFD did not approve the trade.

***

On June 28, 2017, Marcial rescinded his retirement request. That same day, he requested, and LACOFD granted, a medical leave for a shoulder injury. Marcial was on leave for the shoulder injury from June 2017 through May 2018.

In May 2018, LACOFD still had only two USAR fire stations: FS 103 and FS 136. Marcial could no longer work at a USAR fire station, however, because he allowed his necessary USAR certifications to lapse. With that understanding, Marcial requested to be assigned to FS 80 (a non-USAR station) because it was a sufficient distance from FS 103 to 'allow [him] to relieve [his] anxiety [about interacting with firefighters from that station] and allow [him] to work until [he has] at least [25] years towards retirement.. LACOFD granted Marcial's request."

Holding:

"Accordingly, we conclude Marcial failed to establish he suffered an injury that had a substantial and detrimental effect on his employment, or that LACOFD took any affirmative employment action against him. Because an adverse employment action is an essential element of Marcial's claims for discrimination, retaliation under FEHA, and retaliation in violation of Labor Code section 1102.5, these claims fail as a matter of law."

Legal Lesson Learned: The FD reasonably accommodated his transfer requests.

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

File: Chap. 11, Fair Labor Standards Act

RI: FD IN RECEIVERSHIP – "CAP" OVERTIME PAY IN CBA – FLSA VIOL. – BACKPAY & LIQUIDATED DAMAGES $279,969

On Aug. 19, 2022, in James Almagno, on behalf of all similarly situated current and former employees v. Central Coventry Fire District, U.S. District Court Judge John J. McConnell, Jr., U.S. District Court of Rhode Island, the Judge held that cap on overtime pay in the CBA violated FLSA. "The CBA also caps overtime paid. Under Article III, Section 3 of the CBA, 'when the District reaches One Hundred Twenty Thousand Dollars ($120,000.00) in overtime expenses (i.e., time-and-one-half pay) in any fiscal year...the District shall pay firefighters...their straight time hourly rate... for each hour actually worked in excess of 212 hours. *** Relying on the DOL's investigation, Plaintiffs now move for summary judgment, arguing that there are no disputed issues of material fact as to the District's liability or damages such that they are entitled to judgment. After a thorough review of the briefing and record, the Court GRANTS Plaintiffs Motion for Summary Judgment. *** Considering the statutory double damage requirement for all but "reasonable," 'good faith' mistakes, the Court finds that Plaintiffs are entitled to liquidated damages of $279,969.68. See 29 U.S.C. §§ 216(b), 260."

> "The United States Department of Labor ("DOL") reviewed Defendant Central Coventry Fire District's ("the District") payroll records in 2018 and concluded that the District violated the Fair Labor Standards Act. ("FLSA") when it did not properly compensate its firefighters as required by the Collective Bargaining Agreement ("CBA").
>
> ***
>
> The CBA requires that the District pay the Plaintiffs overtime at a rate of time and one half of their hourly rates after fifty-three (53) hours per week. The CBA also caps overtime paid. Under Article III, Section 3 of the CBA, "when the District reaches One Hundred Twenty Thousand Dollars ($120,000.00) in overtime expenses (i.e., time-and-one-half pay) in any fiscal year...the District shall pay firefighters...their straight time hourly rate... for each hour actually worked in excess of 212 hours.
>
> ***
>
> Plaintiffs also worked voluntary shifts performing collateral and fire marshal duties outside their normal schedules. Collateral duties include teaching and instructing bargaining unit members and performing facility upgrades. When performing these added duties, Plaintiffs routinely exceeded fiftythree (53) hours worked in a week. The District recorded payments for these duties as a separate line item on the Plaintiffs paychecks and it did not include these hours worked for overtime purposes.
>
> ***

According to the records the DOL reviewed, from April 2, 2016, to the present, Plaintiffs regularly performed firefighter, collateral, and Fire Marshall duties more than 212 hours in a twenty-eight-day period and the District did not pay time-and-one-half for all hours worked in excess. The District also paid the Plaintiffs straight time for all overtime hours worked after the District reached the $120,000 overtime cap during three different time periods amounting to about fifteen months.

