SEPTEMBER 2024 – FIRE & EMS LAW NEWSLETTER

[NEWSLETTER IS NOT PROVIDING LEGAL ADVICE.]

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20 RECENT CASES – INCLUDING THIS IMPORTANT COURT DECISION: FIRE CHIEFS / OTHER PUBLIC OFFICIALS: 1st Amendment Right To Refuse To Falsify Report or Lie [Chap. 16]

- **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**
- **TEXTBOOK:** Updating 18 chapters of my textbook (2018 to current). FIRE SERVICE LAW (SECOND EDITION), Jan. 2017

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File: Chap 1 – American Legal System, Arson

OH: MATTRESS FIRE – WOMAN SERVED 6 YRS OHIO PRISON - FD INVESTIGATOR: TWO FIRES – DEFENSE EXPERT: FALSE, ONE FIRE

On August 26, 2024, in Kayla Jean Ayers v. Ohio Department of Rehabilitation And Corrections, the U.S. Court of Appeals for the Sixth Circuit (Cincinnati), held (3 to 0) that the former prisoner is entitled habeas corpus relief, so she no longer has to register annually as an arson offender; can possess a firearm. Her court-appointed trial attorney was ineffective in not retaining an expert witness concerning the mattress fire in basement on Oct. 3, 2012, which Massillon FD extinguished. While Ayers was still in prison, the Ohio Innocence Project reviewed the case and consulted with "renowned fire-inspection expert John Lentini (Lentini is one of the principal authors of NFPA 921)." He concluded in his July 29, 2019, report that there were not two separate fires on the mattress. The Court wrote: "Lentini is one of the principal authors of NFPA 921, the manual that [Fire Inspector Reginald] Winters relied on in formulating his opinions. In his report, Lentini opined that '[t]here [was] no evidence that [two fires] were 'simultaneously burning' and that '[t]he damage [was] indistinguishable from damage caused by normal fire spread from a single point of origin,' undermining the State's theory that the fire had been started intentionally Lentini also questioned Winters's qualifications to testify about the fire's cause, stating that Winters's methods were 'unreliable, unscientific, and at odds with generally accepted fire investigation methodology.' *** The district court clearly erred in finding that Lentini's report did not establish the factual predicate for Ayers's ineffective-assistance claim."

THE COURT HELD:

> "Although Ayers was released from prison in 2019 and completed post-release control in 2022, she continues to suffer collateral consequences for her felony arson conviction. See, e.g., Ohio Rev. Code Ann. § 2909.15(D)(2) (requiring arson offenders to register annually with the state 'until the offender's death'); 18 U.S.C. § 922(g)(1) (prohibiting convicted felons from possessing firearms).
>
> ***
>
> And Lentini's report posits that Winters was not qualified to testify about the fire's cause and that his conclusion that the fire had two ignition points was not

based on sound scientific methodology. Indeed, such evidence could have resulted in Ayers's acquittal."

FACTS:

"Kayla Ayers and her three-year-old son lived in a house with Ayers's father, Jeff, and his family in Massillon, Ohio…. Jeff resented Ayers for not contributing financially to his household, and he tried to kick Ayers and her son out of the house…. Ayers refused to leave, and she threatened that if Jeff ever moved out of the house, she would burn it down…. On October 3, 2012, Jeff decided to move out and told Ayers that he was leaving. A few hours later, the Massillon Fire Department responded to a report of a fire at the residence.

Firefighters found a mattress ablaze in the house's basement and extinguished the flames. Ayers and her son were the only people home at the time. Ayers's neighbor, who saw Ayers and her son after they exited the house and provided aid until first responders arrived, said Ayers was 'very upset' and repeatedly asking if she was going to lose custody of her children. Ayers initially told investigators that her son accidentally started the fire. '[Ayers] stated she was in the basement folding clothes when she noticed her son by the bed playing with a lighter." … Moments later, she noticed a fire on the bed and 'grabbed a blanket and started fanning the flame."' … She attempted to extinguish the fire with a glass of water but tripped, broke the glass, and cut her hand. Id.

When the fire inspector, Reginald Winters, interviewed Ayers's son, he confirmed the toddler could ignite the lighter. As investigators questioned Ayers further, she briefly changed her story, speculating that she might have started the fire by falling asleep while smoking a cigarette on the mattress. She then changed her mind again, returning to her original story. Nevertheless, the police arrested Ayers and charged her with aggravated arson and child endangerment. Winters prepared an expert report in support of the State's case against Ayers. Citing a fire-inspection manual called NFPA 921, Winters's initial report opined that 'some type of open flame' caused the fire and that he believed to a reasonable level of 'scientific certainty' that a 'deliberate act of a person' caused the fire.

***

Winters also opined that there was a second, distinct ignition on a wooden post on the bed's other side. The prosecution relied heavily on Winters's testimony to argue that it is unlikely that a fire with two separate ignition points on the same bed happened accidentally."

Legal Lesson Learned: Arson investigators must be qualified and base their testimony on scientific evidence.

File: Chap. 1, American Legal System, Arson

KY: TRAILER FIRE – 4-YR OLD KILLED – COLD CASE REVIEW – 3 CONVICTED 20 YRS LATER, COMPLICITY

On Aug. 22, 2024, in Tony Lear v. Commonwealth of Kentucky, and Virginia Whitfield v. Commonwealth of Kentucky, the Supreme Court of Kentucky held (7 to 0; unpublished opinion) that jury properly convicted two defendants in January, 2023 for the September 2, 1999 trailer fire that killed 4-year old Autumn Raymond. Lear, Whitfield and Bobby F. Napier [who owed back rent on the trailer], were all initially charged with murder, arson and first-degree assault, after a 2012 review of open cases by the Kentucky State Police resulting in new information. Napier pleaded guilty in 2019 to amended charges of second-degree arson, in exchange for a 10-year sentence and testified at the trial, He was already serving time on a variety of convictions, including burglary, theft and being a persistent felony offender. The State was not required to prove who actually ignited the sheets with petroleum fluid around the dryer, since all three were "accomplices" to the crime. The Court wrote: "After six days of trial, the jury returned a guilty verdict on complicity to murder, complicity to arson, and two counts of complicity to first-degree assault against the Appellants. Following the jury's recommendation, the trial court sentenced Whitfield and Lear respectively to 20 years. *** Although no evidence can directly point to an individual who started the fire, enough evidence was presented by the Commonwealth to show the Appellants aided, solicited, counseled, commanded, or engaged in a conspiracy with each other to burn down that trailer. The accomplice instructions mirror such evidence. The instructions provide the jury the ability to decide whether the defendant engaged with the other individuals to burn down the trailer."

THE COURT HELD:

> "Here, the Commonwealth's theory throughout trial was that Walton, Lear, and Whitfield all played a part in burning down the trailer. Testimony from several witnesses placed Whitfield and Lear in the room when Walton discussed burning down the trailer for insurance money. Whitfield moved boxes of clothing out of the trailer a few days before the fire with the help of Lear. Neighbors placed Lear at the trailer on the day of the fire, inspecting the dryer vent with Walton. Expert testimony supported the theory of an intentionally caused fire from items stuffed in and around the dryer."

FACTS:

> "On September 2, 1999, first responders were dispatched to a fire at a trailer where Bobby Walton, Whitfield, and her three children resided. Firefighters rescued Whitfield's seven-year-old daughter, Raquel and four-year-old daughter, Autumn from the trailer. Walton and Whitfield escaped out of a window of the

trailer. Whitfield managed to get her nine-year-old son, Tylor out of another window on the opposite side of the trailer.

Walton died prior to charges being brought in this case. Autumn was hospitalized for about a month before dying from injuries sustained by the fire. Raquel underwent around 50 surgeries to address the scarring from burns all over her body, vocal cord damage from smoke inhalation, cataracts caused by steroids, and damage done to her cornea. Tylor burned his hand touching a doorknob during the fire and cut his leg on the window as he escaped from the trailer. He was hospitalized for two weeks following the fire. Whitfield also suffered injuries from the fire that resulted in her requiring a permanent tracheostomy tube."

Legal Lesson Learned: When three conspire to commit arson, all three can be charged with murder from the fire.

Note: See Jan. 4, 2023 article, "Ohio County cold case ends with convictions."

Here is the "active inmate" photo of Tony Lear.

Photo of Virginia Whitfield

File: Chap. 1, American Lega System, Arson

TX: MAN EVICTED – STARTED FIRE – SAW OWNER, TOLD INVESTIGATOR WILL "TRY AGAIN" – ADMISSIBLE

On Aug. 22. 2024, in Hueathen Kirk Gardner v. The State of Texas, the Court of Appeals of Texas, Fourteenth District, held (3 to 0; unpublished decision) that the trial court properly denied the defendant's motion to suppress his comments; the jury convicted him of the first-degree felony offense of arson of a habitation. He was interviewed at the scene for about 15 minutes by Houston Fire Department Senior Arson Investigator Robert Haynes without a *Miranda* warning. When he was told he was going to be arrested, and he saw the homeowner, he made the comments. The Court wrote: "Haynes testified that 'shortly' after informing appellant that he was going to be charged with arson, appellant saw [homeowner] Hoang and made the statement about "trying again" when he gets out of jail. As the trial court noted, appellant's statement 'was in response to the complainant coming to the scene, not questions asked at the scene. *It was happening at the-near the time.* . . . [H]e just blurted it out when he saw the complainant coming.' *** This response was not the result of a custodial investigation or in response to any questioning by Haynes. We therefore conclude that *Miranda* does not require its exclusion. *** [T]here must be an "exciting" or "stimulating" event. The express statutory terms consider the stimulating event to include the offense itself or the arrest. *See* Tex. Code Crim. Proc. Ann. art. 38.22, § 5. Here, the stimulating events consisted of appellant committing arson and then being informed that he was being arrested and charged with arson. We conclude that the first element is met."

THE COURT HELD:

> "For the second element, the statement must be made sufficiently close in time to the stimulating event. Haynes testified that 'shortly' after informing appellant that he was going to be charged with arson, appellant saw Hoang and made the statement about 'trying again' when he gets out of jail. As the trial court noted, appellant's statement 'was in response to the complainant coming to the scene, not questions asked at the scene. *It was happening at the-near the time.* . . . [H]e just blurted it out when he saw the complainant coming.' (emphasis added). With the statement occurring so shortly after being informed he was going to be arrested for arson, we hold that the second element is satisfied.
>
> Concerning the third element, appellant's unsolicited comment clearly related to both the arson and the arrest. Appellant conveyed his intent to burn the house again if Hoang still owned the home after appellant was released from jail. We hold that the third element is satisfied."

