

## Feb. 2024 – FIRE & EMS LAW NEWSLETTER

[NEWSLETTER IS NOT PROVIDING LEGAL ADVICE.]



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### FREE CE SEMINARS: PROF. BENNETT and FF/PARAMEDIC KENNY SCHROEDEER

March 27, 2024, Ohio BWC Safety Congress, Columbus, OH

2:30 pm – EMS & FIRE LEADERSHIP

4:00 PM – EMS REPORT WRITING

For more information for CE courses, check out [the Ohio Safety Congress site.](#)

- **2024: FIRE & EMS LAW – MONTHLY NEWSLETTERS:** monthly review of recent court decisions [[send e-mail](#) if wish to be added to our free listserv]: [Case summaries since 2022 from monthly newsletter](#)
- **2024: FIRE & EMS LAW – RECENT CASE SUMMARIES / LEGAL LESSONS LEARNED:** Case summaries since 2018 from monthly newsletters an be [viewed via Scholars@UC](#)
- **2024: FIRE & EMS LAW – CURRENT EVENTS:** [View via Scholars@UC](#)
- **TEXTBOOK:** Updating 18 chapters of my textbook (2018 to current). [FIRE SERVICE LAW \(SECOND EDITION\), Jan. 2017.](#)

## 20 RECENT CASES

- Chap. 1 – American Legal System, incl. Fire Codes, Investigations, Arson (2 cases)**
- Chap. 2 – Line Of Duty Death / Safety (2 cases)**
- Chap. 3 – Homeland Security, incl. Active Shooter, Cybersecurity (1 case)**
- Chap. 4 – Incident Command, incl. Training, Drones, Communications (2 cases)**
- Chap. 5 – Emergency Vehicle Operations (1 case)**
- Chap. 6 – Employment Litigation, incl. Work Comp., Age, Vet Rights (1 case)**
- Chap. 7 – Sexual Harassment, incl. Pregnancy Discrim., Right To Pump (3 cases)**
- Chap. 8 – Race / National Origin Discrimination (1 case)**
- Chap. 9 – Americans With Disabilities Act (1 case)**
- Chap. 10 – Family Medical Leave Act, incl. Military Leave**
- Chap. 11 – Fair Labor Standards Act (1 case)**
- Chap. 12 – Drug-Free Workplace, inc. Recovery**
- Chap. 13 – EMS, incl. Community Paramedicine, Corona Virus (4 cases)**
- Chap. 14 – Physical Fitness, incl. Heart Health**
- Chap. 15 – Mental Health, incl. CISM, Peer Support, Employee Assistance**
- Chap. 16 – Discipline, incl. Code of Ethics, Social Media, Hazing (1 case)**
- Chap. 17 – Arbitration, incl. Mediation, Labor Relations**
- Chap. 18 – Legislation, incl Public Records Act**

<b>AMERICAN LEGAL SYSTEM:</b> IL: HOUSE FIRE – CITY “EMERGENCY DEMOLISH ORDER” - FAILURE NOTIFY HOMEOWNER – LAWSUIT TO PROCEED .....	4
<b>AMERICAN LEGAL SYSTEM:</b> WI: ARSON CONV. UPHELD – COMMENTS AT SCENE TO INCIDENT COMMANDER – FIRES IN TWO LOCATIONS .....	5
<b>SAFETY:</b> NY: VOLUNTEER FF / DRILL TEAM - INJURED FELL BACK FIRE ENGINE – CANNOT SUE DRILL TEAM, FD OR DRIVER .....	6
<b>SAFETY:</b> MO: VOLUNTEER FF LODD – WIFE AWARDED ONLY MIN. OF \$40 / WEEK – REVERSED - COMPARE WAGES OF CAREER FF .....	8
<b>HOMELAND SECURITY:</b> NY: WORLD TRADE CENTER “PRESUMPTION” STATUTE – FF OVERDOSE AFTER KNEE REPLACEMENT – LODD PENSION .....	9
<b>INCIDENT COMMAND:</b> NV: FOREST FIRE – FIRST 11 DAYS FOREST SERVICE ONLY “MONITORED” - 18 PROPERTY OWNERS – CASE DISMISSED .....	12
<b>INCIDENT COMMAND:</b> IN: NEW “BUFFER LAW” UPHELD – POLICE CAN ORDER CITIZENS, INCLUDING WITH CAMERAS - BACK 25 FEET .....	14
<b>EMERGENCY VEHICLE OPERATIONS:</b> MO: PD OFFICER RESPONDING TO VEHICLE CHASE – 87 MPH, STOP SIGN - CRASH– RECKLESS - OFFICIAL IMMUNITY .....	16
<b>EMPLOYMENT LITIGATION:</b> VA: FF FRACTURED HIP 2014 – SCREWS – 6 YRS LATER TOTAL HIP – DENIED TEMP. TOTAL / PERM. IMPAIRMENT .....	17
<b>SEXUAL HARASSMENT:</b> WI: FD PHYSICAL FITNESS TEST – MORE DISPARATE IMPACT FEMALES THAN CPAT – JOB RELATED, LAWFUL .....	18
<b>SEXUAL HARASSMENT:</b> DC: LT. ON DUTY GRABBED BREASTS FEMALE FF – CONV. – HOSTILE WORKPLACE CASE PROCEED - NOT RETALIATION .....	20
<b>SEXUAL HARASSMENT:</b> IL: CHICAGO FD – FEMALES FAILED PHYSICAL FITNESS – SETTLEMENT / REHIRED – CAN NOW SEEK DAMAGES .....	22
<b>RACIAL DISCRIMINATION:</b> MS: DIVERSITY SCHOLARSHIPS – NAT. ASSOC. OF EMERG. TECHNICIANS – 4 /YEAR– PLAINTIFF GROUP DENIED TRO .....	23

<b>AMERICANS WITH DISABILITIES ACT:</b> MA: CAPTAIN – MARINE 50% DISABELED – NOT PROMOTED – ALLEGES CHIEF ANIMOSITY DISAB. VETS – CASE PROCEED.....	25
<b>FAIR LABOR STANDARDS ACT:</b> MS: FLSA - LONGEVITY PAY – LAWSUIT SETTLED PAY OCT. 2023 FORWARD - 25 FF AGREED /10 OBJECTED - ENFORCED .....	27
<b>EMS:</b> ME: PERSON DEAD OVERDOSE UNDER SINK – RESIDENT REFUSED TALK TO MEDICS – PROSECUTOR TOLD JURY .....	28
<b>EMS:</b> WA: COVID-19 – VACCINATIONS - 46 OF 192 FF REQUESTED RELIGIOUS ACCOMODATIONS – UNDUE HARDSHIP FOR FD.....	29
<b>EMS:</b> NY: COVID-19 – FDNY - REQUEST RELIGIOUS ACCOMODATION - DENIED, HE RETIRED – CASE DISMISSED .....	30
<b>EMS:</b> MA: EMT - BACKGROUND CHECK – HIRED, 1 YR. RESIGNED – NO ACTUAL DAMAGES - CAN SUE BACKGROUND CHECK CO. ....	31
<b>DISCIPLINE:</b> DC: FEMA - SUSPENDED 13 DAYS – WELL DOCUMENTED REPRIMANDS – CASE DISMISSED, NO RETALIATION .....	33

File: Chap. 1, AMERICAN LEGAL SYSTEM

## **IL: HOUSE FIRE – CITY “EMERGENCY DEMOLISH ORDER” - FAILURE NOTIFY HOMEOWNER – LAWSUIT TO PROCEED**

On Jan. 25, 2024, in [Rosie Houston, et al. v. City of Houston, et al.](#), U.S. District Court Judge Jeremy C. Daniel, U.S. District Court for Northern District of Illinois (Eastern Division) denied the City’s motion to dismiss the lawsuit.

“[P]laintiffs' Fourth Amendment claim may therefore proceed against Defendants City of Chicago, Frydland, Herrera, and Ficco.

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The defendants’ argument is unavailing because it ignores allegations that the demolition was not random or unpredictable at all, but an entirely predictable deprivation that occurred pursuant to state procedures. Specifically, the complaint states that Herrera, while acting under the color of law and within the scope of his employment, ‘caused a Permit for a Demolition Application to [be] issued to Delta Demolition.’ The demolition permit was thereafter issued, and the defendants demolished the plaintiffs’ home. Further, the complaint explains that an emergency demolition permit may only properly occur after (1) seeking an affidavit from the owner authorizing the demolition; (2) alternatively, serving the owner with notice of the demolition via certified mail, and (3) posting a sign no smaller than two feet by three feet stating that the property will be demolished within three days, but alleges that it was the City’s routine practice not to follow these procedures.”

### FACTS:

“Further, the complaint explains that an emergency demolition permit may only properly occur after (1) seeking an affidavit from the owner authorizing the demolition; (2) alternatively, serving the owner with notice of the demolition via certified mail, and (3) posting a sign no smaller than two feet by three feet stating that the property will be demolished within three days, but alleges that it was the City's routine practice not to follow these procedures.

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These claims stem from the December 2018 demolition of the home located at 4202 S. Vincennes Avenue in Chicago, Illinois. According to the complaint, following a November 2018 fire that significantly damaged the home's roof, the defendants obtained an order authorizing the demolition of the home as ‘an actual and imminent danger to the public.’ The plaintiffs allege that the defendants worked together to create and submit false reports to support the emergency demolition of the home.

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According to the complaint, Delta Demolition and its owner, Jeffrey Finucane, (together, ‘Delta Demolition’) ‘executed the unlawful forcible demolition.’ The plaintiffs further allege that Delta Demolition failed to protect the plaintiffs' personal belongings during

and after the emergency demolition. The Third Amended Complaint does not allege that Delta Demolition had any role in the issuance of the demolition order. This precludes any claim that Delta Demolition denied the plaintiffs due process. Moreover, the earliest alleged actions by Delta Demolition occurred on December 18 and 19, 2018, after the order authorizing the demolition issued. As such, one cannot deem Delta Demolition's actions before the demolition was approved unreasonable, given that they acted pursuant to what appeared (at least to them) to be a lawfully issued order to demolish the home. Accordingly, the plaintiffs due process claims and Fourth Amendment claims against Delta Demolition are dismissed.”

