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July 2023 – FIRE & EMS LAW NEWSLETTER

[NEWSLETTER IS NOT PROVIDING LEGAL ADVICE.]

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- **NEWSLETTERS:** If you would like to be added to UC Fire Science listserv, just send him an e-mail. View current and past newsletters via Fire Science webpage.
- **TEXTBOOK:** Updating 18 chapters of my textbook (2018 to current). FIRE SERVICE LAW (SECOND EDITION), Jan. 2017: View textbook via Waveland site.

21 NEW CASES – added to ONLINE LIBRARY (case summaries 2018 - present):

View cases via Scholar@UC

File: Chap. 1, American Legal System

PA: ARSON – SET FIRE IN HOUSE WITH FOUR POLICE OFFICERS PRESENT – FOUR CONSECUTIVE JAIL TERMS

On June 30, 2023, in Commonwealth of Pennsylvania v. Vincent Smith, the Superior Court of Pennsylvania held (9 to 0) that trial court properly imposed four terms of imprisonment (four to eight years each), after he pled guilty to two counts of voluntary manslaughter and four counts of arson endangering persons. He endangered four police officers when lighting gasoline he previously poured in house, trying to commit suicide after killing two men.

The Court held: "In sum, we conclude that under the plain language and meaning of Subsection 3301(a)(1)(i), within the arson endangering persons statute, the unit of prosecution is the intentional starting of a fire which recklessly places another person in danger of death or bodily injury. *See* 18 Pa.C.S. § 3301(a)(1)(i). Accordingly, a defendant may be convicted of and sentenced separately on multiple counts if one act of arson causes more than one person to be in danger of death or bodily injury. Applying this holding to the case *sub judice,* we affirm the separate sentences imposed on each of Appellant's four arson endangering persons convictions, and hold they are not illegal."

> "On February 26, 2018, four police officers went to the rowhome at 103 Penfield Place, Pittsburgh, attempting to locate a missing person, John Van Dyke. *See* Affidavit of Probable Cause, 2/28/18, at 3. The officers forcibly entered the home and repeatedly announced their presence. *Id.* Once inside they heard someone on the second floor say, 'Steve's not here[,]' and the officers again announced their presence and purpose. *Id.* The officers then observed [Appellant] striking matches and tossing them on the floor. The matches started an instant fire[, which] began traveling down the stairs toward the officers. The officers immediately exited the residence and took positions . . . outside[. Appellant] was eventually rescued by firemen and . . . treated for smoke inhalation. . . .
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> The bodies of John Van Dyke and Steven Pariser were recovered from the residence. Both "had obvious trauma to the back of their heads and their deaths were ruled as homicides." Trial Ct. Op. at 2. Appellant told detectives:
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> > [H]e was attacked by the men and he fought back. He . . . admitted that he [threw] them down a flight of steps[.] He covered them with blankets and bags. He further told the detectives that he wanted to kill himself so he took some pills and spread lighter fluid all over the residence. *Id.*
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> ***
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> On June 30, 2021, the trial court imposed the following sentences, all to run consecutively: (1) for the two voluntary manslaughter counts, two terms of five to 10 years' imprisonment; and (2) for the four arson endangering persons count, four terms of four to eight years. Therefore, the aggregate sentence was 26 to 52 years' imprisonment.
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> ***
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> The four counts of arson endangering persons relate to the presence of four police officers when Appellant started the fire. As an issue of first impression, Appellant argues

> the trial court's imposition of multiple sentences for these counts was illegal, as the arson endangering persons statute - Subsection 3301(a)(1)(i) of the Crimes Code - provides for a single sentence regardless of the number of victims. We hold: (1) the unit of prosecution for this offense is **not** merely the starting of a fire, but the intentional starting of a fire that recklessly places another in danger of death or bodily injury; (2) Subsection 3301(a)(1)(i) was written with regard to an individual person being placed in danger of death or serious bodily injury; and (3) a defendant may be convicted of and sentenced on separate counts when there is one arson but more than one victim. We thus affirm."

Legal Lessons Learned: The defendant endangered the lives of four policers; the Court properly imposed four separate prison terms.

File: Chap. 1, American Legal System

NY: EMT POTENTIAL JUROR BURGLARY CASE – CAN'T SERVE IF ADMITS VIEWS PD "VERY FAVORABLE LIGHT"

On June 30, 2023, in The People Of The State Of New York v. Herbert Smith, the Supreme Court of New York, Fourth Division, held (5 to 0) that the burglary defendant is entitled to a new jury trial because two prospective jurors, including an EMT who during voir dire told defense counsel he saw police in "very positive light" were not automatically removed by the judge. The defense attorney had to use two preparatory challenges to keep them off the jury.

The Court held: "It is well established that, when a prospective juror makes a statement or statements that 'cast serious doubt on their ability to render an impartial verdict' (*People v Arnold*, 96 N.Y.2d 358, 363 [2001]), that prospective juror must be excused for cause unless they provide an 'unequivocal assurance that they can set aside any bias and render an impartial verdict based on the evidence' (*People v Johnson*, 94 N.Y.2d 600, 614 [2000]; *see People v Nicholas*, 98 N.Y.2d 749, 750 [2002]; *People v Chambers*, 97 N.Y.2d 417, 419 [2002])."

> "The second prospective juror stated that, because of his work as an emergency medical technician, he saw police 'in a very positive light.' When asked the same question about whose version of events he would believe, the prospective juror stated '[t]o be completely honest, probably the first responder police officer.'"

Legal Lesson Learned: EMS and firefighters can be jurors in criminal cases, but not if they tell Court they view police in a "very positive light."

File: Chap. 1, American Legal System, Code Enforcement

OH: CITY ORDERED VACANT BLDG DEMOLISHED – MAIL NOTICE OWNER RETURNED – DUE PROCESS CASE PROCEED

On June 15, 2023, in Two Bridges, LLC v. City of Youngstown, Ohio, the U.S. Court of Appeals for 6th Circuit (Cincinnati), held (3 to 0; unpublished decision) that U.S. District Court Judge

properly held the city's immunity under Ohio law does not apply in a lawsuit under 42 U.S.C. 1983 for violation of due process rights of 14th Amendment to U.S. Constitution. The city mailed several notices of planned demolition that were addressed to the property that had been vacant for four years (none delivered). The city also mailed notices to two other businesses owned by Two Bridges; all returned undelivered.

The Court held: "The district court denied the city's motion, finding that a state-law provision exempting federal claims from statutory immunity applies. Youngstown now brings this appeal. For the reasons that follow, we AFFIRM the judgment of the district court. *** In sum, whether a plaintiff can invoke the federal exception to statutory immunity depends on the substance of his claim. Properly pleaded due process claims under the federal Constitution are not transformed into tort actions simply because they are raised in the wake of a demolition."

> "The Fire Chief and the city's Code Enforcement Superintendent inspected the building on June 12, 2020, to determine whether it posed a fire hazard. Among other things, they observed that the roof apparently had sunk around 6 to 12 inches on all four sides of the building. From his inspection, the Fire Chief concluded that the building posed a fire hazard and danger to human life; he therefore considered the building an unsafe structure as defined by City Ord. § 1525.01(a)-(b). Under § 1525.01(a)-(b), an 'unsafe structure' is, among other things, one that presents a fire hazard or is 'otherwise dangerous to human life." 'And § 1525.01(c) authorizes the local Fire Chief to order the demolition of any unsafe structure in the case of an emergency. Due to 'the extreme deterioration of the property and the risk that it posed to potential vagrants . . . and first responders,' the Fire Chief ordered an emergency demolition of the building under § 1525.01(c)…. A little over two months later, on August 22, 2020, Youngstown demolished the building at 15 Oak Hill.
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> ***
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> The city mailed multiple notices to Two Bridges in the spring and summer of 2019 advising that the building was in unacceptable condition-but it sent the notices directly to the vacant building. [Footnote 1. Youngstown also attempted to mail notices directly to the property owner at two of his other business addresses. But the mailings were returned by the U.S. Postal Services unclaimed.] No one at Two Bridges received the notices."

Legal Lesson Learned: If notices of demolition are returned undelivered, pick up the phone and speak with the building owner.

File: Chap. 2 – Safety, LODD

NY: 1992 ARSON CLOTHING STORE - LODD OF FDNY LT. – BLDG OWNER 36 YRS PRISON - DENIED HOME DETENTION

On June 30, 2023, in Jack Ferranti v. Warden Allenwood LSCI, the U.S. Court of Appeals for Third Circuit (Philadelphia) held (3 to 0) that U.S. Bureau of Prisons, and U.S. District Court

properly denied his request to serve the remainder of his sentence at home under the Elderly Offender Home Detention Program (EOHDP), a pilot program expanded as part of the 2018 First Step Act signed into law by President Trump. The Feb. 24, 1992, fire, in a three-story brick building with stores on the ground floor, sent smoke-choked tenants into the street and killed Lieut. Thomas A. Williams, 52, a 30-year veteran of the department and the father of two college-age daughters. Lieutenant Williams either fell or was blown out of a second-story window after a buildup of smoke and gases. He was sentenced 435 months' (36 years) imprisonment and with good time credits, the Bureau of Prisons (BOP) expects he will be released from prison in April 2026.

The 3rd Circuit held: "[T]he BOP did not err by concluding that Ferranti's history of violence-comprised of the underlying conduct for his convictions as well as disciplinary infractions in prison-disqualified him from participating in the EOHDP. For the foregoing reasons, we will affirm the District Court's orders denying relief."