FACTS:

> "Appellant rented a home owned by Nguyet Hoang. Although they got along at first, their relationship soured over time, and appellant eventually stopped paying rent. Hoang pursued eviction proceedings, obtained an order of eviction, and notified appellant that he had 24 hours to move out of the house. The next day, Hoang had movers place all of appellant's belongings on the sidewalk in front of the house and then changed the locks.
>
> Realizing that he had been evicted, appellant drove to a nearby gas station, purchased two plastic gas cans with gasoline, and then returned to the house. Although Hoang had changed the locks, appellant jumped the fence with one of the cans of gasoline and kicked in the back door. Appellant then poured gasoline throughout the interior of the home, ignited the gasoline with a match, and returned to the front yard. While a concerned neighbor looked on, appellant poured gasoline from the second gas can all over his own possessions in the yard, and set them on fire.
>
> While a firefighter-neighbor began spraying water on the home with a garden hose to try to contain the fires inside and outside of the house, appellant stood next to his truck across the street and filmed the fire with his cellphone. An undercover police officer who was looking for appellant because of an open, unrelated arrest warrant witnessed appellant's behavior. Appellant drove away from the scene, but he was stopped and arrested based on the open warrant. Because the police officer suspected he committed arson, the officer drove appellant back to the scene.

> Houston Fire Department Senior Arson Investigator Robert Haynes interviewed appellant for about 15 minutes, without any *Miranda* warnings, then assessed the extent of the fire damage. After speaking with several neighbors and other officers, Haynes returned to appellant to advise him that he was going to be charged with arson. According to Haynes, during this second interaction, when appellant saw Hoang arrive at the scene, he blurted, 'when [I] g[e]t out, if [Hoang] still owned the house, . . . [I am] going to come back and try again.'"

Legal Lesson Learned: Exciting or spontaneous comments by defendant admissible in evidence; sometimes called "res gestae."

> Note: See definition of "res gestae."
>
> "Res gestae is a Latin term meaning "things done" or "things transacted." It refers to the events or circumstances at issue, as well as other events that are contemporaneous with or related to them. Courts previously employed this term in order to admit otherwise inadmissible hearsay. The term is not used much now. In evidence law, for example, the Federal Rules of Evidence, Rules 803(1)["present sense impression"], 803(2)["excited utterance"], 803(3)["declaration of existing physical condition"], and 803(4)["declaration of past physical condition"], now specifically encompass and limit what was previously used as res gestae."

File: Chap. 1, American Legal System

NY: E-BIKE FIRE – TENANT CHARGED BIKE ON 5th FLOOR APT - NOT BASEMENT STORAGE – $5,000

On Aug. 19. 2024, in Forest House, LLC v. Jamaris Santos, City of New York, Civil Court, Bronx County, Judge Verena C. Powell held, after a bench trial, that the tenant was negligent in charging e-bike in her 5th floor apartment, instead of the basement storage area, and must reimburse the building owner for the $5,000 deductible on their building insurance policy, plus attorney fees. February 7, 2021, at approximately 1:20 a.m., the New York City Fire Department (FDNY) responded to a 911 fire call on the fifth floor of 770 East 166th Street, Bronx, New York 10456. The Court wrote: "Ms. Santos' testimony established that she was aware of and had access to the building's bike room but decided not to use it, instead storing and charging the device inside her apartment. As the Plaintiff's tenant, the defendant assumed the duty of exercising ordinary care to store the e-bike in an area designated for such items. The defendant's negligence is established by her storing the e-bike in a location other than one designated for its storage, and that, once engulfed in flames, was placed in the public hallway, impeding egress from the building."

THE COURT HELD:

"Fire Marshal Coyle testified that the cause of the fire was the disintegration of the electric wiring coating within the battery compartment of the e-bike. He reached this conclusion by speaking with Battalion Chief McGenn and Lieutenant Owens about the e-bike's condition when they reached the fire, interviewing Ms. Santos regarding her observations of the fire, examining a photograph of the charred e-bike, and noting smoke stains on the apartment wall about 3 feet above the floor. The picture of the e-bike shows that the area under the rider's seat sustained the most significant amount of damage, thus indicating where the fire ignited. This Court credits Fire Marshall Coyle's expert testimony and finds that deterioration of the wiring insulation caused the battery to short circuit, igniting the e-bike battery case covering and the e-bike's seat, thereby causing the February 7, 2021, fire in Ms. Santos' apartment."

FACTS:

"Ms. Santos testified on her behalf. She said she did not recall what she did on February 6, 2021, but remembered going to bed at about midnight. About an hour later, Ms. Santos heard the flames (tr at 95). Ms. Santos stated that when she opened her bedroom door, she could feel the heat of the fire and see the bike in flames (tr at 95, 96). The e-bike was in the foyer of the apartment near the entrance door (tr at 96). She said that she screamed upon seeing the flames waking her boyfriend (id.). Ms. Santos then gathered her children and left the apartment (id.). She said the fire had spread to the wall and the ceiling, but she could not recall if the smoke detector had sounded or if the sprinklers had activated (tr at 97).

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Ms. Santos said that she had purchased the e-bike second-hand about one year before the fire but did not receive the operation manual for the e-bike when she bought it. She testified that she used it to travel to work in Manhattan and stored and charged the e-bicycle in the apartment. Ms. Santos knew of the availability of the storage and bike rooms in the building. She admitted that Dalton Management preferred residents to use the bike storage room but maintained that she believed those facilities were for long-term storage rather than daily use.

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Upon arrival, the firefighters found the fire extinguished by a fire suppressant system, namely, sprinklers. They also observed an e-bike in the fifth-floor hallway with a battery that was shorting out.[FN1] The FDNY determined that the fire originated in apartment 5C, where Jamaris Santos resided with her family. The structure sustained fire, smoke, and water damage on the fourth, fifth, and sixth floors from the fire and efforts to contain it. Forest House reported the incident to their insurance company, York Risk Service Group, Inc. The appraised damage and cost to repair the sixth, fifth, and fourth floors totaled $24,398.84, including Forest House's $5,000.00 deductible.

Legal Lesson Learned: Do not charge e-bike in your apartment or home; tenants will be liable for damages.

File: Chap. 1, American Legal System

IL: ALARM SYSTEM ORDINANCE – COMMERCIAL ALARMS MUST GO DIRECT TO 911 CENTER – LAWFUL

On Aug. 14, 2024, in Alarm Detection Services, Inc, et al. v. Village of Schaumburg, United States District Court Judge Joan H. Lefkow, U.S. District Court for the Northern District of Illinois, Eastern Division, granted summary judgment to the Village, in lawsuit by four alarm companies that claimed they have lost 250 commercial clients because of the 2016 Ordinance that requires alarms to go direct to 911 Center (system managed by Tyco Company), instead of first to the alarm companies centers. The Court wrote: "The Village has proffered abundant evidence, as set out above, to demonstrate that it was not motivated to injure Alarm Companies; rather, its motivation was to improve fire safety in the Village…. Unfortunately, Alarm Companies do not counter with data the Village's evidence that, post passage, response times improved and out-of-service systems decreased. But even if they had, it would not undermine the evidence of the Village's motivation at the time the Ordinance was passed….In light of the evidence that the Village pursued legitimate public safety goals in enacting the Ordinance and the paucity of evidence that it intended to induce Commercial Properties to discontinue contracting with Alarm Companies, the court concludes that no reasonable jury would find that the Village's purpose was to induce property owners to cease doing business with Alarm Companies."

THE COURT HELD:

> "Local fire codes, including those of the Village, require certain commercial and multi-family buildings to be protected by fire-alarm systems and typically require that those systems comply with national safety standards set forth in the National Fire Protection Association's National Fire Alarm and Signaling Code (NFPA 72). Under NFPA 72, the installation and maintenance of fire-alarm systems are the responsibility of individual building owners. Owners of commercial and multi-family properties typically contract with private companies, such as Alarm Companies, to provide and maintain the required fire-alarm systems. Such systems generally have three components: (1) smoke and heat detectors that generate signals; (2) an alarm panel that receives signals from those detectors; and (3) a transmission device that sends signals to a monitoring facility. The signals transmitted by the detectors include alarm signals signifying smoke or fire, as well as 'trouble' or 'supervisory' signals which indicate whether the system is performing properly or is out of service.
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> ***

The court acknowledges that there is record evidence to support Alarm Companies' contentions that the Ordinance had the effect of requiring Commercial Accounts to purchase or lease from Tyco at least some equipment necessary to connect to NWCDS. The Village itself seems to have suggested to businesses that Tyco transmitters may be required; after passage of the Ordinance, the Village sent a notice to property owners indicating that Tyco was 'the authorized installer of the radio equipment
required for fire alarm systems monitored by NWCDS.'

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Alarm Companies argue that there is no genuine dispute of fact that the Ordinance caused many Commercial Accounts either to terminate or to refuse to renew their contracts, costing Alarm Companies hundreds of accounts in the Village. Alarm Companies' argument, however, has no support in the evidentiary record. They fail to point to any evidence that any Commercial Account actually terminated early or otherwise breached a contract in response to the Ordinance."

FACTS:

"On July 25, 2016, the Fire Chief sent a memorandum to the public-safety committee recommending a change to the Village Code that would require all fire-alarm systems to connect directly to the Schaumburg 911 center at NWCDS. In the memorandum, the Fire Chief noted hat the Village Code had required direct connection before the 911 center had been transferred to NWCDS in 2007. While the Village had allowed property owners to subscribe to private alarm-monitoring services after 2007, the Fire Department was now recommending a return to the pre-2007 requirement of direct connection. According to the Fire Chief, the change would 'reduce fire-department response times by eliminating an entire step in the process [and] …routing alarm signals directly to 911.' That extra step, the Fire Chief said, was, in some instances, creating delays in alarm-signal notification that exceeded code requirements by several minutes.

The memorandum also addressed the issue, previously raised in the January meeting, that during inspections building alarm systems were found to be out of service without any notice having been given to the Village.4 The Fire Chief observed that the Fire Department had been closely monitoring the issue for the previous 18 months, had found 29 businesses with various signal or maintenance issues, and had concluded that there were likely 'many more additional problematic systems of which we are unaware.'

Ultimately, the Fire Chief believed the change would both reduce response times and assure that supervisory or trouble signals would be received at NWCDS, which could also ensure that building owners and fire departments would be made aware of system problems. An additional benefit, the Fire Chief stated, was that the Village would receive a credit off its subscription fees to NWCDS of approximately $23 per month per property owner that contracted with NWCDS

> for direct monitoring. The Fire Chief estimated that these credits would result in between $300,000 and $400,000 in revenue coming back to the Village, which revenue could be used for a variety of capital projects, services, programs, or tax relief. Alternatively, the Village could waive the credits to reduce the monitoring fees charged to businesses."