**Legal Lesson Learned: In an emergency demolition, personally serve homeowner with demolition order whenever possible.**

File: Chap. 1, AMERICAN LEGAL SYSTEM

## **WI: ARSON CONV. UPHELD – COMMENTS AT SCENE TO INCIDENT COMMANDER – FIRES IN TWO LOCATIONS**

On Jan. 23, 2024, in [State of Wisconsin v. James Farrar](#), the Court of Appeals of Wisconsin held (3 to 0; unpublished opinion) there was sufficient evidence to support jury’s conviction of arson of a building of another. The defendant was living in his father’s house (rental), father was in the hospital and would not allow the son to take over the lease. There were two fires set – one in bedroom and another in the basement.

“The jury rejected the defense's theory that Farrar set the fire accidentally and found Farrar guilty of the arson charge. Farrar now appeals, challenging the sufficiency of the evidence to support his conviction.

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We disagree with Farrar's suggestion that an expression of intent was required for the jury to find that he intentionally set the fires at the residence. As explained above, the evidence introduced at trial, while circumstantial, was sufficient to support a reasonable inference that Farrar started the fires with the intent to damage the residence.”

FACTS:

The Court referenced the Incident Commander’s testimony:

“Deputy Chief Jeremy Kopp of the Wausau Fire Department testified that he was the ‘incident commander’ for the fire at the residence. Kopp testified that he spoke with Farrar at the scene of the fire, but Farrar's statements ‘throughout the first ten, twenty minutes, didn't jibe, they weren't consistent, which drew [Kopp's] attention to some concerns [he] might have with this fire.’ In particular, Kopp noted that Farrar ‘did talk about how he tried to get back in to put the fire out, as well as to save some pets,’ which was inconsistent with Farrar's earlier statement that he had discovered the fire when he

returned from ‘walking the pets.’ Kopp also testified that he heard Farrar speaking loudly on the phone ‘about watching his dad’s house and that, you know—there was some sort of disagreement on who should have his dad’s things or the house if something were to happen to his dad.’

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Typically when I arrive on a fire scene where someone is losing personal belongings, they’re usually either screaming, crying, upset, trying to explain to us what is important to them, what needs to come out if there’s, you know, people or pets left in the house, personal belongings that might be important, those types of things, and those never came up, it was more about him being a firefighter in the past and how he tried to save it and what he did and those type of things.

Kopp further testified that after the firefighters at the scene had ‘knocked down’ a fire in a bedroom on the main level of the residence, they searched the house and discovered a second fire in the basement. Kopp testified that the presence of two fires in the home, in different locations, caused him to question whether the fires had been set intentionally because it is not common to encounter two separate, unconnected fires at the scene of a structure fire. Kopp therefore made the decision to call fire investigators.”

**Legal Lesson Learned: Document in your fire report the suspicious comments of the resident.**

File: Chap. 2, SAFETY

## **NY: VOLUNTEER FF / DRILL TEAM - INJURED FELL BACK FIRE ENGINE – CANNOT SUE DRILL TEAM, FD OR DRIVER**

On Jan. 17, 2024, in [William A. Knipper v. Drill Team of Lindenhust Fire Department, Inc, et al.](#), the Superior Court of New York held (4 to 0) that the trial court properly dismissed the lawsuit against the Drill Team, the Fire Department and the volunteer firefighter who drove the fire engine. The injured firefighter already applied for is workers comp, and under the state Volunteer Firefighters’ Benefit Law he cannot sue for damages.

“Section 19 of the Volunteer Firefighters’ Benefit Law provides, in pertinent part, that ‘[t]he benefits provided by this chapter shall be the exclusive remedy of a volunteer firefighter’ for injuries sustained “in line of duty... as against... any person or agency acting under governmental or statutory authority in furtherance of the duties or activities in relation to which any such injury resulted.’ Thus, where a volunteer firefighter sustains an injury in the line of duty, the injured firefighter is barred from seeking recovery against either a fire company with which he or she had an employer/employee relationship ... or fellow firefighters acting “in furtherance of their duties and activities”

(*Maines v Cronomer Val. Fire Dept.*, [50 N.Y.2d 535, 546](#) [internal quotation marks omitted]).

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Here, the Lindenhurst defendants submitted, and Weckerle referenced, evidence showing that the plaintiff applied for and was awarded workers' compensation benefits based upon a determination that he was injured in the line of duty. Moreover, viewing the plaintiff's allegations in the light most favorable to him, the plaintiff failed to allege that Weckerle was not acting in furtherance of his duties and activities as a volunteer firefighter at the time of the accident by preparing for a competitive tournament (*see Volunteer Firefighters' Benefit Law § 5*[1][i]). Thus, the Lindenhurst defendants and Weckerle demonstrated that the plaintiff did not have a cause of action against them because the plaintiff's claims against them were barred by the exclusivity provisions of *Volunteer Firefighters' Benefit Law § 19* (*see Brady v Village of Malverne*, [76 A.D.3d 691, 693](#); *Theodoreu v Chester Fire Dist.*, [12 A.D.3d at 500](#); *Malone v Jacobs*, [88 A.D.2d at 928](#)). Accordingly, the Supreme Court properly granted the motions of the Lindenhurst defendants and Weckerle pursuant to [CPLR 3211\(a\)\(7\)](#) to dismiss the amended complaint insofar as asserted against each of them.”

#### FACTS:

“The plaintiff, a volunteer member of the defendants Drill Team of Lindenhurst Fire Department, Inc., and Lindenhurst Fire Department, Inc. (hereinafter together the Lindenhurst defendants), allegedly was injured when he fell from the back of a fire truck operated by the defendant Thomas Weckerle, a fellow volunteer firefighter. The accident occurred at a ‘fire track’ allegedly owned by the defendant Ridge Fire District, sued herein as Ridge Volunteer Fire Department, Inc. (hereinafter Ridge District), during an event held in preparation for a firefighting competition. Based on a determination by the Workers' Compensation Board in February 2018 that the plaintiff was injured ‘in the line of duty,’ he was awarded benefits under the Volunteer Firefighters' Benefit Law.

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Furthermore, in support of Ridge District's motion, it submitted documentary evidence conclusively establishing that it did not own the property where the accident occurred, and thus, that “a material fact as claimed by the plaintiff is not a fact at all” (*Sabharwal v Hyundai Mar. & Fire Ins. Co., Ltd.*, [216 A.D.3d at 1016](#) [internal quotation marks omitted]; *see Guggenheimer v Ginzburg*, [43 N.Y.2d at 274-275](#)). Accordingly, the Supreme Court properly granted Ridge District's motion pursuant to [CPLR 3211\(a\)](#) to dismiss the amended complaint insofar as asserted against it.”

**Legal Lesson Learned: Volunteer firefighters injured in line of duty are covered by worker’s comp and that is their only remedy.**

File: Chap. 2, SAFETY

## **MO: VOLUNTEER FF LODD – WIFE AWARDED ONLY MIN. OF \$40 / WEEK – REVERSED - COMPARE WAGES OF CAREER FF**

On Jan. 10, 2024, in [Dependent of Russell Hayes, Deceased, Susan Hayes v. City of Eldorado Springs](#), the Court of Appeals of Missouri, Southern District, held (3 to 0) that Labor and Industrial Commission” is reversed, and must conduct a new hearing before an Administrative Law Judge to determine if duties on a volunteer FF are “similar” to those of a career FF; if they are similar then award a monthly amount consistent with the “usual wage” of a career FF.

“Having found that Wife presented evidence of the ‘usual wage’ of firefighters, the Commission did not then compare the services provided by such firefighters to the services provided by Husband as a volunteer firefighter to determine whether those services are ‘similar’ as is required by section 287.250.1(6). Rather, the Commission misapplied the law in suggesting that Wife was misguided in asserting ‘that the services rendered by a full-time career firefighter and by a rural volunteer firefighter are similar’ and in ruling that ‘[t]his [Commission] cannot assume facts not in evidence’ as the record reveals that such evidence was produced by Wife

### FACTS:

“The Labor and Industrial Relations Commission (“Commission”) awarded Susan Hayes (‘Wife’) \$40 per week in benefits for the death of her husband, Russell Hayes (‘Husband’), who died while working as a volunteer firefighter for the City of El Dorado Springs, Missouri, (‘Employer’). In the first of three points on appeal challenging the Commission's award, Wife contends the Commission misapplied the law in its determination that Husband's weekly wage could not be determined under section 287.250.1(6) and by calculating its award, instead, under section 287.250.4. Because this point has merit, we reverse the Commission's award, do not reach Wife's remaining points, and remand for further proceedings consistent with this opinion.

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An evidentiary hearing was held before a Division of Workers' Compensation (‘Division’) Administrative Law Judge (‘ALJ’). The parties reached a pre-hearing stipulation whereby the ‘sole issue to be resolved’ was ‘[w]hether the employee's average weekly wage is an amount that results in a compensation rate in excess of the statutory minimum of \$40.00 per week.’ The only witnesses to testify at the hearing were Wife and her two expert witnesses, Lieutenant Brian Zinanni (“Lieutenant Zinanni”), a career firefighter and paramedic, and Phillip Eldred (“Eldred”), a certified vocational expert.

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Lieutenant Zinanni testified that he has decades of firefighting experience, including as a career firefighter in Clayton, Missouri, as well as a volunteer firefighter in Rock Falls, Illinois. Lieutenant Zinanni provided his opinion on the level of compensation Husband would have received, based upon Husband's experience, had Husband been employed as



a career firefighter. Lieutenant Zinanni confirmed that wage data compiled by Eldred reflected the ‘average’ wages of career firefighters in the localities from which such data was received. Furthermore, while he was not directly familiar with Husband's specific duties as a volunteer firefighter, Lieutenant Zinanni testified that ‘as a general rule most firefighters have similar job.’

Eldred's testimony generally addressed the vocational report he generated concerning Husband's employment as a volunteer firefighter. That report included wage data for firefighters generally, including the mean annual salaries for full-time firefighters nationally, within Missouri, and within southwest Missouri nonmetropolitan areas. The report also included a general firefighter job description, as well as Employer's volunteer firefighter job description.”