This conduct violated several FLSA provisions for 1) 'failing to combine all hours worked (firefighter, collateral duty, Fire Marshall hours) in the week for overtime purposes and *failin*g to include out-of-rank payment in the regular rate,' and 2) 'paying the firefighters straight time for all overtime hours worked after the District reached the overtime cap specific in the CBA each fiscal year." The DOL investigation concluded that for the period April 2, 2016, through March 24, 2018, the District owed Plaintiffs back wages totaling $139,484.47 and that, as of May 6, 2019, the District continued to compensate employees in violation of the FLSA."

Holding:

"Section 216(b) of the FLSA provides that '[alny employer who violates provisions of section 206 or section 207 of this title shall be liable to the employee or employees affected in the amount of their unpaid minimum wages, or their unpaid overtime compensation, as the case may be, and in an additional amount as liquidated damages.' 29 U.S.C. § 216(b).

***

The Court finds that the District has failed to demonstrate good faith or the objective reasonableness of its actions. The District had a duty to ensure that its procedures and payroll systems complied with federal law. After the receivership, the District did not conduct an independent review of their payroll's system for FLSA compliance and, as such, it cannot now argue that its assumptions were tantamount to good faith acts to exonerate itself from liability for liquidated damages. *See Chao,* 493 F.3d at 35. Ignorance or failure to inquire into the law does not qualify under the evidentiary standard of good faith or reasonableness. *See Martin v. Cooper Elec. Supply Co.,* 940 F.2d 896, 907'908."

Legal Lesson Learned: The Fire Department and the Union cannot agree to "cap" overtime pay in violation of the FLSA.

Note: See article, [Oct. 22, 2020, Central Coventry firefighters sue, claiming district stiffed them on overtime]. **"The suit follows** a U.S. Department of Labor investigation, launched in 2018, that found the district owed $139,484 in unpaid overtime to 32 employees accrued from 2016 through 2018. *** **The lawsuit is** yet another chapter in the district's sometimes-strained relationship with its firefighters. The union and the district were long mired in the courts after the district's financial troubles surfaced in 2012 and it was taken into receivership by the state."

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

File: Chap. 13, EMS

WY: CAPTAIN FIRING UPHELD - FREQUENT 911 CALLER FOR LIFT ASSISTS – "KICK HER ASS" – PROVIDED DUE PROCESS

On Aug. 24, 2022, in City of Rawlins v. Stephanie Schofield, the Supreme Court of Wyoming held (5 to 0) that the trial court improperly overturned the Civil Service Commission; Supreme Court upheld the termination. Captain, while initially fired by the interim City Manager without a hearing, was ultimately provided due process hearing by the Civil Service Commission. "The City's rescission of its original termination letter and reinstatement of Ms. Schofield with back pay rendered the initial due process violations moot. The City's June 8, 2020 notice of request for termination provided Ms. Schofield notice of the reasons it relied on in requesting her termination. The contested case hearing provided Ms. Schofield a full and fair opportunity to respond to the reasons underlying the request that her employment be terminated. The Commission's Findings of Fact, Conclusions of Law and Order was supported by substantial evidence and was not arbitrary and capricious, or otherwise not in accordance with law. We reverse the decision of the district court and affirm the Commission's order."

> "In the early morning hours of May 16, 2020, 911 dispatcher Karigan Gates received a call from citizen DM seeking a 'lift assist.' Ms. Gates was familiar with DM as she had spoken with her more than fifty times in her capacity as a dispatcher. DM is in a wheelchair and occasionally has difficulty speaking but given time, can communicate. On receiving DM's call, Ms. Gates called Fire Station One to initiate a response to DM's request. Ms. Schofield, who was nearing the end of a twenty-four-hour shift and had been asleep for several hours, took the call. After Ms. Gates relayed the information, Ms. Schofield replied, 'F***in [DM], G*d d*mn it.' Ms. Schofield and Fire Engineer Paul Hardy then drove to DM's home. There, they discovered that the control stick of DM's wheelchair had gotten stuck underneath her kitchen countertop. After freeing her, they returned to the station.
>
> Three days later, on May 19, 2020, Ms. Gates received another late night 911 call from DM asking for a lift assist. Ms. Gates called Fire Station One and Ms. Schofield, asleep at the end of her shift, answered the call. On learning that the call for assistance was from DM, Ms. Schofield said, 'f***in [DM].' 'I'm going to kick her a**.' Ms. Gates, feeling uncomfortable but not believing Ms. Schofield was intending to act on her comments, laughed. When Ms. Schofield and Fire Engineer Hardy arrived at DM's residence, they found her in her wheelchair in the bedroom. The impetus for her 911 call was that her catheter had disconnected. After reconnecting the catheter and returning to the station, Ms. Schofield called Ms. Gates. She explained the reason behind DM's call and told Ms. Gates that she scolded DM. Ms. Schofield disclosed that she told DM, 'this isn't what we do.... You need to call your parents ....' '[W]e're coming here thinking that this is an emergency.' 'This isn't an emergency.' 'You can't [tell us] lift assist when it's not [an emergency].' Ms. Schofield told Ms. Gates that she thought she had made DM 'feel bad' and 'she may complain.' Fire Engineer Hardy testified he was 'surprised" because '[he] didn't think [Ms.] Schofield would have talked to citizen DM that way.'

