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June 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.

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

View cases via Scholar@UC

File: Chap. 1, American Legal System

GA: FIRE CODE – ETHIOPIAN BAR SHUT DOWN – ALLEGES "RACIAL" ENFORCEMENT – CASE PROCEED COUNTY

On June 1, 2023, in Sheba Ethiopian Restaurant, Inc., d.ba. Queen of Sheba Ethiopian Restaurant v. Dekalb County, Georgia, et al., the U.S. Court of Appeals for the Eleventh Circuit (Atlanta) held (3 to 0) that County officials cannot be sued, but case remanded for possible trial for race discrimination claim against the County. The Court described citizen's complaints.

> "By all accounts, Sheba's relationship with the county proceeded rather smoothly for seven or so years following these amendments. The relationship started to sour, however, in 2015, when Martha Gross-a private citizen who lived near Sheba and several other Ethiopian restaurants-'spearheaded' a campaign to 'cripple' the Ethiopian restaurant community. Gross spoke at the county's public meetings and posted on social media about "her desire to prohibit" certain Ethiopian restaurants and hookah bars 'from operating during late hours . . . either by removing grandfather[ed] status' or by 'preventing the establishments from obtaining [special land use permits].' *** In sum, we do not address whether corporations can-or cannot-state a race discrimination claim under section 1981. We hold only that there was no clearly established law in our circuit determining that officials *are* liable under section 1981 for discriminating against a corporation. In this absence, the officials in our case were entitled to qualified immunity."

More facts:

> "In 2016, shortly after Gross initiated her campaign, the county upped its enforcement efforts by forming a 'Late Night Task Force' to 'randomly select[] and order[] existing restaurants to complete and submit what it call[ed]' a 'letter of entertainment.' The letter of entertainment asked whether the restaurant served as a late night establishment and/or a nightclub. The county required Sheba to complete a letter of entertainment in late 2016, when Sheba filed its annual business license renewal application. In its letter, Sheba stated that it was a late night establishment (not a nightclub), and the county approved Sheba's business license, saying 'grandfathering renewed for [late night establishment].'
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> Over the next few months (in early 2017), the county's task force members-including representatives of the Fire Marshal's Office and the Code Enforcement Division-visited Sheba for a series of inspections. During these inspections, the task force members cited Sheba for code violations, including overcrowding by exceeding occupancy limits, use of sparklers and open flames, failure to comply with prior orders, failure to obtain permits for construction, and operating as a nightclub (recall that Sheba failed to inform the county that it operated as a nightclub in its letter of entertainment). Sheba alleged that these were 'petty infractions' and that '[n]one of the alleged violations were a matter of life safety.'
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> The county came down hard on Sheba for these violations. In March 2017, the fire marshal-having cited Sheba for overcrowding and using sparklers in champagne bottles-issued a 'Notice of Fire Hazard' directing Sheba to cease all operations until it received

> approval to reopen. A month later, in April 2017, the county decided to (1) revoke Sheba's alcohol license, certificate of occupancy, and 2016 business license; (2) deny its 2017 business license; and (3) terminate its legal nonconforming use status under the zoning code. The county maintained that these decisions were justified by Sheba's repeated code violations, the restaurant's change in use, and public safety concerns."

Legal Lesson Learned: The lawsuit for race discrimination has been remanded to U.S. District Court for trial against the County.

File: Chap. 1, American Legal System

DC: U.S. SUP. CT. – FALSE CLAIMS ACT – WHISTLEBLOWER CASES MADE EASIER - "SUBSTANTIAL RISK" FALSE PRICES

On June 1, 2023, in United States ex. Rel. Schutte, et al. v. SuperValu, Inc. [and companion case of United State ex rel. Proctor v. Safeway, Inc.], the U.S. Supreme Court held (9 to 0) in an opinion by Justice Clarence Thomas, that lawsuits by private individuals suing on behalf of U.S. Government against two retail drug store companies may proceed. The plaintiffs claim that companies false certified to Medicaid and Medicare that drug prices were the "usual and customary" price, but many of drugs were actually sold to cash customers at greatly discounted prices. Whistleblower lawsuits may proceed if evidence pharmacies to "substantial risk" that drug prices to Federal government did not reflect customer discounts. Justice Thomas described this example.

> "For example, petitioners have presented evidence that Safeway charged just $10 for 94% of its cash sales for a 90-day supply of a cholesterol drug between 2008 and 2012. Yet Safeway apparently reported prices as high as $108 as "usual and customary" during that time. And petitioners presented evidence that, at least at some times and for some drugs, SuperValu made more than 80% of its cash sales for prices less than what it disclosed as its "usual and customary" price…. For scienter, it is enough if respondents believed that their claims were not accurate."

More facts:

> "In certain circumstances, pharmacies are required to bill Medicare and Medicaid for their "usual and customary" drug prices. And, critically, these cases involve defendants (respondents here) who may have correctly understood the relevant standard and submitted inaccurate claims anyway. The question presented is thus whether respondents could have the scienter required by the FCA if they correctly understood that standard and thought that their claims were inaccurate. We hold that the answer is yes: What matters for an FCA case is whether the defendant knew the claim was false. Thus, if respondents correctly interpreted the relevant phrase and believed their claims were false, then they could have known their claims were false.
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Under the FCA, petitioners may establish scienter by showing that respondents (1) actually knew that their reported prices were not their "usual and customary" prices when they reported those prices, (2) were aware of a substantial risk that their higher, retail prices were not their "usual and customary" prices and intentionally avoided learning whether their reports were accurate, or (3) were aware of such a substantial and unjustifiable risk but submitted the claims anyway. §3729(b)(1)(A). If petitioners can make that showing, then it does not matter whether some other, objectively reasonable interpretation of "usual and customary" would point to respondents' higher prices."

Legal Lesson Learned: This is a significant decision given the large number of Whistleblower lawsuits filed in the health care industry, including EMS billing cases.

Note: See Feb. 7, 2023, the U.S. Department of Justice press release: "False Claims Act Settlements and Judgments Exceed $2 Billion in Fiscal Year 2022. Second Highest Number of Settlements in History.

"Of the more than $2.2 billion in False Claims Act settlements and judgments reported by the Department of Justice this past fiscal year, over $1.7 billion related to matters that involved the health care industry, including drug and medical device manufacturers, durable medical equipment, home health and managed care providers, hospitals, pharmacies, hospice organizations, and physicians. The amounts included in the $1.7 billion reflect recoveries arising only from federal losses, and, in many of these cases, the department was instrumental in recovering additional amounts for state Medicaid programs. The recoveries in fiscal year 2022 also reflected the department's focus on new enforcement priorities, including fraud in pandemic relief programs and alleged violations of cybersecurity requirements in government contracts and grants.

In 1986, Congress strengthened the False Claims Act by increasing incentives for whistleblowers to file lawsuits alleging false claims on behalf of the government. These whistleblowers, or qui tam, actions comprise a significant percentage of the False Claims Act cases that are filed. Qui tam cases may be pursued by the government or the whistleblower, and this past year significant recoveries were obtained by both. When a qui tam action is successful, the whistleblower, also known as the relator, typically receives a portion of the recovery ranging between 15% and 30%. Whistleblowers filed 652 qui tam suits in fiscal year 2022, and this past year the department reported settlements and judgments exceeding $1.9 billion in these and earlier-filed suits."

File: Chap. 1, American Legal System

DC: U.S. SUP. CT. – HONEST SERVICES FRAUD CONV. REV – AID NY GOV. COMO PAID $35,000 – BUT LEFT STATE GOV'T

On May 11, 2023, in Joseph Percoco v. United States, the U.S. Supreme Court held (9 to 0) in opinion by Justice Samuel Alito that jury instructions were improper regarding honest-services-fraud and reversed conviction since conduct occurred when not a State employee. During 8-months when he left position of Executive Deputy Secretary for Governor Como to run his campaign, he accepted $35,000 in two payments from a developer seeking to do business with the State of New York.

> "Petitioner Joseph Percoco was charged with conspiring to commit honest-services wire fraud during a period of time that included an eight-month interval between two stints as a top aide to the Governor of New York. Percoco was convicted of this offense based on instructions that required the jury to determine whether he had a 'special relationship' with the government and had 'dominated and controlled' government business…. We conclude that this is not the proper test for determining whether a private person may be convicted of honest-services fraud, and we therefore reverse and remand for further proceedings."

More facts:

> "Percoco was a longtime political associate of former New York Governor Andrew Como. Except for a brief but important hiatus in 2014, Percoco served as the Governor's Executive Deputy Secretary from 2011 to 2016, and that position gave him a wide range of influence over state decision-making. In April 2014, Percoco resigned from this position to manage the Governor's reelection campaign, but after the Governor was reelected, he resumed his role as Executive Deputy Secretary in December 2014.
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> The question we address today arises from Percoco's activities during his break in government service. In July 2014, Empire State Development (ESD), a state agency, informed developer Steven Aiello that his real-estate company, COR Development, needed to enter into a 'Labor Peace Agreement' with local unions if he wished to receive state funding for a lucrative project…. Interested in avoiding the costs of such an agreement, Aiello reached out to Percoco through an intermediary so that Percoco could 'help us with this issue while he is off the 2nd floor,'i.e., the floor that housed the Governor's office…. Percoco agreed and received two payments totaling $35,000 from Aiello's company in August and October 2014. On December 3, mere days before returning to his old job, Percoco called a senior official at ESD and urged him to drop the labor-peace requirement. ESD promptly reversed course the next day and informed Aiello that the agreement was not necessary."

Legal Lesson Learned: Former government employees can still be prosecuted for accepting money to influence former colleagues; new jury instructions are needed.

> Note: Justice Neil Gorsuch, along with Justice Clarence Thomas, agreed with reversal but had these observations in a concurring opinion.