### **Legal Lesson Learned: A very positive decision for volunteer firefighters.**

Note: [See USA Fire Administration report on death of Firefighter Russell “Russ” H. Hayes.](#)

“On October 3, 2018 at approximately 0855hrs, Firefighter Hayes was driving an engine apparatus along a local highway on the way to a pump test. Witnesses indicated that they observed the right front tire go off of the roadway. Firefighter Hayes overcorrected as he brought the apparatus back onto the roadway, thereby causing it to travel to the opposite ditch and overturn. Firefighter Hayes was ejected from the vehicle. He was treated on the scene by local EMS personnel and then flown by medical helicopter to a regional hospital. Firefighter Hayes was admitted to the hospital and died from his injuries the following day.”

See also: [Read more about Russell Hayes via National Fallen Firefighters Foundation](#)

See article on this case. [“Volunteer firefighter’s widow wins chance for higher benefits.”](#) (Jan. 18, 2024).

File: Chap. 3, HOMELAND SECURITY

## **NY: WORLD TRADE CENTER “PRESUMPTION” STATUTE – FF OVERDOSE AFTER KNEE REPLACEMENT – LODD PENSION**

On Jan. 3, 2024, in [Michelle Quinn v. The Board of Trustees of the Fire Department of the City of New York Pension Fund](#), Justice Arthur F. Engoron, Superior Court of New York, New York County, held (unpublished decision) that the wife of late Peter A. Quinn is entitled to line-of-duty death benefits, overruling the Pension Fund’s Oct. 26, 2022 denial of benefits. He died of drug overdose on Jan. 21, 2019 (prescribed morphine and oxycodone), two days after being released from hospital for left knee replacement. The wife provided a report from Dr. Richard Stripp, Ph.D, who had found it was not suicide, but an accidental overdose due to poor health

status and previous history of respiratory disease and sleep apnea which “*greatly* increased the risk of a fatal accidental overdose from opioid analgesics.”

“Pursuant to the WTC Bill, an eligible firefighter's disability or death as a result of a qualifying WTC condition, as defined in Retirement and Social Security Law § 2 (36), is ‘presumptive evidence that it was incurred in the performance and discharge of duty and the natural and proximate result of an accident not caused by such member's own willful negligence, unless the contrary be proved by competent evidence’ (the ‘WTC Presumption’).

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Here, there is no question that Quinn was at the WTC site and disabled as the proximate result of his line-of-duty exposure.... Petitioner, through the report of Dr. Stripp, has made a credible argument supporting the proposition that the accidental overdose cause of death listed on Quinn's autopsy was, in turn, a result of his WTC injuries... That Quinn's qualifying conditions specifically made him susceptible to an accidental overdose is further supported by the HSS doctor's notes and the fact that he was prescribed anti-overdose medications. \*\*\* It was arbitrary and capricious for respondents to find that Quinn was not entitled to the WTC Presumption, and, therefore, they must rebut that presumption with "credible evidence," which they failed to do. Respondent's conjecture and unsupported suspicion that Quinn's accidental overdose was not ultimately caused by a qualifying WTC condition is insufficient. ... Therefore, this Court will direct respondent to vacate its prior determination, denying petitioner's application for a line-of-duty death benefit pension pursuant to the WTC Bill.”

#### FACTS:

On January 25, 2023, petitioner, Michelle Quinn, commenced this Article 78 Special Proceeding seeking: (1) to annul the October 26, 2022 determination of respondent The Board of Trustees of the Fire Department of the City of New York Pension Fund (the "Board") that denied a World Trade Center (‘WTC’) line-of-duty death benefit pension arising from the post-surgery accidental drug overdose death of petitioner's husband, retired firefighter Peter A. Quinn (‘Quinn’), and (2) directing that respondents grant the application.

The parties do not dispute that Quinn was a uniformed member of the FDNY who retired in 2015 with a line-of-duty disability pension, pursuant to New York Administrative Code § 13-353.1(1)(a) (the ‘WTC Bill’). A December 11, 2014 report from New York Fire Department Pension Fund Subchapter II Medical Board recommending Quinn's retirement found that he was ‘permanently disabled with reactive airways disease and asthma ... he has had symptoms for many years which has always been called bronchitis but has required prednisone on multiple occasions.’ The Board also noted that Quinn had ‘gained about 150 lbs. over the past several years which he describes [sic ] to his use of prednisone.’.

On January 15, 2019, Quinn was admitted to the Hospital for Special Surgery ('HSS') for a total replacement of his left knee apparently due to his underlying obesity. The day after the surgery, according to HSS medical records, a doctor 'educated' Quinn about pain management and its risks, especially 'in the setting of' obstructive sleep apnea ('OSA'), a recognized WTC condition of which Quinn suffered. On January 20, 2019, Quinn was discharged and given various prescriptions, including for morphine and for a naloxone rescue kit in case of an overdose.

On the morning of January 21, 2019, Quinn was found unresponsive and later pronounced dead. An autopsy report determined that his death was an accident caused by 'acute mixed drug intoxication' from 'medication ingestion' and 'acute bronchopneumonia.'

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On March 12, 2020, petitioner applied to the Board for a line-of-duty pension. On October 9, 2020, the Board denied petitioner's application, noting that, while Quinn had been disabled due to his pulmonary health, 'it is not clear whether [Quinn] meets the criteria for [a] Line-Of-Duty pension, as it is not clear what his actual cause of death was, or the circumstances that surrounded his death.' The Board also expressed 'our hope and expectation that further information will be made available to us that will help us in understanding FF Quinn's psychological state of mind in the years of his retirement and at around the time of his death.'

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On May 28, 2021, petitioner submitted to the Board a toxicology case record review by Dr. Richard Stripp, Ph.D, who had found, to a 'reasonable degree of toxicological certainty,' that Quinn 'experienced respiratory complications as a result of consuming morphine and oxycodone. His health status and previous history of respiratory disease and sleep apnea *greatly* increased the risk of a fatal accidental overdose from opioid analgesics. Dr. Stripp also found that suicide was unlikely as Quinn's postmortem drug levels reflect an accidental overdose in a high-risk situation that was precipitated by previous physical health conditions as a result of working recovery/rescue operations at the WTC site. Had it not been for Mr. Quinn's history of respiratory disease (RADS), pneumonia and sleep apnea, it is unlikely that doses of these drugs would have been fatal in a tolerant individual.

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The purpose of the WTC Bill 'is to protect workers harmed by the September 11th tragedy.' *Dement v Kelly*, 97 A.D.3d 223, 231 (1st Dept 2012). 'Respondents' narrow reading of the law would defeat the avowed purpose of the statute, i.e., to protect 9/11 workers as a result of their heroic efforts ... The statutory' language 'an impairment of health caused by a qualifying [WTC] condition' must be interpreted in a manner consistent with the underlying purposes of the statute.'

It was arbitrary and capricious for respondents to find that Quinn was not entitled to the WTC Presumption, and, therefore, they must rebut that presumption with 'credible

evidence,' which they failed to do. Respondent's conjecture and unsupported suspicion that Quinn's accidental overdose was not ultimately caused by a qualifying WTC condition is insufficient.”

**Legal Lesson Learned: Excellent decision based on World Trade Center “presumption” law.**

File: Chap. 4, INCIDENT COMMAND

**NV: FOREST FIRE – FIRST 11 DAYS FOREST SERVICE ONLY  
“MONITORED” - 18 PROPERTY OWNERS – CASE DISMISSED**

On Jan. 23, 2024, in [Tyrone R. Atwater v. The United States of America](#), U.S. District Court Judge William B. Shubb, U.S. District Court for Eastern District of California, granted the Government’s motion to dismiss. Federal Tort Claims Act does not allow claims based on government discretionary decisions, such as “monitoring” a fire in rural area, and only posting one warning on its Facebook page.

“The decision to adopt the monitoring strategy exudes policy deliberations that are ‘quintessentially discretionary,’ Knezovich, 82 F.4th at 938, and therefore beyond the scrutiny of this court. Accordingly, the court will dismiss plaintiffs’ negligence, negligence per se, and trespass claims.”

**FACTS:**

“On July 4, 2021, a hiker on the Pacific Crest Trail notified the Carson Ranger District of smoke that he saw rising north of Tamarack Lake, in an area within the Humboldt-Toiyabe National Forest in California.

The Forest Service sent a helicopter to monitor the fire a few hours later.

The next day, on July 5, the Forest Service published the Tamarack Incident Decision, which set forth its initial assessment of and monitoring plan for the Tamarack Fire. The Incident Decision explained the Forest Service's choice to monitor the fire, instead of actively suppressing it, as the course of action that best balanced firefighter safety, expenditure of resources, and risk of a bigger fire. Over the next eleven days, the Forest Service monitored the Tamarack Fire via in-person visits, cameras, and aircraft. (Mot. at 5; Stansfield Decl.

On July 10, the Carson Ranger District posted a video of the Tamarack Fire on the Forest's Facebook page, informing the public of the Forest Service's decision to monitor the fire and that the fire posed no present threat to the public. (Hupp Decl. (Docket No. 16-11) ¶ 4 & Facebook Post (Docket No. 16-12).)

On July 16, the Tamarack Fire had grown to the point that the Forest Service began committing air and ground resources to suppress it. However, the fire quickly grew out of control, growing from 100 acres to more than 10,000 acres within a day. The fire burned for months and at its peak consumed more than 60,000 acres of land. It also destroyed more than 20 houses and structures, including the real property of the plaintiffs.

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The United States has waived its sovereign immunity against most tort claims pursuant to the Federal Tort Claims Act (“FTCA”). 28 U.S.C. §§ 2671 *et seq.*; *United States v. Orleans*, 425 U.S. 807, 813 (1976). However, there are exceptions.

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One such exception is the discretionary function exception, which provides that the United States remains immune from suit under the FTCA when the plaintiff’s claim is ‘based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused.’ 28 U.S.C. § 2680(a).

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Plaintiffs’ first three claims challenge the Forest Service’s initial decision to monitor the fire instead of attacking it right away. However, the Forest Service’s deliberations and ultimate choice to monitor involves the kind of exercise of judgment protected by the discretionary function exception.

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Even at face, the Forest Service’s decisions regarding the mode, frequency, and content of its notification to the public about the Tamarack Fire are plainly susceptible to policy considerations, as they implicate, among other things, questions about the speed and accuracy of information to be published. Its decision to make one Facebook post between July 5 and July 15 instead of conducting more proactive outreach by posting more, posting on other public platforms, or contacting vicinity property owners directly about a potential fire threat was also proportionate to its initial, discretionary assessment that ‘[c]ritical values [*i.e.*, public safety] have a low probability of being impacted . . . . Consequences may include limited impact to infrastructure . . . .’ (Incident Decision at 20.)