> "Ferranti was convicted in the United States District Court for the Eastern District of New York of arson homicide, arson conspiracy, 16 counts of mail fraud, and witness tampering, based on an insurance-fraud scheme. Ferranti was responsible for causing a fire at his business that resulted in the death of a firefighter. The trial judge sentenced him to 435 months' imprisonment. *See United States v. Ferranti,* 928 F.Supp. 206, 21316 (E.D.N.Y. 1996). His conviction and sentence were affirmed on appeal. *See United States v. Tocco*, 135 F.3d 116 (2d Cir. 1998). Ferranti's post-conviction efforts have been unsuccessful. With good time credits, the Bureau of Prisons (BOP) expects he will be released from prison in April 2026.
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> While incarcerated at LSCI-Allenwood in 2019, Ferranti applied to participate in the Elderly Offender Home Detention Program (EOHDP), a pilot program expanded as part of the First Step Act, for prisoners deemed eligible under criteria provided in 34 U.S.C. § 60541(g)(5)(A). The warden denied the application because the statute prohibits participation by inmates whom the BOP has determined in its discretion to have a history of violence, see § 60541(g)(5)(A)(iv). *See* Memorandum and Exhibits to § 2241 petition (ECF No. 2) at 18 (containing warden's decision which explained that Ferranti 'ha[d] an identified history of violence'). When Ferranti appealed, the regional director found him ineligible under a different subsection, § 60541(g)(5)(A)(ii), because he was 'convicted of a crime of violence,' specifically, 'Conspiracy to Commit Arson, Arson Resulting in Death, Mail Fraud, and Tampering with a Witness.' *Id.* at 21. The administrator of the regional appeals agreed with the warden's and regional director's decisions and denied the appeal. *Id.* at 24."

Legal Lesson Learned: Arsonists, and other violent offenders, are not qualified for Elderly Offender Home Detention Program (age 60 or older).

> Note: See Aug. 16, 1995 New York Times article, "Storeowner Guilty of Arson Where Fireman Died."

"The owner of a Queens clothing store was convicted of arson by a Federal court jury in Brooklyn yesterday in a fire that killed a highly decorated firefighter. The storeowner, Jack Ferranti, 42, of Manhattan, could receive life in prison. Mr. Ferranti's brother, Mario, 37, was convicted of arson conspiracy, and could receive five years in prison. The sentencing by Judge Jack B. Weinstein will not be scheduled until after the trial of Thomas Tocco, 29, a third defendant, whose case was severed from the Ferranti trial, officials said. Mr. Tocco's trial is scheduled to begin on Monday…. The indictment, unsealed in February, three years after the Feb. 24, 1992, fire, charged that shortly before the blaze, Jack Ferranti had moved a large amount of merchandise from the store, Today's Styles, at 66-45 Grand Avenue in Maspeth, and that after the fire he falsely claimed the goods had been destroyed, for a loss of $100,000. During the investigation, Mr. Ferranti withdrew the insurance claim. Besides the arson charge, Mr. Ferranti was found guilty of 16 counts of mail fraud in connection with the insurance claims and one count of witness tampering. The fire, in a three-story brick building with stores on the ground floor, sent smoke-choked tenants into the street and killed Lieut. Thomas A. Williams, 52, a 30-year veteran of the department and the father of two college-age daughters. Lieutenant Williams either fell or was blown out of a second-story window after a buildup of smoke and gases."

File: Chap. 2, Safety, LODD

PA: KIDNEY CANCER – STATE LAW PROPERLY EXTENDS COVERAGE TO CHEMICALS LATER PLACED IN "GROUP 1"

On June 21, 2023, in City of Philadelphia v. Joseph Healey (Workers' Compensation Appeal Board), the Commonwealth Court of Pennsylvania held (7 to 0) that the firefighter was properly granted workers comp for his kidney cancer, rejecting the City's argument that the state's 2011 statute improperly allows additional substances like trichlorethylene (TCE is industrial solvent for degreasing metal parts) to be added to Group 1 list by the International Agency for Research on Cancer. In 2011, TCE was listed as a Group 2a substance ("probably carcinogenic to humans").

The Court held: "Employer argues that the WCJ erred by relying on Claimant's TCE exposure to grant the Claim Petition under Section 108(r) of the Act. Specifically, Employer contends that interpreting Section 108(r) of the Act to include TCE as a Group 1 carcinogen *after* Act 46 became law on July 7, 2011, makes Section 108(r) of the Act reliant on the IARC's ever-changing Group 1 carcinogen list and, thus, the General Assembly unconstitutionally delegated its lawmaking authority to the IARC. *** [Footnote 11. In addition, well-settled delegation standards and case law specify that the General Assembly has the authority 'to delegate to [the IARC], its execution and administrative authority over Pennsylvania's [occupational disease classifications], . . . as long as: (1) basic policy choices are still made by the General Assembly; and (2) the legislation contains adequate standards to guide and restrain the exercise of those functions.' *Pa. Builders Ass'n v. Dep't of Lab. & Indus.*, 4 A.3d 215, 224 (Pa. Cmwlth. 2010); *see also Protz*."

> "Employer hired Claimant as a firefighter in 2003. Employer promoted Claimant to Lieutenant in 2013. In June 2016, Claimant underwent medical testing which revealed a mass on his kidney. Claimant was out of work from July 13 to September 23, 2016. On July 21, 2016, Claimant was diagnosed with clear cell renal carcinoma. Claimant developed some complications requiring him to undergo a cryoablation on the same kidney, which resulted in him being out of work again from December 6 to December 20, 2017. Claimant subsequently developed a hernia at one of the incision sites which necessitated surgery and required him to be out of work again from January 8 to February 1, 2018.
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> ***
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> At the July 16, 2019 hearing, Employer agreed to Claimant's allegations as averred in his Claim Petition, but contested causation. At the WCJ hearings, Claimant offered the testimony of internal and occupational medicine expert Arthur L. Frank, M.D., Ph.D. (Dr. Frank), who reported that firefighters are exposed to arsenic, asbestos, polycyclic aromatic hydrocarbons (PAHs), and trichlorethylene (TCE). *See* WCJ Dec. at 9, Finding of Fact (FOF) 10a. Dr. Frank 'opined that Claimant's exposure to arsenic, asbestos, diesel fumes and TCE [was] the major occupational risk factor[] for developing kidney cancer.' WCJ Dec. at 11, FOF 10h."

Legal Lesson Learned: It's amazing what "weak" arguments employer's workers comp. representatives sometimes make to avoid liability.

File: Chap. 3, Homeland Security

LA: FED. JUDGE INJUNCTION – FED. GOV'T TRYING GET FACEBOOK, TWITTER TO DELETE POSTS - DOJ APPEALS

On July 4, 2023, in State of Missouri, et al. v. Joseph R. Biden, Jr., et al, U.S. District Court Judge Terry A. Doughty, U.S. District Court for Western District of Louisiana, Monroe Division, granted State of Missouri, State of Louisiana, and five individuals a preliminary injunction (but denied class action) concerning Whitehouse efforts to get social media companies to delete posts that opposed Covid-19 vaccinations, and other "hot" topics. The judge's 155-page opinion has drawn national attention and promptly appealed by U.S. Department of Justice to the U.S. Court of Appeals for 5th Circuit (New Orleans).

Judge Doughty (nominated by President Trump in 2017) wrote: "The Plaintiffs are likely to succeed on the merits in establishing that the Government has used its power to silence the opposition. Opposition to COVID-19 vaccines; opposition to COVID-19 masking and lockdowns; opposition to the lab-leak theory of COVID-19; opposition to the validity of the 2020 election; opposition to President Biden's policies; statements that the Hunter Biden laptop story was true; and opposition to policies of the government officials in power. All were suppressed. It is quite telling that each example or category of suppressed speech was conservative in nature. This targeted suppression of conservative ideas is a perfect example of

viewpoint discrimination of political speech. American citizens have the right to engage in free debate about the significant issues affecting the country."

> "On January 23, 2021, three days after President Biden took office, Clarke Humphrey ('Humphrey'), who at the time was the Digital Director for the COVID-19 Response Team, emailed Twitter and requested the removal of an anti-COVID-19 vaccine tweet by Robert F. Kennedy, Jr.
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> ***
> On April 14, 2021, Flaherty demanded the censorship of Fox News hosts Tucker Carlson and Tomi Lahren because the top post about vaccines that day was 'Tucker Carlson saying vaccines don't work and Tomi Lahren stating she won't take a vaccine.'
>
> ***
> On April 23, 2021, Flaherty sent Facebook an email including a document entitled "Facebook COVID-19 Vaccine Misinformation Brief' ('the Brief'), which indicated that Facebook plays a major role in the spread of COVID vaccine misinformation and found that Facebook's policy and enforcement gaps enable misinformation to spread.
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> ***
> On May 5, 2021, then-White House Press Secretary Jen Psaki ("Psaki") publicly began pushing Facebook and other social-media platforms to censor COVID-19 misinformation.
>
> The next day, on July 16, 2021, President Biden, after being asked what his message was to social-media platforms when it came to COVID-19, stated, '[T]hey're killing people.' Specifically, he stated 'Look, the only pandemic we have is among the unvaccinated, and that they're killing people.' "

Legal Lesson Learned: U.S. Department of Justice has already filed an appeal with 5th Circuit. For more details, please read the case via the Washington Post.

> Note: See this July 4, 2023 article on the case. Federal Judge Limits Biden Officials' Contacts With Social Media Sites.

