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Feb. 2023 – FIRE & EMS LAW NEWSLETTER

[NEWSLETTER IS NOT PROVIDING LEGAL ADVICE.]

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- **TEXTBOOK:** Updating 18 chapters of my textbook (2018 to current). FIRE SERVICE LAW (SECOND EDITION), Jan. 2017: View textbook via Waveland site

19 RECENT CASES

File: Chap. 1 – American Legal System / Fire Codes

SC: PUBLIC HOUSING – 2 DEAD - BAD FURNACE, NO CO DETECTORS – CITY CAN BE SUED - "SHOCK CONSCIOUS"

On Jan. 19, 2023, in Daniel Washington, Personal Representative of the Estate of Calvin Witherspoon v. Housing Authority of the City of Columbia, the U.S. Court of Appeals for the Fourth Circuit (Richmond, VA) held (3 to 0) that that the U.S. District Court judge should not have dismissed this lawsuit. "In sum, at this early stage, Plaintiff has alleged sufficient facts to establish that the Housing Authority's policies and customs were the moving force behind the constitutional injury." The gas furnace was installed in 1990, had never regularly inspected, tested, or maintained, and build-up of debris caused the furnace's carbon monoxide venting to stop functioning leading to two deaths and hospitalizations in 2019. Carbon dioxide detectors were required by law to be in each unit, but none were in any of the 244 units. The Court held: "Plaintiff has alleged enough facts at this early stage to establish that the Housing Authority recognized the risk of carbon monoxide poisoning and acted inappropriately in light of that risk."

> "The police and fire chiefs determined that Witherspoon's death was entirely preventable had the Housing Authority performed regular maintenance. Yet they found that the Housing Authority had performed no preventative maintenance on appliances at the complex, maintenance reports were inadequate or incomplete, and tenants who lived at the apartments believed that "if they complained, things would not be fixed…. The Housing Authority only had a single inspector for all 2,600 of its housing units. And ultimately, an inspection of the apartments revealed 869 code violations, ranging from missing carbon monoxide detectors and faulty smoke detectors to exposed wires and expired fire extinguishers. The fire chief found that several stoves were leaking natural gas, presenting a 'severe risk for the community and its occupants.'
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> Additionally, the Housing Authority adopted a specific policy in 2017 to ensure that missing carbon monoxide detectors, which it considered to be "life-threatening conditions," were installed in *some* (privately owned) properties…. But two years later-

> and with time to reflect that such "life-threatening conditions" from carbon monoxide threatened *all* of its properties-the Housing Authority had chosen not to apply the same policy to its *own* housing. Thus, the facts alleged show there was ample time to deliberate and reflect on those choices. Accordingly, deliberate indifference is the correct standard to apply here.
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> To prove a violation of substantive-due-process rights under the Fourteenth Amendment, a plaintiff must show that a defendant's behavior was 'so egregious, so outrageous, that it may fairly be said to shock the contemporary conscience.'

Legal Lesson Learned: The facts alleged do "shock the conscious" and the case will now proceed to pre-trial discovery.

File: Chap. 1 –American Legal System / Fire Codes

SC: SPRINKLERS NOT REQUIRED IN ATTICS OF CONDOS – FIRE CHIEF & BLDG OFFICIAL APPROVED – NO CASE

On Jan. 11, 2023, in Palmetto Pointe at Peas Island Condominium Property Owners Association, Inc., et al. v. Island Pointe, LLC, et al., the Court of Appeals of South Carolina held (3 to 0; unpublished opinion) that jury's verdict for in favor of WC Services, Inc. (WCS) is upheld. The subcontractor that was responsible for supplying and installing fire sprinkler systems in all of the units, per Fire Chief's advice, was not required to install sprinklers in the attic. The Court held: "Claims against several defendants went to the jury. This appeal concerns the POA's [Property Owners Association] claims against WC Services, Inc. (WCS). WCS is the subcontractor that was responsible for supplying and installing fire sprinkler systems in all of the units. The POA's claims against WCS are the only ones that resulted in a defense verdict. We affirm. *** There is a reasonable inference the developer was instructed that it did not need to include sprinklers in the attics. A key piece of evidence is a memo—the "Hall Letter"—memorializing a meeting between the developer, the fire chief, and a local building official. The letter begins by referencing Folly Beach's local sprinkler system requirements, but after that, the letter explains the development's sprinkler systems must comply with a national standard. That standard does not require attic sprinklers in this situation."

> "Then, the letter references two particular provisions (and only those two provisions) of the local sprinkler ordinance. We agree with WCS that it is possible to read the letter as informing the developer that the national standard applies and (by implication) that attic sprinklers are not required.
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> WCS's expert testified that changes to design plans regularly occur in the field and that a building official always ensures that the installed system conforms to the plans before

approving the system. This expert said building officials must have permitted changes to the original design because the project successfully received the national standard certificate of material and testing, which is completed by the sprinkler subcontractor and either a representative of the owner or the building official after physically inspecting and pressure testing the installed system. We hold that a jury could reasonably infer that the final plans for the project differed from the plans that were placed into evidence at trial.

Legal Lesson Learned: Code does not require sprinklers in attics.

File: Chap. 1 – American Legal System / Fire Codes / Arson

NY: ARSONIST – DENIED "COMPASSIONATE RELEASE" - 1994 LODD FDNY LT. – MUST REMAIN PRISON ALL 43 YRS

On Jan. 5, 2023, in United States of America v. Alberto Raposo, U.S. District Court Judge John P. Cronan, U.S. District Court for Southern District of New York, denied the prisoner's motion for compassionate release. The defendant started eight (8) fires on June 5, 1994 in a building in Manhattan, after a dispute with the two men he lived with on the fifth floor. FDNY responded and unfortunately Lt. Gorge Lener died in subcellar. The Federal judge reviewed his terrible misconduct and denied him early release from prison. The judge held: "In sum, granting early release in this case would fail to reflect the seriousness of Raposo's crime of setting a fire that caused the death of Lieutenant Lener, would not justly punish that offense, would fail to promote respect for the law, and would not achieve adequate deterrence for such conduct. Thus, the applicable section 3553(a) factors compel the conclusion that no reduction of the imposed sentence is warranted."

> "On the evening of June 5, after a dispute with Ruiz, Raposo set eight fires throughout various floors and the subcellar of 79-81 Worth Street…. Raposo waited until Ruiz and Delvalle were inside the building on the fifth floor before setting the fires…. Raposo set the first fire in the subcellar, proceeded to the fourth floor where he gathered his belongings and set more fires, and then set additional fires on the second floor, in the lobby, and outside the building…. Raposo also strategically poured oil on egresses including a stairwell leading to a fire escape and the fire escapes themselves, locked the doors with a mortise lock to which he held the only key, and removed wires to disable the building's fire alarm.
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> [F]irefighters with FDNY Ladder Company #6, led by Lieutenant George Lener, fought the blaze in the subcellar of the building, navigating their way through water that had accumulated from the sprinkler system…. Lieutenant Lener remained alone in the subcellar after the tanks of the firefighters under his command ran dry…. Subsequently, other firefighters heard a distress call, and one eventually found Lieutenant Lener facedown and unconscious in a foot of water in the subcellar…. Lieutenant Lener was carried out by five firefighters and rushed to a hospital in an ambulance…. Tragically,

Lieutenant Lener never regained consciousness, and, approximately forty-five days later, died of carbon monoxide poisoning endured in the subcellar."