Accordingly, the court will dismiss plaintiffs’ failure to warn claim on this basis.”

**Legal Lesson Learned: Discretionary decisions on when to let forest fire burn, and what notice to provide to public, are exceptions to Federal Tort Claims Act.**

File: Chap. 4, INCIDENT COMMAND

## **IN: NEW “BUFFER LAW” UPHELD – POLICE CAN ORDER CITIZENS, INCLUDING WITH CAMERAS - BACK 25 FEET**

On Jan. 12, 2024, in [Donald Nicodemus v. City of South Bend, Indiana](#), U.S. District Court Judge Damon R. Leichty, U.S. District Court for the Northern District of Indiana (South Bend Division) denied the Plaintiff’s motion for a permanent injunction and dismissed the lawsuit. The Court also referenced that Indiana has a “perimeter law” where incident commanders at an emergency scene can set up a perimeter safety zone.

“On July 1, 2023, Indiana’s so-called buffer law took effect, criminalizing as a misdemeanor a person’s unlawful encroachment on a police officer’s lawful duties. This buffer law prohibits a person from knowingly or intentionally approaching within 25 feet of an officer engaged in his or her lawful duties after the officer orders the person to stop approaching. See Ind. Code § 35-44.1-2-14.

Law enforcement officers have jobs to do, and often difficult jobs that require decision making in tense, uncertain, fluid, and unsafe circumstances. At the same time, the public has a right to record the police. Audio visually recording police activity fits within the First Amendment’s guarantee. The right isn’t unlimited, but robustly it exists to serve important purposes. It facilitates transparency, training, scrutiny of police misconduct, and the exoneration of officers from unfair charges. Candid critique of our government and its officials matters in a free society. By shining a light on newsworthy police conduct, the public’s recordings benefit our citizens and law-abiding officers alike.

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The public has a First Amendment right to record police activity—a critically important right. Law enforcement officers have a right to perform their lawful duties unimpeded. Indiana’s buffer law has many constitutional applications within its plainly legitimate sweep. It never once permits an officer to tell a reporter or citizen-journalist to leave altogether or to cease recording police activity. The law is directed toward encroachment on an officer’s lawful duties within 25 feet. It doesn’t target speech. It penalizes approaching a lawfully-engaged officer (after an order), not recording one. And at 25 feet, in measure small steps from an officer’s work, this law has only an incidental effect on the public’s First Amendment right to capture audio and video and otherwise to scrutinize police conduct. The court denies a permanent injunction because Indiana’s buffer law is not unconstitutional by virtue of being facially overbroad. A case might be different if an officer enforces this law unconstitutionally in a particular scenario, but the court is not deciding such a case today.”

### FACTS:

“For several years, Mr. Nicodemus has regularly recorded police activity in the South Bend, Indiana area. He posts these recordings on his YouTube channel—‘Freedom 2 Film’—with the hope that his more than 23,000 subscribers will better understand what law enforcement officers do and to shine a light on inappropriate police behavior. He

livestreams videos. He says it is sometimes necessary to get within 25 feet of police activity so that his recordings are discernable to viewers. In the early morning hours of July 20, 2023, Mr. Nicodemus went to the intersection of North Brookfield Street and Lincoln Way West in South Bend after hearing a report of shots fired there. Six South Bend squad cars were at the scene along with several officers. Mr. Nicodemus noticed an officer marking bullet casings on the southwest corner of the intersection, so he stood on the northeast corner of the intersection and began livestreaming.

Shortly after a semitruck was permitted to traverse the intersection, Officer Nathan Stepp walked over to Mr. Nicodemus and ordered him and others to move back, walking off 25 feet from the west side of Brookfield Street. Why exactly he chose this point remains unclear, though an SBPD squad car was situated there. Officer Stepp says he moved the group of individuals, including Mr. Nicodemus, back so that they would not interfere with a potentially dangerous situation. He didn't mind the recording. From watching the videos (both Officer Stepp's bodycam and the video taken by Mr. Nicodemus), there might be some question whether the officers were actually acting under Indiana's buffer law or Indiana's emergency incident perimeter law that was amended in 2023 at the same time as the buffer law was enacted, likewise to 25 feet (reduced from 150 feet). But the State seems to concede that the officers were acting under the buffer law such as to confirm Mr. Nicodemus's standing today.

Shortly after, a loud disturbance occurred at a house on the north side of Lincoln Way West past the intersection and past a closed retail building. From his position, Mr. Nicodemus could not record the house or this disturbance as officers approached the home. Either Mr. Nicodemus or another videographer next to him noted on video that they could move outside the shooting scene to a nearby alley to view the disturbance, but by choice they stayed put.

Mr. Nicodemus and another videographer levied criticism toward the officers by yelling and swearing and asserting their right to record. Officer Jeffrey Veal walked to Mr. Nicodemus and others in response to the shouting. Officer Veal told the group that he was the crime scene technician (a position he has held since 2019), that the area of the intersection was a crime scene, and that they needed to move back another 25 feet. He referenced the 'new law' from July 1.

Of note, a car had driven down Brookfield Street—straight through this location staked out by Officer Veal. Mr. Nicodemus protested that he had already been moved back 25 feet by Officer Stepp, but Officer Veal stood by his order and told Mr. Nicodemus he would go to jail if he didn't comply. Someone shouted an obscenity to Officer Veal, and the group continued to yell and swear. Officer Veal retrieved a ten-foot tape to measure his newly prescribed distance from the intersection, though it was not demonstrably far from the point that Mr. Nicodemus originally had chosen for his video.”

**Legal Lesson Learned: An excellent “buffer law” that will also help Fire & EMS.**

File: Chap. 5, EMERGENCY VEHICLE OPERATIONS

## **MO: PD OFFICER RESPONDING TO VEHICLE CHASE – 87 MPH, STOP SIGN - CRASH– RECKLESS - OFFICIAL IMMUNITY**

On Jan. 30, 2024, in [John Carlton v. Brandon Means](#), the Court of Appeals of Missouri, Eastern Division (Second Division) holds (3 to 0) that while the officer may have been reckless, he enjoys official immunity under Missouri law since there was no “malice” (improper or wrongful motive) on his part.

“Carlton suggests he can show the requisite intent because Officer Means's conduct was *so* reckless and was *so* willfully in disregard of another's rights that a trier of fact could infer he had an improper or wrongful motive. No Missouri cases have found malice based on an inference of intent drawn solely from the recklessness of an officer's conduct in responding to an emergency. *Throneberry* and *Moore*, however, noted the *lack* of any facts giving rise to such an inference, which suggests the possibility that such an inference could be drawn in appropriate circumstances. But no such inference can be drawn from the facts or opinions in this case, even when viewed in the light most favorable to Carlton. In the context of responding to this emergency, Officer Means's act of driving over the speed limit and past a stop sign—even if reckless—did not show an intent to injure anyone, only an intent to get to the officer in need as quickly as possible.”

### **FACTS:**

“On September 10, 2019, Officer Means was on duty in his department vehicle when he heard a radio call from another officer requesting assistance with a traffic stop. As Officer Means drove to the scene, he heard the other officer ‘call out urgently over the police dispatch radio that the vehicle he stopped backed into his vehicle and that he was in pursuit.’ Officer Means activated his emergency lights and sirens and increased his speed as he drove toward the other officer's location to assist, heading south on Adie Road. The speed limit on Adie Road, a two-lane road, was 30 miles per hour as posted and 20 miles per hour by ordinance. At times, Officer Means's vehicle went into the northbound traffic lane as he passed cars that had pulled to the side of the road. Officer Means accelerated past a stop sign at the intersection of Adie Road and Old St. Charles Road at a time when other vehicles were in and around the intersection. Based on ‘black box’ data, Carlton's experts opined that Officer Means accelerated from 86 to 87 miles per hour with the gas pedal 99.9 percent engaged as he went through the intersection.”

**Legal Lesson Learned: This officer, and his City, were very fortunate to escape liability for this reckless conduct.**



File: Chap. 6, EMPLOYMENT LITIGATION

**VA: FF FRACTURED HIP 2014 – SCREWS – 6 YRS LATER  
TOTAL HIP – DENIED TEMP. TOTAL / PERM. IMPAIRMENT**

On Jan. 30, 2024, in [Joshua Stanton v. Virginia Beach – Fire Operations](#), the Court of Appeals of Virginia, held (3 to 0) that Virginia Worker’s Compensation Commission properly held that the firefighter was not entitled to temporary total and permanent impairment coverage for a “changed condition.” On Aug. 30, 2014 he fractured his hip on duty (3 screws), and returned full duty Sept. 2015. He then worked full duty for net six year, until he needed total hip replacement Aug. 31, 2021; on light duty until returned full duty Nov. 2021. The Court agreed with the Commission - his claim for temporary total disability and permanent impairment were untimely since not made with two year of last workers comp payment (six years prior).

“Thus, September of 2015 was the last time that Stanton received compensation ‘pursuant to an award.’ As a result, the two-year statute of limitations period under Code § 65.2-708(A) began in September of 2015, and any tolling of subsection (A) due to the fulfillment of the conditions described in subsection (C) would need to have occurred in the following 24 months. Since Stanton was not placed on light duty again until six years later in October of 2021 after undergoing hip replacement surgery, he may have fulfilled the conditions as expressed in subsection (C), but he did so outside of the statute of limitations of subsection (A). Therefore, we find no error in the Commission’s finding and affirm the Commission’s decision.”

**FACTS:**

“Stanton sustained a compensable injury to his hip on August 30, 2014, when he fractured his hip in the course of his employment as a firefighter paramedic for the City of Virginia Beach. On that same date, he underwent surgery and had three screws placed in his hip. He received a compensatory award by order dated September 18, 2015, and ‘was awarded temporary total disability benefits from August 30, 2014[,] through October 14, 2014.’ He also received partial disability benefits from June 23, 2015, through August 25, 2015. In September of 2015, Stanton returned to full duty work, and remained on full duty work, until his hip was replaced in August of 2021. His condition had remained stable until March of 2021 when pain in the hip led him to seek further treatment. Testing revealed that he suffered from avascular necrosis of the hip, leading to a total hip replacement operation performed on August 31, 2021. Following the hip replacement, Stanton was placed on light duty from October 2021 through November 2021, and returned to full duty thereafter, earning his pre-injury wage.”