Legal Lesson Learned: Village ordinance has proven effective in prompt notification to 911 Center of alarms, and notification to FD of problems with commercial property systems.

File: Chap. 2 – FF Safety, LODD

MI: FF KILLED RESTAURANT FIRE – SEARCH WARRANT OWNER'S PROPERTIES, NOT CHARGED – LT. IMMUNITY

On Aug. 23, 2024, in George Marvaso, et al. v. Richard Sanchez, the U.S. Court of Appeals for 6th Circuit (Cincinnati) held (3 to 0; unpublished opinion) that Michigan State Patrol lieutenant Richard Sanchez was properly dismissed from lawsuit. Firefighter Brian Woehlke died in May 8, 2013 fire at Marvaso's Italian Grille in Westland, Michigan. The Court wrote: "According to Plaintiffs, Sanchez knowingly omitted key information and knowingly included false information in drafting the affidavits, which resulted in the execution of illegal search warrants that violated their Fourth Amendment rights. To support their argument, Plaintiffs list various factual omissions that they claim would have affected the magistrate judge's ultimate probable cause determination. However, with or without the consideration of the additional facts that Plaintiffs proffer, there would have been probable cause to search their homes. Because no Fourth Amendment violation occurred, we agree with the district court's determination that Sanchez is entitled to qualified immunity."

[Note: State OSHA fined the FD $3,500; FF entered; evacuation ordered but only 2 came out.]

THE COURT HELD:

> "First, and perhaps most importantly, Plaintiffs argue that Sanchez withheld the reports of two other fire investigators that concluded that the fire classification was 'undetermined,' not 'incendiary.' Yet, in writing his search warrant affidavits, Sanchez solely mentioned the most recent fire investigation report, which concluded that the fire was incendiary. Although Sanchez certainly should have provided the magistrate judge with the full picture of the various investigations that had occurred, a status of 'undetermined' does not rule out arson. In other words, two reports that failed to arrive at any conclusion at all do not negate or contradict the third report that concluded the fire was likely incendiary. And, without any reports directly contradicting the report that concluded foul play caused the fire, this third report serves as essential evidence to the determination

of probable cause, even considering the other two reports. Further, even if the magistrate had the two 'undetermined' reports, there was still likely enough evidence in the affidavit to clear the low bar of probable cause. Cf. Gerstein v. Pugh, 420 U.S. 103, 121(1975) (holding that the probable cause determination 'does not require the fine resolution of conflicting evidence that a reasonable-doubt or even a preponderance standard demands'). Therefore, this omitted fact does not defeat the probable cause determination."

FACTS:

"On the morning of May 8, 2013, a fire broke out at Marvaso's Italian Grille in Westland, Michigan. The fire spread to the adjacent Electric Stick pool hall and charity poker facility. Both the restaurant and the pool hall are leased and operated by Plaintiffs George and Mary Marvaso whose children George 'Geo' Marvaso Jr. and Sunday Gains are also Plaintiffs to this action and are employed by Electric Stick. Emergency services were called at approximately 8:16 am, and firefighters responded and entered the building within minutes. Although the firefighters successfully extinguished the fire, Firefighter Brian Woelke was unable to exit the building before it collapsed and tragically passed away as a result of smoke inhalation.

Several investigations into the cause of the fire followed. The Wayne-Westland Fire Department conducted an initial on-scene investigation, which revealed no evidence of accelerants or foul play. Shortly after, on May 9, 2013, two other investigators—one representing Plaintiffs' insurer and one representing Plaintiffs' landlord—each preliminarily concluded that the cause of the fire was 'undetermined.' Meanwhile, the Michigan Occupational Safety and Health Administration ("MIOSHA") investigated Woelke's death. Based on various violations of health and safety regulations, MIOSHA cited and fined the City of Westland. The Fire Department admitted these violations and paid the relevant fines.

Months after the fire, Fire Marshal John Adams—despite having uncovered no new evidence—suddenly concluded that there was an 'incendiary cause' to the fire. Adams Report, R. 49-7, Page ID #793. This new conclusion represented a change in course from the on-scene investigation, which originally found no accelerants or other evidence of arson.

Based on this altered determination that the fire was incendiary, Adams submitted a detailed report to the Michigan State Police ('MSP'), which opened a homicide investigation. Lieutenant Sanchez participated in the investigation into the fire on behalf of MSP. Eventually, officers began to suspect Plaintiffs of starting the fire. After reviewing the available evidence, which included Adams' latest report, Sanchez submitted substantially identical affidavits in support of warrants to search each Plaintiff's home, Plaintiffs' business, and Plaintiffs' storage unit. Among other supporting information, the affidavits noted that: (1) a Fire

Marshal's report determined that the fire was arson; (2) several named sources tipped off police that the fire was 'suspicious and most likely an arson fire'; (3) the doors of both businesses were locked at the time of the fire, indicating that 'someone with a key had entered the establishment to ignite the fires';
(4) Plaintiffs were experiencing financial difficulties around the time of the fire;
(5) Plaintiff George Marvaso had increased the coverage on his insurance policy covering the building a few months prior to the fire from $400,000 to $600,000;
(6) Plaintiffs were allowed onsite after the fire was extinguished and were observed retrieving various documents and other items; and (7) managers of family-run businesses frequently store business records at their homes. Sanchez Aff., R. 56-3, Page ID #1578–80. A magistrate judge issued the warrant based on probable cause, and, shortly after, MSP officers executed the warrants at Plaintiffs' three respective homes. No charges were ever filed against Plaintiffs as a result of the searches."

Legal Lesson Learned: Arson investigators enjoy qualified immunity if search warrant was sufficient to show probable cause, even if some exculpatory information was not included.

Note:

- See May 30, 2023 article - Westland firefighters remember Brian Woehlke's 'biggest smile' a decade after his death. "Michigan State Police Lt. Mike Shaw said the case is still open and the agency is still actively seeking information. A National Institute of Occupational Safety and Health report from 2016 concluded staffing issues and below-industry standard equipment could have played roles in Woehlke's death."

- April 15, 2016 article – "Federal agency releases report on fatal Westland fire." "On Friday, the National Institute of Occupational Safety and Health, a division of the Centers for Disease Control, officially issued its 113-page report investigating the death of Brian Woehlke, who died in the line of duty May 8, 2013. The report provides a detailed account of what happened during the fatal fire, which has been ruled a case of arson and homicide. *** The hose team decided to exit the structure. As they were leaving, Woehlke became separated from the other two crew members. The incident commander saw the two members of the hose team and called over the radio for Woehlke, who responded, giving his location as being at the rear of the building."

- Read NIOSH April 15, 2016 report: "Career Probationary Firefighter Runds Out of Air and Dies in Commercial Structure Fire".

- June 27, 2013: "Michigan OSHA investigation - $3,500 fine recommended." Employee #1 was later found approximately six feet from an exit door at the rear of the building and had succumbed to smoke inhalation after running out of air. The hose had looped over itself when

> the team encountered a wall and moved to the right. It is unknown if this led to Employee #1 becoming disoriented and unable to follow the hose out of the structure."

File: Chap. 2, FF Safety

KY: EMPLOYEE HAND INJURED IN PRINTER – LOCKED FD, OSHA INSPECTED – COMPANY CONSENTED OSHA

On August 23, 2024, in Harland Clarke Corp. v. Kentucky Safety And Health Commission, the Kentucky Court of Appeals held (3 to 0; unpublished decision) that the company consented to the Kentucky OSHA [KOSH] inspection of the printer, and the FD policy of locking machinery causing an injury until KOSH inspection did not invalidate the consent. The Court wrote: "In this case, the evidence of record, including Harland's own witnesses, supported the hearing officer's finding that valid consent for the inspection was given. A Harland employee contacted the Cabinet to come to its facility. Moreover, Harland gave the KOSH officers access to the facility two separate times."

THE COURT HELD:

> "On appeal, Harland's sole argument is that its consent to the KOSH inspection and on-premises investigation was not freely and voluntarily given. Rather, they allege it was coerced by the Fire Department's actions in locking the printer so that it could not be used until Harland consented to KOSH's inspection and investigation. However, we agree with the circuit court, who stated the following:
>
> > [Harland] spends the majority of its brief asserting that the Fire Department violated its constitutional rights, however, the Fire Department is not under the jurisdiction of the Cabinet and is not a party to this action. Although the Fire Department said it was their policy that the injury causing machine be locked up until KOSH] conducted an investigation, that policy does not belong to the Cabinet who has the statutory authority to inspect and prosecute occupational violations. At the administrative hearing, the Director of [K]OSH Compliance testified that the Cabinet does not have any policy that would require the Fire Department to lock up a potentially unsafe machine. The Court understands [Harland's] frustration with the Fire Department's actions, however, any disagreement with the placement of a lock on the printer is between [Harland] and the Fire Department, a nonparty to this action with zero authority to inspect and prosecute occupational violations.
>
> In this case, the evidence of record, including Harland's own witnesses, supported the hearing officer's finding that valid consent for the inspection was given. A Harland employee contacted the Cabinet to come to its facility. Moreover, Harland gave the KOSH officers access to the facility two separate times. Harland – through Birkenfeld – gave the compliance officers verbal consent to conduct an

inspection and never made an objection. Finally, another Harland employee, Chetson Hammonds, participated in the inspection and never made an objection."

FACTS:

"Harland prints checks and other financial documents for financial institutions. On February 20, 2019, one of Harland's employees caught her hand in the company's main printer. While the employee was attempting to extract her hand from the printer, other employees called 911. When the E.M.S. responders arrived at the facility, they discovered that the employee had managed to extricate her hand from the printer and was sitting in an office with a cold compress on her hand. E.M.S. examined the employee's hand and determined that she did not have any severe injuries. However, the decision was made to transport the employee to the emergency room to have her hand examined.

Shortly after E.M.S. and the employee left, Deputy Chief Lieutenant Colonel James Sebastian, from the Jeffersontown Fire Department ('Fire Department'), and other crew members arrived at Harland's facility. Lt. Col. Sebastian requested to see the printer and informed Harland's safety manager that it was the Fire Department's policy to place a lock on any potentially unsafe machines. He further stated that he would only remove the lock when Harland consented to – and an inspection was conducted by – KOSH.