> "It's a situation that leaves prosecutors and lower courts in a bind. They must continue guessing what kind of fiduciary relationships this Court will find sufficient to give rise to a duty of honest services. For them, it is back to the drawing board in their indictments and their jury instructions. But they are not the main victims here. That plight belongs to private citizens. In this country, a criminal law is supposed to provide 'ordinary people fair notice of the conduct it punishes.' Johnson v. United States, 576 U. S.591, 595 (2015); see also Connally v. General Constr. Co., 269 U. S. 385, 391 (1926). Yet even 80 years after lower courts began experimenting with the honest-services-fraud theory, no one can say what sort of fiduciary relationship is enough to sustain a federal felony conviction and decades in federal prison."

Justice Gorsuch also had informative comments about our civil liberties in another recent case involving COVID-19 orders by government officials. On May 18, 2023, in Arizona, et al. v. Alejandro Mayorkas, Secretary of Homeland Security, et al., the U.S. Supreme Court declined to decide a case concerning the Department of Homeland Security use of Title 42 Orders (Covid-19 national emergency) to deport illegal immigrants. Justice Neil Gorsuch filed a Statement blasting both Federal and local government officials overuse of "executive orders.".

> "Since March 2020, we may have experienced the greatest intrusions on civil liberties in the peacetime history of this country. Executive officials across the country issued emergency decrees on a breathtaking scale. Governors and local leaders imposed lockdown orders forcing people to remain in their homes. They shuttered businesses and schools, public and private. They closed churches even as they allowed casinos and other favored businesses to carry on. They threatened violators not just with civil penalties but with criminal sanctions too. They surveilled church parking lots, recorded license plates, and issued notices warning that attendance at even outdoor services satisfying all state social-distancing and hygiene requirements could amount to criminal conduct. They divided cities and neighborhoods into color-coded zones, forced individuals to fight for their freedoms in court on emergency timetables, and then changed their color-coded schemes when defeat in court seemed imminent."

File: Chap. 1, American Legal System

CA (5/1/2023): ARSON – CONV. UPHELD – CIRCUMSTANTIAL EVIDENCE - DEFENDANT SEEN AT 4 OF 5 FIRES ONE YEAR

On May 1, 2023, in The People v. Franklin Alan Goubert, the California Court of Appeals, Third District, Tehama held (3 to 0; unpublished decision) that the trial court judge, in a bench trial (no jury) properly found defendant guilty of two counts of arson to property, and one count of arson of forest land.

> "The trial court heard testimony that the fire department saw defendant at four out of the five suspicious fires, and that seeing someone at multiple fires is unusual. The fifth suspicious fire further occurred near the camp where defendant was living. The five fires occurred over a one-year span; the fires were relatively small; two occurred near a railroad; at least three occurred in the middle of the night; four were near homeless encampments; and all five fires involved the burning of vegetation. There was further testimony that three of the fires were deliberately set and were not accidental or unintentional. Based on defendant's unusual presence at the restaurant fire (and the other fires), and the similarities between the restaurant fire and the other fires, it is reasonable to infer someone started the restaurant fire, and it was defendant who did so. (See *Andrews I*, *supra*, 222 Cal.App.2d at pp. 245-246 [finding sufficient evidence to establish the corpus delicti of arson when "[f]our fires within the same neighborhood, close in point of date . . ., closer in point of time of day . . ., all started by an apparently similar method, cumulate[d] to give to [the] circumstantial proof much more than prima facie veracity"].) The circumstantial evidence in this case "snapp[ed] the long arm of coincidence" and established the corpus delicti for the restaurant fire. (*Andrews I*, *supra*, 222 Cal.App.2d at p. 245.)"

More facts:

> "The first fire occurred behind a grocery store on July 7, 2020, at approximately 2:00 a.m. The fire occurred near homeless encampments, and it burned the interior of a recreational vehicle and less than one acre of vegetation consisting mostly of grass. Chief Ray Barber of the Red Bluff Fire Department (the fire department) saw defendant at the scene observing the fire.
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> The second fire, which occurred at approximately 12:00 a.m. on August 30, 2020, was a small vegetation fire in an empty field near train tracks. The fire burned a shopping cart and a pile of vegetation. Captain Matthew Shobash of the fire department excluded potential causes of the fire-including cooking items, children, smoking material, natural causes, equipment failure, and train malfunction-and expressed the opinion that someone lit the fire. Defendant reported the fire, and Captain Shobash saw defendant near the fire.
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> The third fire, located behind a restaurant, occurred on December 10, 2020 (the restaurant fire). The fire burned a pile of items comprised of garbage, vegetation, and sticks. Captain Shobash saw defendant at the scene of the fire, and defendant admitted he 'started the fire to clean up the area.'
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> On May 3, 2021, the fire department responded to the fourth fire, located inside a drainpipe within a creek bed (the drainpipe fire). Chief Barber testified the pipe was not 'actually' damaged, but described approximately two feet of 'heavy charring' on the inside of the pipe and stated the fire burned the inside of the pipe. He also expressed the opinion that someone built the fire by stuffing brush and twigs into the pipe, and then lit the materials on fire. Defendant's camp-where he was living at the time-was only a few feet away from the drainpipe, and the fire department described the fire as an 'outside open fire for warming or cooking.' Chief Barber visited defendant's camp later that day, and defendant

stated he did not know about the fire. At a later interview with Chief Barber and Detective Sean Baxter, defendant admitted he started the fire.

The final fire occurred near a railroad at approximately 3:00 a.m. on July 13, 2021, and burned grass, brush, and vegetation. Chief Barber saw defendant being escorted away from the fire while holding a hoe and a rake. Homeless encampments were nearby, including defendant's camp, and after eliminating electrical and lightening causes, the fire department determined a 'hot start of some sort' caused the fire. Defendant initially maintained he did not start the fire, but ultimately admitted to starting it.

At trial, Chief Barber testified it is uncommon to see the average citizen at multiple fires, and Captain Shobash testified it is uncommon to see someone at multiple fires unless they are affiliated with the fire department. The trial court also heard testimony that defendant admitted to starting multiple fires. Defendant told Detective Baxter he set fires for a purpose, either to clean up brush, improve the area, or for some other purpose. Defendant also told Detective Baxter he normally used a lighter to start fires, and he believed 'he had above average knowledge of fire.'"

Legal Lesson Learned: Observing defendant at multiple fires led to his convictions.

File: Chap. 2, LODD & Safety

IL: FF CANCER - LINE-OF-DUTY DISABILTY PENSION WITH HEALTH INSURANCE - EVEN OFF-DUTY JOBS EXPOSURES

On May 22, 2023, in James Ivetic et al. v. The Bensenville Fire Protection District No. 2, the Court of Appeals of Illinois, First District, First Division, held (3 to 0) that the firefighter and his wife were entitled to health insurance premium benefits.

> "The Pension Board held a hearing on James' pension application beginning on September 18, 2015. The evidence showed that James worked at a restaurant and a grocery store prior to becoming a firefighter. Additionally, during his career as a firefighter, James worked a number of part-time jobs, including being taxi and truck drivers and remodeling homes. James admitted that he was likely exposed to some chemicals from his part-time jobs, like oil-based paints and wallpaper removing chemicals. *** Here, the District essentially argues that James cannot satisfy the emergency prong of section 10 because there was no evidence of a direct cause of his cancer. Stated differently, in order to recover benefits under the Act, James had to prove that his injury was received during an emergency response and that it was the sole cause of his cancer. This argument, however, ignores that '[a]n injury may have more than one proximate cause.' (Internal quotation marks omitted.) *Richter v. Village of Oak Brook*, 2011 IL App (2d) 100114, ¶ 21. Under Illinois law, proximate cause is defined as a cause that, in the natural or ordinary course of events, produced the plaintiff's injury, but a

cause need not be the only, last, or nearest cause; rather, the combination of multiple causes may result in the injury."

More facts:

"In January 2008, James was diagnosed with a condition called nondisabling small lymphocytic lymphoma which later evolved and developed into chronic lymphocytic leukemia (CLL/SLL), requiring a complete bone marrow transplant and resulting in total disability. James' bone marrow biopsy confirmed that his cancer was stage IV. According to his primary doctor, James had been suffering from the cancer for at least two years. James received a second opinion from Patricia Madej, M.D., who recommended a form of chemotherapy treatment called Rituxan. James underwent treatment and continued working for the District until June 2008, when he retired.

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James, thereafter, applied for health insurance premium benefits from the District for him and his wife. The District denied James' request, concluding that he suffered from cancer, which was a disabling 'illness,' rather than an 'injury,' and therefore, he was not entitled to the additional health insurance benefits. The District further concluded that James had not established that he was injured in the course of responding to what he reasonably believed was an emergency, as required under the Act.

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Moreover, as stated, the Board found that James was exposed to carcinogens when he was responding to emergencies and that those exposures were either the cause of or a contributing cause of his cancer. See *Gaffney v. Board of Trustees of the Orland Fire Protection District*, 2012 IL 110012, ¶ 63 (noting that "section 10(b) covers situations arising in the performance of a public safety employee's job" and that "[t]he term 'emergency' in section 10(b), as applied to a firefighter, connotes the sense that either a person or property is in some form of imminent danger"). The Board's finding was supported by all three independent medical evaluations of James, as well as by James' own testimony. Because the exposures at least contributed to James' cancer, plaintiffs can recover under the Act. See *Richter*, 2011 IL App (2d) 100114, ¶ 21 (holding the plaintiff could recover under the Act so long as the injury he sustained during an emergency response was a contributing cause of his disability, even if it was not the sole cause of that disability). In sum, we conclude that the circuit court properly granted summary judgment to plaintiffs because they satisfied both the catastrophic injury and emergency prongs of the Act and therefore were entitled to health insurance premium benefits from the District."

Legal Lesson Learned: Under Illinois statute, and case law, there is no requirement that firefighter prove a specific emergency run was the cause of cancer.

File: Chap. 3, Homeland Security

DC: U.S. Sup. CT - NIGHTCLUB BOMBING IN TURKEY BY ISIS – FAMILIES CAN'T SUE FACEBOOK, TWITTER, OR GOOGLE

On May 18, 2023, in Twitter, Inc. v. Taamneh et al., the U.S. Supreme Court held (9 to 0) in an opinion by Justice Clarence Thomas, that Plaintiffs' allegations that these social-media companies aided and abetted ISIS in its terrorist attack on the Reina nightclub fail to state a claim under 18 U. S. C. §2333(d)(2).

