NOV. 2024 – FIRE & EMS LAW NEWSLETTER

[NEWSLETTER IS NOT PROVIDING LEGAL ADVICE.]

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- **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

34 RECENT CASES

HAVE A FIRE POLE? SEE COLUBUS FD CASE - CHAP. 2

CASE SUMMARIES

Chap. 1 - American Legal System, incl. Fire Codes, Investigations, Arson

IA: ARSON – FORMER GIRLFRIEND DATING ANOTHER – 5 HOME – CONV. 5 COUNTS ATT. MURDER – 50 YRS PRISON

On Oct. 30, 2024, in State of Iowa v. Ishmael Shabazz Carter, the Court of Appeals of Iowa held (3 to 0): "A defendant challenges the sufficiency of the evidence supporting his convictions for arson in the first degree and five counts of attempted murder. AFFIRMED."

FACTS:

> "Ishmael Carter had been in an on-again-off-again romantic relationship with a woman for six years. One afternoon when the relationship was off, the woman and her new boyfriend ran into Carter while out for a walk. The woman and Carter had a verbal altercation, and the police were called to the scene. After the police came, Carter shouted at the woman and her boyfriend. They perceived Carter's comments as threats. Approximately one week later, the woman called 911 at 10:45 p.m. to report an individual, who she believed to be Carter, knocking and pouring liquid on or around her apartment door.*** The State charged Carter with arson in the first degree. It also charged him with five counts of attempted murder—one count each for the woman, her three children, and her boyfriend who were in the apartment. Following a trial, the jury found Carter guilty of all six crimes, and the court sentenced him to up to fifty years in prison. Carter appeals and challenges the sufficiency of the evidence supporting all his convictions. *** But the fact the State's case is built largely on circumstantial evidence does not undermine Carter's conviction—direct and circumstantial evidence are equally probative. See State v. Brimmer, 983 N.W.2d 247, 256 (Iowa 2022). In fact, a conviction can be based solely on circumstantial evidence so long as that evidence is sufficient to convince a factfinder of the defendant's guilt beyond a reasonable doubt. See State v. Bol, 9 N.W.3d 783, 788 (Iowa 2023)."

Legal Lesson Learned: Circumstantial evidence can support an arson conviction.

Chap. 1

OH: OBSTRUCTION OF OFFICIAL BUSINESS - FIRE OUT OF CONTROL IN FRONT HER HOME – THREATENED FIRE CHIEF

On Oct. 25, 2024 in State of Ohio v. Jasmine A. Anderson, the Ohio Court of Appeals, Seventh Appellate District, Belmont County, held (3 to 0) "Appellant Jasmine A. Anderson argues that her conviction for obstruction of official business was against the sufficiency and manifest

weight of the evidence. *** Appellant's assignment of error is without merit, and her conviction and sentence are affirmed. *** The court sentenced Appellant to 90 days in jail and court costs, with credit for 10 days."

FACTS:

> "The record shows that Appellant interfered with the Village of Brookside Fire Department in putting out a fire in front of her home. She was on the porch of the house while the fire raged out of control in front of it. She ordered the fire chief to get off of the property and threatened to kill him. When police arrived, Appellant entered the house, barricaded one door, and went into the attic. The police eventually found her and arrested her in the attic. The record contains ample evidence that Appellant interfered with both the fire department and with the police in carrying out their duties. *** The essential elements of this crime are: '(1) an act by the defendant, (2) done with the purpose to prevent, obstruct, or delay a public official, (3) that actually hampers or impedes a public official, (4) while the official is acting in the performance of a lawful duty, and (5) the defendant so acts without privilege.' State v. Kates, 2006-Ohio-6779, ¶ 21 (10th Dist.). Words alone may constitute obstruction of official business. 'The proper focus in a prosecution for obstructing official business is on the defendant's conduct, verbal or physical, and its effect on the public official's ability to perform the official's lawful duties." State v. Wellman, 2007-Ohio-2953, ¶ 12 (1st Dist.).'"

Legal Lesson Learned: Threatening words may constitute obstruction of official business.

Chap. 1

PA: ARSON – HIS CELL PHONE RECORDS SHOW AT HOME TIME FIRE – GETTING DIVORCE – 7.5-15 MONTHS / $369K

Oct. 21, 2024 in Commonwealth of Pennsylvania v. Sherman E. Lowry, the Superior Court of Pennsylvania held (3 to 0; non-precedential decision): "The evidence was sufficient for the jury to conclude that the fire was set by Appellant and that he did it intentionally, causing the damage that resulted."

FACTS:

> "At trial, Katherine Lowry, Appellant's wife who was in the process of divorcing him, testified to the events leading up to the fire at her home. At approximately 5:30 PM on April 4, 2019, she left the house to drive her children to baseball practice. N.T., 6/1/23, at 60-62. The family dog was inside the home and the house was secured when the family left. When they returned home shortly before 8:00 PM and entered the driveway, the house was smoking. She saw flames upon opening the door. N.T., 6/1/23, at 105. The family dog was outside, although the doors were shut. N.T., 6/1/23, at 83. The video surveillance system had been unplugged and its SIM card component necessary for monitoring was removed. N.T., 5/31/23 PM, at 125. Photos of the family had been shattered on the floor. N.T., 6/1/23, at 71-72. Hours after the fire, Mrs. Lowry checked the gun safe which, days earlier, had contained Appellant's firearms. It had been emptied.

*** An analysis of Appellant's mobile phone and cell tower connection data showed that Appellant had been at the home on April 4, 2019 around the time of the fire. Additionally, Appellant's phone, set to automatically connect to familiar WIFI networks, connected to the WIFI in Mrs. Lowry's home at 7:23 and 7:25 PM on the night of the fire. N.T., 6/1/23, at 91; Commonwealth Ex. 185. The records show Appellant's device move to his sister's home at 7:32 PM, which is approximately 100 yards from Mrs. Lowry's home. N.T., 5/31/23 PM, at 118. The phone connects to Mrs. Lowry's WIFI again at 7:34 PM. Commonwealth Ex. 185. *** At the conclusion of the trial, Appellant was found guilty and sentenced on July 13, 2023 to seven and one-half (7.5) months to fifteen (15) months incarceration. He was ordered to pay restitution to Katherine Lowry in the amount of $1294.66, and to Erie Insurance in the amount of $369,269.23."

Legal Lesson Learned: Cell phone data placed defendant at the scene of the fire. A search warrant for cell phone records is a powerful investigative tool.

Chap. 1

AR: ARSON – TRUCK FIRE – DEF. CONV. ARSON OF "OCCUPIED STRUCTURE" – INCLUDES A VEHICLE – 35 YRS

On Sept. 17, 2024 in State of Arizona v. Edwardo Serrato, III, the Court of Appeals of Arizona, Division 1, held (3 to 0): "Edwardo Serrato, III appeals his conviction and sentence for arson of an occupied structure.[1] He argues that the vehicle subject to the arson was not occupied because there was no proof that anyone else was inside or in the vicinity of the vehicle that burned. We address whether a defendant's presence alone is sufficient to find a structure is occupied. We hold that it is. Accordingly, we affirm."

FACTS:

"One night in December 2007, Kingman firefighters found a pickup truck on fire. The truck smelled of gasoline, and there was a melted gas can on the passenger seat. An arson investigator determined that the fire was set in the truck's passenger compartment. The police later arrested Serrato, and a grand jury indicted him for arson of an occupied structure. In July 2023, a jury found him guilty and found multiple aggravating circumstances. The superior court sentenced Serrato to an aggravated prison sentence of 35 years. *** 'A person commits arson of an occupied structure by knowingly and unlawfully damaging an occupied structure by knowingly causing a fire or explosion.' A.R.S. § 13-1704(A). An '[o]ccupied structure' is defined as 'any structure [including a vehicle] in which one or more human beings either is or is likely to be present or so near as to be in equivalent danger at the time the fire or explosion occurs.' A.R.S. § 13-1701(2), (4). *** During his closing argument, the prosecutor argued: '[Serrato] himself was obviously present when he set the truck on fire, so his presence alone makes the truck an occupied structure, even if no one was inside the vehicle.' On appeal, Serrato argues insufficient evidence supported his conviction. Because no record evidence supported finding another human being was present when the truck was set on fire, we ordered supplemental briefing to address whether Serrato's presence was sufficient. *** Even if we were to conclude that § 13-1701(2) is ambiguous, we would arrive at the same result because interpreting 'one or more human beings' to include the defendant is

consistent with the statute's legislative history. *** A defendant's presence alone is sufficient to sustain a conviction for arson of an occupied structure. A.R.S. § 13-1701(2). We therefore affirm Serrato's conviction and sentence."

Legal Lesson Learned: Arizona has broadly defined "occupied structure" in its arson statute.

Chap. 1

MN: ARSON – SET FIRE IN HIS KITCHEN & LIVING ROOM – TO "SECURE TRIP TO JAIL" – NO PROBATION - 48 MONTHS

On Sept. 16, 2024, in State of Minnesota v. Hunter Steven Hipp, the Minnesota Court of Appeals held (3 to 0) "Hunter Hipp pleaded guilty to first-degree arson after intentionally setting fires in the kitchen and living room of his apartment. He notified the district court in writing of his intent to move 'for a dispositional and/or durational departure from the presumptive sentence,' and at sentencing he argued exclusively that he was particularly amenable to probation. The district court denied his departure motion. *** We affirm."

FACTS:

"Hunter Hipp pleaded guilty to first-degree arson after intentionally setting fires in the kitchen and living room of his apartment. *** In April 2022, then 19-year-old Hunter Hipp decided he needed to spend time in jail to effect a major change in his life and deal with his mental-health challenges. And to secure a trip to jail, Hipp turned on his apartment stove and put cardboard boxes on the burner. He piled clothes and furniture in his living room and transferred the stove fire to the pile. Then he dialed 9-1-1 and pounded on the doors of other units in the building to alert them to get out to safety. Police and firefighters arrived and doused the fire. Hipp told police that he started the fire, disclosing that he 'wanted to be arrested, so [he] thought arson [was] the best thing to do.' *** The district court addressed the Trog factors as they relate to Hipp's alleged particular amenability to probation. It denied Hipp's downward-departure motion and imposed the 48-month presumptive prison sentence designated by the guidelines. In doing so, the district court reasoned that Hipp had failed to address his mental-health issues while he was incarcerated following his arrest and in the period immediately following his release on bail. *** Hipp appeals the district court's sentencing decision. *** We see no abuse of discretion."

Legal Lesson Learned: Trial court has discretion in sentencing - jail time or probation.

Chap. 1

TX: ARSON – 3 FIRES ON DAD'S PROPERTY – JURY TOLD OF 2 PRIOR FIRES – NOT JUST CLEARING BRUSH - 20 YRS

On Sept. 4, 2024 in Bryan Andrew Bruce v. The State of Texas, the Texas Court of Appeals, Seventh District at Amarillo, held (3 to 0): Following a plea of not guilty, Appellant, Bryan Andrew Bruce, was convicted by a jury of arson and sentenced to confinement for twenty years.

Presenting three issues, he maintains (1) the trial court abused its discretion by admitting evidence of fires on the property in addition to the fire alleged in the indictment; (2) the evidence is insufficient to sustain his conviction for arson of vegetation; and (3) court costs for court-appointed counsel and court-appointed investigator were improperly assessed. We affirm the judgment but direct preparation of an amended bill of costs."

