July 2024 – FIRE & EMS LAW NEWSLETTER

[NEWSLETTER IS NOT PROVIDING LEGAL ADVICE.]

Prof. Bennett and his pet therapy dog, FRYE.

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19 RECENT CASES

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

File: Chap. 1, American Legal System

U.S. SUP. CT: HOMELESS CAMPS – CITIES MAY ENFORCE CIVIL & CRIMINAL ORDINANCES – 9th CIRCUIT REVERSED

On June 28, 2024, in City of Grants Pass, Oregon v. Johnson, et al., the U.S. Supreme Court held (6 to 3) that injunction issued by a federal District Court judge on behalf of two homeless people living in their car is set aside. "Grants Pass, Oregon, is home to roughly 38,000 people, about 600 of whom are estimated to experience homelessness on a given day. Like many local governments across the Nation, Grants Pass has public-camping laws that restrict encampments on public property." The City may now enforce its ordinance: "Penalties for violating these ordinances escalate stepwise. An initial violation may trigger a fine. §§1.36.010(I)–(J). Those who receive multiple citations may be subject to an order barring them from city parks for 30 days…. And, in turn, violations of those orders can constitute criminal trespass, punishable by a maximum of 30 days in prison and a $1,250 fine."

THE COURT HELD (opinion by Justice Neil Gorsuch):

> " Homelessness is complex. Its causes are many. So maybe the public policy responses required to address it. At bottom, the question this case presents is whether the Eighth Amendment grants federal judges' primary responsibility for assessing those causes and devising those responses. It does not. *** Constitution's Eighth Amendment serves many important functions, but it does not authorize federal judges to wrest those rights and responsibilities from the American people and in their place dictate this Nation's homelessness policy. The judgment below is reversed, and the case is remanded for further proceedings consistent with this opinion."

FACTS:

> "With encampments dotting neighborhood sidewalks, adults and children in these communities are sometimes forced to navigate around used needles, human waste, and other hazards to make their way to school, the grocery store, or work. San Francisco Cert. Brief 5; States Brief 8; California Governor Brief 11–12.
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> ***
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> As many cities see it, even as they have expanded shelter capacity and other public services, their unsheltered populations have continued to grow. Id., at 9–11. The city of Seattle, for example, reports that roughly 60 percent of its offers of shelter have been rejected in a recent year. See id., at 28, and n. 26. Officials in Portland, Oregon, indicate that, between April 2022 and January 2024, over 70 percent of their approximately 3,500 offers of shelter beds to homeless individuals declined. Brief for League of Oregon Cities et al. as Amici Curiae 5 (Oregon Cities Brief). Other cities tell us that "the vast majority of their homeless populations are not actively seeking shelter and refuse all services." Brief for Thirteen California Cities as Amici Curiae 3. Surveys cited by the Department of Justice suggest that only "25–41 percent" of "homeless encampment residents" "willingly" accept offers of shelter beds. See Dept.

of Justice, Office of Community Oriented Policing Services, S.Chamard, Homeless Encampments 36 (2010).

Five years ago, the U. S. Court of Appeals for the Ninth Circuit took one of those tools off the table. In Martin v. Boise, 920 F. 3d 584 (2019), that court considered a public-
camping ordinance in Boise, Idaho, that made it a misdemeanor to use 'streets, sidewalks, parks, or public places' for 'camping.' Id., at 603 (internal quotation marks omit-
ted). According to the Ninth Circuit, the Eighth Amendment's Cruel and Unusual Punishments Clause barred Boise from enforcing its public-camping ordinance against
homeless individuals who lacked "access to alternative shelter.' Id., at 615. That 'access' was lacking, the court said, whenever 'there is a greater number of homeless individuals in a jurisdiction than the number of available beds in shelters.' Id., at 617 (alterations omitted). According to the Ninth Circuit, nearly three quarters of Boise's shelter beds were not 'practically available' because the city's charitable shelters had a 'religious atmosphere.' Id., at 609–610, 618. Boise was thus enjoined from enforcing its camping laws against the plaintiffs. Ibid.

No other circuit has followed Martin's lead with respect to public-camping laws.

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Still, shortly after the panel decision in Martin, two homeless individuals, Gloria Johnson and John Logan, filed suit challenging the city's public-camping laws. App. 37,
Third Amended Complaint ¶¶6–7. They claimed, among other things, that the city's ordinances violated the Eighth Amendment's Cruel and Unusual Punishments Clause. Id., at 51, ¶66. And they sought to pursue their claim on behalf of a class encompassing 'all involuntarily homeless people living in Grants Pass.' Id., at 48, ¶52. The district court certified the class action and enjoined the city from enforcing its public-camping laws against the homeless. While Ms. Johnson and Mr. Logan generally sleep in their vehicles, the court held, they could adequately represent the class, for sleeping in a vehicle can sometimes count as unlawful 'camping' under the relevant ordinances.

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Nor, focusing on the criminal punishments Grant Pass imposes, can we say they qualify as cruel and unusual. Recall that, under the city's ordinances, an initial offense may
trigger a civil fine. Repeat offenses may trigger an order temporarily barring an individual from camping in a public park. Only those who later violate an order like that may face a criminal punishment of up to 30 days in jail and a larger fine. See Part I–C, supra. None of the city's sanctions qualifies as cruel because none is designed to 'superad[d] "terror, pain, or disgrace." Bucklew, 587 U. S., at 130 (internal quotation marks omitted). Nor are the city's sanctions unusual, because similar punishments

have been and remain among 'the usual mode[s]" for punishing offenses throughout the country."

Legal Lesson Learned: Great decision; hopefully cities throughout nation will start enforcing their no camping ordinances.

File: Chap. 1, American Legal System

NY: FIRE SAFETY INSPECTOR / VILLAGE BLDG OFFICIALS CUT PADLOCK - SMELL OF GAS – NO WARRANT NEEDED

On June 27, 2024, in Caril Simmons, as Administrator of the Estates of Charles Griffin and Geraldine Griffin, deceased, and Craig Griffin v. Daniel Casella, Building Superintended of the Incorporated Village of Rockville Center, et al., U.S. District Court Judge Hector Gonzales, U.S. District Court for Eastern District of New York, dismissed plaintiff's lawsuit alleging violation of the Constitution rights. After repeated complaints from neighbors, and prior citations, the FD and Building officials smelled gas and strong burning odor and entered the property grounds (turned out to be old battery) and shut off the gas. "For the reasons stated herein, the Court finds Defendants are entitled to qualified immunity as to the Section 1983 claim, and the Court will not exercise supplemental jurisdiction over Plaintiffs' remaining state law claim."

THE COURT HELD:

> "Here, the Court similarly finds that reasonable firefighters and building inspectors could believe, based on the condition of the Property on May 1, 2013, that a warrantless entry and search of the grounds was necessary to protect occupants of the house, the public, and first responders if a fire occurred. *Cf.* Simpson v. Rivera, No. 20-cv-02478, 2023 WL 2585478, at *9 (N.D. Ohio Mar. 21, 2023), *aff'd*, No. 23-3300, 2024 WL 1739774 (6th Cir. Apr. 23, 2024) (finding exigent circumstances exception applied where officers reasonably believed their immediate entry onto the property was necessary to protect the occupants, neighbors, and the fire department).
>
> It is undisputed that it was not the first time some of these Defendants had seen the Property, as they had received complaints about it, previously inspected it, and previously issued citations regarding the need for the structural repair of the Property. ECF No. 143-4 at 2; ECF No. 143-5 at 3; ECF No. 143-8 at 2. Plaintiffs' neighbor had informed the town that his 'biggest concern' was the 'structural soundness of the house.' ECF No. 147-24. Defendant Bunting, who was on the Property a day earlier, noted that the front porch was collapsing. ECF No. 14711 at 2; ECF No. 150-1 at 226. This knowledge, coupled with the conditions observed or experienced by Defendants on May 1, 2013-especially the presence of a strong burning odor- presented an urgent situation that could be reasonably perceived as one requiring the immediate action on the part of Defendants to ensure the safety of the Property's occupants, the public, and

first responders. The Court therefore finds Defendants' entrance onto the Property without permission or a warrant was done in the midst of exigent circumstances and thus Defendants are entitled to qualified immunity. *See Mangino v. Inc. Vill. of Patchogue*, 739 F.Supp.2d 205, 266 (E.D.N.Y. 2010) ("[I]f Poulos had an objectively reasonable belief that . . . a warrantless search without consent was justified based on his belief that there were exigent circumstances requiring his immediate attention, . . . he is entitled to qualified immunity."), *on reconsideration in part*, 814 F.Supp.2d 242 (E.D.N.Y. 2011).

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Even if the odor was the only condition experienced by Defendants, the Court would still find that it was objectively reasonable for Defendants to believe that exigent circumstances existed. *See Klump*, 536 F.3d at 118 (no clear error in district court's determination that firefighters and agents reasonably believed it was necessary to enter a warehouse after smelling a burning odor); *Simpson*, 2023 WL 2585478, at *9 (finding warrantless entry into occupant's home lawful under exigent circumstances exception in part because the officers noticed a smell of natural gas). Plaintiffs' assertion that there could not be a gas smell on the Property because there was no gas on the Property misses the point. The relevant issue is not whether the source of the odor was actually gas, but rather whether there was, in fact, a burning odor indicating a danger which emanated from the Property. As to that issue, Plaintiffs do not refute that there was a strong burning odor; they only refute that the source of any odor could not have been gas. Although the Court notes that Defendants did, in fact, find a deteriorating car battery, the Court is not permitted to assess whether Defendants' belief that there was a dangerous odor is supported in "hindsight" in determining whether exigent circumstances existed. *Klump*, 536 F.3d at 118. Nor were Defendants obligated to "wait until they saw actual smoke or flames" to reasonably believe the conditions on the Property posed a danger. *Id.* Rather, the Court's inquiry is focused on whether the undisputed facts demonstrate Defendants reasonably believed the entry onto the Property was necessary to protect the occupants, the public, and first responders. *See id.* (finding firefighters and DEA agents had an objectively reasonable basis for believing there was a fire necessitating a warrantless entry in part because they smelled smoke, and finding it irrelevant that no fire or smoke was actually found in hindsight)."

FACTS:

"On May 1, 2013, Defendant Klugewicz, Chief Fire Safety Inspector for Rockville Centre, Defendant Thorp, Assistant Fire Chief for Rockville Centre, and Defendants Casella, Gooch and Bunting visited the Property. ECF No. 143-4 at 2; ECF No. 143-5 at 3; ECF No. 143-6 at 2 (Thorp Aff.); ECF No. 143-7 at 1 (Klugewicz Aff.); ECF No. 143-8 at 2. Upon arriving at the Property, Defendant Klugewicz observed it to be in a 'threatening condition.' ECF No. 143-7 at 1. He described the windows as being 'covered with clothing and papers,' which, in his opinion, 'increased [the] risk it

posed to public safety and the public responders should a fire occur.' *Id.* Defendant Klugewicz further observed 'vehicles and automobile parts . . . as well as debris and overgrown shrubs' on the Property. *Id.* He also noticed the presence of an odor he described as 'a strong smell of gas' emanating from the Property. *Id.* Defendant Bunting likewise described the presence of a 'strong burning smell' at the Property. ECF No. 147-11 at 4. In light of what he observed and smelled, Defendant Klugewicz deemed the Property to be a safety hazard for first responders and immediately issued an order-for dissemination to multiple firehouses in the vicinity of the Property-that public responders were only to 'surround and drown' and not enter the house if a fire occurred at the Property. ECF No. 143-7 at 2. Defendants Casella and Thorp described observing similar conditions at the Property and Defendant Thorp additionally noticed a worn-out extension cord on the porch. ECF No. 143-4 at 2; ECF No. 143-6 at 2; *see also* ECF No. 143-8 at 2. These conditions, and the concern for the immediate danger that they posed to occupants of the Property, the public, and first responders, prompted Defendant Thorp to cut the padlock on a gate to allow entry into the backyard of the Property. ECF No. 143-6 at 2; ECF No 147-11 at 3-4. Defendants Klugewicz, Casella, Thorp, and Bunting thereafter went into the backyard, where they observed more automobile parts, debris, a propane tank, and a decaying car battery that turned out to be the source of the perceived strong burning or gas-like odor. ECF No. 143-4 at 2; ECF No. 143-6 at 2; ECF No. 143-7 at 2; ECF No. 143-8 at 2; ECF No 147-11 at 4. Defendants Casella and Thorp also turned off the electricity at the Property to lessen the risk of fire."

