Aug. 2024 – FIRE & EMS LAW NEWSLETTER

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Prof. Bennett and his pet therapy dog, FRYE.

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14 RECENT CASES

- 2024: FIRE & EMS LAW – MONTHLY NEWSLETTERS: monthly review of recent court decisions [send e-mail if wish to be added to our free listserv]
- 2024: FIRE & EMS LAW – RECENT CASE SUMMARIES / LEGAL LESSONS LEARNED: Case summaries since 2018 from monthly newsletters
- 2024: FIRE & EMS LAW – CURRENT EVENTS
- 2024: AMERICAN HISTORY – LEGAL LESSONS LEARNED FOR FIRE & EMS
- 2024: EMS LAW- LEGAL, POLITICAL & REGULATORY ENVIRONMENT OF EMS
- TEXTBOOK: 2017: FIRE SERVICE LAW (Second Edition) (ISBN 978-1-4786-3397-6); Waveland Press: (First Edition – Prentice Hall, 2008)

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File: Chap. 1, American Legal System, Arson Investigations

IN: ARSON INVEST. – MOTEL ROOM FIRE STARTED SHORTLY AFTER GIRLFRIEND LEFT - MJ ROACH DIDN'T START FIRE

On July 30, 2024, in Thomas F. Dunigan, II v. State of Indiana, the Indiana Court of Appeals held (5 to 0) that expert witness testimony was properly admitted, based on peer reviewed articles he read about it taking at least 20 minutes for a lit cigarette left on bed to cause ignition. Defendant was sentenced to 12 years after jury convicted him of arson; trial court did not abuse its discretion "when it permitted an expert witness to testify that the fire in his motel room was intentionally caused by a direct flame source and not accidentally caused by a smoldering marijuana cigarette."

THE COURT HELD:

> "Under Evidence Rule 702(b), the trial court had discretion to conclude that Malon's reliance on those articles and studies was sufficient to show that his opinion was supported by reliable scientific principles.
> ***
> Malon testified that, in concluding that the fire was intentionally set and not caused by a smoldering marijuana cigarette, he had relied on 'several peer[ ]reviewed articles and studies done through NIST[,] National . Association of Fire Investigators[, and] Underwriters Laboratory,' including 'one study from 2014 done by the National Association of Fire Investigators' specifically addressing 'the propensity for hand rolled marijuana cigarettes and tube rolled marijuana cigarettes to be self-extinguished.'… Tr. Under Evidence Rule 702(b), the trial court had discretion to conclude that Malon's reliance on those articles and studies was sufficient to show that his opinion was supported by reliable scientific principles.
> [He testified.]
>
> > [S]tudies on smoldering fires indicate that the transition from a smoldering fire to an exothermic chemical reaction, which is where we see flaming fire, is twenty (20) minutes to several hours. Um, there was one particular peer reviewed article that stated twenty-two (22) minutes on average. But, um, according to other research, smoldering fire, making that transition is twenty (20) minutes to several hours."

FACTS:

> "On January 6, 2022, Dunigan was living in a motel room with his girlfriend, C.G., their baby, and Dunigan's father, Thomas Sr. That morning, while Thomas Sr. was at work, Dunigan and C.G. fought, and Dunigan 'struck' her in the face…. C.G. took the baby and left the motel room. A short time later, Dunigan also left the motel room, but he left the door slightly ajar upon his exit.
> Shortly after Dunigan's exit, a bystander saw smoke coming out of Dunigan's motel room and called the fire department. Firefighters who responded saw that 'the fire was on top of the bed.' … While the fire was being extinguished, Anthony Malon, Anderson's Chief Fire Marshall, began to investigate the cause. Malon collected evidence, took eyewitness statements, talked to firefighters on the scene, and examined surveillance video taken outside the motel room. Malon also examined the motel room and interviewed C.G. After his investigation was complete, Malon concluded that the fire was 'incendiary in nature,' meaning that something on the bed was lit with a 'direct flame source' like a lighter or

match or 'some other type of torch.' … The motel surveillance video showed smoke coming out of the slightly ajar motel room door within approximately three minutes of Dunigan leaving the room."

Legal Lesson Learned: Opinion testimony is admissible under Federal Rule of Evidence 702 if the trial court judge determines that witnesses is qualified as an expert.

Note: Rule 702 provides:

A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if the proponent demonstrates to the court that it is more likely than not that:

(a) the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue.

(b) the testimony is based on sufficient facts or data.

(c) the testimony is the product of reliable principles and methods; and

(d) the expert's opinion reflects a reliable application of the principles and methods to the facts of the case.

File: Chap. 1, American Legal System

VT: PROPERTY OWNER - 3 RVs – HOMELESS COULD LIVE THERE – VIOLATION OF HEALTH AND SAFETY CODE

On July 12, 2024, In re Kurt Daims/Brattleboro Common Sense**,** they Vermont Supreme Court held (3 to 0) that ordinance was lawful and applied to RVs, rejecting the property owner's argument that RVs are not "regular residents." The property owner was given two day hearing before the Vermont Board of Health, which upheld the eight code citations. The Vermont Supreme Court agreed that code applied to RVs. "We agree with the Board that the RVs should be considered regular residences and that appellants must comply with the code here. The RVs were offered to community members as living units."

THE COURT HELD:

> "Appellants argue that the RVs should not be subject to the code because they are not a 'regular residence.' See RRHHS Code § 3.1 ('This Rental Housing Health and Safety Code shall apply to all rented dwellings, dwelling units, rooming houses, rooming units, and mobile home lots used as a regular residence.') We agree with the Board that the RVs should be considered regular residences and that appellants must comply with the code here. The RVs were offered to community members as living units. They fit within the definition of 'rooming units.' See *id*. § 4.20 (defining 'rooming unit' as 'room or group of rooms let to an individual or household for use as living and sleeping, but not for cooking or eating purposes, whether or not, common cooking facilities are made available'); *id*. § 4.19 (defining 'rooming house' as 'any dwelling or part thereof containing one or more rooming units and/or one or more dormitory rooms in which space is let by the owner or operator to one or more persons who are not immediate family members of the owner)."

FACTS:

"Three RVs were placed on Mr. Daims' land in late 2022 pursuant to a lease with Brattleboro Common Sense, Inc. They were made available to those in need of emergency shelter. Appellants did not obtain any wastewater permits, water-supply permits, electrical permits, mobile-park permits, or any other state or local permit for the project or the RVs. Nearby residents complained to town officials about public urination and unsafe electrical issues creating potential fire hazards.