File: Chap. 3, Homeland Security

NC: SYRIA IS LIABLE IN U.S. TERRORIST MURDERS / INJURIES US CITIZENS - NO SOVEREIGN IMMUNITY

On May 30, 2023, in Cameron Cain Baarbe, et al. v. The Syrian Arab Republic, U.S. District Court Judge Terrence M. Boyle, U.S. District Court for Eastern District of North Carolina, Western Division, held that Syria is liable in damages in this default judgment case for the deaths of four U.S. citizens, and injury to four others in ISIS terrorist attacks in Istanbul, Paris and Brussels.

The Court held: “This is a civil action for damages pursuant to the Foreign Sovereign Immunities Act (“FSIA”) 28 U.S.C. § 1602 *et seq*. Plaintiffs are the estate and family of U.S. national Nohemi Gonzalez murdered in a terror attack on November 13, 2015, the family and estate of U.S. national Abvraham Goldman murdered in a terror attack on March 19, 2016, the estate and family of Alexander Pinczowski murdered in a terror attack on March 22, 2016, and the estate and family of U.S. national Erez Orbach murdered in a terror attack on January 8, 2017. Plaintiffs are also the survivors of the terror attacks on March 19, 2016 and January 8, 2017 and their families. Plaintiffs filed this action on June 2, 2020 against Syria. (Dkt. 1). *** When a state such as Syria chooses to use terror as a policy tool that state forfeits its sovereign immunity and deserves unadorned condemnation. Barbaric acts like those alleged in this action have no place in civilized society and represent a moral depravity that knows no bounds. In stark contrast to the terrorist thugs and their Syrian sponsors stand the courageous Plaintiffs in this action, who have resolved to fight injustice with whatever tools are at their disposal, and their patient determination in this case is a credit to both them and to the memory of their decedents. This Court hopes that the Plaintiffs may take some measure of solace in this Court's final judgment.”

> “Syria's relationship with ISIS during the time period most relevant to this case - the post Arab Spring period - is best understood in the context of support that Bashar al-Assad's regime provided to previous iterations of the Zarqawi organization before the Arab Spring…. Syria's considerable support for AQI was intended to undermine coalition efforts in Iraq…. Addressing the Syrian parliament in March 2003 - the month of the U.S. invasion - Syrian foreign minister Farouq al-Sharra said that ‘Syria has a national interest in the expulsion of the invaders from Iraq….’ Though Syria's involvement with the Zarqawi organization went between tacit approval and blatant support, evidence of such support from 2002 to around 2010 is well documented and has been established by analysts and court opinions….’
>
> ***
> In light of the entire record, the Court finds that Syria provided material support to the ISIS and facilitated the murder of Alexander Pinczowski, Abvraham Goldman, Erez Orbach and Nohemi Gonzalez and facilitated the infliction of bodily injuries upon Ron Greenfield, Pnina Greenfield, Eytan Rund and Nitzhia Goldman. Damages will be awarded in accordance with these findings.”

Legal Lesson Learned: This judgment will then allow plaintiffs to find Syria assets in US that can be seized.

File: Chap. 4, Incident Command, Training .....

File: Chap. 5, Emergency Vehicle Operation

TX: EMT 65+ MPH THROUGH RED LIGHT – MVA – TEXAS "MEDICAL LIAB" LAW REQ. EXPERT REPORT NEGLIGENCE

On June 15, 2023, in City of Alvin v. Edna Fields, the Court of Appeals of Texas, First District, held (3 to 0) that trial court should have granted city's motion to dismiss, because the patient claiming neck injury from the accident was required by the Texas Medical Liability Act (TMLA) to file report from an expert supporting a claim of negligence by ambulance driver.
The Court held: "[EMT driver Beverly] Scott testified that she entered the intersection against the red light to protect her partner, who was unrestrained because he was providing emergent health care to Fields. She also said that she was considering herself, her partner, her patient, and everyone in the vicinity 'while running emergency traffic.' We conclude that the claim that Fields pleaded has a nexus between the alleged negligence and the provision of health care, and we hold that Fields's claim is a health care liability claim. *Ross*, 462 S.W.3d at 504; *see Coming Attractions Bridal & Formal*, 595 S.W.3d at 664. It is undisputed that Fields did not timely serve an expert report. *See* TEX. CIV. PRAC. & REM. CODE § 74.351(b). We therefore hold that the trial court erred by denying the City's motion to dismiss. We sustain the City's second issue."

> "On October 28, 2019, Edna Fields called 911 after she experienced a headache and weakness in her left arm two weeks after having suffered an intracranial bleed. Emergency medical technicians (EMTs) Beverly Scott and William Danley responded. Danley determined that Fields was probably experiencing a stroke, which he referred to as a 'neuro.' The EMS Patient Care Record states: 'PT on scene stroke scale was positive. PT is at this time determined urgent.' As the EMT providing direct patient care, Danley determined that they should transport her to the hospital using 'emergency traffic' protocol with lights and sirens. Fields was strapped into a gurney, where she sat upright, while Danley, who was not restrained, continued to provide medical care. As the ambulance approached an intersection at about 65 miles per hour, which was about ten miles per hour over the posted speed limit, the green light turned to yellow. Scott, who was driving the ambulance, decided to continue into the intersection to avoid injuring Danley, who was unrestrained, by suddenly stopping the ambulance.
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> The ambulance entered the intersection against a now-red light, with lights, sirens, a rumbler, and air horn activated to warn nearby vehicles to yield the right of way. A pickup truck entered the intersection on a green light and collided with the ambulance. Scott pulled over and checked on Danley and Fields before checking on the passengers in the pickup truck, who denied injury.
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> The Friendswood Police Department responded to the accident, and the investigating officer ticketed Scott for disregarding a red light and the driver of the pickup truck for failing to yield the right of way to an emergency vehicle. The investigating officer's narrative stated: 'No injuries occurred due to this incident.' The City of Alvin EMS Patient Care Record, which was signed by both Scott and Danley, elaborated: 'In route . . . this ambulance had a crash involving a second vehicle as it was proceeding through a[n] intersection. [Fields] was immediately asked if she was ok. [Fields] agreed no changes but maybe her headache got a bit worse.'"

Legal Lesson Learned: EMS transporting stroke victim, where time is of the essence, should still slow down from 65 MPH when entering a controlled intersection. In many states, this would be a normal tort claim for negligence, and not a medical claim requiring expert report.

Note: Under Ohio law. Section 4511.03 | Emergency vehicles at red signal or stop sign.

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

See also Ohio Administrative Code: Rule 3335-21-12 | Emergency and public safety vehicles.

> "(A) Privileges of drivers. The driver of an authorized emergency vehicle or public safety vehicle, when responding to an emergency call, or when in the pursuit of an actual or suspected violator of the law, or when responding to but not upon returning from a fire or other emergency alarm, may exercise the privileges set forth in this regulation, but subject to the conditions herein stated. The driver of an authorized emergency vehicle or public safety vehicle may:
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> (1) Park or stand, irrespective of the provisions of these regulation;
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> (2) Proceed past a red or stop signal or stop sign, but only after slowing down as may be necessary for safe operation;
>
> (3) Exceed the maximum speed limits so long as he or she does not endanger life or property; and
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> (4) Disregard regulations governing direction of movement or turning in specified directions."

File: Chap. 6, Employment Litigation, Workers Comp.

PA: KIDNEY CANCER AFTER HE RETIRED - 37 YRS CITY FF - NOW TWP FIRE MARSHAL – CITY'S WORK. COMP. LIABLE

On July 6, 2023, in City of Chester v. John Gresch and Nether Providence Township (Workers' Compensation Appeal Board), the Commonwealth Court of Pennsylvania, held (3 to 0; unpublished decision) that the Worker's Compensation Board properly held that the City, not the Township, must covered his disability claim.

The Court held: "Although Claimant worked for the Township more recently, for two years immediately preceding his diagnosis, Claimant credibly testified that he responded to six or

seven fires in total while employed by the Township. In contrast, Claimant responded to 12 fires per month while employed by the City. It is therefore obvious that Claimant's actual exposure to the relevant group 1 carcinogens was far greater while employed by the City than the Township. Thus, the City is liable for the payment of Claimant's workers' compensation benefits."

> "Claimant worked for the City as a firefighter for approximately 37 years, from May 28, 1977, to April 1, 2014, eventually achieving the rank of 'battalion chief.' Following his retirement, Claimant began to work as a fire marshal for Nether Providence Township (Township) and has worked for the Township since September 10, 2015. In November 2017, Claimant was diagnosed with kidney cancer. He was treated for the cancer, had part of his kidney surgically removed, and missed approximately six months of work with the Township.
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> ***
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> A hearing was held before the WCJ on September 9, 2019. By deposition, Claimant testified that he was exposed routinely to smoke, soot, and diesel emissions during his career with the City. He also quantified those exposures, testifying that he responded to 12 structure fires per month. Claimant's current duties as a fire marshal differ considerably. In that role, Claimant performs fire inspections, conducts fire investigations, and hosts fire safety programs with children. Claimant is not an active firefighter but has been on the grounds of fire scenes approximately six or seven times during his service with the Township."

Legal Lesson Learned: Another case where a city's worker's comp representative seeks to avoid clear legal obligation.

File: Chap. 6, Employment Litigation

NJ: FF / EMT INJURED BACK MOVING PT TO HOSPITAL BED – ORDINARY DISABILITY – NOT A "TRAUMATIC EVENT"

On June 30, 2023, in John Karolinski v. Board of Trustees, Public Employees' Retirement System, the Superior Court of New Jersey, Appellate Division, held (2 to 0) that while the firefighter / EMT is entitled to ordinary disability retirement benefits, he is not entitled to accidental benefits for a "traumatic event." The Court agreed with the Administrative Law Judge there firefighter was performing task he had done many times.