Legal Lesson Learned: An arsonist is legally responsible for injuries and deaths to others, including firefighters.

Note: He was first tried in state court – surprisingly a jury found him not guilty. Fortunately, he was then charged with federal offense of committing arson of property used in interstate commerce and convicted.

> "Raposo originally was charged in New York Supreme Court, New York County, with arson in the first degree, arson in the third degree, and murder in the second degree…. On July 1, 1996, a jury found Raposo not guilty of those state charges…. A federal investigation followed Raposo's state court acquittal, leading to his arrest on federal arson charges on March 5, 1998…. The Indictment, which was filed on March 4, 1998, charged Raposo with one count of committing arson of property used in interstate commerce, with death resulting, in violation of 18 U.S.C. § 844(i)…. On February 9, 1999, Raposo was found guilty of that count by a jury…. The conviction carried a maximum term of imprisonment of life."

File: Chap. 2 – LODD / Safety

NJ: VOL. FF CLAIMED STRUCK BY CAR – INDICTED FOR INSURANCE FRAUD, NOT GUILTY – BOROUGH IMMUNITY

On Jan. 25, 2023, in Joseph Fehl v. Borough of Allington, et al., the U.S. Court of Appeals for the Third Circuit (Philadelphia), held (3 to 0) that U.S. District Court properly granted summary judgment to the Borough, its former business administrator, and Police Captain who investigated the claim. "Drawing all reasonable inferences in Fehl's favor, we see no error in the District Court's analysis. The facts known to Kudlacik at the time of Fehl's arrest provided a sufficient basis to doubt Fehl's credibility and to believe he committed the charged crimes. Contrast, for instance, Fehl's statement in his benefits application that he was struck by a car, with the absence of any corroborating physical evidence. Or take Fehl's claim that he suffered nerve damage from the accident-an injury that, according to a responding EMS lieutenant, conflicts with the extent and type of physical harm a victim would typically suffer in a hit-and-run. And Fehl changed his story, first claiming that a vehicle hit him, then conceding that he might have merely tripped and fallen. These facts are sufficient to find probable cause."

> "Fehl served as a volunteer EMT and firefighter for the Borough of Wallington. He filed for worker's compensation, claiming he was "hit by [a] car" during an emergency response. App. 123. Kudlacik conducted an investigation that raised questions about Fehl's story, as it found no physical evidence, no indication of serious injury, and no vehicle matching the description Fehl provided. Nor did video from the scene show any vehicles in the area where the accident allegedly occurred. As a result, Fehl was indicted for criminal insurance fraud and tampering with public records. Following trial, a jury acquitted him of those charges.
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> Based on the acquittal, Fehl sued Baginski, Kudlacik, the Borough, and the Bergen County Prosecutor's Office, asserting several claims arising from his arrest and

prosecution. The District Court granted the Defendants' motions for summary judgment, concluding their acts were supported by probable cause. Finding no error, we will affirm.

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Guilt in a criminal case must be proven beyond a reasonable doubt, a standard enforced by the rules of evidence. *Brinegar*, 338 U.S. at 174. But probable cause imposes no such burden on the Government-rather, it demands that police officers find merely a "fair probability" that a crime was committed. *Dempsey*, 834 F.3d at 467. That standard was satisfied at the time of Fehl's arrest, and the jury's verdict does not alter that finding."

Legal Lesson Learned: Workers comp claim, unsupported by physical or other evidence, can lead to indictment.

File: Chap. 2 – LODD / Safety

NJ: CAPT. INJURED - HOSE COUPLING OFF HYDRANT – PROBIE ERROR - CAN'T SUE, NO "SHOCK THE CONSCIOUS"

On Jan. 9, 2023, in Robert Eckert v. City of Camden, the Superior Court of New Jersey, Appellate Division, held (3 to 0) that trial court judge properly held that the Captain's sole remedy is workers comp. In May, 2017, FD hired 33 probationary FF, and assigned two to each engine company, instead of usual practice of only one. On Jan. 31, 2018, at a fire scene the Captain was injured when a probationary FF apparently did not properly secure hose to a hydrant and coupling struck him in the head. The Court held: "Plaintiff here contends that it is sufficient to sustain a cause of action under the 'state-created danger' doctrine if the state actor acts with 'willful disregard' for the safety of another, even if that conduct or inaction does not 'shock the conscience.' We reject that argument."

"On January 31, 2018, plaintiff Robert Eckert, a captain in the City of Camden's Fire Department (Department), was injured responding to a fire along with two "probationary firefighters," Achabe Quinones and Jose A. Berrios, both recently transferred to plaintiff's fire company. Quinones and Berrios were two of thirty-three probationary firefighters hired in May 2017. In July, the Chief of the Department, Michael Harper, assigned two probationary firefighters to each of eight companies, including plaintiff's company.

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The president of the fire officers' union and captains other than plaintiff complained to Chief Harper about assigning more than one probationary firefighter to a company. Edward Glassman, a Deputy Chief of the Department who retired in 2020, certified that he was aware of Gforer's memorandum [17 years ago, Joseph Gforer, then Deputy Chief of Operations memo wrote that FD make every effort to only assign only one probie per engine company], and Chief Harper knew that captains and other officers in the Department were concerned that assigning two probationary firefighters to a company jeopardized the safety of other firefighters and the public. Glassman also asserted that probationary firefighters did not receive adequate training on 'Camden-type hydrants.'

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{P]laintiff fails to meet the second prong of *Gormley*'s test because no reasonable factfinder could conclude that when Camden assigned two probationary firefighters to plaintiff's company, it acted with a degree of culpability that shocked the conscience. Conscience-shocking conduct occurs if the state actor intentionally caused unjustifiable harm and never occurs if the harm arose from negligence. *Id.* at 102 (citing *Lewis*, 523 U.S. at 849). '[W]hether conduct is conscience-shocking is a fact-sensitive analysis' which depends on 'whether the officials' conduct is egregious in light of the particular circumstances.' *Id.* at 103 (citing *Lewis*, 523 U.S. at 850)."

Legal Lesson Learned: In vast majority of firefighter injuries, workers comp is only remedy.

File: Chap. 3 – Homeland Security

WA: SEATTLE – GEORGE FLOYD PROTESTS - 16-BLOCKS – TEXTS NOT PRESERVED - MAYOR, POLICE & FIRE CHIEFS

On Jan. 13, 2023, in Hunters Capital, LLC, et al. v. City of Seattle, U.S. District Court Judge Thomas S. Zilly, U.S. District Court for Western District of Washington (Seattle), held that the City had an obligation to perverse the text messages between the Mayor, the Police Chief, the Fire Chief and other senior officials. Plaintiffs are business owners and residents who claim $2.9 million in loss when the city "abandoned" 16-blocks from June 8 to July 1, 2020 during "Capitol Hill Occupied Protest" (CHOP). The lawsuit was filed on June 24, 2020, and City was notified to preserve text messages. The Court commented that Mayor Jenny Durkan's various reasons for deleting her text messages "strain credibility." For example, on July 4, 2020, Mayor Durkan claims that she dropped her City-owned iPhone 8 Plus into the water while she was visiting a beach. "[T]he Court finds substantial circumstantial evidence that the City acted with the requisite intent necessary to impose a severe sanction and that the City's conduct exceeds gross negligence."