Ms. Gates did not report the calls to her supervisor or anyone else. However, as a separate matter, she had emailed her supervisor requesting a recording of a call that had come in just after Ms. Gates' first call to Ms. Schofield.[2] In preparing to record that call, the supervisor heard the exchange between Ms. Gates and Ms. Schofield. The supervisor reported the call to the Rawlins chief of police."

Holding:

"At the hearing, the parties fully litigated the facts surrounding the City's request that Ms. Schofield's employment be terminated. The City called four witnesses-Ms. Gates, Battalion Chief Robinson, Mr. Ziebold, and Fire Engineer Hardy. Ms. Schofield testified and called interim Fire Department shift captain David Gier, and Fire Chief Rutherford to testify on her behalf. The hearing officer admitted forty-five exhibits into evidence. At the close of evidence, the parties submitted written closing arguments, proposed orders, and objections. The hearing officer then submitted its findings and a proposed order to the Commission. On November 23, 2020, the Commission issued its Findings of Fact, Conclusions of Law and Order terminating Ms. Schofield."

Legal Lesson Learned: The City corrected its initial mistake of terminating the Captain without a due process hearing; wisely then provided hearing before the Civil Service Commission.

File: Chap. 13

TX: STRETCHER - 94-YR-OLD PATIENT - FELL ONTO SLOPED DRIVEWAY - HEAD INJURY, DIED 8 DAYS – GOV. IMMUNITY

On Aug. 23, 2022, in City of Houston v. Kathy Denby, Court of Appeals of Texas, First District, held (3 to 0) that the trial judge's decision denying the City's motion for summary judgment is reversed; the City "here retains its immunity under the 9-1-1 Emergency Services exception to the TTCA [Texas Tort Claims Act. *** Moreover, even if we concluded that the EMTs acted in a way that breached the standard of ordinary care, we could not say section 773.009 was violated."

"Kathy Denby's mother, Elizabeth Dott, was 94 years old in July 2020. Dott had 24-hour caregivers due to an elevated risk for falls, but she was otherwise independent. When Dott experienced breathing difficulties, Denby's husband called 9-1-1 to transport Dott to an emergency room for medical care. Both Kathy and her husband believed that Dott's breathing difficulty was not a "life or death emergency," but they reasoned that, in light of the COVID-19 pandemic, Dott would receive medical care more promptly if she were transported by ambulance.

After an evaluation, the emergency medical technicians ("EMTs") who had been dispatched to Dott's home decided to transport her to a nearby hospital for further evaluation and care. The EMTs unloaded a stretcher from the ambulance, which was parked on the street near Dott's inclined driveway. The EMTs rolled the stretcher up the

sloped driveway to the front door. Dott, who was alert and responsive, was strapped onto the stretcher in a seated, upright position. The EMTs rolled the stretcher, which was adjusted to an elevated position, down the driveway.

When the stretcher approached the bottom of the driveway, the EMTs began rolling the stretcher sideways before clearing the uneven tip of the curb. Both Dott, who was strapped to the stretcher, and the stretcher fell sideways onto the ground. Dott suffered a broken thumb and a bleeding head wound, and she became unresponsive. She was transported to a hospital with a trauma center rather than the nearby hospital originally intended. Dott never regained consciousness, and she died eight days later."

