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Jan. 2023 – FIRE & EMS LAW NEWSLETTER

[NEWSLETTER IS NOT PROVIDING LEGAL ADVICE.]

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PEER SUPPORT - PRIVILEGED COMMUNICATIONS

The Ohio Senate on Dec. 15, 2022 passed House Bill 545 (31-0), following the House vote in May 2022 (89 – 0). The bill now goes to Governor DeWine to be signed into law. For more details for the House Bill 545, follow this link.

18 RECENT CASES

FURTHER RESOURCES

- **ONLINE LIBRARY OF CASE SUMMARIES:** Fire & EMS Law scholar@UC
- **NEWSLETTERS:** If you would like to be added to UC Fire Science listserv, just send him an e-mail. List of Fire & EMS newsletters.
- **TEXTBOOK:** Updating 18 chapters of my textbook (2018 to current). FIRE SERVICE LAW (SECOND EDITION), Jan. 2017.

File Chap. 1, American Legal System

NJ: ARSON – PROSECUTOR FILES CONFIDENTIAL – CIVIL SUIT $4M LOSS BLDG - SECURITY FENCE ONLY 3 SIDES

On Dec. 7, 2022, in American Insurance Company, et al. v. Meridia Downtown Urban Renewal, et al. and Somerset County Prosecutor's Office, the Superior Court of New Jersey, Appellate Division, held (3 to 0) that trial judge improperly ordered the Prosecutor's Office to disclose documents prior to the trial of the indicted arsonist concerning the January 12, 2020 fire, including videos and witness statements. The pending civil litigation by the insurance company concerning construction company's failure to fence in the entire property does not outweigh the public interest protected by the strict confidentiality that attaches to the criminal investigative file of an ongoing criminal prosecution.

> "[W]e believe the judge mistakenly exercised his discretion by failing to judiciously and painstakingly balance the competing interests at stake. Compelling the production of the materials sought here risks compromising the vital public interest protected by the strict confidentiality that attaches to the criminal investigative file of an ongoing criminal prosecution."

Legal Lesson Learned: There is very strong public interest in protecting the confidentiality of Prosecutor's evidence pending trial of the arsonist.

File – Chap. 1, American Legal System

NY: COVID VACCINATIONS – RELIGIOUS EXEMPTION - FDNY FF ORDERED REHIRED – "REASONABLE ACCOMMODATION"

On Oct. 7, 2022, in Timothy Rivicci v. New Yok City Fire Department and The City of New York, Judge Ralp J. Porzio, Supreme Court, Richmond County (unpublished decision), granted the firefighters petition for reinstatement to full duties at Engine 158, back pay, and attorney fees. The judge noted in his very direct opinion, that FDNY has granted 20 requests for religious or medical accommodations, and referenced the affidavits of Robert Banome and Stephen Fitzgerald, members of the FDNY who were granted reasonable accommodations of weekly testing and mask wearing. The FF has been on FDNY since 2016. During COVIC-19 pandemic, Mayor Bill DeBtasio declared a state of emergency and required all NYC employees be vaccinated by Oct. 28, 2021. The FF was placed on leave without pay on Nov. 1, 2021 for not showing proof of vaccination. On Nov. 5, 2021 he submitted a religious reasonable accommodation request to the FDNY Equal Employment Opportunity Office (EEO). Without any dialog with the FF, the EEO denied the request; he appealed to the NY Reasonable Accommodations Appeals Panel, and without any dialog with FF denied his appeal, and he was fired March 14, 2022.

> "The Court cannot help but question, why were those accommodations of testing and masking granted, while this Petitioner's request for an accommodation would cause an 'undue burden' to the Department. It makes no difference to this Court whether the accommodation was granted for a religious or medical reason. The record is bereft of any reasoning, rational or otherwise."

Legal Lesson Learned: Similar to ADA claims, employers need to dialog with requests for accommodation before declaring request is an "undue hardship."

File – Chap. 2, FF Safety

NY: "FIREMAN'S RULE" MODIFIED BY STATUTE – INJURED FDNY FF MAY SUE RESTAURANT IF CODE VIOLATION

On Dec. 1, 2022, in Frank Ruggiero & Amy Ruggiero v. 357-359 Sixth Avenue Associates, LLC, et al., Judge Paul A. Goetz, Supreme Court, New York County, in unpublished decision, denied the restaurant's motion for summary judgement. On Jan. 11, 2019, the firefighter responded to a fire above the hood from the wood stove; the firefighter went to the second floor to check for extensions and injured his back moving the couch in the second floor storage area with a low ceiling. NY statute allows fire and police to sue if code violation directly or indirectly caused injuries.

> "[I]t is undisputed that the only reason plaintiff was at the premises and allegedly lifting the couch was to check for the presence of fire in the floorboards, a fire which allegedly resulted from defendant Llama San's violations of the fire code and negligence. Thus, plaintiffs claims for common law negligence and under the more liberal causation standard under General Municipal Law Section 205-a cannot be dismissed.''