"When the case goes to trial the Court will issue an adverse instruction that the jury *may* presume that the City officials' text messages (deleted after Plaintiffs commenced this action) were unfavorable to the City.

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Although Plaintiff's have been prejudiced by the destruction of the officials' text messages, whether the spoliated text messages contained evidence supporting particular elements of Plaintiffs' claims is unclear. Instead, the Court will issue an adverse instruction at trial that the jury *may* presume that the City officials' text messages (deleted after Plaintiffs commenced this action) were unfavorable to the City."

Legal Lesson Learned: When City was informed of lawsuit and instruction to preserve records, key officials must preserve their records.

> Note: Plaintiffs likewise have obligation to preserve their records. Trial judge held that the City will be allowed to present evidence and argument at trial regarding [Hunters Capital's founder and CEO Michael] Malone's missing text messages.

File: Chap. 3 – Homeland Security

NY: NEW CONCEALED CARRY LAW – U.S. SUP. COURT TEMP. NOT BLOCKING – AWAIT 2nd CIRCUIT DECISION

On Jan. 11, 2023, in Ivan Antonyuk, et al. v. Steven Nigrelli, In His Official Capacity As Acting Superintendent of New York State Police, et al., the U.S. Supreme Court issued an order that keeps State of New York's new "Concealed Carry Improvement Act" (July 1, 2022) in effect while the U.S. Court of Appeals for 2nd Circuit hears oral argument and issues their opinion. Two Supreme Court Justices have urged the 2nd Circuit to decide the case on an expedited basis; see statement by Justice Samuel Alito, joined by Justice Clarence Thomas.

> "The New York law at issue in this application presents novel and serious questions under both the First and the Second Amendments. The District Court found, in a thorough opinion, that the applicants were likely to succeed on a number of their claims, and it issued a preliminary injunction as to twelve provisions of the challenged law. With one exception, the Second Circuit issued a stay of the injunction in full, and in doing so did not provide any explanation for its ruling…. I understand the Court's denial today to reflect respect for the Second Circuit's procedures in managing its own docket, rather than expressing any view on the merits of the case. Applicants should not be deterred by today's order from again seeking relief if the Second Circuit does not, within a reasonable time, provide an explanation for its stay order or expedite consideration of the appeal."

On Jan. 17, 2023, the City of New York has filed a brief with the 2nd Circuit describing the importance of the State of New York's new concealed carry law, that prohibits firearms in "sensitive areas" like Times Square and allows licensing officials to consider the mental and criminal history of the applicant.

> "The CCIA's licensing standard, which requires an applicant to have the 'essential temperament' to possess and carry a firearm safely, is squarely in line with 'shall-issue' licensure standards that the Supreme Court said in Bruen [New York State Rifle & Pistol Ass'n, Inc. v. Bruen, 142 S. Ct. 2111 (2022)] appropriately ensure that only such citizens are authorized to carry firearms."

In the Bruen case, U.S. Supreme Court on June 23, 2022 declared unconstitutional a prior version of the New York law, that prohibited residents from carrying a handgun in public unless they could prove a "special need for self-protection."

On Oct. 6, 2022, U.S. District Court Judge Suddaby, Southern District of New York, issued a preliminary injunction against the new State of New York law, focusing on its "good moral character" provision.

> "In essence, New York State has replaced its requirement that an applicant show a special need for self-protection with its requirement that the applicant rebut the presumption that

he or she is a danger to himself or herself, while retaining (and even expanding) the open-ended discretion afforded to its licensing officers.

Simply stated, instead of moving toward becoming a shall-issue jurisdiction, New York State has further entrenched itself as a shall-not-issue jurisdiction. And, by doing so, it has further reduced a first-class constitutional right to bear arms in public for self-defense (which, during the 19th and 18th centuries in America, generally came with an assumption that law-abiding responsible citizens were not a danger to themselves or others unless there was specific ground for a contrary finding) into a mere request (which is burdened with a presumption of dangerousness and the need to show 'good moral character')."

Legal Lesson Learned: Gun violence is a growing problem in our Nation, and States and cities are seeking to enact laws that face legal challenges.

Note: Jan. 20, 2023: "Columbus gun laws dodge block on enforcement, going into effect soon." "A Fairfield County judge on Friday opened an opportunity for the City of Columbus to enforce its recently passed gun limitations that have been embattled by a lawsuit."

See also: Jan. 20, 2023 - Remarks by Deputy Attorney General of United States, Lisa O. Monaco, at the ATF Academy Graduation, Glynco, GA.

> "Just last week, ATF took an important step to enhance public safety when it issued the Stabilizing Brace Rule. This is a rule that ensures all short-barreled rifles, including those created when a qualifying brace is added to a pistol, are subject to applicable law. The rule makes clear that short-barreled rifles must be registered and subject to a background check before any transfer so they don't end up in the hands of prohibited persons. This rule is about safety. In recent years, mass shootings in Dayton, Ohio, and Boulder, Colorado, were carried out with firearms outfitted with stabilizing braces."

File: Chap. 4 – IC / Training

WV: FIRE CHIEF FIRED – FALSIFY HYDRANT & TRAINING RECORDS – NO CIVIL SERVICE PROTECTION

On Jan. 18, 2023, in David Crimm v. City of Grafton, the Supreme Court of Appeals of West Virginia held (5 to 0) that the trial court properly dismissed the former Fire Chiefs appeal; the evidence was so clear the Court of Appeals decided this appeal without oral argument. He was fired in March, 2018 for "falsification of official city documents." The city presented documentation to the Circuit Court judge that he had ordered subordinates to falsify the fire hydrant and department training records. The Court found: "Here, the City ordinance reflects the City's decision not to place the position of fire chief under the civil service provisions. Because the position was not placed within civil service provisions, he has failed to show that he is entitled to a civil service position within the Grafton Fire Department. In addition, contrary to petitioner's assertions, the City presented documentary evidence to the circuit court regarding

petitioner ordering subordinates to falsify the fire hydrant and department training records for the Grafton Fire Department "

> "That evidence included a June of 2018 letter from the county prosecutor setting forth his belief that petitioner had falsified documents and an April of 2018 letter from a state police sergeant detailing conversations with several individuals, which support the City's contention that petitioner directed subordinates to falsify records. The purported training records, which were reportedly completely fabricated at petitioner's direction, and fire hydrant tests, which were presented as new data despite reusing outdated data from previous years at petitioner's direction, were also produced below and are included in the record before this Court.
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> Here, the City ordinance reflects the City's decision not to place the position of fire chief under the civil service provisions. Because the position was not placed within civil service provisions, he has failed to show that he is entitled to a civil service position within the Grafton Fire Department."

