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# March 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

**ARLINGTON COUNTY, VIRGINIA – CANCER PREVENTION BEST PRACTICES**
**UC STUDENT BEST TERM PAPER / VIDEOTAPED INTERVIEW**

## 19 RECENT CASES

File: Chap. 1 – American Legal System

## OH: TEACHERS CAN HAVE FIREARMS – WITH SCHOOL PERMISSION - 24 HRS TRAINING – REQUEST LIST

Now that this new statute became effective September 12. 2022, Ohio Fire & EMS Departments, as well as police departments, should have a current list of school employees who are authorized to carry firearms. It would also be helpful to have their photographs and invite them to participate in Active Shooter drills. On June 13, 2022, Governor Mike DeWine signed House Bill 99. The statute requires 24 hours of training, overturning a decision of Ohio Supreme Court, which held that teachers must take same training as police officers – about 60 hours. Gabbard et al. v. Madison Local School District Board of Education. June 23, 2021;

> "In April 2018, just over two years after a school shooting at Madison Junior/Senior High School that resulted in injuries to four students, appellant Madison Local School District Board of Education ('the board') passed a resolution to authorize certain school-district employees to carry a deadly weapon or dangerous ordnance on school property 'for the welfare and safety of [its] students.' This appeal asks us to determine whether that resolution complies with Ohio law. We conclude that it does not.

House Bill 99 requires each school district or governing body to maintain a list of personnel who are trained and qualified to carry a firearm. However, the bill explicitly exempts this list from the definition of a public record.

**Legal Lesson Learned: Fire and Police Departments should have current list of these armed personnel.**

> Note: See newspaper comments on the law.
>
> "Ohio Gov. Mike DeWine signed a bill on Monday allowing teachers to carry guns in class after 24 hours of training, over opposition from teachers and a police group. Backers say the policy will make schools safer, but critics say that's not the case, citing experts' analysis. The new law dramatically reduces the amount of training a teacher must undergo before they can carry a gun in a school safety zone. Instead of more than 700 hours of training that's currently required, school staff who want to be armed would get training that "shall not exceed" 24 hours, House Bill 99 states."*** "No school has to do this. This is up to a local school board," DeWine said, adding that some schools might have security officers or other plans to deter or counter an active shooter scenario. "The best thing is to have a police officer in the schools," he said. "They can be plain clothes, but some schools may not be able to do that."

File: Chap. 2 – LODD; Safety

## FL: JACKSONVILLE FD - NO BEARD RULE UPHELD – OSHA REQUIREMENT - BLACK FIREFIGHTERS CASE DISMISSED

On Jan. 13, 2023, in Terrance Jones v. City of Jacksonville, U.S. District Court Judge Harvey E. Schlesinger granted summary judgment to the City of Jacksonville. The judge wrote: "Title VII does not require employers to depart from binding federal regulations…. Binding federal {OSHA] regulations present a complete defense…. The OSHA regulation in question strictly

prohibits any facial hair between the mask and the wearer's face. Thus, any proposed alternative involving even a scant amount of facial hair would not be an available alternative."

See Jan. 31, 2023 newspaper description of case. "Black firefighters who sued Jacksonville for requiring them to shave lost case."

> "The firefighters went to court in 2020 arguing the fire department was wrongly burdening Black firefighters by requiring them to be cleanshaven even if they had a condition called pseudofolliculitis barbae, or PFB, which can involve ingrown hairs, irritated skin and scarring.*** "At issue is whether the city discriminated against plaintiffs when it required firefighters with PFB, which primarily affects African American men, to be cleanshaven," U.S. Senior District Judge Harvey Schlesinger wrote this month in an order that ends the case. Thirty firefighters initially sued, saying they should be allowed to have close-trimmed beards that would be enough to avoid skin inflammation but wouldn't harm the fit of oxygen masks their jobs require in emergency settings. *** The firefighters had argued the trimmed-bear standard they wanted counted as a "reasonable accommodation" for PFB under the Americans with Disabilities Act, but the ask "is not reasonable within the meaning of the ADA because it is specifically prohibited by a by a binding regulation," Schlesinger concluded. "The federal regulations do not allow for individual consideration of facial hair," the judge wrote. "…[I]t prohibits all facial hair. There is no mechanism for the city to deviate." The city followed the exact accommodation the firefighters were seeking back in 2015, but had backtracked in 2016 after city lawyers said that concession was improper. That had left the firefighters frustrated and confused, leading to attorneys in Jacksonville becoming part of a lengthening list of cities nationwide where rules on firefighter hair were decided by litigation."

**Legal Lesson Learned: Fire Departments must follow OSHA regulation.**

File: Chap. 3 – Homeland Security

## MD: ACTIVE SHOOTER - TEMP EMPLOYEE KILLED 3, INJURED 3 - WAREHOUSE & TEMP CO. NO PRIOR WARNING

On March 2, 2023, in Haissaun Mitchell. et al. v. Rite Aid of Maryland, et al., Court of Special Appeals of Maryland held (3 to 0) that the Rite Aid Distribution Center and the Temp company that hired her had no prior warning that the temp employee, who had only worked eight shifts, was going to be an active shooter when she tried to cut in line to clock in and fellow workers stopped her. Three co-workers who survived the shooting (all from Mitchell family) were all covered by workers comp. and then sued for damages. Court ruled: "It is a somber and sobering fact that the steady increase in the number of mass shootings1 has impelled both public and private organizations to begin considering security measures responsive to that risk. This appeal arises out of the tragic mass shooting that occurred on September 20, 2018, at a warehouse facility leased by appellee, Rite Aid of Maryland, Inc. ('Rite Aid') in Aberdeen, Maryland. The

shooter, Snochia Moseley ('Moseley'), was an employee of appellee, Abacus Corporation ('Abacus'), temporarily assigned to work in Rite Aid's facility. On the day in question, Moseley gained access to the facility using her ID badge and proceeded to open fire on her coworkers, killing three and wounding three more. *** We affirm … the circuit court's alternative grant of summary judgment in favor of Rite Aid on the Mitchells' premises liability claim because the Mitchells failed to present any admissible evidence establishing that Moseley's tragic shooting spree was foreseeable. *** We caution that this opinion should not be read to suggest that mass shootings are unforeseeable as a matter of law. As grim statistics and the development of the law in our sister states foreshadow, the standards of care surrounding a business owner's duty to protect invitees from gun violence are not static and will continue to evolve in light of 'common sense perceptions of the risks created by various conditions and circumstances.' Axelrod v. Cinemark Holdings, Inc., 65 F. Supp. 3d 1093, 1100 (D. Colo. 2014) (quoting Taco Bell, Inc. v. Lannon, 744 P.2d 43, 48 (Colo. 1987))."