Legal Lesson Learned: Fire and building officials lawfully made forced entry because "exigent circumstances" required immediate action. Suggestion – include police when making a forced entry.

Note: See 6th Circuit [Cincinnati] decision in Christian Simpson v. Shane Rivera, et al., April 23, 2024, where three Euclid, OH firefighters responded to a resident's call for a water leak. The resident's lawsuit against FD and PD, claiming unlawful entry was dismissed.

> "Upon arrival, firefighters observed the water leak high up on the neighbor's basement wall, about a foot from the ceiling. Believing Simpson to be home, the firefighters attempted to make contact by knocking on his door but were unsuccessful. EFD requested EPD to assist. Dispatch directed EPD to assist with a water leak and a 'possible domestic issue.' DE 27-2, Fire Dep't Report, Page
> ID 389. Four officers—Rivera, Linder, Mausar, and Thirion—arrived on scene around noon. The officers also attempted to make contact with Simpson by knocking on his doors and windows, but there was no response. Near the back of the house, the officers and firefighters smelled an odor of natural gas. Based on the ongoing water leak, the smell of natural gas, and the unresponsive occupant, the firefighters obtained permission from their supervisor to force entry, but requested that the officers enter first and conduct

a ‘safety sweep’ to ensure the firefighters’ safety. Holden granted the officers permission to conduct the sweep.

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The officers twice announced their presence inside the home and received no response. After proceeding upstairs, Mausar discovered Simpson asleep in his bed, where his hands were obscured by blankets. The officers identified themselves again and ordered Simpson to put his hands up and approach them. Simpson, who had woken up, complied with the instructions. As soon as the officers noticed that Simpson was unarmed, they re-holstered or lowered their
weapons. At no point did any officer touch Simpson.

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The district court granted summary judgment for the five officers based on federal qualified immunity and Ohio governmental immunity. Simpson appeals the grant of summary judgment. We affirm the district court’s well-reasoned opinion in full.” [See March 21, 2023 decision by U.S. District Court.]

File: Chap. 1, American Legal System

TX: FIREWORKS AT PUBLIC LAKE & PARK – EXPLOSION - INJURIES – NO IMMUNITY UNDER RECREATION STATUTE

On June 12, 2024, in Lubbock County Water Control And Improvement District No. 1 v. Jonathan Rodriguz, et al, the Court of Appeals. Seventh District of Texas at Amarillo held (3 to 0) that the trial court correctly denied the District with governmental immunity. “The Recreational Use Statute limits the liability of both public and private landowners who permit others to use their property for activities the statute defines as ‘recreation.’ *** WCID claimed that it remained immune from suit because Rodriguez was injured while engaging in recreational activity and Appellees had not produced sufficient evidence that WCID engaged in grossly negligent conduct. *** Once Appellees settled in to watch the fireworks display, their purpose was not to interact with their natural surroundings but rather to be entertained by a human production. Therefore, we conclude that being outdoors and watching a fireworks display, as Rodriguez did here, is not ‘recreation’ as contemplated by the Recreational Use Statute. Thus, the Recreational Use Statute does not apply to Appellees’ claims.”

THE COURT HELD:

> “The Recreational Use Statute provides a non-exclusive list of activities that are considered ‘recreation,’ including fishing, swimming, boating, camping, picnicking, hiking, and “any other activity associated with enjoying nature or the outdoors . . .

.”’TEX. CIV. PRAC. & REM. CODE ANN. § 75.001(3). WCID contends that Appellees’ activity on the day of the incident, such as several hours of swimming, reflects that they were engaged in ‘recreation,’ namely ‘activity associated with enjoying nature or the outdoors . . . .’ TEX. CIV. PRAC. & REM. CODE ANN. § 75.001(3)(L). In City of Bellmead v. Torres, the Supreme Court of Texas explained that, because the Recreational Use Statute is a premises defect statute, whether a particular action qualifies as ‘recreation’ turns on the precise activity the plaintiff was engaged in when the injury occurred. 89 S.W.3d at 614. Texas courts have also recognized that a person may be engaged in ‘recreation’ when engaged in acts that are incidental to their active participation in a recreational activity.

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The active sports and hobbies listed in the statute are, generally speaking, physical, hands-on activities usually enjoyed outdoors. See TEX. CIV. PRAC. & REM. CODE ANN. § 75.001(3). While we recognize that the list in section 75.001(3) is neither exclusive nor exhaustive, the participatory pursuits enumerated in the statute are not similar to the passive observation of a manmade exhibition, even in a natural setting.”

FACTS:

“On July 5, 2019, Jonathan Rodriguez (‘Rodriguez’) and his family traveled to Buffalo Springs Lake to spend the day with friends. Buffalo Springs Lake is owned by
WCID, which had contracted with Extreme Pyrotechnics to produce a fireworks display
for the Fourth of July holiday. Rodriguez and his family swam, ate, and then ‘just waited
until it got dark out’ to watch the fireworks show. As darkness fell and the fireworks started, Rodriguez quickly realized that his group was ‘right in front of’ the discharge site
from which the fireworks were launched. Soon after the show began, a fire started in the
discharge area, followed by an explosion. Rodriguez and his wife saw sparks and fireworks flying at them and debris falling. Something struck Rodriguez on the back of
his head, causing a serious wound. Firefighters responded to fires at the scene and emergency responders assisted Rodriguez, who was transported to a hospital.”

Legal Lesson Learned: Do not allow people near the fireworks discharge area.

U.S. SUP. CT. – "LANDMARK" DECISION - FED. JUDGES STOP DEFERRING TO AGENCIES – IMPACT OSHA / FIRE SERVICE

On June 28, 2024, in Loper Bright Enterprises, et al. v. Raimond, Secretary of Commerce, et al., the U.S. Supreme Court held (6 to 3), in a "landmark decision" reversing the famous Chevron 1984 decision that has often led Federal courts to defer to agency interpretations of federal statutes and regulations. For the fire service, this decision may lead to legal challenges of OSHA's proposed new "Emergency Response Standard" and impact on volunteer FDs with costly requirements such as annual medical evaluations and annual fitness-for-duty testing for all members.

In this case, four family-owned fishing businesses in New Jersey and Rhode Island that catch Atlantic herring brought lawsuits challenging a new requirement to have "monitors" (private inspectors certified by federal government) on their boat to enforce annual catch limits. The conservation program aimed to monitor 50 percent of declared herring fishing trips in the regulated area, with program costs split between the federal government and the fishing industry. The cost to commercial fishermen of paying for the private inspector monitoring was an estimated $710 per day for 19 days a year, which could reduce a vessel's income by up to 20 percent, according to government figures. U,S. Court of Appeals in D.C. and the U.S. Court of Appeals for 1st District (Boston) upheld the dismissals of the lawsuits under the "Chevron doctrine," deferring to the expertise of the federal agency - the National Marine Fisheries Service (part of U.S. Department of Commerce). The U.S. Supreme Court reversed and sent case back for further judicial review.

THE COURT HELD (opinion written by Chief Justice John Roberts).

> "Chevron [U. S. A. Inc. v. Natural Resources Defense Council, Inc., 467 U. S. 837 (1984)] is overruled. Courts must exercise their independent judgment in deciding whether an agency has acted within its statutory authority, as the APA requires.
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> ***
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> Chevron has proved to be fundamentally misguided.

FACTS:

> "Four decades after its inception, Chevron has thus become an impediment, rather than an aid, to accomplishing the basic judicial task of 'say[ing] what the law is.' Marbury, 1 Cranch, at 177. And its continuing import is far from clear. Courts have often declined to engage with the doctrine, saying it makes no difference.
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> ***

> The dissent ends by quoting Chevron: 'Judges are not experts in the field.' Post, at 31 (quoting 467 U. S., at 865). That depends, of course, on what the 'field' is. If it is legal
> interpretation, that has been, 'emphatically,' 'the province and duty of the judicial department' for at least 221 years.'"

Legal Lesson Learned: This is a "landmark" decision that will impact many industries challenging federal agencies, including the fire service and the proposed new OSHA standard.

> Note: See National Volunteer Fire Council comments on the OSHA proposed standard, including below two rules (posted 6/28/2024).
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> **"OSHA's Proposed Rule:** All Emergency Service Organizations shall conduct a community or facility vulnerability and risk assessment for its service area, for the purpose of establishing its standards of response and determining the ability to match the community or facility's risks with available resources.
> **OSHA's Proposed Rule:** OSHA's inclusion of NFPA 1582: Standard on Comprehensive Occupational Medical Program for Fire Departments, which requires annual medical evaluations proving fit for duty.
> **OSHA's Proposed Rule:** OSHA Is seeking guidance on whether an action level of 15 exposures to combustion products within a year trigger medical surveillance consistent with NFPA 1582 is too high, too low, or an appropriate threshold.
> **OSHA's Proposed Rule:** OSHA's Proposed Rule is seeking input on whether the proposed rule should specify retirement ages for personal protective equipment (PPE). Current NFPA standards call for 10 years.
> **OSHA's Proposed Rule:** If approved, the new OSHA rules would require your fire department to conduct annual fitness for duty testing, essentially an annual physical ability test that includes dragging dummies, hitting targets with axes, and forcing a door or breaching a wall."

File: Chap. 2, Safety

NY: EMT HEARING LOSS – NO PROOF CAUSED BY JOB – HUNTED 26 YRS WITHOUT PROTECTION – NO WORK COMP

On June 27, 2024, In The Matter of the Claim of Andrew P, DeWolf v. Wayne County, the Supreme Court of New York, Third Department, held (5 to 0) that the Workers' Compensation Board properly overruled their Administrative Law Judge and denied the claim. Plaintiff's experts had no specific information about the level of noise in the ambulance or frequency of exposure.

THE COURT HELD:

> "Claimant testified that he suffered hearing loss due to repeated exposure to loud siren and radio noise at work. Claimant testified that he worked full time, sometimes in excess of 60 hours per week, but that he could not quantify how often he was exposed to loud noise. Claimant also could not quantify the decibel level of noise but he did testify that he could carry on a conversation in the vehicle with the siren on. Claimant also testified that he has hunted recreationally for the past 26 years without consistently wearing ear protection.
>
> ***
> In support of his claim, claimant offered the medical narratives and deposition testimony of otolaryngologists Michael DeCicco and Benjamin Crane. DeCicco examined claimant in May 2021 and diagnosed moderately severe to severe bilateral sensorineural hearing loss. DeCicco testified that, based upon the history that claimant provided, 'there was a very good chance' that claimant's hearing loss was related to noise exposure at work. DeCicco also testified that he was not provided any information as to the decibel levels that claimant was exposed to nor the duration of the exposure and that he was not aware of claimant's use of firearms.
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> Crane examined claimant in July 2021 and concluded that claimant's hearing loss was 'likely related to noise exposure.' Crane testified, however, that he did not have an opinion as to whether claimant's hearing loss was related to noise at work because claimant had two sources of noise exposure, 'work and recreational[ ].' Crane further noted the lack of information regarding the level and duration of claimant's exposure to noise at work. Although Crane concluded that noise exposure at work 'could have and I guess I believe it did' play a role in claimant's hearing loss, he added that, 'as mentioned, I don't have the details on how much noise exposure it actually was.'
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> In light of the foregoing, we conclude that the Board acted within its authority in rejecting claimant's medical evidence of a causal relationship as speculative (*see Matter of Tucker v City of Plattsburgh Fire Dept.*, 153 A.D.3d 984, 988 [3d Dept 2017], *lv denied* 30 N.Y.3d 906 [2017]; *Matter of Mayette v Village of Massena Fire Dept.*, 49 A.D.3d at 922). We note that the Board was entitled to reject claimant's medical evidence even though there was no other medical evidence presented on the issue of causation (*see Matter of Glowczynski v Suburban Restoration Co., Inc.*, 174 A.D.3d 1236, 1238 [3d Dept 2019]; *Matter of Bradley v U.S. Airways, Inc.*, 58 A.D.3d 1043, 1045 [3d Dept 2009]).:

FACTS:

> "Claimant worked in the field as an emergency medical technician for Wayne County for roughly 15 years. In August 2020, he filed a claim for workers' compensation benefits, alleging that he sustained hearing loss due to prolonged exposure to workplace noise. Following a hearing, the Workers' Compensation Law Judge established the claim for occupational binaural hearing loss. Upon administrative

> appeal, the Workers' Compensation Board reversed, finding that claimant did not meet his burden of establishing a relationship between his injury and his employment by competent medical evidence, and disallowed the claim."