Legal Lesson Learned: Falsifying records is a sure way to get fired.

Chap. 5 – Emergency Vehicle Operations

File: Chap. 6 – Employment Litigation / Workers Comp

PA: VOLUNTEER FF – KIDNEY / COLON CANCER – GETS WORK COMP UNDER PA "STATUTORY PRESUMPTION"

On Jan. 10, 2023, in Volunteer Fire Companies of Lower Saucon v. David Cawley (Workers' Compensation Appeal Board, the Commonwealth Court of Pennsylvania held (3 to 0; unpublished opinion) that the Administrative Law Judge, and the Appeal Board, both properly held that the volunteer firefighter, with over 20 years of service, and over 1,000 fires, who worked in Fire Station that did not extract diesel smoke, was entitled to worker's comp for his kidney and colon cancers. Under the PA statutory presumption statute, firefighters with over 4 years on the job, with no cancer when they joined fire service, only had to prove a **"general causative link between the claimant's type of cancer and a Group 1 carcinogen."** The Court held: "In other words, the claimant *must produce evidence that it is possible* that the carcinogen in question caused the type of cancer with which the claimant is afflicted. It does *not require the claimant to prove that the identified Group 1 carcinogen actually* caused claimant's cancer."

> "Here, Claimant testified that he has always worked at the same firehouse, which operates three diesel-powered vehicles, and it does not have a diesel fuel emissions capture system…. He could see and smell diesel fuel emissions on every fire call for approximately five to eight minutes before the trucks pulled out of the firehouse, during which time he was not wearing breathing protection. … He was also exposed while the trucks are running at every fire scene…. Claimant recalled that the firehouse apparatus door, walls, and ceiling were covered in diesel fuel soot, which he periodically participated in cleaning without being given personal protective equipment.

> Claimant described that he fought at least 1,000 interior and exterior fires over the years, including house, car, trash, brush, and warehouse fires…. Claimant presented Employer's pre-PennFIRS and PennFIRS reports reflecting his firefighting since 1979. He stated that he participated in all firefighting stages, including: the attack phase (entry, search, rescue, ventilation and suppression), the overhaul phase, the salvage phase, and the fire investigation phase, all of which exposed him to soot and smoke…. Claimant explained that, although firefighters now use self-contained breathing apparatuses (SCBAs) for all types of fires and phases, for the first 20 years or so of his service, SCBAs were not used for exterior fires, car fires, overhaul, or salvage.
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> "The express language of **Section 108(r)** [**of the Act**], namely that the claimant has a 'cancer . . . which is caused by exposure to a known (Group 1) carcinogen' clearly imposes an initial burden of causation on the claimant. Importantly, however, the provision **only requires the claimant to establish a general causative link between the claimant's type of cancer and a Group 1 carcinogen**…. Section 108(r) [of the Act] embodies a legislative acknowledgement that firefighting is a dangerous occupation that routinely exposes firefighters to Group 1 carcinogens that are known to cause various types of cancers. The 'general causation' requirement under Section 108(r) [of the Act] constitutes a recognition that different types of cancers have different etiologies, and it weeds out claims for compensation for cancers with no known link to Group 1 carcinogens. The burden imposed by Section 108(r) [of the Act] is not a heavy burden."

Legal Lesson Learned: Statutory presumption statute in Pennsylvania, and many other states, is very helpful.

File: Chap. 6 – Employment Litigation

AL: ASSISTANT FIRE CHIEF – ARRESTED DOMESTIC VIOLENCE - RETIRED "IMMEDIATELY" – NOT FORCED

On Jan. 6, 2023, in Kenneth Bolling v. City of Montgomery, U.S. District Court Judge A. Austin Huffaker, Jr., U.S. District Court for Middle District of Alabama (Northern Division), held that after holding a bench trial May 16-17, 2022 and July 11, 2022, he found that Assistant Fire Bolling's allegation that Fire Chief directed him to immediate resign after his arrest for domestic violence was not credible. Bolling was second in command at the FD, 33 years of service, was arrested on June 27, 2018 for alleged domestic violence against his former girlfriend the night before. When released from jail after 12-hour mandatory hold, he first called the City's retirement specialist for estimate of his retirement payout. He then met with Fire Chief Miford Jordan, and Chief of Staff Chief of Staff John Petrey, and signed a suspension with pay document. He then when to retirement specialist, obtained retirement document, and signed for "immediate retirement" (not giving 7-days' notice led to forfeiture of accrued leave and sick time). The Court held: "And finally, and perhaps most persuasively, on the morning he turned

himself into the city police-*before* his parking lot discussion with Chief Jordan and *before* the Petrey office meeting-Bolling called city retirement specialist Kim Neese to obtain an estimate of retirement benefit payouts should he decide to retire immediately. This uncoerced, self-initiated action supports the inference that Bolling intended to resign (or at least was seriously considering it) prior to any discussion with Chief Jordan and Petrey about his termination and supposed loss of retirement benefits."

> "According to Chief Jordan, in the parking garage and on the way to Petrey's office, Bolling kept repeating that he should not have gone over to his ex-girlfriend's house. Chief Jordan also testified that the two did not talk about anything related to Bolling's employment status at the time. According to Bolling, the discussion was somewhat different. Per Bolling, Chief Jordan approached Bolling in the parking lot, hugged him, and told him, "They [are] going to fire you." Chief Jordan also said, "Bolling, I'm talking to you like a brother [T]here ain't no fighting this."
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> Chief Jordan further testified that he never told Bolling that he was being terminated, that he should resign, or that he would lose his benefits if he did not resign. Simply put, according to Chief Jordan, they never discussed resignation or termination whatsoever during the meeting. This version of events was fully corroborated by Petrey, who reiterated in his testimony that Bolling was put on administrative leave without ever discussing resignation, retirement, or termination, and that Bolling acknowledged being put on administrative leave while an investigation into the arrest was conducted.
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> Footnote 2: From Bolling's standpoint, resignation ended any city investigation into the domestic violence incident over which criminal charges had been initiated and therefore Bolling would have avoided having to sit and answer questions during the interview about the incident as well as the other incidents, allegations, and convictions of domestic violence against Bolling over the years, and arguably would have allowed him to separate in good standing. During the trial, there was much testimony and evidence about other domestic violations incidents, criminal charges and convictions against Bolling. The Court fails to see the relevancy of his domestic violence history other than the impact it may have had in his decision to resign, effective immediately.

Legal Lesson Learned: Do not make hasty retirement decisions.

> Note: The Court is an earlier decision in this case, April 2, 2020, wrote: "Bolling has never been convicted of domestic violence, but he has been charged with domestic violence at least eight times during his career."