***

In February 2023, the town health officer and the assistant fire chief inspected the property and the RVs. The health officer found the RVs 'dangerous to the life and health of any occupant' and determined that they created 'a public-health hazard.' He identified numerous deficiencies that violated the National Fire Protection Association Code, the Vermont Residential Rental Housing Health and Safety Code, and the town's municipal ordinances. The violations included, among other things, blocked windows, the absence of potable or running water connected to any unit, the absence of fire extinguishers, damaged or inoperable windows, the absence of indoor toilet facilities in two of the RVs, no public or private sewer connections or sewage-disposal system, and the use of extension cords for electricity in the units, which posed a fire hazard. The health officer testified to these deficiencies during the hearing before the Board, and his testimony generally tracked the results of his inspection. The health officer also testified that Mr. Daims told him that the tenants of the RVs were charged rent at one time but now each occupant performed work on the property. The Board credited this testimony. The health officer also indicated that he found evidence of human feces and toilet paper on the property and in the trash can, which he considered evidence of unsanitary conditions. The Board found that the problems identified by the health officer in early February 2023 remained substantially unresolved.

***

The Board found eight violations and issued an order prohibiting occupancy of the RVs until the town health officer inspected them and certified that each unit satisfied the requirements of the various fire and health codes."

Legal Lesson Learned: The property owner must now comply with Health & Safety Code.

File: Chap. 2. Line Of Duty Death / Safety

IN: CAPTAIN FELL DOWN STAIRWELL BDG FIRE – GAP IN WALL - "FIREMAN'S RULE" EXCEPTION IF "DUTY TO WARN"

On July 2, 2024, in Richard Dolsen, Jr. v. VeoRide. Inc. and Sweet Real Estate – City Center, LLC, the Supreme Court of Indiana held (3 to 0) that trial court should not have dismissed the Captain's lawsuit, and case remanded for pre-trial discovery and trial. He was injured in a warehouse fire; the company rents electric scooters and electric bicycles that are powered by

lithium batteries, and one of the batteries caught fire. As the Captain is conducting primary search along a wall, it "was composed of bare wooden studs, with a gap left by a missing stud. Dolsen 'could not see the opening in the wall due to the lack of light and the presence of smoke.' Id. Dolsen 'fell to the bottom of the stairwell' and was injured."

THE COURT HELD:

> "Fort Wayne Fire Department Captain Richard Dolsen, Jr., was injured while responding to a fire in a building leased by VeoRide, Inc. Dolsen sued VeoRide for negligence. VeoRide moved for summary judgment on the basis that Dolsen's claims were barred by Indiana's firefighter's rule,1 and the trial court granted that motion. On appeal, Dolsen argues that the trial court erred. We agree, so we reverse and remand for further proceedings.
>
> ***
>
> Based on the foregoing, we conclude that whether VeoRide owed Dolsen a duty to warn him of the gap in the wall next to the stairwell depends upon underlying facts that require resolution by the trier of fact, including whether VeoRide should have realized that the condition involved an unreasonable risk of causing physical harm to Dolsen (who did not know or have reason to know of the condition and the risk involved), whether VeoRide should have expected that Dolsen would not discover or realize the danger, and whether VeoRide had reason to expect that Dolsen would encounter the condition in the exercise of his license. Assuming arguendo that such a duty existed, we further conclude that genuine issues of material fact exist regarding whether VeoRide's failure to warn Dolsen of the condition and the risk involved was a breach of that duty, that is, a failure to exercise reasonable care under the circumstances pursuant to Restatement Section 342(b); among the factors to be considered are whether VeoRide had a reasonable opportunity to alert fire department personnel. Additional issues of material fact exist regarding whether any breach of a duty to warn proximately caused Dolsen's injuries and the extent to which Dolsen might have contributed to his injuries for purposes of the Comparative Fault Act. Consequently, we reverse the trial court's entry of summary judgment in VeoRide's favor and remand for further proceedings."

FACTS:

> "On June 11, 2020, one of the batteries ignited and started a fire in the building. No VeoRide employees were on the premises at that time. *** Around 6:38 p.m., Dolsen's unit was dispatched to the fire. Dolsen had never been inside the building. He was 'equipped with a radio, so any warning sent by [Sweet] or [VeoRide] could quickly and easily have been conveyed to [him]….' On 'many occasions in [his] career, [he had] responded to other fires where an owner or tenant at a commercial building [had] warned [fire department personnel] about potential dangers inside, including holes in a floor.'

> Dolsen entered the building through a door, 'at which point [he] could not see due to lack of light and smoke…." He 'moved around the perimeter of the inside of the building … to look for a ventilation opening and electrical breaker box by touching and pressing the inside wall to guide [him]….' Just after he passed a closed door 'at the southeast corner of the building, [he] extended [his] left arm to press the wall, as [he] had been doing, but contacted nothing but air, and fell through an opening in the wall down into what [he] later realized was a stairwell…." The wall was composed of bare wooden studs, with a gap left by a missing stud. Dolsen 'could not see the opening in the wall due to the lack of light and the presence of smoke…' Dolsen 'fell to the bottom of the stairwell' and was injured."

Legal Lesson Learned: Hopefully the trial court or jury will find that VeoRide had a "duty to warn" the FD about a gap in the wall and open stairwell.

File: Chap. 3, Homeland Security

IL: DEMOCRATIC NATIONAL CONVENTION - SECURITY ORDINANCE – NO OBJECTS "SAFETY HAZARD" - LAWFUL

On July 19, 2024. in Coalition for Reproductive Justice & LGBTQ+ Liberation, et al., Plaintiffs, v. City of Chicago**,** U.S. District Court Judge Thomas M. Durkin denied an injunction sought by a group that plans to hold demonstrations at the Convention. On April 17, 2024, the City enacted an ordinance that listed items prohibited in the "Security Footprint" including laptops, sealed packages, drones, firearms, ammunition, tents, "[a]ny pointed object(s) including knives of any kind" and other items that are a "potential safety hazard." Plaintiffs provide affidavits stating, for example, that they intend to bring pens, first aid kits containing scissors, and 'protest buttons that attach with a pin in the back' into the Security Footprint. Judge concluded. "It is likely that Plaintiffs will be asked to discard certain items (such as the scissors) before they are allowed entry into the Security Footprint, just as happens at airports on a daily basis. This would not constitute a First Amendment injury as Plaintiffs would, upon discarding such innocuous items, likely be allowed entry into the Security Footprint with the subsequent ability to exercise their First Amendment rights.