FACTS:

> "Appellant lived in a house on property belonging to his father which included a pecan orchard. His father testified Appellant had permission to live on the property. On October 22, 2020, volunteer firefighters were called to Appellant's address to extinguish an unsupervised grass fire. Several firefighters testified that once the fire was under control, Appellant came out of his house in an agitated state. Shortly after departing the scene, the firefighters were recalled to the property after dark because the fire had reignited. According to one of the firefighters, Appellant rode a motorcycle around the firetrucks in a weaving pattern and yelled obscenities at them and called them 'idiots' and 'dumbass firemen.' His conduct impeded the firefighters' ability to control the fire. ***On November 3, 2020, Appellant started a grass fire which escalated and burned a garage-type shed containing some of his father's belongings. According to a deputy who responded to the fire, Appellant was not cooperative and wanted all law enforcement and firefighters off the property. Appellant's father testified Appellant did not have permission to start any of the fires and indicated he told Appellant several times to not start any fires. After the November 3 fire, he had explicitly told Appellant, '[n]o more fires.' *** Just weeks later, on November 17, 2020, Appellant started another fire which he asserted was a controlled burn. The fire escalated beyond control and a neighbor called 911 to report the fire. A police department employee who answered the 911 call testified, over objection, that her notes from November 17, 2020, reflected the caller reported a 'male who is in a field fixing to light a fire and thinks he's doing this intentionally.' She also testified the caller reported that Appellant was using gasoline to start the fire. One of the firemen testified gasoline is not an accelerant generally used for a grass fire. When a deputy responded to the November 17 fire, Appellant was not cooperative. He waved a saw blade and used expletives while yelling at the deputy to leave his property. Although Appellant was holding a shovel which is a common tool used in a controlled burn, the deputy testified Appellant was not attempting to manage the fire. Once firefighters arrived, Appellant again impeded their ability to fight the fire by riding his motorcycle through the fire in a weaving pattern and harassing firefighters. After the third fire, Appellant was charged with arson. *** The State's strategy in offering evidence of prior fires was to establish an elemental fact of the charged offense and to rebut Appellant's defensive theory. The fires were relevant to prove intent and knowledge and were not introduced to prove character conformity. In conducting a Rule 403 balancing test, the trial court correctly ruled that the probative value of the evidence far outweighed any unfair prejudice. *** The trial court did not abuse its discretion in admitting the objected-to evidence related to the prior fires."

Legal Lesson Learned: Prosecution properly allowed to inform jury of two prior fires on property to prove was not merely clearing brush.

Chap. 2 - Line Of Duty Death / Safety

Chap. 2

AR: TUCSON – UNCONSCIOUS BUS STOP – STRUCK FF IN FACE – SENTENCED MAX AGGRAVATED ASSAULT – 3.75 YRS

On Oct. 30, 2024, in State of Arizona v. Adam F. Rivas, the Arizona Court of Appeals, Division Two held (3 to 0; not for publication decision): "Adam Rivas appeals from his conviction and sentence for aggravated assault, arguing the trial court erred when it considered a prohibited aggravating factor at sentencing. For the reasons that follow, we affirm."

FACTS:

> "In August 2022, two firefighters with the Tucson Fire Department, Daniel Banales and John Binaculli, were dispatched to check on an unconscious person at a bus stop. Upon arrival, they found Rivas unconscious and non-responsive to verbal cues. Banales rubbed Rivas's sternum with a closed fist in an effort to wake him. Rivas 'jumped up' and told the firefighters he was fine. They then called their dispatcher with an update to prevent more first responders from arriving on scene. As the firefighters attempted to give their dispatcher a better description of Rivas and the area, Rivas ran towards Banales and attacked him, striking him in the face and head. Binaculli came to the aid of Banales and the two men subdued Rivas until police officers arrived and placed him under arrest. Rivas was charged with aggravated assault pursuant to A.R.S. § 13-1204(A)(8)(c). After a two-day jury trial, he was convicted and sentenced to 3.75 years in prison. *** Rivas further contends that while the court did not impose an aggravated sentence, it considered the 'unproven' aggravating factor and weighed it against the mitigating factors for sentencing. He argues he might have been sentenced 'to a minimum or mitigated term of imprisonment had [the court] not found the aggravating factor of emotional and physical harm.' *** But, in Arizona, the statutory maximum sentence is the presumptive sentence, which is what Rivas received."

Legal Lesson Learned: Trial court when imposing a sentence will consider aggravating facts, such as assaulting a firefighter.

Chap. 2

OH: COLUMBUS FD - FIRE POLE – RIDE-ALONG BREAKS LEG – IMMUNITY "NEG. TRAINING" BUT CASE PROCEED SAFETY

On Oct. 29, 2024, in Keri Howard, et al. v. City of Columbus, the Court of Appeals of Ohio, Tenth Appellate District, held (3 to 0): "Defendant-appellant, City of Columbus ("City"), appeals from a January 23, 2024 decision and entry from the Franklin County Court of Common Pleas granting in part and denying in part its motion for judgment on the pleadings. For the reasons

that follow, we reverse. *** In the City's sole assignment of error, it argues that the trial court erred by denying its claim for immunity as to the appellees' negligent training and supervision theory of premises liability. *** The City's sole assignment of error is sustained, and this matter is remanded for further proceedings as to the remaining causes of action [including (2) Defendants failed to warn [Mrs. Howard] not to go down the fire pole. 3) Defendants were negligent due to the absence of any warning or safety equipment appended to the fire pole or near it. 4) Defendant failed to train [Mrs. Howard] how to go down the fire pole].

FACTS:

> "In February 2021, Mrs. Howard was enrolled at the Ohio Fire Academy to become an emergency medical technician ('EMT')…. On February 27, 2021, Mrs. Howard went to Columbus Fire Station 1 ('Fire Station'), located in Columbus, Ohio, for a ride-along as part of her EMT training…. Upon arrival at the Fire Station, she was escorted up three flights of stairs to a table where several firefighters were congregating…. After conversing with the firefighters, the Fire Station's alarms went off and some of the firefighters went down the fire pole…. Mrs. Howard asked if she should go on the run, to which the unidentified Fire Station supervisor responded, 'If you want to go on the ride-along, you should." … Mrs. Howard tore her Achilles tendon as well as broke several bones in her toes, foot, ankle, and leg while attempting to descend the fire pole.*** While the trial court found that the City was entitled to immunity as to the Howards' claim that the fire pole constituted a physical defect, it denied the City's motion as to the absence of safety equipment theory of premises liability as it could constitute a physical defect under R.C. 2744.02(B)(4)."

Legal Lesson Learned – Make sure "ride-along" demonstrates how to safely go down the fire pole or require use of the stairs.

Chap. 2

KY: "FIREMAN'S RULE" EXCEPTION - TROPPER I-71 INJURED BY 2 TRUCKERS SPEEDING – SUE COMPANIES DAMAGES

On Oct. 24, 2024, in Wooster Motor Ways, Inc.; James Baumhower; EC Delivery. LLC; Kentucky Farm Bureau Mutual Insurance ;and Teddy Seer v. Michael Gonterman; Jenna Gonterman; and Kentucky Self-Insured Auto Program Risk & Insurance Services Division, the Supreme Court of Kentucky held (7 to 0): "The Firefighter's Rule ('the Rule') is a 'common law rule of long standing,' judicially created as a 'public policy' exception to the liability for negligence which might otherwise exist.' *** As applied here, a police officer is injured by the independent negligence of another while performing his duty as a public employee, the Rule will not act to bar suit against the negligent party."

FACTS:

> "On the morning of April 25, 2018, John Crawford pulled his tanker truck onto the right shoulder of Interstate 71, just past a short bridge. While traveling on the interstate, Crawford noticed two dogs running loose on the bridge and, being an animal lover, he stopped his car with the intent to remove the dogs from the roadway. After pulling off,

Crawford called 911 at 7:14 a.m. Crawford then exited his vehicle to begin corralling the canines. Kentucky State Trooper Michael Gonterman was tasked with assisting Crawford. Gonterman arrived on the scene at 7:28 a.m., pulled onto the shoulder, and activated his cruiser's flashing lights. Five to seven minutes after Gonterman's arrival, three vehicles approached the scene in the right lane of I-71. The first was a Nissan Altima driven by Kim Perkinson, followed by a box truck driven by James Baumhower for EC Delivery, and finally a tractor trailer driven by Teddy Seery for Wooster Motor Ways. As the trio rounded a curve approximately a quarter mile from the bridge, each began to move into the left lane. As traffic approached the scene, cars were slowing considerably and Perkinson slowed her vehicle in response. Baumhower, for reasons disputed by the parties, was unable to slow his box truck commensurately and elected to swerve back into the right lane to avoid hitting Perkinson's car. Seery, traveling only 50 yards behind Baumhower when Baumhower moved into the right lane, was now presented with a similar problem: swerve into the right lane or hit Perkinson. Seery made the same choice as Baumhower and moved into the right lane. Seery was then unable to brake quickly enough to avoid the now braking Baumhower in the right lane and his tractor trailer collided with the back of Baumhower's box truck. Just prior to the collision, Crawford and Gonterman had brought the dogs under control and were walking single file along the narrow emergency shoulder of the bridge. When Seery's tractor trailer hit the box truck, it caused the box truck to flip onto its side and slide down the roadway toward Crawford and Gonterman. When everything came to rest, Crawford was pinned between the box truck and the concrete barrier on the edge of the bridge. Crawford ultimately died from his injuries. Gonterman was knocked off the bridge, causing him to fall 30 feet. He was severely injured, suffering multiple broken bones, internal bleeding, a punctured lung, and a head injury. Gonterman survived but spent 38 days in the hospital and nearly 8 weeks in a wheelchair. The injuries continue to plague him. *** The Firefighter's Rule, in its most fundamental sense, stands for the proposition that 'a person does not owe a duty of care to a professional rescuer for injury that was sustained by the very negligence that occasioned the rescuer's presence and that was within the scope of the hazards inherent in the rescuer's duties.' … *** The record suggests that both Seery and Baumhower were operating their vehicles in a negligent manner that led to the crash independent of the dogs or of Gonterman and Crawford. Both truck drivers were travelling too fast and following too close to the respective vehicle in front of them."

Legal Lesson Learned: Excellent decision finding an exception to the Fireman's Rule; some states have abolished the Fireman's Rule completely.

Chap. 3 – Homeland Security

Chap. 3

DC: SECRET SERVICE PROTECTION – NO ENTERING RESTRICTED ZONE – CAPITOL INVASION – 14 DAYS JAIL

On Oct. 22, 2024 in United States o America v. Couy Griffin, the U.S. Court of Appeals for the District of Columbia Circuit, held (3 to 0): "This appeal turns on interpretation of a federal law enacted to better protect the President and other national leaders from assassination, kidnapping, and assault. The law creates a narrow domain of federal trespass authority to prevent unauthorized members of the public from getting too close to a person under Secret Service protection.*** The defendant says a person 'knowingly enters' the restricted safety zone only if he knows that the basis of the restriction is to safeguard a Secret Service protectee. Id. § 1752(a)(1). We hold that knowingly breaching the restricted area suffices, even without knowing the basis of the restriction—here, the presence of Vice President Pence at the Capitol on January 6—which merely confirms that such trespasses are within Congress's legislative authority."

FACTS:

> "Couy Griffin knowingly intruded into the area of the United States Capitol grounds that had been restricted in order to protect Vice President Pence on January 6, 2021, during the counting of the electoral college votes for President. Griffin came to the Capitol that day along with thousands of other people to try to stop the certification of the electors' ballots. He breached the boundary established to prevent public access and remained for approximately two hours in the restricted area while the Capitol Police struggled, facing serious injury and even death, to control the mob that overwhelmed them and broke into the Capitol Building. *** The district court sentenced Griffin to fourteen days of incarceration, with credit for time served, and one year of supervised release. He timely filed this appeal. *** Griffin's public statements in the days after January 6 confirm that Griffin knew when he entered and stayed on the Capitol grounds that the area was 'restricted' within the meaning of section 1752(c)(1). See J.A. 536-37. On January 7, Griffin recalled that the inaugural stage that he climbed was 'roped off,' and that 'D.C. police' had told the rioters 'you can't step over this." … And, on January 14, Griffin reiterated that 'there was some fencing up' that alerted the rioters they 'couldn't go any further,' but the crowd— including Griffin—'just pushed through.' *** Accordingly, a rational factfinder could conclude—as, indeed, the district court did, see J.A. 536-37—that Griffin was aware that the U.S. Capitol grounds were 'posted, cordoned off, or otherwise restricted' and his presence was unauthorized when he remained there during the afternoon of January 6, 2021."

Legal Lesson Learned: May not enter a Secret Service restricted area.

Chap. 3

U.S. SUPREME CT - DOMESTIC RESTRAINING ORDER – BOYFRIEND FIREARM, VIOL. FED. LAW - CONSTITUTIONAL

On June 21, 2024, in United States v. Zackey Rahimi, the U.S. Supreme Court held (8 to 1): "A federal statute prohibits an individual subject to a domestic violence restraining order from possessing a firearm if that order includes a finding that he 'represents a credible threat to the physical safety of [an] intimate partner,' or a child of the partner or individual. 18 U. S. C. §922(g)(8). Respondent Zackey Rahimi is subject to such an order. The question is whether this provision may be enforced against him consistent with the Second Amendment. *** In Heller, McDonald, and Bruen, this Court did not 'undertake an exhaustive historical analysis . . . of the full scope of the Second Amendment.' Bruen, 597 U. S., at 31. Nor do we do so today. Rather, we conclude only this: An individual found by a court to pose a credible threat to the physical safety of another may be temporarily disarmed consistent with the Second Amendment."