Harland contacted KOSH, explained the situation, and inquired as to what could be done to have the lock removed and the printer returned to service. After two KOSH compliance officers arrived at the facility, a conference was held with Lt. Col. Sebastian and Harland's corporate safety director, Kyle Birkenfeld. Birkenfeld asked Lt. Col. Sebastian if he would remove the lock immediately if Birkenfeld consented to the KOSH inspection, to which Lt. Col. Sebastian agreed. At that point, Birkenfeld consented to the inspection, which the compliance officers performed, and Lt. Col. Sebastian removed the lock.

The compliance officers ultimately issued a citation and notification of penalty alleging a violation of 29 C.F.R.2 § 1910.212(a)(1), which requires adequate machine guarding. The proposed penalty was $7,000.00. *** On October 4, 2021, the hearing officer issued findings of fact, conclusions of law, and a recommended order finding that the Cabinet had met its burden of proof for the cited violation of 29 C.F.R. § 1910.212(a)(1). The hearing officer suggested a penalty of $5,200.00."

Legal Lesson Learned: Consent was given for the Kentucky OSHA inspection; interesting FD policy of locking machines causing injury until inspected by KY OSHA.

File: Chap. 3, Homeland Security

NY: NY CITY 2020 CURFEWS UPHELD – GEORGE FLOYD DEMONSTRATIONS - VIOLENCE FOR SIX NIGHTS

On August 16, 2024, in Lamel Jeffery, et al. v. City of New York, et al., the U.S. Court of Appeal for the 2nd Circuit (New York City) held (3 to 0) that the nighttime curfew restrictions were lawful. The Court wrote: "At issue on this appeal is a constitutional challenge to a nighttime curfew imposed throughout New York City ('City') for the one-week period between June 1 and June 7, 2020, in response to violence and destruction attending certain public demonstrations protesting the May 25, 2020 death of George Floyd at the hands of Minneapolis police ('Floyd demonstrations'). *** "The curfew here … was imposed in response to documented violence, destruction, and looting 'across multiple areas' of a large, densely populated city…. The curfew here… was imposed in response to criminality 'border[ing] on chaos….' Further … the City here employed a 'measured approach' to curb criminal activity…. It first relied on traditional policing; then, when criminality escalated, it supplemented traditional policing with a one-night curfew; then, when criminality continued to escalate, it extended the curfew for an additional six nights; and finally, when conditions improved and stabilized, the City ended the curfew one night early…. In these circumstances, even on strict scrutiny, we conclude as a matter of law that the extended curfew was narrowly tailored to employ the least restrictive means to serve the City's compelling public interest in curbing escalating crime and restoring order."

THE COURT HELD:

> "Even when viewed 'in the light most favorable to plaintiffs," the facts alleged in plaintiffs' complaint … admit a single conclusion, i.e., that the challenged curfew—implemented against the highly unusual and well-documented confluence of a deadly global pandemic and nationwide Floyd demonstrations—(1) served compelling governmental interests in curbing escalating crime and restoring public order, and (2) was narrowly tailored to those interests…. Accordingly, we affirm the challenged judgment of dismissal."
>
> "The curfew here … was imposed in response to documented violence, destruction, and looting 'across multiple areas' of a large, densely populated city…. The curfew here… was imposed in response to criminality 'border[ing] on chaos….' Further … the City here employed a 'measured approach' to curb criminal activity…. It first relied on traditional policing; then, when criminality escalated, it supplemented traditional policing with a one-night curfew; then, when criminality continued to escalate, it extended the curfew for an additional six nights; and finally, when conditions improved and stabilized, the City ended the curfew one night early…. In these circumstances, even on strict scrutiny, we conclude as a matter of law that the extended curfew was narrowly tailored to

employ the least restrictive means to serve the City's compelling public interest in curbing escalating crime and restoring order."

FACTS:

"On May 25, 2020, Minneapolis police officers arrested George Floyd, a 46-year-old African-American man, for allegedly buying cigarettes with a counterfeit $20 bill. This court has recognized that '[w]hat happened next,' both in Minneapolis and across the nation, 'is now well known':

> When Floyd resisted sitting in the back seat of the police squad car, saying he was claustrophobic, three officers pinned him face-down on the ground. A white officer knelt on Floyd's neck for nearly ten minutes while Floyd repeatedly said he could not breathe. Floyd was pronounced dead that night, and video of his encounter with the police went viral, sparking major protests against police brutality and racism in Minneapolis and around the country.

As plaintiffs acknowledge, in the City, such protests involved thousands of persons and spanned all five boroughs: '[B]eginning on May 28, 2020, thousands of marchers, protestors, and demonstrators began gathering in various sections of the five boroughs to protest police brutality against Black and minority communities.' Compl. ¶ 11. Plaintiffs allege that the vast majority of demonstrators were 'peaceful,' id. ¶ 13, a point that defendants do not dispute, see City Appellees' Br. at 6. Nevertheless, as plaintiffs further acknowledge, there were 'tumultuous and confrontational moments in some areas in the City,' id. ¶ 14, and 'severe instances of criminal behavior,' id. ¶ 46, including 'looting, destruction of property, and violence by a small number of individuals,' id. ¶ 14. To illustrate, the complaint references 'reports' of 'property destruction, vandalism, and looting" in the Bronx along Fordham Road; in Manhattan along Sixth Avenue, in Herald Square, in the Diamond District, and in SoHo; and in Brooklyn near the Barclays Center and outside three police precincts. Id. ¶ 16."

Legal Lesson Learned: Curfews are a lawful response to widespread violence.

Chap. 4, Incident Command

Chap. 5, Emergency Vehicle Operations

File: Chap. 6, Workplace Litigation

MA: BOSTON FF – MUSLIM – REFUSED COVID WEEKLY TESTING OR VACINATION – NO UNEMPLOYMENT

On August 28, 2024, in Michael Browder v. Department of Unemployment Assistance, the Appeals Court of Massachusetts held (3 to 0) that the former Boston firefighter was not entitled to unemployment compensation. The Court wrote: "As directed, the [unemployment hearing] examiner made one additional finding:

> 'Since being placed on an employer-imposed leave of absence, [Browder] has not been actively seeking work because he only wants to be a firefighter and feels that other municipalities would not hire him because of his vaccination status.' Adopting the review examiner's factual findings in their entirety, the board reached a different conclusion: Browder was neither totally nor partially unemployed under G. L. c. 151A, §§ 1 (r) and 29, and was therefore ineligible for unemployment benefits.

In the BMC [Boston Municipal Court], Browder argued that the board failed to provide a full remand hearing with an opportunity for Browder to testify and submit evidence of his search for work. While the remand procedure employed by the board does indeed appear unorthodox, Browder's principal brief provides no legal authority demonstrating that the procedure violated any statute, regulation, or Browder's due process rights. Nor does he provide any basis for us to conclude that the board's decision, to which we owe substantial deference, was arbitrary or capricious, was not based on correct legal principles, or was not supported by substantial evidence."

THE COURT HELD:

> "The judge had no obligation to take Browder's testimony, as the administrative agency is the sole finder of fact and judicial review is based on the administrative record. See Curtis v. Commissioner of the Div. of Unemployment Assistance, 68 Mass. App. Ct. 516, 519 (2007). Live testimony is not necessary where the claims of irregularities in the agency procedure can be decided on the record."

FACTS:

> "Browder was employed as a firefighter by the city of Boston's fire department. In the early stages of the COVID-19 pandemic, the city required its employees to 'have regular temperature checks, report any COVID-19 symptoms, and answer questions regarding their health.' In August 2021, the city enacted a COVID-19 vaccine mandate for its employees, effective that October. As an alternative, employees were allowed to submit a negative COVID-19 test result each week. Unless the city had approved a 'reasonable accommodation,' those who did not comply would be placed on unpaid administrative leave and face progressive 'discipline up to and including termination.'
>
> Browder, a practicing Muslim, requested a reasonable accommodation in September 2021 because both vaccination and testing clashed with his beliefs. He

> proposed alternative safety measures, including face coverings and temperature checks, in an attempt to compromise. The city did not respond. Instead, about one month later, the city notified him by e-mail that it would place him on unpaid administrative leave. Browder sent an e-mail message to follow up on his accommodation request. The city did not respond. On October 27, 2021, the city placed him on unpaid leave. It soon thereafter denied his request for a religious exemption, with no further explanation. Browder asked the city to reconsider its decision, but again, the city did not respond."

Legal Lesson Learned: Unemployment denied for failure to comply with COVID safety precautions.

File: Chap. 7, Sexual Harassment

LA: OFFICE ROMANCE – ADMIN. AIDE FIRED – TROUBLE IN WORKPLACE - DIVORCED A/C, MARRIED FORMER D/C

On August 7, 2024, in Stacie Dellucky and Frank Dellucky v, St. George Fire Protection District, et al., U.S. Court of Appeals for 5th Circuit (New Orleans) held (3 to 0) that trial court properly summary judgment to the FD and fire chief. The Court wrote: "Here, the challenged government action-the Chief's termination of Stacie-did not prohibit whole classes of people from marrying. Appellants adduced no evidence of a St. George policy barring co-workers from marrying or banning marriages between members of management and their subordinates. The evidence shows that the Chief's decision was motivated by the fact that *Stacie* [who divorced Assistant Fire Chief Chad Roberson] married *Frank* [Dellucky, now former District Chief]; there is no evidence that the outcome would have been the same if the marriage had been between two other employees. Moreover, Stacie's termination clearly did not discourage or render practically impossible her marriage to Frank: the record indicates that they remain married today. The challenged government action did not directly and substantially interfere with Stacie's or Frank's right to marry. The district court correctly determined that the appropriate standard of review, therefore, is rational basis review. *** Here, the Chief justified terminating Stacie in their conversation in July 2020: Stacie's and Frank's relationship had caused trouble in the workplace in the past, and the Chief had warned them that if their relationship became permanent, they would not be able to work at St. George. Maintaining workplace order and morale and ensuring that the chain-of-command operates effectively is a legitimate objective."

THE COURT HELD:

> "And Appellants' unsupported assertions notwithstanding, the summary judgment record suggests that Stacie's and Frank's relationship threatened the Chief's ability to accomplish that objective. Appellees have proffered summary judgment evidence showing that the Chief's decision to terminate Stacie bore a 'rational relationship' to a legitimate objective. *Lewis*, 2022 WL 10965839, at *3.

Accordingly, the Chief's decision to terminate Stacie's employment passes the rational basis test."

FACTS:

"St. George provides fire protection services in East Baton Rouge Parish. The Chief manages St. George's daily operations, including personnel matters. Stacie was employed by St. George in an administrative role in 2014. She was married to Chad Roberson ('Roberson'), who had worked at St. George since 1992. Frank had begun working for St. George as a firefighter in 1999. For most of his time at St. George, Frank was married to Nichole Dellucky, who was never employed by St. George.