Legal Lesson Learned: Wear hearing protection when driving emergency apparatus with siren activated, and when hunting. When making a claim for workers comp, expert witnesses need to measure the actual noise level in the cab.

File: Chap. 3, Homeland Security

U.S. SUP. CT: DOMESTIC VIOLENCE – COURT MAY ORDER FIREARMS SEIZED IF "CREDIBLE THREAT"

On June 21, 2024, in United States v. Zackery Rahimi, the U.S. Supreme Court held (8 to 1), in opinion by Chief Justice John G. Roberts, Jr., that 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." Rahimi was indicted by a federal grand jury and pled guilty but appealed on Second Amendment. The Supreme Court reversed March 2, 2023, decision by the U.S. Court of Appeals for the 5th Circuit (New Orleans).

THE COURT HELD:

> "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.
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> ***
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> When a restraining order contains a finding that an individual poses a credible threat to the physical safety of an intimate partner, that individual may—consistent with the Second Amendment—be banned from possessing firearms while the order is in effect. Since the founding, our Nation's firearm laws have included provisions preventing individuals who threaten physical harm to others from misusing firearms. As applied to the facts of this case, Section 922(g)(8) fits comfortably within this tradition."

FACTS:

Justice Roberts described the incident that led to civil protective order.

> "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 alter-
> cation, 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. Ibid. Undeterred by this threat, C. M. went to court to seek a restraining order. In the affidavit accompanying her application, C. M. recounted the parking lot incident as well as other assaults. She also detailed how Rahimi's conduct had endangered A. R. Although Rahimi had an opportunity to contest C. M.'s testimony, he did not do so. On February 5,2020, a state court in Tarrant County, Texas, issued a restraining order against him. The order, entered with the consent of both parties, included a finding that Rahimi had committed 'family violence.' App. 2. It also found that this violence was 'likely to occur again' and that Rahimi posed 'a credible threat' to the 'physical safety' of C. M. or A. R. Id., at 2–3. Based on these findings, the order prohibited Rahimi from threatening C. M. or her family for two years or contacting C. M. during that period except to discuss A. R. Id., at 3–7. It also suspended Rahimi's gun license for two years."

5th Circuit decision described 5 shootings.

> "Between December 2020 and January 2021, Rahimi was involved in five shootings in and around Arlington, Texas.1 On December 1, after selling narcotics to an individual, he fired multiple shots into that individual's residence. The following day, Rahimi was involved in a car accident. He exited his vehicle, shot at the other driver, and fled the scene. He returned to the scene in a different vehicle and shot at the other driver's car. On
> December 22, Rahimi shot at a constable's vehicle. On January 7, Rahimi fired multiple shots in the air after his friend's credit card was declined at a Whataburger restaurant.
>
> Officers in the Arlington Police Department identified Rahimi as a suspect in the shootings and obtained a warrant to search his home. Officers executed the warrant and found a rifle and a pistol. Rahimi admitted that he possessed the firearms. He also admitted that he was subject to an agreed civil protective order entered February 5, 2020, by a Tarrant County state district court after Rahimi's alleged assault of his ex-girlfriend. The protective order prohibited Rahimi from, inter alia, '[c]ommitting family violence,' '[g]oing to or within 200 yards of the residence or place of employment' of his ex-girlfriend, and '[e]ngaging in conduct . . . including following the person, that is reasonably likely to harass, annoy, alarm, abuse, torment, or embarrass' either his ex-girlfriend or a member of her family or household. The order also expressly prohibited Rahimi from possessing a firearm." United States v. Rahimi

Legal Lesson Learned: Great opinion; nice to have confirmation of a Federal statute allowing seizure of firearm in domestic violence matter; many states have similar statutes.

File: Chap. 4, Incident Command

OH: OPEN BURN – FF DENIED ACCESS UNTIL PD ARRIVED – CONV. REVERSED FOR "MISCONDUCT AT EMERGENCY"

On June 4, 2024, in Belmont County v. James K. Gaito, the Court of Ohio, Seventh Appellate District (Belmont County), the Court (3 to 0) reversed the conviction of misconduct at an emergency, but upheld disorderly conduct. For disorderly conduct, the trial court had sentenced Appellant to 30 days in jail, suspended, a fine, and court costs. "Firefighter Blake testified that when they arrived on the scene, he observed a small brush fire burning….Two vehicles obstructed their ability to get the fire truck near the scene…. They did not know who owned the vehicles….Firefighter Blake stated that Appellant approached the fire truck and asked Captain Barto what they were doing there….Firefighter Blake testified that when they told Appellant they were there to put out the fire, Appellant started using profanity and stated, 'You'ns ain't putting out the fire.' … Firefighter Blake recalled Appellant stating, 'You guys will not put out this 'F'ing' fire. You're trespassing on my property. You need to get out of here now.'… Firefighter Blake recalled that Captain Barto told Appellant, 'Well, we'll just let the sheriff's department decide that.' *** Appellant made comments to the firefighters in the instant case. His words did not rise to the level of 'fighting words' and did not match the conduct by the defendants in the other cases where courts upheld convictions for misconduct in an emergency under R.C. 2917.13(A)(1) and (C). There was no evidence presented showing that Appellant was given a directive and defied it. There was no evidence demonstrating that Appellant was given instructions to move or refrain from any actions and refused to follow. No evidence demonstrated that he committed any action violative of the statute."

THE COURT HELD:

> "Appellant was charged under R.C. 2917.13(A)(1) and (C) for misconduct at an emergency. These sections provide in relevant part that:
> (A) No person shall knowingly do any of the following:
> (1) Hamper the lawful operations of any law enforcement officer, firefighter, rescuer, medical person, emergency medical services person, or other authorized person, engaged in the person's duties at the scene of a fire, accident, disaster, riot, or emergency of any kind;
> * * *
> (C) Whoever violates this section is guilty of misconduct at an emergency. Except as otherwise provided in this division, misconduct at an emergency is a misdemeanor of the fourth degree. If a violation of this section creates a risk of physical harm to persons or property, misconduct at an emergency

is a misdemeanor of the first degree

***

However, insufficient evidence supports a finding that Appellant hampered the firefighters from extinguishing the fire.

***

The few Ohio cases affirming a defendant's conviction under R.C. 2917.13(A)(1) and (C) involved more affirmative acts than strong words or expelling profanity at emergency workers. In Blocker, 2007-Ohio-144, paramedics described the defendant as 'belligerent,' 'nearly screaming' at them, and barraging them with questions while they attempted to medically aid her sister such that they could not hear responses to medical questions and provide assistance. Id. at ¶ 8-9. The paramedics testified that Blocker also revoked permission for one of them to return to her apartment and called someone to the apartment who made them feel more threatened. Id. at ¶ 12.

In Zaleski, 2010-Ohio-5557, the defendant stipulated that his conduct of shutting off the power interfered with the firefighters' duties. Id. ¶ 11. He asserted only
that the situation was not an emergency under R.C. 2917.13(A) because the source of the alarm was located.

In State v. Mast, 5th Dist. Holmes No. 17CA11, 2017-Ohio-8388, ¶ 4, the defendant not only yelled at firefighters trying to extinguish a fire, but he also drove a skid loader past one of their trucks, failed to comply with the firefighter's commands to stop the skid loader, and yelled at the firefighter to 'move that piece of shit or [he would] move it for you.'

***

Appellant made comments to the firefighters in the instant case. His words did not rise to the level of 'fighting words' and did not match the conduct by the defendants in the other cases where courts upheld convictions for misconduct in an emergency under
R.C. 2917.13(A)(1) and (C).

***

As to Appellant's disorderly conduct conviction, his counsel represented at oral argument that he was not challenging this conviction. For the foregoing reasons, Appellant's conviction for misconduct at an emergency is reversed and vacated. Appellant's disorderly conduct conviction is affirmed."

FACTS:

"Appellant cites Firefighter Blake's testimony that Appellant only used profanity and stated that he did not want the fire extinguished. Appellant also cites Blake's

> testimony that he did not know Appellant's intention when Appellant stated there would
> be 'issues' between Appellant and the firefighters if they extinguished the fire….
>
> Appellant emphasizes that the other two responders who testified did not perceive his words as threatening but only as a dissatisfaction with the firefighter's actions. He cites Captain Barto's testimony that Appellant was not aggressive when telling firefighters that they were not going to extinguish the fire and Captain Barto observed nothing at the scene that caused concern…. Appellant also notes Corporal Sall's testimony that while Appellant and the people around the fire were upset, she heard nothing that constituted a threat, and the fire was extinguished without incident."

Legal Lesson Learned: Conviction reversed based on absence of "Fighting Words" or aggressive conduct at the scene.

File: Chap. 4, Incident Command

MS: FD LACK OF TANK WATER / DIFFICULTY HYDRANT – PROPERTY OWNER CAN'T SUE FOR CARDIAC / STROKE

On May 30, 2024, in Yazoo City v. Kenneth Hampton, the Mississippi Supreme Court held (3 to 0) that the trial court improperly denied the City's motion for summary judgment, and authorized plaintiff to conduct discovery. The fire started on a neighbor's property (house was total loss) and spread to Mr. Hampton's property; FD had limited tanker water and apparently had difficulty connecting to a hydrant until assisted by a retired firefighter. Hampton claims he had cardiac issues and a stroke with onset of his symptoms one day after the fire, and three days after the fire was diagnosed at University of Mississippi Medical Center. "To reiterate, the exception in Mississippi Code Section 11-46-9(1)(c) provides: 'unless the employee acted in reckless disregard of the safety and well-being of any person not engaged in criminal activity at the time of injury[.]' § 11-46-9(1)(c). *** Hampton's claim clearly does not fall within this exception. The problem with his claim lies in his linking the property damage to his personal injury. Hampton does not argue that the fire department acted 'in reckless disregard of [his] safety and well-being' or any other person's when it was fighting the fire. Id. (emphasis added). Rather, he argues that the fire department acted in reckless disregard of his property and is therefore liable for stress-related injuries he suffered three days after the fire was extinguished. Ineffectively fighting a fire and damaging a man's property, however, does not amount to 'reckless disregard of the safety and well-being of any person.' Id. (emphasis added). We therefore find that Section 11-46-9(1)(c) immunizes Yazoo City from Hampton's personal injury claim.

THE COURT HELD:

> "Regarding immunity, Mississippi Code Section 11-46-9(1)(c) provides:

> (1) A governmental entity and its employees acting within the course and scope of their employment, or duties shall not be liable for any claim:
>
> (c) Arising out of any act or omission of an employee of a governmental entity engaged in the performance or execution of duties or activities relating to police or fire protection unless the employee acted in reckless disregard of the safety and well-being of any person not engaged in criminal activity at the time of injury[.]
>
> Miss. Code Ann. § 11-46-9(1)(c) (Rev. 2019)

This Court considered the statute in a similar context to the present one in Collins, 240 So. 3d at 1222-23. There, the home of Donald and Mary Collins 'was struck by lightning, caught fire, and burned.' Id. at 1215. Following various failures while fighting the fire, primarily on the part of an interim fire department chief, the fire resulted in a total loss of the couple's home. Id. 'The Collinses argue[d] that a genuine issue of material fact exist[ed] that the defendants had [r]eckless disregard for the failure to protect the property.' Id. at 1222 (third alteration in original) (internal quotation marks omitted). In their argument, '[t]hey focus[ed] solely on criticizing how the . fire was fought and the resulting property damage.' Id. The city, however, 'claim[ed] immunity for the acts surrounding the fire at . [the] residence, claiming that the Collinses failed to show reckless disregard.' Id.

Considering Section 11-46-9(1)(c), the Collins Court ultimately held that '[t]he plain language of the statute requires that an employee must act with 'reckless disregard of the safety and well-being of any person.' Id. at 1223 (quoting Miss. Code Ann. § 11-46-9(1)(c) (Rev. 2012)). Further, '[t]he statute's plain language simply does not contemplate liability for actions that may relate merely to alleged reckless disregard of property. Because Donald and Mary do not allege that the actions fighting the fire endangered the safety and well-being of any person, their claim is subject to immunity.' Id.

Returning to the present case, Hampton and Young's claim mirrors the Collinses' claim and is thus subject to the same immunity. Hampton and Young seek to hold Yazoo City liable for the damage to their property, but, like the Collinses, they do not assert that the fire department's actions were in "reckless disregard of the safety and well-being of any person." Miss. Code Ann. § 11-46-9(1)(c). They instead "focus solely on criticizing how the . fire was fought and the resulting property damage." Collins, 240 So. 3d at 1222. Yazoo City is therefore immune under Section 11-46-9(1)(c) since Hampton and Young's property damage claim (1) arises directly from an "act or omission of an employee of a governmental entity engaged in the performance or execution of duties or activities relating to . fire protection" and (2) does not fall into the exception for when 'the employee acted in reckless disregard of the safety and well-being of any person.' § 11-46-9(1)(c)."