FACTS:

> "In December 2019, Rahimi met his girlfriend, C. M., for lunch in a parking lot. C. M. is also the mother of Rahimi's young child, A. R. During the meal, Rahimi and C. M. began arguing, and Rahimi became enraged…. C. M. attempted to leave, but Rahimi grabbed her by the wrist, dragged her back to his car, and shoved her in, causing her to strike her head against the dashboard. When he realized that a bystander was watching the altercation, Rahimi paused to retrieve a gun from under the passenger seat. C. M. took advantage of the opportunity to escape. Rahimi fired as she fled, although it is unclear whether he was aiming at C. M. or the witness. Rahimi later called C. M. and warned that he would shoot her if she reported the incident. *** Rahimi was indicted on one count of possessing a firearm while subject to a domestic violence restraining order, in violation of 18 U. S. C. §922(g)(8). At the time, such a violation was punishable by up to 10 years' imprisonment (since amended to 15 years). *** Rahimi moved to dismiss the indictment, arguing that Section 922(g)(8) violated on its face the Second Amendment right to keep and bear arms…. Concluding that [5th] Circuit precedent foreclosed Rahimi's Second Amendment challenge, the District Court denied his motion. [5th Circuit reversed; U.S. Supreme Court holds 8 to 1 that statute is constitutional.]. Rahimi then pleaded guilty. *** Rather, we conclude only this: An individual found by a court to pose a credible threat to the physical safety of another may be temporarily disarmed consistent with the Second Amendment."

Legal Lesson Learned: This decision will hopefully help reduce gun violence involving domestic partners.

Chap. 4 - Incident Command, incl. Training, Drones, Communications

Chap. 4

MA: CAPTAIN NOT PROMOTED DC - 5 PROMOTED – POOR ANSWER INCIDENT COMMAND QUESTION / PRIOR FIRE

On Oct. 11, 2024. in Pierre Grenier v. Civil Service Commission and City of Springfield, the Massachusetts Appeals Court held: "The plaintiff, Pierre Grenier, appeals from an order of a judge of the Superior Court granting judgment in favor of the defendants, the Civil Service Commission (commission) and the city of Springfield (city). The judge affirmed the decision of the commission that the city had reasonable justification to bypass Grenier for a promotion to district fire chief. We affirm."

FACTS:

> "In August 2018, the Massachusetts Human Resources Division (HRD) established a list of eligible candidates to fill positions of district fire chief in the city, ranked in order based on the candidates' scores on the civil service examination and veteran status. Six candidates were on the list; Grenier's rank was third. *** In December 2019, the HRD issued a certification authorizing the Springfield Fire Department (SFD) to fill five vacancies for district fire chief from the eligible list. As part of that process, SFD formed a selection board including Fire Commissioner Bernard Calvi, an SFD Deputy Chief, two outside fire chiefs, the Springfield Director of Finance and Administration, the Springfield Chief Diversity and Inclusion Officer, and the Springfield Assistant Human Resources Director. While the appointment decision ultimately resided solely with Calvi, the selection board interviewed all the candidates. They used a semi-structured process during which each candidate was asked the same ten questions. Each board member scored each answer based on a scale of one to five, with one being a low score. *** In addition to the interview scores, [Fire Commissioner Bernard] Calvi considered the candidates' scores on the civil service examination, their level of education, and other relevant professional experience. Based on his review, Calvi appointed five of the candidates to the position of district fire chief, excluding Grenier. In accordance with G. L. c. 31, § 27, Calvi issued a letter to Grenier, stating three reasons for the bypass. First, as compared to the other candidates, Grenier had pursued less continuing education in the field of fire science and his focus was on his 'side job as an electrician.' Second, Grenier's response to an actual fire scene 'put lives at risk' and his answer to the hypothetical fire scenario demonstrated an inability to learn from his experience during the Crystal Street fire. Third, Calvi cited Grenier's lack of vision for improving the department, which was disappointing given his years of experience, especially in leadership.*** Grenier appealed to the [Civil Service] commission, which found that the interview process was unbiased and reasonable justification existed to support the bypass of Grenier. A judge of the Superior Court affirmed the commission's decision and Grenier now appeals. *** Indeed, the commission found that there was not reasonable justification to bypass Grenier based on a comparison of his continuing education experience alone. However, the commission appropriately credited Calvi's testimony that Grenier's responses to the interview questions raised concerns about his qualifications for the position, despite his relative seniority. *** The commission found that Calvi's assessment of those answers was credible and unbiased and that Grenier's interview performance 'raised a legitimate concern about his readiness to assume an elevated level of responsibility on a permanent basis.' We agree."

Legal Lesson Learned: Use of selection board is an excellent promotion process.

Chap. 4

CA: WILDLAND FIRE – BACKFIRES – RANCHER MUST PROVE BACKFIRES NEG. USED DURING "RED FLAG WARNINGS"

On Oct. 8, 2024, in Joe Allen Wixson v. The United States, the United States Court of Federal Claims [Wahington, D.C.] held: "Joe Allen Wixson alleges that the government took his private property for public use by allowing it to be destroyed by a fire. He alleges that the decisions by the U.S. Forest Service to cancel prescribed burns and employee trainings during the covid-19 pandemic, and then to use defensive firefighting techniques during a windy day, caused the fire to affect his property. *** In sum, the government's decisions to cancel prescribed burns and firefighter training cannot form the basis for Mr. Wixson's takings claim or any other claim in this court. *** Because the government did not intend to invade Mr. Wixson's property, Mr. Wixson must show that the fire on his property was the direct, natural, or probable result of the government's use of backfires, or controlled burn techniques."

FACTS:

> "In September 2020, fire burned 'several of [Mr. Wixson's] homes, buildings, heavy equipment, millions of feet of merchantable timber and much more personal property in Kettenpom, California. *** Mr. Wixson alleges that the fire on his property would not have occurred "[i]f the Government had not started new 'defensive firing' fires and done drip torching to start new fires during Red Flag Warnings." ECF No. 19 at 6 [¶37]; see ECF No. 1 at 2. He argues that '[m]any [of the] fires were set by the Defendant and existing fires caused by [lightning] or other fires started by Defendant were made larger and more dangerous by the Defendant firing and torching and setting more new fires during Red Flag Warnings." ECF No. 21 at 3. The government argues that lightning, not the government's defensive firing or backfires, caused the complex fire. ECF No. 20 at 2. The government adds that there are no facts alleged 'supporting even an inference that the United States started the fire, or portion of the fire, that damaged [Mr. Wixson's] property.' ECF No. 22 at 8. The government argues that Mr. Wixson has not described sufficient facts 'to allow this Court to conclude that the backfires are the reason that the fire spread to his property.' Id. at 1. *** For these reasons, the court grants the government's motion to dismiss Mr. Wixson's claims that (1) the government's cancellation of prescribed burn and firefighter training constituted a taking; (2) he is entitled to compensation due to previous congressional action; and (3) wildfires caused increased covid-19 cases. The court denies the government's motion to dismiss Mr. Wixson's claim that the government's use of firefighting techniques burned his property and effected a taking."

Legal Lesson Learned: Property owner will need expert testimony showing backfires were done in a negligent manner during Red Flag warnings.

Chap. 4

CA: CAMPERS CALLED 911 – SEE WILDLAND FIRE – TOLD NO DANGER 3-4 DAYS / WILL ADVISE – INJURED – IMMUNITY

On Oct. 8, 2024, in Michelle Portillo, et al. v, Madera County, the California Court of Appeals, Fifth District. Held (3 to 0; unpublished opinion): "Appellants are a number of campers that were caught in the 2020 Creek Fire. They sued Madera County (County) after they were injured, claiming a County employee negligently advised them about the fire danger and broke a promise to inform them if the danger increased. The trial court dismissed their third amended complaint on demurrer. Appellants challenge this ruling. For the reasons set forth below, we affirm."

FACTS:

> "Appellants are a number of campers that were caught in the 2020 Creek Fire. They sued Madera County (County) after they were injured, claiming a County employee negligently advised them about the fire danger and broke a promise to inform them if the danger increased. The trial court dismissed their third amended complaint on demurrer. Appellants challenge this ruling. For the reasons set forth below, we affirm. *** [A]ppellants were 'camping with friends and relatives at the Mammoth Pool Reservoir' when they 'observed a fire in the distance and immediately called 911 to determine the location of the fire.' This first call occurred at 12:50 a.m. on September 5, 2020. The call was 'immediately transferred to a Madera County employee who identified himself as a County employee.' After being advised of the sighted fire, the County employee stated they were 'attempting to determine where the fire was located' and advised appellants 'the forest service would be contacted.'*** Sometime before 3:00 a.m., appellants called the employee a second time. The third amended complaint alleged '[t]he following conversations occurred: (1) [appellants were] advised by the County employee that the fire was not a danger to [appellants] for a minimum of 3-4 days and they would not have to evacuate; (2) in the event there was any change in that opinion of the fire danger in less than 3-4 days, the County official who had been provided [appellants'] phone number would immediately contact them and warn them of any potential danger so [appellants] could immediately evacuate; (3) the County employee indicated that the forest service had been contacted and would inspect the area and, once again, if they were alerted to any particular potential danger, they would immediately advise [appellants] of any danger; [and] (4) [appellants] emphasized that during these phone calls there were over 150 people in the area and if the fire spread to the area there would be a potential danger.' According to the third amended complaint, the 'County employee acknowledged' the risk of danger and indicated 'that he would immediately notify [appellants] if there was any danger of the fire spreading' but that 'at that time there was absolutely no peril or emergency.' *** There are no facts suggesting that the actual danger presented by the fire increased because of the employee's conduct or that appellants were incapable of continuing to monitor their own safety because of the employee's negligence. Rather, the only facts alleged are that the employee made a promise to call if the danger increased and failed to do so. Such allegations suggest ordinary negligence. While it does not take much in the way of factual allegations to sufficiently plead gross negligence, it requires something more than a bare assertion of ordinary negligence. (See *Jimenez v 24 Hour Fitness USA, Inc.* (2015) 237 Cal.App.4th 546, 557-561 [discussing, in summary judgment context, multiple cases demonstrating that facts showing mere negligence are

insufficient to demonstrate gross negligence].) Accordingly, we find no error in the trial court's ruling."

Legal Lesson Learned: Very difficult for these campers to prove gross negligence.

Chap. 4

CT: WIRES DOWN ON CAR – 2 TRAPPED FOR 1-HOUR - – STATE ORDERS UTILITY COMPANY MORE RAPID RESPONSE

Oct. 2, 2024, in The Connecticut Light & Power Company, d/b/a Eversourse Energy v. Public Utilities Regulatory Authority, the Superior Court of Connecticut, Judicial District of New Britain, Tax and Administrative Appeals Division, (Judge Matthew J. Budzik) held: "Because the statutes and regulations cited by Eversource are either inapplicable, or merely permit - - but do not require -- PURA to hold a hearing on the instant investigation, the court grants the motion to dismiss."

FACTS:

"On January 17, 2023, at approximately 2 p.m., a car ran into an electric utility pole in Norfolk, Connecticut (the accident)…. When members of the Norfolk Volunteer Fire Department arrived at the accident scene, they observed two seriously injured people trapped inside the car and that the car was smoking…. Because the accident caused electrical wires to fall on to the victims' car, emergency personnel were unable to immediately extract the injured persons from the car. At approximately 2:20 p.m., Eversource received a request to 'deenergize,' i.e., turn off the electricity to, the accident area…. By approximately 3:30 p.m., Eversource personnel had confirmed that the accident area had been deenergized and, shortly thereafter, Norfolk Volunteer Fire Department personnel began to extract the two individuals from the car. *** On January 18, 2023, the Norfolk Fire Chief sent a letter to Eversource complaining that it had taken one hour for Eversource to confirm that the accident area had been deenergized…. In his letter to Eversource, the Norfolk Fire Chief stated that he found Eversource's response time 'completely unacceptable' and that Eversource's response time may have endangered the seriously injured persons trapped in the car. *** On January 30, 2023, PURA [Public Utilities Regulatory Authority] issued a Notice of Proceeding initiating an investigation (the investigation) of Eversource's conduct regarding the accident pursuant to Connecticut General Statutes …. *** On February 28, 2023, Eversource submitted, at PURA's direction, a root cause analysis as part of the investigation…. PURA issued interrogatories as part of the investigation…. On April 6, 2023, PURA held a remote evidentiary hearing (the hearing) as part of the investigation. Id. Eversource participated in the hearing.*** On August 9, 2023, PURA issued a decision resulting from the investigation and hearing…. The decision concluded that Eversource's response to the accident was imprudent and may have violated Connecticut law…. PURA also ordered Eversource to undertake several measures intended to reduce the time it takes Eversource to respond to incidents similar to the accident. *** As set forth below, the court finds that Eversource's cited authorities are either inapplicable to this case, or do not require that a contested case hearing be held. *** Eversource points to no statutory authority requiring that PURA institute a contested case before ordering a regulated electric utility to shorten

the time it takes to respond to emergency calls from emergency first responders in order to protect public safety. *** For all the foregoing reasons, the motion to dismiss is granted."