THE COURT HELD:

> "Plaintiffs take issue with the phrase 'potential safety hazard' and argue that the word 'hazard' is not sufficiently defined…. But words are sufficiently defined where an ordinary person would 'use and understand' those words in 'normal life.' Curry, 918 F.3d at 540 ('Even a protean word such as 'reasonable' has enough of a core to allow its use in situations where rights to speak are at issue.'). Soo here, an ordinary person understands what a "hazard" is in the context of their everyday life. What's more, the Ordinance supplements and clarifies the phrase 'potential safety hazard' with a detailed list of prohibited items set forth in Exhibit A."

FACTS:

> "In anticipation of hosting the Democratic National Convention in August 2024, the City of Chicago enacted Ordinance 2024-0008373 (the 'Ordinance')…. In relevant part, the Ordinance makes it unlawful for people to bring certain items into the 'Security Footprint,' a protected area around the Convention sites…. Within the Security Footprint, people may not possess 'any item that poses potential safety hazards . . . including, but not limited to, any item listed in Exhibit A….' Exhibit A lists items such as laptops, sealed packages, drones, firearms, ammunition, tents, '[a]ny pointed object(s) including knives of any kind,' and 'Any Other Items Determined by Chicago Superintendent of Police, in consultation with the United States Secret Service and the Chicago Office of Emergency Management and Communications, to be Potential Safety Hazards."
>
> During the Convention, Plaintiffs intend to enter the Security Footprint area 'to participate in marches or demonstrations' in exercise of their First Amendment Rights."

Legal Lesson Learned: Security ordinance is lawful, and necessary to protect all attending the Convention.

File: Chap. 3, Homeland Security

LA: PD INJURED BY ROCK THROWER - "BLACK LIVES" PROTEST - MAY SUE PROTEST ORGANIZER NEGLIGENCE

On June 16, 2024, in Officer John Doe, Police Officer v. DeRay Mckesson; Black Lives Matter, the U.S. Court of Appeals for 5th Circuit (New Orleans), held (2 to 1) that a Baton Rouge police officer, who suffered "loss of teeth, injury to jaw, [and] injury to brain and head," when an unknown protestor threw an object during a July 9, 2016 demonstration, may proceed with his negligence lawsuit against the protest organizer (but can't sue the Black Lives organization). The state Supreme Court confirmed to the 5th Circuit that the "Fireman's Rule" (or professional rescuer doctrine) no longer state law, so police of firefighters can sue for on duty injuries.

THE COURT HELD:

> "This case returns to us after remand from the Supreme Court and certification to the Supreme Court of Louisiana. The controversy concerns a Black Lives Matter protest organized and led by Appellee DeRay Mckesson. During that protest, an unidentified demonstrator struck Appellant John Doe, a police officer in the Baton Rouge Police Department, with a heavy object, causing him to sustain severe injuries.
>
> ***
> "Our limited holding guarantees only that Doe may proceed to discovery on his negligence claim. It does not guarantee that he will prevail on that claim. Mckesson will have every opportunity to discover and offer evidence disproving Doe's allegations that Mckesson breached his duty of care, and that the breach was a but-for cause of Doe's injuries. Likewise, and in light of the fact that Doe seeks to avail himself of Louisiana tort

law, Mckesson is entitled to seek to avail himself of traditional tort defenses. These defenses would of course be available to future defendants in future cases. For example, if a defendant could show that a police officer improperly provoked a confrontation with a protestor, the defendant might assert the defense of comparative negligence, which remains available to assign proportional fault, as the Supreme Court of Louisiana explained on certification."

DISSENT:

"Officer John Doe was honoring his oath to serve and protect the people of Baton Rouge when an unidentified violent protestor hurled a rock or something like it, striking Doe in the face and inflicting devastating injuries. Officer Doe risked his life to keep his city safe that day—same as every other day he put on the uniform. He deserves justice. Unquestionably, Officer Doe can sue the rock-thrower. But I disagree that he can sue Mckesson as the protest leader. The Constitution that Officer Doe swore to protect itself protects Mckesson's rights to speak, assemble, associate, and petition. First Amendment freedoms are not absolute—but there's the rub: Did Mckesson stray from lawfully exercising his own rights to unlawfully exorcising Doe's? I don't believe he did."

FACTS:

"Appellee DeRay Mckesson is a leader in the national social movement known as "Black Lives Matter." Throughout 2015 and 2016, and prior to the events at issue here, Mckesson participated in Black Lives Matter protests in Baltimore, McKinney, Ferguson, and Earth City, in which protesters injured dozens of police officers, looted businesses, and damaged private and public property. Continuing the string of protests, Mckesson planned a Black Lives Matter demonstration for July 9, 2016, in Baton Rouge. On that day, under Mckesson's leadership, protesters congregated in front of the police station for the Baton Rouge Police Department. The congregation blocked access to the police station and the adjacent streets, Airline Highway and Goodwood Boulevard. As a precaution, the police leadership directed officers to monitor the protest and make arrests, if any were necessary. The police organized a front line of officers in riot gear, arranged in front of officers in ordinary uniforms, designated to make arrests. Officer John Doe was one of the latter. According to the complaint, Mckesson was 'in charge' of the protest at all times, and regularly 'gave orders' to the demonstrators. The protest began peacefully, but soon escalated and 'turned into a riot.' According to the complaint, Mckesson 'did nothing to stop, quell, or dissuade these actions.' The protestors then looted a grocery store, taking water bottles among other things. They began to throw the water bottles at the police. Doe alleges that, rather than attempt to 'calm the crowd,' Mckesson 'incited the violence' and 'direct[ed] the activity of the protesters Mckesson then led the protestors into the street on Airline Highway, with the purpose of proceeding to and obstructing Interstate 12. The police. blocked the protestors' advance, but the protestors continued to throw water bottles. When they ran out of those, one demonstrator 'picked up a piece of concrete or similar rock like substance' and threw it into the assembled officers. The projectile struck Doe 'fully in the face,' immediately knocking him down, incapacitated."

Legal Lesson Learned: Protests can quickly get ugly; this is an important decision on potential liability of a protest leader.

> Note: Louisiana has abolished the "Fireman's Rule." See Footnote 6: "As noted above, we previously apprehended that Louisiana's professional rescuer's doctrine might apply here and bar Doe's negligence claim…. But on certification, the Supreme Court of Louisiana held that the doctrine has been 'abrogated in Louisiana both legislatively and jurisprudentially' … As such, the doctrine poses no bar to Doe's recovery here."