In 2016, when the events giving rise to this suit began, Roberson was the Assistant Fire Chief. He and Stacie both worked on the second floor of St. George's administrative building. Although Roberson now serves as the Assistant Chief of Operations, he is slated to succeed the Chief. Frank had been promoted several times and eventually became the District Fire Chief for the A Shift, and his office was on the same floor as Stacie's and Roberson's.

Stacie and Frank began spending significant amounts of time together and were rumored to be in an intimate relationship. Nichole and Roberson began to suspect Stacie and Frank were having an affair, and Roberson hired a private investigator. In October 2016, Nichole and Roberson separately discovered Frank and Stacie together, in various states of undress, at their respective homes. Nichole called the Chief to complain about the situation.

The Chief testified in his deposition that regardless of its nature, Stacie's and Frank's personal relationship had disrupted the workplace. For example, Frank spent significant time in Stacie's office although his position generally required him to be in the field. The relationship 'was creating a problem' for St. George and had led to 'an unbelievable situation in the office[.]'

Roberson similarly testified that the relationship had caused tension among the St. George leadership. After Nichole called the Chief, he met with Stacie and Frank and told them that they needed to stop allowing their personal relationship to interfere with work. Stacie and Frank maintained that their relationship was not sexual in nature; the Chief informed them that if they got married or entered into a long-term relationship, they could no longer work at St. George. The Chief did not bring the issue up again for quite some time.

In August of 2017, another St. George employee accused Frank of making sexually explicit comments to her. The Chief launched an investigation and, as a result, Frank agreed to resign and entered into a settlement agreement with St. George. *** Frank began working for a different fire department.

Meanwhile, Roberson and Nichole each filed a petition for divorce from Stacie and Frank, respectively, in early 2017. Both divorces were finalized in 2018. After their divorces were finalized, Stacie and Frank formalized their relationship, and they married in late June 2020.

On July 7th, the Chief called Stacie into his office, and Stacie surreptitiously recorded the meeting on her phone. The Chief told Stacie that her marriage to Frank was 'problematic[.]' He expressed concern regarding her ability to work with Roberson and reminded her about the conversation he had with her and Frank in 2016, recounting that he told Stacie then that if she and Frank 'got hooked up that neither one of [them] could work' at St. George. He also noted that Stacie's position was starting to become obsolete. Ultimately, he said, he was 'following through on the discussion [they] had in the past' that Stacie's relationship with Frank was 'a problem for [St. George]' and that Stacie and St. George would 'need to part ways.' Stacie was placed on administrative leave until August 16th, when her employment was officially terminated."

Legal Lesson Learned: As the Court wrote: "Maintaining workplace order and morale and ensuring that the chain-of-command operates effectively is a legitimate objective."

File: Chap. 7, Sexual Harassment

VI: SHE WOKE UP FF "SUCKING ON HER BREAST" - CONT. VIOL. - PRIOR CLAIMS ALSO ADMISSIBLE

On Aug. 6, 2024, in Syreeta Gumbs v. Government of the Virgin Island and Association of Firefighters Local 2125, Judge Denise M. Francois, Superior Court of the Virgin Island, denied the defense motion for summary judgment, finding that the FD failed to adequately investigate complaints of harassment. Her 2017 complaint about "breast sucking" was timely, however under the "continuing violation doctrine" prior incidents can also go to jury. The Court wrote: "It is reasonable to expect that when faced with a sexual harassment complaint, an employer is not relieved of its duty to ensure the work environment is free from sexual harassment once a complaint is made, regardless of whether the alleged victim cooperates or not. *** November 6, 2017, is the date of the last alleged injury…. by fellow firefighter Lionel Warrell while they were both stationed in St. John. After Hurricanes Irma and Maria destroyed the Cruz Bay fire stations' lodging quarters, firefighters working 24-hour shifts were housed at the St. John Westin, and Gumbs was given her own room within a suite. During the early morning on November 6, Gumbs was asleep in her suite when she was 'woke up to her shirt lifted above her breast and Warrell sucking on her breast without her consent.' Gumbs screamed and immediately told Worrell to get out of her room; she later confronted him about the incident. Warrell subsequently admitted to Gumbs' allegations."

THE COURT HELD:

> “Because Gumbs' most recent claimed injury occurred within the limitations period, the continuing violation doctrine renders Gumbs' 2009 and 2013 claims timely. The Court concludes that a reasonable jury could enter judgment in favor of Gumbs and consider the 2009, 2013, and 2017 incidents of alleged sexual harassment and the manner in which GVI handled those complaints as ongoing, discriminatory practice that created a hostile work environment. Accordingly, summary judgment is denied.
>
> ***
> Drawing all reasonable inferences in favor of Gumbs as the nonmoving party, a trier of fact could find that the incidents reported were not discrete and unrelated but were part of an ongoing discriminatory pattern or practice of sexual based harassment. Although several years lapsed between the alleged conduct, Andre Smith was the same superior to whom Gumbs reported her harassment claims to in both 2009 and 2013. Furthermore, Chief Smith acknowledged that at the time of Gumbs' initial complaint, female fire fighters were relatively new to VIFS. In addition, the agency had not dealt with sexual harassment complaints before Gumbs and the record demonstrates a lack of consistency in the protocol followed in response to each of her complaints.”

FACTS:

> “Gumbs began working as a firefighter with the Virgin Islands Fire Service ("VIFS") in 2007 and alleges that she encountered sexual harassment and sexual assault at the hands of her employer. Gumbs was also a member of VIFS' associated union, the Association of Firefighters Local 2125 (‘the Union’).
>
> ***
> First, in 2009, Gumbs alleges she was groped by her supervisor [Captain] that she asked to be moved to St. John as a result, and that it took a full month before action was taken on her behalf.
>
> ***
> Looking next to the 2013 complaint, all parties agree that Gumbs reported that Sargeant Chazmal Miller - a fellow firefighter who later became Gumbs' supervisor -showed her sex acts on his phone.”

Legal Lesson Learned: Thoroughly investigate and document correct actions taken for each complaint received, including when complainant does not wish to further proceed.

TN: BLACK FF FIRED – FACEBOOK POST – CIVIL SERVICE COMMISSION MUST COMPARE TO PRIOR DISCIPLINE WHITE FFs

On Aug. 29, 2024, in Taurick Boyd v. City of Memphis, the Court of Appeals of Tennessee held (5 to 0) that the Civil Service Commission must examine whether the discipline is not in line with three white firefighters for inappropriate Facebook posts. The Court wrote: "We do not go so far as the trial court to definitively conclude that termination of Private Boyd's employment was unwarranted. Rather, based on our determination that the Commissioner failed to consider all relevant requirements of MFD 103.01, we vacate its order and remand for reconsideration."

THE COURT HELD:

> "In truth, each of these firefighters, Lieutenant Kramer, Lieutenant Tolliver, Private Luhrs, and Private Boyd posted photos, statements, or memes that were offensive and in clear violation of MFD's policies. These postings caused uproar in the community and resulted in negative press against the MFD. Like Private Boyd, Lieutenant Kramer had numerous previous policy violations. Like Private Boyd, Lieutenant Tolliver's offensive photo was published to Facebook by a third-party. Like Private Boyd, Lieutenant Kramer, Lieutenant Tolliver, and Private Luhrs cooperated in their respective investigations, acknowledged that their respective actions were inappropriate, and issued apologies. Yet, only Private Boyd's employment was terminated."

FACTS:

> "Appellee Taurick Boyd was employed by the City of Memphis ("City") Fire Department ('MFD') as a Fire Private. At the time of the termination of his employment, Private Boyd had been with the MFD for approximately 19 years. Prior to the charges giving rise to the termination of Private Boyd's employment, he was suspended three times for the following infractions: (1) 360 hours for violating the substance-abuse policy in 2015; (2) 144 hours for being charged with domestic abuse and being noncompliant with the recommendations he was given under the Formal Management Referral process in 2013; and (3) 96 hours for leaving his post while on duty in 2001.
>
> ***
> Termination of his employment, effective June 7, 2017, was based on several alleged violations of the MFD Rules and the PM. As set out in the termination letter:
>
> > "On April 26, 2017, you entered a private room on Facebook called Pettyville. According to your testimony, this is an adult room where adult humor is shared. You stated that you pulled a picture off another Facebook private room that you could not remember the name of. This picture

> displayed a condom displaying a red substance on it that you said represented blood. There was a caption under the picture that sated 'when girl scouts are better than the cookies.' When asked by another person why use a condom you stated 'Fuck go Raw.' This instantly created a fire storm of negative comments aimed at your posts and comments. Shortly afterwards calls were received by the City of Memphis concerning your Facebook post. Complaints were sent to Local News Stations, the Memphis Fire Department Facebook site and Child Services."

Legal Lesson Learned: Facebook and other social media posts can result in discipline, but the level of discipline must appropriate in comparison of others with similar violations.

File: Chap. 8 – Race / National Origin

TX: FF (IRAQ ORIGIN) FIRED - THREATS CITY ANIMAL SERVICE OFFICER – HAD SIDE DOG RESCUE BUSINESS

On Aug. 27, 2024, in Safealdean Alusi v. City of Fresno, Texas, United States District Court Judge Sean D. Jordan, U.S. District Court for Eastern District of Texas, Sherman Division, affirmed the prior decision to grant summary judgement to the City. The Court wrote: "After working for the FFD for nearly two-and-a-half years, Alusi was terminated after the FFD discovered that he had engaged in off-duty misconduct while operating his dog rescue side-business-including by threatening a City of Temple Animal Services Officer - and that he had misrepresented his physical limitations and his inability to return to work. In Alusi's termination notice, FFD Chief Mark Piland noted a number of City of Frisco (the 'City') policies that Alusi violated, which boil down to (1) engaging in unethical and dishonest conduct unbecoming of a member of the FFD, (2) lying about physical capabilities while on restricted work duty, and (3) failing to cooperate and being dishonest during the investigation. *** Notwithstanding the fact that Alusi's colleagues knew he was Iraqi, none of the allegedly disparaging comments concerned his Iraqi national origin-or any national origin, for that matter."