> "Snochia Moseley was a temporary worker at the Rite Aid Distribution Center in Aberdeen, Maryland. Prior to September 20, 2018, she had only worked approximately eight shifts at the facility. On that fateful September morning, Moseley reportedly agitated other workers when she cut in front of them to check into work. She then left the facility for a brief period and returned with a handgun. At approximately 9:00 a.m., Moseley re-entered the Rite Aid Distribution Center's perimeter gate using her access badge. After parking her car, she got out and opened fire on a group of workers congregated outside the building. Moseley proceeded to enter the building through the front entrance and into the break room, where Haissaun and Shyheim [Mitchell] were taking their break. *** Moseley's deadly assault occurred within a span of five minutes. Harford County Sheriff's Office deputies, Maryland State Police, and EMS personnel began responding to the active shooter situation at 9:11 a.m., but by that time six victims had been shot by Moseley, three of whom ultimately died. Moseley was found at the scene by Harford County law enforcement officers with a self-inflicted gunshot wound to the head."

**Legal Lesson Learned: The Temp company that hired the shooter wisely had conducted a state & federal criminal history and administered a drug test.**

File: Chap. 4 – Incident Command

## NB: FF FIRED – SHE CLAIMED CAPTAIN "ABANDONED US" IN FIRE – MAY DEPOSE OUTSIDE ATTY INVESTIGATED CLAIM

On March 1, 2023, in Amanda Benson v. City of Lincoln, et al., U.S. District Court Judge Brian C. Buescher, District Court of Nebraska, entered an order limiting the topics that plaintiff may ask during the deposition of attorney Torrey Gerdes, who was retained by the City (paid $180,000) to investigated the firefighter's claims of being endangered by a FD Captain at the warehouse fire. Judge Buescher ruled that the City did not wave the attorney-client privilege (such as her advice

to the City) or attorney work product privilege (such as her investigative notes) when it provided the investigation report to the plaintiff.

"On October 19, 2021, after a [pre-disciplinary] hearing, Chief Engler terminated Benson's employment, concluding:

> 'The evidence confirms that you made serious false allegations against a fellow firefighter. You reported to Lincoln Fire and Rescue (LF&R) and have continuously stated thereafter that you and your crew were abandoned in a dangerous burning warehouse by Captain Shawn Mahler at the April 26, 2021 fire scene. You also stated that his behavior 'could have injured or killed [you], FAO Roberts, and FF Recruit Hurley.' *See, e.g.*, your June 11, 2021 sworn statement and incorporated attachments filed in Case No. 4:18CV3127. However, none of the evidence, audio recording/transcript, witness statements, the findings of investigator Torrey Gerdes, or the findings of Judge Kopf lend any credibility to your statements.'

Judge Buescher set aside a U.S. Magistrate's less restrictive decision and held:

> "IT IS ORDERED:
>
> 1. With regard to Gerdes' investigation into the events of April 26, 2021, plaintiff Benson may inquire into the general methods by which Gerdes conducts investigations and into the facts set forth in the Investigation Report … but Benson will not inquire into topics that the Court has determined are privileged;
>
> 2. Benson will not inquire into … any other investigation that does not directly involve Benson;
>
> 3. Benson will not inquire into communications by Gerdes that are attorney-client privileged, including communications with the City or its attorneys or any of Gerdes' other clients."

The judge further wrote that while he won't impose a specific time limit in the deposition: "The Court adds however that it cannot imagine that the deposition would need to run more than four hours."

**Legal Lesson Learned: When a City retains outside legal counsel to investigate a firefighter's claims, providing the investigation report to the firefighter does not waive attorney-client or attorney work-product privilege.**

File: Chap. 5 – Emergency Vehicle Operations

## OH: ENGINE 20-25 MPH THROUGH RED LIGHT - FD & TWP IMMUNITY – LAWSUIT AGAINST FF TO PROCEED

On Feb. 21, 2023, in Brandon Freeman v. David A. Lovejoy, et al., the Court of Appeals, Fifth District (Fairfield), held (3 to 0) that the trial court judge properly denied the firefighter's motion for summary judgment in a personal injury lawsuit by a motorist who collided with the engine on April 19, 2019 in an intersection where the motorist had a green light, and the engine came through a red light. "On April 25, 2022, the trial court granted summary judgment in favor of the Fire Department and the Township, finding the Fire Department and the Township were statutorily immune from liability as Appellant did not act in a willful or wanton manner. However, the trial court denied Appellant's motion for summary judgment, finding a genuine issue of material fact exists as to whether Appellant operated the fire engine in a reckless manner. *** Viewing the evidence in a light most favorable to Appellee, we find reasonable minds could come to different conclusions about Appellant's operation of the fire engine given the visual and sound obstructions in the area, the number of lanes of travel Appellant was crossing."

> "Pickerington Police Officer Thomas Spreen completed the Crash Report. Therein, Officer Spreen indicated the traffic was moderate, the road conditions were wet, and it was raining. Officer Spreen concluded Appellant [firefighter] was at fault for the accident, explaining Appellant entered 'the busy intersection at an estimated speed of 20 mph to 25 mph without stopping on a red light. Therefore, I find that the driver of the fire truck did not use due regard when entering the intersection causing the accident.' Crash Report at 8. Officer Spreen stated, 'From the vantage point of the Unit 2 driver [Appellee]. I found that his view or initial observation point on the fire truck was partially obstructed by the CVS building, (4) trees, landscaping and landscaping wall (photo taken). I also find that his being able to hear the (2) sets of approaching sirens from the (2) Truro emergency vehicles while approaching the intersection would also have been obstructed by the physical barriers listed.'"