> "First, the relationship between defendants and the Reina attack is highly attenuated. As noted above, defendants' platforms are global in scale and allow hundreds of millions (or billions) of people to upload vast quantities of information on a daily basis. Yet, there are no allegations that defendants treated ISIS any differently from anyone else. Rather, defendants' relationship with ISIS and its supporters appears to have been the same as their relationship with their billion-plus other users: arm's length, passive, and largely indifferent…. Second, because of the distance between defendants' acts (or failures to act) and the Reina attack, plaintiffs would need some other very good reason to think that defendants were consciously trying to help or otherwise 'participate in' the Reina attack."

More facts:

> "Plaintiffs' case arises from a 2017 terrorist attack on the Reina nightclub in Istanbul, Turkey. The attack was carried out by Abdulkadir Masharipov on behalf of the Islamic State of Iraq and Syria (ISIS). Born in Uzbekistan, Masharipov had received military training with al Qaeda in Afghanistan in 2011 and eventually became affiliated with ISIS. In 2016, he was ordered by ISIS to travel to Turkey and launch an attack in Istanbul on New Year's Eve. After planning and coordinating the attack with ISIS emir Abu Shuhada, Masharipov entered the Reina nightclub in the early hours of January 1, 2017, and fired over 120 rounds into a crowd of more than 700 people. In total, Masharipov killed 39 people and injured 69 others. The next day, ISIS released a statement claiming responsibility for the attack. Two weeks later, Masharipov was arrested in Istanbul after hiding out in ISIS safe houses.
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> As is common knowledge, these three [social media] companies control three of the largest and most ubiquitous platforms on the internet: Facebook, YouTube, and Twitter. At the time of the Reina attack, Facebook had over 2 billion active users each month, YouTube had over 1 billion, and Twitter had around 330 million.
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> But not all of the content on defendants' platforms is so benign. As plaintiffs allege, ISIS and its adherents have used these platforms for years as tools for recruiting, fundraising, and spreading their propaganda. Like many others around the world, ISIS and its supporters opened accounts on Facebook, YouTube, and Twitter and uploaded videos and messages for others to see. Like most other content on those platforms, ISIS' videos and messages were then matched with other users based on those users' information and use history. And, like most other content, advertisements were displayed with ISIS'

> messages, posts, and videos based on information about the viewer and the content being viewed. Unlike most other content, however, ISIS' videos and messages celebrated terrorism and recruited new terrorists. For example, ISIS uploaded videos that fundraised for weapons of terror and that showed brutal executions of soldiers and civilians alike. And plaintiffs allege that these platforms have been crucial to ISIS' growth, allowing it to reach new audiences, gain new members, and spread its message of terror."

Legal Lesson Learned: By unanimous decision, the U.S. Supreme Court held that the social media companies conduct did not constitute aiding or abetting ISIS.

File: Chap. 4, Incident Command, Training

NY: MENTAL PATIENT – LOCKED IN ROOM - SAWZALL CUT DOOR, MAN GRABBED SAW – LATER DIED – CASE PROCEED

On May 30, 2023, in Anthony Andre Paul, et al. v. The City of New York, U.S. District Court Judge Vernon S. Broderick, U.S. District Court for Southern District of New York, denied the City's motion for summary judgment. The judge held that while police had lawful authority to force the door, tase the person, and take him to hospital, use of Sawzall raises jury question.

> "Here, there appears to be harmful bodily contact between the saw and Paul as evidenced by, among other things, the injuries Paul sustained to his hands. Further, Plaintiff asserts that the officers used the saw with the intent of harming Paul. Whether or not the evidence supports this assertion is a question of fact for the jury."

More facts:

> "On July 1, 2015, one of Paul's roommates observed him acting strangely and speaking 'in tongues"'as though he were possessed…. Later in the evening, when Paul's roommate returned home, the apartment door was locked; the roommate asked Paul to open the door, but Paul would not open it…. All residents assigned to an apartment at Freedom House had equal rights to access the apartment and Paul was not entitled to lock his roommates out of the apartment…. Freedom House counselors tried to communicate with Paul to get him to come out of the apartment but were not successful. (*Id.* ¶ 73.) 'Paul said 'crazy stuff' to House # 19 staff.…' The Freedom House counselor also tried to open the door with a key, but Paul turned the locking mechanism to prevent the door from being opened…. At approximately 9:46 p.m., a Freedom House staff member called 911 and reported that an emotionally disturbed person ('EDP') had locked themselves in a shared room in his apartment…. NYPD officers from the local precinct responded to the 911 call and arrived at approximately 9:50 p.m.
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> An HNT [Hostage Negotiation Team] detective spoke to Paul for a disputed amount of time between five and forty minutes, during which Paul was hostile, told her to shut up,

said she was the devil, and demanded $500 in exchange for exiting the apartment…. After the HNT detective left, Officer DiFrancesca tried to communicate with Paul, but Paul continued to scream, bang, and stated the world was coming to an end…. Officers McNamara and Ramos arrived at the location between 11:30 p.m. and 12:00 a.m…. Eventually, the officers decided to cut a hole in the door either to view Paul directly or by using a camera…. The officers attempted to use a circular hole saw to drill a hole in Paul's door, but the drill bit broke….The officers then used a Halligan tool to make a starter hole and a Sawzall to begin making a triangular hole…. After Defendant Ramos made the second cut in the door, the officers observed blood on the saw blade and Ramos stopped cutting…. It appeared that Paul might have grabbed onto the blade of the Sawzall…. As blood came from beneath the door, the officers believed there was a medical emergency.

As the Entering Officers pushed open the door and attempted to enter the room, Paul resisted, spat blood at the officers, grabbed the top of the shield, and was tasered…. Officers entered the room and Paul was naked on his back on the floor of the hallway…. The parties dispute whether Paul attempted to get back up before he was tasered again…. Eventually, Paul was handcuffed and turned over to EMS personnel.

The ambulance carrying Paul left Freedom House at 12:40 a.m. on July 2, 2015…. While in the emergency room, Paul was agitated and combative…. He had three taser prongs in his body, was noted to have an altered mental status, stated he wanted to die, and attempted to bite emergency department staff…. At 1:20 a.m. Paul went into cardiac arrest and after an unsuccessful attempt at resuscitation, he was pronounced dead at 1:39 a.m.

On July 3, 2015, the City Medical examiner, Dr. Monica Smiddy, performed an autopsy on Paul…. On September 22, 2015, Dr. Smiddy issued a report concluding that Paul's manner of death was accident and cause of death was ‘cardiac arrhythmia due to agitated delirium, (possible drug intoxication)….’ The report also noted blunt impact injuries and contusions of the hands, wrist, and right foot, superficial incised wounds to the hands and forearms with no injury to major blood vessels, an absence of the big toenail on the right foot, and three taser probes in his skin.”

Legal Lesson Learned: Review your SOP on forced entry and use of power saws.

File: Chap. 6, Employment Litigation

MI: ARMY FF NOT PROMOTED CAPTAIN – RATED BELOW 2 OTHERS – NO RETALITION / COMMENTS HIS "B-SIZE BRA"

On June 2, 2023, in Joe Dasilva v. Mark Esper, et al., U.S. District Court Judge Mark A. Golsmith, U.S. District Court for Eastern District of Michigan, Southern Division, granted U.S, Army's motion for summary judgment, dismissing the lawsuit by the firefighter / EMT. He claimed that the Chief of the Fire Division, Martin Potter, who served on the three-member promotion panel in 2019, denied him promotion because he had filed EEOC complaints against him in 2017 and 2018 after comments such as, "I bet you can wear a B-sized bra."

> "Dasilva alleges that Potter created a hostile work environment by sexually harassing him…. According to Dasilva, Potter 'continuously' told him from 2008 until 2018, 'I bet you can wear a B-sized bra….' Potter also allegedly once asked Dasilva how much breast implants cost and once stated, 'Hey, Dasilva [bet] you can . . . hold this pencil under . . . your breasts…..'" Dasilva further asserts that Potter retaliated against him for reporting the sexual harassment. *** The Army asserts that Dasilva was not selected for the position of captain because he was less qualified than the candidate who was selected, Shane Biehl…. The three individuals who interviewed and rated Dasilva's abilities when Dasilva applied for the position-Potter, Assistant Chief Adam Todd, and Assistant Chief Lesley Tillman-submitted declarations stating that they did not deem Dasilva qualified for the position…. The rating criteria sheets attached to the declarations show that all three individuals rated Dasilva the second lowest of the eight individuals who applied for the position….. Out of 110 total points, they scored the highest-scoring applicant between 48-52 points higher than Dasilva…. The interview rating sheets attached to the declarations show that Potter and Tillman found that Dasilva did not demonstrate leadership performance skills….Todd's interview rating sheet shows that Todd found that Dasilva lacked evidence of numerous performance skills, including leadership, customer service, motivating others, team building, and 'planning, prioritizing, and goal setting…..' It also states that Dasilva 'does not demonstrate abilities needed to effectively lead at the GS-8 level' and 'should continue to improve and work towar[d] engaging in activity to help….' Defendants' reason for not promoting Dasilva to captain-that he was not qualified-satisfies their burden of proof at this stage."

Legal Lesson Learned: Promotion panel score sheets carry great weight. FD officers need to be cautious about comments on firefighter appearance – male or female.

File: Chap. 6, Employment Litigation

IL: FF INJURED LINE OF DUTY – UNDER CBA FULLY PAID MED. INSURANCE – GETS MARRIED, NO FAMILY COVERAGE

On May 26, 2023, in Steven Owen v. The Village of Maywood, the Court of Appeals of Illinois, First District, Sixth Division, held (3 to 0) that the collective bargain agreement has no provision requiring Village to add the firefighter's new wife to the insurance coverage.

> "Plaintiff maintains that because article 16 did not provide an explicit limitation for insurance benefits to the date pensioned in the line of duty disability provision, when he married in May 2019, family coverage became applicable. As such, it was a breach of contract for defendant to deny family coverage under the CBA. We have reviewed the CBA and conclude that plaintiff's argument is without merit."