The Court held: "Petitioner testified he was injured while transferring a patient from a stretcher to the catheterization table, a job duty he had performed 'hundreds of time[s]' and was trained to do. It was petitioner's work effort that caused his disability. He stated it was common for patients to be 'freaking out.' Therefore, it was not unexpected for a patient to be uncooperative during the transfer process. Moreover, he testified the way in which he transfers a patient-using a double sheet-'makes it a lot easier to move . . . a patient that[] [is] not cooperating.' It was not an 'unexpected happening' that petitioner would need to help a patient to prevent a fall during a transfer."

> "Petitioner had been employed as a Firefighter EMT since 2009. The

position required him to perform 'strenuous physical activities such as . . . lifting and carrying people and equipment for rescue and salvage.' On this particular occasion, petitioner and his partner were dispatched to a call for a cardiac emergency. They drove to the scene in an ambulance and, with other medics, they placed the patient on a stretcher. Petitioner described the patient as a '[h]usky guy' and estimated that it took 'at least six' people to move the patient from the floor to the stretcher. Petitioner said the patient was 'freaking out' during the ride to the hospital but that was common behavior. Upon arrival at the hospital, petitioner transported the patient on the stretcher 'into the emergency room and right to the cath[eterization] lab.' The EMTs and hospital staff were instructing the patient to calm down so they could take the stretcher's straps off him. They were also telling the patient not to move and that they would let him know when they were going to move him. Petitioner stated that the patient began to move himself from the stretcher to the catheterization table that was several feet away. Petitioner was able to
grab the sheet on the stretcher before the patient fell and place the patient on the table. Petitioner said the sheet was doubled which made it easier to move an uncooperative patient."

Legal Lesson Learned: Under NJ law, accidental disability with enhanced compensation is only for fire & EMS personnel "permanently and totally disabled as a direct result of a traumatic event occurring during and as a result of the performance of [their] regular or assigned duties."

File: Chap. 6, Employment Litigation

RI: RETIRED PROVIDENCE FF – CANCER – COVERED BY STATE'S DISABILITY, EVEN IF CITY HAS RETIREMENT PLAN

On June 26, 2023, in The Providence Retired Police And Firefighter's Association v. The City of Providence, Judge R. David Cruise, Superior Court of Rhode Island, held that retired Providence firefighters, who develop cancer, are covered for disability benefits under the state's 1986 statutory presumption law, even though City of Providence does not participate in the State's "Municipal Employee Retirement System" and in 2008 enacted its own statutory presumption ordinance under its retirement plan.

The Court held: "The Court agrees with Plaintiff that our Supreme Court's decision in *East Providence* [*v. IAFF Local,* 850, 982 A.2d 1281 (R.I. 2009)], supports that § 45-19.1-3 does not restrict its application to only firefighters of municipalities that participate in the MERS…. Furthermore, it is apparent that § 45-19.1-3 was intended to provide cancer disability benefits to *all* firefighters in the State, in accordance with the legislative intent and our Supreme Court's explanation in *East Providence*, and it would be absurd for the Court to conclude that Providence firefighters are excluded from said benefits when § 45-19.1-3 is meant to apply to all firefighters."

"In 1986, the General Assembly enacted the Cancer Benefits for Firefighters statute that is codified in chapter 19.1 of title 45 of the General Laws (the Statute). ASF ¶ 23; *see also* G.L. 1956 chapter 19.1 of title 45. The Statute includes a presumption that '[a]ny type of cancer found in a firefighter is conclusively presumed to be an occupational cancer as that term is defined in R.I.G.L. § 45-19.1-2.' ASF ¶ 27; *see also* § 45-19.1-4(a). Occupational cancer is defined as 'a cancer arising out of his or her employment as a firefighter, due to injury from exposures to smoke, fumes, or carcinogenic, poisonous, toxic, or chemical substances while in the performance of active duty in the fire department.' ASF ¶ 27; *see also* § 45-19.1-2.

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Municipalities' participation in the MERS is voluntary and most municipalities participate; however, the City of Providence never has participated in the MERS.

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In 1986, the General Assembly enacted the Cancer Benefits for Firefighters statute that is codified in chapter 19.1 of title 45 of the General Laws (the Statute). ASF ¶ 23; *see also* G.L. 1956 chapter 19.1 of title 45. The Statute includes a presumption that '[a]ny type of cancer found in a firefighter is conclusively presumed to be an occupational cancer as that term is defined in R.I.G.L. § 45-19.1-2.'

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On May 9, 2008, the City Council enacted an Ordinance Establishing a Presumptive Cancer Benefits & Wellness Incentive for Firefighters (the Ordinance). ASF ¶ 10; *see also id.* Ex. B (the Ordinance). The Ordinance creates a rebuttable presumption that a firefighter's cancer diagnosis, that arises after the start of their employment, was developed during the course and scope of their employment as a firefighter if five criteria are established. (Providence Code of Ordinances Chapter 17 Article III Division 7 § 17-135.) If said criteria are met and the firefighter is determined to be disabled because of the cancer diagnosis, then the firefighter shall be entitled to an accidental disability pension. *Id.* § 17-138.1.

Legal Lesson Learned: The state-wide retirement system fortunately includes a statutory presumption for cancer that includes retirees.

Note: See July 5, 2023 article on the case, "Retired Providence firefighters not barred from cancer benefits."

File: Chap. 6, Employment Litigation

CT: SPECIAL DISABILITY – HEART DISEASE – FOR PAID FFs HIRED BEFORE JULY 1, 1996 – P/T AVERAGE 20 HRS / WEEK

On June 20, 2023, in Christopher A. Clark v. Town of Waterford, Cohanzie Fire Department, et al., the Supreme Court of Connecticut, held (6 to 1) that the Town correctly contended that a state statute awarding municipal police and firefighters hired prior to July 1, 1996 with enhanced

benefits for heart or hypertension disease (get benefits as if they suffered on duty personal injury), but only if they worked an average of 20 hours a week or more. Case remanded to determine if he met this hourly requirement when he served as a part-time firefighter starting in 1992.

The Court held: “Because the [Workers Comp.] commissioner did not apply the correct legal standard in failing to make a finding as to whether the plaintiff had customarily worked the requisite twenty hours per week prior to his hiring as a full-time firefighter, the plaintiff is entitled to have the commissioner decide that factual issue.”

> "The commissioner held a formal hearing on the plaintiffs claim on March 7, 2019. The plaintiff testified at the hearing, but he did not testify on direct examination as to the number of hours he customarily worked while he was employed as a part-time firefighter. On cross-examination, however, the plaintiff testified that he worked assigned shifts and that the number of shifts he was assigned varied from week to week. In light of the plaintiffs testimony regarding his other employment and the irregular number of hours he worked per week as a part-time firefighter, the town argued that the plaintiff had failed to establish that he customarily worked twenty hours or more per week prior to July 1, 1996." (Footnote omitted.) *Clark v. Waterford, Cohanzie Fire Dept.,* supra, 206 Conn.App. 226-27.
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> ***
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> Footnote 7: Some weeks he was assigned to work multiple shifts, and other weeks he was not assigned to work. As a part-time employee of the town, the plaintiff did not receive any holiday or vacation pay or benefits toward a pension. In 1997, the town employed the plaintiff as a full-time firefighter and paid him accordingly. Part-time and full-time firefighters were paid by the town, and their duties were the same.
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> ***
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> [Footnote 11]. We acknowledge the town's argument that, in providing for heart and hypertension benefits, § 7-433c is special" 'bonus legislation,'" the eligibility for which must be strictly construed under the board's decision in *Gaudett v. Bridgeport Police Dept.,* No. 6337, CRB 4-19-7 (September 8, 2021), rev'd, 218 Conn.App. 720, 293 A.3d 351 (2023)…. To the extent the dissent relies on the legislative history of § 7433c in support of the proposition that the legislature intended to provide a broad benefit to *all* paid firefighters and police officers in Connecticut, without qualification, we respectfully disagree.”

Dissent:

> “These statutory benefits have existed since the early 1950s, and never once in the past seventy years has this court or, to my knowledge, anyone else suggested that the benefits were not available to *all* uniformed members of *any* municipal fire department and *all* regular members of *any* municipal police department who met the statutory criteria. Indeed, heart and hypertension benefits have been awarded to countless firefighters and police officers under § 7-433c, in contested and uncontested cases alike, without

reference to the definition of "member" set forth in General Statutes § 7-425 (5). Until today."

Legal Lesson Learned: This is unusual decision; per the Dissent, the Court is reversing 70 years of history awarding disability benefits to all uniformed members of municipal fire departments.

Note: See June 26, 2023 article, "Connecticut High Court Nixes Workers' Comp for Firefighter With Heart Condition."

File: Chap. 7, Sexual Harassment

NY: FF STALKING – FEMALE FF STOPPED DATING HIM – U.S. DEPT. JUSTICE SUES – RETALIATION - CONSENT DECREE

On June 21, 2023, in United States of America v. Town / Village of Harrison, New York; Fire District Two of Harrison, New York; Harrison Volunteer No. 1 of Harrison, New York, U.S. District Court Judge Cathy Seibel, U.S. District Court for Southern District of New York, published the Consent Decree agreed to by all parties, including $425,000 up front payment, new Town policy, annual training. Volunteer firefighter Angela Bommarito, complained to FD after ending her dating relationship with Henry Mohr, a senior firefighter. When FD took no action, she filed a police report. The Police Chief not only took no action, but threatened to charge her with filing a false report and prepared a resignation letter which she signed. Mr. Mohr continued to stalk her even after her resignation, and was arrested May 3, 2016 and in July 19, 2016 pled guilty, with protective order.