**Legal Lesson Learned: FDs should consider adopting an SOP requiring a "full stop" at red lights.**

File: Chap. 6 – Employment Litigation; Workers Comp.

## LA: NASAL CANCER – FF WINS WORK COMP – STATUTORY PRESUMPTION – "CANNOT RULE OUT" CAUSED BY THE JOB

On March 1, 2023, in James Schexnayder v. Jefferson Parish Fire Department, the Court of Appeals of Louisiana, Fifth Circuit held (3 to 0) that Office of Workers Comp (OWC) judge erred in dismissing claimant's petition and we reverse the judgment appealed, based on the state "statutory presumption" law for firefighters who have cancer. "In this case, it is undisputed that claimant has been employed in the classified service as a firefighter for the Jefferson Parish Fire

Department for more than 31 years and is still employed as a professional firefighter with the Parish and actively fighting fires today. Therefore, he is clearly entitled to the presumption set forth in the Cancer Act. Upon review of all evidence presented at trial, we find that the Parish did not rebut the presumption sufficiently to dismiss claimant's petition. Although the Parish put forth evidence to demonstrate that the type of lymphoma claimant has been diagnosed with is generally caused by the EBV virus, the claimant presented evidence that such a diagnosis is multifactorial and that the etiology is complicated. The evidence claimant introduced clearly demonstrated that claimant's employment could not be ruled out as a contributing factor to his disease."

> "The [Firefighter Cancer] Act embodies the social policy of the state which recognizes that firemen are subjected during their career to the hazards of smoke, heat, and nauseous fumes from all kinds of toxic chemicals…. The legislature recognized that this exposure could cause a fireman to become the victim of cancer and the presumption relieves the claimant from the necessity of proving an occupational causation of the disease.
> ***
> We find the evidence presented at trial could not rule out that claimant's more than 30-year employment actively fighting fires could not have contributed to his diagnoses of lymphoma in this case. Consequently, we find the OWJ was clearly erroneous in dismissing claimant's 1008."

**Legal Lesson Learned: Another case where the "statutory presumption" was the deciding factor. FF should keep records of fires and other chemical exposures.**

File: Chap. 6 - Employment Litigation

## MA: FIRE CHIEF CONTRACT NOT RENEWED AFTER 5th YEARS – DIDN'T HAVE LIFETIME APPOINTMENT

On Feb. 24, 2023, in Mark Tetreault v. Board of Selectmen of Lynnfield, the Appeals Court of Massachusetts, Essex, held (3 to 0) that that the town did not violate the "strong chief" statute, the town charter, or the town's personnel bylaws by electing in 2018 not to renew Tetreault's contract. The Court noted: "Tetreault suggests that its purpose was to protect fire chiefs from 'political machinations' and to allow them independence in the discharge of their duties. He argues that this purpose would be undermined by our interpretation. We disagree. *** Even if the strong chief statute could be interpreted to provide fire chiefs with lifetime tenure -- a doubtful proposition -- Tetreault waived any such statutory right by entering into the employment contract. When he did so, he knew that the contract had language and terms that conflicted with what he professes was his belief about the meaning of the strong chief statute. As we have said, however, nothing would prohibit a fire chief from entering into an employment contract on terms that differ from the strong chief statute, and G. L. c. 41, § 108O, expressly permits that course of action."

> "In December 2013, the board appointed Tetreault as the town's fire chief 'subject to the successful negotiation of an employment contract.' During those negotiations, in discussing the contract provision that he serve as an employee at will during an initial six-month probationary period, Tetreault told the town administrator that it was his understanding that under the strong chief statute, a chief 'only could be terminated for

cause.' Tetreault asked to include in the contract language that provided that '[n]othing in this agreement shall diminish the authority, duty, and protections granted under [G. L. c. 48, § 42],' and that the contract was 'in accordance with [G. L. c. 41, § 108O].' The town administrator declined to do so, and no reference to either statute was included in the contract."

**Legal Lesson Learned: Fire Chiefs when negotiating an employment contract should have a clear provision on basis for non-renewal of the contract; wise to have an attorney review.**

File: Chap. 7 – Sexual Harassment

## DOL: NURSING MOTHERS – FEDERAL "PUMP ACT" – REQUIRES EMPLOYER PROVIDE PRIVATE PLACE TO PUMP

The U.S. Department of Labor, Wage & Hour Division, has published guidance that Fire & EMS department may find helpful. All employers covered by Fair Labor Standards Act, including Fire & EMS departments, must comply with the new law. "Frequently Asked Questions – Break Time for Nursing Mothers."

> "On December 29, 2022, President Biden signed the Consolidated Appropriations Act, 2023, into law. The law includes the PUMP for Nursing Mothers Act ("PUMP Act"), which extends to more nursing employees the rights to receive break time to pump and a private place to pump at work and may impact some of the other information provided below. Under the PUMP Act, most nursing employees have the right to reasonable break time and a place, other than a bathroom, that is shielded from view to express breast milk while at work. This right is available for up to one year after the child's birth.

***

What must an employer provide to workers who need to express breast milk in the workplace?

> Employers are required to provide a reasonable amount of break time and a space to express milk as frequently as needed by the nursing mother, for up to one year following the birth of the employee's child. The frequency of breaks needed to express breast milk as well as the duration of each break will likely vary. The space provided by the employer cannot be a bathroom and it must be shielded from view and free from intrusion by coworkers or the public.

***

Do employers need to create a permanent, dedicated space for use by nursing mother employees?

> No. A space temporarily created or converted into a space for expressing milk or made available when needed by the nursing mother is sufficient provided that the space is shielded from view, and free from any intrusion from co-workers and the public. The location provided must be functional as a space for expressing breast milk. If the space is not dedicated to the nursing mothers' use, it must be available when needed in order to meet the statutory requirement. Of course, employers may choose to create permanent,

dedicated space if they determine that is the best way to meet their obligations under the law."