Legal Lessons Learned: Some states like Florida have completely abolished the Fireman's Rule, while other states like Ohio have not modified or abolished it.

File – Chap. 3, Homeland Security

U.S. SUP. CT: TITLE 42 PUBLIC HEALTH ORDER REMAIN – IMMIGRANTS SENT BACK - FEB. 2023 ORAL ARGUMENT

On Dec. 27, 2022, in Arizona, et al. v. Alejandro Mayorkas, Secretary of Homeland Security, the Court held (5 to 4) that the Title 42 public health order issued in March 2020 by U.S. Department under President Trump will temporarily remain in place until oral arguments in February, 2023 and full Court decision thereafter. The Court stayed the Nov. 22, 2022 decision by U.S. District Court Judge Emmet G. Sullivan, District of Columbia, who ruled that the 2020 public health order (issued under 1893 Federal public health statute) cannot be enforced since it did not consider vaccinations as restrictive measure to protect the public from COVID-19. Five conservative Supreme Court Justices granted the stay sought by 19 states, including Arizona and Texas. Therefore, currently migrants can continue to be returned to Mexico or their home nation. To date the 2020 public health order has been used to expel more than 2 million migrants.

> "This stay precludes giving effect to the District Court order setting aside and vacating the Title 42 policy; the stay itself does not prevent the federal government from taking any action with respect to that policy."

Three liberal justices, plus Justice Neil Gorsuch (nominated by President Trump) dissented. Justice Gorsuch wrote:

> "But the current border crisis is not a COVID crisis. And courts should not be in the business of perpetuating administrative edicts designed for one emergency only because elected officials have failed to address a different emergency. We are a court of law, not policymakers of last resort."

Legal lesson learned: The border crisis demands reform of our immigration laws.

> Note: U.S. Department of Homeland Security issued following Press Release: "As required by today's Supreme Court order, the Title 42 public health order will remain in effect and individuals who attempt to enter the United States unlawfully will continue to be expelled to Mexico or their home country. People should not listen to the lies of smugglers who take advantage of vulnerable migrants, putting lives at risk. The border is not open, and we will continue to fully enforce our immigration laws.
> We will continue to manage the border, but we do so within the constraints of a decades-old immigration system that everyone agrees is broken. We need Congress to pass the comprehensive immigration reform legislation President Biden proposed the day he took office." departmentofhomelandsecurity@messages.dhs.gov
>
> Read the Nov. 22, 2022 decision by U.S. District Court Judge Emmet G. Sullivan, District of Columbia, who ruled Title 42 order was illegal and cannot be enforced. "The Court concludes that CDC failed to appropriately consider the availability of effective therapeutics that 'reduce[d] the risk of hospitalization' by approximately 70 percent in its August 2021 Order."

File – Chap. 4, Incident Command

ME: HOUSE FIRE – TOWN IMMUNITY – HOMEOWNER CLAIMS PUMPER USE WAS DELAYED - HOUSE TO BE DEMOLISHED

On Oct. 31, 2022, in Seth T. Carey v. Town of Rumford and Rumford Fire Department, Justice Julia M. Lipez, the Superior Court of Maine (Oxford), granted the Town and Fire Department's motion to dismiss. The Oct. 5, 2020 structure fire damaged the home so extensively. The Town declared the home a "Dangerous Building" and ordered its demolition. Under the Maine immunity statute, governmental entities enjoy sovereign immunity; the exception for negligent acts in use of government vehicles does not apply to alleged delay in use of a fire department pumper.

> "Here…the gravamen of the plaintiffs complaint is that 'the Town made imprudent tactical decisions in the course of fighting the fire…..' He does not allege that he was injured by contact with a negligently operated or maintained fire truck, just that the firefighters did not deploy the truck properly. Thus, even accepting as true the plaintiffs claims that the firefighters acted negligently, the vehicle exception does not apply…. Because section 8104-A(1)'s vehicle exception is inapplicable and the plaintiff makes no claim that any other exception to immunity applies, the court concludes that the Town is immune from the plaintiffs suit pursuant to section 8103(1) of the MTCA."

Legal Lesson Learned: Sovereign immunity statute protects government entities from liability.

> Note: See Nov. 17, 2021 Court decision. "At the hearing [on homeowner's appeal of demolition order before the 3 members of Board of Selectpersons], there were over twenty documents admitted as evidence, and testimony was heard from four individuals. (PR 1-2.) One of those individuals, Rumford's fire chief, testified that he classified Carey's residence as a 100% loss once he viewed the premises after the fire was extinguished. (PR 4.) The chiefs opinion was premised upon his thirty years of experience fighting and investigating fires and the extensive structural damage to the building, which included: charred joists and subfloor, structural damage to the roof including two holes for fire ventilation, the complete loss of the staircase which rose from the basement to the first floor, the partial loss of the staircase which rose from the first to the second floor, and damage to the property's plumbing, electrical and heating systems. (PR 5.)"