The Consent Decree details the retaliation by Police Chief:

> "On January 22, 2016, [Harrison Police Chief Anthony] Marraccini met with Bommarito. During their meeting, Marraccini suggested that he could arrest Bommarito for her presentation of what Marraccini claimed was incomplete and false information to the Police Department regarding her relationship with Mohr. Marraccini also noted Bommarito's sexual relationships with other Harrison employees. Marraccini told Bommarito that he had to report this information to the Fire Commissioners unless Bommarito resigned. Marraccini prepared a resignation letter for Bommarito, which stated that she would resign from the Fire Department. Bommarito signed the resignation letter."

The Consent Decree includes following:

> "In settlement of the claims of the United States for relief on behalf of Ms. Bommarito and in consideration of her signed General Release (attached as Exhibit A), Defendants shall pay a total amount of $425,000, which shall consist of: (1) an up-front cash payment to Ms. Bommarito; and (2) a sum to fund the purchase of an annuity contract to pay

future periodic payments to Ms. Bommarito and her attorney (for reasonable attorneys' fees).

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Defendants shall maintain the written anti-discrimination and anti-retaliation policy, titled "Town of Harrison Anti-Discrimination and Anti-Retaliation Policy," which has been approved by the United States, and which includes, among other things, prohibitions on discrimination, sexual harassment, and retaliation, as well as provisions requiring objective fact-finding investigations into complaints of policy violations.

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Within 90 days of the Effective Date, Defendants, at their own cost, shall provide the Harrison Fire Department's supervisors, and the Town of Harrison's supervisors, Human Resources personnel, Investigators, and other appropriate individuals or entities identified in the updated policies and procedures, and any other Town of Harrison employee who is involved in receiving, investigating, or resolving complaints of discrimination and retaliation made by an employee of the Town of Harrison, a mandatory, live (in person or virtually via internet-based video conferencing), interactive training on prohibited employment practices under Title VII and on Defendants' anti-discrimination and anti-retaliation policy and investigation procedures as developed or revised under this Decree. The training will be provided by an independent party."

Legal Lesson Learned: Complaints of stalking must be promptly investigated either by FD or the Police Department.

Note: See June 8, 2023 U.S. Department of Justice Press Release: United States Sues the Town/ Village of Harrison, NY and FD for Discrimination & Sexual Harassment

File: Chap. 8, Race Discrimination

File: Chap. 9, ADA

IL: CHICAGO FD APPLICANT SENT PSYCH EXAM – PRIOR HISTORY – FAILED – CITY MUST NAME 12 OTHERS FAILED

On July 5, 2023, in Nicholas Sintos v. City of Chicago, U.S. District Court Judge Sara L. Elli, U.S. District Court for Northern District of Illinois, Eastern Division, ordered the City to produce the names and unredacted psych exam records of12 other applicants who were ordered to take psychological exams having received job offers upon passing the exam. The Court had initially held that names of these individuals should not be disclosed, upon after a court hearing decided that names must be disclosed, and no requirement city first get their authorization.

The Court held: "During discovery, the City produced medical clearance files for other applicants, however, it redacted their names and contact information. Sintos asked the Court to require the City to produce unredacted versions so that he could contact other candidates who, like him, were required to undergo post-offer psychological exams. Sintos argued that he is entitled to contact these individuals as they are potential witnesses. *** To support his argument that the practice is widespread, Sintos seeks to contact other applicants who underwent the psychological evaluation exam but were not hired. *See Reed v. Wexford Health Sources, Inc.*, No. 20-cv-01139-SPM, 2022 WL 4483949, at *6 (S.D. Ill. Sept. 27, 2022) ("*Monell* claims often require broad discovery.). Here, the Court is allowing Sintos access to the unredacted information for at most twelve individuals. Given the small number of individuals and the need for this information to establish his *Monell* claim, the Court found it appropriate to order the City to provide unredacted files. *** The City contends that even if the federal psychotherapist-patient privilege, and not the Mental Health Act, applies, that it too bars the disclosure of the unredacted third-party applicant files absent consent from each individual…. Here, the third-party applicants were not seeking mental health treatment, as in *Jaffee* [*v. Redmond*, 518 U.S. 1, 10 (1996)] but instead were participating in a compelled evaluation in hopes of gaining employment with the City. *See id.* Thus, the Court finds that neither the Mental Health Act nor the federal psychotherapist-patient privilege apply."

> "In September 2014, Plaintiff Nicholas Sintos, who has depression and anxiety, applied to work as a firefighter/EMT with the City of Chicago. After passing the City's written examination, the City placed him on a list of eligible candidates. The City offered Sintos employment conditioned on the successful completion of a psychological suitability evaluation, which the City does not uniformly require all applicants to complete. In February 2019, Sintos underwent a five-hour psychological suitability evaluation. In June 2019, the head of the Chicago Fire Department's medical division, Dr. William Wong, informed Sintos that the psychologist did not recommend him for employment, leading the City to take Sintos off the eligible candidate list.
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> Sintos brought this lawsuit against the City alleging the City discriminated against him based on his disability, in violation of the Illinois Human Rights Act, 775 Ill. Comp. Stat. 5/1-101 *et seq.*, and the Americans with Disabilities Act (the "ADA"), 42 U.S.C. § 12101 *et seq.*, that the psychological exam was unlawful under the ADA because the City did not subject all potential employees to the exam, and that the City has a widespread practice of only requiring candidates with a history of psychiatric disabilities to undergo the exam. The parties are currently completing fact discovery."

Legal Lesson Learned: Many FDs require psych exams as part of final job offer for all finalists; see below EEOC Guidance.

> Note: See EEOC Enforcement Guidance On Disability-Related Inquries And Medical Examinations Under ADA.
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> "Under the ADA, an employer's ability to make disability-related inquiries or require medical examinations is analyzed in three stages: pre-offer, post-offer, and employment. At the first stage **(prior to an offer of employment)**, the ADA prohibits all disability-

related inquiries and medical examinations, *even if* they are related to the job. At the second stage **(after an applicant is given a conditional job offer, but before s/he starts work)**, an employer may make disability-related inquiries and conduct medical examinations, regardless of whether they are related to the job, as long as it does so for all entering employees in the same job category. At the third stage **(after employment begins)**, an employer may make disability-related inquiries and require medical examinations *only* if they are job-related and consistent with business necessity."

File: Chap. 9, ADA

WA: FF PTSD – DENIED REQUEST TO BRING HIS SERVICE DOG TO WORK – CITY PSYCHOLOGIST MAY EXAMINE FF

On June 23, 2023, in Abraham Meyer v. City of Chehalis, U.S. District Court Judge David G. Estudillo, U.S. District Court for Western District of Washington, Tacoma, has agreed with the City that plaintiff must undergo a psychiatric examination by their expert to confirm he still suffers from PTSD as he did in 2019 when they turned down his request to bring a service dog to work. The Court, however, denied the City's request to have their expert examine the firefighter's current service dog. The Court held: "The Court also agrees with the City that there is good cause for a Rule 35 exam here since the City would otherwise be forced to rely on years-old psychological evaluations conducted by dueling medical professionals to build their case. The Court therefore GRANTS the City's motion to compel a psychological evaluation of Plaintiff. *** Evaluating Plaintiff's current service dogs will not shed light on the training of his prior service dog at the time of the City's initial denial of Plaintiff's reasonable accommodation request. Additionally, Plaintiff need not use his current service dog as part of any future reasonable accommodation reached with the City. Indeed, the focus on a specific service dog's training appears to be an implicit concession by the City that a service dog trained to their standards could constitute a reasonable accommodation. The Court therefore DENIES the City's motion to compel an evaluation of Plaintiff's current service dog."

> "In 2019, Plaintiff, a firefighter, submitted a reasonable accommodation request to the City seeking permission to bring his service dog to work to help alleviate his post-traumatic stress disorder ('PTSD')….The City ultimately denied this request…. Plaintiff's complaint alleges he was suffering from PTSD when his request for a reasonable accommodation was denied …and alleges 'ongoing' economic and noneconomic damages resulting from the denial of his proposed reasonable accommodation for his PTSD …. As part of the reasonable accommodation process between the parties, Plaintiff alleges, and the City does not dispute, he was subjected to psychiatric examinations by two different doctors in 2019, both of whom determined Plaintiff suffered from PTSD."

Legal Lesson Learned: Service dogs have been found to be reasonable accommodation in several industries; it is unclear how the firefighter in this case would house the dog when he is responding on a run.

File: Chap. 9, ADA

TN: ADA – NASHVILLE FF INJURED BACK – DENIED LIGHT DUTY WHEN HR DIDN'T DISCUSS DR'S NOTE - CASE PROCEED

On June 15, 2023, in Brian Moat v. The Metropolitan Government of Nashville And Davidson County, Tennessee, U.S. District Court Judge Aleta A. Trauger denied the city's motion for summary judgment; the firefighter was injured on duty Dec. 13, 2019, and placed on Injured On Duty (IOD) medical leave with full pay for maximum period of six months (Dec. 13, 2019 – June 22, 2020). Before his IOD leave expired, he asked FD for light duty but was denied by HR. When Civil Service Commission denied his extension of IOD leave because they needed medical letter on his expected return to work, he then provided HR with letter from his doctor authorizing light duty. This was denied by HR Mgr. Jamie Summers and he was forced to go on disability retirement (lower pay) until he returned to full duty on July 1, 2021.