FACTS:

> "On November 18, 2020, a fire broke out at Young's property in Yazoo City. The Yazoo City Fire Department responded, but extinguishing the fire proved difficult for two reasons: (1) a lack of tank water in the fire department's truck and (2) an inability to connect to a nearby fire hydrant.
>
> The fire spread, eventually reaching Hampton's property. Only after the fire department enlisted a nearby retired fireman to help connect to the hydrant was the fire extinguished. And by that time, Young's property had become a total loss. Hampton's property had also been significantly damaged by both fire and smoke.
>
> The record reveals that neither Young nor any person other than fire department personnel was on Young's property during the fire. Hampton was present at his property, but he was not trapped in the fire or subjected to any fire department action. He instead looked on and eventually "pour[ed] water on his vehicles . trying to preserve [them] from getting engulfed in flames."

Legal Lesson Learned: The Mississippi statutes provide immunity unless firefighters acted in "reckless disregard of the safety and well-being of any person."

Chap. 5 – Emergency Vehicle Operations

File: Chap. 6, Employment Litigation

NY: FF HEART ATTACK – STATUTORY PRESUMPTION CAUSED BY JOB "REBUTTED" – FAMILY HISTORY, SMOKER

On June 27, 2024, In the Matter of Joseph Martino v. Thomas P. DiNapoli, as State Comptroller,
The Supreme Court of New York, Third Department, held (5 to 0) that the firefighter gets only normal disability pension, not enhanced pension disabilities caused by unexpected incident on the job. Following a hearing and redetermination, including the review of voluminous medical records, the Hearing Officer properly upheld the denial, finding that petitioner's disability was not caused by the performance and discharge of his duties as a firefighter. In May, 2015, he suffered a heart attack at the Fire Station after a fire run but no expert tied this to his job, but even his own cardiologist could not connect this to his job. "Although petitioner faults the Retirement System's expert for failing to expressly exclude his employment as a causative factor … petitioner's argument on this point overlooks the fact that his own cardiologist concluded that petitioner's disabling heart condition did not arise out of his employment."

THE COURT HELD:

> "Petitioner, a firefighter, applied for performance of duty disability retirement benefits in June 2015 asserting that he was permanently incapacitated from the performance of his duties as the result of a heart condition. Although petitioner indeed was found to be permanently incapacitated, his application was denied upon the ground that his disability was not the natural and proximate result of an incident sustained in service.
>
> ***
>
> The New York State and Local Employees' Retirement System concedes that petitioner is permanently incapacitated from the performance of his duties as a firefighter and, further, that the 'heart presumption' set forth in Retirement and Social Security Law § 363-a (1) applies. As such, the sole contested issue is whether the Retirement System met its burden of rebutting the statutory presumption, 'which, in turn, required the Retirement System to demonstrate - through expert medical proof - that petitioner's cardiac condition was caused by risk factors other than his employment' …. Upon our review of the record, we are satisfied that the statutory presumption was rebutted."

FACTS:

> "With respect to the May 2015 incident, petitioner testified that he arrived at the firehouse for his scheduled shift and, after 'go[ing] over the rig and mak[ing] sure everything is where it's supposed to be,' he went upstairs to complete his paperwork. Although he initially 'was feeling okay,' he 'started getting a burning sensation in [his] chest' and began 'sweating a little bit.' A call then came in for 'a pan and meat' in an apartment building - meaning that someone had burned their dinner and filled the building with smoke - and petitioner donned his turn-out gear (weighing approximately 70 pounds) and responded to the call. On the way to the call, petitioner testified, the sweating and burning sensation 'had subsided,' but it returned after exiting the building. During the call, the petitioner carried a positive pressure fan up two flights of stairs to help ventilate the structure. When petitioner returned to the ladder truck, his symptoms became 'more intense and [his] arm started hurting.' Upon returning to the firehouse, the petitioner 'started feeling worse and worse,' prompting his colleagues to call for an ambulance. Subsequent testing revealed that the petitioner had suffered a heart attack.
>
> ***
>
> Although petitioner attributes his heart attack to the rigors of firefighting, the record reflects that petitioner has 'a markedly positive family history' for coronary artery disease. Notably, petitioner's father had a heart attack in his early 40s, and petitioner has 'multiple first-degree relatives with premature cardiovascular disease.'

> As to petitioner's admitted history of cigarette smoking, petitioner testified that he smoked 10 or 12 cigarettes a day for one year and quit smoking altogether in 2007, but petitioner's medical records indicate that he smoked at least a pack of cigarettes a day for multiple years and suggest that he did not quit smoking until 2015. Prior to his disabling heart attack in May 2015, petitioner experienced 'some chest discomfort' while drinking a protein shake in January 2015, prompting an evaluation at a local emergency department. Although the evaluation was 'negative' and petitioner was discharged, he experienced two subsequent episodes of 'chest burning after exercise,' underwent a nuclear stress test, which reportedly showed 'a fix basal inferior wall defect without ischemia,' and was placed on blood pressure medications.
>
> After examining petitioner in 2017 and reviewing various medical records, including the statement of disability completed by petitioner's cardiologist, the Retirement System's expert concluded that petitioner was permanently disabled from his duties as a firefighter "due to his coronary artery disease and prior [myocardial infarction]," both of which were "related to [petitioner's] cigarette smoking and markedly positive family history for early [coronary artery disease]."

Legal Lesson Learned: Statutory presumption was rebutted; family history; smoker; even his own cardiologist.

File: Chap. 6, Employment Litigation

DC: FIREFIGHTERS ON DCFD – DENIED "IMMEDIATE INJUNCTION" – MUST "BUY" EMS YRS FOR FF PENSION

On June 26, 2024, in Ricardo Clark, et al. v. District of Columbia, U.S. District Court Judge Randolf D. Moss denied motion of eight firefighters for an "immediate injunction" that they are entitled to include their prior service as EMTs in the calculation of their Police and Firefighter Retirement and Relief Fund, without having to first "buy" time in the firefighter pension. If the EMS did not purchase additional years of prior service, they would not receive a higher annuity. "For the reasons explained above, the Court sees little, if any, merit in Plaintiffs' claims based on the Transfer Amendment Act and the now-repealed 2008 Act. To the contrary, neither law ever suggested that a transferee firefighter would be entitled to benefit accrual (as opposed to vesting accrual) based on prior years of service, and, under current law, Plaintiffs are still entitled to transfer funds contained in their defined contribution plan accounts (including earnings) to purchase additional benefit accrual (based on actuarial assumptions) in the defined benefits plan."

THE COURT HELD:

> "In 2013, 2015, and 2016, for example, the fire department issued Special Orders announcing firefighter roles. The FAQ section of each of these orders contained the following:

> Upon appointment to a firefighter, you are eligible to be placed in the Police Officers, Fire Fighters and Teachers Retirement Benefit Replacement Plan of 1998 (Firefighters Plan), as set forth in D.C. Official Code § 1-901.01 et seq. (2001). . . .
> Contributions made to the Civil Service Retirement System and the D.C. Defined Contribution Pension Plan, 401(A) CANNOT BE "TRANSFERRED"
> to the Firefighter's Plan. However, employees may 'buy' time in the Firefighter's Plan based on prior credible FEMS service.

***

The District also held various meetings with the firefighters over the years, including a May 2015 meeting with the firefighters who transitioned from EMS in 2009. Dkt. 39-12. According to Defendants, slides were presented at that meeting that explained (1) that 'EMS service is counted only for retirement eligibility purposes;' (2) that the 'future annuity received from [the FRRF will be] based on service from' the 2009 transition up until the date of retirement;" and (3) that '[t]ransitioned members must purchase additional previous service to receive a higher annuity.' Id. at 7. This presentation further explained that if the transferee-firefighters did not purchase additional years of prior service, they would 'receive an annuity based on years of active service from date of transfer into the Police/Fire Plan and will also retain their 401(a) benefits.' Id. at 9. The purchase of additional 'prior service' would require payment of 'the full actuarial value of the service which includes missed District contributions, employee contributions, and fund interest.' Id. at 10."

FACTS:

"The District of Columbia currently has one department, known as D.C. Fire and Emergency Services, which 'is an all-hazards agency that provides both fire suppression and emergency medical services.' Dkt. 39-1 at 10. It was not always this way. For many years, D.C. had a fire suppression service and an emergency medical service ('EMS'), which included EMTs and paramedics. Dkt. 26 at 3 (SAC). According to Plaintiffs, 'prior to the 1980s,' the fire suppression service was 'predominately white and overwhelmingly male' while the while the emergency medical service 'was predominantly Black[] and had substantially more women.' Id.at 2–3. The two services had separate unions, separate budgets, different pay scales, and different retirement plans. Id. at 3–4. Originally, both services offered employees a defined benefit plan: fire suppression had the FRRF and '[p]rior to 1987, EMS employees were part of the federal Civil Service, which [offered] a defined benefit pension plan.' See id. at 3. In 1987, however, new 'EMS employees were moved to a city-wide municipally controlled defined contribution plan similar to a 401(k), which is called a 401(a) plan.' Id. Under the defined contribution plan, 'the District contributes an amount equal to five percent of each participant's

> base salary into a trust[;] . . . [e]mployees become fully vested in the [plan] after five years of creditable service[,] . . . reach the age of 65 and separate from District employment, die while employed by the District, or become entitled to disability benefits under the Social Security Act;' and "[a] vested participant or former participant . . . will [start to] receive . . . benefits' upon 'separation from District employment, disability, or death.'
>
> In 2001, the D.C. Council enacted the Paramedic and Emergency Medical Technician Lateral Transfer to Firefighting Amendment Act ('Transfer Amendment Act'), which authorized the Mayor 'to provide for the transfer of . . . paramedics [and] emergency medical technicians to be uniformed firefighters.' D.C. Law 14-28 at § 202(a) (codified at D.C. Code § 5-409.01(a))."

Legal Lesson Learned: The plaintiffs will have an "uphill battle" given legislative history; the Court has given them opportunity to file a third Amended Complaint by July 15, 2024 and then begin pre-trial discovery.

File: Chap. 6, Employment Litigation

NY: FIRE CHIEF (ret) – PENSION "FINAL AVERAGE SALARY" REDUCED – OVERTIME HRS NOT APPROVED BY FD BOARD

On June 20, 2024, In the Matter of Tory Gallante, Petitioner v. Thomas P. DiNapoli, as State Comptroller, et al., Respondents. The Supreme Court of New York, Third Department, held (5 to 0) that the retired Fire Chief's "final average salary" must be recalculated to exclude overtime pay because he had a "free hand" in determining when he was paid overtime (such as at structure fires) and when he received comp time (such as meeting after regular hours). After a 30-year career as a firefighter, petitioner retired as Chief of the Arlington Fire District in March 2019 and began collecting retirement benefits. In 2020, the New York State and Local Retirement System notified petitioner that, after receiving salary information from the District, certain earned compensation would be excluded from the calculation of his final average salary. The Court did, however, order that his 144 hours of earned Holiday Pay be included in the calculation of his "final average salary."

THE COURT HELD:

> "Next, and contrary to petitioner's view, the Comptroller rationally excluded petitioner's overtime payments because the employment agreements (i) did not prescribe when and how overtime would be worked, (ii) did not identify petitioner's regularly scheduled hours of employment, and (iii) did not indicate whether prior approval was required for the performance of overtime work. The agreements established that petitioner's '[w]orking hours will be 40 hours per week on a five day

a week basis.' Although '[t]he typical work week is Monday through Friday,' petitioner had discretion to vary his weekly schedule 'for the best use to fit the District's needs.' Further, neither the agreements nor the Board's eight-hour workday resolution specified which hours of the day petitioner was required to work. Taken together, the Comptroller rationally concluded that petitioner did not have 'regularly established hours' within the meaning of General Municipal Law § 90.