More facts:

> "The underlying facts are not in dispute. Plaintiff was employed as a firefighter/EMT for defendant from August 12, 2002, until he was injured in the line of duty on January 5, 2014. On August 17, 2017, the circuit court of Cook County found that plaintiff was entitled to a line of duty disability pension, retroactive to October 11, 2015.
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> ***
>
> The firefighter's union and defendant executed a CBA on June 2, 2015, which provided, among other things, benefits for firefighters who sustained line of duty disabilities. As part of his disability pension, plaintiff received payments for his healthcare premiums under article 16 of the CBA. Article 16, titled 'Pension Benefits,' provides in relevant part:
>
> > 'The Village shall pay the medical insurance premiums for employees injured in the line of duty. Upon certification of the Maywood Fireman's Pension Board that the employee is being pensioned with an on-the-job medical pension pursuant to Illinois State Statutes, the Village agrees to pay the entire amount of the individual or, where applicable, family medical insurance in an amount not to exceed the cost paid by the Village for the employee and his dependents in this category. In the event an employee receives a pension other than a duty related medical disability pension from the Maywood Fireman's Pension Board, the Village agrees to pay 50% of the medical insurance in an amount not to exceed the cost paid by the Village on the date pensioned."
>
> The CBA was valid from May 1, 2014, until April 30, 2018. The CBA provided that it would continue in effect every year thereafter unless terminated by the parties; however, the record does not contain information as to whether or when the CBA was subsequently terminated.
>
> Plaintiff got married on May 11, 2019, and requested that his insurance coverage be changed from single coverage to family coverage. On June 6, 2019, the Village, through its attorney, denied plaintiff's request.
>
> ***

> We therefore conclude that the plain and ordinary meaning of article 16 is that the applicable period for the calculation of payment of the medical insurance premiums is when the pension board certifies that the employee will receive an on-the-job medical pension per the plain language of the contract. Plaintiff was unmarried when his pension status was certified in 2017 as an on-the-job medical pension (retroactive to October 2015). As such, defendant was obligated to fully pay his individual medical insurance premiums, which it has done and continues to do. Plaintiff's marriage in May 2019 occurred several years after the certification of his pension status. Under the provisions of article 16, plaintiff was not entitled to change from individual to family medical insurance because such status was not applicable when the certification was made. He was single at the time of certification and did not marry until after the applicable CBA expired, and thus there was no way for him to create or establish a new right to family coverage."

Legal Lesson Learned: When interpreting CBA, Courts will carefully review language in agreement to find parties intent.

File: Chap. 7, Sexual Harassment

IL: GAY CHICAGO FF – CLAIMS FEMALE MGR. ASKED FOR SEX / HARASSED – CITY SLOW INVEST. - CASE PROCEED

On May 18, 2023, in James Mundo v. City of Chicago and Janice Hogan, U.S. District Court Judge Matthew F. Kennelly, U.S. District Court for Northern District of Illinois, Eastern Division, denied the City's motion for summary judgment on firefighter's asserts a hostile work environment claim under Title VII of the Civil Rights Act of 1964. The Court described allegations.

> "On October 5, 2018, Mundo and his husband Dave met with Malec [Steven Malec, the Assistant Commissioner of Internal Affairs] over lunch. During their meeting, Mundo handed Malec a six page, typed document listing a number of instances of sexual harassment that he said he had experienced at Hogan's hands. *** The entries range from October 1, 2016 to October 11, 2018. The reported incidents include, among other things: Hogan repeatedly asking Mundo to have sex with her and to masturbate in front of her (and on one occasion, onto her phone); hitting Mundo over the head; undressing in front of him at least twenty times; making comments about her genitalia and comparing it to a flower; saying that she and Mundo would be perfect together if he wasn't gay; using homophobic slurs; saying that she needed to 'get laid; and threatening to send Mundo back to the field if he didn't comply with her demands. *** Deputy Commissioner Vasquez and DeCamp did not sit down with Hogan [Deputy Chief of Labor Relations Division] until a month after Mundo made his official complaint, and in the interim they allowed her to remain in her then-current position. After their interview, Vasquez and DeCamp allowed Hogan to move back to her career service rank of firefighter/paramedic despite her admission that she had engaged in some of the conduct that Mundo accused her of. Moreover, the EEO Division did not begin conducting interviews of the parties

> and witnesses until another month after that (December 2018). Nor did the EEO Division complete its investigation until over a year and one-half later, on July 10, 2020. And despite Commander Ford's statement that he found Hogan's conduct to be 'egregious,' she did not serve her suspension until almost seven months later, on January 29, 2021. Finally, although Hogan and Mundo ceased working together the very same day he made his complaint to Malec, a reasonable jury could find that was due to Mundo taking medical leave, not any remedial action on the City's part."

More facts:

> "In August 2006, Mundo began his employment with the CFD as a firefighter/paramedic. In January 2008, Mundo moved from his field-based position to an office-based role as an investigator in the CFD's Internal Affairs Division (IAD), where he remained until January 2013. While working in IAD, Mundo reported to Steven Malec, the Assistant Commissioner of Internal Affairs. Malec also identifies as a gay man and has been employed by the CFD for almost thirty years.
>
> ***
> At some point during his tenure in IAD-it is unclear exactly when-Mundo told Malec that he experienced homophobic harassment while working as a firefighter/EMT at Engine 112. Some of the instances of harassment that Mundo described during his testimony included: seeing gay pornography taped to lockers of those suspected to be gay; homophobic slurs being used in his presence to describe gay people; witnessing a crew refuse to help a transgender person on a medical call and being harassed for helping the person himself; crew members making comments about his familiarity with the gay bars in a particular area to which the crew was called; witnessing a crew member refuse to render aid to someone inside a gay bar named Roscoe's; and crew members arguing with each other about having to sleep next to Mundo because he is gay.
>
> ***
> Malec testified during his deposition that, in response to Mundo's disclosure, he informed Mundo that the time frame during which he could have made a formal complaint about the harassment had passed and that he would therefore not achieve any satisfaction from filing a complaint now.
>
> ***
> In January 2013, Mundo moved from his position in IAD to a position in LRD. Mundo remained in that position until he went on a medical leave of absence in October 2018. Mundo has not returned to work following his leave of absence but remains a CFD employee."

Legal Lesson Learned: Internal complaints of hostile work environment should be promptly investigated and corrective action taken.

File: Chap. 7, Sexual Harassment

NY: "CALENDAR GIRL" – FDNY CALENDAR - CASE PROCEED "DISPARATE TREAMENT" AGAINST HER FEMALE CAPTAIN

On May 15, 2023, in Margot Loth v. City of New York, Judge Nicholas W. Moyne, Superior Court, New York County, denied the City's motion to dismiss the lawsuit (unpublished decision). In this early stage of litigation, the specific allegations support a claim of disparate treatment by female Captain against females.

> "Plaintiff began working for Defendant as a FDNY Haz-Tac Emergency Medical Technician on February 14, 2011. In July 2018, Plaintiff was featured in the FDNY's 2019 Calendar of Heroes. Thereafter, on multiple occasions, Captain Donna Lynn Hannon Tiberi ('Tiberi') allegedly referred to Complainant as a 'calendar girl' to other FDNY members in a disparaging manner. In November 2018, Plaintiff agreed to participate as a witness in connection with a gender discrimination complaint filed with the FDNY's Equal Employment Opportunity ('EEO') office by female Paramedic Carin Rosado ('Rosado') against Tiberi. Both Plaintiff and Rosado claimed that they regularly observed Tiberi subjecting female employees to disparate treatment as compared to similarly situated male employees. ***At this early stage of the litigation, dismissal would be inappropriate as the plaintiff has sufficiently pled claims for gender discrimination pursuant to the SHRL {New York State Human Rights Law] and CHR [New York City Human Rights Law].

More facts:

> "After the EEO complaint was filed, the plaintiff alleges that Tiberi began retaliating against her by, among other things, vandalizing her personal belongings and denying her time and leave requests, as well as denying her overtime that she was entitled to per FDNY policy. The plaintiff, as well as four other women, subsequently participated in a EEO proceedings as witnesses for Rosado. Subsequently, Tiberi allegedly engaged in further acts of retaliation against the plaintiff by denying her time off and annual leave requests, overtime opportunities, providing negative statements about plaintiff in connection with her performance evaluation, denying her promotional opportunities and/or salary raises, filing disciplinary charges against plaintiff based upon false accusations, and hindering her ability to enroll in medic classes or transfer within the department.
>
> ***
>
> On August 30, 2019, Ms. Loth engaged in further protected activity by filing an internal EEO complaint against Tiberi. The plaintiff alleges that Tiberi increased retaliatory actions against her by, among other things, docking her pay for alleged lateness, refusing to provide her 2018 evaluation, interfering with her s ability to apply for an available Hazardous Materials Instructor position for which she was qualified, assigning her to overtime shifts for which she never confirmed her availability, and refusing to provide the plaintiff with an evaluation and recommendation that was required for her medic school program. Tiberi also allegedly subjected female employees, including the plaintiff, to disparate treatment as compared to similarly situated male employees."

Legal Lesson Learned: Supervisor's negative comments such as "Calendar girl" can be basis of disparate treatment litigation.

File: Chap. 8, Race Discrimination

MO: ST. LOUIS FD – 17 "ACTING" OFFICERS – CITY NOT PROMOTING UNTIL NEW EXAM - RACE CASE SETTLEMENT

On May 19, 2023, in Robert Eveland, et al. v. City of St. Louis, et al., U.S. District Court Judge Catherine D. Parry, U.S. District Court for Eastern District of Missouri, Eastern Division, declined to issue a preliminary injunction ordering the City to promote the 17 "acting" Battalion Chiefs and Captains.