Chap. 7 – Sexual Harassment, Hostile Work Atmosphere, Pregnancy Discrimination, Gay Rights

File: Chap. 8 – Race

IN: CAPTAIN [BLACK] DEMOTED FOR BREACH ORDER NOT DISCUSS VIDEO TWO MEN HAVING SEX – CASE DISMISSED

On Jan. 24, 2023, in Brad M. Collier v. City of New Albany, U.S. District Court Judge Robert L. Miller, U.S. District Court for Southern District of Indiana (New Albany Division) granted the City's motion for summary judgment, dismissing his claims of race discrimination, ADA, FMLA. The plaintiff (African American) was a firefighter for over 20 years, and retired May 4, 2022; he was demoted for breach of a direct order on Nov. 1, 2019. A firefighter on his crew showed the Captain and another firefighter a video – another firefighter ["Mr. Doe"] having sex with two other males [not firefighters]. The Fire Chief ordered video destroyed, and the three firefighters to not discuss with others. For beach of that order, Captain was demoted to Sergeant and suspended for 5 days without pay; the firefighter who brought in the video was suspended for 10 days [Fire Chief first recommended he be fired for bringing the video to fire station], and the other firefighter was suspended for 1.5 days. Court dismissed the lawsuit, holding: "None of this would allow a reasonable factfinder to find race discrimination."

> "On the morning of November 1 [2019, Captain] Collier was doing chores at the firehouse. [Firefighter] Sullivan approached [Captain] Collier and told him that [firefighter] 'John Doe' wasn't 'the guy you think he is.' [Firefighter] Sullivan showed Mr. Collier a video of Mr. Doe having sex with two other adult men and suggested that if Mr. Doe would have sex with men, he was capable of 'messing around with' children. Mr. Sullivan then showed a report from Child Protective Services involving Mr. Doe, suggesting he might be a child abuser.
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> [Firefighter] Peters then entered the room and viewed the video. The three men called Battalion Chief Bowyer to the station and saved the materials to a thumb drive. After Chief Bowyer arrived, they shared the information with him, and he summoned Deputy Chief Gadd to the station. They described the information to Deputy Chief Gadd, who in turn called Fire Chief Matt Juliot and the New Albany Police Chief to the station.
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> When the fire chief and police chief arrived, the three men admitted the flash drive contained no material involving children but demanded that Mr. Doe be disciplined and that they not work with him anymore. The police chief checked into the Child Protective Services allegations and learned that they had been investigated and deemed unfounded. Battalion Chief Bowyer explained that Mr. Doe was 'macho' and might kill himself if this information got out, though Fire Chief Juliot understand the statement to be more hyperbole than literal.
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> The police chief ordered the men to destroy the thumb drive and not to discuss the materials. Chief Juliot and Deputy Chief Gadd reiterated that the command was a formal order. Deputy Chief Gadd called the station later that day to reiterate the order not to discuss the material.
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> Mr. Collier and his crew continued to talk about John Doe. Mr. Collier told some colleagues on another crew about the incident. He described in some detail the video of Mr. Doe being intimate with two men and implied there was material relating to minors.

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Mr. Collier first admitted that he violated rules and regulations by disobeying direct orders and agreed that as a captain, he was held to a higher standard than many other firefighters.

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New Albany contends that Mr. Collier violated fire department rules and regulations by continuing to discuss the Doe incident with others despite being ordered not to do so. New Albany cites its disciplinary notice to Mr. Collier, which explained the violations and cited to department rules against disobeying orders, acting in a manner unbecoming of a firefighter, and disseminating false reports about others. New Albany uses Deputy Chief Gadd and Chief Juliot's testimony to show that Mr. Collier was held to a higher standard and should have led by example rather than aggravating the situation. Mr. Collier conceded the same points in his deposition, testifying that department practice was to treat captains' violations as more serious than firefighters' violations. According to New Albany, Mr. Collier's conduct around the Doe defeats the prima facie case.

Legal Lesson Learned: Captain's acknowledged breach of a direct order resulted in his demotion.

File: Chap. 8 – Race

MN: HOSPITAL – FIRED MEDIC, IN BLACKFACE AT HALLOWEEN PARTY 15-YRS PRIOR – NEWSPAPER ARTICLE

On Jan. 9, 2023, in Amber Brown v. Hennepin Healthcare Systems, the Court of Appeals of Minnesota held (3 to 0) that the Hospital had lawful right to terminate the paramedic without cause per Employee Handbook. She has worked at the hospital since 2002, and promoted Deputy Chief of Emergency Medical Services, managing the Community Paramedic Program. On February 15, 2022, the Hospital [HHS] received an unsigned email with an attached photo depicting Brown in blackface. Brown admitted that she was in the photo and said that it had been taken 15-17 years earlier at a private Halloween party. The photo was of Brown and two others dressed up as the musical group, The Supremes. The photo had been posted on someone else's Facebook page. On March 3, 2022 the Hospital fired Ms. Brown. The Court of Appeals wrote: Following an internal investigation, HHS decided to discharge Brown. But before HHS could inform Brown of its decision, the Star Tribune published an article about the photo titled "Hennepin Healthcare promised to address 'systemic racism.' Then came the blackface photos." The Court held that under Minnesota statute only requires HHS to create "a procedure for employees to appeal discharge decisions" and HHS did so by giving her an opportunity to appear before their Board of Directors (which she declined). "The statute does not require HHS to provide what Brown advocates-a just-cause hearing before discharge."

> "It is undisputed that Brown was hired for an indefinite term. And, like the contract in *Reierson*, the employee handbook states that 'Employees may resign their employment with HCMC *at any time for any reason*, and HCMC reserves the same right regarding the discontinuation of an individual's employment.' (Emphasis added.) This record supports

the determination that Brown was an at-will employee, and HHS's decision to end her employment could not be arbitrary, unreasonable, or unsupported by the evidence."

Legal Lesson Learned: An "at will" employee has no right in Minnesota to a fact finding hearing.

Note: Perhaps this is the "rest of the story" when Court wrote:

> "Following an internal investigation, HHS decided to discharge Brown. But before HHS could inform Brown of its decision, the Star Tribune published an article about the photo titled "Hennepin Healthcare promised to address 'systemic racism.' Then came the blackface photos."

See this article: "Hennepin Health accused of 'deeply rooted' racism following blackface, 'excited delirium' incidents." (March 4, 2022).

Chap. 9 – Americans With Disabilities Act

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

File: Chap. 11 – FLSA

OH: FLSA – 7(K) EXEMPTION APPLIES TO SMALL UNINCORP. TOWNSHIPS – OVERTIME ONLY AFTER 53 HOURS / NOT 40

On Jan. 11, 2023, in Phillip Strzalkowski v. Mary Ann Township, Chief U.S. District Court Judge Algenon L. Marbley, U.S. District Court for Southern District of Ohio, held that a former fulltime firefighter with Mary Ann Township, an unincorporated civil township located in northeastern Licking County, Ohio, is covered by the 7(K) exemption, and he is not entitled to overtime after 40 hours. Larger townships (i.e., with a population of 2,500 or more) are authorized to adopt a limited home rule government. Strzalkowski became a full-time firefighter with the township in 2019, and continued in that role until August 9, 2021. He often worked more than 40 hours per week, and was given overtime pay (i.e., time-and-a-half pay, or 1.5 times his regular hourly wages) for time worked in excess of 106 hours during each two-week work period. The Court held that a civil township (1,308 in Ohio) qualifies as "a municipality, county, fire district, or State" under the Fair Labor Standards Act. "Ultimately, it is clear to this Court that § 3(y) was not intended to exclude the numerous unincorporated local government units across the United States that provide fire protection services to their residents. The language of the statute is ambiguous as to the question of incorporation: as noted, whether the definition of municipality includes only incorporated local governments depends on the dictionary one cites."