Holding:

"Because the Legislature's waiver of governmental immunity does not extend to Denby's claims, we must reverse the trial court's judgment and render judgment dismissing Denby's suit.

***

On appeal, the City argues that the trial court erred by denying its motion for summary judgment because even if Denby had established a valid waiver of immunity under the TTCA, the exception to the waiver of liability found in section 101.062 of the Texas Civil Practice and Remedies Code ("9-1-1 Emergency Service") applies, and the City therefore retains immunity. We agree.

***

The statutory exception at issue in this appeal is section 101.062, the "9-1-1 Emergency Service" exception, which provides that the TTCA applies to a claim against a public agency that arises from an action of an employee of the public agency or a volunteer under direction of the public agency and that involves providing 9-1-1 service or responding to a 9-1-1 emergency call *only if the action violates a statute or ordinance applicable to the action*. *Id.* § 101.062(b) (emphasis added)."

***

Moreover, even if we concluded that the EMTs acted in a way that breached the standard of ordinary care, we could not say section 773.009 was violated."

Legal Lesson Learned: City is protected from liability by the immunity statute; EMS must use extreme care when moving a patient on a stretcher down a sloped driveway.

File: Chap. 13

TN: FEMALE PATIENT – EMT ALLEGEDLY "STROKED HER RING UP AND DOWN" ASKED MARRIED – CASE DISMISSED

On Aug. 22, 2022, in Myca Holloway v. Memphis Fire Department and Roddi Hugard, U.S. District Judge John T. Fowles, Jr., U.S. District Court for Western District of Tennessee [Western Division] held that lawsuit is dismissed with prejudice.

"On December 27, 2021, the Magistrate Judge entered an order granting Plaintiff leave to proceed *in forma pauperis* and a report and recommendation that the § 1983 action should be dismissed with prejudice for failure to state a claim for which relief may be granted…. The Magistrate Judge noted that Holloway alleged that Hugard grabbed her left hand with his blue latex glove, stroked her ring up and down, and inquired about her marital status.

***

A plaintiff must allege (1) a deprivation of a right or rights secured by the Constitution and laws of the United States (2) that were committed by a defendant acting under color of state law. In the report and recommendation, the Magistrate Judge determined that Holloway specifically failed to state what actions were committed by the Memphis Fire Department or Firefighter Roddi Hugard that deprived her of her Constitutional rights."

Holding:

"Plaintiff was given fourteen (14) days in which to file objections to the report and recommendation. None were filed.

***

In this case, Plaintiff was advised that dismissal of her action would follow, without further notice, if she failed to respond to the undersigned Order to Show Cause. (ECF No. 8.) As noted, to date, Plaintiff has failed to respond. The Sixth Circuit held that dismissal for failure to prosecute is warranted where the Court affords a plaintiff a reasonable period of time to comply with orders before the dismissal occurs."

Legal Lesson Learned: Strange case by *in forma pauperis* [no money] patient with no money.

Chap. 14 – Physical Fitness, incl. Heart Health
Chap. 15 – CISM, incl. Peer Support, Employee Assistance

File: Chap. 16, Discipline

OK: FIRE CHIEF FIRED – LAWSUIT REINSTATED – MAY NOT BE "AT WILL" EMPLOYEE – LACK OF DUE PROCESS

On Aug. 19, 2022, in Stephen Parmenter v. City of Nowata, Oklahoma, the U.S. Court of Appeals for Tenth Circuit (Denver) held (3 to 0) that trial court improperly granted summary judgment to the City and remanded the case. "The United States District Court for the Northern District of Oklahoma granted the City's motion for summary judgment, holding (1) that Mr. Parmenter did not have a protected interest in his job and therefore was not entitled to procedural due process, and (2) that in any event he was provided adequate process. Mr. Parmenter appealed. We reverse and remand for further proceedings to determine whether Mr. Parmenter had a protected interest in his position, and if so whether he received sufficient process."