THE COURT HELD:

> "[A]s the Court explained in its order granting summary judgment, the allegedly discriminatory comments included remarks about Alusi's skin color and his religion. Race and religion are distinct protected classes under Title VII, but they are not the bases of Alusi's alleged discrimination. Neither those comments nor the additional comments Alusi complains of-i.e., the comment concerning Alusi's fit within the FFD, a colleague's question about Alusi's lack of involvement in the Gulf War, and one colleague's use of Arabic-refer to Alusi's national origin.
>
> ***

The comments Alusi points to were not frequent, threatening, or severe. *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 23, 114 S.Ct. 367, 126 L.Ed.2d 295 (1993) (explaining that courts must consider the "frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance"). Thus, the comments are insufficient to mount a claim for discrimination.

***

Alusi concedes that he did not allege national origin discrimination until *after* he was terminated. Thus, the City was not put on notice of any alleged discriminatory practices. Therefore, Alusi did not engage in a protected activity. And since Alusi did not engage in a protected activity, he could not have been retaliated against for engaging in a protected activity. Accordingly, the Court correctly concluded that the City was entitled to summary judgment on this claim."

FACTS:

"According to Alusi, his fellow firefighters told him that he was not a good fit for the FFD, asked Alusi why he did not participate in the Gulf War, told Alusi that all Muslims are terrorists, pointed out that Alusi was 'blacker than' a black firefighter, and shouted 'Yella, Yella' (an Arabic phrase meaning 'quickly, quickly') to Alusi. (Dkt. #40-2 at 3-6). The Court concluded that these comments did not demonstrate national origin discrimination because they had nothing to do with Alusi's national origin. (Dkt. #57).

***

Following his termination, Alusi appealed the adverse employment decision to Chief Piland, alleging that his termination was somehow connected to his being on worker's compensation. Alusi made no mention of national origin discrimination in this appeal. Chief Piland denied the appeal after finding that the City's reasons for terminating Alusi were legitimate and supported by the evidence. Following this denial, Alusi filed a second appeal to the Frisco City Manager. Once again, he did not assert national origin discrimination. It was only at the final hearing on his second appeal when Alusi - who was represented by new counsel-presented his brand new theory that he was terminated because of his national origin. In so doing, Alusi raised for the first time an allegation of national origin discrimination. Following this hearing, the City postponed Alusi's appeal and conducted a thorough investigation into this new allegation. At the conclusion of the investigation, Alusi's termination was once again upheld. The City found no evidence of national origin discrimination."

Legal Lesson Learned: Comments by fellow firefighters were not "frequent, threatening, or severe."

File: Chap. 8, Race

TX: BLACK FF – STOP SHAVING / RELIGION – FD CHAPLAIN MEMO - BELIEFS "INSINCERE" – IMMUNITY

On Aug. 8, 2024, in Brandon E. O'Neal v. City of Houston, United States District Court Judge Keith P. Ellison, U.S. District Court, Southern District of Texas, Houston Division, granted the motion to dismiss the libel lawsuit against Chaplain Richard Raymond Ponce II, who enjoys immunity under Texas Tort Claims Act for official actions. The Court wrote: "After serving his [2 shift; 24 hours] suspension, O'Neal was required to meet with HFD Chaplain Richard Raymond Ponce II… Following the meeting, Ponce wrote a memorandum to Fire Chief Samuel Peña describing O'Neal's religious beliefs as 'insincere.' … O'Neal believes that Ponce's memorandum formed the basis of HFD's denial of his accommodation request…. O'Neal later asked Ponce to retract the statements in his "defamatory letter to Chief Peña," but Ponce declined to do so. *** A defendant is entitled to dismissal under section 101.106(f) upon proof that the plaintiff's suit (1) was based on conduct within the scope of the defendant's employment with a governmental unit and (2) could have been brought against the government unit under the Tort Claims Act."

THE COURT HELD:

> "Plaintiff does not-and cannot-argue that drafting the memorandum at Chief Pena's direction was outside the scope of Ponce's role as HFP Chaplain. Instead, he argues that Ponce's 'choice to libel Capt. O'Neal in the memorandum,' i.e., the choice to label O'Neal's beliefs as 'insincere' in the memorandum, was outside of the scope of his employment. ECF No. 27 at 6. Plaintiff's argument misses the mark. Ponce's 'ulterior motives or personal animus is irrelevant so long as a connection exists between the employee's lawful job duties and the alleged misconduct.' *** Here, there is plainly a connection between Ponce's duties (drafting a memorandum on O'Neal's religious beliefs) and the alleged misconduct (including allegedly libelous statements in the memorandum). Thus, Ponce acted within the scope of his employment when he committed the allegedly tortious acts."

FACTS:

> "Plaintiff Brandon E. O'Neal is a 38-year-old African American man and a devout nondenominational Christian…. He has been employed as a firefighter with the Houston Fire Department ("HFD") since 2007…. HFD requires firefighters to be cleanshaven unless it grants an accommodation….On August 4, 2022, O'Neal requested an accommodation that would allow him to grow out his facial hair, based on his 'deeply and sincerely held religious belief based on biblical interpretation that proper observance of his faith entails wearing facial hair.…' On October 18, 2023, HFD denied O'Neal's request, ordered him to shave, and threatened him with

disciplinary action-including indefinite suspension - if he did not comply with the order….O'Neal alleges that '[u]pon information and belief, the order was retaliatory in nature.'.

On January 18, 2023, O'Neal filed a charge of discrimination against the City of Houston with the Equal Employment Opportunity Commission ('EEOC'), alleging religious discrimination and retaliation….HFD subsequently ordered him to shave a second time and again threatened him with disciplinary action if he did not comply….Based on his religious beliefs, O'Neal refused to shave…. He was then reprimanded on February 8, 2023, and suspended for two shifts (for a total of 24 hours) in September 2023…. O'Neal appealed the suspension.

After serving his suspension, O'Neal was required to meet with HFD Chaplain Richard Raymond Ponce II…. Following the meeting, Ponce wrote a memorandum to Fire Chief Samuel Pena describing O'Neal's religious beliefs as 'insincere.'… O'Neal believes that Ponce's memorandum formed the basis of HFD's denial of his accommodation request…. O'Neal later asked Ponce to retract the statements in his "defamatory letter to Chief Pena," but Ponce declined to do so.

***

On October 11, 2023, O'Neal's appeal of his suspension was successful…. Still, O'Neal alleges that HFD continues to threaten him with disciplinary action-including termination-if he does not shave his facial hair."

Legal Lesson Learned: The Chaplain enjoys immunity from personal liability for performing duties in scope of his employment.

Chap. 9 – Americans With Disabilities Act

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

Chap. 11, Fair Labor Standards Act

File: Chap. 12, Drug-Free Workplace

IN: FF DRUG TEST - MARIJUANA – ADMIN. INVEST. STOPPED, MIGHT NOT HAVE USED – CANNOT SUE CITY

On Aug. 8, 2024, in Paul Russell v. John Doe, M.D., John Doe Hospital, John Doe Retracted Network, Inc. d/b/a John Doe Redacted Health, Omega Laboratories Inc., and

City of East Chicago, the Court of Appeals of Indiana held (3 to 0) that trial court properly dismissed his complaint against the City of East Chicago. The Court wrote: "In his complaint, Russell made clear that he was 'not alleging that [the City] wrongly or negligently initiated an administrative process' but that 'there came a point in [that] administrative process when [the City] knew or had reason to know that [Russell] had not ingested marijuana.' Appellant's App. Vol. 2, p. 40; *see also* Appellant's Br. at 45. Russell thus alleged that the City had caused him monetary harm by continuing with the administrative process after having received the conflicting evidence. *** Indiana Code section 34-13-3-3(a)(6) provides that a governmental entity "is not liable if a loss *results from* . . . [t]he initiation of a judicial or an administrative proceeding." (Emphasis added.) We think that language is clear: a governmental entity is not liable for any loss that arises from the initiation of an administrative proceeding or "results from" the initiation of that proceeding. A loss plainly "results from" the initiation of a proceeding if it occurred *during* the proceeding and *after* its initiation."

THE COURT HELD:

> "Russell's claims against the City are expressly premised on information obtained by the City after it had initiated the administrative proceedings against him and while those administrative proceedings were ongoing. Russell's claims against the City therefore seek to hold the City liable for losses that 'result from' the City's initiation of the administrative proceedings against Russell. The City is therefore immune from Russell's claims, and the trial court properly dismissed them.
> Still, Russell asserts that, insofar as his claims against the City are premised on 'intentional misrepresentation' by the City, they should proceed because Indiana Code section 34-13-3-3(a)(14) provides that a governmental entity is not liable for only 'unintentional' misrepresentations. Appellant's Br. at 10-11. But we conclude that section 34-13-3-3(a)(14) is irrelevant where, as here, the governmental entity has established that it is entitled to immunity under a different subsection of the ITCA on the same facts.
>
> For all of these reasons, we affirm the trial court's dismissal of Russell's complaint against the City."

FACTS:

> "In April 2021, the City employed Russell as a firefighter. On April 23, the City required Russell to partake in a drug screen. The medical providers who conducted that drug screen reported to the City that Russell had failed his screen for the use of marijuana. As a result, the City initiated administrative proceedings against Russell.
>
> During the course of the pending administrative proceedings, the City learned of possible conflicting evidence that suggested that Russell had not used marijuana. The City also learned of possible evidentiary issues with the positive test results. Nonetheless, the City continued its prosecution of the administrative proceedings. However, in February 2022, the administrative board dismissed the City's allegations."

Legal Lesson Learned: City not liable for brining administrative charges; firefighter however can still bring lawsuit against drug testing facility.

File: Chap. 13, EMS

OH: FAMILY CLAIMS PT FELL OFF COT – EMTs DENY – NO LIABLITY – NOT WILLFUL / WANTON MISCONDUCT

On Aug. 30, 2024, in Carthagenia Wyatt, as Administrator of the Estate of Deltina Graves v. City of Springfield, Ohio, et al., the Ohio Court of Appeals of Second District (Clark County) held (3 to 0) that trial court granted summary judgment to two EMTs and the City. Autopsy showed patient died of "acute atraumatic intracranial hemorrhage," meaning that the hemorrhage was not caused by any head trauma. The cot was equipped with two straps – one across the patient's waist and one across legs [not third over shoulders]. A neighbor believed she saw the patient dropped on her head. The Court wrote: "We see nothing from which a trier of fact reasonably could have concluded that Kaufman or Scanlan acted recklessly. The appellants complain about Graves not being strapped above the waist, but nothing in the record suggests the availability of additional straps. We note too that the EMTs provided uncontroverted testimony about the cot's partial side rails being up. he appellants also complain about the EMTs not mentioning Graves' fall to the emergency-room physician after the fact. But the physician, Dr. Guest, promptly had been made aware of the allegation by Graves' mother. At most, the record suggests that Kaufman and Scanlan were inattentive when Graves unexpectedly slid from her cot. As a matter of law, this conduct could not have constituted more than negligence."