File – Chap. 6, Employment Litigation

NJ: FF BACK INJURY CARRYING PATIENT – NOT "UNEXPECTED" - DENIED ACCID. DISABILIY PENSION

On Dec. 16, 2022, in Dennis Coaxum v. Board of Trustees, Police and Firemen's Retirement System, the Superior Court of New Jersey, Appellate Division, held (2 to 0) that the Administrative Law Judge properly concluded that the injury suffered by the Atlantic City firefighter was not "undesigned and unexpected" as required under State law for accidental disability retirement benefits (ADRB). The ALJ found Dennis failed to satisfy, by a preponderance of the evidence, the July 18, 2017 incident was "undesigned and unexpected." Additionally, the ALJ questioned Dennis' credibility given his lack of disclosure about the patient grabbing the railing on any form or to any doctor prior to his testimony.

> "Dennis was performing his normal job duties on the date of the incident. He had been trained to transport people to medical facilities. While the utilization of a stair chair was more common and preferable, Dennis had been supplied with and trained to use a Reeves Sleeve and had utilized it to move patients on previous occasions. He conceded he was trained to move patients in different types of areas and under different circumstances. He testified he was trained to lift things over his head as a firefighter. The record is bereft of any indication Dennis' injury arose from anything other than ordinary strenuous work effort." https://casetext.com/case/coaxum-v-bd-of-trs

Legal Lesson Learned: Thoroughly document in all reports that the patient grabbed the railing.

Chap. 5 – Emergency Vehicle Operations

File – Chap. 6, Employment Litigation

SC: FF BACK INJURY - WORKERS COMP AWARDED FOR "REPETITIVE TRAUMA INJURY" – ALJ REVERSED

On Dec. 7, 2022, in Nicholas B. Thompson v. Bluffton Township Fire District, et al., the Court of Appeals of South Carolina, held (3 to 0) that Administrative Law Judge is reversed, since there is substantial evidence of repetitive trauma injury caused by his work as a firefighter. He began experiencing back pain in 2014, but was able to perform firefighter duties. In 2016, Thompson identified three specific instances where his back pain was "significant" at work. In late spring of 2016, Thompson responded to a "lift and assist call" to help a four-hundred-pound woman rise from the floor of her home. On July 9, 2016, he was at the scene of a large house fire (the Belfair Fire) where he handled high-pressure hose and replaced SCBAs. In October 2016, he used chains in aftermath of Hurricane Matthew. In January 2017, Thompson reported to his Battalion Chief that his back pain was affecting his ability to do his job and underwent MRI that revealed he had a bulging disc, disc degeneration, and nerve impingement in his lower back. The Court was particularly critical of ALJ's criticism that firefighter did not file reports of injury from these incidents.

> "We find Thompson, although experiencing and receiving treatment for back pain from 2014 until 2016, could not have reasonably known it was a compensable repetitive trauma injury until February 2017, when the pain from his gradual onset injury became so intense that he was unable to complete daily duties as a firefighter and he sought medical treatment from Dr. Cramer…. We also find Thompson presented competent medical evidence 'that there is a direct causal relationship between the condition under which the work is performed and the injury.' § 42-1-172(D). Dr. Lindley was under no misapprehension about the duties Thompson was required to perform as a firefighter when giving his opinion about the cause of Thompson's repetitive trauma injury, and it was his expert medical opinion-recited in both his July 11, 2017 letter and in his sworn deposition testimony-that to a reasonable degree of medical certainty, Thompson's repeated activity of picking up heavy objects and people caused Thompson's L4-5 disc protrusion with radiculopathy, nerve impingement, and bowel and bladder issues."

Legal Lesson Learned: Excellent decision based on substantial testimony about the firefighter's strenuous job duties.

File – Chap. 7, Sexual Harassment

NB: MEDIC 90 DAYS IN JAIL - PRECEPTOR KISSED STUDENT RIDE-ALONG 3 RUNS – WARNED HER NOT TELL - $1000 FINE

On Dec. 20, 2022, in State of Nebraska v. Monty Betancur, the Court of Appeals of Nebraska, held (3 to 0; unpublished decision) affirmed the convictions by a jury of for two counts of third degree sexual assault, one count of first degree false imprisonment, and one count of tampering. On Oct. 11, 2020, 22-year-old Ashley M. _____an EMT (and volunteer FF for 3 years), enrolled in paramedic program at Western Nebraska Community College, did a ride-along shift from 7 am – 7 pm at Valley Ambulance. Betanbcur was a preceptor for the paramedic program. The Court described the three runs where he kissed her without consent.

> Run No. 1:
> "After unloading the patient at the hospital, [EMT Taylor] Severyn reported to the ER nurses while Ashley and Betancur walked back to the ambulance bay to clean the ambulance. Ashley stated, '[Betancur] pulled me to the backside of the ambulance and kind of [grabbed my arm and] pulled me into him, and then through our facemasks, kissed me on the lips.'"
>
> Run No. 2:
> "According to Ashley, when the signal for the second call went off later that morning, the crew was working on stretcher lifting techniques in the ambulance bay at the station. Ashley testified that Severyn went inside the living quarters 'and at that time [Betancur] came back over to me and [grabbed my arm and] pulled me back in towards him and kissed me for the second time' while both were wearing masks."
>
> Run No. 3:
> "Ashley said she was inserting an IV into the patient's wrist and had the patient's wrist 'on my right leg and was kind of stabilizing it to insert the IV,' and '[Betancur] had one of his hands helping me stabilize it and the other hand was squeezing the inside of my left thigh the whole time.'