The Court held: "As set forth above, the plaintiff has made a *prima facie* showing that he requested a reasonable accommodation [light duty]. The defendant arguably engaged with the plaintiff's request for an extension of his IOD leave when the [Civil Service] Commission considered that request in an open meeting. The interactive process, however, is an going process. *See, e.g.*, *Fisher v. Nissan N. Am., Inc.*, 951 F.3d 409, 422 (6th Cir. 2022). The plaintiff's reiteration of his request to [HR manager] Summers for light-duty work after his doctor relaxed his work restrictions - which took place *before* his IOD leave expired and apparently before his disability pension had been processed - at least arguably triggered a duty on the part of Metro to consider that request rather than to simply defer to the plaintiff's already-denied request for an extension of his IOD leave. *** Because the defendant has not shown that either of the requested accommodations would have been unduly burdensome or that they would have resulted in the elimination of an essential job requirement, in view of the temporary nature of the requested accommodations, the defendant is not entitled to summary judgment on the plaintiff's ADA claim based on the failure to accommodate his disability."

> " Moat had a follow-up appointment with Dr. Aaronson just nine days later [after he met with the Commission], on June 18, 2020. Moat emailed Summers after the appointment, notifying her that the doctor had returned him to light duty effective June 19, 2020 and requesting that he be placed on light duty until his reevaluation in August…. Summers responded that, '[p]er Civil Service Rules your IOD and IOD light duty run concurrently, you only have six months total for your IOD….' Because his IOD leave was set to expire on June 22, 2020 (not having been extended by the Commission), he was 'not eligible for light duty….'
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> ***
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> According to Summers, because the form contained very little information-not even indicating whether the plaintiff had actually had an appointment with Dr. Aaronson-and was not signed by the plaintiff, she had no way to 'verify' it. (Summers Dep. 145.) She disputed the suggestion that she 'denied' Moat's request for light duty; instead, in her view, she simply informed him that it "wasn't available, per the rule." (*Id.* at 147.) She did not recall reaching out to discuss the matter with anyone else before sending her email response. (*Id.* at 157.) She also did not request more information from Moat or ask him whether he had actually seen Dr. Aaronson."

Legal Lesson Learned: The 6th Circuit and other Courts have held that ADA requires employers and employees to have an "interactive process" where the employee can share their physician's expectation on return to work.

File: Chap. 9, ADA

DC: FEMALE FF CLAIMS SEXUALLY ASSAULTED BY TWO FF – MENTAL STRESS. FORCED RETIRE - ADA CASE PROCEED

On June 14, 2023, in Nicole Rena McCrea v. District of Columbia, et al., U.S. District Court Judge Tanya S. Chatan, U.S. District Court for District of Columbia, denied the City's motion to dismiss her ADA case.

The Court held: "Plaintiff Nicole McCrea is a former firefighter with the District of Columbia Fire and Emergency Medical Services Department (EMS). Proceeding *pro se,* she alleges that in May 2013, two fellow firefighters sexually assaulted her while she was on duty, and after she reported the incident, EMS managers, government employees, and mental health professionals conspired to deny her requests to classify her subsequent behavioral health challenges as job-related injuries and to force her into retirement. *** "'While the viability of her claim at the summary judgment stage appears tenuous given her apparent failure to provide the District with the requested medical documentation,' the court reaffirms that Plaintiff's allegations plausibly state a claim that the District failed to provide reasonable accommodation for her disability. *Id.* (citing 42 U.S.C. § 12112; 29 U.S.C. § 794(d))."

> "In short, Plaintiff alleges that she was sexually assaulted while at work at the fire station on or around May 30, 2013, SAC [second amended complaint] ¶¶ 1-4; that in the following months she began experiencing resultant stress, along with other cognitive and physical symptoms, and was placed on medical leave, *id.* ¶¶ 11-13, 15; that her request to have her symptoms treated as 'performance on duty' (POD) injuries was wrongfully denied, *id.* ¶¶ 15-18, 20; and that she was ultimately ordered into involuntary, non-POD disability retirement, *id.* ¶¶ 92, 97-98, 108.
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> ***
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> Defendants contend that Plaintiff's own allegations 'establish *her* repeated refusal to cooperate with . . . requests for additional information needed to evaluate her [reasonable accommodation] request(s).' *Id.* at 20. But the court has already rejected those arguments, concluding that it sufficed for Plaintiff to allege 'that she requested reasonable accommodations, as recommended by her treating physician, that would have allowed her to return to work, but EMS would not accept the recommendations and in fact asked her to provide additional information before it would consider her request.' *McCrea*, 2021 WL 1216522 at *6. Thus, '[w]hile the viability of her claim at the summary judgment stage appears tenuous given her apparent failure to provide the District with the requested medical documentation,' the court reaffirms that Plaintiff's allegations plausibly state a claim that the District failed to provide reasonable accommodation for her disability. *Id.* (citing 42 U.S.C. § 12112; 29 U.S.C. § 794(d))."

Legal Lesson Learned: ADA requires an "interactive process" and employers have right to see employee's medical evaluations to confirm she is "disabled."

> Note: See EEOC "Enforcement Guidance on Reasonable Accommodation and Undue Hardship under the ADA."
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> "While an individual with a disability may request a change due to a medical condition, this request does not necessarily mean that the employer is required to provide the change. A request for reasonable accommodation is the first step in an informal, interactive process between the individual and the employer. In some instances, before addressing the merits of the accommodation request, the employer needs to determine if the individual's medical condition meets the ADA definition of 'disability,' a prerequisite for the individual to be entitled to a reasonable accommodation."

File: Chap. 10 – FMLA / Military Leave

FL: SHERIFF PILOT RESIGNED – FEMALE MGR ANTI-MILITARY – JURY "WILLFUL" VIOL., COURT MUST FOLLOW

On June 22, 2024, in Scott Thomas v. Broward County Sheriff's Office, the U.S. Court of Appeals for 11th Circuit (Atlanta) held (3 to 0) that under the Uniformed Services Employment and Reemployment Rights Act, a federal District Court judge can double the lost wages verdict for "willful" violations of the Act, and when as in this case the parties agree to submit that decision to a jury, the District Court judge cannot set aside the jury's finding of "willful" as merely advisory. Pilot awarded $240,000, which is then doubled, for willful violation.

The 11th Circuit held: "The jury determined that the sheriff's office's violation of the Act was willful. Thomas argues that this finding bound the district court because the parties consented to a jury trial on the issue of willfulness. Alternatively, he argues that the jury's determination was conclusive because the statute itself gave him the right to have the jury decide the issue. We need not reach his second argument because his first argument is correct."

> "A jury determined that the Broward County Sheriff's Office discriminated and retaliated against helicopter pilot Scott Thomas in violation of the Uniformed Services Employment and Reemployment Rights Act and awarded Thomas $240,000 in lost wages. The verdict form also asked whether the sheriff's office 'willfully violated the law,' and the jury answered, 'Yes.' Based on a statutory provision that awards double damages for willful violations.
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> Scott Thomas applied to work as a helicopter pilot for the Broward County Sheriff's Office's air rescue program. Because of his prior military service, Thomas had significant flight training and experience. From 2004 to 2011, Thomas served as a helicopter pilot in

the United States Army and flew nearly a thousand hours in combat over the course of three deployments to Iraq and Afghanistan. Thomas later flew helicopters as a civilian contractor for a Federal Bureau of Investigations hostage rescue team. The sheriff's office invited Thomas to interview twice in the summer of 2018 with Chief Tammy Nugent, the division chief of emergency medical services for the county's Department of Fire Rescue, and Deputy Brian Miller, the law enforcement aviation unit's chief pilot.

***

At a visit to a fire station in December, Fuller told Thomas that she 'knew better qualified pilots that she would rather have in the unit,' which Thomas interpreted as a reference to civilian pilots, and Thomas complained to her that her treatment of the military pilots was uninformed and unfair. And when Thomas requested leave to see a Veterans' Affairs doctor, Fuller denied the request by saying that she was 'a mother,' that the rest of the pilots were 'children,' and that 'children weren't allowed to question their parents.' In mid-January, Thomas raised his concerns about Fuller to an instructor in the sheriff's office, who shared them with Chief Nugent.

Around this time, Fuller began to investigate the pilots' backgrounds. She had them complete pilot experience forms in early January. Thomas completed his form using the backup log-book on his cell phone, and the flight hour numbers differed from the rounded numbers on his resume. Fuller then asked the pilots to bring her their logbooks. All brought their official logbooks except Thomas, who testified that he brought his backup logbook because Fuller said that he did not need to bring his official logbook. and that she was "perfectly fine" with the backup logbook alone. The numbers on Thomas's backup logbook and form roughly—though not perfectly—matched those on the resume he submitted when he applied for the job. For instance, he stated on the form that he had 2,131 total flight hours, 1,431 pilot-in-command flight hours, and 531 night-vision-goggle flight hours, whereas he stated on his resume that he had 2,080 total flight hours, 1,500 pilot-in-command flight hours, and 530 night-vision-goggle flight hours.

Fuller recommended that Thomas be "release[d] . . . from service" due to "major discrepancies" in his flight experience paperwork. Fuller testified that she did so because the various figures "[did]n't add up" and constituted "falsification." Chief Nugent met with Fuller and another employee to review Thomas's records. Relying on their views that the discrepancies were material, Chief Nugent determined that Thomas's probationary employment should be terminated. On January 28, Chief Nugent gave Thomas the option of being fired or resigning. He resigned."

Legal Lesson Learned: USERRA prohibits employers, including sheriffs and Fire & EMS, from discriminating against past and present members of the uniformed services.