As to overtime requirements, the agreements specified that any work in excess of 40 hours per week would be paid with compensatory time. According to the record and representations at oral [argument, compensatory time was generally calculated at petitioner's hourly rate of pay. Petitioner testified that he earned compensatory time for off-hours meetings and non-emergency work. Emergency call-back hours — time spent fighting fires outside of the regular workday — were compensated at time and a half pay. Although these provisions authorized petitioner to work overtime, they did not specify any terms or conditions that would require him to do so (see General Municipal Law § 90; Conrad v Regan, 175 AD2d at 629-630). Given the absence of a provision for prior approval — a finding that petitioner does not dispute — the Comptroller appropriately found that the agreements do not cover when or how petitioner worked overtime. In sum, because the employment agreements appear to have given petitioner a 'free hand in determining when and for how long [he] would work' (Matter of Murray v Levitt, 47 AD2d at 269), the Comptroller's determination excluding petitioner's overtime payments from his final average salary is reasonable, supported by substantial evidence and will not be disturbed (see Matter of Shames v Regan, 132 AD2d at 745; Matter of Mowry v New York State Employees' Retirement Sys., 54 AD2d at 1063)."

FACTS:

"After a 30-year career as a firefighter, petitioner retired as Chief of the Arlington Fire District in March 2019 and began collecting retirement benefits. In 2020, the New York State and Local Retirement System notified petitioner that, after receiving salary information from the District, certain earned compensation would be excluded from the calculation of his final average salary. Accordingly, petitioner's monthly retirement benefit amount was reduced, and petitioner was advised that he would be charged with an overpayment. Petitioner applied for a hearing and redetermination of his retirement benefits (see Retirement and Social Security Law §§ 74 [d]; 374 [d]). Following a hearing, the Hearing Officer determined that the Retirement System properly excluded petitioner's overtime pay, a staff development stipend and a portion of holiday pay from his final average salary. Respondent Comptroller adopted the Hearing Officer's findings of fact and conclusions of law and denied petitioner's application, prompting this CPLR article 78 proceeding.

***

[Footnote 1.] Petitioner testified that, under the District's time tracking system, he would fill out a form indicating the overtime he had worked on a given day either

immediately after completing the work or the day after. According to petitioner, the Board had the option of reviewing payroll records at their twice-monthly meetings after the payroll process was complete. In other words, this system 'does not set out any procedure for the regulation of overtime' worked by petitioner (Matter of Shames v Regan, 132 AD2d at 745), and therefore does not affect our conclusion.'"

Legal Lesson Learned: Fire Chiefs in New York and in other states with similar Comptroller laws should have a written overtime review procedure.

Chap. 7, Sexual Harassment

File: Chap. 8, Race Discrimination

CA: LATIN AMER. BC - NOT PROMOTED / 4 TESTS – BLACK FIRE CHIEF – BC LACKED CONFIDENCE & ABILITY TO LEAD

On June 18, 2024, in Carlos Flores v. County of Los Angeles, the California Court of Appeals, Second District, Fifth Division, held (3 to 0; unpublished decision). Plaintiff took 4 promotional exams; each time the Fire Chief (African America) selected others in his band or in a lower band (if there were three or fewer in higher band). "All applicants in the same band were to be treated equally for promotion. Fire Chief Daryl Osby, who is African American, was the sole decisionmaker as to who would be promoted. Chief Osby testified that he was required to select from the top band with eligible candidates; however, if there were three or fewer candidates in a band, he could consider candidates in the next band. " The County obtained summary judgment and Flores appeals. We affirm."

THE COURT HELD:

"In this complaint, Flores alleges five causes of action, each asserting a violation of the FEHA: Age discrimination, disability discrimination, medical condition discrimination (which was virtually identical to disability discrimination), ethnicity discrimination, and failure to prevent discrimination.

***

Chief Osby declared that he did not select Flores for promotion because, in his determination, Flores was not as qualified as those promoted over him, and his skill set did not meet what Chief Osby sought. He specifically stated that Flores did not present himself with confidence, which is necessary for leadership positions.[8]

Footnote 8: Flores subsequently submitted excerpts from Chief Osby's deposition, in which he set out his impressions of Flores's performance during

> the 2017 interview: ‘Vague on the positions that were available at that time. And compared to the other candidates interviewed, he didn't exude a high level of confidence that I felt as it pertains to his leadership and his ability to lead people. I can't say that I would use 'meek' as a word, but definitely his presence in the room as it pertained to his voice, his responses to questions, my ability from a perspective of an intangible, it just didn't give me confidence that he would lead to the capacity or the level that the other candidates exhibited in their interview.’

As to promoting Enriquez and Mackey from Band 3 over Flores in 2016, Chief Osby identified the particular skills and experience those two individuals had, which Chief Osby believed Flores lacked (for example, experience with brush fires), which were necessary for the specific Assistant Chief positions that were vacant.[9]

> Footnote 9: Chief Osby added that, in 2021, he appointed Flores as Acting Assistant Chief ‘to give him an opportunity to demonstrate his abilities and also to improve upon leadership skills.’ Flores ‘performed poorly as Acting Assistant Fire Chief because he demonstrated poor communication skills’ and was ultimately removed from the position. County saw this as confirmation that Chief Osby was correct in his decision not to promote Flores.

***

Thus, when considering those appointed to Acting Assistant Chief, what is relevant is not the ethnic breakdown of all Department personnel, but the ethnic breakdown of those eligible for such an appointment - the Battalion Chiefs. When considering those promoted to Assistant Chief, what is relevant is not the ethnic breakdown of the entire Department, but only those who successfully passed the exam for Assistant Chief. Porter [plaintiff’s expert] simply did not do this calculation.”

FACTS:

A. *The 2013 Exam*

The following facts are undisputed with respect to the 2013 Exam: Flores placed in Band 4 on the Eligible List. Seven applicants were ultimately promoted. Each applicant who was promoted placed in a higher band than Flores.

***

B. The 2016 Exam

The following facts are undisputed with respect to the 2016 Exam: Flores placed in Band 2 on the Eligible List. Five applicants were ultimately promoted. Three of the applicants who promoted were in the same band as Flores; two of them were in the band below him.[4] The two promoted from Band 3 were Jim Enriquez and Anderson

Mackey, Jr. Enriquez identifies as Hispanic or Latin American; Mackey is African American.

Footnote 4: No applicant placed in Band 1 in the 2016 exam.

Before Chief Osby made the promotions, he interviewed promotable candidates, including Flores. Flores had sustained a work-related knee injury on January 31, 2017. On February 10, 2017, when Flores interviewed with Chief Osby for the Assistant Chief position, he was wearing a knee brace and planning to have surgery.

***

C. The 2018 Exam

The following facts are undisputed with respect to the 2018 Exam: Flores placed in Band 5, the lowest band. Five applicants were ultimately promoted. Each applicant who was promoted placed in a higher band than Flores.

[Plaintiff was age 65 when list expired in 2021.]

***

The 2021 Exam

While this action was pending - and Flores was in the Acting Assistant Chief position - the Department held its 2021 exam for Assistant Chief. The following facts are undisputed with respect to the 2021 Exam: Flores placed in Band 3 on the Eligible List. Eight applicants were promoted by Chief Osby. Four of the applicants who promoted were in higher bands than Flores; four of them were in Band 3 with him. The first set of seven promotions was made on November 16, 2021, and the eighth promotion was made on February 23, 2022."

Legal Lesson Learned: Plaintiff and his expert failed to prove by direct or statistical evidence that he was not promoted because he was Latin American (or his age, or his injured knee.

Note: The Court shared this statistical calculation.

Footnote 20: "If we accept Chief Osby's testimony that he cannot reach a lower band until there are three or fewer appointees left in the higher bands, the proper comparison set is even smaller. To take a concrete example, in 2013, 12 individuals took the exam, 3 of them were Hispanic or Latin American, and only 1 Hispanic or Latin American candidate was included in the 7 promoted. This results in the conclusion that Hispanic or Latin American candidates made up 25 percent (3 in 12) of the successful candidates, but only 14 percent (1 in 7) of the promotions. But two of the Hispanic or Latin American candidates placed in Band 4, and Band 3 was the

lowest band reached for consideration for promotion. If one considers only the candidates in Band 3 or higher as "successful" and eligible for promotion, Hispanic or Latin American candidates comprised only 10 percent of this group (1 in 10), yet still accounted for 14 percent of the promotions. A similar result applies in 2018, when there were 19 candidates on the eligible list, 3 of whom were Hispanic or Latin American, but 2 of them were in Bands 4 and 5, which were not reached. Considering everyone on the eligible list, Hispanic or Latin American candidates accounted for 16 percent of the pool and 20 percent of the promotions. But if we look only at the bands that were reached, Hispanic or Latin American candidates were only 11 percent of the eligible candidates, yet still accounted for 20 percent of the promotions. Putting it yet another way: our review of the data indicates that, in all four exams, the *only* times a Hispanic or Latin American candidate was in a reachable band and was not promoted, that candidate was Flores (in 2016 and 2021)."

File: Chap. 8, Race Discrimination

CA: BLACK FF – TURNED DOWN ARSON INVEST. JOB - JURY FOUND "RETALIATION" FOR $175K SETTLEMENT IN 2013

On June 5, 2024, in Larry Jacobs v. City and County of San Francisco, the California Court of Appeals, First District, Third Division, held (3 to 0; unpublished decision) that trial court properly denied the City's motion for a new trial. "The jury returned a verdict [in April 2022 for $725,000] in Jacobs's favor, although two of the twelve jurors found against Jacobs on his retaliation claim. With regard to his FEHA {Fair Employment and Housing Act] claim, the jury concluded that the City did not assign Jacobs to a position as an arson investigator after March 31, 2018, and that Jacobs's complaints of discrimination [2011 lawsuit for race discrimination; 2013 settlement for $175,000] were a substantial motivating reason for the City's decision. *** In sum, viewing the whole record in a light most favorable to the judgment, we find substantial evidence supporting the jury's finding that the Department denied Jacobs an investigator position in retaliation for protected activity. In reaching this conclusion, we emphasize it is not our role to reweigh evidence. *** [T]he trial court is directed to enter a new order granting the motion for a new trial only on the issue of economic damages. In all other respects, the judgment is affirmed."

THE COURT HELD:

> "Beyond the foregoing two instances when promotional opportunities did not materialize for Jacobs, we note the evidence that Jacobs was removed from the eligibility list in October 2021 for allegedly falsifying that he had responded to 100 fires in his H-6 application. Jacobs was removed based on a fire history report that

> Chief Nicholson testified was her practice to run for anyone applying for an arson investigator position. The Chief Information Officer for the Department, Jesus Mora, testified anyone can run the report, however, he has rarely been asked to run the report; indeed, Mora could not remember when he last ran it, or even give an estimate of how often he ran it. He also testified that certain kinds of fires were not included in the report, are counted in determining whether a firefighter has responded to 100 fires. David Johnson, a witness for the City and a City employee for about 32 years, testified that he was not aware of the Department ever questioning anyone but Jacobs about their 100 fires documentation. The Department's conduct could reasonably be viewed as further evidence that the Department singled Jacobs out, taking steps to prevent Jacobs from obtaining the promotion that he sought."

FACTS:

> "In August 2020, Jacobs filed this suit against the City alleging causes of action for whistleblower retaliation in violation of Labor Code section 1102.5, and for retaliation in violation of Government Code section 12940 (Fair Employment and Housing Act or FEHA). At all relevant times beginning in May 2005, Jacobs worked as a firefighter (civil service classification H-2) for the San Francisco Fire Department (the Department). Since 2008, he has consistently sought appointment as an 'Arson Investigator' (civil service classification H-6), and this lawsuit contended he was impermissibly denied such a position around October 2017 and April 2018. Jacobs, who is African American, claimed the Department denied him the H-6 position in retaliation for his exercise of protected activity in suing the City in 2011 for racial discrimination and in 2014 for complaining about black mold in a fire station."

Legal Lesson Learned: Courts of Appeal, and trial courts, seldom grant motions to set aside civil jury verdict for retaliation.

File: Chap. 9, ADA

MD: BIPOLAR DISORDER - ADA ALLOWS FD TO REQUIRE CURRENT EMT TO HAVE PSYCH EXAM FOR NEW POSITION

On June 26, 2024, in Matthew Schaeffer v, Mayor and City Council of Baltimore, U.S. District Court Judge Catherine C. Blake, U.S. District Court for District of Maryland, granted City's motion for summary judgment. "Pro se plaintiff Matthew Schaeffer alleges that the Baltimore City Fire Department ('BCFD') discriminated against him on the basis of his disability when it revoked his conditional offer of employment for the position of Emergency Medical Technician/Firefighter ('EMT/FF') after he failed to complete a required medical examination, and then retaliated against him for filing an EEOC charge by rejecting his subsequent application for the same position. *** It is undisputed that Mr. Schaeffer reported

to PSI [Public Safety Infirmary] to undergo his medical examination on September 24, 2018, as directed by his conditional offer of employment…. But it is also undisputed that Mr. Schaeffer's examination result was 'deferred pending further examination,' … and Mr. Schaeffer acknowledged that he was required to submit additional information, …. Mr. Schaffer's 'verification of treatment' letter, whether timely submitted or not, did not comment on how his condition would impact his ability to serve as a firefighter or his medication compliance, and therefore did not fully comply with PSI's request for information [position filled Feb. 2019]."