***

Ashley stated that when the crew arrived back to the Valley Ambulance station, they got out of the ambulance. She said, 'as I got out of the side door, [Betancur] got of [sic] the passenger door and he, again, pulled me to him and kissed me for the third time'; both were still wearing masks. Neither one of them said anything, but Ashley pulled her body back away from him."
End Of Shift Threat / Facebook Messenger
"[At end of her shift at 7 pm] as Ashley was getting ready to leave Betancur said, 'If you say anything, I will make your life hell.'"

***

At 9:42 p.m. on October 11, 2020, Betancur reached out to Ashley via Facebook Messenger. Ashley said that she did not open the message 'because I didn't want him to see that I had read the message, but I had seen the message' on the screen saver. The message, which was received into evidence, stated, 'I want you to be completely honest. Were you at anytime today uncomfortable??' Ashley did not respond to Betancur's message."

> "We disagree with Betancur's contention that 'an unwanted kiss on the victim's lips by an actor using his own lips' does not satisfy the requirements for third degree sexual assault in § 28-320(1) and (3) because it does not meet the definition of 'sexual contact'

> set forth in § 28-318(5). As noted by the State, '[§ 28-318(5)] defines sexual contact as the touching of the victim's sexual or intimate parts"'and 'in order to give effect to all words of the statute, 'sexual' parts must be something different from 'intimate' parts."

Legal Lesson Learned: The EMT victim promptly reported the assaults to the Fire Chief, and to the Scottsbluff Police Department

Chap. 8 – Race / National Origin Discrimination

File – Chap. 9, Americans With Disabilities Act

DE: FF BACK INJURY DURING TRAINING – NO LIGHT DUTY – ON MEDICAL LEAVE 1-YR, FIRED – CASE PROCEED

On Dec. 15, 2022, in Hiram Whatley v. City of Wilmington, U.S. District Court for Delaware, Federal Judge Stephanos Bibas, visiting judge from U.S. Court of Appeals for 3rd Circuit (Boston), denied the City's motion to dismiss; pre-trial discovery will now begin. Hiram Whatley was a Wilmington firefighter for more than two decades, when in June 2019, he injured his back in a training exercise. "This injury kept him out of work and ultimately required surgery. When Whatley asked for light duty, the Fire Chief told him that no such assignment exists in the fire department. Whatley also sought extensions of his medical leave. But in July 2020, Wilmington fired Whatley after more than a year away from work." Whatley claims the City has offered light duty to him for a previous injury, as well as to other injured firefighters.

> "Wilmington argues that Whatley is not qualified because his requests for additional leave and light duty were unreasonable accommodations…. At this stage, [his allegation about light duty] is enough to show that light duty is a reasonable accommodation."

Legal Lesson Learned: The case will now proceed to pre-trial discovery.

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

File – Chap. 11, FLSA

CA: FLSA – SETTLEMENT SALARIED "REGIONAL DISASTER COORDINATOR" 16 COUNTIES - 71% OVERTIME CLAIMED

On Dec. 9, 2022, in Aram Bronston v. County of Alameda, U.S. Magistrate Judge Alex G. Tse, U.S. District Court for Northern District of California (San Francisco Division) approved the settlement: $97,448 to Mr. Bronston, and $52,531 to his attorney. His original claim was for $135,000 in unpaid overtime and an equal amount in liquidated damages. The plaintiff worked for 21 months as an EMS Coordinator, with job title of "Regional Disaster Medical Health Specialist," where he coordinated regional medical and health responses for 16 counties in Northern California in the event of an epidemic, natural disaster, power shutoff, other situation requiring the coordination of medical and health needs. He worked 1,400 hours of overtime

during his employment from November 19, 2018, and August 21, 2020; he was paid as a salaried employee with no overtime pay. The County contends that Plaintiff's position fell within the FLSA's administrative and highly compensated employee exemptions to its overtime requirement because: (1) Plaintiff met the weekly and annual salary requirements for each exemption; (2) performed non-manual work directly related to the County and the State's general business operations; and (3) exercised discretion and independent judgment as to matters of significance. *See* 29 C.F.R. §§ 541.200(a) & 541.601(a)(1). Mr. Bronston Plaintiff disputes that his job duties directly related to the County's general business operations and required him to exercise discretion and independent judgment with respect to matters of significance. The Court referred the case to Magistrate Judge Donna Ryu for a settlement conference, who held a settlement conference on November 7, 2022, during which the parties reached a settlement agreement, conditioned upon this Court's approval.

> "The Court finds that the proposed agreement-which represents approximately seventy one percent of the overtime pay Plaintiff claims that he is due and seventy four percent of the attorney's fees and costs that Plaintiff claims would be recoverable as of the date of the settlement conference were this matter to proceed to trial-reflects a reasonable compromise with respect to these difficult issues."