**Legal Lesson Learned: The parties agreed that if he had received a prosthesis in 2014, instead of three screws, then a “repair replacement” of the prosthesis in 2021 would have been covered.**

File: Chap. 7, SEXUAL HARASSMENT

## **WI: FD PHYSICAL FITNESS TEST – MORE DISPARATE IMPACT FEMALES THAN CPAT – JOB RELATED, LAWFUL**

On Jan. 22, 2024, in [Catherine Erdman v. City of Madison](#), the U.S. Court of Appeals for 7<sup>th</sup> Circuit (Chicago), held (3 to 0) that trial court judge properly dismissed the lawsuit since the Madison test was job related, even if it had more disparate impact on females than the IAFF Candidate Physical Ability Test (CPAT) – which requires passage within 10 minutes and 20 seconds, whereas Madison has separate times for each event. Plaintiff is a career firefighter with City of Janesville, Wisconsin and has passed CPAT twice, but had difficulty with Madison's ladder positioning and pike pole tests.

“The district court [following Oct. 2018 bench trial] found [July 2022] that Erdman had shown the Madison test had a prima facie disparate impact on women. The court also found, however, that the Madison test was job-related and served the city's legitimate needs. The court also found that Erdman had failed to prove that her proposed alternative hiring practice would serve the city's legitimate needs. The use of the Madison physical abilities test to disqualify Erdman thus did not violate Title VII. We affirm.”

### FACTS:

“Erdman entered firefighting first as a volunteer in Poynette, Wisconsin, and then, in 2007, as a full-time firefighter in Janesville, Wisconsin. At Janesville, in a 90-person fire department, she was promoted several times. After being nominated by her peers and chosen by the fire chief, she received the Janesville Firefighter of the Year award in 2014. At the time of the trial in 2018, she had been deployed to about 230 fires, about 60 to 65 of which were structure fires.

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Erdman met the cut score and received points for five of the seven events: equipment shuttle, hose drag, sledgehammer event, search, and rescue. While Erdman did not meet the cut score for the ladder event, she nevertheless attained the minimum acceptable score required to avoid disqualification. Whether she passed or failed the entire test came down to the final event, the pike pole test. In this event, the applicant must use a pole with a hook on it first to simulate breaching a ceiling from below to look for hidden flames, and then pulling down ceiling material.

The minimum acceptable score for that event was 16 repetitions in the time allowed. Erdman completed only 12 repetitions. That score eliminated her from the 2014 hiring process. If she had met the pike pole event's minimally acceptable score of 16, she would have passed the entire test and moved on to the next stage in the hiring process.

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The Alternative: The IAFF Candidate Physical Abilities Test

Erdman contends that a different physical abilities test would have had less disparate impact on female applicants but would have sufficiently served the city's purpose in testing applicants' physical abilities to work as firefighters. As her alternative, Erdman proposes the Candidate Physical Abilities Test. It is licensed by the International Association of Fire Fighters (IAFF) and used as a screening tool for many fire departments across the nation. The test was developed in conjunction with ten fire departments in North America, including New York City, Indianapolis, and Austin, Texas.

The district court heard detailed evidence on the similarities and differences between the Madison test and the IAFF test. The IAFF test contains eight component parts, seven of which are identical or similar to events in the Madison test.

Differences include the method of timing each test. The IAFF test requires applicants to complete all events within a designated total time but does not put a time limit on individual events. The Madison test times each event separately. The IAFF test also allows candidates several chances to pass the test. A candidate may take the test up to three times, and he or she must pass only once. In the Madison recruiting process, each applicant has only one chance to pass the Madison physical ability test. 1

Footnote 1: As a result of a 2006 conciliation agreement between the Equal Employment Opportunity Commission and the International Association of Firefighters, takers of the IAFF test are also afforded practice sessions in the weeks before the test that offer candidates hands-on experience with testing equipment under the guidance of trainers who coach candidates on how to successfully complete the component tasks of the test. To the extent that one's success with a task-oriented physical abilities test like the Madison test or IAFF test depends on technique as well as physical strength, these practice sessions provide a concrete benefit to any candidate, male or female. But Erdman's expert witness, Professor Arthur Weltman, was unaware of any study documenting that female candidates benefit more from pre-testing practice and training than do their male counterparts. R. 67 at 27–28.

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The city concedes on appeal that the Madison test as a whole shows a statistically significant disparate impact on female applicants. In 2014, the pass rate for women who appeared to take the test was 14% (4 out of 28), while the pass rate for men who appeared to take the test was 84% (395/471).

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Evidence showed that “many, many” departments around the country use the IAFF test, which was developed in conjunction with ten leading fire departments in large cities across North America. Yet the city also offered evidence that the Madison fire department maintained a substantially higher rate of female firefighters than the national average; 14% in Madison in 2014 as compared to a national average of about 4%. The district court was careful to note that a “relatively strong record of hiring women more

generally when compared to other fire departments around the country” did not excuse the Madison fire department from considering an alternative test. 615 F. Supp. 3d at 899. But even with this caveat, the district court was still persuaded that the most plausible inference was that Madison's high rate of female firefighters was traceable at least in part to the city's use of its physical ability test.

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The judgment of the district court is AFFIRMED.

### **Legal Lesson Learned: The Madison test is job related.**

Note: [“Wisconsin capital’s firefighter aptitude test survives Seventh Circuit scrutiny.”](#) (Jan. 22, 2023).

See also article about oral arguments before 7<sup>th</sup> Cir. [“Wisconsin firefighter who says entry test skews against women seeks new trial at Seventh Circuit.”](#) Sept. 14, 2023.

File: Chap. 7, SEXUAL HARASSMENT

### **DC: LT. ON DUTY GRABBED BREASTS FEMALE FF – CONV. – HOSTILE WORKPLACE CASE PROCEED - NOT RETALIATION**

On Jan. 29, 2024, in [Anaje Boyd v. District of Columbia](#), U.S. District Court Judge Rudolph Contreras, U.S. District Court for District of Columbia, held that the plaintiffs claim for hostile work environment may proceed with pre-trial discovery, but the claim of retaliation for FD delay in conducting an internal investigation is dismissed. When she filed a complaint with the Police Department, the FD’s EEO officer (Amy Mauro) and Internal Affairs Captain Melonie Barnes told her to hold off filing EEOC charge while criminal case was proceeding.

“Although Boyd's written narrative does mention that Mauro and Cpt. Barnes instructed her that she could not file an EEO complaint until the criminal proceedings against Lt. Jordan had concluded, *see* EEOC Charge at 5; *see also* Pl.'s Opp'n at 9 (arguing that the inclusion of these facts satisfies the exhaustion requirement), there is nothing in that narrative that suggests-in any way-that Boyd viewed Mauro's or Cpt. Barnes's instructions to be retaliatory.... Rather, Boyd's description of Mauro's and Cpt. Barnes's acts is best (and most reasonably) understood as providing support for why she delayed in filing her formal discrimination complaint. That being so-and given the absence of any other factual allegations that suggest Boyd was describing a retaliation claim-the Court cannot conclude that Boyd's complaint would have ‘reasonably give[n] rise to an investigation’ into retaliation (as opposed to an investigation solely focused on sex discrimination and sexual harassment).”

## FACTS:

“The events giving rise to Boyd's complaint began in April of 2020. At that time, Boyd was working as ‘a firefighter and an emergency medical technician’ for the District of Columbia Fire and Emergency Medical Services (‘DC FEMS’)-a position she had held since 2011. Boyd alleges that, on the night of April 25, she awoke during her shift to find her supervisor, Lt. Antwan Jordan, ‘standing over her.’ Lt. Jordan told Boyd that ‘she had just been relieved of duty and that her Officer in Charge . . . was looking for her ....with [her] sexy ass.’ Lt. Jordan then left the room, but he returned shortly thereafter to ask whether Boyd had ‘left anything on the ambulance.’ When she replied that she had ‘left her go-bag,’ he responded, ‘so you didn't leave this?’ As he said this, he ‘forcibly put his hand down [Boyd's] shirt into her bra and squeezed her right breast.’ Boyd ‘grabbed his hand and tried to remove it from her breast but’ to no avail. Instead, Lt. Jordan ‘attempted to grab her left breast’ as well, before leaving the room for a second time. ‘[S]haken by the assault,’ Boyd then left the fire station. After she had left, she ‘felt something in her bra,’ which turned out to be ‘two twenty-dollar bills.’

The next day, Boyd reported the incident to Lt. Martin McMahon, her ‘general supervisor.’ Specifically, she told Lt. McMahon that Lt. Jordan had ‘sexually harassed her’ and that ‘she wished to file an [Equal Employment Opportunity (“EEO”)] complaint.’ Lt. McMahon assured Boyd ‘that he was going to contact the EEO Office.’

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Almost a year later, on June 27, 2022, Lt. Jordan was convicted of sexually abusing Boyd. Three days later, Boyd contacted an EEO counselor “to discuss her complaint of sexual harassment.’ On July 25, ‘Boyd received an exit letter stating that [she] could file a complaint with [the] D.C. Office of Human Rights.’ Three days after receiving her exit letter, ‘Boyd filed a discrimination complaint with the D.C. Office of Human Rights’ And on September 9, Boyd ‘filed a charge of discrimination’ with the Equal Employment Opportunity Commission (‘EEOC’). Ten days later, the EEOC sent Boyd a ‘Notice of Right to Sue.’

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Footnote 1: The District initially moved to dismiss Boyd's hostile work environment claims as well. *See* Def.'s Mot. at 4-6. The District has since ‘withdraw[n]’ this aspect of its motion and asserts that ‘[d]iscovery is needed to resolve th[e] issue’ of whether Boyd ‘timely exhaust[ed] her administrative remedies” in relation to those claims.”

**Legal Lesson Learned: An on-duty assault is shocking. The court opinion does not mention whether the Lt. Antwan Jordan was fired, or whether he received jail time.**

Note: [A Google search reveals a prior incident on March 7, 2014](#) that appears to be same individual. “Wednesday, firefighter Antwan Jordon was arrested outside of firehouse Engine 15 and charged with misdemeanor sex abuse. Surveillance video shows Jordan, in uniform, slapping a woman’s buttocks at a Southeast D.C. elementary school, according to Fox 5. A fire department spokesman says ... Jordan [has] been placed on administrative leave.”