Legal Lesson Learned: Nice to see State agency holding utility company's "feet to the fire" for slow response to wires on occupied vehicle call.

Chap. 5 - Emergency Vehicle Operations

Chap. 5

PA: EMS LICENSE - 1-YR SUSP. REVERSED – 65 MPH / 40 ZONE – LIGHTS / SIREN - MOTORIST PULLED OUT / KILLED

On Oct. 24, 2024 in Steve E. Piotrowski v. Department of Health, the Commonwealth of Pennsylvania held (3 to 0): "Steve E. Piotrowski (Piotrowski) petitions for review of an adjudication of the Department of Health (Health Department) that suspended his license as an emergency medical services provider for operating an ambulance in a reckless manner. In doing so, the Health Department rejected the proposed adjudication of its hearing officer that Piotrowski's operation of an ambulance en route to an emergency in excess of the posted speed limit did not, ipso facto, constitute reckless conduct. On appeal, Piotrowski argues that the Health Department erred in its rejection of the hearing officer's interpretation and application of the term 'reckless' is set forth in Section 8121(a)(6) of the Emergency Medical Services System Act (EMS Act),

FACTS:

"Piotrowski has been employed by Scranton Quincy Ambulance LLC d/b/a Commonwealth Health Emergency Medical Services (Commonwealth Health) for approximately 12 years. On October 4, 2021, the Health Department's Bureau of Emergency Services (Bureau) instituted an enforcement action against Piotrowski as a result of an accident that occurred on July 30, 2021. In that accident, the ambulance operated by Piotrowski collided with another vehicle, causing the death of the other driver, Beverly Zeman (Decedent). Shortly before the collision, the ambulance was recorded traveling at 65 miles per hour, where the posted speed limit was 40 miles per hour. The Bureau asserted that Piotrowski's chosen rate of speed constituted reckless conduct in violation of Section 8121(a)(6) of the EMS Act. *** On July 30, 2021, Piotrowski was assigned to work 7:00 a.m. to 7:00 p.m. with his wife, Kathleen, also an EMT, out of the Texas Ford Fire Department Station in Honesdale, Pennsylvania. At approximately 5:00 p.m., they were dispatched to the Beach Lake Boat Launch to respond to a reported overdose. Tusten EMS and Beach Lake Fire Department were also dispatched to the emergency. After receiving the dispatch, Piotrowski activated the ambulance's siren and lights. On the way to the Beach Lake Boat Launch, approximately 30 vehicles responded to the ambulance's siren and lights by pulling over to the side of

the road and stopping. On State Route 652, the ambulance passed through 'rural farm country' with some businesses…. At approximately 5:15 p.m., Piotrowski 'changed [the] siren tone' when, suddenly, Kathleen 'screamed out, oh no, she's not stopping.' … He saw Decedent's vehicle leave the parking lot of a Dollar General Store without stopping at the stop sign posted at the parking lot's exit. Decedent did not look for oncoming traffic before pulling out onto the roadway. *** Based on this conclusion, the Deputy Secretary imposed sanctions. After considering Piotrowski's years of service, lack of driving citations, and lack of any prior EMT discipline, the Deputy Secretary imposed the following sanctions on Piotrowski: (1) $500 fine; (2) one-year suspension as an EMS provider, with a return to work on a probationary basis for one year; and (3) completion of three courses on driving safety prior to returning to work. *** We hold that for a person's conduct to be 'reckless,' there must be 'conscious' or 'deliberate' indifference to the risk of causing harm to others. BLACK'S LAW DICTIONARY 1524 (11th ed. 2019). *** The Bureau proved that Piotrowski was driving well above the posted speed limit 16 seconds, or approximately one quarter mile, before the point of impact. Exceeding the speed limit alone is not operating 'an emergency vehicle in a reckless manner,' 35 Pa. C.S. §8121(a)(6), particularly where, as here, Piotrowski's other actions demonstrated care for, and mindfulness of, the safety of others."

Legal Lesson Learned: Emergency run – 65 in 40 mph zone in rural area is not clearly reckless.

Chap. 5

MI: AMBULANCE STRUCK BY MOTORIST – PATIENT DIED – EMS MAY BEEN EXCESIVE SPEED – NO IMMUNITY

On Oct. 11, 2024 in Tia Gentry, personal representative of the estate of Delana Gentry v. Ryan Baugh; City of Detroit; et al., the Michigan Court of Appeals held (3 to 0): "In sum, as the record currently stands, there are genuine issues of material fact whether [firefighter] Baugh was negligent in his operation of the ambulance. The trial court accordingly did not err by denying defendants' motion for summary disposition under MCR 2.116(C)(7) on grounds that plaintiff's claims were barred by governmental immunity."

FACTS:

"Defendants-appellants, Ryan Baugh and the city of Detroit (the city), appeal as of right the trial court's order denying their motion for summary disposition under MCR 2.116(C)(7), which argued that the claims brought by plaintiff, Tia Gentry, as personal representative of the estate of Delana Gentry, are barred by governmental immunity. We affirm. *** This case arises out of a motor vehicle accident at around 9 p.m. on October 23, 2020, at the intersection of James Couzens Freeway and West McNichols Road in Detroit, Michigan. Plaintiff's mother, Delana, was recovered from a burning home by the Detroit Fire Department and transported by EMS employees to the hospital for further treatment. Baugh drove the ambulance while others treated Delana in the back of the vehicle. As Baugh drove down James Couzens Freeway through the West McNichols Road intersection, defendant Edwin Nichols struck the ambulance, causing it to roll over. The details of the accident are hotly contested. Baugh wrote in his report following the

accident that he had a green light and that Nichols 'ran a red light' at a high rate of speed, causing the crash. At his deposition, Baugh testified that he could not remember the color of his light but 'remember[ed] driving down James Couzens and seeing the green light.' In contrast, Nichols and a witness interviewed at the scene both said that Nichols had the green light. Nichols also testified that he was traveling the speed limit, which was 35 miles per hour. Baugh wrote in his report and testified at his deposition that he slowed down at the intersection, looked both ways to make sure the intersection was clear, and only proceeded after determining that it was safe to do so. Baugh's supervisor testified that, when she arrived at the scene of the accident, a witness told her that Nichols' vehicle went around stopped traffic to enter the intersection. Nichols, however, never said that he went around stopped traffic before the accident. He testified that he turned onto McNichols and was simply driving through his green light when the accident happened. Plaintiff's accident reconstructionist seemingly confirmed this—he represented that the crash data from the vehicle Nichols was driving showed that Nichols' 'vehicle was traveling between 34-35 m.p.h. in the five seconds leading up to the crash . . . .' Baugh testified at his deposition that he had his lights and sirens activated, and a witness at the scene confirmed this and additionally reported that the ambulance sounded its horn before entering the intersection. Nichols, however, said that, while he heard sirens, he thought that they were the sirens of ambulances that he could see down the street in front of him, and he denied seeing any lights on the ambulance that Baugh was operating. The speed that Baugh was traveling before the accident is also unclear. In his report, Baugh wrote that his speed was '55' but crossed that out and wrote '30.' Then, at his deposition, Baugh said that he 'couldn't put an estimate on' his speed, but 'would say more than 10 miles an hour is a good estimate.' When asked if he was traveling '[m]ore than 50,' he said, 'Probably not more than 50,' and agreed that he was traveling '10 to 50, somewhere in there.' "

Legal Lesson Learned: In deposition, EMS driver was not clear about speed.

Chap. 6 - Employment Litigation, incl. Work Comp., Age, Vet Rights

Chap. 6

VA: AGE DISCRIMINATION NOT PROVEN – BC AGE 47 – FIRED FOR UNAUTHORIZED PURCHASE OF BRUSH TRUCK

On Oct. 25, 2024, in Clay O'Neal Fitzgerald v. Botetourt County, Virginia, the U.S. Court of Appeals for the Fourth Circuit (Richmond, VA) held (3 to 0; unpublished opinion): "Plaintiff-appellant Clay O'Neal Fitzgerald alleges that his former employer, Botetourt County, Virginia, terminated him in retaliation for his complaints about age discrimination. The district court granted Botetourt County's motion for summary judgment, finding that Fitzgerald failed to produce sufficient evidence under the McDonnell Douglas framework to show that the County's

proffered justification for terminating him was pretextual. Because we agree that no reasonable jury could conclude that the County's legitimate non-retaliatory reason for Fitzgerald's termination was mere pretext, we affirm. *** Per the County, Fitzgerald neither had 'authority to make [the purchase] [$37,500 Ford pickup truck for neighboring volunteer fire department] nor did [he] seek or receive appropriate authorization."

FACTS:

> "Plaintiff-appellant Clay O'Neal Fitzgerald [47-year old firefighter] alleges that his former employer, Botetourt County, Virginia, terminated him in retaliation for his complaints about age discrimination. *** Fitzgerald was hired by Botetourt County as a firefighter and EMT in 2007. He was forty-seven years old. Fitzgerald became a logistics technician around 2010 and later received two notable promotions, first to lieutenant in 2016 and then to battalion chief in 2017. Both promotions came with a pay raise and increased supervisory responsibilities. Despite these professional accomplishments, Fitzgerald felt that he was treated unfavorably due to his age. Sometime between 2010 and 2012, Fitzgerald made informal complaints about being denied opportunities to 'ride the seat' meaning to serve as the officer on a fire engine. S.J.A. 124. He believed he was being passed over in favor of younger employees for this important step on the path to advancement. *** In September 2017, [Fire Chief] Britt began exploring the acquisition of a new brush truck for the Glen Wilton Volunteer Fire Department. Britt emailed the County's purchasing manager, Susan Tincher, to request quotes for a new truck. Tincher emailed Britt the quotes and copied Fitzgerald. On November 3, Britt passed the information to Glen Wilton's chief, Tim Keyser. Britt's email included his 'recommendation[] that the Ford be chosen.' J.A. 264. *** Fitzgerald wrote that 'Purchasing . . . is just waiting on the go ahead to execute the order" and asked Ferguson, as administrative battalion chief, to 'confirm the money' in the budget. Id. On December 7, Fitzgerald emailed Tincher 'We are good to go' with the Ford. J.A. 269. The next day, Ferguson confirmed that the budget contained sufficient funds and Tincher executed the $37,500 purchase order. Three months later, on March 16, 2018, Fitzgerald emailed Larrowe to ask about the plan for the old Glen Wilton brush truck once the new one came in. Larrowe did not respond. Fitzgerald wrote Larrowe again on April 27 to let him know that the truck had arrived. Larrowe did reply to this email, asking Fitzgerald, 'Who signed off on the purchase of this truck? Where did the funds come from? When did you get involved?' J.A. 281. Fitzgerald explained that the purchase 'was something Britt put in motion' and that 'it never would have occurred to [him] that Britt would have executed a bid process for something without approval.' J.A. 280–81. *** The County terminated Fitzgerald's employment on May 16, 2018. The five-page termination letter signed by Larrowe listed six categories of policy violations justifying the County's decision. The letter explicitly referenced the brush truck purchase, identifying Fitzgerald's 'lead role' in 'expressly approv[ing], without authority, the purchase of the Glen Wilton brush truck' as a violation of the County's personnel policy…. Per the County, Fitzgerald neither had 'authority to make [the purchase], nor did [he] seek or receive appropriate authorization.' *** We agree with the district court that Fitzgerald failed to produce evidence showing that the unauthorized purchase of the brush truck was a false or otherwise pretextual reason."