> "This is a legally complicated case. There is a possibility that plaintiffs may prevail on the merits of their claim, but they face many legal obstacles that they may not be able to overcome. In any event, I will deny the motion for a preliminary injunction because plaintiffs have not shown that they are threatened with immediate and irreparable harm or that any harm to them outweighs the harm that will result to the City if I were to grant the preliminary injunction. *** At the hearing, plaintiffs' counsel argued that because the Civil Service Rules provide that the 'appointing authority' is the Fire Chief and not the Director of Public Safety, plaintiffs' right to due process was violated when the Director effectively vetoed their promotions. Rather than arguing that they were entitled to some pre-deprivation process (such as a hearing), they argue that this alleged violation of due process simply entitles them to be promoted. But Missouri case law recognizes that the Fire Chief's decision-making power is subject to oversight by the Director of Public Safety."

More facts:

> "The last promotion examination for Fire Captain and Battalion Chief was conducted in 2013. In 2015, the Firefighters Institute for Racial Equality (F.I.R.E.) sued the City alleging that the test discriminated against Black promotional candidates. *Green v. City of St. Louis*. (4:15CV1433 RWS). The parties to the case reached a settlement on August 10, 2017, and the case was dismissed…. That agreement provided that the 2013 eligible lists for Captain and Battalion Chief would continue to be used for promotions until new lists were developed based on a new promotional exam. The City agreed it would not intentionally delay promotions in anticipation of new promotional exams nor intentionally delay the next exam. The City also promised to use its best efforts to hold the next exams by December of 2018, and to schedule future exams approximately three years after certification of the eligible lists from the previous exams.
>
> As of today, no new exams have been given. The reasons for the delay are not entirely clear from the record; a city witness testified that initially the Board of Aldermen failed to budget money for a consultant to prepare the test and that the COVID pandemic caused additional delays. Witnesses also testified that the Fire Department has now hired a consultant who has developed (or is in the last stages of developing) a new test, and the City hopes to have the test administered and to have results certified within seven or eight months.

In January of 2022 the Director of Public Safety began denying the Fire Chief's requisition requests to fill vacancies in the department and informed him that no promotions would be made until a new exam produced new eligible lists. Witnesses testified to several reasons for the moratorium: the Director wanted to review the entire command structure at the department, the 2013 list was too old and did not give newer employees a chance to apply for promotion, the candidates remaining on the 2013 eligibility list scored relatively low on the test (although they all had passing scores), and a new test was in the process of being developed.

Because someone needs to perform the supervisory work left by the existing vacancies, Chief Jenkerson appointed sixteen of the seventeen plaintiffs in this case to serve as "Acting" Fire Captains and Battalion Chiefs. Chief Jenkerson testified that he appointed plaintiffs to these roles because they were the highest scoring candidates on the 2013 exam and that he would have promoted them if the Direct of Public Safety approved his requisition requests. He also testified that he will recommend the remaining plaintiff for the next vacancy that occurs."

Legal Lesson Learned: Preliminary injunctions are an "extraordinary remedy" that requires proof of "irreparable harm" to the plaintiffs.

File: Chap. 9, Americans With Disabilities Act

LA: 16-YR OLD AUTISM – PD (365 LBS) SITS HIM – DIES ASPHYXIATION - DOJ POOR USE "DE-ESCALATION" POLICY

On May 18, 2023, in Donna Lou, et al. v. Sheriff Joseph P. Lopinto, III, et al., U.S. District Court Judge Wendy B. Vitter, U.S. District Court for Eastern District of Louisiana, the Judge denied the Parents' motion for partial summary judgement; but will allow them to file an Amended Complaint and may then allow case to proceed to trial. The Judge referenced the 80-page original Complaint, including alleged violation of ADA, but did not refence the May 12, 2023, the U.S. Department of Justice "Statement of Interest" with the Court, asserting Deputy Sheriffs may have violated ADA by failure to use "de-escalation strategies" including mobile crisis team.

Read Court's ruling.

"In Count Three, Plaintiffs assert official capacity claims against Sheriff Lopinto based upon violations of Title II of the Americans with Disabilities Act (the 'ADA') and Section 504 of the Rehabilitation Act ('RA'), alleging that the JPSO Deputy Defendants knew that E.P. had autism and failed to reasonably accommodate him or to avoid discriminating against him based upon his disability. *** The Court points out that the only two paragraphs in the Complaint cited by Plaintiffs that specifically reference the Fourth Amendment, Paragraphs 386 and 391, allege constitutional violations based upon the action or inaction of the JPSO Deputy Defendants 'in using excessive and unreasonable force in the seizure and restraint of E.P. and in failing to intervene or act to prevent such actions, despite having the opportunity to do so,' and in violating, among

other things, E.P.'s 'right to freedom from unreasonable seizure' and 'right to freedom from the use of unreasonable, unjustified, and excessive force and summary punishment.'"

More facts:

"According to Plaintiffs, defendant, Deputy Chad Pitfield, arrived on the scene first.[12] Plaintiffs allege that E. P. began slapping at himself, his father, and Deputy Pitfield and that Deputy Pitfield took E.P. to the ground. Plaintiffs assert that several JPSO officers subsequently arrived on the scene minutes later. Plaintiffs allege that when the officers arrived, E.P. was held down in a prone position, on his stomach, handcuffed, shackled, arms and legs held down, head, shoulder, and neck encircled by the arm of a deputy, with JPSO deputies applying their own body weight as a restraint, while E.P. was suffering from an acute sensory episode or 'outburst' related to, and caused by, his severe autism. Plaintiffs also allege that the JPSO deputies knew E.P. was obese and that he was autistic, but that they persisted in "dangerously and forcefully retraining E.P. without appropriately monitoring his condition, until they killed him.'

***

Pertinent to the instant Motion, Plaintiffs allege that instead of conducting a critical incident review of E.P.'s death, JPSO officers 'engaged in an attempt to use their police powers to collect information in an effort to insulate themselves from liability.' Plaintiffs allege that JPSO obtained and served several criminal search warrants on E.P.'s doctors, even though JPSO 'conceded that it was not investigating a crime.' Plaintiffs also allege that JPSO caused the St. Charles Parish Sheriff's Office to request and obtain a search warrant for E.P.'s school records on the basis of a 'violation of a pending death investigation' and 'generalized law enforcement inspection.' Plaintiffs allege that these warrants were absurd on their face because they did not seek the fruits, instrumentalities, or evidence of a crime."

Legal Lesson Learned: U.S. Department of Justice obviously has a high degree of interest in police affixation cases.

Note: Read the DOJ Statement of Interest, where PDs are urged to modify their response policies dealing with people with disabilities.

"Modifications that may have been reasonable for officers to implement, depending on the circumstances and existing services, include dispatching crisis intervention trained officers or arranging for a mobile crisis team to respond; using de-escalation strategies; removing distractions and providing time and space to calm the situation when the child poses no significant safety threat; and avoiding or minimizing touching a child whose disability makes them sensitive to touch. If available, officers should enlist a child's parent, guardian, treating medical professional, or another trusted support person, to help to effectively communicate with the child and de-escalate the situation."

File: Chap 9, Americans With Disabilities Act

OH: TRANSGENDER EMT FIRED 2 MONTHS – "RUDE" COMMENTS HOSP – "REGARDED AS" CASE PROCEED

On May 12, 2023, in Rayne S. Fedder v. Ohio Medical Transportation, Inc., U.S, Magistrate Judge Chelsey M. Vascura issued a Report and Recommendation to U.S. District Court Judge Saras D. Morrison, finding that plaintiff was fired after two months on the job, and while her claims of hostile work environment must be dismissed since she didn't report incidents to management (for example, comments that she "stands up to pee"), she may proceed on claim that management fired her because she was "regard as" disabled. On April 19, 2022, plaintiff and her partner were at a hospital to transport a psychiatric patient to Columbus Springs, In Dublin, OH, when plaintiff made strange comments to hospital staff., was placed on Administrative Leave and was fired on May 3, 2022.

> "On the evening of April 19, 2022, Plaintiff and her partner were dispatched to O'Bleness Memorial Hospital to transport a psychiatric patient to Columbus Springs Dublin…. Plaintiff felt that O'Bleness staff were not performing their jobs properly and voiced criticisms of the use of an armed security officer ('asking what he even needed that gun holstered to his hip for, and quipp[ing] that he probably did not know how to operate it') and the poor quality of the paperwork provided by the nursing staff ('Plaintiff does not remember saying that the report from the charge nurse about the patient was 'shitty,' though Plaintiff does concede that the sentiment was there….) Plaintiff also alleges that the desk attendant asked how Plaintiff was doing, and Plaintiff said 'something about how she would be doing much better if she passed or if she did not work with a bunch of creepy bigots, or something of the sort….'After some resistance by the patient, Plaintiff, her partner, and other O'Blenness staff were able to buckle the patient to a stretcher and the patient was transported without further incident."

More facts:

> "On the morning of April 20, 2022, an O'Blenness manager contacted Defendant to complain about Plaintiff's 'unprofessional' and 'disrespectful' behavior…. The O'Blenness manager reported that a doctor present during Plaintiff's pickup felt that Plaintiff might need a 'blue gown' (*i.e.*, involuntary hospitalization for a psychiatric emergency) because Plaintiff was making 'off the wall comments' and saying 'unnecessary' and 'oddly inappropriate things….' A nurse who was present during Plaintiff's pickup also stated in an email forwarded to Defendant that Plaintiff had been 'rude and inappropriate' and exhibited 'rude, bizarre, and erratic behavior,' and that the nurse "might have reservations about releasing a patient" to Plaintiff….
>
> Later that day, Defendant placed Plaintiff on administrative leave with pay pending Defendant's investigation of the O'Blenness staff's complaints….On May 3, 2022, Plaintiff attended a meeting at Defendant's office, during which Defendant terminated her employment based on the complaints by O'Blenness staff."

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

Note: See EEOC Guidance on “regarded as” disabilities.

How does the ADAAA define "disability?"