Note: Read the article: The Uniformed services Employment Reemployment Rights Act.
"USERRA applies to all public and private employers in the United States, regardless of size. For example, an employer with only one employee is covered for purposes of the act. USERRA also applies to foreign employers doing business in the United States. A foreign employer that has a physical location or branch in the United States (including

U.S. territories and possessions) must comply with USERRA for any of its employees who are employed in the United States.

File: Chap. 11, Fair Labor Standards Act

File: Chap. 12, Drug-Free Workplace

File: Chap. 13, EMS

AL: BYSTANDER CPR – TOLD STOP BY VOL. FF – FIRE DEPT. IMMUNITY, BUT NO APPEAL BY PLAINTIFF UNTIL FF TRIAL

On June 30, 2023, in Carol Rogers, as administratrix of Estate of Susan Bonner v. Cedar Bluff Volunteer Fire Department and Cherokee County Association of Volunteer Fire Department, Inc., the Supreme Court of Alabama hold (8 to 1) that they will not decide Carol Rogers appeal from Court's grant of summary judgment to Volunteer FD and its Association, since the lawsuit against the volunteer firefighter (Guice) is still awaiting trial.

The Court held: "In the present case, it is undisputed that the viability of Rogers's wrongful-death claim against either Cedar Bluff or the Association is entirely dependent on her still-pending claim against Guice. The bottom line is that if Guice is found not liable, then there would be no need for us to review the trial court's summary judgment in favor of Cedar Bluff or the Association in almost any scenario. For example, if a jury decides that Guice acted reasonably, or breached no duty, or was not the proximate cause of Bonner's death, then this appeal would be mooted. Likewise, even if a jury finds none of those things, but finds that Guice "was acting in good faith and within the scope of [his] official functions and duties for a ... governmental entity," then pursuant to § 6-5-336(d)(1) of the VSA, Guice would be immune from liability and Cedar Bluff could not be held vicariously liable for his conduct."

> On June 6, 2017, Bonner was driving on County Road 45 in Cherokee County when her vehicle left the roadway and ended up submerged in a creek. After Bonner was rescued by a couple of passing motorists, a bystander who also happened to be a volunteer firefighter with the McCord's Crossroads Volunteer Fire Department ('the MCVFD') began performing cardiopulmonary resuscitation ('CPR') on Bonner. At some point, Cherokee County Emergency Medical Services ('Cherokee County EMS') was notified of the accident, and paramedics were dispatched to the scene
>
> Guice heard the call about the accident on a radio issued to him by the CBVFD and, because he was nearby, allegedly on a personal errand, decided to go to the scene to see if

> he could assist the paramedics even though he was not within the CBVFD's service area and the CBVFD had not dispatched him to the scene. After Guice arrived, the bystander who had been performing CPR on Bonner asked Guice to take over, but Guice declined. Instead, he advised that all resuscitative efforts should cease and stated over his CBVFD-issued radio that a death had occurred at the scene. Guice then allegedly entered the water to help other bystanders search for a possible second victim in Bonner's submerged vehicle.
>
> Five minutes after the bystander ceased performing CPR on Bonner, Cherokee County EMS paramedics arrived at the scene. They examined Bonner and found that she was warm to the touch, had a pulse, and had responsive pupils. As a result, the paramedics performed CPR on her until she experienced a return of spontaneous circulation. She was transported to the hospital for further treatment but died two days later as a result of anoxic encephalopathy. [Footnote 4: According to the record, anoxic encephalopathy occurs when blood ceases to flow to the brain.]."

Legal Lesson Learned: Do not direct others to stop CPR unless patient is clearly dead. Know your local EMS protocols on when a patient is deceased.

File: Chap. 13, EMS

IL: TWO MEDICS CHARGED WITH MURDER – STRAPPED PT FACE DOWN / DIED – BOND FOR A MEDIC REDUCED $600K

On June 16, 2023, in The People of the State of Illinois v. Peggy J. Finley, the Court of Appeals of Illinois, Fourth District, held (3 to 0) that the trial court should have lowered the paramedic's bond from $1 million to $600,000 (she must post 10%).

The Court held: "Defendant, a 45-year-old paramedic, was on duty and working with Peter Cadigan, when they responded to a call for the transportation of Earl Moore, Jr., to the hospital for medical treatment. Shortly after his arrival at the hospital, Moore died. Asserting Moore died of positional asphyxiation and compressional asphyxiation after being strapped face down on a gurney, the State charged defendant and Cadigan with first-degree murder. *** Here, defendant's ties to central Illinois are strong, indicating a low risk of flight. Except for a relatively brief time when her work addressed COVID-19-related staffing issues in Kentucky, Oregon, and St. Croix, defendant has resided in central Illinois her entire life. Her adult children reside there, as do her grandchildren. She is in what appears to be a romantic relationship with someone in central Illinois. Defendant also maintained gainful employment in the area. Defendant's financial condition further makes it unlikely she will flee. The circuit court found her to be indigent. Defendant is relying on the financial support of family, friends, and acquaintances to receive bail money. Nothing on the record from her background indicates defendant has the ability or desire to flee and deprive those individuals of reimbursement of those funds."

> "[T]estimony establishes, after Cadigan and defendant arrived, police officers initially positioned Moore on the gurney. Cadigan repositioned Moore. It is unclear whether the officers or Cadigan placed him in the prone position on the gurney, but the testimony

shows defendant did not participate in the placement of Moore. After Moore was on the gurney, defendant draped a blanket or sheet onto him. She also buckled one of the three seat belts over Moore. Cadigan tightened the belts. Neither the gurney nor the blanket impeded the 'nasal passages.' The preliminary-hearing transcript further illustrates the State's case against defendant. The State argued there was probable cause to charge defendant with first-degree murder under a theory of accountability. The State maintained Cadigan and defendant acted together as paramedics and both transported Moore to the hospital while Moore laid in the prone position."

Legal Lesson Learned: A jury of 12 will ultimately decide if State has proven therse charges beyond a reasonable doubt.

Note: Watch this TV video, including PD body camera.

File: Chap. 14, Physical Fitness

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

File: Chap. 16, Discipline

NY: STATE PASSES "FF BILL OF RIGHTS" LAW – INDEP. HEARING OFFICERS FOR DISCIPLINE - CASE REMANDED

On June 22, 2023, In The Matter of Local 32, International Association of Firefighters, AFL-CIO, Utica Professional Firefighters Association v. New York State Public Employment Relations Board, the Supreme Court of New York, Third Department, held (5 to 0) that in light of new State law, PERS [New York Public Employment Relations Board] must be given new opportunity to decide whether City of Utica must negotiate changes in disciplinary interrogation practices. The new law, "New York State firefighter bill of rights act," effective March 1, 2023, provides that paid firefighters in cities less than one million population now have right to independent hearing officer before discipline, including termination, can be imposed. The legislative history of the new law also addresses "presumption of negotiability" before a city may change its disciplinary practices.

The Court held: "During the pendency of this appeal, the Legislature enacted the New York State Firefighter Bill of Rights Act (L 2022, ch 674), which amended both the Taylor Law and Civil Service Law § 75, addressing removal of and other disciplinary action against public employees. The Senate Introducer's memorandum in support of the bill recognized that "court decisions have noted that... several statutes contain[ ] provisions favoring the local control of police and fire discipline that would override the Taylor Law presumption of negotiability," and, against that backdrop, the Legislature saw it necessary to "declare it to be the public policy of the State of New York that[,] for firefighters, disciplinary procedures are terms and conditions of

employment subject to mandatory negotiation under the Taylor Law" (Senate Introducer's Mem in Support of 2022 NY Senate Bill S8481, enacted as L 2022, ch 674). The act thus amends the aforementioned statutes accordingly (*see* Civil Service Law §§ 75 [2-a]; 201 [4]; 204-a [4]).”

> “In June 2016, petitioner filed an improper practice charge with respondent Public Employment Relations Board (hereinafter PERB) alleging that respondent City of Utica, a second-class city, violated multiple sections of Civil Service Law article 14 (hereinafter the Taylor Law) by unilaterally changing past practices related to disciplinary interrogations of City firefighters. Following administrative review, PERB concluded that it was constrained to follow *Matter of City of Schenectady v New York State Pub. Empl. Relations Bd.* (30 N.Y.3d 109 [2017]), in which the Court of Appeals held that police discipline was a prohibited subject of bargaining for cities covered by the Second-Class Cities Law (*id.* at 115-116). In doing so, PERB rejected petitioner's argument that firefighters were differently situated from police officers and, thus, the policy considerations in *Matter of City of Schenectady*, and the line of cases upon which it relied, were inapposite. Petitioner then commenced this CPLR article 78 proceeding to annul PERB's determination, which respondents moved to dismiss. Supreme Court granted that motion, agreeing with PERB that the disciplinary provisions of the Second-Class Cities Law apply with equal force to both police officers and firefighters. Petitioner appeals.
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> ***
> Although, as the City aptly notes, the act expressly states that it applies to proceedings commenced on or after March 1, 2023 (*see* L 2022, ch 674, § 5), PERB asserts that this newly promulgated legislation directly impacts its analysis and has asked this Court to remit this matter to it for a new determination. Acknowledging these somewhat unusual circumstances, petitioner has agreed that remittal is appropriate. In light of the foregoing, we grant PERB's request and remit the matter to it for further proceedings.”

Legal Lesson Learned: PERS will now decide if Utica Local’s charge is well founded.

Note: Several states have enacted a “Firefighter Bill of Rights” such as California, Florida, New Mexico and Illinois, which broadly address procedural rights in discipline, including written notice of charges. This new NY law only addresses the right to third-party independent hearing officer.