File: Chap. 4, Incident Command

UT: TWO FOREST FIRES – IC DECIDED TO LET BURN – HIGH WINDS 100,000 ACRES – BUILDING OWNERS CAN'T SUE

On July 30, 2024, in Strawberry Water Users Association v. United States, the U.S. Court of Appeals for 10th Circuit (Denver) held [3 to 0) that U.S. District Court judge properly dismissed the lawsuit for "lack of jurisdiction." "[T]he Forest Service undoubtedly acted within the ambit of its authority in allowing the fires to burn. Congress granted the Forest Service the authority to develop and implement wildfire-management policies under dual statutory regimes."

THE COURT HELD:

> "The issue on appeal is whether the discretionary-function exception to liability under the Federal Tort Claims Act (FTCA) applies to the United States Forest Service's alleged mismanagement of two wildfires ignited on public lands. The district court held that the exception applied and therefore it was stripped of jurisdiction to hear the claims… Exercising jurisdiction under 28 U.S.C. § 1291, we affirm."

FACTS:

> "The underlying facts are uncontested. The accounts that follow are taken from the complaint, a government affidavit, and official documents. In late summer 2018 lightning struck remote areas of national forests in Utah, igniting the Bald Mountain and Pole Creek Fires. Believing the small fires could benefit the forest environment, the Forest Service decided to monitor and contain the fires rather than suppress them. But unpredicted high winds fueled the fires' expansion. Although the Forest Service soon evolved its strategy from containment to full suppression, the wildfires burned approximately 100,000 acres of public and private lands for over a month. Seeking damages for the wildfires' destruction of property of its members, Plaintiff Strawberry Water Users Association sued the United States under the FTCA, alleging mismanagement of the wildfires.
>
> ***

> On September 10 [2018] the National Weather Service issued a Red Flag Warning for high winds in the area, 'earlier than the firefighters expected.' …The winds rapidly escalated the growth of the fires over the next few days. Fire managers' strategy evolved from 'confine and contain' to 'full suppression,' and individuals threatened by the spread of fire were to be evacuated…. Fire managers implemented a wide variety of control tactics, including the use of aircraft and bulldozers, and the establishment of new containment lines. On September 13 the Forest Service announced its intent to '[u]tilize direct and indirect tactics to fully suppress the fire. This action will take into account: first, risk and exposure to firefighters and the public; and second, the protection of identified values such as utility corridors and infrastructure, private structures, the railroad corridor, and the Highway 6 corridor." … In October 2018 the fires were finally brought under control. Yet the wildfires left nearly 100,000 acres of public and private land burned in their wake. 'This explosion of fire activity was driven by winds that, according to the Public Information Officer attached to the incident, 'were almost unnatural.' "

Legal Lesson Learned: Congress under Federal Tort Claims Act provides immunity for government officials making discretionary decisions.

File: Chap. 4, Incident Command

KY: FIRE CHIEF – REFUSED MUTUAL AID 3rd FD – PRIOR ISSUES 3rd FD's INCIDENT COMMAND – QUAL. IMMUNITY

On July 26, 2024, in Lina Combs v. Jackson Fire Chief Chase Deaton, the Court of Appeals of Kentucky held (3 to 0) that trial court properly dismissed the lawsuit regarding total loss of a commercial building in 2021. The Fire Chief enjoys qualified immunity for discretionary duties; he testified that he called in two mutual aid FDs, but rejected offer for 3rd FD since he has prior experience with that FD which "do not fall within the incident command structure, will not listen to anything anybody tells them to do, which violates all National Incident Management System practices." Court also rejected building owner's argument that FD liable because one hydrant had low flow; hydrants regularly inspected, including in 2020.

THE COURT HELD:

> "Deaton, in his official capacity as fire chief, is also afforded this same sovereign immunity as the city and the JFD.
>
> ***
>
> We must move to individual capacity liability. Public officers and employees are entitled to qualified official immunity for negligent conduct when the negligent act or omissions were (1) discretionary acts or functions, that (2) were made in good faith (or more to the point not made in bad faith), and (3) were within the scope of the employee's authority.
>
> ***

The circuit court found that Deaton's actions in refusing assistance from QFD were clearly discretionary. Further, the court found that Combs was unable to meet the burden that Deaton had acted in bad faith in making his decisions.

***

The Fire Chief testified in his deposition:

> The Quicksand Fire Department, we do not feel, was capable to fall with the incident command structure and keep themselves or somebody else from getting hurt or killed on that fire. The fire on Main Street was not your average, everyday single-wide trailer fire that you would go to. That building, that large with that much smoke buildup, and that much fire involvement could easily get somebody hurt or killed. With previous experience with Quicksand, they have put – and they do not fall within the incident command structure, will not listen to anything anybody tells them to do, which violates all National Incident Management System practices.

***

Combs was unable to show a breach of any ministerial duty to inspect and maintain the fire hydrants in the city by Deaton in his job of fire chief nor any causation between the water available at the location of the hydrant as compared to other water sources."

FACTS:

"In the early morning hours of September 17, 2021, a commercial building located at 1148 Main Street, in Jackson, Kentucky, caught fire. Combs owned the building. At approximately 2:41 a.m., the Jackson Fire Department ('JFD' received the call from dispatch. JFD Chief Deaton proceeded to the scene. Several other firefighters, including two assistant chiefs, were already on scene when Deaton arrived. According to Deaton, he was on the phone with Assistant Chief Art Sebastian ('Sebastian') while he was on his way. Sebastian recommended to Deaton that they request more manpower, as this was a large fire. Deaton made requests to two local fire departments for assistance, Wolfcoal Fire Department and Watts-Caney Fire Department. Both departments responded and came to the scene to assist. In addition to these departments, Quicksand Fire Department ('QFD') offered assistance although not requested. Deaton rejected QFD's offer."

***

Deaton and the other firefighters discovered the hydrant supplying the hose from Engine 1 was not giving an adequate water supply. This led to the firefighters attaching another

> hose to a hydrant farther away. Despite the firefighters' efforts, which lasted throughout the day, the building was a total loss."

Legal Lesson Learned: Fire Chief has qualified immunity in making discretionary decisions in good faith, including rejecting mutual aid from a FD that does not follow incident command.