File: Chap. 7, SEXUAL HARASSMENT

## **IL: CHICAGO FD – FEMALES FAILED PHYSICAL FITNESS – SETTLEMENT / REHIRED – CAN NOW SEEK DAMAGES**

On Jan. 7, 2024, in [Jennifer Livingston, et al. v. City of Chicago](#), U.S. District Court Judge Sara L. Ellis, U.S. District Court for Northern District of Illinois (Eastern Division) held that while most of the five female paramedics (fired 2014 – 2016) have been re-hired under a 2019 settlement agreement, an amended complaint may now be filed to seek uncapped damages. One of the medics failed her medical - in March 2019, Dr. William Wong, CFD's medical director, indicated that he would not clear Donna Griffin for reinstatement because she used prescription alprazolam and trazadone for "adjustment disorder with anxious mood and secondary insomnia." Ms. Griffin has filed a separate lawsuit, and Judge Ellis declined to combine it with this case. [See note below for information in [Griffin v. City of Chicago](#) case.]

"The (Oct. 2016) complaint alleges that this hostility manifests itself in a number of other contexts, including: 1) the City's failure to properly accommodate nursing mothers; 2) the City's failure to provide adequate bathrooms, locker facilities, and sleeping quarters; 3) episodes of verbal and physical harassment and intimidation; and 4) sexually discriminatory treatment by the CFD's Medical Division.

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Plaintiffs seek to add new theories of recovery under § 1983 [violation of Constitutional rights under 42 USC 1983] and ICRA [Illinois Civil Rights Act of 2003] based on the same factual allegations laid out in the original complaint. Plaintiffs argue this is because § 1983 and ICRA do not carry a statutory cap on economic damages as Title VII does.... As such, Plaintiffs may amend their complaint to include their proposed § 1983 and ICRA claims.

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Plaintiffs may file a first amended complaint to add these theories of liability. But because Griffin's additional claims and the allegations regarding the veteran's preference are either unnecessary or depend on new factual allegations, Plaintiffs may not include these claims or allegations in their first amended complaint."

### FACTS:

"Plaintiffs are all licensed paramedics who matriculated to the CFD's Training Academy ('Academy') as candidate Fire Paramedics. Between 2014 and 2016, the CFD fired or suspended Plaintiffs after they each failed certain physical tests. Plaintiffs filed their original complaint in October 2016, alleging the City discriminated against female paramedic candidates by principally relying on two physical tests—the 'Lifting and Moving Sequence' and the 'Step Test'—that were not job related and operated as a barrier to employment for women.

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From January 2017 until June 2018, the parties participated in settlement discussions that

led to an agreement for several of the Plaintiffs, including Griffin, to be reinstated to the Academy ('2019 Hiring Opportunity').”

**Legal Lesson Learned: The pre-trial discovery may now proceed in this case seeking uncapped damages.**

Note: Title VII of the Civil Right Act is subject to the following statutory caps.

“Statutory caps limits exists for combined awards of front pay, punitive damages, and compensatory damages. The [caps](#) are based upon the number of employees employed by the employer against whom the charge of discrimination has been made. The caps are as follows:

1. For more than fourteen (14) and less than one hundred and one (101) employees in each of twenty (20) or more calendar weeks in the current or preceding year the cap is \$50,000;
2. For more than one hundred (100) but fewer than two hundred and one (201) employees, the cap is \$100,000;
3. For more than two hundred (200) employees but fewer than five hundred and one (501) employees, the cap is \$200,000; and
4. For an employer with more than five hundred (500) employees, the cap is \$300,000.”

Note: [Judge Ellis is also assigned to the separate lawsuit by Donna Griffin](#). On Jan. 22, 2024, the Judge ruled:

“Because Griffin presents sufficient evidence to establish a dispute of fact as to whether she was a qualified individual and whether her disability caused her termination from the Academy, the Court denies the City's motion as to Griffin's discrimination claim under the ADA and IHRA. However, because Griffin cannot present admissible evidence that she made a request for accommodation, the Court grants the City's motion as to Griffin's reasonable accommodation claim under the ADA and IHRA.”

File: Chap. 8, RACIAL DISCRIMINATION

**MS: DIVERSITY SCHOLARSHIPS – NAT. ASSOC. OF EMERG. TECHNICIANS – 4 /YEAR– PLAINTIFF GROUP DENIED TRO**

On Jan. 23, 2024, in [Do No Harm v. National Association of Emergency Medical Technicians](#), U.S. District Court Judge Carlton W. Reeves, U.S. District Court for the Southern District of Mississippi (Northern Division) denied the Plaintiff group’s motion for Temporary Restraining Order since no White member of the group has applied or been denied the scholarships. The NAEMT may therefore proceed with its application process for four \$1,250 “diversity” scholarships to attend EMT school (applications due February 1, 2024 - March 31, 2024); however the Court notes they have taken down the scholarship from their web page.

“Applied here, the caselaw suggests infirmities in Do No Harm’s standing to bring this § 1981 claim. Its member has apparently only been deterred from applying, rather than refused a contract. See Arguello, 330 F.3d at 358-59. And in the absence of a racial requirement in the scholarship’s eligibility requirements or an explicit bar against white applicants, we are all forced to ‘speculate as to the injuries [Member A] might suffer. That we cannot do.’ Barber, 860 F.3d at 357.

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Lastly, the Court observes that as of today, NAEMT has removed its diversity scholarship from public display on its website. If the parties’ differences have been resolved, they shall promptly notify the Court.”

#### FACTS:

“Do No Harm ‘is a nationwide membership organization consisting of healthcare professionals, students, patients, and policymakers who want to protect healthcare from radical, divisive, and discriminatory ideologies.” Docket No. 1 at 2. It objects to a “woke takeover” of the medical profession. [Do No Harm Staff, The Woke Language Police Have Come For Health Care, DO NO HARM: COMMENTARY](#) (May 22, 2023),

Defendant National Association of Emergency Medical Technicians (‘NAEMT’) ‘is the only national association representing the professional interests of paramedics, advanced emergency medical technicians, emergency medical technicians, emergency medical responders, and other professionals providing prehospital and out-of-hospital emergent, urgent or preventive medical care.’ [ABOUT NAEMT](#), (last visited Jan. 23, 2024).

On January 10, 2024, Do No Harm filed its complaint in this case. It alleges that NAEMT operates ‘a race-based ‘diversity’ scholarship that awards money only to ‘students of color.’ Do No Harm argues that the scholarship program ‘flatly’ excludes white students. Because there apparently is a future contractual relationship between NAEMT and scholarship recipients, Do No Harm says the program violates 42 U.S.C. § 1981. Id. The diversity scholarship awards \$1,250 each to four students who do not hold an EMS certification but intend to become EMS practitioners.

NAEMT has not yet been required to answer this suit or respond to these allegations. According to a 2021 post on its website, though, it explains that the scholarship reflects NAEMT’s commitment ‘to supporting the development of greater diversity in the EMS workforce, so that [the EMS] workforce more closely reflects the communities [EMS professionals] serve.’ NAEMT Announces New Diversity Scholarship, NAEMT: ALL NEWS (Aug. 5, 2021). [Footnote 1.]

[The scholarship application](#) window opens on February 1, 2024 and closes on March 31, 2024. Docket No. 1-1.

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[FOOTNOTE 1]: In 2019, 72% of the EMS workforce identified as non-Hispanic White, 13% identified as Hispanic, and 8% identified as non-Hispanic Black. Rebecca E. Cash et al., Trends in demographic and employment characteristics of US emergency medical technicians and paramedics, 2011-2019, J. AM. COLL. EMERGENCY PHYSICIANS, Aug. 2022, at 4.”

**Legal Lesson Learned: Lawsuit may now proceed with pre-trial discovery unless it has been mooted by NAEMT dropping their diversity scholarships.**

Note: This case is another example of lawsuits being filed challenging diversity programs since the U.S. Supreme Court’s June 29, 2023 decision holding that Harvard University and University of North Carolina’s admissions programs accounting for race of applicants violated the Equal Protection Clause of 14<sup>th</sup> Amendment. [STUDENTS FOR FAIR ADMISSIONS, INC. v. PRESIDENT AND FELLOWS OF HARVARD COLLEGE](#) (6 to 2; Justice Ketanji Brown Jackson recused herself), [and STUDENTS FOR ADMISSION v. UNIVERSITY OF NORTH CARLINA](#) (6 to 3).

See: [“As Legal Challenges Mount, Some Companies Retool Diversity and Inclusion Programs”](#) (Jan. 12, 2024).

See also: [“Lawsuits Challenge Law Firm Diversity Programs as Racially Discriminatory”](#) (Oct. 6, 2023).

File: Chap. 9, AMERICANS WITH DISABILITIES ACT

**MA: CAPTAIN – MARINE 50% DISABLED – NOT PROMOTED – ALLEGES CHIEF ANIMOSITY DISAB. VETS – CASE PROCEED**

On Jan. 10, 2024, in [Pierre Grenier v. City of Springfield, et al.](#), U.S. Magistrate Judge Katherine A. Robinson issued a Report & Recommendation allowing case to proceed with pre-trial discovery regarding Captain’s allegation that Fire Commissioner had animosity against him because of his military service-connected disability (former Marine). He was the only of six candidates not promoted to District Chief.

“Drawing all inferences in Plaintiff’s favor, a reasonable employee in his position might interpret [Fire Commissioner] Calvi’s stop at the fire station [May 26, 2019] after hearing that Plaintiff had set the wheels in motion for a formal hearing], was intended to intimidate or coerce Plaintiff into abandoning his right to a hearing to protect his position and promotional aspirations in the Department. This aspect of the claim also merits evaluation on a more complete factual record.”

## FACTS:

On May 19, 2018, Captain Grenier took the written test; six candidates made the list – he was No. 3. However, his interview on Jan. 17, 2020 before a 7-member panel went poorly, including failing to offer suggestions to improve FD operations. After the other 5 candidates were promoted, his appeal to Civil Service Commission was denied, and on March 8, 2023, a Justice on the Massachusetts Superior Court denied his appeal.

In this federal court lawsuit, the U.S. Magistrate Judge held that pre-trial discovery should proceed about two incidents of alleged animosity by Fire Commissioner - May 26, 2019 meeting at fire station; fire on Nov. 19, 2019 where the Fire Commissioner allegedly ordered him to take over Incident Command.