> “Section 75 of the civil service law is amended by adding a new subdivision 2-a to read as follows:
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> “2-a. Independent hearing officer. (a) Notwithstanding any other provision of law to the contrary, including but not limited to subdivision four of section seventy-six of this title, any paid officer or member of an organized fire company or fire department of a city of less than one million population, or town, village or fire district who is represented by a certified or recognized employee organization pursuant to article fourteen of this chapter shall not be subjected to the penalty of dismissal from service or any other discipline if the hearing, upon such charge,

has been conducted by someone other than an independent hearing officer to be agreed to by the employer and the person against whom disciplinary action is proposed."

File: Chap. 16, Discipline

IL: ANGRY LT. PUSHED FEMALE LT. WALL 3 TIMES – SUSP. 24 HRS - NO PROOF FD CONDONED THIS CONDUCT

On June 15, 2023, in Michelle Giese v. City of Kankakee, Damon Schuldt and Nathan Boyce, the U.S. Court of Appeals for 7th Circuit (Chicago) held (3 to 0) that U.S. District Court had properly granted summary judgment to all defendants, and there was no proof FD condoning aggressive conduct or a "code of silence."

The Court held: "We are sympathetic to Giese, who continues to suffer mental and physical injuries from an attack that should never have occurred. But Giese's remedy, if any, is not in federal court. *** On the merits, Giese's claim fails because none of her evidence, separately or taken together, creates a genuine dispute regarding whether the defendants had a practice of condoning aggressive behavior, resulting in a constitutional injury. Although we have previously recognized that a defendant's 'code of silence' can give rise to a valid *Monell* claim, such a claim requires more than evidence of 'individual misconduct by ... officers'; it requires 'a *widespread practice* that permeates a critical mass of an institutional body.' *Rossi v. City of Chicago,* 790 F.3d 729, 737 (7th Cir. 2015); *see also Sledd v. Lindsay*, 102 F.3d 282, 289 (7th Cir. 1996)."

> "On October 18, 2018, Michelle Giese-a lieutenant in the Kankakee Fire Department ('KFD') - was attacked by another firefighter while responding to a fire at a senior living facility. The City suspended the other firefighter for twenty-four hours without pay, ordered him to complete an anger management course, and directed him to avoid working on the same shift as Giese for three months. Giese experienced ongoing physical and mental injuries from the incident, causing her to take leave from work and apply for workers' compensation. She returned to work six months later but permanently left her position shortly after. She then filed this lawsuit, alleging that the defendants, among other things, retaliated against her for certain protected activities under Title VII and condoned aggressive and inappropriate behaviors as part of a "code of silence" that resulted in her attack. The district court granted summary judgment for the defendants, and this appeal followed.
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> ***
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> On October 18, 2018, Michelle Giese and several other firefighters, including Lieutenant Nathan Boyce, responded to a call on the second floor of a senior living facility. Boyce took command of operations, while Giese and another firefighter brought a fire hose up the stairs. Boyce claims that he ordered the firefighters to wait until the hose was 'charged,' or filled with water, to proceed through the fire doors into the second-floor main hallway, but Giese testified that she did not hear the order.

While Boyce was 'flaking out' or unkinking the fire hose so that it could be charged, Giese and several other firefighters used thermal imagining technology to evaluate the conditions behind the fire doors. They determined that the fire was contained in one of the units behind the fire doors and therefore decided to proceed down the hallway with the uncharged fire hose. After the firefighters heard moans from inside an apartment, they dropped the hose and entered the apartment to assist an elderly woman who had caught on fire.

Boyce realized that Giese and the others had continued into the hallway in violation of his orders and followed them. Once he reached the entryway of the apartment, Boyce grabbed Giese by the harness and pushed her into the wall- lifting her so high that her feet were off the ground. After Giese slid down the wall and regained her footing, Boyce pushed her against the wall two more times, each time pulling her back with her harness before pushing her into the wall again. During the incident, which lasted about a minute to a minute-and-a-half, the two moved through the apartment from the entryway into an internal hallway, where Boyce pushed Giese three more times.

Giese informed her supervisors of the incident, and over the following week, Chief Damon Schuldt met with Giese twice. Schuldt informed her that he would not take the matter lightly and that Boyce would be disciplined, and he instructed her to change her work schedule so that she and Boyce would not be on the same shift. Schuldt ultimately suspended Boyce for twenty-four hours without pay and required him to complete an anger management course. Schuldt further directed Boyce not to work on the same shifts as Giese for three months and instructed that any additional violations of department rules could lead to further discipline, including termination. Some firefighters and union members later testified that they believed this punishment to be relatively light, and Giese contends that Schuldt imposed a short suspension because the Police and Fire Commission must approve suspensions of more than forty-eight hours.

***

Giese began working again on April 14. She was assigned to light duty, which included tasks such as cooking, cleaning, and clerical work. Apparently, no one informed Casagrande that Giese was assigned to light duty because, on her first day back, Casagrande asked her to assist in an active fire investigation. Giese told Casagrande that she was assigned to light duty and therefore could not conduct the investigation. Casagrande did not insist or require her to complete the fire investigation or any task she was restricted from doing.

Giese continued to work light duty until May 10, when they sent her home because she broke out in hives and blisters and had an elevated blood pressure. She has not returned to work since and applied for a disability pension in November 2019. Her application was still pending as of March 2023."

Legal Lesson Learned: Plaintiff did not have evidence to prove alleged violent workplace or "code of silence."

File: Chap. 17 - Arbitration

OH: YOUNGSTOWN CAPT. – DENIED PROMOTION – UNDER CBA ARBITRATION ONLY REMEDY – EVEN DELAYED UNION

On July 6, 2023, in The State ex rel. Casey et al. v. Brown, Mayor, et al., the Supreme Court of Ohio held (7 to 0), in a per curium decision [not authored by a single judge; appeal was also decided without need for oral argument], that the Ohio Court of Appeals for the Seventh District correctly held that the Captain has an adequate remedy through arbitration under the collection bargaining agreement, even if the arbitration has been delayed because Local 312 President is waiting for an arbitration decision by another Captain. He and others took a promotion exam in Oct. 2021 when a battalion chief retired; if he ultimately wins in arbitration, then he gets back pay with interest.

The Court held: "In summary, Casey had an adequate remedy in the ordinary course of the law to advance his grievance by way of the CBA because his claim was grievable. *** Casey's argument is internally inconsistent. On the one hand, he concedes that so long as he was able to seek relief through the CBA's grievance procedure, his remedy under the CBA was adequate. But, the argument runs, once he received an unfavorable decision by way of the union president's decision to decline to advance his grievance to arbitration, the remedy became inadequate, clearing the way for this action. It follows that if his remedy was at one time adequate-as he concedes that it was-then that is enough."

> "Casey is a captain in the city's fire department and a member of the Youngstown Professional Fire Fighters Local 312 ('union'). The city and the union are signatories to a collective-bargaining agreement ('CBA') that governs Casey's employment.
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> Part of the background underlying Casey's complaint relates to the city's handling of three battalion-chief positions. In October 2019, the State Employment Relations Board ('SERB') found that there was probable cause to support an unfair-labor-practice charge brought by the union regarding the city's threatened elimination of the positions. The city later eliminated the positions.
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> In January 2020, the Mahoning County Court of Common Pleas issued an order granting SERB's request for an injunction to prevent the city from eliminating the positions while SERB investigated the charge. In June 2020, the trial court held the city in contempt for violating the terms of the injunction and, as a means of purging the contempt, ordered the city to promote a qualified candidate to fill a vacant battalion-chief position. The city appealed the contempt order, and the court of appeals affirmed. *State Emp. Relations Bd. v. Youngstown,* 7th Dist. Mahoning …2021-Ohio-4552 ("*Youngstown I* ").
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> Meanwhile, SERB carried on with its investigation and, in June 2020, determined that the city had committed an unfair labor practice by eliminating the three positions. SERB ordered the city to, among other things, reconstitute the abolished positions. The city

appealed SERB's order to the trial court, which affirmed. On appeal, the court of appeals affirmed the trial court's judgment. *Youngstown v. State Emp. Relations Bd,* 2021-Ohio-4591, 182 N.E.3d 436 *('Youngstown II ').*

In June 2021, a battalion-chief vacancy arose upon an individual's retirement. Casey thereafter sat for a promotional examination and finished, according to Casey, 'on the top of the eligibility list.' But when Casey asked Fire Chief Barry Finley about a 'timetable for promotion,' the chief told Casey that the city did not intend to promote anyone to fill the vacancy.

***

On January 5, 2022, Casey asked the union president and other officials whether they planned to advance his grievance to arbitration under 'Step 4' of the CB A given that the court of appeals in *Youngstown II* had upheld the trial court's affirmance of SERB's order directing the city to reconstitute the three battalion-chief positions. The union president advised Casey that the union could not commit to advancing his grievance to arbitration, because the union had already committed to prosecuting the grievance of another union member who contended that she had been wrongly denied an opportunity to sit for the promotional examination. The union president thus recommended that Casey hire private counsel to advance his interests."

Legal Lesson Learned: The Captain's sole remedy is to seek arbitration under CBA.

Note: See decision in *Youngstown II*; Dec. 13, 2021;

> "On November 12, 2019, Union learned that City planned to pass legislation to eliminate the three Battalion Chief positions [apparently to pay for $285,000 radio upgrade demanded by Union]. The next day, City Council passed Ordinance No. 19-336 to amend Section 1 of Ordinance 19-47, to abolish three Battalion Chief positions by attrition. That Ordinance was later determined to be an unlawful retaliation against Union."