**Legal Lesson Learned: Fire & EMS departments must comply with this new federal law if they have nursing mothers.**

File: Chap. 8 – Race Discrimination

## NY: BLACK FD CAPTAIN – GOT DRUNK, DEFICATED IN PANTS - PROMOTION BAT. CHIEF PROPERLY RESCINDED

On March 9, 2023, in Jeremy Clawson v. The City of Albany Department of Fire And Emergency, U.S. District Court Judge Mae A. D'Agostino, North District of New York, granted the City's motion for summary judgment. His promotion was rescinded based on Jan. 31, 2019 incident.

> "On January 31, 2019, at 10:00 p.m., Plaintiff, 'while off duty,' went to more than one business, and drank multiple drinks over the course of three to four hours…. At approximately 5:00 a.m., the Albany Police Department ('APD') received a call about 'a person exposing himself' in a Dunkin Donuts…. According to Defendant, at 5:10 a.m. police arrived at the scene…. At this point Plaintiff was outside of the Dunkin Donuts, with his 'pants pulled down' and wearing 'boxer shorts"…. Defendant states that Plaintiff was 'covered in feces' when he was discovered…. APD officers called emergency medical services…. An ambulance took Plaintiff to Albany Medical Center at approximately 5:45 a.m. on February 1, 2019….Plaintiff left the hospital at around 10:00 a.m.
>
> ***
>
> Five months after the rescission of promotion, Plaintiff was offered to apply for a Deputy Chief position, a higher position than Battalion Chief, which Plaintiff declined to do because that position did not offer civil service protection."

Judge ruled:

> "In sum, ample and uncontroverted evidence establishes that Plaintiff's promotion was rescinded because of his conduct on the night of January 31, 2019, and that his race played no role in the decision…. Stated another way, the promotion was rescinded after Plaintiff became so intoxicated in public that he defecated on his pants and had to be brought to a local hospital for observation by the APD."

Court also found no violation of Americans With Disabilities Act; he was not perceived to be disabled, just because they suggested he might benefit from EAP counseling.

> "Even if he was regarded as 'having a problem with alcohol,' that does not sufficiently allege disability under the ADA, as it does not allege that this was more than 'transitory or minor.' As such, rescinding a promotion based on one public night of intoxication does

not require a finding that an employer was on notice of a disability or regarded someone as having a disability."

**Legal Lesson Learned: The facts supported the decision.**

Note: See article: "Black captain sues Albany Fire Department for rescinding his promotion." Dec. 9, 2020. "ALBANY — Jeremy E. Clawson, a captain and the only minority supervising officer in the Albany Fire Department, has filed a federal civil rights lawsuit accusing city leaders of rescinding his promotion to the position of battalion chief early last year after he was treated for hypothermia by paramedics during an off-duty incident."

Chap. 9 – Americans With Disabilities Act

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

File: Chap. 11 - FLSA

## CA: FLSA – FOUR BATTALION CHIEFS CLAIM NOT "EXEMPT" – CITY SETTLEMENT – $145,000, PLUS $25,000 ATTY FEES

On March 7, 2023, in James Mickelson v. City of Encinitas, U.S. District Court Judge Cynthia Bashant, Southern District of California, approved a settlement of a lawsuit filed by four Battalion Chiefs, based on their pay for prior two years, with City not admitting to any violation of FLSA. The Court agreed to the settlement because law is unclear on whether these Battalion Chiefs are exempt from overtime. Under the terms of the Settlement, the City agreed to pay a total of $145,000.00 to Battalion Chiefs based on their hours works in two prior years (if willful violations were proven at trial, Court can award three years back pay, doubled as liquidated damages): (1) $26,108.22 paid to James Mickelson; (2) $12,373.71 paid to Terence Chiros; (3) $47,677.74 paid to Jorge Sanchez; and (4) $58,850.33 paid to Michael Spaulding.

The Court noted:

"First, the parties disagree as to whether Encinitas Battalion Chiefs are FLSA-exempt employees. Plaintiff relies on regulations that clarify the scope of FLSA exemptions: 'The [FLSA minimum wage provision] exemptions . . . do not apply to . . . fire fighters . . . who perform work such as preventing, controlling or extinguishing fires of any type.' 29 C.F.R. § 541.3. Plaintiff maintains that Battalion Chiefs 'actively engage in fire-fighter responsibilities' and 'regularly respond to calls for rescuing fire and accident victims; medical calls for services, and regularly carry and use fire suppression and medical equipment….'

Defendants, by contrast, take the position that managerial fire employees like Battalion Chiefs are properly exempt, so long as they meet the requirements of the executive or administrative exemption….To qualify for the administrative exemption, the employee must meet a minimum salary and the employee's primary duty must be 'the performance of office or non-manual work directly related to the management or general business

operations of the employer....' 28 C.F.R. § 541.200(a). The parties point to recent Fourth Circuit caselaw and a 2005 Department of Labor Opinion Letter that both determined fire department battalion chiefs were properly classified as exempt…. Defendant asserts that Encinitas Battalion Chiefs are 'always responsible for supervising both Captains and the other firefighters' and that preliminary discovery confirmed they 'rarely if ever engage in actual firefighting…."

**Legal Lesson Learned: The law is unsettled about Battalion Chiefs being "exempt"; be interesting to learn whether the next CBA with City of Encinitas will address this issue.**

Note: The Court noted the attorney fees were reasonable. "Plaintiff's counsel has acted as lead counsel in more than fifty FLSA lawsuits representing tens of thousands of employees…. In addition, Plaintiff's counsel has published books on the FLSA, conducted FLSA audits, and lectured on the FLSA."