Legal Lesson Learned: County terminated for unauthorized purchase of truck; not age of Battalion Chief.

Chap. 6

OH: CINCINNATI FF – THYROID CANCER – STATUTORY PRESUMPTION WAS CAUSED BY JOB

On Oct. 10, 2024, in State ex rel. City of Cincinnati v. Industrial Commission of Ohio (re: claimant, Joshua K. Knoechel), the Ohio Court of Appeals for the Tenth Appellate District held (3 to 0): "Relator, the City of Cincinnati, commenced this original action requesting this court to issue a writ of mandamus ordering respondent, the Industrial Commission of Ohio ("commission"), to vacate its order exercising continuing jurisdiction to allow the workers' compensation claim of claimant, Joshua K. Knoechel, for papillary thyroid cancer and to reinstate the March 11, 2022 order of the Staff Hearing Officer ('SHO') denying the claim. [Court agreed with Magistrate, who recommended] that this court should deny the employer's petition for writ of mandamus."

FACTS:

> "On June 30, 2020, respondent in the present matter, Joshua K. Knoechel ('claimant'), was diagnosed with thyroid cancer (papillary thyroid carcinoma) while employed as a firefighter for the employer, for whom he had worked since October 2012. *** On October 5, 2021, claimant filed an application for workers' compensation benefits. Accompanying his application was a C-265 Presumption of Causation for Firefighter Cancer, in which claimant indicated he was exposed to each of the 16 group 1 or 2A carcinogens, as well as the category marked 'other.' Claimant indicated that he had been assigned to hazardous duty as a firefighter for the employer from October 14, 2012, to the present. Claimant also indicated that he had been employed as a firefighter for the Montgomery Fire Department from June 2009 to June 2013, and the Covington Fire Department from October 2011 to November 2012. *** The magistrate recommends that this court deny the employer's request for a writ of mandamus. *** The employer contends that in support of denying the claim for thyroid cancer, the SHO correctly found that the employer rebutted the presumption in R.C. 4123.68(X)(1) by submitting Dr. Kakel's January 5, 2022, report; Dr. Kakel relied on medical documents and medical literature; and Dr. Kakel opined that the medical literature did not support a causal relationship between working as a firefighter and developing thyroid cancer. The employer asserts that the commission had to find a clear mistake of law to exercise continuing jurisdiction but, instead, merely cited a different interpretation of the evidence and improperly reweighed the evidence. The employer points out that the commission never indicates what the alleged error of law was, but states only that Dr. Kakel's reports fall short of showing that exposure to the carcinogens did not or could not have caused the cancer being alleged.*** Specifically, the commission determined that the January 5, 2022, report from Dr. Kakel falls short of showing by a preponderance of competent scientific evidence that exposure to the type of carcinogen alleged did not or could not have caused the cancer being alleged, as required by R.C. 4123.68(X)(2)(b). Therefore, for the same reasons explained in case 21AP-702, the commission did not

abuse its discretion when it found the SHO's decision contained a clear mistake of law sufficient to invoke continuing jurisdiction."

Legal Lesson Learned: Statutory presumption that cancer was caused by the job; employer's expert report did not overcome this presumption.

Chap. 6

OH: PROSTATE CANCER – 25 YRS ON JOB BEFORE RETIRED – AWARDED PERMANENT PARTIAL DISABILITY

On Oct. 17, 2024, in State ex rel. City of Cincinnati v. Industrial Commission of Ohio (re: claimant Michael K. Hines), the Cour of Appeals of Ohio, Tenth Appellate District. held (3 to 0): "The magistrate determined the commission correctly applied R.C. 4123.57 in determining claimant is entitled to PPD compensation. Thus, the magistrate recommends this court deny employer's petition for a writ of mandamus. *** Upon review, we find no error of law or other defect on the face of the magistrate's decision. Therefore, we adopt the magistrate's decision as our own, including findings of fact and conclusions of law, and we deny employer's petition for a writ of mandamus."

FACTS:
[Magistrate wrote as follows.]

> "On December 3, 2020, claimant was diagnosed with Stage IV prostate cancer. Claimant had worked for the employer as a firefighter from 1984 through December 19, 2014. *** After a hearing, on June 1, 2022, a staff hearing officer ('SHO') issued an order, in which he vacated the DHO's March 10, 2022, order and found the following: (1) the claim is allowed for stage IV prostate cancer; (2) claimant contracted an occupational disease in the course of and arising out of his employment as a firefighter with the employer; (3) claimant testified that he used to be a tobacco smoker but has not smoked in 20 years; (4) claimant provided sufficient evidence to satisfy the requirements of R.C 4123.68(X); (5) claimant is entitled to the presumption that his stage IV prostate cancer was caused by his work activities; (6) the employer did not contest at the hearing that claimant was entitled to this statutory presumption; (7) the employer has presented sufficient evidence under R.C. 4123.68(X)(2) to rebut claimant's statutory presumption via Dr. Kakel's April 6, 2022, report that claimant's prior history of tobacco usage presented claimant with an extremely high risk for the development of prostate cancer; (8) however, claimant satisfied his burden of proving by a preponderance of the evidence that he sustained an occupational disease in the course of and arising out of his employment with the employer, relying upon the January 31, 2022, and April 22, 2022, reports of Dr. Cochran; and (9) therefore, claimant contracted an occupational disease in the course of and arising out of his employment as a firefighter, and the claim is allowed for stage IV prostate cancer. *** In the end analysis, the SHO was tasked with determining whether claimant was entitled to PPD compensation under R.C. 4123.57, and the employer has set forth no valid argument as to why claimant does not qualify given that he proved that his prostate cancer was caused by his employment by a preponderance of the evidence."

Legal Lesson Learned: Statutory presumption that prostate cancer caused by the job.

Chap. 6

PA: FF – COLON CANCER / KIDNEY DISEASE – STATUTORY PRESUMPTION FOR CANCER – GETS WORK COMP.

On Oct. 10, 2024, in West Conshohocken Borough v. David Markland (Workers' : Compensation Appeal Board), the Commonwealth Court of Pennsylvania held (6 to 1): "West Conshohocken Borough (Employer) petitions for review of the November 18, 2022 opinion and order (Order) of the Workers' Compensation Appeal Board (Board) that affirmed the Workers' Compensation Judge's (WCJ) May 2, 2022 decision and order (Decision) granting the Claim Petition that David Markland (Claimant) filed under the Workers' Compensation Act (Act).After careful review, we affirm."

FACTS:

> "On December 27, 2019, Claimant filed a Claim Petition based upon an occupational disease. Claimant verified the Claim Petition was for 'an Act 46 (firefighter/cancer) claim' and alleged as of August 23, 2019, he sustained '[c]olon cancer and retroperitoneal lipomatus cancer' of the left kidney and right kidney. *** Claimant listed his last day of work, and of exposure, as September 1, 2018, and his "date of injury/onset of disease' as August 23, 2019. *** Employer appealed the decision to the Board, and the Board affirmed the WCJ in its Order. Employer now seeks review in this Court. *** Employer asserts the medical experts agree 'Claimant did not have colon cancer' and medical experts on both sides presented evidence Claimant's tumor was 'a benign growth of fat cells that is by definition not a malignant condition.' Employer's Petition for Rev. ¶ 5. In response, Claimant asserts the record evidence the WCJ found credible supports the WCJ's findings that Claimant had colon cancer and soft tissue sarcoma, including his atypical lipomatous tumor (ALT)/well differentiated liposarcoma (WDL), which are cancers caused by exposure to IARC Group I carcinogens. Claimant's Br. at 20.*** On July 7, 2011, Act 46 added Section 108(r) to the Act, which defines the term occupational disease to include, inter alia, '[c]ancer suffered by a firefighter which is caused by exposure to a known carcinogen [that] is recognized as a Group 1 carcinogen by the [IARC].' 77 P.S. § 27.1(r). This section 'embodies a legislative acknowledgment that firefighting is a dangerous occupation that routinely exposes firefighters to Group 1 carcinogens that are known to cause various types of cancers.' City of Phila. v. Healey (Workers' Comp. Appeal Bd.), 297 A.3d 872, 878 (Pa. Cmwlth. 2023). *** While the medical experts disputed whether Claimant's ALT/WDL was cancer, the WCJ accepted the testimony and opinions of Dr. Guidotti as fact. WCJ Dec., F.F., ¶ 8. The WCJ found Dr. Guidotti's testimony and opinions to be 'clear, persuasive, and supported.' *** Employer failed to establish a specific, non-firefighting cause of Claimant's cancer necessary to rebut the presumption of compensability applicable to this claim. Id. ¶ 5. The WCJ's findings are supported by the record."

Legal Lesson Learned: Employer failed to prove another "specific, non-firefighting cause" of the colon cancer.

Chap. 6

LA: HEART DISEASE – STATUTORY PRESUMPTION – NEW ORLEANS FF RECEIVES WORKERS COMP. & ATTY FEES

On Oct. 4, 2024, in Kenneth Prevost v. City of New Orleans Fire Department, the Louisiana Court of Appeal, Forth Circuit, held (3 to 0): "This is a workers' compensation case. Defendant-Appellant, the New Orleans Fire Department ('NOFD') appeals the May 20, 2022 judgment rendered by the workers' compensation judge ('WCJ'), which found the claim filed by Plaintiff-Appellee, Kenneth Prevost ('Prevost'), under the Fireman's Heart and Lung Act was compensable and awarded Prevost $2,000.00 in penalties and $3,500.00 in attorney's fees. For the following reasons, we affirm."

FACTS:

> "The Firefighter's Heart and Lung Act (the "Act") is 'special legislation created to protect firefighters who develop cardiac and pulmonary issues resulting from their service.' … The Act is set forth in La. R.S. 33:2581, and provides:
>
> > Any disease or infirmity of the heart or lungs which develops during a period of employment in the classified fire service in the state of Louisiana shall be classified as a disease or infirmity connected with employment. The employee affected, or his survivors, shall be entitled to all rights and benefits as granted by the laws of the state of Louisiana to which one suffering an occupational disease is entitled as service connected in the line of duty, regardless of whether the fireman is on duty at the time he is stricken with the disease or infirmity. Such disease or infirmity shall be presumed, prima facie, to have developed during employment and shall be presumed, prima facie, to have been caused by or to have resulted from the nature of the work performed whenever same is manifested at any time after the first five years of employment.
>
> Only Prevost testified at trial. Prevost stated he became a firefighter in the 1980s. Before his employment as a fireman, he testified he did not have any heart problems. However, Prevost stated that he was told that his heart 'jumps an extra beat.' Prevost testified in January 2020, he was diagnosed with aortic stenosis. He stated that he had to have open heart surgery June 2020 and got a pig valve to replace a defective heart valve. *** The medical records further show that in March 2020, Prevost underwent cardiac catheterization. Eventually, Prevost had aortic valve replacement (sometimes referred to in the record as 'AVR') surgery in June 2020. *** On May 20, 2022, the trial court issued a judgment and reasons for judgment finding: that NOFD failed to rebut the presumption under La. R.S. 33:2581; that Prevost's Heart and Lung Act claim was compensable; and that NOFD acted arbitrarily and capriciously regarding its controversion of Prevost's benefits and awarded Prevost $2,000.00 in penalties and $3,500.00 in attorney's fees. *** For the foregoing reasons, we affirm the March 20, 2022 judgment of the WCJ. Additionally, we award Prevost $2,500.00 in attorney's fees to cover the cost of defending the appeal."

Legal Lesson Learned: Heart disease, including defective heart valve covered by statutory presumption.

Chap. 6

NY: HIP PROBLEMS MANY YRS – ACCIDENTAL DISABILITY RETIREMENT DENIED – ON DUTY FALL IN 2013 NOT CAUSE

On Oct. 3, 2024, in Matter of Darren Mozdziak v. Thomas P. DiNapoli, State Comptroller, the New York Appellate Division, Third Department held (5 to 0): "In June 2015, petitioner, a firefighter, filed applications for accidental and performance of duty disability retirement benefits alleging that he sustained disabling injuries to his back, left knee and both hips as the result of an incident occurring in May 2013 when he fell after a stair broke while he was descending a staircase. The applications were denied on the ground that petitioner's disabilities are not the natural and proximate result of an accident or incident sustained in service. *** We confirm."