File: Chap. 5, Emergency Vehicle Operations

TX: CAPTAIN IN FD VEHICLE – STOPPED FOR GAS / MVA – CITY CAN BE SUED – EXCEPTION "GOING & COMING RULE"

On July 16, 2024, in The City of Houston v. Amber Stoffer, the Court of Appeals of Texas, First District, held (3 to 0) that trial court properly denied the City's motion for summary judgment; under the City's tort claim act it can be sued for damages incurred by employees "acting within the scope of employment." Under the "coming-and-going rule," an employee is generally not acting within the scope of her employment when traveling to and from work. However, since the Captain stopped for gas for FD vehicle, after conducting training at a FD station (the fire station pump was not working), there is a presumption she was acting within scope of her employment and jury can decide that question of fact.

THE COURT HELD:

> "Because conflicting inferences could be drawn from Captain Tollett's affidavit and deposition testimony, and we resolve doubts in Stoffer's favor, Captain Tollett's statements that she stopped at the convenience store to refuel her city-issued vehicle is some evidence that she was not merely stopping for personal needs.
>
> ***
>
> The TTCA's limited waiver of immunity for motor vehicles only applies if the government employee was 'acting within the scope of employment' at the time of the alleged event. Tex. Civ. Prac. & Rem. Code § 101.021(1). The TTCA defines 'scope of employment' as 'the performance for a governmental unit of the duties of an employee's office or employment and includes being in and about the performance of a task lawfully assigned to an employee by competent authority.' *Id.* § 101.001(5).
>
> ***
>
> Under the 'coming-and-going rule,' an employee is generally not acting within the scope of her employment when traveling to and from work…. However, if the vehicle involved in the accident was owned by the defendant and the driver was an employee of the defendant, a presumption arises that the driver was acting within the scope of her employment when the accident occurred."

FACTS:

> "Captain Tollett's act of stopping at the convenience store to refuel her city-issued vehicle, which she had been unable to do earlier that day at the fire station because the pumps were not working, benefitted her employer because it enabled her to travel and perform the duties of the training project.
>
> ***
>
> My overtime began when I reached the station to be trained, usually between 7:00-7:30 am, and stopped when training and equipment matters were completed, usually between 4:30 and 5:00 pm. I needed fuel and was going to stop at the convenience store located at Larkin and TC Jester. The light at that intersection does not have a protected left turn. There were two cars in front of me at the light. When there was a break in traffic, the two cars ahead proceeded to make the left turn and I followed. The first car turned into the convenience store and the second car (the one ahead of me) came to a complete stop. A vehicle traveling at a high rate of speed in the far-right southbound lane came over the TC Jester bridge. There was another car in the eastbound lane of Larkin so I could not move past the car ahead of me. The southbound vehicle did not engage the brakes until it was in front of the convenience store and struck the vehicle [] I was driving on the passenger side. There was nothing I could do to get out of the way."

Legal Lesson Learned: The "coming and going" to work rule, where employer normally cannot be sued, doesn't apply when employee operating FD vehicle and stopping for gas.

File: Chap. 6, Employment Litigation

IL: FF LINE-OF-DUTY KNEE INJURY – 6 YRS LITIGATION – GETS HEALTH INSURANCE – REIMBURSED PRIVATE PAY

On July 29, 2024, in Benno Ceyer, et al. v. The City of Berwyn, the Court of Appeals of Illinois, First District, First Division, held (3 to 0) that the FF is entitled to reimbursement for the private insurance costs he purchased (Oct. 11, 2008 – Feb. 15, 2015), when the city's Pension Fund denied his disability claim. Under section 10 of the state's Public Safety Employee Benefits Act (Act) (820 ILCS 320/10 (West 2018)), firefighters who suffer a catastrophic injury in responding to an emergency are entitled to payment of health insurance premiums by their employer. When the city Pension Fund initially denied him coverage. The Trial Court judge found that the Pension Fund hearing officer, instead of being "neutral" hearing officer, was also an attorney for the Fund. The retired FF opened his own business, Weimer Machine (WM), which reimbursed health insurance for his two employees; he had no obligation to have the company reimburse himself, and from 2008 – 2015 he purchased his own private insurance.

THE COURT HELD:

"The record reflects that, at all relevant times, Ceyer has been covered under the City's group health insurance plan. He paid his own premiums from September 2008 to May 2015, after which the City commenced making payments under the Act. At no time did Ceyer receive health insurance through WM, nor did he receive reimbursement from WM for the cost of the premiums that he paid. The City nevertheless argues that Ceyer had 'access to health insurance through [his] employer' because WM paid health insurance premiums for two of its employees, Pietraszewski and Rausch, and could therefore theoretically have done the same for Ceyer.

We disagree. As the trial court aptly stated, 'to find that 'payable from any other source' under [the Act] includes a beneficiary's individual capacity to go buy themselves insurance would be inconsistent with the purpose of [the Act].' Indeed, such an interpretation would entirely vitiate the statute. We will not interpret a statute 'in a manner that makes [it] meaningless.' Boucher v. 111 East Chestnut Condominium Ass'n, 2018 IL App (1st) 162233,¶ 18.

FACTS:

"On July 1, 2005, Ceyer injured his right knee while responding to an emergency fire alarm. Following multiple surgeries and a period of many months, when he was unable to perform any work, he was placed on light duty. On January 8, 2008, his treating surgeon recommended permanent work restrictions that would prohibit him from returning to full duty.

***

Ceyer's eligibility for health insurance coverage expired in October 2008 when he ceased to be on the City's payroll. Following a hearing about which [trial court] Judge Flynn expressed 'considerable concern' that it was 'substantially other than neutral,' Ceyer was denied a line-of-duty disability pension on December 23, 2008, and was forced to engage in more than six additional years of litigation before finally being awarded his pension in 2015. Notably, Judge Flynn explicitly stated that the Pension Fund's denial of benefits and 'the non-level playing field which was evinced during the hearing seem to be related to each other to some degree."

Under these specific facts, we hold that the trial court correctly found that Ceyer's eligibility for the Act benefits commenced on December 23, 2008, the date on which the Pension Fund initially denied his application for a line-of-duty disability pension."

Legal Lesson Learned: It is a shame to have 6 years of litigation to receive disability retirement health insurance.

> Note: Under the State statute, he was entitled to free insurance for a line-of-duty injury.
> [Footnote 1.] "A 'catastrophic injury' is defined as 'an injury resulting in a line-of-duty disability' under section 4-110 of the Illinois Pension Code (40 ILCS 5/4-110 (West 2000)). Krohe v. City of Bloomington, 204 Ill. 2d 392, 400 (2003).