Before his firing, Mr. Parmenter had served as the City fire chief for five years. At all relevant times Melanie Carrick was Nowata city manager-the head of municipal government appointed by the City's board of commissioners. On August 31, 2017, Mr. Parmenter received a written reprimand from Ms. Carrick alleging the following infractions:

> Altering of employee time sheets, falsification of own time sheet, interfered with the City's relationship with the Harmon Foundation, providing false information to supervisor, hindering the accounting process by holding checks that need to be deposited and not turning them in for deposit in a timely manner, allowing multiple employees to take comp time that they had not accrued, issuance of comp time not in accordance with City personnel manual, fostering and allowing to continue an environment of low morale in department, creating feelings of fear of retribution or retaliation in employees in the department[,] creating a harassing, hostile and threatening work environment for employees, non-compliance with hiring policy, holding volunteer pay until dues are paid, scheduling parttime workers more than part time hours.

Because of these alleged infractions, Ms. Carrick removed Mr. Parmenter from his parallel role as the City's director of emergency medical services (EMS), she instructed him to work at least one shift per week 'as a regular fireman to foster better relationships with employees in the department and boost morale,' *id.*, and she warned him that further infractions could result in discipline up to termination. The reprimand has a checked box labeled 'Final Warning.' *Id.* A paragraph labeled 'Consequences of Further Infractions' states that the reprimand was 'the only warning that [Mr. Parmenter] will receive due to the serious and damaging nature of the offenses.' *Id.*

***

In March 2019 Ms. Carrick heard new complaints about Mr. Parmenter's performance. Ms. Carrick learned that some workers were following improper procedures in filling out time sheets, and she suspected Mr. Parmenter had authorized the impropriety. EMS employees and firefighters reported Mr. Parmenter's dismissive attitude toward their objections to a new schedule he had created and his refusal to consider their requests for accommodation under the new schedule. The employees likewise complained of "very low" morale in the EMS and fire departments, Mr. Parmenter's abrasive "[m]y way or the highway" attitude, and Mr. Parmenter's favoritism toward one subordinate. *Id.* at 51 (internal quotation marks omitted). In addition, one firefighter told Ms. Carrick that he was afraid to fill out the City's employee questionnaire because he had previously been retaliated against after filling out a similar survey. The City's police chief submitted a memorandum to Ms. Carrick that corroborated some of the employees' concerns.

***

On April 8, 2019, in a face-to-face meeting with Mr. Parmenter, Ms. Carrick informed him that he was terminated. Although she testified at her deposition that Mr. Parmenter had an 'opportunity to speak,' *id.* at 87, his response was brief. He asked, 'Really?' and 'Why?' *Id.* at 112. Ms. Carrick answered, 'It's on the sheet' - referencing the termination

letter. *Id.* But the letter stated only that he was being terminated 'for the good of the service' and that in Ms. Carrick's opinion good and sufficient cause exists.' *Id.* at 56. Mr. Parmenter did not say anything more and left."

Holding:

"The district court held that Mr. Parmenter lacked a property interest in continued employment as the City's fire chief. The court recognized that an Oklahoma statute provides: 'The chief and members of all paid municipal fire departments shall hold their respective positions unless removed for a good and sufficient cause as provided by applicable law or ordinance.' Okla. Stat. tit. 11, § 29-104. But it held that this state law was overridden by the City of Nowata's Charter because of the Oklahoma home-rule doctrine.

***

The district court said, '[B]ecause the Nowata's City Charter provides that all City employees are at will and may be fired with or without notice, its provision prevails over 11 O.S. § [29]-104.' Aplt. App. at 139. But we do not see how the court concluded that the charter so provides. The only pertinent language of the charter assigns the city manager the 'powers and duties' of 'appoint[ing] and remov[ing] all Heads of Departments, and all subordinate officers and employees of the City. *Id.* at 59. The 'at will' language apparently comes from the City's personnel manual- an informal guidance document that describes itself as 'for information only' - which says, 'No employee or representative of the City has any authority to enter into an employment contract to change the 'at will' employment relationship, or to make any agreement contrary to the foregoing.' *Id.* at 63. The manual also states, 'All employees must remember that employment may be terminated with or without cause or notice, at any time by the employee or the City of Nowata.' *Id.* at 65.

***

The City suggests that we can affirm by determining ourselves that Mr. Parmenter was afforded due process. It contends that the August 2017 warning letter gave Mr. Parmenter adequate notice. But the cases cited by the City do not wholly persuade us that a document from August 2017 can serve as pretermination notice for a firing that occurs one-and-a-half years later based on intervening events. In any event, the issue is best resolved by the district court in the first instance. *See Rimbert*, 647 F.3d at 1256. If the district court on remand determines that Mr. Parmenter had a protected property interest in his position, it should consider procedural adequacy.