File: Chap. 11 - FLSA

## DC: FLSA – U.S. SUP. CT. - OIL RIG "TOOL PUSHER" – MAKES $200,000 / YR - SINCE HE IS PAID HOURLY, NOT EXEMPT

On Feb. 23, 2023, in Helix Energy Solutions Group, Inc. et al. v. Michael Hewitt, the U.S. Supreme Court held (6 to 3) that the Supervisor (earned $200,000 a year), working 84 hours a week on the oil rig, supervising 12-14 employees, was not "exempt" from earning overtime after 40 hours. After he was fired, he sued for overtime pay, seeking "hundreds of thousands of dollars in retroactive overtime pay." [Dissenting opinion, Justice Brett Kavanaugh.] The majority opinion has awarded him this windfall. From 2015 to 2017, Hewitt worked 28-day "hitches," living on an offshore oil rig for 28 days at a time and being on-duty for 12 hours each day. His pay ranged from $963 to $1,341 per day. Hewitt earned $248,053 in 2015 and $218,863 in 2016, according to court records.

"The question here is whether a high-earning employee is compensated on a 'salary basis' when his paycheck is based solely on a daily rate—so that he receives a certain amount if he works one day in a week, twice as much for two days, three times as much for three, and so on. We hold that such an employee is not paid on a salary basis, and thus is entitled to overtime pay."

**Legal Lesson Learned: In the fire service, typically Fire Chief are considered "executives" under FLSA and "exempt" from overtime pay. Battalion Chiefs, and other lower ranked officers, may or may not be "exempt" based on their job duties.**

See this article: Battalion Chiefs, Executive Exemption, and Overtime (Sept. 17, 2018): See Feb. 22, 2023 article on the Supreme Court's decision: "Supreme Court Upholds Salary Requirement for Overtime Exemption."

File: Chap. 12 – Drug Free Workplace

# PA: 7 DISPATCHERS FIRED – EGG NOG / ALCOHOL – THEIR PRIOR CALL CENTER ISSUES NOT "CITIZEN SPEECH"

On March 9, 2023, in Justin Zucal, et al. v. County of Lehigh, et al., U.S. District Court Judge John M. Gallaher, Eastern District of Pennsylvania, granted the defense motion to dismiss the lawsuit filed by seven dispatchers who were fired on Jan. 21, 2020 after the New Year's Eve toast. In January 2019, the Allentown 911 Emergency Call Center merged with the Lehigh County 911 Emergency Call Center; some dispatchers complained to County officials, and police and fire agencies about call center issues, and alleged discrimination against a Latino dispatcher. The Court rejected their claim that they were fired in retaliation for exercising their First Amendment rights to complain to public. "[T]he Court finds that Plaintiffs' complaints that serve as the basis for their retaliation claim are not protected by the First Amendment as citizen speech. And because the Plaintiffs' statements were made within their duties as government employees, the Court need not address whether their statements involved a matter of public concern or whether the government lacked an 'adequate justification' for treating the employee differently than the general public based on its needs as an employer under the *Pickering* balancing test.' *Dougherty*, 772 F.3d at 987 (quoting *Gorum*, 561 F.3d at 185). Accordingly, Defendants' motion to dismiss this claim is granted."

The Court described the "Fact Finding" meeting that led to their termination.

> On December 31, 2019, Alvarez-Carril, Plaintiffs and other 911 dispatchers shared a New Year's Eve toast over small cups of eggnog…. Plaintiffs claim that Gieringer granted permission to Alvarez-Carril to use alcohol for the toast…. Plaintiffs also claim that prior to the toast, they had observed supervisors and other Lehigh County employees use, possess, or distribute alcohol on county property without any discipline….
>
> ***
>
> On January 21, 2020, Plaintiffs were all ordered to attend individual meetings with Redding the next day…. Plaintiffs claim that during these meetings with Redding, they learned that county supervisors were alleging they had "drinking problems…." During these meetings, Plaintiffs Zucal, Francis C. Gatens, Geiger, Landis and Palmer were told their positions were being terminated and they were given an opportunity to resign….These plaintiffs claim Redding told them they could reapply for their positions, and that resignation would look better than termination…. They subsequently resigned, wrote a resignation letter, and immediately applied for reinstatement…. Plaintiffs claim the applications for reinstatement were ignored and dismissed….During their meetings with Redding that day, Plaintiffs David M. Gatens and Kirchner were informed their employment was being terminated and were subsequently escorted from the premises."

**Legal Lesson Learned: Dispatchers drinking alcohol on duty, of any amount, can lead to termination.**

> Note: See Oct. 22, 2021 article, "Lehigh County Pushes Back Against Lawsuit Alleging that Racism, Negligence at Emergency Call Center Led to Deaths."

File: Chap. 13 - EMS

# MS: EMS WORKED GUN SHOT PATIENT AT SCENE 16 MIN — PLAINTIFF'S MD NOT QUALIFIED AS "EXPERT" IN EMS

On March 9, 2023, in Marcus Walker, on behalf of beneficiaries of De'Aubrey Rajheem Roscoe, Deceased v. Jonathan Upp, Medstat EMS, et al., the U.S. Court of Appeals for Fifth Circuit (New Orleans) held (2 to 0), unpublished decision, that the trial court judge properly found the plaintiff's expert witness unqualified because he had no experience in emergency medicine. Court of Appeals held: "As the district court noted, however, Dr. McNair conceded in his deposition 'that the standard of care for pulmonology and internal medicine-the disciplines in which he does possess specialized knowledge, experience, and training-is different from the standard of care for paramedicine.' At the same time, Dr. McNair unequivocally stated that he had no experience or education in paramedicine. Additionally, he failed to cite to any literature or published works pertaining to paramedicine that he might have relied on in formulating his opinions…. We conclude that the district court did not abuse its discretion in determining that Dr. McNair was not qualified by his 'knowledge, skill, experience, training, or education' to testify as an expert in this case.