Legal Lesson Learned: Settlement of the case avoids the expense and risk to both parties of protracted litigation.

> Note: See article on this settlement: *CA County Settles FLSA Suit with Former EMS Coordinator.*

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

File – Chap. 13, EMS

CA: SAN FRAN. MEDICS ON "FIELD TEAMS" REMOVE HOMELESS – LACK OF SHELTERS - COURT INJUNCTION

On Dec. 23, 2022, in Coalition On Homelessness v. City and County of San Francisco, U.S. Magistrate Judge Donna M. Ryu issued a preliminary injunction to "enjoin Defendants from enforcing San Francisco ordinances that punish sleeping, lodging, or camping on public property and related California Penal Code provisions, and to prohibit Defendants from seizing and destroying the unabandoned personal property of homeless individuals." There are approximately 7,754 homeless in the City, with only 5,080 shelter beds. The City conducts several encampment closures each week, with "field teams" which consist of an SFFD paramedic who serves as the "incident commander," two to four Homeless Outreach Team workers, one DPH clinician, zero to six police officers, four to eight DPW street cleaners, and two parking control officers.

> "The relief sought by Plaintiffs will not bar Defendants' efforts to 'keep public spaces clean and sanitary' or 'allow safe access' to sidewalks and rights-of-way since Plaintiffs do not ask the court to enjoin any ordinances targeting public health nuisances or willfully obstructing streets, sidewalks, or other passageways, as discussed below. Rather, Plaintiffs ask that Defendants be enjoined from enforcing ordinances that punish

individuals for ‘involuntarily sitting, lying, and sleeping in public’ and from’ seizing and destroying’ homeless individuals' unabandoned property in violation of their constitutional rights.”

Legal Lesson Learned: Lack of shelter beds is in an issue in many cities.

File – Chap. 13, EMS

CA: BAT. CHIEF – TERMINATION UPHELD - NOT REPORTING MEDIC HITTING PATIENT – ALSO DENIED KNOWLEDGE

On Dec. 22, 2022, in Steve Jones v. City of Loma Linda, et al., the California Court of Appeals, Fourth District (Second Division) held (3 to 0) that the City Council was authorized to reject a hearing officer’s recommendation that the Battalion Chief, with 26 years with the Fire Department, be reinstated with a letter of reprimand. The Court found that City Council could reasonably conclude that the harm to the public service was so great that terminating his employment was the “only reasonable option.” The incident involved a Medic who slapped a mental patient; during the transport the patient had freed his right arm from soft restraints and was spitting at the crew [see below note].

> “Jones asserts that he had an ‘unblemished 26-year career,’ so terminating his employment was an abuse of discretion. Jones's long and mostly untarnished career indicates that it is less likely his dishonesty will be repeated, which is a relevant factor. (*Skelly v. State Personnel Bd.*, *supra*, 15 Cal.3d at p. 218.) However, ‘the overriding consideration in these cases is the extent to which the employee's conduct resulted in . . . '[h]arm to the public service.' (*Ibid.*) The City Council could reasonably conclude that the harm to the public service was great because Jones repeatedly had such poor judgment in this serious situation that his decision making could no longer be relied upon, which meant terminating his employment was the only reasonable option.”

Legal Lesson Learned: If there is a report of assault on a patient, promptly inform Senior Management and have entire crew write reports.

> Note: In a Feb. 13, 2019. In an unpublished decision, a judge described the Medic’s actions.
>
> “Toppo placed his left hand on the patient's forehead, and cupped his right hand under the patient's chin, so as to keep the patient's mouth closed to prevent the patient from spitting on the firefighters and the medics. Toppo had seen patients spit on personnel in other situations. There was a harness on the patient attaching him to the gurney, but the straps were not tight. Toppo's hand placement on the patient's face lasted five to 10 seconds, then Toppo focused on tightening the straps of the patient's harness, leaving his left hand on the patient's forehead. *** Toppo's striking of his own hand made a slapping sound. Toppo believed his left hand was slightly raised from the patient's forehead, so when his right hand struck his left hand, his left hand made a slapping noise as it came in contact with the patient. After Toppo struck his hand, "[t]he ambulance went silent," and the personnel were able to restrain the patient. Toppo believed the ambulance went silent "because of the slap."