FACTS:

> "In June 2015, petitioner, a firefighter, filed applications for accidental and performance of duty disability retirement benefits alleging that he sustained disabling injuries to his back, left knee and both hips as the result of an incident occurring in May 2013 when he fell after a stair broke while he was descending a staircase. The applications were denied on the ground that petitioner's disabilities are not the natural and proximate result of an accident or incident sustained in service. A hearing ensued, at which the New York State and Local Police and Fire Retirement System conceded that the May 2013 incident constituted an accident within the meaning of the Retirement and Social Security Law and, further, that petitioner is permanently incapacitated from the performance of his duties due to the condition of his hips. At the conclusion of the hearing, the Hearing Officer upheld the denial of the applications, finding that petitioner's disability was not causally-related to the May 2013 accident. Respondent adopted the Hearing Officer's findings and conclusions, prompting this CPLR article 78 proceeding. *** In contrast, Edward Toriello, the orthopedic surgeon who examined claimant and reviewed his medical records on behalf of the Retirement System, found no causal relationship between the 2013 accident and the condition of petitioner's hips. According to Toriello, petitioner suffers from femoral acetabular impingement, which is a malady that caused repetitive injuries to his growth plate during childhood, resulting in the degeneration of his hips. Toriello further opined that the 2013 accident did not aggravate or exacerbate the condition of petitioner's hips, citing the lack of contemporaneous complaints of hip pain immediately following the accident since, in Toriello's opinion, the seriousness of petitioner's hip injury 'would declare itself right away.' Further, although petitioner testified that he had never had any problems or received any medical treatment for his hips prior to the May 2013 accident, according to Toriello's testimony and the written report of his examination of petitioner, petitioner informed him that he had experienced 'multiple accidents to his lower back, left knee and hips dating back to 2004.' *** Accordingly, respondent's determination that petitioner's incapacity was not the natural and proximate result of the May 2013 accident is supported by substantial evidence and it will not be disturbed …."

Legal Lesson Learned: Firefighter's hip issues were not proven to be a result of May 2013 accident.

Chap. 8 – Race / National Origin Discrimination

Chap. 8

IL: CHICAFO FF – FACEBOOK POSTS RACIST – CITIZEN COMPLAINTS - TERMINATION UPHELD

On Oct. 7, 2024, in Sam Inendino v. Annette Nancy-Holt, Brian Casey, and the City of Chicago, U.S. District Court Judge Matthew F. Kennelly, U.S. District Court for the Northern District of Illinois, held: "Sam Inendino alleges that Annette Nance-Holt, Brian Casey, and the City of Chicago violated his First Amendment rights when he was terminated from the Chicago Fire Department (CFD) for offensive public statements he made on Facebook. The parties have filed cross-motions for summary judgment. For the following reasons, the Court grants summary judgment in favor of defendants Nance-Holt, Casey, and the City of Chicago."

FACTS:

> "At all relevant times, Inendino maintained a public Facebook profile page, and any member of the public could view his Facebook content. Inendino expressly identified himself on his profile as a CFD firefighter, and his profile picture showed him and his son wearing Chicago firefighter paraphernalia while sitting on the back of a fire truck. Inendino's profile photo was visible to anyone who visited his Facebook page and appeared next to every comment or post he made on Facebook. *** In October 2019, the Chicago Office of Inspector General (OIG) received two complaints from members of the public concerning inappropriate and offensive comments Inendino made on someone else's Facebook post. The Facebook post concerned the alleged mistreatment of the Facebook user's brother by a Chicago police officer. Following an exchange on the post between Inendino and others, Inendino commented, 'Your comments are all weak. . . can't talk I have to go to work to pay for all your scumbag kids that you welfare fucks keep having!!!" … Inendino further commented, 'NOT get all HOOD on me YO. . . take your ass back over the border where ya belong. . . gotta go I have a real job./ … *** Inendino posted an image of a gun being pointed at an African-American man's head with the caption, 'If black lives really mattered they'd stop shooting each other' and '94 percent of all blacks shot are shot by blacks.'*** On June 9, 2021, Inendino was terminated from the CFD and placed on the City's no rehire list.*** Inendino's race-based comments posed even a greater risk to the CFD's mission. The engine company where Inendino worked served a predominantly African American neighborhood, yet Inendino repeatedly posted content suggesting African-Americans were looters, abused public assistance, and were 'animals.' … Inendino disputes the interpretation of these statements, arguing that they were not racially charged, but the CFD reasonably concluded that 'any minority resident of the City, who was exposed to the content on

> Inendino's public Facebook page, could reasonably question whether he would deliver the appropriate level of care were they to need his services as an EMT.' *** Based on the factual record, Inendino cannot show that defendants violated his rights under the First Amendment."

Legal Lesson Learned: Race-based comments on Facebook or other social media can result in termination.

Chap. 9 - Americans With Disabilities Act

Chap. 9

CT: FF DISPUTE - PUT BOTH HANDS AROUND CO-WORKERS NECK – FIRED – NO ADA ACCOMODATION REQUIRED

On Sept. 16, 2024, in Maurice Remillard v. Department of the Navy, the United States Merit System Protection Board (Washington, D.C.) held (3 to 0' nonprecedential order): "The appellant has filed a petition for review of the initial decision, which affirmed the agency's removal decision. *** After fully considering the filings in this appeal, we conclude that the petitioner has not established any basis under section 1201.115 for granting the petition for review. Therefore, we DENY the petition for review. Except as expressly MODIFIED to clearly state that the appellant was not a qualified individual with a disability and supplement the analysis of this finding, and to VACATE the administrative judge's alternative basis for concluding that the appellant failed to prove that the agency denied him reasonable accommodation, we AFFIRM the initial decision."

FACTS:

> "The appellant was a Lead Firefighter with the agency's Fire and Emergency Services division in Groton, Connecticut…. On October 18, 2019, the appellant scraped his thumb 'dealing with an issue with [a] Ladder Truck [that was] going out of service,' and put a large bandage on his thumb to stop the bleeding…. According to the appellant, during a subsequent verbal exchange with a coworker, his coworker said, in a condescending manner, 'that's a pretty big Band-Aid for a scrape.' … The appellant responded to this by putting both his hands around the coworker's throat…. The appellant admitted doing so in a subsequent investigation by the agency…. *** The agency proposed the appellant's removal for this incident, charging him with conduct unbecoming…. The appellant responded to the proposal in writing asserting, among other things, that he was subsequently diagnosed with anxiety, for which he had begun treatment. After considering the appellant's response, the deciding official sustained the charge and the penalty of removal…. The agency removed the appellant effective March 28, 2020…. The appellant filed the instant appeal of his removal to the Board [Merit Systems Protection Board] …. He disputed the charge and alleged that the penalty of removal was too severe…. He further alleged disability discrimination because the agency failed to provide a reasonable accommodation for his anxiety. *** After holding a hearing, the

> administrative judge issued an initial decision affirming the appellant's removal…. She found that the agency proved its charge, noting that the appellant admitted to engaging in the conduct as alleged…. She also determined that the appellant failed to establish a prima facie case of failure to accommodate his disability…. Specifically, she held that the appellant failed to show that his medical condition was 'sufficiently severe or pervasive to constitute a disability under the law.' … She further held that the appellant was not diagnosed with anxiety until after the agency proposed his removal, did not request an accommodation at any time, and did not identify any accommodation that would have prevented him from having similar violent outbursts in the future. *** Regardless of any obligation it has to initiate the interactive process, an agency is never required to excuse a disabled employee's violation of a uniformly applied job-related rule of conduct, even if caused by his disability. *** The administrative judge held that the deciding official considered the relevant factors and that the penalty of removal was reasonable…. We agree. *** The appellant further asserts on review that his coworker did not sustain any serious injuries and did not press charges after the incident. *** Accordingly, we discern no basis to disturb the administrative judge's determination that the penalty of removal was within the tolerable bounds of
> reasonableness."

Legal Lesson Learned: The firefighter failed to prove that his anxiety was so severe to constitute a disability under ADA.

Chap. 13 - EMS, incl. Community Paramedicine, Corona Virus

Chap. 13

NY: DIFFICULTY BREATHING – DISPATCH SENT BLS – EMTS ON SCENE 12 MIN. FOR ALS – DISCRETIONARY – IMMUNITY

On Oct. 23, 2024, in Anita Walker-Rodriquez v. City of New York, et al., the New York Appellate Division, Second Judicial District, held (5 to 0): "In an action, inter alia, to recover damages for personal injuries, etc., the defendants City of New York, New York City Police Department, and New York City Fire Department Emergency Medical Services appeal from an order of the Supreme Court, Kings County (Marsha L. Steinhardt, J.), dated August 22, 2019. The order denied those defendants' motion pursuant to CPLR 3211(a)(7) to dismiss the complaint insofar as asserted against them or, in the alternative, for summary judgment dismissing the complaint insofar as asserted against them. *** Accordingly, the Supreme Court should have granted that branch of the defendants' motion which was for summary judgment dismissing the complaint insofar as asserted against them."

FACTS:

““On November 2, 2015, the plaintiff Dynell Fountaine called 911 to request an ambulance for his wife, the plaintiff Anita Walker-Rodriguez, who was experiencing difficulty breathing. Based upon the information received from Fountaine, a 911 dispatcher sent a ‘Basic Life Support’ (hereinafter BLS) ambulance to the scene, as opposed to an ‘Advanced Life Support’ (hereinafter ALS) ambulance. Within minutes, the BLS ambulance, staffed by emergency medical technicians (hereinafter EMTs), arrived at the plaintiffs' apartment. The EMTs assessed Walker-Rodriguez, who was unresponsive, and promptly contacted a dispatcher to request an ALS ambulance, staffed by paramedics. After learning that the ALS ambulance was approximately 12 minutes away, the EMTs decided to continue treating Walker-Rodriguez in the apartment while they waited for the paramedics to arrive, instead of immediately transporting her to a nearby hospital, which was 5 minutes away. Upon arrival, the paramedics rendered treatment to Walker-Rodriguez, but attempts at intubation were unsuccessful. The EMTs and paramedics ultimately placed Walker-Rodriguez in an ambulance and transported her to the nearby hospital where she was successfully intubated. Walker-Rodriguez allegedly suffered injuries, including brain damage, as a result of the incident. *** The defendants demonstrated that the 911 dispatcher's decision, among other things, to send a BLS ambulance rather than an ALS ambulance ‘was discretionary and, therefore, protected by the doctrine of governmental immunity’ …. Under the circumstances presented, the defendants also established that the EMTs exercised their discretion in declining to immediately transport Walker-Rodriguez to the nearby hospital and to instead wait for the paramedics in the ALS ambulance to arrive. Similarly, the defendants demonstrated that the actions of the paramedics resulted from discretionary decision-making, including with regard to the type of treatment to render….”

Legal Lesson Learned: Dispatch and EMS immunity for discretionary decisions.

Chap. 16 - Discipline, incl. Code of Ethics, Social Media, Hazing

Chap. 16

NY: NO DEFAMATION - REPORTED FF USING TOWING CO. FD BUSINESS - THEFT BUS SEAT / CATALYTIC CONVERTER

On Oct. 17, 2024, in Timothy Halpin v. George M. Banks, et al., the New York Appellate Division, Third Department, held (5 to 0): “Appeal from an order of the Supreme Court (Kevin R. Bryant, J.), entered May 26, 2023 in Ulster County, which granted defendants' motion for summary judgment dismissing the complaint. *** Appeal from an order of the Supreme Court (Kevin R. Bryant, J.), entered May 26, 2023 in Ulster County, which granted defendants' motion for summary judgment dismissing the complaint. *** Supreme Court also properly dismissed the complaint against PEFD. The Board investigated plaintiff's complaint against Banks and is

vested with discretion to determine if disciplinary action should be taken or if the matter should be closed (*see* Port Ewen Fire District Personnel Policy § 8)."