> "After local law enforcement officers secured the scene, the MedStat crew made contact with Roscoe between 8:12 P.M. and 8:16 P.M. They found him lying in the yard of his girlfriend's house, awake, alert, and oriented, with no active bleeding. [Paramedic Jonathan] Upp noted a gunshot wound to the right side of Roscoe's back near the axillary space and two wounds to the posterior of his right upper arm. At 8:20 P.M., Roscoe was in the ambulance. Upp administered oxygen via a non-rebreather mask and then attempted unsuccessfully to gain vascular access. He next attempted to gain peripheral access via an intraosseous device, but both attempts failed because the catheters bent. Upp then observed that Roscoe was becoming short of breath and that the right side of his chest was moving less than the left. He suspected that air present in Roscoe's chest cavity was putting pressure on his lung. Upp successfully performed a needle decompression which allowed the air to escape the chest cavity. But then at 8:24 P.M., Upp noted that Roscoe was in respiratory distress and attempted to intubate him, but could not because Roscoe had lockjaw. After Upp and Walda administered medical care to Roscoe at the scene for approximately sixteen minutes, they began transporting him to the hospital at 8:27 P.M. and arrived four minutes later at 8:31 P.M. Roscoe was pronounced dead twenty-five minutes later at 8:56 P.M. The hospital listed Roscoe's cause of death as cardiac arrest due to gunshot wounds."

**Legal Lesson Learned: An "expert witness" must have experience directly related to skills required of paramedics.**

File: Chap. 13 - EMS

# WV: PIPELINE EMPLOYEE BROKE ANKLE – CAN'T SUE CO. EMT OR CO. FOR NOT PROMPTLY CALLING AMBULANCE

On March 6, 2023, in Precision Pipeline, LLC, et al. v. Mark Weese, the Supreme Court of Appeals of West Virginia held (5 to 0) that a pipeline work, who suffered a broken ankle and a torn Achilles tendon, and received workers comp coverage, cannot sue the company or the company's EMT, even if he was not taken directly to a hospital. The Court reversed the trial court judge that had denied the employer and EMT's motion to dismiss. Court held: "Though respondent claims that Precision's negligence in hiring, retaining, and supervising Petitioner Vanessa Stromberg as an EMT is not the type of employer negligence contemplated by our workers' compensation law such that immunity should bar his claim, he cites to no supporting legal authority for this proposition and, indeed, ignores the clear and unambiguous language of West Virginia Code § 23-2-6, which dictates that immunity does apply to respondent's claim.

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As such, Stromberg and her fellow employees are immune from suit."

> "Respondent was employed by Precision at a pipeline construction project in Marshall County on April 12, 2019, when he severely injured his left leg while dragging a fuel hose. Witnesses to respondent's injury called for assistance and Petitioner Vanessa Stromberg, the site Emergency Medical Technician (EMT) and a Precision employee, responded. Respondent alleges that, despite her title, Ms. Stromberg is not a licensed EMT; that she 'provided no actual medical assistance or intervention on site;' and that 'no ambulance or outside medical assistance' was summoned. According to respondent, 'worksite directives, plans to address injuries, public policy to treat medical emergencies, and West Virginia Code § 21-3-1' required that respondent 'be taken to the nearest medical facility for immediate care.' Although respondent was placed 'into a pickup truck for transportation to a medical facility,' he was taken, instead, to Precision's 'yard' or 'office' located in McMechen, West Virginia, where he was transferred to another vehicle driven by a Precision employee and ultimately transported to a MedExpress urgent care facility."

**Legal Lesson Learned: Workers comp is sole remedy for injured employee in most jurisdictions, unless prove an "intentional tort."**

> Note: In Ohio, for example, Ohio Revised Code 2745.01 provides.
> "(A) In an action brought against an employer by an employee, or by the dependent survivors of a deceased employee, for damages resulting from an intentional tort committed by the employer during the course of employment, the employer shall not be liable unless the plaintiff proves that the employer committed the tortious act with the intent to injure another or with the belief that the injury was substantially certain to occur."

File: Chap. 15 – CISM, Peer Support, Mental Health

# LA: FD FINANCE MGR. – EAP COUNSELING SESSIONS ONLY AFTER WORK – RESIGNED - NO CONSTRUCTIVE DISCHARGE

On March 1, 2023, in Sherita Ann Cooks v. The City of Shreveport, et al., the Court of Appeals of Louisiana, Second Circuit, held (3 to 0) that the trial court properly dismissed her claim of that workplace was so hostile that she was forced to quit. The Court wrote: "The plaintiff's summary judgment evidence falls far short of prima facie proof of constructive termination. The entirety of the evidence that she cites in support of that claim consists of an April 2016 email exchange between her and Chief Tolliver wherein the plaintiff requested an explanation as to why she could not attend an EAP session during her lunch hour, even though it would take more than one hour when including travel time. The plaintiff offered to compensate the City for the time the session required in excess of the allotted one-hour lunch by taking sick leave. In response, Chief Tolliver granted the plaintiff permission to attend one session during her lunch hour, but stated that, thereafter, the plaintiff would have to adhere to the fire department's policy of requiring that EAP sessions take place after work hours."

> "This case stems from the plaintiff's employment as a financial accreditation manager with the Shreveport Fire Department, which began in June 2014. In or around December 2014, the plaintiff's immediate supervisor, Chief of Communications, Kathy Rushworth ('Chief Rushworth'), allegedly ordered the plaintiff to spend her personal money on official fire department business and indicated that plaintiff would be reimbursed from an "off the books" bank account known as the International CAD Consortium fund ('ICC fund'). It contained money that was to fund a consortium event; the event was later canceled, but the money was not refunded. The plaintiff alleged that her assistant, Ashley Wiggins ('Wiggins'), and Chief Rushworth, used the ICC fund as a 'slush fund,' and that Chief Rushworth instructed her to not open the ICC bank statements or mention the ICC fund to the finance auditor or Violet Anderson, the Assistant Chief of Communications.
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> ***
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> Also, in April 2016, because of the stress that the hostile work environment and the slush fund matter allegedly caused her, the plaintiff voluntarily began counseling or psychiatry sessions pursuant to the city's employee assistance program ('EAP'). However, with only one exception, she was not allowed to use her sick leave to attend these sessions during the workday. Furthermore, as previously stated, the plaintiff took a two-month sabbatical beginning in April 2016. It bears repeating that when the plaintiff returned to work in June 2016, both Chief Rushworth and Wiggins were no longer employed with the Shreveport Fire Department. The plaintiff did not quit her job until November 2016."