“At some time not specified in the SAC [Second Amended Complaint], plaintiff heard that [Fire Commissioner Bernard] Calvi ‘had animosity towards him as a disabled veteran and that he had a target on his back.’ On or around May 20, 2019, Plaintiff asked for a conference with Calvi and asked his District Chief for a hearing regarding Calvi’s animosity against him. On May 26, 2019, in a step the Plaintiff claims was not in accordance with department procedure, Calvi stopped by the station where Plaintiff was working, directed plaintiff to a private room, and closed the door. Plaintiff told Calvi that Plaintiff had been told that Calvi ‘had animosity’ against Plaintiff because Plaintiff was a disabled veteran. Calvi told Plaintiff that the report of animosity was not true and that Calvi was not aware of problems with Plaintiff’s ability, performance, or work ethic.

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In Nov. 2019, while Plaintiff was the acting district chief assigned to district 1, there was a fire in district 2. Plaintiff was the third commanding officer to arrive at the scene. The first responsible commanding officer had already left. Calvi ordered Plaintiff to serve as incident commander at the scene. According to Plaintiff this order was ‘unjust’ and was taken in retaliation because he has raised a question about Calvi’s animosity against him.”

**Legal Lesson Learned: If an employee is claiming animosity, consider having a second person (another officer or HR) with you when holding discussion with the employee.**

Note: March 8, 2023, [Justice Michael K. Callan, Massachusetts Superior Court denied his appeal from Civil Service Commission.](#)

File: Chap. 11, FAIR LABOR STANDARDS ACT

**MS: FLSA - LONGEVITY PAY – LAWSUIT SETTLED PAY OCT. 2023 FORWARD - 25 FF AGREED /10 OBJECTED - ENFORCED**

On Jan. 25, 2024, in [Derrick Gates, et al. v. City of Biloxi, Mississippi](#), U.S. District Court Judge Louis Guirola, Jr., U.S. District Court for Southern District of Mississippi (Southern Division) granted the City’s motion to enforce the settlement agreement.

“Here, the parties through their retained counsel announced the settlement, and the terms were recited into the record. It is the recorded recitations that control. Therefore, the settlement agreement is enforceable as recorded in the transcript at the close of the settlement conference, regardless of any alleged omissions contained in a later memorialization of the parties’ agreement.”

**FACTS:**

“The Complaint in this matter, filed in this Court on December 30, 2022, was brought by several ‘first-responder’ firefighters employed by Defendant, the City of Biloxi. Plaintiffs allege that Defendant is liable under the Fair Labor Standards Act (FLSA) and for breach of contract for refusing to pay them longevity pay, and overtime pay.). The case was resolved at a settlement conference held May 3, 2023. As part of the terms of the settlement, Defendant agreed to reinstate longevity pay to Plaintiffs and all firefighters beginning October 1, 2023, and that such longevity pay ‘would be paid going forward,’ rather than as ‘a back payment.’ The settlement was made contingent upon the approval by the City of Biloxi’s city council.

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The city council then adopted the Agreement on May 23, 2023, by resolution, which was approved by the mayor on May 26, 2023.

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On August 24 and 30, 2023, the Magistrate Judge held two telephonic status conferences regarding the status of settlement. At these teleconferences, plaintiffs’ counsel ‘advised the Court that while twenty-five of the Plaintiffs had signed the Settlement Agreement and Release, ten of the Plaintiffs were refusing to sign the Agreement [seeking longevity pay for entire 2023 year, not just beginning in October, 2023].”

**Legal Lesson Learned: A settlement agreement agreed to by Plaintiffs’ legal counsel applies to all firefighters on the fire department.**

File: Chap. 13, EMS

## **ME: PERSON DEAD OVERDOSE UNDER SINK – RESIDENT REFUSED TALK TO MEDICS – PROSECUTOR TOLD JURY**

On Jan. 30, 2024, in [State of Maine v. Ralph A. Tripp, Jr.](#), the Maine Supreme Judicial Court held (7 to 0) that trial court judge properly allowed jury to hear testimony of the paramedics from Bangor Fire Department that the defendant along with his wife called 911 on April 17, 2021, and they both refused to tell the medics anything about the person dead under the sink in their apartment. The jury convicted the defendant of aggravated trafficking of a scheduled drug that in fact caused the death of a person, three counts of aggravated trafficking of scheduled drugs: fentanyl powder, cocaine, and methamphetamine, one count of possession of a firearm by a prohibited person); and two counts of criminal forfeiture.

“Even if the right to remain silent extends to a paramedic’s questioning, we conclude that Tripp failed to demonstrate that he invoked his right to remain silent in this non-custodial context.

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Here, after Tripp let the paramedics into the rooming house and directed them upstairs to the unconscious person, he went into his room, denied knowing the person, and refused to answer the paramedic’s questions about the person. He was not in custody, and beyond remaining silent, Tripp did not expressly state nor otherwise manifest his intention to exercise the constitutional right against self-incrimination. These facts are not sufficient to demonstrate Tripp’s invocation of his Fifth Amendment right against self-incrimination.”

### FACTS:

“During its opening statement, the State commented on the events that occurred prior to Tripp calling 9-1-1, as well as Tripp’s decision to enter his room and his refusal to answer the paramedics’ questions. [Footnote 3.] During closing argument, the State again commented on Tripp’s refusal to answer the paramedics’ questions. [Footnote 4.]

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Footnote 3: The prosecutor stated, “You’ll hear that [Tripp] and Amanda shut themselves into [their room], denied knowing [the decedent], and refused to answer even basic questions from the medics who were trying to save [the decedent’s] life.

Footnote 4: The prosecutor argued, “You heard that [Tripp] and Amanda . . . shut themselves into [their room] and wouldn’t answer questions from the EMTs or paramedics. They wouldn’t admit to knowing this person; wouldn’t say who he was; wouldn’t help to identify the patient so that maybe they could find his medical history or anything else that might help them to try to resuscitate this person. They wouldn’t tell [the EMTs or paramedics] what he took. Nothing. They were panicked. They turtled. They shelled themselves in that apartment and willed it to all go away. But it did not.

They did not expect the neighbors to point the police directly to [their room], which they did.”

**Legal Lesson Learned: The defendant was not in custody, so there was no need to warn him of his Miranda rights.**

Note: Many states, including Maine, have adopted laws to protect individual using drugs to call 911 to get help for overdose of another. The Maine Supreme Court in this case agreed with trial court judge – the immunity statute does not protect a drug dealer who calls 911.

“If the accused, in good faith, either sought medical assistance or administered naloxone for another person while that person was experiencing a drug-related overdose, the accused can seek immunity from arrest or prosecution only for the four enumerated crimes within the statute. Our conclusion is further supported by considering the statute in the context of the statutory scheme of Chapter 45 (Drugs), which demonstrates that the Legislature intended to bar prosecution for crimes that are associated with drug use while still permitting prosecution for crimes that involve trafficking, furnishing, cultivating or fabricating, or importing drugs.”

File: Chap. 13, EMS

**WA: COVID-19 – VACCINATIONS - 46 OF 192 FF REQUESTED RELIGIOUS ACCOMODATIONS – UNDUE HARDSHIP FOR FD**

On Jan. 25, 2014, in [David Petersen, et al. v. Snohomish Regional Fire & Rescue, et al.](#), U.S. District Court Judge Thomas S. Zilly, U.S. District Court, Western District of Washington (Seattle) granted the FD’s motion for summary judgment. Employers do not need to accommodate an employee if this would create an undue hardship – with 11 stations and 192 firefighters providing fire & EMS services, the FD could not safely place 46 unvaccinated firefighters in these stations.

“Plaintiffs argue that masking, PPE, testing, and social distancing are accommodations that would have allowed them to continue working from October 18, 2021, to the end of April 2022, without imposing an undue hardship on Snohomish Fire. Snohomish Fire counters that allowing Plaintiffs to work while unvaccinated would have been an undue hardship even with masking, testing, PPE, and social distancing measures in place.

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In sum, the uncontroverted evidence in this case demonstrates that unvaccinated firefighters were at a higher risk of contracting and transmitting COVID-19 even with the use of masks, PPE, testing, and social distancing. *See Lynch Decl.* at ¶¶ 41, 44. Snohomish Fire informed Plaintiffs it could not accommodate their vaccination exemption requests because of the increased health risks of working as unvaccinated firefighters.”

## FACTS:

“Moreover, the fact that 46 out of 192 Snohomish Fire firefighters requested an exemption and accommodation increased Snohomish Fire's hardship and the risks associated with accommodating Plaintiffs in their patient-care roles while living and working in fire stations.

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The MOU [with Local 2781] modified requirements for using accrued leave time so that a firefighter could continue pay and benefit accrual during leave as an accommodation. Upon exhaustion of paid leave, Snohomish Fire communicated that it would approve requests from firefighters for a personal leave of absence of up to a year. After that, or if a firefighter chose to leave employment, the MOU allowed that firefighter to be placed on a disability list, which gave them priority rehire rights with no loss of rank, seniority, or benefit accrual status for two years.”

**Legal Lesson Learned: Employers do not need to provide accommodation if it would create an “undue hardship.”**

File: Chap. 13, EMS

## **NY: COVID-19 – FDNY - REQUEST RELIGIOUS ACCOMODATION - DENIED, HE RETIRED – CASE DISMISSED**

On Jan. 9, 2024, in [Michael Currid v. The City of New York, et al.](#), Judge Gina Abadi, New York Supreme Court, Kings County, granted the City’s motion to dismiss (unpublished decision). The plaintiff served with the FDNY from about 1998 through April 19, 2022. On or around October 27, 2021, following the issuance of the COVID-19 vaccine mandate for City employees, plaintiff applied for a religious accommodation, which was denied by the FD (January 6, 2022) and his appeal to the City was also denied (March 17, 2022). The Court rejected his claim that he was “constructively discharged” because of intolerable working conditions.

“In his verified complaint, plaintiff does not set factual allegations regarding a conflict between the vaccine mandate and his bona fide religious beliefs. Further, while plaintiff alleges that he was threatened with termination in the event he failed to receive the vaccine, there is no allegation that plaintiff was actually terminated or otherwise disciplined. Rather, it is not in dispute that plaintiff retired from service. Plaintiffs contention that his retirement amounts to a constructive discharge or termination is unavailing since plaintiff does not allege facts showing that the FDNY ‘deliberately created working conditions so intolerable, difficult or unpleasant that a reasonable person would have felt compelled to resign.’ *Mascola v City Univ, of N.Y.*, 14 A.D.3d 409, 410 (1st Dept 2010).”