File: Chap. 6, Employment Litigation

LA: NEW TIMEKEEPING SYSTEM – ALL FF REQUIRED FINGERPRINTS - UPHELD BY U.S. DISTRICT COURT

On July 22, 2024, in Chistopher Perre, et al. v. East Bank Consolidated Special Service Fire Protection Section, five firefighters filed a lawsuit challenging new "Kronos" timekeeping security system where their fingerprints must be taken. U.S. District Court Judge Wendy B. Vitter, in a lengthy decision reviewing U.S. Supreme Court and lower court decisions, dismissed the lawsuit. "However, even assuming such mandatory fingerprint collection qualifies as a Fourth Amendment search, Plaintiffs fail to show that the search was unreasonable… The intrusion undertaken by Defendants therefore satisfies the legitimate government interest in timekeeping and ensuring that public funds related to employee salaries are used for their intended purpose. The fingerprinting policy was justified at its inception."

THE COURT HELD:

> "While the fingerprinting in this case likely constituted a search under *Jones*, the search did not run afoul of the Fourth Amendment. The scope of the particular intrusion and the manner in which it was collected in this case were minimal. The timekeeping justification for the intrusion constitutes a legitimate work-related, non-investigatory intrusion that satisfies the reasonableness standard in terms of its inception and scope. Therefore, the fingerprinting of Plaintiffs was not an unreasonable search in violation of the Fourth Amendment. Because the Plaintiffs cannot demonstrate an underlying constitutional violation, their § 1983 *Monell* claims against the Defendants necessarily fail. Likewise, the Plaintiffs' Louisiana constitutional claims also fail."

FACTS:

> "In response to this initial opposition from Plaintiffs and other firefighters to the request to turn over their fingerprints, the then-existing Fire Department Fire Chief David Tibbets ordered the Plaintiffs to submit to a fingerprint search without exceptions under 'the threat of disciplinary action.' With objection, the Plaintiffs complied with the order and let the Fire Department take their fingerprints. The Plaintiffs maintain that there was no 'special need' for the fingerprint search nor was

there any valid basis for the taking of their fingerprints. The Plaintiffs also claim that several administrators in the fire Department exempted themselves from the fingerprinting policy."

Legal Lesson Learned: There is little case law on fingerprinting of employees; this decision is extremely well researched.

Note: See the "Kronos" timekeeping system.

Chap. 7 – Sexual Harassment, incl. Pregnancy Discrimination

Chap. 8 – Race / National Origin Discrimination

Chap. 9 – Americans With Disabilities Act

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

File: Chap. 11, Fair Labor Standards Act

SC: FF / PARAMEDIC – 90% OF HER TIME EMS DUTIES – FF EXEMPTION STILL APPLIES - OVERTIME AFTER 53 HOURS

On July 30, 2024, in Heather Nicole Davis v. Jasper Countyv, U.S. District Court Judge Bruce Howe Hendricks granted summary judgment to Jasper County; as a firefighter / paramedic she is only entitled to overtime after 53 hours (not 40 hours). "The Court finds Plaintiff's argument without merit. Based on the testimonial evidence set forth above, there is no genuine dispute that Plaintiff actually engaged in fire prevention and suppression – she sometimes drove the fire truck, has operated the fire pump, and has put on her turn out gear and entered a structure on fire. There is no requirement in the statute that Plaintiff engage in fire prevention and suppression with any specified frequency."

THE COURT HELD:

> "Here, Plaintiff does not dispute that she was employed as a Firefighter/Paramedic; that she trained in fire suppression; that she had the legal authority to engage in fire suppression; and that she was employed by a fire department of a county…. Thus, as to the first part of § 203(y), elements (1) through (4), the remaining issue is whether plaintiff had the responsibility to engage in fire suppression.
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> ***
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> In 1999, Congress amended the FLSA to 'clarify the overtime exemption for employees engaged in fire protection activities.' Pub. L. No. 106-151, 113 Stat. 1731(codified as amended at 29 U.S.C. § 203(y)). Under 29 U.S.C. § 203(y), the following employees are, by definition, considered to be involved 'in fire protection activities' for the purpose of the Section 207(k) exemption: an employee, including a

> firefighter, paramedic, emergency medical technician, rescue worker, ambulance personnel, or hazardous materials worker, who . . . is trained in fire suppression, has the legal authority and responsibility to engage in fire suppression, and is employed by a fire
> department of a municipality, county, fire district, or State; and is engaged in the prevention, control, and extinguishment of fires or response to emergency situations where life, property, or the environment is at risk."

FACTS:

> "Here, Plaintiff testified that while employed with the County as a Firefighter/Paramedic, she was assigned to the ambulance performing medical functions 90 percent of the time…. She testified that she responded to some fire calls and was sometimes in the fire truck and has driven the firetruck in response to a fire call…. While on the scene of a structure fire, she testified that she has filled the role of incident commander and pump operator, and she has actually gone into a structure to fight a fire…. On those
> occasions where she responded to a fire call in an ambulance, she testified that there were times when she was asked to put on her turn out gear—which she testified she carried everywhere she went—and to assist with fighting the fire….
> (further testifying that it 'just depended on what the incident commander had tasked you to do').) As to the frequency in which that happened, Plaintiff testified that she could 'probably count on two hands the time[s] that [she] actually fought fire, but if the need arose or she was asked while she was on the scene performing medical functions, she could have, would have, and was expected to engage in fire suppression activities… On cross-examination, Plaintiff first testified that she did not know but then estimated that out of the 1,960 calls on average that she received during her employment with the County, 12 of them resulted in her actually performing fire suppression activities."

Legal Lesson Learned: FLSA Section 207(k) exemption clearly applies to her; one has to wonder why she even filed this lawsuit.

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

File: Chap. 13, EMS

FL: CAPTAIN FIRED - REFUSED ISSUE COVID REPRIMANDS – – CASE REINSTATED - U.S. SUP. CT. "SOME INJURY" TEST

On July 23, 2024, in Stephen M. Davis v. Orange County, the U.S. Court of Appeals for the 11th Circuit (Atlanta) held (3 to 0) that the fired Captain's lawsuit will be remanded to U.S. District Court Judge in Florida, who had dismissed "retaliation" claims because the order to

issue written reprimands did not amount to a "serious and material change in the employees' terms, conditions, and privileges of employment." However, on April 17, 2024, the U.S. Supreme Court issued the "landmark" decision in Muldrow v. City of St. Louis, which held that a female Saint Louis police officer may sue for her job transfer from Intelligence Division back to patrol duties.