The ADA Amendments Act of 2008 (ADAAA) was enacted on September 25, 2008, and became effective on January 1, 2009. This law made a number of significant changes to the definition of "disability." ***

The ADAAA and the final regulations define a disability using a three-pronged approach:

- a physical or mental impairment that substantially limits one or more major life activities (sometimes referred to in the regulations as an "actual disability"), or
- a record of a physical or mental impairment that substantially limited a major life activity ("record of"), or
- when a covered entity takes an action prohibited by the ADA because of an actual or perceived impairment that is not both transitory and minor ("regarded as"). [Section 1630.2(g)].

File: Chap. 10, Family Medical Leave Act

DC: FMLA – IF HOLIDAY WHEN EMPLOYEE ONLY TAKING PART OF WEEK OFF, NOT COUNTED FULL WEEK OF LEAVE

On May 30, 2023, the U.S. Department of Labor, Wage and Hour Division, issued Opinion Letter FMLA2023-2-A on calculating amount of leave used by an employee taking leave during a week where there is a holiday (such as 4th of July).

> “When a holiday falls during a week that an employee is taking a full workweek of FMLA leave, the entire week is counted as FMLA leave. 29 C.F.R. § 825.200(h). Thus, for example, an employee who works Monday through Friday and takes leave for a week that includes the Fourth of July on Thursday would use one week of leave and not 4/5 of a week. However, when a holiday falls during a week when an employee is taking less than a full workweek of FMLA leave, the holiday is not counted as FMLA leave unless the employee was scheduled and expected to work on the holiday and used FMLA leave for that day.”

More facts:

> “The FMLA entitles eligible employees of covered employers to take unpaid job-protected leave for qualifying family and medical reasons with continuation of group health insurance coverage under the same terms and conditions as if the employee had not taken leave. Eligible employees may take up to 12 workweeks of leave in a 12-month period for various qualifying reasons, and up to 26 workweeks of leave during a single 12-month period to care for a covered servicemember.
>
> ***

> For example, for an employee who normally works a 5-day week and takes one day of FMLA leave, excluding the holiday from the week would result in the employee using 1/4 of a workweek of FMLA leave in a workweek that includes a holiday instead of 1/5 of a workweek of FMLA leave. Calculating the amount of leave used in this way would be an interference with the employee's FMLA rights. 29 C.F.R. § 825.220(b)."

Legal Lesson Learned: Wage & Hour Opinion Letters are helpful, and Courts will often refer to them in litigation.

File: Chap. 11, Fair Labor Standards Act

OR: FLSA – COMPANY CONTRACTS TO PROVIDE FOREST FIRE PERSONNEL - NOT "INDEPENDENT CONTRACTORS"

On May 24, 2023, the U.S. Department of Labor, Wage and Hour Division, determined that the private company, under contract with U.S. Forest Service to fight forest fires in Oregon, Arizona, California and Washington, should have paid the firefighters and truck drivers for overtime after 40 hours. Instead, they were paid between $200 and $250 per day regardless of overtime hours worked. The company has now settled for $180,00, including $152,003 in overtime wages and fringe benefits, plus $12,577 in liquidated damages, and $16,981 in civil penalties; individual firefighters received from $101 to $14,783 per worker.

> "Investigators with the department's Wage and Hour Division determined KL Farms/Fire LLC of Summerville paid a flat daily rate of between $200 and $250 to 57 firefighters and truck drivers, regardless of their total hours worked. From June 2019 through October 2021, the U.S. Forest Service contracted the company to provide fire engines, firefighters, trucks and driver services for fire suppression and firefighting in Arizona, California, Oregon and Washington."

More facts:

> "A federal contractor in Oregon misclassified dozens of workers – who battled some of the nation's worst wildfires an average of 70 hours a week in 2020 and 2021 – as independent contractors and denied them their full wages and benefits as a result, the U.S. Department of Labor has found."

Legal Lesson Learned: Miscalculation of workers as independent contractors is a common issue. Read the Wage and Hour advisory.

> Note: See May 28, 2023 article, "Private Oregon firefighting company fined $180K after US Dept. of Labor investigation."
> "Investigators use a multi-prong test to determine whether contractors actually qualify as employees, said Carrie Aguilar, director of the Department of Labor's Wage and Hour Division in Portland…. But Aguilar did say that wage issues are part of a growing trend in the private firefighting business. It's similar to forestry, she said, which struggles with these issues."

File: Chap. 11, Fair Labor Standards Act

HA: FLSA – HONOLULU FF CLASS ACTION PROCEED – 300 FF – ALLEGED ERRORS MULTIPLE SYSTEMS TRACK TIME

On April 28, 2023, in Robert M. Hayslip, on behalf of other similarly situated individuals v. City and County of Honolulu, Chief U.S. District Court Judge Derrick K. Watson, U.S. District Court for District of Hawaii, granted the plaintiff's motion for conditional certification of collective action. The case will now proceed to pre-trial discovery on firefighter income that is allegedly not included in setting their overtime hourly rate of pay. Hayslip alleges that the failure to pay overtime under the FLSA was due to 'human and mechanical error through the use of multiple systems to track time."

> "Plaintiff Robert Hayslip moves for conditional certification of a collective action comprised of emergency medical technicians and paramedics employed by Defendant City & County of Honolulu (Honolulu), alleging that Honolulu has failed to properly calculate this group's 'regular rate' of pay or pay overtime as required by the Fair Labor Standards Act (FLSA). At the instant 'preliminary' stage of the litigation, as both parties acknowledge, the standard for certifying such a collective action under the FLSA is less than demanding. And, here, Hayslip has met this less than demanding standard. Specifically, Hayslip has alleged that the above-mentioned group is sufficiently 'similarly situated' with respect to the FLSA claims at issue. Therefore, the motion for conditional certification, Dkt. No. 26, is GRANTED to that extent. Hayslip also moves for approval of a notice to be sent to potential members of the now conditionally certified collective action. Honolulu, however, has submitted an opposing proposed notice. As more fully explained below, the Court orders the parties to meet-and-confer on the same with the goal of submitting a *joint* proposed notice to the extent possible."

More facts:

> "On September 14, 2022, Hayslip initiated this lawsuit with the filing of a Complaint…. Therein, Hayslip alleges that Honolulu has or currently employs approximately 300 active or retired paramedics and emergency medical technicians (or EMTs)….Hayslip further alleges that Honolulu has failed to (1) properly calculate these workers' 'regular rate' of pay by not including 'all required compensation' in the calculation, (2) pay these workers for work that qualifies as 'overtime' under the FLSA, and (3) timely pay these workers 'overtime' under the FLSA…. Hayslip also alleges that the failure to pay overtime under the FLSA was due to 'human and mechanical error through the use of multiple systems to track time.'"

Legal Lesson Learned: Errors in tracking overtime can lead to FLSA litigation.

> Note: The Court referenced a "less than demanding standard" in determining what other employees are "similarly situations" and get the invitation to join in the class action. This "less than demanding" standard has been recently rejected by 6th Circuit Court of Appeals, and also 5th Circuit. On May 19, 2023, in Brooke Clark, et al. v. H&L

Homecare and Training Center, LLC et al., the U.S. Court of Appeals for the 6th Circuit (Cincinnati) held (2 to 1) that U.S. District Court judges in states controlled by the Court (Kentucky, Michigan, Ohio and Tennessee) must apply a tougher "strong likelihood" standard when deciding which employees are "similarly situated" with plaintiffs and invited to join in a FLSA class action against the employers.

This is the second Circuit Court to require tougher standard; in 2021 the 5th Circuit (Louisiana, Mississippi, and Texas) also adopted tougher standard.

See this May 22, 2023 article, "Sixth Circuit Establishes Stricter Standard for Granting Notice of FLSA Collective Action."

File: Chap. 12, Drug-Free Workplace

NY: OXYCONTIN – CO. BANKRUPTCY APPROVED, ALONG WITH SACKLER FAMILY RELEASE - $5 - $6B TO STATES

On May 30, 2023, in bankruptcy case In Re: Purdue Pharma L.P., et al., the U.S. Court of Appeals for Second Circuit (in New York City), approved (3 to 0) settlement of mass tort litigation from overdose deaths from OxyContin, and the Sackler family owners will pay about $5 to $6 billion to state and local governments and others and give up control of Purdue Pharma (based in Stamford, CT) , and about $750 million will go to individuals (ranging from $3,500 to $48,000). Several states had opposed the plan, but with revisions all agreed to the plan. In 2021, U.S. District Judge Colleen McMahon in New York found that federal bankruptcy law does not give the bankruptcy judge who had accepted the plan the authority to grant that kind of release to Sackler family; the 2nd Circuit reversed that ruling.

> "In sum, we reverse the district court's holding that the bankruptcy court lacked the authority to approve the Plan that included the nonconsensual third-party releases. We instead hold that the bankruptcy court properly approved the Plan and made the requisite detailed factual findings to approve of the Shareholder Releases."

More facts:

> "In 1995, Purdue developed, and the Food and Drug Administration ('FDA') approved, OxyContin, a controlled-release semisynthetic opioid analgesic. At that time, and for years following, Purdue advertised that the time-release formulation prevented OxyContin from posing a threat of abuse or addiction. OxyContin's FDA label reflected a purportedly low risk of addiction. From 1996 to 2001, Purdue aggressively marketed OxyContin to patients and doctors while downplaying growing addiction concerns. Over this time-period, both prescribed and illegal use of OxyContin increased across the country.
> ***
> The Sackler brothers, including Mortimer and Raymond Sackler, purchased Purdue, a privately held pharmaceutical company, in the 1950s…Starting in 2007, the Sacklers anticipated that the effects of litigation against Purdue would eventually impact them

directly. See, e.g., Deferred Joint App'x at 5059 (David Sackler emailed Jonathan and Richard Sackler, 'We will be sued . . . .[A]sk yourself how long it will take these lawyers to figure out that we might settle with them if they can freeze our assets and threaten us.').