FACTS:

> "Plaintiff owns and operates an automotive repair and towing business, is a firefighter for defendant Port Ewen Fire District (hereinafter PEFD) and was a commissioner for the Board of Fire Commissioners for the PEFD (hereinafter Board) between 2017 and 2021. Defendant George M. Banks is a firefighter for PEFD and was a commissioner for the Board during the years 2019 and 2020. On October 9, 2019, plaintiff and defendant engaged in a heated discussion at the fire station exchanging allegations that each had violated PEFD rules. Specifically, plaintiff alleged that Banks accused him of being involved in criminal conduct for receiving payment for the tow and storage of a PEFD fire truck in 2018. [Footnote 1**:** At the Board meetings, Banks also allegedly accused plaintiff of removing a bus seat and catalytic converter from a bus used for training purposes in 2017, without the requisite permission.] Similar statements were repeated by Banks at public sessions of the Board's monthly meetings held on December 3, 2019 and January 8, 2020. Banks eventually provided a written statement to the Board dated January 17, 2020, claiming that plaintiff was paid by PEFD 'for a service he performed through his personal business . . . [t]owing a district vehicle that was involved in a motor vehicle accident. [Plaintiff] knowingly billed [PEFD]'s insurance company . . . knowing he is not supposed to be paid by the [PEFD] he was elected to serve. [Plaintiff] has also stolen items from vehicles loaned to the [PEFD] for training purposes (bus seat, catalytic converters). . . . [Plaintiff] stated he had permission from the owner which is a false statement.' *** Nor did Supreme Court err in dismissing the statements, both oral and written, made by Banks within the confines of the Board meetings held on December 3, 2019 and January 8, 2020, as these statements are subject to the common interest qualified privilege. Pursuant to the PEFD personnel policy, Banks had a duty to report ethical or illegal conduct by other members (*see* Port Ewen Fire District Personnel Policy § 7). The Board is tasked to oversee members and commissioners and has the authority to take disciplinary action (*see* Port Ewen Fire District Personnel Policy § 8). All of Banks' statements were made in his capacity as a PEFD firefighter and commissioner and referenced legitimate issues related to PEFD's personnel policy and code of ethics. The statements were made to fellow commissioners, who share a common interest in the oversight and safeguarding of the PEFD …. Accordingly, the burden shifted to plaintiff to show that the privilege did not apply, and that Banks was motivated by malice alone when he made these statements…."

Legal Lesson Learned: Qualified privilege when honestly reporting possible wrongdoing to Fire Department Board.

Chap. 16

UT: ASSISTANT FIRE CHIEF – PLED GUITY TO FORCIBLE RAPE OF FEMALE FF – SENTENCED 1-15 YEARS

On Oct. 3, 2024, in State of Utah v. Austin James Corry. The Utah Court of Appeals held (3 to 0): "Austin James Corry, an assistant fire chief, pled guilty to four counts of forcible sexual abuse of a female firefighter he supervised. In its presentence report, Adult Probation and Parole (AP&P) recommended a prison sentence even though the Utah Sentencing Commission's Adult Sentencing & Release Guidelines recommended that Corry serve up to 210 days in jail and Corry had already served more than 210 days in pretrial detention. *** We discern either no error or no prejudice related to each of these claims and therefore affirm Corry's sentence."

FACTS:

> "Austin James Corry, an assistant fire chief, pled guilty to four counts of forcible sexual abuse of a female firefighter he supervised. *** In August 2018, Vicky,1 a volunteer firefighter, reported to police that Corry had repeatedly sexually assaulted her. She later described the abuse as follows:
>
> > In August 2015, Corry asked Vicky to come to the station to help with air tanks on a fire engine. When she arrived, she found that she was alone with Corry. Vicky was sitting in the passenger seat of a truck when Corry 'grabbed [her] legs and pulled them towards . . . the door. 'She asked what he was doing, and he said, '[T]his [will] only take a minute. Come on.' Vicky responded, 'No, I got to get home to my kids.' But Corry 'pulled [her] legs up . . . so [she] was laying down' and then pulled down her sweatpants. He pulled his pants down,' 'put his hand around [her] throat,' restricting her breathing, and put his penis 'inside [her] vagina' until he ejaculated.
>
> ***
>
> On August 20, 2018, Vicky arrived at the station in response to a call for a fire. Corry told Vicky to ride with him in a brush truck. The call was eventually canceled, so Corry and Vicky returned to the station, where they were initially alone. Vicky heard Corry walking toward her, so she again began recording on her phone. She tried to walk away and leave the station, but he grabbed her and pushed her 'against the brush truck.' Corry proceeded to touch Vicky's breasts and 'put his hands inside of [her],' despite her repeatedly asking him to stop. She 'kept trying to push him away,' but 'there was not much [she] could do.' Then Corry heard another fire truck coming around the corner and 'immediately stopped,' 'did up his pants,' and 'went over and opened the bay door.' Vicky told another firefighter that Corry had raped her, and she reported Corry's abuse to police. Corry texted Vicky later that night; the message read, 'Hey I need to [apologize] to you about tonight. I am very sorry. I have been having some issues which is why I'm planning on moving and leaving the fire department. Hope you'll forgive me. Won't happen [again].'
>
> *** In November 2021, Corry pled guilty to four counts of forcible sexual abuse—each a second-degree felony—as part of a plea deal. Under the terms of this deal, the State agreed to dismiss the remaining counts, dismiss another case pending against Corry involving a charge of rape allegedly committed against another victim, and recommend concurrent sentences. *** AP&P prepared a presentence report. While the sentencing

guidelines recommended a sentence of up to 210 days in jail and Corry had already been in pretrial detention for 568 days, AP&P deviated from the guidelines' recommendation and instead recommended a prison sentence. *** He then asked Vicky to speak. Vicky explained the profound psychological impact of Corry's actions on her and the devastating consequences they had caused to her relationships, career, and life. Among other things, she stated, 'I will hurt every single day for the rest of my life." She implored the court, "Please do not let him walk free. . . . Do not allow him to not face consequences for his actions." *** After this, the court sentenced Corry to a prison term of one to fifteen years for each charge, with the sentences to run concurrently and a recommendation to the Board of Pardons and Parole that Corry receive credit for the time he had already served. *** Given the foregoing, the court's imposition of a prison sentence rather than probation was not unreasonable and, thus, not an abuse of discretion.

Legal Lesson Learned: A prison sentence was appropriate for this terrible conduct.

Chap. 16

MI: WHISTLEBLOWER PROTECTION ACT – AC FIRED AFTER TOLD FD BOARD - FIRE CHIEF CONDUCT - CASE PROCEED

On Sept. 5, 2024, in Eric Dale v. Marshall Township, the Michigan Court of Appeals held (3 to 0; unpublished opinion): "Because Dale established that he was engaged in a protected activity and that there was a causal connection between his protected activity and his termination, the trial court legally erred by holding that he failed to establish a prima facie case under the WPA [The Whistleblowers' Protection Act]. Accordingly, we reverse the trial court's grant of summary disposition to the township."

FACTS:

"Dale served as a firefighter for the township for nearly 20 years, and also served as an assistant fire chief, when the township fire board voted to terminate Dale's employment based on the recommendation of township fire chief, Steven Riggs. In the weeks and months before his termination, Dale reported various concerns to township leaders about problems within the fire department, the most serious of which involved the legitimacy of certain payments Chief Riggs made to his sons, who also worked for the fire department. Because we hold that Dale established a genuine issue of material fact that he was both engaged in a protected activity and that Marshall Township terminated him because of that activity, we reverse the trial court's grant of summary disposition to the township under MCR 2.116(C)(10). *** The Marshall Township Fire Department hired Dale as a firefighter in 2001. Chief Riggs served as the fire chief and, in 2015 or 2016, Chief Riggs appointed his son Jay Riggs and Dale to share the job of assistant fire chief. Chief Riggs's other son, Josh Riggs, also worked as a firefighter for the township's fire department. In 2019, Jay accepted a job as a full-time firefighter for the city of Marshall while he continued to serve as an officer for the township fire department. The township had a mutual aid agreement with the city of Marshall and other municipalities in Calhoun County. The agreement allowed fire departments to respond to and assist with incident calls in other jurisdictions. According to Dale, although no written policy prohibited it, there was a long-standing rule that township fire department officers could not also work

> for fire departments with which the township had mutual aid agreements. After Jay began working for the city fire department, Dale expressed concerns about a violation of the dual employment rule to Chief Riggs and members of the fire and township boards. Dale also expressed concerns that Jay received compensation from both the city and township when he responded to incident calls under the mutual aid agreement. According to Dale, when Jay would arrive at a mutual aid incident as a city firefighter, he would instruct someone from the township fire department to also put his name down on the township run sheet so that he would get paid by both the city and township for working the same incident. Dale also asserted that the township paid Jay to participate in township fire department training while Jay was on duty at the city's fire department. *** Dale also observed that Chief Riggs paid his sons to do administrative tasks that the township paid Chief Riggs to perform and that he did not pay other firefighters for doing work in addition to their fire runs and training hours. Dale testified that Chief Riggs also paid one or both of his sons for training and fire runs that never occurred or in which they did not participate as township firefighters. In Dale's opinion, it violated the law for Jay to receive double pay and for Chief Riggs to pay Jay and Josh additional compensation from the fire department. *** Chief Riggs stated in the grievance document that he recommended Dale's termination because, since 2019, Dale had concerns about Jay working for both the city and as a township fire department officer and that he reported his concerns to township officials. The grievance document is direct evidence of retaliation because, in writing, Chief Riggs recommended Dale's termination because of Dale 'not following chain of command by continually going over [Chief Riggs's] head and that of the Fire Board by going to a Township Board member."' Albaugh, as a member of the fire board, also voted for Dale's dismissal, and Dale spoke directly to Albaugh about his concerns regarding Chief Riggs's misappropriation of funds."

Legal Lesson Learned: The State's Whistleblower Protection Act is important protection against retaliation.

Chap. 17 - Arbitration, incl. Mediation, Labor Relations

Chap. 17

OH: FIRE CHIEF – LT. APPOINTED INTERIM – CIVIL SERVICE EXAM - REPLACED BY A/C WHO SCORED HIGHEST

On Oct. 31, 2024, in The State ex rel. Patrick Johnson v. Mark Higgins, the Supreme Court of Ohio held (7 to 0): "Higgins is currently serving as chief of the fire department of the City of Brook Park, a position to which Johnson claims legal entitlement. Johnson seeks a writ ousting Higgins from the position and declaring that Johnson is entitled to the position. We deny the writ."

FACTS:

> "In January 2022, the chief of Brook Park's fire department, Thomas Maund, announced his intent to retire in August 2022. Both Johnson and Higgins were employed by the fire department at that time - Johnson as assistant fire chief and Higgins as a lieutenant. In June 2022, the city announced a civil-service examination for the fire-chief position. Fifty percent of the total score would be from a written exam and 50 percent from an assessment-center test. The firefighters' union filed a grievance arguing that scoring from an assessment-center test was not permitted under the union's collective-bargaining agreement. The mayor denied the grievance, and the union filed suit in the Cuyahoga County Court of Common Pleas, seeking to prevent the city from hiring a fire chief while the union pursued arbitration. In August, the court granted an injunction enjoining 'the City from using the results of the Assessment Center to appoint the new Fire Chief until after the results of the Arbitration,' which would 'determine whether the Assessment Center [exam] will be pass/fail or used in the manner the City [had] propose[d].' *** On August 17, the city conducted a written civil-service promotional exam for fire chief. Out of three applicants, Higgins scored the highest and Johnson scored the lowest. Because of the court injunction [Union obtained], no eligible-candidate list was created at that time. *** On January 20, 2023, the civil-service commission conducted an assessment-center promotional exam. On February 13, the arbitrator of the union's grievance determined that the assessment-center tests could be used only on a pass/fail basis. In March and April, Johnson and Higgins took additional testing for advancement to fire chief. On May 23, after the completion of all exams, the civil-service commission issued an eligible-candidate list. Higgins was the only name on the list. *** Meanwhile, on September 7, 2022, while the litigation and examinations were ongoing, the mayor swore in Johnson as fire chief. The core disputed issue in this case is whether Johnson was appointed as the permanent chief or only a temporary or interim chief. *** On March 7, 2023—six months after Johnson's appointment and before the release of an eligible-candidate list—the mayor nominated Higgins as chief, and Higgins was sworn in as chief on March 10. *** On July 7, after the release of an eligible-candidate list containing only Higgins's name, Higgins was sworn in as permanent chief. He continues to serve as Brook Park's fire chief. *** Thus, a necessary qualification for permanent fire chief in Brook Park is selection through a civil-service examination as an eligible candidate. Here, Johnson's name never appeared on an eligible-candidate list for promotion to fire chief, and Higgins scored higher than Johnson on the promotional exam. This alone defeats Johnson's claim that he is entitled to the position of fire chief."

Legal Lesson Learned: Civil Service process was followed.