**Legal Lesson Learned: Employee Assistance Programs (EAP) can be very beneficial. Consider adding a provision in employee handbook allowing sick leave to be used.**

File: Chap. 15 – CISM, Peer Support, Mental Health

# FL: BAT. CHIEF "EXTREMELY ANXIOUS" MAKING EMER. RUNS – DENIED OFFICE WORK ONLY - PIP - FIRED

On Feb. 14, 2023, in William Valencia v. Haines City, Florida, U.S. District Court Judge Tom Barber granted City's motion for summary judgment. The Battalion Chief suffered from high blood pressure and anxiety, and in 2018 the Fire Chief allowed him to do administrative work and not make emergency runs. In February 2019, Jeffrey Davidson became the new Fire Chief. Plaintiff asked Davidson to excuse him from running calls. Davidson did not agree, and he asked Plaintiff to provide medical documentation to support the request, which Plaintiff never did. He was placed on a 90-day Performance Improvement Plan [PIPO|] in Nov. 2019, and ultimately fired after a pre-disciplinary hearing on April 10, 2020. The Court held: "In short, Defendant has pointed to legitimate reasons that would motivate a reasonable employer to take the actions it did, and Plaintiff has not shown that the reasons were pretextual under the standards set forth above. Defendant may have been high-handed, unfair, or wrong, but Plaintiff has pointed to no evidence that its stated reasons were not the real reasons. Accordingly, Defendant's motion for summary judgment is granted."

> "Defendant [Fire Department] has offered legitimate non-discriminatory and non-retaliatory reasons for Plaintiff's discipline and termination, identifying numerous specific incidents and problems with Plaintiff's performance as Battalion Chief in 2019. Chief Davidson supported his recommendation that Plaintiff be terminated by citing the following issues, among others: multiple instances of improper use of a department purchasing card for supplies without using a tax exemption as required by department policy, failure to turn in an assignment in time for Davidson to use at a meeting, failure to send part of another assignment until reminded to do so by Davidson, turning in a report that was due in October on November 1, 2019, failing to attend a training class as directed, failing to prepare a draft purchasing procedure as directed, and coming to a meeting without a list of specific job responsibilities as directed."

**Legal Lesson Learned: A "PIP" can be an effective management tool.**

> Note: See EEOC description of "reasonable accommodations" obligations under ADA.
> "An employer doesn't have to provide an accommodation if doing so would cause undue hardship to the business. Undue hardship means that the accommodation would be too difficult or too expensive to provide, in light of the employer's size, financial resources, and the needs of the business."

File: Chap. 16 - Discipline

# IL: RACIST FACEBOOK POSTINGS – CHICAGO FF FIRED – CASE PROCEED DISCOVERY – "BALANCING" TEST

On March 3, 2023, in Sam Inendino v. Lori Lightfoot, City of Chicago, et al., U.S. District Court Judge Thomas M. Durkin, Northern District of Illinois, denied in part the City's motion to dismiss. The Judge wrote: "The Seventh Circuit, however, has advised courts that the relative balancing of the state's interests against the employee's interests should not be decided at the pleading stage because it is "preferable to leave to the defendant the burden of raising justification as an affirmative defense." *Gustafson v. Jones*, 117 F.3d 1015, 1019 (7th Cir. 1997); *Glass v. Dachel*, 2 F.3d 733, 744 (7th Cir. 1993) (explaining that the state bears the burden of demonstrating an interest which outweighs the employee's interest in speaking). *** Therefore, and because the *Pickering* [*Pickering v. Board of Education,* 391 U.S. 563 (1968)] balancing test is highly fact dependent, its application 'will be possible only after the parties have had an opportunity to conduct some discovery.'"

> Inendino was employed as a Chicago firefighter and EMT beginning in May 2005…. He served as a firefighter with Engine 54 and Truck 20 in the Englewood neighborhood of Chicago without incident for sixteen years until he was terminated on June 8, 2021…. Inendino was well-respected within his workplace, acted as the cook in the firehouse, and never had any complaints against him by the public until the incidents at issue.
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> In October 2019, Inendino commented on a Hispanic person's post which complained about the poster's brother's treatment by a Chicago Police Department lieutenant…. After some back and forth, Inendino stated, 'Your comments are all weak... can't talk I have to go to work to pay for all your scumbag kids that you welfare fucks keep having,"' and '[ . . .] that's a good come back. NOT get all HOOD on me YO. take your ass back over the border where ya belong. gotta go I have a real job.'
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> Inendino's other Facebook posts contained in the OIG report contain a mix of fairly inflammatory politically and racially charged memes, including criticisms and personal attacks of [Chicago Mayor Lori] Lightfoot like, 'you could take one out of the ghetto but can't take the ghetto out of them, what a dirty hoodrat she is,' 'hope she chokes on something,' and 'fluent in ghetto….'He also posted a petition to recall Lightfoot.
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> Other examples contained in the OIG report include an image of pregnant black women, captioned, 'the real housewives of public housing…; various memes about black-on-black crime statistics…; posts supporting a shooting at a protest in Kenosha, Wisconsin (including captions like, 'Good for him should aim for the torso!!!')…; comments about wanting to leave Chicago because of crime and protests ….; comments calling looters 'animals' and implying they receive government aid…; memes discussing why the shooting of Breonna Taylor was justified …; a post making fun of an Asian-American White House correspondent's accent…; and a cartoon image of a truck running over stick

figures with the caption, 'All Lives Splatter. Nobody Cares About Your Protest. Keep Your Ass Out of the Road…'"

**Legal Lesson Learned: Under the Pickering "balancing test" the City clearly has a legitimate interest in limiting Facebook posts that are highly offensive to the public.**

File: Chap. 17 – Arbitration, Labor Relations

## NLRB – REVERSES TWO PRIOR RULINGS - SEVERANCE AGREEMENTS – NO DISCLOSURE / NO "DISPARAGE"

On Feb. 21, 2023, in McLaren Macomb and Local 40 RN Staff Council, Office and Professional Employees, International Union (OPEIU), AFL–CIO, the National Labor Relations Board departed from two prior decisions in 2020, and held (3 to 1) that a hospital in Mt. Clemens, Michigan, with 2,300 employees, during the COVID period in June 2020 permanently furloughed 11 service employees who were members of this Local. Each employee signed a Severance Agreement that not only released the hospital from any claims arising from their employment, but further prohibited then from disparaging the hospital, and required confidentiality about the terms of the agreement, except to spouse or tax preparer or attorney. The NLRB General Counsel filed a complaint against the hospital, since breach of these provisions could lead to loss of severance benefits. The NLRB agreed: "Examining the language of the severance agreement here, we conclude that the non-disparagement and confidentiality provisions interfere with, restrain, or coerce employees' exercise of Section 7 rights."