THE COURT HELD:

> "The ADA specifically permits 'a medical examination after an offer of employment has been made to a job applicant and prior to the commencement of the employment duties of such applicant, and [an employer] may condition an offer of employment on the results of such examination, if" 'all entering employees are subjected to such an examination regardless of disability.' 42 U.S.C. §§ 12112(d)(3), 12112(d)(3)(A).
>
> ***
>
> The relevant EEOC guidelines, which 'constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance,' *Coffey*, 23 F.4th at 339 (internal citations omitted), support this conclusion. The guidelines advise that, when considering 'an employee who applies for a new (i.e., different) job with the same employer,' the "employer should treat an employee . . . as an applicant for the new job.' U.S. Equal Emp. Opportunity Comm'n, Enforcement Guidance: Disability-Related Inquiries and Medical Examinations of Employees under the Americans with Disabilities Act (ADA), 2000 WL 33407181, at *9 (2000) (emphasis omitted). Therefore, '[a]fter the employer extends an offer for the new position, it may ask the individual disability-related questions or require a medical examination as long as it does so for all entering employees in the same job category."'*Id.* Accordingly, the court will apply the Section 12112(d)(3) standard to determine the propriety of the medical examination requirement in Mr. Schaeffer's case.
>
> ***
>
> In June 2018, Mr. Schaeffer applied for the EMT/FF position with BCFD because, according to Mr. Schaeffer, it 'awards a higher salary, a less strenuous job load, better working conditions, and considerably further promotional opportunities.'
>
> ***
>
> BCFD extended Mr. Schaeffer a conditional offer of employment in the EMT/FF position on September 21, 2018. Mot. Ex. 4, ECF 35-9. The offer was conditioned 'on the results of medical exam [sic] and drug/alcohol screening,' which was scheduled at PSI on September 24, 2018. *Id.* Mr. Schaeffer reported for his exam and PSI 'deferred [a conclusion] pending further examination.' Mot. Ex. 5, ECF 35-10.

PSI gave Mr. Shaeffer a 'Request for Information' form requiring that he submit a note from his psychiatrist about his 'mental health to include diagnosis, treatment prescribed and any limitations to physical to work [sic] as Baltimore City Firefighter,' along with 'medication compliance,' within ten days.

***

Mr. Schaeffer fails to adduce any evidence to show that BCFD's reason for revoking his conditional offer of employment was pretextual. Mr. Schaeffer's allegations imply his belief that he had satisfied the medical examination requirement and was on track to be hired until BCFD's Human Resources department intervened and asked PSI to request more information from him with only days to provide it. Compl. ¶ 20. But there is no evidence in the record to suggest any reason for BCFD's request that PSI reopen Mr. Schaeffer's chart, let alone that BCFD directed PSI to request additional information or that the request was discriminatorily motivated. Instead, the record evidence shows that PSI did not ask Mr. Schaeffer for further additional information until after he submitted an incomplete response to the initial request for information. Conic Aff. ¶¶ 15-18. Mr. Schaffer cannot rely on speculation to show pretext, *Burnett*, 2024 WL 1014074, at *6 (quoting *Warfaa v. Ali*, 1 F.4th 289, 296 (4th Cir. 2021)), and he therefore fails at *McDonnell Douglas* step three.

For all of these reasons, Mr. Schaeffer has not established a genuine dispute of material fact as to his discrimination claim and the City is entitled to judgment, so the City's motion for summary judgment on that claim will be granted."

FACTS:

PSI called Mr. Schaeffer on January 24, 2019, after he submitted the verification letter, and left a voicemail asking him to return the call. Conic Aff. ¶ 18; *id.* at 6. Because the verification letter did not include all the requested information, PSI marked Mr. Schaeffer's examination result 'info not received' on February 1, 2019, and sent that determination to BCFD. Mot. Ex. 5; Conic Aff. ¶¶ 19-20. Mr. Schaeffer got in touch with PSI on February 8, 2019, Compl. ¶ 17, and PSI informed him that he needed to provide a fully compliant 'medical clearance' from his psychiatrist by Monday, February 10th,' *id.* Mr. Schaffer claims that he noted he had given PSI an open waiver to access his medical history and PSI responded that he needed to procure the clearance. *Id.* The timeline for approval was apparently cramped at this point, as BCFD published a General Order on February 14, 2019, listing transfers to the fire academy. *Id.* ¶ 18; Mot. Ex. 13, ECF 35-18. Mr. Schaeffer did not submit medical clearance by February 10, and, accordingly, BCFD withdrew his conditional offer of employment on February 12, 2019, and omitted his name from the February 14 General Order."

Legal Lesson Learned: FD can require current EMT seeking a new position to complete another medical clearance.

Note: FD also required plaintiff to see their psychiatrist when he returned from medical leave.

> "Footnote 2: Mr. Schaeffer was on medical leave from BCFD when he submitted his EMT/FF application [June 2018]…. When he returned for work, and while his application was pending, he was subject to a 'Fit For Duty' evaluation, which included many of the same requirements as the EMT/FF application, including a physical test, background check, and PSI medical clearance. Id. Mr. Schaeffer alleges that PSI expressed concerns that his absence was related to his disability and that, in response, he gave PSI 'an open ended, written waiver allowing them to contact the plaintiffs [sic] primary care physician and therapist and obtain written records at any time without specific approval.' Id. Mr. Schaeffer also met with a BCFD psychiatrist around the same time. Id. Mr. Schaeffer was subsequently returned to duty."

Chap. 10 – Family Medical Leave Act

Chap. 11, FLSA

Chap. 12, Drug-Free Workplace

File: Chap. 13, EMS

WA: COVID-19 - SPOKANE FF CASE REINSTATED – MUTUAL AID FF WERE GRANTED RELIGIOUS ACCOMMODATIONS

On June 18, 2024, in Michael Bacon, et al. v. Nadine Woodward, Mayor of the City of Spokane, et al., the U.S. Court of Appeals for 9th Circuit (San Francico) held (2 to 1) that the lawsuit by the 25 plaintiff firefighters should be reinstated. The Governor's COVID-19 Proclamation, which required workers for state agencies to be fully vaccinated, may have violated the Free Exercise Clause of the First Amendment since the City failed to grant any religious accommodations, and allowed mutual-aid firefighters to respond to calls in the City without being vaccinated.

THE COURT HELD:

> "The Complaint alleges that, once unvaccinated firefighters were terminated, Spokane
> would turn to firefighters from neighboring fire departments to fill the gaps left by the firefighters' departure even though those fire departments granted religious accommodations to their employees. In other words, Spokane implemented a vaccine policy from which it exempted certain firefighters based on a secular criterion—being a member of a neighboring department—while holding firefighters who

objected to vaccination on purely religious grounds to a higher standard. The Free Exercise Clause prohibits governments from 'treat[ing] comparable secular groups more favorably.' Fellowship, 82 F.4th at 694. If the secular category of 'firefighters from neighboring departments' is exempt from Spokane's policy, then the Free Exercise
Clause mandates that religious objectors be granted equivalent accommodation. Had Spokane subjected unvaccinated out-of-department firefighters to the same standard, its implementation of the vaccine policy might well be generally applicable. But that is not this case. By continuing to work with unvaccinated firefighters from surrounding departments, Spokane undermined its interest and destroyed any claim of general applicability."

FACTS:

"Washington Governor Jay Inslee, by Proclamation, required workers for state agencies to be fully vaccinated against COVID-19. Though the Proclamation purported to
broadly accommodate those with sincerely held religious beliefs, those accommodations were allegedly not given in practice. Plaintiffs, City of Spokane firefighters, allege
that—as applied to them—the Proclamation violated the Free Exercise Clause. The district court dismissed that claim on the pleadings. We reverse.

***
Proclamations 21-14 and 21-14.1 (collectively 'Proclamation') prohibited '[a]ny Health Care Provider from failing to be fully vaccinated against COVID-19 after October 18, 2021.' The Proclamation also required a 'sincerely held religious belief accommodation' to be granted in some cases. Spokane firefighters are required to be licensed EMTs or
paramedics, and they fall within the Proclamation's definition of 'Health Care Provider' as a result. They were therefore subject to the Proclamation's vaccine requirement.

The City 'created a framework to evaluate exemption and accommodation requests.' Bacon v. Woodward, No. 2:21- CV-0296-TOR, 2021 WL 5183059, at *1 (E.D. Wash. Nov. 8, 2021) ("Bacon I"). But after considering the individual requests, it 'determined accommodating unvaccinated [firefighters] would impose an undue hardship,' a Title VII
standard. Id. The City 'scheduled . . . hearings to allow [the firefighters] the opportunity to be heard," as required by Cleveland Board of Education v. Loudermill, 470 U.S. 532
(1985). Bacon I, 2021 WL 5183059, at *1. The hearings were ultimately unfruitful. The City considered the firefighters' arguments, but once again determined that it could not grant the requested accommodations. Id. The firefighters have since been terminated for failing to get vaccinated.

> Although Spokane refused to grant accommodation requests to its own firefighters, several other fire departments in Washington—each of which, no less than Spokane was subject to the Proclamation—granted religious and medical accommodations to their firefighters. Some of those departments neighbored Spokane and had a mutual assistance agreement with Spokane under which their firefighters entered Spokane 'on a daily basis to provide emergency services.'"

Legal Lesson Learned: Covid-19 litigation continues to illustrate the need for due process in evaluating religious and other accommodations.

> Note: Some fired firefighters apparently were hired by neighboring FDs. See Footnote 2: "At oral argument, counsel stated that many firefighters who lost their positions with Spokane later took up employment with neighboring fire departments that did the same jobs in Spokane."

Chap. 14 – Physical Fitness, incl. Heart Health

File: Chap. 15, Mental Health

MI: WORKPLACE THREATS – 2 PSYCH EXAMS ORDERED — REFUSED 2nd - 6th CIR. REFERENCES INDIANAPOLIS FD CASE

On June 5, 2024, in Jeffrey Capen v. Saginaw County, Michigan, the U.S. Court of Appeals for the 6th Circuit (Cincinnati), held (3 to 0) that U.S. District Court judge properly granted summary judgment to the County. After County layoffs, Maintenance employee Jeffrey Capen was reduced in rank and pay; he then allegedly stated to a co-worker that 'it would not surprise [him] if they all ended up dead." Co-worker responded, "Come on Jeff you do not mean that," after which Capen allegedly said, "Fuck that Nick I could do it. I mean it I could." Capen denies making any of the above statements. *** The County ordered Casper to take two fitness-for-duty evaluations; 6th Circuit held there was no violation of his procedural due process rights under the Fourteenth Amendment, referencing Coffman v. Indianapolis Fire Dep't, 578 F.3d 559, 565–66 (7th Cir. 2009) (fitness-for-duty evaluations of a female firefighter with introverted behavior).

THE COURT HELD:

> "A common requirement for both municipal and individual liability under 42 U.S.C. § 1983 is that a plaintiff's rights under a federal statute or the U.S. Constitution must have been violated. We begin and end our analysis with this requirement because Capen has not demonstrated a violation of his federal statutory or constitutional rights. Capen asserts that Defendants violated his constitutional rights under the Due

Process Clause of the Fourteenth Amendment, which prohibits states from "depriv[ing] any person of life, liberty, or property, without due process of law." U.S. Const. amend. XIV, § 1.

***

Capen specifically argues that under the Due Process Clause, he possesses a constitutionally protected interest in refusing his fitness-for-duty evaluations. A fitness-for-duty evaluation may, under certain circumstances, function as 'a useful procedure to determine an employee's competency to perform his duties.' Risner v. U.S. Dep't of Transp., 677 F.2d 36, 38 (8th Cir. 1982) (per curiam) (involving a fitness-for-duty evaluation of a Federal Aviation Administration employee). Such an evaluation may serve important goals, such as protecting the safety of employees or the public's safety at large. See Coffman v. Indianapolis Fire Dep't, 578 F.3d 559, 565–66 (7th Cir. 2009) (concerning a fitness-for-duty evaluation of a firefighter)."