Chap. 17

IL: SHIFT TRADES FOR LT. – FIRE CHIEF CHANGED 25-YR POLICY – ONLY FF ON PROMOTION LIST - MUST BARGAIN

On Oct. 28, 2024, in City of Park Ridge v. Illinois Labor Relations Board, the Illinois Appellate Court, First Judicial District, held (3 to 0): "(1) the shift trade qualification policy was a mandatory subject of bargaining; (2) the Union did not waive its right to bargain over the

qualifications for shift trades; and (3) the City's unilateral change of the shift trade qualification policy without giving notice and opportunity to bargain the change violated sections 10(a)(1), 10(a)(4), and 14(l) of the Illinois Public Labor Relations Act since the change occurred during interest arbitration."

FACTS:

> "On November 4, 2018, Lieutenant/Paramedic John Ortlund ('Ortlund') submitted a shift trade request, pursuant to which Firefighter/Paramedic Zivko Kuzmanovich ('Kuzmanovich') would cover his shift on December 25, 2018. Battalion Chief Scott Sankey ('Sankey') approved the trade. However, Fire Chief Jeff Sorenson ('Sorensen') instructed Sankey to cancel the trade. In December 2018, Sorenson decided that individuals who were on the promotional list were the only individuals who were qualified to trade shifts with lieutenants. Kuzmanovich was not on the promotional list. Sorenson also decided that non-paramedic firefighters were no longer qualified to trade shifts with paramedics. For the past 25 years, non-paramedic firefighters could trade with paramedics and firefighters who qualified to act as lieutenants pursuant to section 200.20 could trade with lieutenants. Ortlund filed a grievance over the cancellation of his shift trade. *** At the hearing [before Illinois Labor Relations Board], Union Vice President Brian Pavone ("Pavone") testified that he worked as a fire fighter/paramedic for the Department since 2000. Pavone compiled Union Exhibit 2 which included the roster sheets for the 73 days during 2018 on which shift trades occurred. Pavone stated that the reason he compiled Union Exhibit 2 was to show that the fire department was fully functional with allowing out-of-class shift trades. Pavone also compiled Union Exhibit 3. He stated that he compiled Union Exhibit 3 to show that in 2018, the fire department required individuals who were not on the promotional list to act as lieutenants. In 2021, the Department continued this practice after Sorenson changed the shift trade qualifications policy. Prior to December 2018, Pavone never heard of a shift trade being denied for any reason other than an injury to one of the individuals requesting the trade."

Legal Lesson Learned: Court held that change in shift trade policy is subject of collective bargaining.

Chap. 17

NY: ARBITRATOR HELD FOR 2 UTICA FF - CALLED IN FAMILY EMERGENCIES DAY BEFORE SHIFT – NOT COMP TIME

On Oct. 4, 2024, in Matter of Local 32, Intl. Assn. of Fire Fighters, A.F.L.-C.I.O.-C.L.C. (City of Utica), the New York Appellate Division, Fourth Department, held (5 to 0): "It is hereby ORDERED that the order insofar as appealed from is unanimously reversed on the law without costs, the petition is granted in its entirety and the arbitration award is confirmed in its entirety. *** The arbitrator determined, inter alia, that the firefighters were entitled to paid emergency leave for the time in question and directed respondent to restore the charged compensatory time."

FACTS:

> "As relevant to this appeal, two firefighters requested emergency leave to attend to family emergencies. At the time each firefighter learned of the emergency, he was off duty but was scheduled to report for duty the following day. Thus, each firefighter's request for emergency leave was made prior to his tour of duty. Although each firefighter was excused from the next day's tour of duty, respondent [Utica FD] ultimately charged the missed time against the firefighter's compensatory time, rather than treating it as paid emergency leave, inasmuch as the requests were not made during the firefighter's tour of duty. *** The emergency leave provision of the CBA provides that '[e]mergency leave shall be granted during a member's tour of duty in the event of an unexpected serious illness of his wife, child, father, mother, brother, sister, mother-in-law, or father-in-law. The member shall make every effort to return to duty as soon as possible.' *** The arbitrator concluded that nothing in the language of the emergency leave provision required that the emergency leave request be made during the member's tour of duty. Rather, the use of the phrase 'during a member's tour of duty' in the CBA's emergency leave section was meant to allow the member to leave or miss work to attend to a family emergency, and the phrase thus addressed the period of time when the leave must be taken, not when the request must be made. The arbitrator determined, inter alia, that the firefighters were entitled to paid emergency leave for the time in question and directed respondent to restore the charged compensatory time. *** Contrary to respondent's urging, the arbitrator's determination was not irrational; nothing in the CBA suggests that a request for emergency leave may not be made prior to the start of a tour of duty…."

Legal Lesson Learned: Arbitrator decision upheld.

Chap. 17

OH: CLEVELAND FD – PLAN TO PUT CAMERAS ON AMBULANCES – CANCELLED - MUST BE BARGAINING

On Oct. 3, 2024, in City of Cleveland v. State Employment Relations Board, et al., the Court of Appeals of Ohio, Eight Appellate District (Cuyahoga County), held (3 to 0): "Plaintiff-appellant City of Cleveland (the 'City') appeals the trial court's judgment affirming the decision of defendant-appellee State Employment Relations Board (the 'SERB') in favor of defendant-appellee union Cleveland Association of Rescue Employees (the 'Union' or 'CARE'). The court upheld SERB's finding that the City violated R.C. 4117.11(A)(5) by refusing to bargain collectively with the Union over the effects of the installation of dashboard audio/visual cameras in the City's emergency medical service (EMS') vehicles (ambulances'). *** For the following reasons, we affirm the trial court's judgment."

FACTS:

> "On August 30, 2021, the City informed the Union of its determination to implement a pilot program on September 7, 2021, that involved the installation of dashboard audio/video cameras in two City ambulances. The City advised that the dashboard cameras would be used to improve the efficiency and effectiveness of services and to provide information regarding ambulance accidents. One camera would face forward from the cab of the ambulance, and one would face into the cab. Activation of sirens, lights or crash sensors or backing up the ambulance would trigger the camera's

audio/video features. On September 2, 2021, the Union responded with its concerns. Issues included the following: when would the dashboard cameras and microphones be activated, who would be able to access the footage, how would the footage be used, Health Insurance Portability and Accountability Act of 1996 ('HIPAA') compliance, system and data storage costs, service contracts requirements, use of the dashboard cameras for disciplinary concerns, and privacy issues for employees and patients. *** On September 13, 2021, the City responded that under the enumerated rights and waiver language contained in the CBA ('CBA Art. 3'), the City had no obligation to bargain installation and use of the dashboard cameras. The City advised that no meeting request had been made by the Union, '[h]owever, in response to your request, the City is willing to meet and confer with representatives of CARE and review any concerns or suggestions they have regarding this pilot program.' The same day, the Union responded that it did not believe a meeting would be productive if the City did not acknowledge its obligation to bargain the City's unilateral decision to install dashboard cameras in the ambulance units to an agreement. *** On September 17, 2021, the Union was notified that the dashboard cameras had been installed on Trucks 17 and 7, but the dashboard cameras would not become operational until a notice was published and distributed to the Union. Three Union members submitted affidavits stating the dashboard cameras were activated and recorded approximately 30 hours of footage over a month. The City advised that activation was never authorized. The City eventually decided it would not initiate the trial and removed the dashboard cameras from the vehicles. *** On September 22, 2021, the Union filed an unfair labor practice ('ULP') charge alleging the City's unilateral decision to install the dashboard cameras violated R.C. 4117.11(A)(1) and (A)(5)."

Legal Lesson Learned: Court held that putting video cameras in ambulances must be collectively bargained.

Note:

See Aug. 8, 2024 decision on Cleveland Fire Department hiring part-time EMS:

"The City of Cleveland (the 'City') appeals the trial court's denial of its administrative appeal of appellee State Employment Relations Board's ("SERB") order and decision finding that the City violated R.C. 4117.11(A)(1) and (A)(5) by refusing to bargain with appellee Cleveland Association of Rescue Employees, I.L.A.,Local 1975 ('CARE'), regarding its decision to hire part-time employees and assign bargaining-unit work to those employees. Because we do not find that the trial court abused its discretion in affirming SERB's opinion and order, we affirm the judgment. *** Due to a lack of emergency medical service employees, the City operated less ambulances. This led to an increase in response times as well as an increased workload on CARE members. The City mandated overtime for the workforce, but some overtime assignments were refused. *** At the June 17th [2021] 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."

IA: PSO PROGRAM (POLICE & FIRE) - 8 CAREER FF LAYOFF – UNION ANIMUS – CASE REMANDED FOR UNION REMEDY

In Oct. 2, 2024, in International Association of Fire Fighters, Local 1366 v. City of Cedar Falls and the Iowa Public Employment Relations Board, where the Court of Appeals of Iowa held: "The International Association of Firefighters, Local 1366 (the Union) filed a prohibited practice complaint against the City of Cedar Falls (the City) after its city council passed a resolution to fully transition to a public safety officer (PSO) program to provide traditional police officer and firefighter services. The passage of the resolution led to eight traditional firefighters represented by the Union being placed on administrative leave pending layoff. *** The agency found 'overwhelming' evidence of union animus by the City that led to its decision to 'place the firefighters on administrative leave pending layoff' rendering it a prohibited practice. Yet the agency determined the City's decision to lay off the firefighters was not a prohibited practice. *** For the reasons set forth above, we hold the agency's decision in its remedy order to deny the Union firefighters' request for damages resulting from the layoff violated Iowa Code section 17A.19(10)(i). Accordingly, we believe the district court correctly reversed the agency's decision in its remedy order."

FACTS:

> "Since at least 1995, the City has experimented with alternative methods of providing traditional police and firefighter services for its citizens. This experimentation began with the creation of a police officer reserve program in 1995. A decade later the City took another step in the direction of providing alternative police and firefighter services by starting the 'Paid on Call' (POC) program. The POC program permitted the City's employees from other departments to cross-train and apply for positions as firefighters or police officers. According to the City, the POC program was a resounding success. The City claims its citizens noticed' more police on patrol and significantly more firefighters responding to a fire incident.' And the City believed the POC program presented promising potential to deliver traditional police and firefighting services to its citizens in a more cost-effective manner. *** In a sign of things to come, the Chauffeurs, Teamsters &Helpers Local 238-the union representing the City's police officers-amended its bargaining unit description to add the position of 'police officer/firefighter' in 2009. *** The transition task force [in 2020] provided three recommendations for the eight traditional firefighters impacted by the full implementation of the PSO model. The traditional firefighters could apply to become a cross-trained PSO, apply for another position within the City, or accept a severance package. If the traditional firefighters elected not to take any of these three options, they would be laid off effective June 22, 2020. On March 16, the city council passed resolution 21,918, which adopted the recommendations for the traditional firefighters provided by the transition task force. Of the eight traditional firefighters, five opted to accept the severance package the City offered, one opted to transition to a PSO position, one was promoted to fire captain, and one was laid off. *** On April 2, 2020, the Union filed a prohibited practice complaint against the City with PERB. Among other things, the Union asserted the City committed

a prohibited practice in violation of several paragraphs of Iowa Code section 20.10(2) by placing the traditional firefighters on administrative leave pending the elimination of the firefighter position. *See* Iowa Code § 20.10(2). *** [T]he the ALJ reasoned the City's actions were motivated by union animus based on the comments of city council members, the disparate treatment of traditional firefighters, and the abrupt departure from past practice regarding the implementation of the PSO program. *** The City then appealed the ALJ's proposed decision to PERB. PERB expressly adopted the ALJ's factual findings and conclusions of law. *** In its remedy order, PERB found that damages resulting from the layoff would be inappropriate '[b]ecause the final layoff on June 22, 2020, was not determined to be a prohibited practice.' PERB determined the appropriate remedy was a cease-and-desist order. *** [Footnote 5: In briefing to PERB on the issue of an appropriate remedy, the Union argued reinstatement, back pay, and the restoration of benefits were appropriate here.] *** The district court agreed, finding the agency's decision that the layoffs were not found to be a prohibited practice was 'clearly erroneous, illogical, and irrational.' *** Accordingly, we believe the district court correctly reversed the agency's decision in its remedy order. We thus affirm the judgment of the district court as modified and remand to the district court with instructions to remand to the Iowa Employment Appeal Board for purposes of fashioning a remedy consistent with this opinion."

Legal Lesson Learned: The PERB must now consider an appropriate remedy for the union.