The NLRB issued a Press Release about this significant decision.

> "Board Rules that Employers May Not Offer Severance Agreements Requiring Employees to Broadly Waive Labor Law Rights
>
> Today, the Board issued a decision in *McLaren Macomb*, returning to longstanding precedent holding that employers may not offer employees severance agreements that require employees to broadly waive their rights under the National Labor Relations Act. The decision involved severance agreements offered to furloughed employees that prohibited them from making statements that could disparage the employer and from disclosing the terms of the agreement itself.
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> The decision reverses the previous Board's decisions in *Baylor University Medical Center* and *IGT d/b/a International Game Technology,* issued in 2020*,* which abandoned prior precedent in finding that offering similar severance agreements to employees was not unlawful, by itself.
>
> Today's decision, in contrast, explains that simply offering employees a severance agreement that requires them to broadly give up their rights under Section 7 of the Act violates Section 8(a)(1) of the Act. The Board observed that the employer's offer is itself an attempt to deter employees from exercising their statutory rights, at a time when

employees may feel they must give up their rights in order to get the benefits provided in the agreement.

'It's long been understood by the Board and the courts that employers cannot ask individual employees to choose between receiving benefits and exercising their rights under the National Labor Relations Act. Today's decision upholds this important principle and restores longstanding precedent,' said Chairman Lauren McFerran.

Members Wilcox and Prouty joined Chairman McFerran in issuing the decision. Member Kaplan dissented."

**Legal Lesson Learned: Fire & EMS Departments should consult Legal Counsel about this significant change by NLRB. See two prior decisions, and dissenting opinion by NLRB Member Marvin Kaplan**.

Note: See two decisions in 2020 now being rejected.
Baylor University Medical Center and Dora S. Camacho. Case 16–CA–195335
March 16, 2020.
"Baylor fired Camacho on September 30, 2016. On October 4, it offered her over $10,000 in exchange for signing a … Separation Agreement [that contained waiver of future claims; non-disparagement; non-disclosure.] She refused to sign the Separation Agreement and, instead, brought the instant charge challenging the legality of the agreement. *** In these circumstances, we find that the mere proffer of severance agreements containing the three challenged provisions did not reasonably tend to interfere with, restrain, or coerce employees in the exercise of rights under the Act.7 Accordingly, we reverse the judge in part and dismiss the complaint.

GT d/b/a International Game Technology and International Union of Operating Engineers Local Union 501, AFL-CIO. November 24, 2020.
"The Respondent is a multinational company that assembles, installs, removes, services, and repairs gaming machines. It has a practice of offering the Agreement to employees terminated as a result of the elimination of their positions [with two weeks of pay]….In conclusion, because the Agreement is entirely voluntary, does not affect pay or benefits that were established as terms of employment, and has not been proffered coercively, we find that the nondisparagement provision would not tend to interfere with, restrain, or coerce employees in the exercise of their rights under the Act."

See dissent by NLRB member Marvin E. Kaplan:

"Baylor and IGT were sound, pragmatic decisions fully consistent with the Act, and my colleagues have failed to establish sufficient grounds for overturning those decisions. Contrary to my colleagues' assertions, the holdings in Baylor and IGT did not conflict with 'long-standing precedent.' None of the cases cited by my colleagues found that an employer, never having suggested any proclivity to violate the Act, violated the Act by proffering a severance agreement that could possibly be interpreted as limiting Section 7 rights. Indeed, the instant case does not present those circumstances. Nevertheless, my colleagues have used this case to overrule extant law that was consistent with finding the violation in this case in order to change the law, in effect, for cases not involving the facts

presented in this case. Not only does this new standard go beyond what is necessary to decide this case but, for the reasons I have discussed, my colleagues' finding of a threat violation under this new standard is neither correct under Board law nor consistent with the General Counsel's complaint and litigation of this matter. Accordingly, I must respectfully dissent from this aspect of my colleagues' decision."

File: Chap. 18 – Legislation

## OH: OHIO PUBLIC RECORDS ACT - DISPATCHER RESIDENCE / FAMILY INFO EXEMPTED FROM DISCLOSURE

On June 13, 2022, Governor Mike DeWine signed House Bill 99, allowing teachers to carry firearms. In addition, the Bill also expanded the list "public service workers" whose home addresses and other family information is exempt from release under Ohio Public Records law, including "the name, the residential address, the name of the employer, the address of the employer, the social security number, the residential telephone number, any bank account, debit card, charge card, or credit card number, or the emergency telephone number of the spouse, a former spouse, or any child of a designated public service worker. Ohio Revised Code 149.43(A)(8)(f).

The exemption now includes dispatchers ("emergency service telecommunicators") and Ohio National Guard members, protective services workers, forensic mental health providers, mental health evaluation providers, and regional psychiatric hospital employees. See Ohio Revised Code 149.43(A)(7):

> (7) "Designated public service worker" means a peace officer, parole officer, probation officer, bailiff, prosecuting attorney, assistant prosecuting attorney, correctional employee, county or multicounty corrections officer, community-based correctional facility employee, designated Ohio national guard member, protective services worker, youth services employee, firefighter, EMT, medical director or member of a cooperating physician advisory board of an emergency medical service organization, state board of pharmacy employee, investigator of the bureau of criminal identification and investigation, emergency service telecommunicator, forensic mental health provider, mental health evaluation provider, regional psychiatric hospital employee, judge, magistrate, or federal law enforcement officer.

**Legal Lesson Learned: Ohio 911 Communication Centers should educate their staff on this new law.**

Note: See this article on the Bill.