***

In the years following, OxyContin has been blamed for significantly contributing to one of the largest public health crises in this nation's history: the opioid epidemic. The fallout from this crisis led to a veritable deluge of litigation against both Purdue and individual members of the Sackler family. Claimants, spread across the United States and Canada, included many sufferers of opioid addiction and the families of those lost to opioid overdoses. To settle the mass of civil claims, the parties, including Purdue and the Sacklers, agreed that in exchange for Purdue filing for bankruptcy, the Sacklers would personally contribute billions of dollars to the bankruptcy if all civil claims against them were released…. In exchange, the Sacklers agreed to contribute a total $5.5-6.0 billion to the bankruptcy. On subsequent appeal, however, the district court for the Southern District of New York reversed the bankruptcy court and vacated the court's confirmation order, ruling that the Bankruptcy Code did not permit such releases.

***

In 2019, the United States Attorneys' Offices for the Districts of New Jersey and Vermont, and the United States Department of Justice ('DOJ') brought federal criminal and civil charges against Purdue. The criminal counts alleged that Purdue defrauded the government by inducing healthcare providers to prescribe OxyContin and violated the federal anti-kickback statute. The DOJ also brought civil claims under various federal statutes and common law doctrines (such as mistake, unjust enrichment, fraud, nuisance, and negligent entrustment). In 2020, after filing for bankruptcy, Purdue entered into a plea agreement with the DOJ, the terms of which created future obligations on Purdue. First, in exchange for Purdue pleading guilty to violations of the federal anti-kickback statute, the DOJ agreed it would 'not initiate any further criminal charges against Purdue.'"

Legal Lesson Learned: OxyContin has led to death of many; this bankruptcy ends numerous mass tort cases.

Note: See May 30, 2023 article, "A landmark appeals court ruling clears way for Purdue Pharma-Sackler bankruptcy deal."

> "As part of the bankruptcy settlement, the Sacklers are expected to pay roughly $5 to $6 billion and give up control of Purdue Pharma. Roughly $750 million from that payout will go to individuals across the U.S. who became addicted to OxyContin and to the families of those who died from overdoses."
>
> See March 3, 2022 New York Times article, "Sacklers and Purdue Pharma Reach New Deal With States Over Opioids."

"The agreement brought holdout states on board, and would settle thousands of lawsuits over the company's and family's roles in the opioid epidemic. The Sacklers agreed to pay an extra $1 billion. Members of the billionaire Sackler family and their company, Purdue Pharma, have reached a deal with a group of states that had long resisted the company's bankruptcy plan — a crucial step toward funneling billions of dollars from the family's fortune to addiction treatment programs nationwide, according to a court filing on Thursday. If Judge Robert Drain, who has presided over Purdue's bankruptcy proceedings in White Plains, N.Y., approves the agreement, the Sacklers would pay as much as $6 billion to help communities address the damage from the opioid crisis. In return, Sackler family members would get the prize they insisted upon for nearly three years: an end to all current and future civil claims against them over the company's prescription opioid business."

See Oct. 21, 2020 Press Release, "Justice Department Announces Global Resolution of Criminal and Civil Investigations with Opioid Manufacturer Purdue Pharma and Civil Settlement with Members of the Sackler Family."

"Under a separate civil settlement, individual members of the Sackler family will pay the United States $225 million arising from the alleged conduct of Dr. Richard Sackler, David Sackler, Mortimer D.A. Sackler, Dr. Kathe Sackler, and Jonathan Sackler (the Named Sacklers). This settlement resolves allegations that, in 2012, the Named Sacklers knew that the legitimate market for Purdue's opioids had contracted. Nevertheless, they requested that Purdue executives recapture lost sales and increase Purdue's share of the opioid market. The Named Sacklers then approved a new marketing program beginning in 2013 called 'Evolve to Excellence,' through which Purdue sales representatives intensified their marketing of OxyContin to extreme, high-volume prescribers who were already writing "25 times as many OxyContin scripts" as their peers, causing health care providers to prescribe opioids for uses that were unsafe, ineffective, and medically unnecessary, and that often led to abuse and diversion."

File: Chap. 13, EMS

OK: COMBATIVE PT - MEDICS CALL HELP – 4 FF PIN HIM FACE DOWN, PD HANDCUFFS - DIES – FF QUAL. IMMUNITY

On May 19, 2023, in Charles Kaleb Vanlandingham, Administrator for the Estate of Charles Lamar Vanlandingham v. City of Oklahoma City, Chief U.S. District Court Judge Timothy D. DeGisti, U.S. District Court, Western District of Oklahoma, dismissed the four firefighters from the lawsuit; they enjoy qualified immunity even if performing law enforcement type duties of subduing the patient. The lawsuit may, however, proceed against the police officer on alleged excessive force.

> "The Court recognizes that Plaintiff alleges the paramedics called for assistance in handling a combative patient, and case law supports the view that restraints imposed for this purpose do not constitute a 'seizure' under the Fourth Amendment…. In response to Firefighters' Motion, Plaintiff identifies no Supreme Court, Tenth Circuit, or other published appellate decision that would have made clear to a reasonable person in Firefighters' position that their alleged conduct toward Mr. Vanlandingham was governed by the Fourth Amendment. *** The Court therefore finds that Plaintiff has not met his burden to overcome Firefighters' qualified immunity from suit on his § 1983 claims for unlawful detention of, or use of unreasonable force against, Mr. Vanlandingham."

More facts:

> "Specifically, the Third Amended Complaint relates the following version of events. The paramedics were employed by a private ambulance service, Defendant American Medical Response Ambulance Service, Inc. ('AMR'), and were first responders to a 911 call for medical help. Mr. Vanlandingham "was in a postictal state" of a grand mal seizure and 'was disoriented and confused' but 'conscious and verbally responsive.' *See* 3d Am. Compl… A paramedic attempted to restrain Mr. Vanlandingham's arms behind his back (contrary to medical standards), but he did not want to be restrained and pulled away. 'Paramedics for AMR then called for assistance from Oklahoma City Police Department and the Oklahoma City Fire Department falsely alleging that Mr. Vanlandingham was combative and aggressive with them….'
>
> Firefighters arrived on the scene shortly after this call. Immediately upon entering the room where Mr. Vanlandingham was located, they 'tackled him to the ground' without pausing 'to assess the situation or speak with any in'olved parties…." Firefighters acted in haste on a mistaken belief that "Mr. Vanlandingham was being physically combative with paramedics for AMR" and he had 'committed or attempted to commit some kind of assault and/or battery upon paramedics for AMR….'
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> ***
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> The prone restraint of Mr. Vanlandingham - under the weight of all four Firefighters pressing down on his legs, hips, back, and head - continued more than ten minutes. During that time, Mr. Vanlandingham 'repeatedly screamed out in pain and attempted to yell for help….' During the last two or three minutes, Officer Lee had arrived and increased the level of restraint by handcuffing Mr. Vanlandingham and 'adding the force and weight from [Officer Lee's] knee and hand to Mr. Vanlandingham's upper and lower back….' Also during these two or three minutes, Firefighters and Officer Lee raised Mr. Vanlandingham's legs 'to his butt . . . in a 'hogtie' position. This facedown 'hogtie' position, with hands cuffed behind his back, further restrict[ed] Mr. Vanlandingham's air flow….' At no time during the restraint did Mr. Vanlandingham receive a medical assessment or monitoring of his airway or breathing, and instead, the paramedics increased the dangerousness of the situation by administering a sedative drug. Mr. Vanlandingham lost consciousness and went limp. Firefighters and Officer Lee then got off Mr. Vanlandingham's back, and the group proceeded to discuss whether to 'press charges against him.

> Seconds after the discussion about seeking charges against Mr. Vanlandingham, paramedics for AMR and the individual Defendants discovered that Mr. Vanlandingham stopped breathing. This was the first and only time a medical assessment of Mr. Vanlandingham was conducted since his restraint began. Paramedics for AMR and the Defendant firemen then rushed to begin chest compressions to revive Mr. Vanlandingham. However, their efforts were delayed because Officer Brandon Lee had to take time to remove two sets of handcuffs he had placed on Mr. Vanlandingham before the medical resuscitation could begin. Mr. Vanlandingham ultimately died on the floor of his friend's home without ever being transported to a hospital."

Legal Lesson Learned: Firefighters enjoy qualified immunity; restraining a combative patient does not constitute a 'seizure' under the Fourth Amendment

File: Chap. 13, EMS

KY: FIRE CHIEF HELPED 3 PD HANDCUFF NAKED MAN – "BAD METH" - DIED – QUALIFIED OFFICIAL IMMUNITY

On May 19, 2023, in Paula M. Haney, as Personal Representative of Estate of Donald Prater, Jr., v. City of Painesville, et al., the Court of Appeals of Kentucky held (3 to 0: unpublished opinion) that Fire Chief Rick Ratliff, Paintsville Fire Department was properly dismissed from the lawsuit. The case against police officers was remanded to trial court to make a finding on whether the patient was in their custody and owed him duties due to this "special relationship."

> "Instead, all three officers, along with Fire Department Chief Ratliff who had arrived on the scene to respond as a medical responder, worked together to handcuff Prater. *** Notably, Kentucky has a longstanding tradition of treating firefighting as a governmental function and thereby cloaking it in immunity. *** The trial court's determination as to whether the Paintsville Fire Department is entitled to governmental immunity was correct. Turning to the determination as to Chief Ratliff personally, the trial court determined that his actions on that day were discretionary. We agree. As Chief Ratliff is a firefighter and emergency medical responder, he is not ordinarily engaged in participating in the arrest of citizens. He made a judgment that his assistance was needed to place Prater in handcuffs. The exercise of judgment is the gravamen of the exercise of discretion."

More facts:

> "On April 17, 2020, the Paintsville Fire Department received a call that an injured man was sitting on the porch of an abandoned home on Main Street in Thelma, Kentucky, a community in Johnson County. When emergency medical services responded, they found Donald Prater, Jr. (Prater) sitting on the porch, clad only in a t-shirt. He was covered in mud and blood and was clearly under the influence of a controlled substance. He was transported to the hospital by emergency medical services.

Deputy Jeff Tabor of the Johnson County Sheriff's Department responded to the hospital. There, he interviewed Prater who told him he believed he had ingested some 'bad meth' and had been hallucinating that he had been run over by a train which had 'pushed his soul out of his body.'