File – Chap. 13, EMS

NY: EMTALA - PSYCH RUN – ER DOC MET PARENTS, IN HOSPITAL 3 DAYS – CASE NOT FILED 2-YR STATUTE

On Nov. 30, 2022, in Lanit Amira v. Maimonides Hospital, et al., U.S. Magistrate Judge Taryn A. Merkl, U.S. District Court for Eastern District of New York, issued a Report and Recommendation that the psychiatric patient's lawsuit hospital failed to provide adequate medical screening before admitting her must be dismissed since not filed within two years required by the 1986 Emergency Medical Treatment & Labor Act (EMTALA). Plaintiff was at home on Dec. 10, 2018 when her mother called Hatzalah medics [Jewish based service]for medical assistance; her daughter had recently gone through a divorce and was concerned about her behavior "over the last few months." Hatzalah's medics at the Brooklyn home for two hours, and then called for back-up from Maimonides Hospital medics and NYPD. They eventually persuaded her to go to hospital ER in their ambulance. Plaintiff arrived at the emergency room around 5:00 p.m., at which point a nurse instructed her to change into a hospital robe and to place her belongings in a plastic bag; a doctor spoke to her parents at the ER and admitted her (allegedly "without first speaking to" the plaintiff). Plaintiff remained at hospital for three days, was administered medication, and discharged on Dec. 13, 2018. She filed this lawsuit on July 6, 2021. On Dec. 29, 2022, U.S. District Court Judge Rachel P. Kovner dismissed the case.

> "With EMTALA, Congress created a federal cause of action, but also placed a strict limit on the time period under which medical providers could be held liable under its provisions. As a consequence, Plaintiff's EMTALA claim was barred as of December 10, 2020, two years from the date of the alleged violation of the law's screening requirement, i.e., Maimonides's failure 'to evaluate [Plaintiff] in the emergency room, prior to placing [her] under observation.'
>
> *Footnote 11*
> To establish her EMTALA claim based on Maimonides's violation of the screening requirement, Plaintiff needed only to establish that she 'show[ed] up for treatment at a hospital's emergency room' and that the hospital failed to 'provide for an appropriate medical screening examination . . . to determine whether or not an emergency medical condition' existed. *Hardy v. N.Y.C. Health & Hosp. Corp.*, 164 F.3d 789, 792 (2d Cir. 1999). Since Plaintiff's allegations are that Maimonides failed to provide an examination at the emergency room *whatsoever*, she necessarily knew the 'critical facts of injury and causation' at such time. *Kronisch*, 150 F.3d at 121. Accordingly, even if the discovery rule applies, Plaintiff's two-year clock began to run from the date of Maimonides's alleged EMTALA violation. The date Plaintiff 'discovered' that there might be a federal claim on this basis is irrelevant."

Legal Lesson Learned: Congress included two year statute of limitations in EMTALA so that hospitals can have timely notice to investigate and respond to patient allegations.

Note: EMTALA also imposes a medical screening requirement. See 42 U.S.C. § 1395dd(b).

(a) Medical screening requirement

> In the case of a hospital that has a hospital emergency department, if any individual (whether or not eligible for benefits under this subchapter) comes to the emergency department and a request is made on the individual's behalf for examination or treatment for a medical condition, the hospital must provide for an appropriate medical screening examination within the capability of the hospital's emergency department, including ancillary services routinely available to the emergency department, to determine whether or not an emergency medical condition (within the meaning of subsection (e)(1)) exists.

Chap. 14 – Physical Fitness, incl. Heart Health

File – Chap. 15, CISM, PEER

MN: PTSD STATUTORY PRESUMPTION - DEPUTY GETS WORKER COMP – COUNTY PSYCH IME NOT FOR 10 MONTHS

On Dec. 21, 2022, in Douglas Juntunen v. Carlton County, et al., the Supreme Court of Minnesota held (7 to 0; including 2 concurring opinions) that Deputy Juntunen is entitled to workers compensation. The Deputy's psychiatrist concluded he suffered from PTSD on the date of the exam, Aug. 20, 2019. The County took 10 months to arrange for their psychiatrist to conduct an independent medical exam (July 20, 2020), who concluded that the Deputy now suffers from major depression but not PTSD. The County therefore failed to rebut the Minnesota statutory presumption for emergency responders. The Deputy also submitted proof of seeking mental help after the suicide of a former partner in 2016. He contacted County EAP who referred him to Beth Jordan, a licensed mental health clinician, who he saw four our times during next 3 months. Then in Dec. 2018, he renewed meeting with the Beth Jordan when he found it more and more difficult to report to duty. Over the next few months, he met with Jordan a few times a month, and he received eye movement desensitization and reprocessing (EMDR) therapy to process the pursuit and suicide, his partner's suicide, his mother's death, and the death of a 16-year-old boy in MVA who had just received his driver's license. The Workers Comp administrative law judge denied coverage based on the County's psychiatrist's report. On appeal, the Workers' Compensation Court of Appeals reversed since that report was 10 months after the Deputy's report of PTSD (Aug. 20, 2019). The Minnesota statutory presumption law became effective for claims made on or after Jan. 1, 2019.

> "The employer argues that Dr. Arbisi's opinion from July 2020 was sufficient to rebut the presumption. We disagree. The WCCA determined that the County did not rebut the presumption for the following reason:
>
> > The presumption [based on Dr. Keller's diagnosis in September 2019] established that at the time of his disablement from work, the employee had compensable PTSD. To rebut, the employer needed to offer evidence that at the time of the employee's disablement, he did not have a PTSD diagnosis. The employer failed to do so as Dr. Arbisi's opinion was, at the time of his July 2020 evaluation and for the 30 days preceding that evaluation, that the employee did not have a PTSD diagnosis. His opinion, in both his report and his deposition testimony, failed to

address the issue surrounding the statutory presumption, specifically whether the employee had a diagnosis of PTSD in September 2019."