FACTS:

"A. Plaintiff's Alleged Threats of Violence

From 2007 to 2021, Capen was employed as a maintenance worker in the Saginaw County Maintenance Department. During the period preceding this lawsuit, Capen worked under the supervision of Annette Taylor, who was the Maintenance Department's interim director.

Also at this time, several Saginaw County departments, including the Maintenance Department, were overseen by Defendant Robert V. Belleman, who was the Controller and Chief Administrative Officer of Saginaw County. In 2020, Belleman implemented a series of job cuts throughout the County, which resulted in Capen's reclassification to a lower-paying job in October 2020.

In December 2020, Nicholas Cooper, a co-worker of Capen's, reported that Capen had threatened to kill Annette Taylor and employees working in the Controller's Office. According to Cooper, on November 18, 2020, Capen told him that he could not wait for Taylor to leave her role as interim director and that Capen stated 'fuck that bitch' regarding Taylor and 'fuck them motherfuckers in the Controller Office.' See Cooper Statement, R. 22-2, Page ID #165. Capen then allegedly stated that 'it would not surprise [him] if they all ended up dead.' Id. Cooper claims that he responded, 'Come on Jeff you do not mean that,' after which Capen allegedly said, 'Fuck that Nick I could do it. I mean it I could!' Id. Capen denies making any of the above statements.

On December 6, 2020, Cooper reported this conversation to Taylor, and on December 9, 2020, Cooper submitted a written complaint to Saginaw County detailing Capen's alleged statements.

B. Plaintiff's First Fitness-for-Duty Evaluation

Cooper's written complaint was reviewed by Belleman, who in consultation with the County's legal counsel made the decision to schedule Capen for a 'fitness-for-duty' evaluation with a psychologist. At the direction of the County's undersheriff, Belleman also reached out to local law enforcement to have Capen criminally investigated.

Belleman met with Capen on December 14, 2020, to inform Capen that he had been scheduled for a fitness-for-duty evaluation and advised Capen that he had been placed on paid administrative leave. Belleman also gave Capen a letter that Capen opened after the meeting, which stated that Capen's administrative leave was 'pending completion of an investigation into the statements of violence [he] made.' 12/14/2020 Letter re Leave, R. 22-6, Page ID #196. The letter also stated, 'You must make yourself available to assist with the investigation and any County request during this paid administrative leave. Your lack of cooperation could result in this paid administrative leave being converted to an unpaid leave of absence.' Id. A second letter that Capen received from Belleman that day notified him that his fitness-for-duty evaluation was scheduled for the next day, December 15, at Saginaw Psychological Services, and that the evaluation was '[d]ue to a conversation [he] had with a co-worker on November 18, 2020.' 12/14/2020 Scheduling Letter, R. 22-5, Page ID #193. The second letter further stated that '[i]t is mandatory that you appear for this appointment. Should you have any questions or concerns, please feel free to contact [Belleman] immediately.' Id.

The following day, Capen appeared for his fitness-for-duty evaluation, which was administered by licensed psychologist Mark Zaroff, Ph.D. In a report following the evaluation, Dr. Zaroff stated that Capen had obvious tremors in his hands, complained of 'significant memory problems,' told Dr. Zaroff that he could not 'independently maintain written records of activities,' 'relie[d] on colleagues to remind him what has been done during the day,' and had been recently diagnosed with brain lesions. Zaroff Report, R. 22-8, Page ID #264–65. Based on the above, Dr. Zaroff concluded that Capen was unable 'to perform the work described in [his] current job description' and that his 'neurological condition [may] ha[ve] caused personality change and/or reduced his overall ability to inhibit responses,' and recommended a full neuropsychological evaluation. Id. at Page ID #265. Dr. Zaroff also stated that because Capen's 'current neurological condition may be affecting decision making, impulse control, and personality,' he likely did make the statements of violence that Cooper reported and that 'the risk level would be considered moderate and should be taken seriously.' Id. at Page ID #266.

C. Plaintiff's Second Fitness-for-Duty Evaluation and Termination

On February 1, 2021, Belleman sent Capen a letter conveying Dr. Zaroff's opinion that Capen was unable to perform his current work and his recommendation for an additional evaluation. The letter also requested that Capen apply for short-term

disability leave, asked Capen to release his medical records to the County, and requested the contact information for Capen's primary-care doctor and treating neurologist. Capen's counsel then sent Belleman a letter requesting that Capen be returned to work and advising the County that it had violated Capen's rights under the Americans with Disabilities Act, 42 U.S.C. § 12101 et seq. Capen also gave the County a physician's note stating that 'Pt is seen here today. Can return to his normal duties at work.' Physician's Note, R. 25-18, Page ID #508.

Approximately one month later in March of 2021, Belleman sent Capen a letter that reiterated Dr. Zaroff's findings, again asked for Capen to release his medical records, and stated that Capen was being scheduled for 'an independent neuropsychological evaluation to determine whether [he] can safe[l]y perform the essential job functions of [his] position with or without an accommodation.' 3/17/2021 Letter, R. 25-19, Page ID #509. By August 2021, Capen had not released his medical records or appeared for a neuropsychological evaluation.

On August 26, 2021, the County's counsel sent Capen's counsel a letter directing Capen to 'participate in [an] interactive process' pursuant to the Americans with Disabilities Act and its Michigan counterpart, the Persons with Disabilities Civil Rights Act, M.C.L. § 37.1101 et seq. 1 8/26/2021 Letter, R. 25-20, Page ID #512. According to the letter, Dr. Zaroff's findings revealed that Capen 'm[ight] be unable to perform his current job duties with or without an accommodation.' Id. To determine 'the potential reasonable accommodations available' to Capen, the County set an 'interactive process' meeting for September 8, 2021 to take place in the Saginaw County Controller's Office. Id. Because an '[e]mployee has a duty to cooperate' in the interactive process, the letter also advised Capen that his 'refusal to participate in the interactive process w[ould] constitute abandonment of his position.'2 Id. at Page ID #512–13.

Capen did not appear for the September 8, 2021 interactive-process meeting, and he received a termination letter on September 28, 2021, effective that day. Two days later, Capen received a second letter 'to correct and supplement' the September 28 correspondence, which stated that Capen was entitled to a pre-termination hearing. 9/30/2021 Letter, R. 25-22, Page ID #516. The letter directed Capen to advise Belleman within a week whether he was requesting a pre-termination hearing, or his employment would be terminated on October 8, 2021. Capen did not respond to the County, and his employment was terminated on October 8, 2021."

Legal Lesson Learned: Employee was provided due process, and he declined an "interactive" ADA accommodations meeting. FD Employee Handbook should require employees to immediately report any threats of violence.

Note: See 2009 Indianapolis Fire Department case cited by Court. Coffman v. Indianapolis Fire Dep't, 578 F.3d 559, 565–66 (7th Cir. 2009): "As explained above, the Department has a compelling interest in ensuring both the physical and mental well-being of its force. And for the reasons discussed above, the Department's

decision to refer Coffman for the fitness for duty evaluations was not arbitrary-it was based on observations from multiple sources questioning Coffman's fitness for duty."

> "Coffman, who is by her own description five feet tall 'with shoes on,' began working for the Indianapolis Fire Department in April 2001. She worked as a "substitute" firefighter until 2005, rotating shifts at various fire stations throughout the Department. Her tenure was apparently unremarkable until late 2003. In October and November 2003, two fellow firefighters who had ridden as passengers with Coffman in department vehicles expressed concern about her driving ability.
>
> ***
> Despite Captain Baade's largely favorable report, the concern about Coffman's driving persisted into 2004 and expanded into a critique of her paramedic skills as well.
>
> ***
> Following Captain Baade's review, a number of officers broached concerns about Coffman's well-being and other issues. Specifically, the Emergency Medical Services Duty Officer, Gregory Robinson, e-mailed Chief Charlie Miller, stating that he had noticed that Coffman was 'often alone or withdrawn' and seemed to be 'defensive' for 'no legitimate reason.' Lieutenant Robinson's observations prompted a number of other individuals to become involved, including Chief Stahl.
>
> ***
> A month passed before Coffman was again evaluated-this time by Dr. Jeffrey Savitsky. He deemed Coffman prepared to return to light-duty status for three or four weeks. Five weeks later, Coffman returned for a follow-up evaluation and Dr. Savitsky recommended that she return to active duty, which she did."

File: Chap. 16, Discipline

PA: VOL. FF & TREASURER – $21K CHECKS - NO PROOF HIS COMMENTS CITY COUNCIL LED TO DISCHARGE / CHARGES

On June 18, 2024, in Robert Steven Forish v. John Brasile, et al., U.S. District Court Judge William S. Stickman, U.S. District Court for Western District of Pennsylvania, granted the defense motion for summary judgment; the plaintiff's 95 page Amended Complaint failed to allege facts showing violation of his Constitutional rights. "Forish, a Latrobe City Council member, is a former volunteer fireman in the LVFD. He began serving as a volunteer fireman

in 1997…. Forish was a member and the treasurer of Hose Company No. 1… At the time of events at issue, Brasile was the LVFD fire chief, and McDowell was the president of the LVFD. *** Forish has possibly alleged that he engaged in some First Amendment protected conduct by complaining at a December 2019 City Council meeting about Brasile's misconduct as fire chief and making an inquiry about an appeal hearing for expelled Hose Company No. 1 firefighters prior to June 25, 2020. The suspension of his membership with Hose Company No. 1 in April 2021, the filing of criminal charges against him on July 20, 2021, and his September 3, 2022, expulsion from Hose Company No. 1 can be construed as retaliatory acts, but Forish has failed to plead a causal link between his possibly protected speech and the alleged retaliatory act(s).”

THE COURT HELD:

> “To state a claim under § 1983, Forish must allege the violation of a right secured by the Constitution and laws of the United States, and must show that the alleged deprivation was committed by a person acting under color of state law. *Rehberg v. Paulk,* 566 U.S. 356, 361 (2012). He has not done so.
>
> ***
>
> Here, there is no temporal connection between Forish's alleged citizen speech in December 2019 (and June 2020) and his April 2021 suspension, the filing of criminal charges against *him* in June 2021, or his discharge from Hose Company No. 1 in September 2022.
>
> ***
>
> After five volunteer firefighters were expelled, Forish alleges that a quorum of Hose Company No. 1 members voted on January 9, 2021, to provide legal assistance to the expelled firefighters and he co-signed three checks to legal counsel in his capacity as treasurer. *(Id.* at 1721)
>
> ***
>
> According to Forish, he learned on April 7, 2021, from the President of Hose Company No. 1 and the Fireman's Club, Charles ‘Chazzy’ Nindle, Jr., that ‘Defendants Brasile and LVFD were taking steps to retaliate against him [ ] for [his] role in dispensing Hose Company No. 1 funds to legal counsel....’ *(Id.* at 21-22). Several days later, Forish was suspended by letter from the Acting Secretary of Hose Company No. 1 from any and all activities within the company. Forish was directed to turn over all property, including paperwork related to his role as treasurer. *(Id.* at 22); (ECF No. 22-15). He has filed a ninety-five page Amended Complaint. The facts set forth in his Amended Complaint remain virtually unchanged since the filing of his original complaint *(compare* ECF No. 1, pp. 3-22 *to* ECF No. 22, pp. 3-32), and Forish has admitted as much.”

FACTS:

> “In at a city council meeting on or about December 2019, Plaintiff Forish also advised Mayor Wolford and Latrobe City Council of Defendant Brasile's history of

aggressive and unlawful retaliation against members of the Latrobe Volunteer Fire Department who exercise their First Amendment rights to citizen speech about matters of public concern, and who report in good faith Brasile's instances of civil and criminal wrongdoing, fraud, waste, and corruption in his official capacity as Fire Chief, and warned and requested Mayor Wolford and Latrobe City Council to 'rein him in,' including imposing greater training, supervision, and discipline immediately upon Defendant Brasile and other high ranking Defendant Fire Department managerial personnel, including Defendant McDowell, in order to prevent further violations of the Constitutional and federal civil rights of its volunteer firefighters, as well as imminent harm to the citizens and property of Defendant City.

***

Forish contends that Brasile and McDowell manipulated evidence (including the minutes from the January 9, 2021, monthly meeting) to secure the filing of criminal charges against him for allegedly misappropriating $21,000.00. (ECF No. 22, pp. 22-24). On July 20, 2021, Gardner, a detective with the Westmoreland County District Attorney's Office, filed misdemeanor and felony charges against Forish. *(Id.* at 26); (ECF No. 22-14). The Commonwealth of Pennsylvania withdrew the charges on December 20, 2021, and an interpleader action commenced in the Court of Common Pleas of Westmoreland County at Case No. 281 of 2022 as to whether the payments were legally authorized by Hose Company No. 1. (ECF No. 22, p. 29). The interpleader action was resolved in Forish's favor. *(Id.* at 31)."