***

Shortly after Tabor left the hospital, an emergency call was received into dispatch from the hospital, reporting that a man had torn a telephone off the wall of the emergency department and then had run naked out a back door of the hospital. Paintsville Police Department officers were dispatched to the hospital, where they learned that the man had been seen running in the direction of a nearby hotel. Deputy Tabor also responded back to the scene. Along with the hospital security guard, the three officers went to the hotel, where they were told that the naked man had been there, but he had already run out the front door. The officers split up to search the area for the man, believed to be Prater.

A call came in from a nearby apartment complex reporting a naked man walking down Main Street. The law enforcement officers all converged on Main Street, with Paintsville Police Department (PPD) Officer Shane Cantrell arriving first. He made contact with Prater, who refused to heed his commands and started yelling and cursing at him. PPD Officer Zachary Stapleton then arrived on the scene and Prater began yelling and cursing at him and began advancing toward him. Officer Stapleton unholstered his taser and ordered Prater to stand still. Instead, Prater rushed towards Stapleton, who deployed his taser. Unfazed by the shock, Prater pulled the taser probes from his body and ran away up Main Street.

The officers followed Prater until he rushed towards Officer Cantrell, who deployed pepper spray at him. Prater continued to resist, undaunted. Officer Stapleton struck Prater with his baton on Prater's right thigh, but Prater still continued to resist arrest. Deputy Tabor arrived on the scene and managed to get Prater prone on the ground, but Prater kept his arms beneath him making it impossible to handcuff him. Tabor deployed his taser without probes in a "dry stun" hoping to subdue Prater, but it had no effect. Instead, all three officers, along with Fire Department Chief Ratliff who had arrived on the scene to respond as a medical responder, worked together to handcuff Prater.

Once they were able to secure him, Ratliff noticed that Prater's breathing had become shallow. Ratliff grabbed a pocket mask from his vehicle and started rescue breathing and monitoring Prater's pulse. While waiting for an ambulance to arrive, Prater went into full arrest, with Ratliff attempting CPR. The EMS crew took over lifesaving efforts and Prater was transported to the hospital. He was pronounced deceased a short time later."

Legal Lesson Learned: Helpful decision confirming "official qualified immunity" for firefighters in Kentucky.

KY: HOSPITAL ON DIVERSION – DIDN'T TELL EMS – STEMI PATIENT TURNED AWAY– JURY $1.8 MILLION PUNITIVE

On May 8, 2023, in William H. Williams v. Baptist Healthcare System, Inc., U.S. District Court Judge Clair H. Boom, U.S. District Court for Western District of Kentucky, Louisville Division, refused the hospital's post-trial motion to set aside the verdict. The hospital admitted it had breached EMTALA [Emergency Medical Treatment and Labor Act]; the jury awarded Plaintiff compensatory damages in the amount of $545,000 and punitive damages in the amount of $1,850,000. The hospital asked trial judge to set aside the verdict, claiming no proof of gross negligence.

> "First, with respect to Nurse Blankenship, the Court finds that the jury could find her actions sufficiently egregious to amount to gross negligence…. The evidence also showed that, prior to the night of April 4, 2015, Nurse Blankenship had only received 'about five minutes' of EMTALA training.
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> ***
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> The failure of Baptist to activate the STEMI protocol, failure to alert local EMS of the diversion every three hours, and failure to call UK when Mr. Williams was actually sent to the University of Kentucky, and also failure to contact EMS per their policy after Mr. Williams showed up and was sent to UK so that it wouldn't happen again later that weekend, failure to disclose in the OIG report that this was a diversion for inbound STEMIs - now, you might view that in a different way, but the language of the OIG report just says "transfers to another hospital" - the fact that Nurse Blankenship didn't - the failure of Nurse Blankenship to write down who the EMS was that called and to take their telephone number; the testimony that Nurse Blankenship told EMS that they should go to Good Samaritan Hospital even though Good Samaritan did not have a cath lab."

More facts:

> "On April 4, 2015, Plaintiff William Williams was working as a tow truck driver when he began to experience chest pain. [R. 300 (Trial Transcript, Testimony of Plaintiff William Williams), Vol. 3, p. 141]. He decided to go to the Paris-Bourbon County fire station, where he was administered an EKG…. Because the EKG readings did not show any dire concerns, Plaintiff left the fire station and continued about his business. *Id*. Later that evening, Plaintiff experienced additional chest pains and returned to the same fire station seeking treatment…. An EMT placed Plaintiff in an ambulance, where he was again administered an EKG…. This time, the EKG indicated Plaintiff was having a suspected ST-Elevation Myocardial Infraction ('STEMI'), known colloquially as a heart attack… Plaintiff was taken in an ambulance to Central Baptist Hospital, now known as Baptist Health Lexington.
>
> Unbeknownst to EMS personnel transporting Plaintiff, Baptist Health Lexington was under diversion of inbound transported heart attack patients because it had no on-call cardiothoracic surgeons between April 3, 2015 and April 5, 2015…. According to Baptist, its diversion plan did not include diverting heart attack patients who had actually arrived at the hospital, but the plan was miscommunicated to the ER staff who mistakenly

> believed they were diverting all heart attack patients…. Indeed, Baptist acknowledged that the diversion decision was not communicated in a 'consistent and uniform' manner in its official response to the Office of Inspector General (OIG).
>
> When the ambulance transporting Plaintiff was roughly ten minutes away, EMS personnel in the ambulance called Baptist to inform it of Plaintiff's arrival and his suspected STEMI…. This call was received by Nurse Micki Blankenship, who testified that she believed Baptist was only on diversion the previous Friday night, and not Saturday, and told the ambulance to proceed to Baptist….
>
> Following this call, Nurse Blankenship informed her Charge Nurse, Nicolas Newsome, that a STEMI patient was inbound….Nurse Newsome reminded Nurse Blankenship that Baptist was unable to care for STEMI patients and that Plaintiff would need to be diverted to another hospital…. Nurse Blankenship then tried unsuccessfully to contact EMS personnel in the ambulance to inform them of Baptist's inability to care for Plaintiff….Shortly thereafter, the ambulance carrying Plaintiff was met at the door of Baptist by Nurse Blankenship, who informed the EMS personnel that Baptist would be unable to care for Plaintiff and directed them to take him to a nearby hospital.:

Legal Lesson Learned: The jury awarded punitive damages to "punish" the hospital for causing delay to patient with STEMI.

File: Chap. 14, Physical Fitness

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

File: Chap. 16, Discipline

TX: HOUSTON ROCKETS PLAYER DROVE HIGH-WATER VEHICLE / SIREN – D/C SUSP. 3 DAYS NOT REPORTING

On May 23, 2023, in City of Houston v. Steven M. Dunbar, the Court of Appeals of Texas, Fourteenth District, held (3 to 1) that the 3-day suspension without pay for not submitting formal report of the incident was properly upheld by Civil Service Commission. The Court of Appeals reversed a District Court judge who had held a "trial de novo" and overturned the suspension.

> "Dunbar nonetheless argues he had no duty to report the conduct he witnessed. Dunbar first argues that he did not have enough information to report any violation 'by well-sustained charges,' as prescribed by section 6.06. The evidence, however, shows that Dunbar witnessed a Houston Rockets player driving a high-water vehicle despite his knowledge that such vehicles could only be driven by HFD members with specific credentials, which would appear to be substantial evidence of a violation of the

provisions listed above. Dunbar further argues that he could not determine whether a violation had taken place because he was aware of other events at which athletes had ridden on or driven HFD vehicles. Evidence of such incidents, however, does not dispel substantial evidence of a reportable violation in this instance."

More facts:

"After the Houston Fire Department ('HFD") chief suspended appellee Steven M. Dunbar for three days without pay, Dunbar appealed the suspension to the Firefighters' and Police Officers' Civil Service Commission of the City of Houston (the 'commission'). The commission issued an order that denied Dunbar relief and upheld the suspension. Dunbar then filed a petition to set aside the decision in district court. *See* Tex. Loc. Gov't Code Ann. § 143.015(a). After 'trial de novo,' the district court rendered a final judgment in Dunbar's favor, reversing the commission's order and reinstating Dunbar's pay for the suspension period.

***

On September 11, 2019, HFD Fire Station 84 hosted a public-relations event featuring Houston Rockets basketball players. During the event, Dunbar, an HFD district chief, witnessed the station's high-water vehicle[2] drive off with Rockets personnel on board. When the vehicle returned to the station, Dunbar observed that a Rockets player was driving the vehicle and the vehicle's lights and siren were activated.

Two days later, assistant fire chief Herbert D. Griffin filed a complaint of employee misconduct naming Dunbar, among others. In a statement attached to his complaint, Griffin alleged, 'It was brought to my attention that several persons who are not employed by the Houston Fire Department (HFD) may have been allowed to ride on, and possibly drive, an HFD emergency vehicle on a public roadway while operating lights and sirens, disregarding multiple traffic laws.' The statement further alleged that Dunbar was among the employees present who allowed the violations to occur.

After an investigation, the department suspended Dunbar for three days without pay for violation of HFD Reference No. I-01, *Rules and Regulations,* section 6.06, which provides:

> 6.06 Maintain Discipline: Officers shall be just, dignified and firm in their relations with subordinates, always being careful to abstain from violent, abusive, or immoderate language in giving orders, directions, or in conversation. Officers must model good behavior *and promptly report, by well-sustained charges, any violations of Laws, Ordinances, Rules & Regulations, and Orders.* (Emphasis added.)

Dissent by Justice Jerry Zimmerer. In dissent, Justice Jerry Zimmerer would set aside the suspension.

"Overarching this case was HFD's lack of objective standards by which "reporting" was to be performed. The failure of HFD to document or otherwise establish policies or

procedures for reporting creates ambiguity as to the requirement of timeliness of any report; who was the event 'sponsor' in charge of reporting;[were there any overarching policy prerequisites; the lack of, and distinction of, authorization required for non-HFD riders vs. drivers; the seriousness of the event in relation to other events,[and whether, following HFD Guidelines the incident would have to be reported at all."

Legal Lesson Learned: Do not allow civilians to drive your apparatus, including professional athletes at a PR event.