THE COURT HELD:

> "With regard to the EMTs, the trial court correctly looked to R.C. 4765.49(A), which provides: 'A first responder, emergency medical technician-basic, emergency medical technician-intermediate, or emergency medical technician-paramedic is not liable in damages in a civil action for injury, death, or loss to person or property resulting from the individual's administration of emergency medical services, unless the services are administered in a manner that constitutes willful or wanton misconduct.'

FACTS:

> "In the present case, EMTs [Scott] Kaufman and [Cory] Scanlan were called to Graves' residence where they found her in an upstairs bathroom. Family members reported that Graves had been experiencing vomiting and diarrhea. She was sweaty, incoherent, and unable to move her left side. The EMTs moved Graves outside and placed her on what they referred to as "a cot." The appellants' strongest evidence with regard to the EMTs' treatment of Graves from that point on came from Theresa Moore, a neighbor who watched from her kitchen window across the street. In her deposition, Moore described what she saw as follows:

> Well, it was when they were sitting there, she—it was like [Graves] had passed out, and it was like slow motion as she went off the side of the gurney. And I literally scared my kids to death because I was standing there going, oh, my God, catch her, catch her, catch her. And [Moore's children] come flying like, what's going on? And that's when I seen her fall off that gurney. And that's—it was—there was no belt on her. If she would have had a belt on, she would have never fell off that gurney. Moore depo. at 43.
>
> ***
>
> Upon being transported to Springfield Regional Medical Center, Graves was diagnosed with a 'subdural hematoma,' or bleeding on the brain, on the left side of her head. In her deposition, Dr. Jenny Guest, the emergency-room physician, testified that Graves' symptoms inside the home before being moved by the EMTs were consistent with a subdural hematoma. Guest depo. at 19. Guest observed no external signs of head trauma, which she typically would have expected to see if Graves had hit her head after falling from a cot."

Legal Lesson Learned: Securely strap the patient to the cot; if there is partial slippage off the cot, document it in the EMS run report.

File: Chap. 13, EMS

MO: GOOD SAMARITAN LAW NOT APPLY – PT REFUSED MEDICAL CARE – CONSENTED PD SEARCH - DRUGS

On August 28, 2024, in State of Missouri v. Timothy Louis Smith, the Missouri Court of Appeals, Southern District, held (3 to 0) that trial court properly denied his motion to suppress the evidence and found him guilty of possession of plastic bag with white residue and a syringe cap with methamphetamine. The Court wrote: "Smith appeals his convictions in a single point, arguing the trial court erred in denying his motion to dismiss because section 195.205 applied since the evidence would not have been discovered but for his call for medical assistance. Smith's argument ignores the plain language of the statute. Because the plain language of the statute requires the evidence be gained as a result of seeking or obtaining medical assistance, it does not apply where there is a break in the causal chain between the request for medical assistance and the discovery of the evidence. In Smith's case, the evidence was found as a result of his consent to a search, not because he called for medical assistance."

THE COURT HELD:

> "In Smith's case, the evidence was found not because Smith called for medical assistance but because he consented to a search after asking the officer for a ride. Applying section 195.205 to Smith's case would not further the purpose of the statute since, by the time the evidence was discovered, he was no

longer in need of medical assistance or seeking medical assistance. The trial court did not err in denying Smith's motion to dismiss and entering a judgment of conviction. Smith's point is denied."

FACTS:

"On June 4, 2021, Smith called 911 because he could not breathe. While talking to the 911 operator, Smith also reported that someone was trying to kill him. Both EMS and a law enforcement officer responded to Smith's location. EMS evaluated Smith and determined there was no medical need to transport him to a hospital and Smith signed a refusal of treatment. While Smith was being evaluated by EMS, the officer spoke to the occupants of the home at the address where he and EMS had been dispatched. The occupants explained Smith had been kicked out of the house after a verbal altercation, but no one was trying to kill Smith. They told the officer that Smith was 'no longer welcome to stay there.'

Because Smith was no longer welcome on the property, the officer told Smith he would need to find a new place to stay. Together, the officer and Smith contacted a hotel and a homeless shelter, but neither place could accommodate Smith. Smith asked the officer if he could go to another friend's house, approximately 100 or 150 yards away, so the two walked to that house but no one was home.

Sometime later, over 40 minutes after EMS had left the scene, Smith asked the officer for a ride to a gas station. The officer agreed on the condition that Smith would consent to a search of his person and belongings for officer safety. Smith consented, and the officer found a plastic bag with white residue and a syringe cap with a similar substance. The residue was sent to a lab for testing and was determined to be methamphetamine."

Legal Lesson Learned: The Good Samaritan Law only protects individuals receiving medical care, not those stupidly asking PD for a ride while in possession of drugs.

Note: See "Missouri's Good Samaritan Law and Drug Charges"
"In 2017, the Missouri Legislature passed RSMo Section 195.205, the " Missouri's Good Samaritan Law" to provide immunity to those seeking assistance with a drug overdose or medical emergency. The rationale behind the law is that drug users might avoid seeking help for a drug overdose because they feared prosecution. The law has undoubtedly saved a number of lives and provides a complete defense to a possession charge. Our St. Louis Criminal Defense lawyer has used the good samaritan law to obtain complete dismissals on a number of drug possession cases. If you or a loved one have questions about whether or not the Good Samaritan Law applies to your case, please do not hesitate to contact our St. Louis criminal defense attorney today for a free case evaluation.
When does the Good Samaritan Law apply?

The good samaritan law applies to a person who is seeking medical assistance for a drug overdose or other medical emergency. It applies to both the person who seeks help and to the person is experiencing the medical emergency or drug overdose. Under the good samaritan law, a drug overdose is defined as "a condition including, but not limited to, extreme physical illness, decreased level of consciousness, respiratory depression, coma, mania, or death which is the result of consumption or use of a controlled substance or alcohol or a substance with which the controlled substance or alcohol was combined, or that a person would reasonably believe to be a drug or alcohol overdose that requires medical assistance". "Medical Assistance" is defined as, "includes, but is not limited to, reporting a drug or alcohol overdose or other medical emergency to law enforcement, the 911 system, a poison control center, or a medical provider; assisting someone so reporting; or providing care to someone who is experiencing a drug or alcohol overdose or other medical emergency while awaiting the arrival of medical assistance." It is important to note, that medical assistance must be sought in "good faith". In other words, you can't just say you're having a drug overdose after the police find drugs in your car to get out of being arrested. *Example:* John and John are using drugs at John's house and Jane overdoses. John calls 911 to seek help for Jane. The police come and find drugs in the house. Under Missouri's Good Samaritan Law, John cannot be prosecuted because he was seeking medical assistance in good faith for Jane.

What charges does the Good Samaritan Law protect against?
The good Samaritan Law protects against prosecution from the following Missouri criminal charges:

- Possession of a Controlled Substance
- Possession of Drug Paraphernalia
- Possession of an Imitation Controlled Substance
- Keeping or maintaining a Public Nuisance
- Sale of Alcohol to Minor
- Minor in Possession of Alcohol
- Misrepresentation of Age by a Minor to obtain alcohol
- Violation of a restraining order
- Violating probation or parole

However, the law does not protect against other charges, such as distribution of a controlled substance or manslaughter. If for instance, you provide drugs to someone who overdoses and dies you could still be charged with those offenses. Moreover, the statute only applies to state charges and is not a defense to federal drug charges."

CA: PT CLAIMED SEX. ASSAULT BY MEDIC – FD DAILY ROSTER ID HIM - CLAIM FD DEFAMED HIM FILED LATE

On August 16, 2024, in Louis Cerda v. City of Los Angeles, the California Court of Appeals, Second District, Third Division, held (3 to 0; unpublished opinion) that the trial court properly dismissed his lawsuit against the City, claiming FD defamed him by sending out internal notices of his suspension on the FD daily staffing roster, since a claim for defamation must be presented within six months of accrual (he was late by one month). The Court wrote: "The City asserts that the defamation cause of action accrued on October 19, 2017, the last date the alleged defamatory statement was published in the roster according to Cerda's opposition to judgment on the pleadings. Given the six month presentation deadline, Cerda's government claim was due April 19, 2018. However, Cerda did not file his government claim until May 14, 2018. We agree with the City that the government claim for the defamation cause of action was untimely."

THE COURT HELD:

> "Moreover, as we explain below, Cerda's failure to file a timely government claim regarding his defamation claim was fatal to his case.
>
> ***
> We agree with the City that the government claim for the defamation cause of action was untimely. We also note that in denying his government claim on June 28, 2018, the City specifically warned Cerda that some of his claims were late and that his 'recourse at this time in regard to the untimely claim(s) is to apply without delay to the Los Angeles City Clerk for leave to present a late claim.' *** Cerda never applied to present a late claim."

FACTS:

> "On September 29, 2017, Los Angeles Fire Department paramedic Cerda and his partner transported an intoxicated female patient from an airplane at the Los Angeles International Airport to a hospital. On October 3, 2017, the Los Angeles Fire Department (the Department) removed Cerda from field work and placed him in a paid administrative assignment while it investigated the patient's claim that during transport, she was sexually assaulted and digitally penetrated by a firefighter matching Cerda's description.
>
> Subsequently, the Department's daily staffing roster, which was distributed to all fire stations in the City, showed that 'Cerda was no longer in field service' and was 'assigned to an administrative detail.' The roster also displayed 'V-Code 09CP,' "which Cerda alleged 'generally means that the referenced firefighter is the subject of a criminal investigation and/or arrest and pending criminal charges.'
>
> ***

> On October 30, 2017, Cerda was returned to restricted duty at a fire station, 'in that he was not permitted to have any patient contact and/or ride a paramedic rig, but was permitted to ride an engine.' On November 15, 2017, Cerda returned to unrestricted field duty.'
>
> ***
>
> On January 29, 2018, Cerda's attorney sent a letter to the fire chief complaining that '[n]o one from the Department ever formally or informally advised' Cerda 'about the nature or progress of any investigation, despite repeated requests for same." Counsel asserted that the Department's unreasonably slow investigation, its refusal to provide any information to [Cerda] and most importantly, the false and defamatory V-Code designation . . . have caused significant detriment to [Cerda].' 'Because no explanation has ever been offered,' Cerda's counsel wrote, 'we believe that discrimination may be the source of this episode.' Counsel closed with a request to discuss the matter with the chief or someone in his 'immediate command staff.' The City Attorney's Office responded to the letter, reiterating the Department removed Cerda from field duty in order to investigate the allegations made by the female patient."