Captain Davis gets the benefit of the new standard requiring only proof of "some injury."

THE COURT HELD:

> "But during the pendency of this appeal, the Supreme Court decided Muldrow v. City of St. Louis, 144 S. Ct. 967 (2024), in which it clarified a plaintiff's required showing for an adverse employment action under the anti-discrimination provision of Title VII. The Supreme Court explained that a plaintiff 'need show only some injury respecting her employment terms or conditions,' or in other words, a 'disadvantageous change in an employment term or condition." Id. at 974, 977 (internal quotation marks omitted). But an injury need not constitute significant, serious, or substantial harm to suffice under the statute. Id. at 974. Thus, Davis does not need to meet our higher pre-Muldrow standard to make out a claim for retaliation under Title VII."

FACTS:

> "Stephen Davis, a former Orange County Fire and Rescue Department battalion chief, filed this lawsuit against Orange County after the County terminated his employment for disobeying a supervisor's order. Davis alleged that the County retaliated against him in violation of Title VII of the Civil Rights Act of 1964, the Americans with Disabilities Act of 1990 ('ADA'), and the Florida Civil Rights Act ('FCRA') when he opposed the County's order to issue written reprimands to unvaccinated firefighters during the COVID-19 pandemic. The district court dismissed the retaliation claims, concluding that he failed to state a claim for relief. After careful consideration, we vacate the district court's judgment and remand for further proceedings.
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> ***
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> Before his termination, Davis served in the Orange County Fire and Rescue Department as a battalion chief. As a battalion chief, he oversaw six fire and rescue stations and over 50 employees. His job responsibilities included issuing discipline up to the level of written reprimands.
>
> Three months before Davis's firing, the County declared a state of emergency due to the COVID-19 pandemic and mandated that all County employees receive a COVID-19 vaccine. After issuing the mandate, the County began negotiations with labor unions to address medical and religious exemptions for County employees who refused to receive the COVID-19 vaccine. Davis submitted a personal religious exemption request.

The County reached an agreement with the labor unions providing, in part, that unvaccinated employees would be subject to weekly COVID-19 testing. Further, unvaccinated employees who failed to submit a timely exemption request 'would receive one written discipline in their employee file with 'no further disciplinary action.' Doc. 1-1 at 6.1 Under the agreement, this written reprimand could 'not be considered or used in the bargaining unit member's performance evaluation' by the County. Id. (internal quotation marks omitted). Only unvaccinated employees who refused to participate in weekly COVID-19 testing were subject to discipline beyond the written reprimand. The agreement made battalion chiefs, like Davis, responsible for issuing the written reprimands to unvaccinated employees without exemptions.

On the same day the agreement went into effect, Davis joined other County employees in filing suit against the County to protest the vaccine mandate. A few days later, Davis received the names of unvaccinated firefighters due to be reprimanded for failing to submit an exemption to the County. Davis believed that some of the listed individuals had properly submitted exemptions and that issuing them written reprimands would be "a violation of state and federal laws." Id. at 7.

Because he received the written reprimand list after business hours, he was unable to verify the list with the human resources office, so he called Assistant Chief Kimberly Buffkin about the perceived discrepancies. Davis informed Buffkin of his concerns about the list's accuracy and his belief that the County fire and rescue rules and regulations obligated him to disregard orders that violated state or federal law. In an email to Buffkin that same evening, Davis expressed that '[h]e would not comply with the order to issue discipline' unless the County verified the list and that 'he considered the entirety of the vaccine mandate unlawful.' Id. at 9. Shortly after Davis sent the email, Davis and Buffkin met in person. Buffkin ordered Davis 'to issue the reprimands, without acknowledging or verifying if his concerns were correct.' Id. at 10. When Davis refused to comply with the order, Buffkin relieved him from duty. The next day, the County clarified that battalion chiefs should check with the human resources office to determine the distributed list's accuracy before issuing written reprimands. After a disciplinary hearing, the County terminated Davis for insubordination.

The district court concluded that Davis failed to state a prima facie case of retaliation under any of the statutes he cited because his subjective belief that the written reprimands constituted discrimination under the statutes was unreasonable on its face. The district court reasoned that the dispositive flaw causing all three retaliation claims to fail was that, under controlling precedent, a showing of discrimination under the statutes required a serious and material change in the employees' terms, conditions, and privileges of employment.:

Legal Lesson Learned: Under the U.S. Supreme Court's new "some injury" standard, many more discrimination and retaliation cases will now proceed to pre-trial discovery and trial.

Note: See this June 15, 2024 article: "BREAKING: Former Orange County Fire Rescue battalion chief announces candidacy for County Commission District 1. Stephen Davis in 2021 was fired from the department after he did not reprimand personnel who refused to take the COVID-19 vaccine."

Chap. 14 – Physical Fitness, incl. Heart Health

File: Chap. 15, Mental Health

ME: DROWNING / PSYCH - FF SHOUTED: "GONNA "KICK HIS ASS IF HE GETS OUT OF THAT WATER" – CASE DISMISSED

On Aug. 1, 2024, in John Cohen v. City of Portland, et al., the U.S. Court of Appeals for 1st Circuit (Boston), held (3 to 0) that Federal District Court judge properly granted summary judgment to City, police officers and the firefighter who made the "kick ass" comments. Regardling the claim against the firefighter, on appeal "the estate simply asserts that Cohen was in shallow water, and therefore 'may have been able to come out of the water' absent [firefighter Ronald] Giroux's threat. Even if we assume that Cohen could have come out of the water in defiance of Giroux's bellowed threat, this assumption would not justify finding that (1) he would have done so, (2) he would have done so before the rescue boat arrived, or (3) doing so would have prevented his eventual death."

THE COURT HELD:

> "We first consider the state-created danger claim against Giroux. Giroux arrived at the Back Cove at 1:42 p.m. Cohen had already been in the water for around twenty minutes. Giroux did not know that Cohen was in the midst of a psychotic episode. He knew only that Cohen had assaulted his girlfriend before fleeing into the water. At 1:43 p.m., Giroux called out: "Tell him we're gonna kick his ass if he gets out of that water." Giroux's only other involvement at the scene was to hand [Police Sergeant Michael] Rand a life jacket for [police officer Blake] Cunningham [a former U.S. Coast Guard rescue swimmer].
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> ***
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> Here, the district court found that no reasonable jury could conclude that Giroux's threat factually or legally caused Cohen's death. See Cohen ex rel. Est. of Cohen v. City of Portland, No. 2:21-CV-00267-NT, 2023 WL 8187213, at *10 (D. Me. Nov. 27, 2023). Specifically, the court found that a jury could only find causation via a series of increasingly speculative inferences:

> [The jury] would have to find that Cohen could have made the deliberate choice to come to shore while in a state of alleged psychosis, would have been able to get himself to shore after having been in the cold water for twenty minutes already, could have done so faster than the rescue boat ultimately did, and would not have died of hypothermia or drowning if he had started for the shore at the time the comment was made."