## FACTS:

“Plaintiff alleges, upon information and belief, that defendants predetermined the denial of the accommodation because of his Christian faith, that at no point did any member of defendants speak to plaintiff about a reasonable accommodation and that the FDNY did not engage plaintiff in a cooperative dialogue. Plaintiff alleges that he was told that his employment with the FDNY would end if he refused to take the CO VID vaccine even though plaintiff was prepared to accept numerous accommodations, including masking and weekly testing.

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While, in his verified complaint, plaintiff states in conclusory fashion that ‘[a]t no point did any member of the Defendants ever speak to Plaintiff about a reasonable accommodation’ and that ‘[a]t no point did any member of the FDNY engage the Plaintiff in a cooperative dialogue,’ he also alleges that he did, in fact, apply for a religious accommodation, which was denied on January 6, 2022, and filed an appeal of the FDNY's decision, which was denied on March 17, 2022. As such, plaintiff fails to state a cognizable claim based upon the cooperative dialogue provisions of the City HRL.

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However, there are no specific facts alleged showing that any group aside from those adhering to plaintiff's creed were allowed religious accommodations to the vaccine mandate or were otherwise treated more favorably by the FDNY and City during the accommodation review and appeals process.”

**Legal Lesson Learned: FDNY set up a COVID-19 religious accommodation appeal process that was fair.**

File: Chap. 13, EMS

**MA: EMT - BACKGROUND CHECK – HIRED, 1 YR. RESIGNED – NO ACTUAL DAMAGES - CAN SUE BACKGROUND CHECK CO.**

On Jan. 8, 2024, in [Nicole Kenn v. Eascare, LLC.](#), the Appeals Court of Massachusetts (Norfolk) held (3 to 0) that even if the EMT has not suffered any actual damages (she was hired as an EMT), she still has standing to sue the background check company in state court for nominal damages, between \$100 and \$100 under the federal Fair Credit Reporting Act, 15 U.S.C. §§ 1681-1681w (FCRA). The EMT signed an authorization form entitled “Consumer Report / Investigative Consumer Report Disclosure and Release of Information Authorization” but she is now claiming that in the form there was no clear listing that a consumer report was to be obtained.

“Although the plaintiff may not be able to articulate concrete, actual damages arising from Eascare obtaining her consumer report by using a noncompliant disclosure form and

requiring her to agree to a release of liability in addition to a background check, the FCRA liability provision recognizes that the injury to the consumer may not be measurable. Thus, in an action for a willful violation, the statute provides for the option of the plaintiff recovering actual damages caused by the FCRA violation or, if the plaintiff cannot prove actual damages, nominal damages between \$100 and \$1,000. See 15 U.S.C. § 1681n(a)(1)(A). In this regard, the plaintiff's allegation of Eascare's willfulness is critical, as the cause of action for a negligent violation, by contrast, does require a showing of actual damages. See 15 U.S.C. § 1681o(a)(1)."

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Here, the plaintiff has plausibly alleged liability of Eascare for FCRA violations and an entitlement to damages if she prevails. The judgment dismissing the plaintiff's FCRA claims for lack of standing is vacated, and the plaintiff may proceed on her claims in the Superior Court."

#### FACTS:

"The complaint alleged that Eascare willfully provided a disclosure and authorization form that violated FCRA, injuring the plaintiff and those similarly situated, as follows:

'25. Without a clear notice that a consumer report is going to be procured on them, applicants like [the plaintiff] have no way to preserve their privacy or to correct errors or other problems with the reports.'

\*\*\*

Eascare is a Massachusetts limited liability company that provides ambulance services. Eascare conducts background checks, which are governed by FCRA, when it makes employment decisions. In January 2018, the plaintiff applied for a position as an emergency medical technician. Eascare provided the plaintiff with a combined disclosure and authorization form regarding the background check, entitled 'Consumer Report/Investigative Consumer Report Disclosure and Release of Information Authorization.' The front side of the form asked the plaintiff to acknowledge her understanding that Eascare would conduct a background check on her for employment purposes, which might include obtaining a 'consumer report' or an 'investigative consumer report' as defined under FCRA. The disclosure form included explanations of what the background investigation might entail, what would happen in the case of an adverse employment decision, and what an applicant could do if she disagreed with the accuracy of any information contained in the consumer report. The bottom of the form sought the plaintiff's authorization for Eascare to conduct the background check. The back side of the form sought her authorization for an entity named PT Research 'to furnish the above information' and for the plaintiff to 'release[] and forever discharge[]' PT Research, Eascare, 'and any person/entity from which they obtained information from any liability resulting from providing such information.'



The plaintiff signed both sides of the form and was subsequently hired, but resigned within a year. [Footnote 2: Her complaint alleged that she was constructively discharged because of a hostile work environment.]

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After the plaintiff filed her complaint, Eascare removed the case to the United States District Court for the District of Massachusetts pursuant to 28 U.S.C. § 1441(a) and there moved to dismiss the plaintiff's FCRA claims under Fed. R. Civ. P. 12(b)(6) for failure to state a claim. A United States District Court judge granted Eascare's motion to dismiss, concluding that the plaintiff lacked standing under art. III. because she failed to allege a "concrete" injury. *Kenn v. Eascare, LLC*, 483 F.Supp.3d 26, 32 (D. Mass. 2020) . The judge initially ordered that the FCRA claims be dismissed without prejudice, but acting on the plaintiff's motion for reconsideration, vacated the dismissal and instead remanded the claims to the Superior Court.

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Back in the Superior Court, Eascare moved to dismiss the plaintiff's FCRA claims pursuant to Mass. R. Civ. P. 12 (b) (6), 365 Mass. 754 (1974), for lack of standing. A Superior Court judge allowed the motion, largely adopting the reasoning of the United States District Court judge.”

**Legal Lesson Learned: The EMS agency in this case was not sued. EMS and Fire agencies that use background check companies should require the company to defend and indemnify the agency for any alleged violations of the FCRA.**

Note: In Ohio, Fire Chiefs of township or fire district can have state conduct criminal history check. See [casetext Kenn v. EasCare,LLC](#) “(A) The fire chief of a township or fire district may request the superintendent of BCII to conduct a criminal records check with respect to any person who is under consideration for appointment or employment as a permanent, full-time paid firefighter or any person who is under consideration for appointment as a volunteer firefighter.”

File: Chap. 16, DISCIPLINE

**DC: FEMA - SUSPENDED 13 DAYS – WELL DOCUMENTED  
REPRIMANDS – CASE DISMISSED, NO RETALIATION**

On Jan. 22, 2024, in [Karl Rabenhorst v. Alejandro Mayorkas, Secretary, U.S. Department of Homeland Security](#), U.S. District Court Judge Manish S. Shah, U.S. District Court for Northern District of Illinois (Eastern Division), granted the Government’s motion for summary judgment.

“Rabenhorst also fails to offer any evidence of ambiguous statements of animus or similarly situated employees who were treated differently. Rabenhorst has not presented any evidence that O’Leary’s reasons for the suspension were pretextual. There is no evidence that would allow a jury to find that O’Leary’s decision to suspend Rabenhorst without pay for 13 days was motivated by anything but Rabenhorst’s misconduct.”

FACTS:

“Plaintiff Karl Rabenhorst worked for the Federal Emergency Management Agency for approximately 14 years as a technical hazard specialist. During his time there, Rabenhorst’s employer reprimanded or disciplined him repeatedly. Believing that he was treated differently than his younger, women colleagues, Rabenhorst filed an EEO complaint with FEMA alleging sex and age discrimination and retaliation. After FEMA found no evidence of discrimination or retaliation, Rabenhorst brought this case alleging the same. Defendant moves for summary judgment.

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Rabenhorst has not presented any evidence that O’Leary’s reasons for the suspension were pretextual. There is no evidence that would allow a jury to find that O’Leary’s decision to suspend Rabenhorst without pay for 13 days was motivated by anything but Rabenhorst’s misconduct.

\*\*\*

Rabenhorst was twice reprimanded for inappropriate interactions with state officials. In April 2016, Rabenhorst was officially reprimanded by a FEMA supervisor for failing to follow the supervisory chain of command when he emailed the Michigan state attorney general to argue about the interpretation of a Michigan state law without FEMA authorization. The reprimand noted two previous exceedingly aggressive or argumentative email exchanges for which Rabenhorst had been verbally counseled and warned the year before. *Id.* The reprimand also warned that future acts of misconduct could result in further discipline up to and including Rabenhorst’s removal from federal service.

\*\*\*

In June 2017, Rabenhorst was again officially reprimanded by another FEMA supervisor for inappropriate behavior during meetings with Ohio state officials, including asking whether they spoke English and cursing. As a result, Ohio state officials asked FEMA to stop assigning Rabenhorst to Ohio events. The reprimand again warned that future acts of misconduct could result in further discipline.

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During an August 2017 exercise, Rabenhorst spoke with a contractor assigned to evaluate the exercise, criticizing O’Leary’s planning and stating, ‘O’Leary had his head up his ass.’ O’Leary emailed Rabenhorst telling him to not interfere or speak with contractors and that Rabenhorst should direct any complaints about the exercise through FEMA’s

chain of command. Yet, the following day, Rabenhorst spoke with another contract evaluator about his concerns with the exercise.

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O’Leary was preparing to discipline Rabenhorst for insubordination and interfering with contractors when Rabenhorst was deployed to Puerto Rico for disaster relief after a hurricane in October 2017.... Less than one month later, Arcurio released Rabenhorst from his deployment, ‘with cause, as a result of conduct and behavior issues with colleagues and supervisors,’ including using profanity during staff meetings, treating women employees and supervisors disrespectfully, and telling his women supervisors that they were ‘sorority girls with ADHD and that he had spanked girls bigger than them.’

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In November 2017, O’Leary received more details from Arcurio and decided to discipline Rabenhorst for his conduct in Puerto Rico.... After considering the record, O’Leary issued a decision suspending Rabenhorst without pay for 13 days on October 1, 2018.”

**Legal Lesson Learned: Thorough documentation of discipline led to dismissal of this lawsuit.**