Legal Lesson Learned: Statutory presumption for emergency responders are extremely helpful for those seeking workers comp for PTSD,

Note: Two of the seven Minnesota Supreme Court Justices issued a concurring opinion. Justice Anderson wrote:

"This [opinion] leaves local government units, and by extension, taxpayers, potentially required to pay disability compensation to any covered employee who is diagnosed with PTSD from the time the employee files the claim until the employer can schedule an independent medical examination, regardless of the validity of the initial diagnosis. *** What amendments, if any, are necessary to clarify the operation of Minn. Stat. § 176.011, subd. 15(e), are within the purview of the Legislative and Executive branches of our government. I write separately only to highlight some potential issues that may, or may not, require further action by those branches."

File – Chap. 15, CISM, PEER

MN: DEPUTY SHERIFF SUICIDE – "KILLED IN LINE-OF-DUTY" PENSION AWARDED TO WIFE – COURT OVERTURNS ALJ

On Dec. 19, 2022, in In The Matter Of A Public Safety Officer Death Benefit For Jerome Rihcard Lannon (deceased), the Court of Appeals on Minnesota, held (3 to 0) that Administrative Law Judge incorrectly ruled that a deputy's suicide cannot be considered a "line of duty death." Deputy Lannon committed suicide in 2018; he had been employed by Washington County Sheriff's Office since 1999 and had responded to numerous critical incidents including a double murder, multiple suicides, a child's sexual assault, and fatal vehicle crashes. He was also involved in high-stress situations like apprehending a suspect in a domestic dispute who had fired a weapon in the home. Inn 2015, Deputy Lannon was diagnosed with anxiety and depression. In 2016, he began attending therapy to address symptoms of anxiety and depression. In September 2018, he was further injured in a serious car accident and in Nov. 2018 a supervisor brought him to a hospital because he was experiencing suicidal ideations; after his release he committed suicide on Nov. 26, 2018.

"The primary question before us is whether a public safety officer who dies by suicide as a result of job-related PTSD is 'killed in the line of duty' within the meaning of the death-benefit statute, Minn. Stat. § 299A.44…. We conclude that 'killed in the line of duty,' as used in Minn. Stat. § 299A.44, includes a death by suicide resulting from PTSD caused by performing duties peculiar to a public safety officer. Accordingly, survivors of such an officer may qualify for the death benefit provided by Minn. Stat. § 299A.44. We further conclude that relator has presented sufficient evidence to raise a genuine issue of material fact as to whether Deputy Lannon's death by suicide meets that qualification. We therefore reverse and remand to the Office of Administrative Hearings for further proceedings consistent with this opinion."

Legal Lesson Learned: Suicide by public safety officers is a nationwide issue. I hope the widow receives LODD benefits.

File – Chap. 16, Discipline

LA: NEW ORLEANS CAPTAIN FIRED – DIDN'T RESPOND TO TRASH FIRE - CLAIMED OVERHEAD DOOR PINNED FOOT

On Dec. 28, 2022, in Michael Ebbs v. New Orleans Fire Department, the Court of Appeals of Louisiana, Fourth Circuit, held (3 to 0) that the city's Civil Service Commission properly upheld the termination, after providing a two-day hearing including a video from Realtime Crime Camera outside the fire station. On June 14, 2020, Captain Ebbs and his platoon at Engine House 24 failed to respond to a fire and relieve the platoon at the fire; the call for a train fire came in at 6:26 am, just before the shift change. First arriving Engine 27 reported it was only a trash fire between the flood wall and the train tracks. Captain Ebbs' written special report claimed that the overhead door "push button malfunctioned" and pinned his foot, and he also filed a workers' comp claim for injuries. The Civil Service Commission decision stated that Firefighter David Smith testified that Captain Ebbs had told him it was a "trash fire" and his personnel would not be responding.

> "As to lawful cause, the CSC determined that NOFD carried its burden of proving that Captain Ebbs was untruthful about his failure to report to the June 14, 2020 fire, because the RTCC footage in evidence did not reflect that the overhead door fell on Captain Ebbs. Superintendent Roman Nelson ('Chief Nelson') testified as the appointing authority involved in the disciplinary process. He attested that a fire officer's primary responsibility is to respond to fires, and that failure to respond to a fire and untruthfulness are violations of public confidence in firefighters whom the public expects to respond when dispatched. He noted that investigations cannot be effective where a member is untruthful during an investigation."

Legal Lesson Learned: False reports can lead to termination.

Note: FD's termination letter included following:

- You falsely reported that "(t]he door did not respond, when the 'down' button was pressed."
- You falsely reported that you "observed that the door was off its track."
- You falsely reported that "once [you] pressed the 'up' button the door jolted and came down swiftly, causing "you" to fall backwards.
- You falsely reported that the overhead door "had [you] pinned."