FACTS:

> "At or around 1 p.m. on April 12, 2020, the Portland Police Department received an emergency call. The caller said that Cohen -- apparently in the throes of a psychotic episode -- had attacked his girlfriend, stripped off his clothes, and fled the scene. After arriving at the scene of the emergency call, several officers (who are not defendants in this case) chased Cohen into the waist-deep waters of the Back Cove. The Back Cove is an estuary basin on the northern side of the Portland peninsula. When Cohen entered the Back Cove at around 1:23 p.m., the water was approximately forty-one degrees Fahrenheit.
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> Shortly after Cohen entered the Back Cove, Gervais asked the Portland Fire Department for a rescue boat to retrieve Cohen. Gervais drove across the city to get the boat, a trip that took him around eleven minutes. The rescue boat set off at 1:34 p.m. with Gervais and two other officers on board.
>
> Meanwhile, Rand arrived at the Back Cove at 1:33 p.m. Upon his arrival, Rand spoke with police officer Blake Cunningham, a former U.S. Coast Guard rescue swimmer. Cunningham said that if Cohen 'beg[an] to struggle,' he would 'go in and [re]cover him.' Rand responded: 'We should have the fire boat right off, but I understand what you gotta do.' At 1:40 p.m., Cunningham remarked that Cohen would likely drown soon. Rand replied, 'Oh, I know,' but added that he did not want Cunningham retrieving Cohen without a life jacket. He then began looking for a life jacket to give Cunningham. At 1:42 p.m., Cunningham 'reported that [Cohen] had gone under water,' and commented '[h]e is dead.'
>
> Three minutes later, at 1:45 p.m., Cunningham said that if Rand would 'give [him] a life jacket, [he would] go save this guy's life.' Rand authorized Cunningham to enter the water, but then retracted his order when the rescue boat reported that it was 100 feet from Cohen. At around the same time, Rand radioed fire dispatch to determine if an ambulance was nearby, only to find that no ambulance had been assigned. Dispatch assigned an ambulance at 1:46 p.m.
>
> At 1:47 p.m., Gervais reported that the rescue boat had pulled Cohen from the water. Cohen had been face down in the waist-deep water, and Gervais could not find a pulse. Neither Gervais nor any other officer on the rescue boat attempted to resuscitate Cohen. Two minutes later, the boat arrived on shore with Cohen's body. No medical or emergency equipment was on shore. A firefighter covered Cohen with

his jacket, but no officer tried to revive or otherwise tend to Cohen. An ambulance arrived at 1:53 p.m., and paramedics administered CPR. The ambulance left the Back Cove around a half hour later. Cohen was pronounced dead at Maine Medical Center at 2:52 p.m. The medical examiner ruled that Cohen died from hypothermia and drowning."

Legal Lesson Learned: No liability but avoid making threatening remarks at an emergency scene; particularly dealing with psycho patient.

Note: Court remarked about Police Department's rescue efforts at the scene.

> "'Protect and serve' is the motto of the Portland Police Department. Even acknowledging the challenge posed by Cohen's behavior, the efforts of the responding officers likely fell short of the aspirations behind that motto. That being said, this appeal turns on whether any defendant violated Cohen's constitutional rights. And for the foregoing reasons, the answer is clearly no. The district court's dismissal and summary judgment orders are therefore affirmed."

Fil: Chap. 16, Discipline

NJ: FF FIRED - "DELIBERATE SHELL GAME" - RETURNED MILITARY LEAVE – BUT ALSO STAYED ON ACTIVE DUTY

On July 31, 2024, In The Matter Of John Tayag-Kosky, Town Of Kearny Fire Department, the Superior Court of New Jersey, Appellate Division, held (2 to 0; unpublished opinion), that the Civil Service Commission properly upheld the termination. In 2014, when he returned from active duty to FD, he worked 24 / 72 hour shift. He "actively concealed" from FD [2014-2018] that he was still employed as a full-time military recruiter and an active-duty member of the Army National Guard, and concealed from Army he was working as a career FF. The Court rejected his argument that under "progressive discipline" the firing was too harsh.

THE COURT HELD:

> "Kosky argues termination was not justified and violated principles of progressive discipline since he had no prior discipline or infractions with the Department. In making its determination on this issue, the Commission reviewed the ALJ's detailed findings and conclusions, including that Kosky's testimony was not credible and his actions warranted a departure from progressive discipline. Progressive discipline is not 'a fixed and immutable rule to be followed without question' because 'some disciplinary infractions are so serious that removal is appropriate notwithstanding a largely unblemished prior record.' Stallworth, 208 N.J. at 196 (citing Carter, 191 N.J. at 484); Herrmann, 192 N.J. at 34-36. The Commission's decision was clearly supported by the record which showed Kosky deliberately deceived the Department by failing to disclose he was holding two full-time positions in an effort to gain personal advantage in the form of additional pension and health benefits."

FACTS:

> “Chief Dyl expressed shock that Kosky had been on active duty since 2014 because if he was on active military duty, ‘he should have been with the military, not the Town of Kearny.
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> ***
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> [The Civil Service Commission agreed with findings of the Administrative Law Judge.]
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> Specifically, the ALJ found Kosky had ‘made a conscious decision to . . . slip between the cracks—and keep both military and paramilitary commands in the dark’ and that his testimony to the contrary was not credible. The ALJ did not find credible Kosky's representation that he had not thought it was necessary to inform the Department of his active-duty status in 2014, instead finding he had engaged in a ‘deliberate shell game’ and that it was Kosky's intention ‘to keep both military and paramilitary chains of command in the dark about his full-time employment with the other’ because ‘[h]e already knew what each would say, and he wanted to stay on both salaries and benefits."

Legal Lesson Learned: Termination was appropriate; progressive discipline is not appropriate who someone conducting a “deliberate shell game.”

> Note: Read the Civil Service Commission report.