Legal Lesson Learned: Even if employee is "at will" it is best practice to provide employee with written notice of charges and a pre-disciplinary meeting.

File: Chap. 17, Arbitration / Union Relations

AK: FORMER UNION PRESIDENT – PASSED OVER PROMOTION B/C – CHIEF LEARNED "BELITTLING" CREWS

On Aug. 24, 2022, in Damon Reed v. City of Conway, Arkansas, et al., U.S. District Court Judge Lee , P. Rudofssky, U.S. District Court for Eastern District of Arkansas (Central Division) granted summary judgment for the City and Fire Chief Michael Winter on Captain Reed's complaint alleging First Amendment retaliation. "First, Mr. Reed points to the fact that he was the unanimous vote of the Chiefs panel for the May 2018 promotion. He says that this 'favorable review' is evidence of pretext. The fatal flaw with this argument is timing. Recall that the Chiefs panel voted for Mr. Reed in January of 2018. Chief Winter did not receive the complaints about Mr. Reed until months after the vote, when word got out that Mr. Reed would be getting promoted. So neither Chief Winter nor the Chiefs panel knew, at the time of this so-called favorable review, that Mr. Reed was belittling subordinates."

> "In 2003, Mr. Reed was promoted from Driver to Lieutenant. At this point, Mr. Reed's climb up the ladder stalled for approximately seven years. In 2010, Mr. Reed addressed the stall by filing a lawsuit against the City of Conway, Mayor Townsell, and Mr. Castleberry. In the lawsuit, Mr. Reed claimed that he was not promoted to the rank of Captain because of his participation in Local 4016. The 2010 lawsuit settled in 2011. As part of the settlement, Mr. Reed attained the rank of Captain retroactive to 2008. On March 10, 2011, Mr. Reed began his work as a Captain.
>
> ***
>
> At some point, Chief Winter received formal notification that Battalion Chief Jones was indeed going to retire in May of 2018. Then, '[w]ord began circulating around the [Conway Fire Department] that [Mr.] Reed was going to be promoted to the Battalion Chief position vacated by Mark Jones.' As Mr. Jones's retirement drew closer, Chief Winter began receiving verbal complaints about Mr. Reed from several men on Mr. Reed's shift. Specifically, these men complained that Mr. Reed 'belittle[d] and curse[d] them.'
>
> ***
>
> [Firefighter] Justin Adlong wrote [to Chief Winter] at Journeyman [training exercise], Mr. Reed continuously called several probationary firefighters 'dumbasses,' 'lazy asses,' and 'stupid.' [Firefighter] A.E. Hurst wrote that, on March 30, 2018, Mr. Reed 'blew up on [him] and went to cussing [him] ...."

Holding:

> "Mr. Reed alleges that Chief Winter denied him the 2018 promotions to Battalion Chief in retaliation for Mr. Reed's exercise of his First Amendment rights. Chief Winter argues that he is entitled to summary judgment for two independent reasons: (1) Mr. Reed cannot establish a causal link between Mr. Reed's not receiving the promotions and his 'participation in protected activity;' and (2) Mr. Reed cannot establish that Chief Winter's reasons for denying Mr. Reed the promotions were pretext for retaliation. The Court agrees on both points.

***

The take-away is that, on this record, a rational juror could only conclude that Chief Winter received verbal complaints about Mr. Reed's belittling of subordinates before he denied Mr. Reed the May 2018 promotion. And a rational juror could only conclude that Chief Winter based his promotion denial on those verbal complaints. The fact that Chief Winter later received these complaints in written form (as he had previously requested) after the May 2018 promotion denial is not enough to allow a rational juror to find that Chief Winter's proffered reason for the promotion denial was pretext for retaliation.

Legal Lesson Learned: "Belittling subordinates" can lead to denial of promotion.