Legal Lesson Learned: The defamation claim was filed late. When a suspended FD employee is reinstated after an investigation is completed, brief the employee about conclusions.

Chap. 14 – Physical Fitness, incl. Heart Health

Chap. 15, Mental Health

File: Chap. 16, Discipline

MI: FIRE CHIEF 1ST AMEND. RIGHT REFUSE TO CHANGE REPORT / LIE – DEATH TWO BOYS, POOR FD SEARCH

On Aug. 22, 2024, in Raymond C. Barton v. Sheldon Neeley, the U.S. Court of Appeals for Sixth Circuit (Cincinnati) held (3 to 0) that the Federal District Court Judge in Michigan properly denied the Mayor's motion to dismiss the case on qualified immunity. The Court wrote: "Two young African American boys died after two City of Flint firefighters failed to properly sweep a burning house. Then-City Fire Chief, plaintiff Raymond Barton, tried to discharge the firefighters for gross misconduct, but Flint's Mayor, defendant Sheldon Neeley, intervened and allegedly covered up the firefighters' malfeasance to advance his support from the firefighters' union in an upcoming election. When Chief Barton refused Mayor Neeley's directives to cover up the malfeasance, Neeley fired Barton. *** However, Barton's speech at the city council meeting is not the

only speech at issue in this case. Barton's relevant speech also included (1) his refusal to change his report on his own, and (2) his refusal to make a public announcement saying that he initiated and agreed with the changed report. Indeed, Barton pleads that these refusals ultimately led to the termination of his employment. It is well established that the First Amendment protects "both the right to speak freely and the right to refrain from speaking at all." Wooley v. Maynard, 430 U.S. 705, 714 (1977). After reviewing the content and context of this refusal-to-speak conduct, Fox, 605 F.3d at 348, we conclude that Barton sufficiently alleged that his unwillingness to lie in order to further Neeley's political campaign was not within the scope of his official duties, see Boulton v. Swanson, 795 F.3d 526, 534 (6th Cir. 2015) (explaining that the 'exception to First Amendment protection'—speech made pursuant to one's official duties—'must be read narrowly'). ***[W]e hold that it is clearly established that public employees cannot be compelled to make false statements on matters of public concern in response to threats of retaliation."

THE COURT HELD:

> "The "critical question" is whether Barton's official duties included taking actions that furthered Neeley's reelection efforts. See id. At most, Barton's refusals of Neeley's threats 'merely concern[ed]' his duties as Fire Chief, which is not enough to constitute public speech. See id.; Boulton, 795 F.3d at 534; Jackler, 658 F.3d at 241 ('In the context of the demands [by a superior] that [a public employee] retract his truthful statements and make statements that were false, we conclude that his refusals to accede to those demands constituted speech activity that was significantly different from the mere filing of his initial [r]eport.'). In sum, Barton was (refraining from) speaking in his capacity as a private citizen when he declined to help Neeley win re-election and cover up racism within the fire department, which he alleges caused his termination as Fire Chief. So we affirm the district court's holding that Barton plausibly alleged a violation of his constitutional rights."

FACTS:

> "In May 2022, six Flint firefighters responded to a house fire and were informed that residents likely were still in the home. Two of those firefighters, Daniel Sniegocki and Michael Zlotek, entered the home to search for the residents. Sniegocki and Zlotek claimed that they thoroughly searched all the rooms on the second floor using infrared equipment and thermal-imaging cameras, and they subsequently declared the home 'all clear.' A few minutes later, however, other firefighters entered the home and immediately found two African American boys, visible to the naked eye, lying on the floor in a second-floor bedroom. The boys eventually died from the fire.
>
> Barton, who was the City's Fire Chief at that time, concluded that Sniegocki and Zlotek lied about their search efforts—potentially due to racial animus. He noted

that the boys were African American while Sniegocki and Zlotek are Caucasian, the boys were readily observable, and Sniegocki and Zlotek refused to cooperate with the investigation. So Barton recommended to the city council and city officials, including Mayor Neeley, that Sniegocki and Zlotek be suspended without pay pending a final investigation and that they be discharged at the conclusion of that investigation.

Neeley disagreed. He instructed Barton to change the recommendation by 'alter[ing] official reports to disguise the firefighters' misconduct, suspend[ing] the firefighters with pay, and drop[ping] his recommendation that they be discharged." Politics allegedly motivated Neeley's orders to Barton: Neeley was running for re-election and needed the support of the firefighters' union, which he did not believe he would get if Barton terminated Sniegocki and Zlotek's employment. Barton refused, telling Neeley that, as Fire Chief, he had a duty to be truthful to the public, and 'in his personal capacity, [he] was unwilling to make false statements or profess professional judgments that he did not actually hold.' Specifically, Barton alleges that he was 'unwilling to participate in a cover-up of firefighter misconduct that was likely motivated by racism.

So Neeley acted on his own, 'unilaterally and surreptitiously chang[ing] [Barton's] official recommendation.' Neeley also 'instructed Chief Barton to make a public announcement saying that he initiated the change and agreed with it.' Again, Barton refused Neeley's demands and 'reminded Mayor Neeley [that] he would not make false statements.' At a subsequent city council meeting, Barton 'explained that he had not changed his recommendation and that he wanted to discharge Sniegocki and Zlotek from the fire department.'

Meanwhile, Neeley was re-elected as Mayor. Nine days later, he allegedly 'called Chief Barton into his office and told Chief Barton to resign as fire chief or be fired because Chief Barton had refused to serve Mayor Neeley's personal interests by participating in the cover-up of the firefighters' misconduct.' Barton refused, so Neeley terminated Barton's employment."

Legal Lesson Learned: Great decision; can be great precedent in future cases.

File: Chap. 17, Arbitration, Labor Relations

OH: CLEVELAND MUST BARGAIN WITH UNION TO HIRE 20 PART-TIME MEDICS – NOT A MANAGEMENT RIGHT

On August 8, 2024, in City of Cleveland v. State Employment Relations Board, et al., the Court of Appeals of Ohio, Eight District (Cuyahoga County) held (3 to 0) that the city has no management right to hire part-time paramedics without bargaining with the Cleveland Association of Rescue Employees, I.L.A, Local 1975 ("CARE"). The city lost before SERB, lost before trial court, and lost on this appeal. The Court wrote: "The issue of

whether an employer may reassign bargaining unit work to non-bargaining unit employees has long been held to require negotiation. Because of this, we cannot say the trial court abused its discretion by finding the City's refusal to bargain was not good-faith bargaining. Finally, we cannot say the trial court abused its discretion by finding that the City's actions in approving part-time paramedic positions, posting those positions, accepting applications, and not rescinding its plan made the issue ripe for review by SERB."

THE COURT HELD:

> "In order for the City to have the ability to reassign work to non-bargaining unit members **without** negotiating with CARE, there must be a reservation of that right in the CBA or a specific waiver of such right in the CBA. *** In order to unilaterally reassign bargaining unit work, the City would have to point to a specific waiver by CARE in the CBA. The CBA does provide a waiver on CARE's part as to 'the exercise of any rights reserved to and retained by it pursuant to either Section 4117.08(C) of the Revised Code or pursuant to this Article of this Agreement.' The ability to reassign work does not appear in the list of reserved rights under Article 3(A)-(K), nor does such appear in R.C. 4117.08(C). Further, R.C. 4117.08(C) specifically requires that a public employer negotiate issues that 'affect wages, hours, terms and conditions of employment, and the continuation, modification, or deletion of an existing provision of a collective bargaining agreement.'"

FACTS:

> "On June 14, 2021, the City notified CARE regarding a labor management committee meeting scheduled for June 17, 2021, with an agenda regarding the potential hiring of part-time paramedics to remedy staffing shortages. Thereafter, CARE asked that the City allow additional CARE board members to attend the meeting and that the City provide it with a proposal before the meeting. The City approved the request for additional members to attend the meeting. It also provided CARE with a summary of the City's plan to hire 20 part-time paramedics with non-union status. CARE then provided the City with a document titled 'CARE Staffing Solutions' to address the staffing; it did not address the City's plan but proposed that the CBA be renegotiated.
>
> At the June 17th meeting, the City presented a plan to hire part-time paramedics to perform CARE bargaining unit work. CARE responded by requesting the City bargain the decision, but the City refused. The City argued that it did not have a requirement to negotiate the hiring of part-time paramedics. On June 24, 2021, the City responded to CARE by stating that it was willing to discuss the plan to hire part-time paramedics but was not willing to discuss modification of the CBA. On June 30, 2021, CARE communicated to the City that bargaining with it was required regarding the City's intent to transfer CARE work to non-bargaining unit

employees. CARE further stated that its request to bargain was not preconditioned on the parties reopening of the CBA.

***

On August 27, 2021, CARE filed an unfair labor practice charge with SERB alleging the City violated R.C. 4117.11(A)(1) and (5) by unilaterally assigning bargaining unit work to non-bargaining unit, part-time employees. On November 28, 2021, SERB determined probable cause existed that a violation may have occurred and issued a Finding of Probable Cause and Direction to Hearing in which it authorized the issuance of a complaint and referred the matter to a hearing to determine whether the City violated RC. 4117.11(A)(1) and (5) when it refused to bargain its decision to assign bargaining unit work to non-bargaining unit, part-time employees. On August 23, 2022, a hearing was held. Thereafter, an administrative law judge issued a proposed order recommending that SERB find the City in violation of RC. 4117.11(A)(1) and (5).

On December 19, 2022, SERB issued an opinion adopting the administrative law judge's findings of fact, analysis and discussion, and conclusions of law, finding the City violated R.C. 4117.11(A)(1) and (5). Within the opinion, SERB ordered the City to cease and desist from refusing to bargain collectively with CARE and to bargain in good faith with CARE over the reassignment of bargaining unit work to non-bargaining unit, part-time employees.

***

In interpreting these [CBA] clauses, the trial court found:

> Pursuant to the CBA and R.C. 4117.08, assigning bargaining unit work to non-bargaining unit employees requires bargaining between the City and CARE. A plain reading of Article 3 of the CBA reveals that CARE did not waive the City's statutory requirement to bargain this issue. Unless a CBA specifically removes a right provided to employees by statute, an employee retains the statutory right. *State ex rel Clark,* 48 Ohio St.3d 19, 548 N.E.2d 940, 942 (1990).”

Legal Lesson Learned: The City had a clear obligation to bargain with the union, including such issues as part-time medic pay rates, assignments, and whether they will be represented by the union.

Chap. 18 – Legislation, incl. Public Records