> "FLSA is a federal statute, applicable nationwide; the firefighter exemption applies in all fifty states, many of which use different names for their local governments. Given that background, this Court concludes that § 7(k) was intended by Congress to be applicable for the broad spectrum of local governments across the country that offer fire protection services, regardless of nomenclature or incorporation status. The applicability of the exemption should not depend on how a particular state labels its administrative subdivisions.

***

But Congress created the § 7(k) exemption for public fire protection personnel, in acknowledgement of the unique schedules that firefighters work, and added the § 3(y) definition to expand, not limit, the scope of the firefighter exemption. A fair reading of Congress's intent leads to the inescapable conclusion that Mary Ann Township is a municipality under 29 U.S.C. § 203(y) and is authorized pay its firefighters according to the partial overtime exemption in 29 U.S.C. § 207(k)."

Legal Lesson Learned: Important decision for 1,308 small, unincorporated civil townships in Ohio; their career firefighters are entitled to overtime, like firefighter in larger townships with 2,500 residents, after 106 hours in a 14-day period, or 53 hours in a 7-day period.

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

File: Chap. 13 – EMS

WA: FD WENT WRONG ADDRESS – 16 MIN. DELAY, BRAIN INJURY– CITY NO "PUBLIC DUTY DOCTRINE" IMMUNITY

On Jan. 12, 2023, in Delaura Norg, as Litigation Guardian ad Litem for her husband, Fred B. Norg v. City of Seattle, the Supreme Court of Washington, held (5 to 4; en banc – all the Justices) that the City does not have immunity under the "public duty doctrine" because the City had an "individualized, actionable duty of reasonable care when it undertook to respond to their 911 call." On Feb. 7, 2017, Mrs. Norg called 911 at 4:42 am and reported husband was making loud sounds, and eyes were wide open and glassy. Dispatch notified Seattle FD and units went in serve at 4:44 from one station, and 4:46 at another – but mistakenly went to a nursing home near the Norg residence. They ultimately arrived at correct address 16 minutes after the initial call to 911. Fred Norg was transported to the hospital, where he was diagnosed with a heart attack. He survived but allegedly suffered "severe and permanent injuries," including brain damage due to a lack of oxygen, resulting in "cognitive deficits and impaired vision, balance[,] and ambulation." The Court held: "The Norgs have established that the City owed them an individualized, actionable duty of reasonable care when it undertook to respond to their 911 call. The Norgs' negligence claim is based solely on the City's alleged breach of this common law duty. Therefore, although we express no opinion as to whether the Norgs will be ultimately be able to prevail on their claim, we hold that the public duty doctrine does not apply."

> "As discussed above, to determine whether the public duty doctrine applies to this case, we must determine what duty the City allegedly breached and whether that duty was owed to the Norgs individually or to the general public. It is clear from the nature of the Norgs' claim that it is based on an alleged breach of the City's common law duty to use

reasonable care, which was owed to the Norgs individually. Therefore, the public duty doctrine does not apply as a matter of law."

Dissent [Justice Barbara Madsen, joined by 3 other Justices]:

"Rather than straightforwardly applying precedent, the majority relies on pronouncements made in concurrences from past cases and accepts them as settled law, rewriting the public duty doctrine to apply only when duties are imposed on government entities by statute or ordinance—creating virtually limitless liability. *** The Norgs have not shown that any duty was owed to them as individuals…. A broad and general responsibility to the public rather than to individual members of the public does not create a duty of care…. I would hold that the public duty doctrine is available to the city of Seattle…. The public duty doctrine applies when a public entity is performing a governmental function."

Legal Lesson Learned: "Public duty doctrine" has generally been a strong defense for public employers.

File: Chap. 13 – EMS

IA: EMS - SPIT HOOD ON MAN ARRESTED DOMESTIC VIOLENCE – PROPERLY USED SENTENCING - 2-YRS JAIL

On Jan. 11, 2023, in State of Iowa v. Spencer Jerrick Carter, the Court of Appeals of Iowa held (3 to 0) that the Prosecutor at time of sentencing properly advised the trial court judge that two EMS had to use a spit hood when transporting the defendant. The defendant had pled guilty to assaulting two police officers, and two firefighters on Oct. 14, 2021. On appeal, Carter contends the prosecutor's relaying of information about use of spit hood constituted improper victim statements and he is entitled to resentencing. The Court of Appeals disagreed, finding "there is nothing in the court's reasons to indicate it considered improper factors."

"Officers restrained the defendant, including by using personal defense spray, and the defendant continued to refuse to cooperate with police attempts to move him. Officers requested assistance from the Dubuque Fire Department, and as the defendant was strapped to a cot and prepared to move he told Officer Warner, "I will kill you and your family." The defendant proceeded to spit on two different firefighters as he was being carried away, Firefighters **Todd Sieverding and Steve Haupert.**

The prosecutor at sentencing hearing told the Court:

"Firefighter Todd Sieverding did say that he wanted to relay that placing a spit hood on a subject is sort of the last resort for what they do. It's demeaning, not only for the subject, but for the firefighters to do that, and if they can avoid using a spit hood, in any, in any sort of way, they would avoid doing so, but they weren't able to do that here because the Defendant continued to resist, even as they were trying to help him. Their hands were tied up holding the cot and the patient, but in order to make sure he caused no harm to himself or to us, we used the spit hood."

Legal Lesson Learned: Spitting on fire / EMS is an assault.

File: Chap. 13 – EMS

NY: PATIENT FELL OFF STRETCHER – NO SHOULDER STRAPS - DIED – EMS FIRED FALSE INFORMATION

On Jan. 5, 2023, In The Matter of Nicholas A. Walker v. City of Plattsburg, et al., the Supreme Court of New York, Third Department. Held (3 to 0) that the Mayor had authority to fire the medic in Jan. 2021, since video of the scene Nov. 21, 2018 showed he lied to police investigating the incident, and also submitted a false EMS run report. "On November 30, 2018 at an apartment complex in the City of Plattsburgh, Clinton County, petitioner, a firefighter and emergency medical technician, responded with his partner to a 911 call regarding a man lying in a fifth-floor hallway requesting medical assistance. When petitioner reached the patient, he was responsive and communicative, asking for help. Petitioner and his partner put the patient on a stretcher, securing him with the stretcher's leg and waist straps but not its shoulder straps. They wheeled the stretcher to the elevator and transported the patient down to the first floor, through the building's lobby and outside to where an ambulance was waiting. As they were leaving the building, the patient's arm went limp and dropped down to the side of the stretcher, causing petitioner to lift the patient's arm and place it across his chest. While petitioner and his partner were attempting to transfer the patient into the ambulance, the patient's upper body slipped off the stretcher and his head hit the back of the ambulance." The Court held: Petitioner concedes that he provided false information in the incident report, patient care report and statement to the police. Thus, as the parties agree, the only issue before this Court is whether the hearing evidence sufficiently established that he did so knowingly. The false statements, which are not in dispute, can be described as follows: petitioner indicated that the patient became unresponsive and was not breathing adequately while in the hallway or elevator, but video evidence and hearing testimony revealed that the patient was alert and responsive as he was transported through the hallway, elevator, building lobby and exterior doors; petitioner claimed that he radioed for assistance when the patient became unresponsive in the hallway or elevator, but the hearing evidence showed that he did not call for backup until after the patient fell off the stretcher and struck his head on the ambulance; petitioner asserted that he assessed the patient and took his pulse in the lobby, yet surveillance video reflected that petitioner did not take these actions at that time; and petitioner indicated that CPR was performed continuously after the patient fell, but video evidence showed that CPR was not begun until several minutes after the patient's fall, and was only conducted for a short time."