Chap. 17, Arbitration / Union Relations

OH: CAPTAIN NO. 1 LIST B/C – CITY DOESN'T WANT TO FILL JOB - UNION WON'T ARBITRATE – LAWSUIT DISMISSED

On Aug. 11, 2022, in The State Of Ohio, Ex Re. John M. Casey, et al. v. Jamael Tito Brown, et al., the Court of Appeals of Ohio, Seventh District (Mahoning County), 2022-Ohio-2843, held (3 to 0) that the Captain's taxpayer lawsuit against the City is dismissed. Plaintiff as a member of the Youngstown Professional Firefighters, IAFF, Local 312; Union President under CBA decides when to pursue arbitration. Plaintiff's so option is to file unfair labor charge against the union.

> "Casey's grievance is one of a series of grievances in recent years involving the City, the Union, and its members. In January 2019, the Union filed a grievance, unrelated to Casey individually, against the City alleging it failed to provide necessary safety equipment. To offset the cost of the equipment, the City had passed an ordinance eliminating three fire Battalion Chief positions through attrition based on the pretext of a restructuring plan. The Union filed an unfair labor practice charge against the City with the State Employment Relations Board (SERB), the state agency responsible for administration and enforcement of the Act.
>
> ***
>
> Meanwhile, SERB concluded that the City committed an unfair labor practice by threatening to eliminate and subsequently eliminating three Battalion Chief positions in retaliation against the Union for pursuing the safety equipment grievance to arbitration. SERB further specified the following in its Order:
>
>> [The City] is ordered to:
>>
>> (2) Further effectuating Ordinance 19-336, which abolishes three Battalion Chief positions upon their vacancy through attrition; since this Ordinance, as applied, violates the rights of [the Union] set forth in Section 4117.03(A) of the Ohio Revised Code.

***

While the appeals of the Mahoning County Court of Common Pleas' contempt order and decision affirming SERB's decision were pending in this Court, Casey alleges one of the Fire Department's Battalion Chiefs retired, creating a vacancy…. According to him, the City's Civil Service Commission administered a promotional examination in response to the anticipated vacancy created by the retirement. Casey took the examination and the Commission issued an eligibility list on October 5, 2021, indicating that he 'finished on the top of the eligibility list.'

***

On October 13, 2021, Casey states he asked the Fire Chief about the time table for promotion and the Fire Chief informed him that the City did not intend to promote anyone to fill the vacancy.

***

On February 2, 2022, the City, through the Mayor's Designee, rejected Casey's grievance…. According to Casey, the Union informed him that it would not seek arbitration of the decision at Step 3…. The CBA provides that arbitration of a grievance is conditioned upon approval by the President of the Union.

***

Casey states he met with union officials about advancing his grievance to arbitration. At the meeting, Casey learned that when he filed his grievance another union member had a grievance pending related to the promotional examination for which he sat. In that grievance, the arbitrator determined the union member should have been allowed to sit for the promotional examination and ordered the City to offer a remedy that would allow that member to qualify for possible promotion by sitting for a promotional examination. The Union advocated as a remedy sought in adjustment of that member's grievance, the decertification of the Commission's October 5, 2021 eligibility list for promotion to the rank of Battalion Chief and to order the City to administer a new promotional examination before any promotions are ordered. The President of the Union recommended Casey hire his own attorney because the Union could not commit to advancing his grievance to arbitration given the decision the arbitrator issued in regard to the other member's grievance."

Holding:

"In sum, it appears beyond doubt that, after presuming the truth of all the material factual allegations in Casey's complaint and drawing all reasonable inferences in his favor, he is not entitled to a writ of mandamus against the City's Mayor, Fire Chief, and Finance Director. Casey's promotion-related claim is governed by the CBA and its grievance and arbitration procedure. As such, Casey had an adequate legal remedy, precluding extraordinary relief in mandamus. Casey also had available to him the additional remedy of filing an unfair labor practice charge against the Union with SERB based on its alleged failure to fairly represent him in violation of R.C. 4117.11 (B)(6).

> ***
> The collective bargaining agreement did *not* leave it to Casey to make the decision respecting whether his grievance over the possible violation of Article 13 [PROMOTIONS] of that agreement should be prosecuted through the final step of the grievance process, *i.e.,* arbitration. *That decision rested entirely with the Union.* Thus, when the Union declined or refused to seek arbitration, that possible remedy no longer was available to Casey."

Legal Lesson Learned: The Union under the CBA has sole discretion on when to pursue an arbitration.