File- Chap. 17 – Arbitration, Union Relations

IN: MAYOR RETALIATED AGAINST UNION– CHANGED SCHEDULE 24/48 TO 8/24 - INJUNCTION AGAINST CHANGE

On Dec. 21, 2022, in International Association of Firefighters, Local 365, et al. v. City of East Chicago and Anthony Copeland, the U.S. Court of Appeals for Seventh Circuit (Chicago), held (3 to 0) that the change in work schedule from 24/48 to 8/24 was in retaliation for union's First Amendment activities, including support of the Mayor Anthony Copeland's opponent in 2019, firefighters' protest at his inauguration, their endorsement and election of six members of city's Common Council, their successful lobbying for increase in firefighter pay ordinance [which

Mayor vetoed], and union rejection on Dec. 2, 2019 of proposed agreement to return to 24/48 schedule if union agreed to stop all lobbying. On December 23, 2019, the Common Council passed Ordinance 19-0029, which set the firefighters' work schedule back to the 24/48 schedule. Copeland vetoed the ordinance, but the Council passed the ordinance over the veto. On March 4, 2021, the Lake County Superior Court issued a decision agreeing with Copeland and struck down the ordinance—leaving the 8/24 schedule in effect. The union then sought a preliminary injunction in Federal court. U.S. District Court Judge Phillip P. Simon (Northern District of Indiana) concluded after a two-day preliminary injunction hearing that the Mayor's actions were motivated by the Local 365 First Amendment activities and on March 28, 2021 ordered City to return to 24/48 schedule.

> "[W]e find that the district court did not err in determining that the defendants' actions were motivated by the Fire Fighters' First Amendment activity; that there was no evidence that the 8/24 schedule was expected to result in cost-savings for the City; and that the Fire Fighters would suffer irreparable harms without an injunction. We additionally find that the district court did not abuse its discretion in balancing the equities in this case, considering the severity of the harms the Fire Fighters have experienced and the lack of evidence supporting the defendants' alleged harms. The decision of the district court is therefore AFFIRMED."

Legal Lesson Learned: Union's First Amendment rights were protected from retaliation by the Mayor. Interesting fact: Mayor Anthony Copeland was a former firefighter of twenty-six years.

> Note: See Dec. 23, 2022 article, "Appeals court win provides backup to EC firefighters union." "EAST CHICAGO — A federal appeals court just gave city's firefighters an early Christmas gift in their three-year-long labor dispute with the mayor."
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> See also March 28, 2021 decision by U.S. District Court Judge Philip P. Simon.

File – Chap. 17, Arbitration, Union Relations

NY: YONKERS MUST CONTINUE TO PAY DISABELED FFs UNDER AGE 65 – HOLIDAY, CHECK-IN, BUT NOT NIGHT PAY

On Dec. 15, 2022, in In The Matter Of John Borelli, et al. v. City of Younkers, the New York Court of Appeals held (4 to 2) that 39 disabled firefighters, who are under age 65 and therefore by State law receive supplemental payments to equal the pay of current firefighters at same pay grade, are entitled to Holiday Pay and Check-In Pay (required to report for duty 12 minutes early) since all current firefighters receive, but they are not entitled to Night Differential since only firefighters work nights get that pay. The State of New York has had statutes since 1938 protecting firefighters disabled in the line of duty, and in 1977 enacted General Municipal Law § 207-a (2) which provides that until a disabled firefighter reaches the mandatory retirement age of 65, their municipal employer must make up the difference between the state's disability pension benefits and the firefighters' "regular salary or wages."

> "It is clear from the CBAs that all firefighters are entitled to receive holiday pay and check-in pay based solely on the performance of regular job duties. The provisions of the CBAs governing check-in pay require that firefighters be present

for duty 12 minutes prior to the commencement of their tours of duty to receive instruction, equipment, and for other miscellaneous duties. They specify, without qualification, that each employee "shall receive an additional [5½] days [of pay]" per year. The provisions governing holiday pay provide that firefighters shall be paid for 12 holidays," *whether worked or not*" (emphasis added). Hence, all active-duty firefighters performing their regular job duties are contractually entitled to receive both check-in pay and holiday pay. "

Legal Lesson Learned: For decades Yonkers has made these "special pays" and the NY's Highest court will require they continue this practice.

Note: Two dissenting Justices noted "A proper interpretation of this statutory term is critical; any unwarranted expansion of the definition undermines the goals of the legislation, forcing municipalities to spend more on disability payments and less on active fire protection." The Justices noted that City of Yonkers has faced a financial difficulty, including $7.4 million gap in their Public School District budget.

Note: See this companion case. On Dec. 15, 2022, in In The Matter Of City of Yonkers v. Yonkers Fire Fighters, Local 628, the New York Court of Appeals held (6 to 0) that the City must arbitrate with Local 628 over their plan to discontinue their practice since at least 1995 to pay "special pay" (including holiday pay, check-in pay for reporting to duty 12 minutes early, and night differential) not only to active duty firefighters, but also to disabled firefighters who have not yet reached age 65.

Chap. 18 – Legislation