> "Within hours of the incident, petitioner filled out an incident report and a patient care form describing what had happened and filed these documents with the City of Plattsburgh Fire Department. The following day, petitioner was interviewed by the City of Plattsburgh Police Department regarding the incident and gave a sworn written statement to a detective. Moving forward, petitioner continued to work as a firefighter and emergency medical technician for over two years. During this time, the State Department of Health conducted an investigation of the incident, the result of which was petitioner agreeing to pay a $5,000 fine and complete additional training, and respondent City of Plattsburgh settled a wrongful death claim brought by the patient's family.
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> ***
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> As to the penalty imposed, we find that the Mayor's decision to terminate petitioner's employment was not "so disproportionate to the offenses as to be shocking to one's sense of fairness…. We see no reason to disturb the penalty imposed by the Mayor, who found,

> notwithstanding petitioner's positive accomplishments, that he had inhibited the investigation into the patient's untimely death and, seeking to avoid personal responsibility, placed his own interests above those of the City of Plattsburgh Fire Department, the patient's family and the public at large."

Legal Lesson Learned: Properly restrain patient on the stretcher; don't file false reports or lie to investigators. Not clear why took two years to discipline.

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

File: Chap. 16 - Discipline

OH: CLEVELAND EMS CAPTAIN FIRED – FACEBOOK POST – WISHED HE HAD KILLED TAMIR RICE – "BALANCING TEST"

On Jan. 25, 2023, in Jamie Marquardt v. Nicole Carlton, et al., the U.S. Court of Appeals for the Sixth Circuit (Cincinnati) held (3 to 0; unpublished decision) that U.S. District Court Judge in Cleveland properly granted summary judgment to the City of Cleveland; the City's interest as an employer outweighed Marquardt's free speech interest. [T]he district court, applying the balancing test announced in *Pickering v. Board of Education*, 391 U.S. 563 (1968), held that defendants were nonetheless entitled to summary judgment on Marquardt's First Amendment claim because the City's interest as an employer outweighed Marquardt's free speech interest. The Court of Appeals agreed. "Commissioner Carlton testified that she believed City services would be disrupted if Marquardt was identified as the author of the posts. Her conclusion, she explained, was informed by earlier 'civil unrest within the City of Cleveland related to the Tamir Rice incident.' Any visceral reaction to Marquardt's posts, Carlton predicted, would lead to further 'protest[s],' 'disharmony amongst EMS staff,' and employees 'refus[ing] to work with Mr. Marquardt.' Her conclusion is well taken.

> "Eight years ago, twelve-year-old Tamir Rice was shot and killed by a police officer. What happened that day has been well documented. A 911 caller reported a 'guy in the park with a pistol' that was 'probably fake.' Dispatchers informed officers that there was a male sitting on a swing pointing a gun at people. Officers responded to the report. Within seconds of arriving at the park, one officer shot Rice. Rice's 'pistol' was later determined to be an airsoft gun with the orange toy markings removed. Cleveland EMS responded and transported Rice to the hospital. He died the next day from his injuries. Protestors, decrying the use of lethal force, flooded Cleveland's streets. The controversy over the shooting did not end in its immediate aftermath. Some fourteen months later, the event was once again the focus of national scrutiny when news broke that Cleveland EMS billed Rice's family $500 for his ambulance ride. *Marquardt v. Carlton*, 971 F.3d 546, 550 (6th Cir. 2020) (citing Christine Hauser, *Cleveland Drops Attempt to Collect $500 From Tamir Rice Family*, N.Y. Times (Feb. 11, 2016), https://www.nytimes.com/2016/02/12/us/cleveland-500-bill-tamir-rice-shooting.html (last accessed Jan. 23, 2023)).

***

Just days later, two posts referring to the shooting appeared on the private Facebook page of Jamie Marquardt, a Cleveland EMS Captain. One stated, 'Let me be the first on record to have the balls to say Tamir Rice should have been shot and I am glad he is dead. I wish I was in the park that day as he terrorized innocent patrons by pointing a gun at them walking around acting bad. I am upset I did not get the chance to kill the little criminal fucker.' The other said, 'How would you feel if you were walking in the park and some ghetto rat pointed a gun in your face? Would you look to him as a hero? Cleveland sees this felony hood rat as a hero.' Marquardt denied making the posts, deleted them, and created a new post disavowing their content.

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Two of Marquardt's co-workers, paramedics, saw the posts the morning they appeared. Both contacted EMS Captain Michael Threat. They expressed worry about Marquardt's wellbeing and the risk of "potential civil unrest" should the posts be seen by the public because there was already "a lot in the media" addressing the Rice incident.
The reports made their way to EMS Commissioner Nicole Carlton. Carlton requested that the City's Office of Integrity Control investigate. During the investigation, Marquardt remained on the job, denying that he authored the posts.

Within three days of the posts appearing on Marquardt's Facebook page, they caught the eye of the Cleveland NAACP President, who condemned them in an article on Cleveland.com. By then, Marquardt acknowledges, the posts had become a national story.

Roughly a month later, Carlton fired Marquardt, attributing authorship of the posts to him. By making those posts, Carlton concluded, Marquardt violated a host of policies-from EMS's mission statement, pledge to the community, and social media policy to the City's civil service commission rules. Marquardt's termination letter stated that the posts were inflammatory, caused disruption (emphasizing that Marquardt's co-workers 'expressed concern for their own welfare and safety'), and cast the EMS division as 'disrespectful of the tragedy.'

***

All told, the charged speech at issue and its actual and predicted disruptive effect on the City's services tip the *Pickering* balance in its favor."

Legal Lesson Learned: Another career ended by stupid Facebook post.