Legal Lesson Learned: Plaintiff failed to prove that his public speech before City Council in Dec. 2019 led to his criminal charges and discharge in June 2021.

File: Chap. 16, Discipline

DE: DEPUTY FIRE CHIEF – SEX WITH JUNIOR FF (AGE 15) – GUILTY - "RAPE BY PERSON OF TRUST" – 35 YRS PRISON

On June 10, 2024, in State of Delaware v. Dwayne L. Pearson, Judge Calvin L. Scott, Jr., Superior Court of Delaware, denied the former Deputy Fire Chief's motion for judgment of acquittal. "In Mr. Pearson's Motion, he challenged the language of 11 Del. C. § 761 and contends that 'a person in a position of trust, authority or supervision over a child' is unconstitutionally vague as drafted. *** The witnesses' testimony at trial confirms the jury's verdict that Mr. Pearson was a person in a position of trust. The following facts were educed from the testimony and evidence at trial that support Mr. Pearson was 'in a position of trust . because of [his] employment/volunteer [and had] regular direct contact with the child. in the course of [his] assumed responsibility, whether temporarily or permanently."

THE COURT HELD:

> "Thus, any question of vagueness is abrogated by the plain language of the nonexclusive list in 11 Del C. § 761(e), and the statutes *mens rea* requirement. Therefore, 11 Del. C. § 778 and 11 Del C. § 761(e), when read together, are not unconstitutionally vague. Thus, Mr. Pearson's Motion for Judgment of Acquittal is **DENIED.**
>
> ***
>
> (1) Mr. Pearson was a Deputy Fire Chief of the Belvedere Fire Company when he met M.M. at a joint training with Mill Creek Fire Company, where M.M. volunteered as a junior fire fighter; (2) M.M. admired Mr. Pearson and had aspirations for him to become her mentor or help her with her career in firefighting; (3) M.M. met Mr. Pearson a second time in his official capacity as Deputy Fire Chief when he volunteered at Mill Creek Fire Company where M.M. was stationed; (4) while acting in his official Capacity as Deputy Fire Chief, Mr. Pearson engaged in inappropriate communications with the M.M. while she was a volunteer; (5) Mr. Pearson and M.M. exchanged social media profile information while he worked in his capacity at Belvedere Fire Company; (6) Mr. Pearson engaged in ongoing communications with M.M. through Snapchat; (7) Mr. Pearson's continued communications with M.M. through Snapchat resulted in Mr. Pearson meeting M.M. in a Dunkin Donuts parking lot next to Mill Creek Fire Company when she was actively volunteering; (8) M.M. testified and surveillance footage confirms that she went for a ride in Mr. Pearson's Belvedere fire company vehicle when she was actively volunteering with Mill Creek Fire Company; (9) M.M. testified Mr. Pearson met her a second time, as M.M. was actively volunteering, and drove M.M. to a nearby secluded parking lot on Mill Creek Fire Company property."

FACTS:

> "Before this Court is Defendant Dwayne Pearson's ("Mr. Pearson") Motion for Judgment of Acquittal pursuant to Superior Court Criminal Rule 29. Mr. Pearson was indicted by the grand jury on March 27, 2023, and the case proceeded to trial on January 22, 2024. At the conclusion of the trial Mr. Pearson was convicted of Count I: Sexual Abuse of a Child by a Person of Trust Authority or Supervision in the First Degree; Count II: Rape In the Second Degree; Count III: Sexual Abuse of a Child by a Person in a Position of Trust Authority or Supervision in the First Degree; Count IV: Rape In the Fourth Degree; Count V: Sexual Abuse of a Child by a Person in a Position of Trust Authority or Supervision in the Second Degree; Count VI: Unlawful Sexual Contact Second Degree."

Legal Lesson Learned: Deputy Chief having sex with junior firefighter – what a terrible way to end a career.

Note: See these articles. Jury finds former Belvedere deputy fire chief guilty of raping 15-year-old girl (Jan. 26, 2024).

Former Delaware fire chief charged with rape involving 15-year-old (Jan. 13, 2023), TV VIDEO.

Former Deputy Fire Chief Arrested for Rape (Jan. 13, 2023); Delaware State Police.

File: Chap. 17, Labor Relations

MI: FF FIRED – DWI ARREST / NEVER TOLD FD - IAFF VOTED NO ARBITRATION - NO BREACH DUTY REPRESENTATION

On June 20, 2024, in Superior Township Fire Fighters Union Local 3392, International Association of Fire Fighters v. Kee Rudowski, the Court of Appeals of Michigan held (3 to 0; unpublished decision) that the Administrative Law Judge and the full Michigan Employment Relations Commission ("MERC") properly held that Local 3392 did not breach their duty of fair representation when they refused to request arbitration after the grievance was denied at Step 1 and Step 2. "There is no dispute that Pierce told charging party that neither the CBA nor the Township's employment policies required an employee to report an off-duty arrest. However, there was competent evidence that the charging party made the ultimate decision to withhold information about his arrest, conviction, and driving restrictions. During cross-examination at the evidentiary hearing, the charging party clarified that Pierce never told him not to report his arrest; Pierce only told charging party that there was no express rule requiring charging party to do so. On the basis of that testimony, the ALJ found that Pierce never advised charging party against reporting his arrest and that it was charging party's decision to withhold the information out of a concern for his own privacy."

THE COURT HELD:

> "There is no dispute that Pierce told charging party that neither the CBA nor the Township's employment policies required an employee to report an off-duty arrest. However, there was competent evidence that charging party made the ultimate decision to withhold information about his arrest, conviction, and driving restrictions. During cross-examination at the evidentiary hearing, charging party clarified that Pierce never told him not to report his arrest; Pierce only told charging party that there was no express rule requiring charging party to do so. On the basis of that testimony, the ALJ found that Pierce never advised charging party against reporting his arrest and that it was charging party's decision to withhold the information out of a concern for his own privacy. For this latter finding, the ALJ relied in part on the February 3, 2021 text message that charging party sent to Pierce, in which charging party suggested that he would have to inform Chief Chevrette of a 'dui conviction' or

‘license suspension,’ but because he was not facing such punishments, he asked Pierce to ‘respect me and my personal life and leave [charging party's OWI conviction] outside of work.

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There is little more respondent could have done to pursue charging party's grievance in light of its duty to the other union members. Respondent took charging party's grievance through two steps, then honored the votes of its members in deciding not to advance the grievance to arbitration. Charging party did not have ‘an absolute right to have his grievance taken to arbitration,’ and respondent had ‘considerable discretion’ to decide whether to arbitrate charging party's grievance. *Demings*, 423 Mich. at 70. Respondent was free to consider the good of the membership as a whole in addition to the relative risks and rewards of arbitrating charging party's grievance. *Knoke*, 201 Mich.App. at 486. There is considerable reason to doubt whether arbitration-which would have cost respondent between $8,000 and $9,000-would have been successful for charging party, especially considering charging party's own concern that the membership would have voted against arbitration if they read Schwartz's Step 2 denial letter.”

FACTS:

“Charging party brought this action after he was discharged from his employment as a fire fighter for Superior Township (the Township). Charging party began working for the Township as a firefighter in January 2019. On January 11, 2020, charging party was arrested for, and later charged with, operating a motor vehicle while intoxicated (OWI) under the Michigan ‘super-drunk’ OWI statute, MCL 257.625(1)(c). The following week, charging party told respondent’s local president, Lance Pierce, about his arrest. Pierce told charging party that there was no provision in the fire fighters’ collective bargaining agreement (CBA) or the Township’s employee handbook that required an employee to report an off-duty arrest. According to charging party, on the basis of this advice, he never disclosed information regarding his arrest to the fire department.

About a year later, on February 3, 2021, charging party sent a text message to Pierce saying that he “might settle” his case, and that he was ‘pretty sure’ he would ‘have nothing to report’ to the fire department because his plea would not include a ‘license suspension’ or a ‘dui conviction.’ Charging party ended the text stating, ‘I would hope at the end of the day you respect me and my personal life and leave it outside of work.’

On February 4, 2021, charging party pleaded guilty to operating while impaired by liquor (OWI), MCL 257.625(3). As part of the plea agreement, charging party had restrictions placed on his driver’s license, under which he was only allowed to drive to work. At that time, charging party believed that he could continue working as long as he did not drive fire-department vehicles and only rode in them as a passenger.

Charging party was scheduled to be sentenced on March 8, 2021. Charging party testified that he had planned to tell Township fire department Chief Victor Chevrette about his conviction around the time of his sentencing. On February 26, 2021, Chief Chevrette was informed through the Michigan Secretary of State that charging party had restrictions placed on his driver's license. That same day, Chief Chevrette sent a memo to charging party stating that he was indefinitely prohibited from driving any fire-department vehicle.

On March 11, 2021, charging party was suspended from work. That same day, charging party met with Pierce, Chief Chevrette, and the Township supervisor, Ken Schwartz. Chief Chevrette and Schwartz told charging party that he would be discharged from his employment due to his failure to disclose his drunk-driving arrest, conviction, and driving restrictions to the fire department. According to charging party, he told Schwartz that he informed Pierce about the criminal charge more than a year earlier, but Schwartz was not interested in that information. Charging party was given the option to either resign or be discharged.

The same day as this meeting, respondent's grievance commission, which included Pierce, held a meeting at which they discussed with respondent's attorney options for dealing with charging party's situation. During the meeting, the union officials learned that taking a grievance from charging party to arbitration would likely cost respondent between $8,000 and $9,000.

At some point, respondent negotiated terms with the Township under which charging party, in exchange for resigning, would receive a neutral job reference to future employers and be paid $11,536.20 for his accumulated leave time.

Over the next week, respondent's grievance commission held several more meetings to discuss how to handle charging party's situation. There was also another meeting between charging party, Pierce, Chief Chevrette, and Schwartz. Charging party was given until March 19, 2021, to decide whether he wanted to resign or be discharged. Charging party told respondent's grievance commission that he would not resign and wished to be discharged then file a grievance against the Township. In accordance with this representation, when charging party met with Pierce, Chief Chevrette, and Schwartz on March 19, 2021, he refused to resign and was discharged. On March 29, 2021, respondent brought a grievance under the CBA on behalf of charging party to contest the discharge. Charging party's grievance was based on a provision of the CBA prohibiting the discipline of individuals without cause. Charging party sought reinstatement to his position and backpay.

On April 5, 2021, respondent held a members' meeting at which an update on charging party's grievance was offered. Respondent explained that Step 1 of the grievance process was to take the grievance to Chief Chevrette, who would have 10 days to decide the grievance. Step 2 of the process was to take the grievance to Schwartz, who would also have 10days to decide the grievance. If the grievance was

denied at each step, the union members would then have 45 days to vote on whether to take the grievance to arbitration.

On April 5, 2021, Chief Chevrette denied charging party's grievance, offering only a brief recitation of the allegations against charging party. Respondent then moved charging party's grievance to Step 2 of the process. On April 15, 2021, Schwartz denied charging party's grievance, offering a lengthy explanation for why discharge was necessary on the basis of safety and public-relations concerns.

As charging party's grievance entered the arbitration stage, charging party understood that advancing his grievance to arbitration required approval by a majority of union membership. Before union membership was set to vote on advancing charging party's grievance, respondent asked charging party if respondent could share with the membership the documents and exhibits considered during Step 2. Charging party did not consent to sharing this information with the union membership.

On April 26, 2021, a representative of the Michigan Bureau of Fire Services Fire Fighter Training Division sent a message to charging party stating that charging party's training certification that permitted him to drive fire-department vehicles was still valid, but the department could nevertheless revoke his driving privileges. Charging party never provided the information relayed in this message to respondent.

On May 5, 2021, respondent held an emergency union meeting with its members. The members were told that, despite being asked twice if the Step 2 denial letter could be shared with members, charging party would not give his permission for the letter to be shared. The members voted by ballot, and the majority chose to not pursue arbitration on charging party's grievance. After the meeting concluded, the executive board told charging party by telephone that the union members had voted, and respondent would not pursue arbitration on charging party's behalf."

Legal Lesson Learned: Arrest for drunk driving can often result in driver's license suspension; FDs should consider provision in Employee Handbook for mandatory, immediate reporting of OWI arrest or conviction.