File: Chap. 16 – Discipline

DC: U.S. AIR FORCE FIRE CHIEF – ALLOWED OVERTIME – FIRING REDUCED 14-DAY SUSP – LATE APPEAL BY AGENCY

On Jan. 18, 2023, in Derick Eshelman v. Department of the Air Force, the U.S. Merit Systems Protection Board held (3 to 0; but concurring opinion) that they will not overturn the Administrative Judge's decision since the Air Force missed filing an appeal through the e-Appeal system (only missed deadline by several minutes), without good explanation for the late filing. The Fire Chief was assigned to a British air base, Royal Air Force (RAF) Croughton. For three years he and other firefighters worked unauthorized overtime, at a higher rate of pay, at cost of approximately $263,000. The Fire Chief's supervisor sought to terminate him for conduct unbecoming an officer. The Chief acknowledged errors: "Although I felt I had good reasons to work the embedded schedule, the extra money earned from the additional time worked was a benefit that was part of the decision. The money aspect made it worth doing all the extra hours and is and was simply the wrong thing to do. I truely [sic] regret costing the Air Force the additional money . . . I should have listened to those around me and those trying to help get me on the right path." The Board did not accept excuse for the late filing of the appeal, and held: "Although the agency's petition for review was untimely by mere minutes, we are not persuaded by the explanation provided. The agency's representative is familiar with the e-Appeal system, having used it throughout this appeal…. She is also familiar with the potential consequences of her untimeliness, having been sanctioned for her untimeliness below…. Nevertheless, the Board's e-Appeal logs indicate that she did not log into the system to begin the process of filing the petition for review until 11:38 p.m. on the day it was due…. Moreover, as detailed above, although the agency asserts that there were two failed attempts at filing the petition before the deadline to do so, the Board's e-Appeal logs reflect otherwise…. Accordingly, we dismiss the petition for review as untimely filed."

Concurring Opinion by Member Tristan L. Leavitt made it clear she disagreed with reduced punishment.

> "I write separately to express my disagreement with the administrative judge's determination to mitigate the penalty of removal to a 14-day suspension. [The Fire Chief's supervisor wrote] 'The offense of working longer hours than authorized is a very serious one…' He considered the appellant's supervisory role, finding 'the level of trust required to be a manager and supervisor of other fire fighters has been tarnished significantly' and that the appellant …cannot continue to service in the leadership role because his trustworthiness is in question.'"

Legal Lesson Learned: Late appeal by the U.S. Air Force representative.

File: Chap. 16 – Discipline

NJ: FF DISPUTE WITH ANOTHER FF – FIRED GUN INTO APARTMENT DOOR –TERMINATION UPHELD, LATE APPEAL

On Jan. 9, 2023, In The Matter Of Gamill Haidara, City of Newark, Fire Department, the Superior Court of New Jersey, Appellate Division, held (2 to 0) that the Civil Service Commission properly refused to hear his request for a hearing – he and his attorney failed to timely file the request. After his arrest on March 1, 2016 for firing gun through apartment door of another Newark firefighter [see below article], he was suspended without pay and eventually terminated. He had 21 days (Aug. 13, 2018) to file his request for a hearing with the city's Civil Service Commission; he retained an attorney and then left the country to help an ailing relative. Upon return to USA on Sept. 16, 2018, he learned that no request for a hearing was ever filed; he retained another attorney who sought unsuccessfully to negotiate a return-to-work agreement, and didn't file a request for hearing until May 30, 2019; it was denied by the Commission on July 1, 2019; subsequent request for reconsideration was also denied. The Court of Appeals agreed with the Commission. "On the facts presented here, Haidara's two-year delay in filing for reconsideration prejudiced the City, thereby precluding a finding of good cause."

> See March 2, 2016 article about his arrest: "**At-home dispute between Newark firefighters end in gunfire, arrest.**"
>
> "NEWARK, New Jersey -- Newark authorities say a dispute between two city firefighters at a home where they both live ended with one firing a shot through the other man's apartment door. Gamil Haidara faces several weapons charges. He's been suspended without pay. Authorities say the firefighters live in separate apartments at the Clifton Avenue home. They were arguing late Tuesday night when Haidara allegedly pulled out a gun. The victim ran into his apartment, and authorities say Haidara eventually fired one shot into the door before fleeing the building. Two police officers who happened to be in the area saw Haidara running with a gun in his hand. He was soon arrested. Haidara has been a city firefighter for eight years. Authorities say he was being treated at a hospital for 'unspecified symptoms,' but declined further comment. It wasn't known Wednesday if he's retained an attorney."

Legal Lesson Learned: Termination for firing gun through apartment door is highly likely going to result in termination.

File: Chap. 16 – Discipline

CT: FF FIRED FIGHT IN STATION - ARRESTED – "HOSTILE WORKPLACE" CLAIM LACKS SPECIFICS – CAN REFILE

On Jan. 6, 2023, in Michael Apatow v. Town of Stratford, et al., U.S. District Court Judge Janet C. Hall, U.S. District Court for District of Connecticut, granted the defense motion to dismiss. The firefighter alleges he has PTSD from hostilities from fellow firefighters. After 13 years on

the FD, he was fired on Dec. 20, 2018. He was arrested and fired for another incident where a firefighter "hid essential components of the plaintiff's fire safety gear…. While tensions were high, another firefighter intervened and cornered Apatow…. This intimidation 'forc[ed Apatow]' to defend himself." Judge held: "However, there are no allegations that the defendants lied to police or made a false report to induce Apatow's arrest. Indeed, Apatow readily admits that he participated in a physical altercation with a colleague…which appears to be the grounds for the call to police, his arrest, and his prosecution… Additionally, if Apatow is alleging that the circumstances of his termination - including the call to police, his arrest, and his subsequent prosecution-were extreme and outrageous, his claim also fails. 'Connecticut courts have held that a report to the police typically does not constitute the type of 'extreme and outrageous' conduct necessary to support a claim for intentional infliction of emotional distress."

Plaintiff alleges hostile workplace; given 21 days to refile with more details.

> His "time with the SFD was also marred by epithets from his fellow firefighters in reference to his girlfriend's Black son as well as a working environment that was generally 'exceedingly hostile and intimidating….' Heated arguments were a regular occurrence in the firehouse, and these disagreements were known to escalate to violence… On one occasion, a colleague threw a wooden cutting board in a 'frisbee-like' manner at the plaintiff. Apatow attempted to file a written complaint about the incident, but it was refused by the Assistant Chief, who directed him instead to 'go out back and fight, fight it out….' The firefighter who flung the cutting board at Apatow faced no disciplinary action, and supervisors at the SFD took 'no steps' to ameliorate the hostility among the firefighters…. The state of the work environment induced Post Traumatic Stress Disorder ('PTSD') and cardiac distress for Apatow."
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> ***
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> "The Complaint does not provide detail on the incident that the defendants allege led to Apatow's firing-noting only that the plaintiff was forced to 'defendant [sic] himself,'
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> ***
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> It is unclear from the Complaint and Apatow's Memorandum in Opposition precisely what conduct he alleges is extreme and outrageous. If Apatow intends to assert that it was the discrimination and retaliation he experienced at SFD, his claim fails.
>
> ***
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> Additionally, if Apatow is alleging that the circumstances of his termination- including the call to police, his arrest, and his subsequent prosecution-were extreme and outrageous, his claim also fails."

Legal Lesson Learned: FD may call police for an assault by a firefighter.

Chap. 17 – Arbitration, incl. Mediation, Labor Relations
Chap. 18 – Legislation