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JUNE 2022 – FIRE & EMS LAW NEWSLETTER

[NEWSLETTER IS NOT PROVIDING LEGAL ADVICE.]

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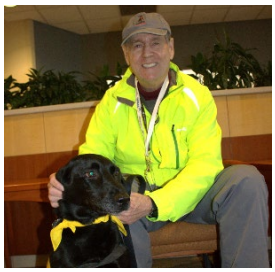
- **2022: FIRE & EMS LAW** – **RECENT CASE SUMMARIES / LEGAL LESSONS LEARNED:** Case summaries since 2018 from monthly newsletters
- **2022: FIRE & EMS OFFICER DEVELOPMENT / LEGAL LESSONS LEARNED / AMERICAN HISTORY**
- **PET THERAPY SUPPORT TEAM: Now at 12 dogs, one large rabbit:** Check out our details about the support team



5 RECENT CASES

File: Chap. 1, American Legal System

AL: DEP. FIRE MARSHAL NO IMMUNITY – FALSELY TOLD PROS. DEF. ADMITTED BURN BARREL DESTROY EVIDENCE

On May 27, 2022, in Ex parte Greg Pinkard (In re; Ronnie Taylor v. Allstate Property & Casualty Insurance Company, et al.), the Supreme Court of Alabama held (8 to 0) that State Deputy Fire Marshal Greg Pinkard's is not entitled to governmental immunity, holding that the trial court judge properly held he can be personally sued for malicious prosecution and defamation for allegedly falsely reporting to District Attorney's Office that the owner of a cabin [a volunteer FF] had admitted to placing a 55-gallon steel barrel "onto the structure with extra fuel items to burn maintaining the fire and destroying evidence." He was charged with arson and tampering with evidence; all charges later dropped. Ronnie Taylor actually told the Deputy Fire Marshal that he only used the burn barrel after the fire to clean up remaining debris, and lawfully submitted an insurance claim of $40,000 for loss of his cabin, his tools and a 1996 Lincoln Town Car. The lawsuit for damages may now be decided by a civil jury.

> "We deny Pinkard's petition for a writ of mandamus. Taylor's suit against Pinkard as an individual is not in effect a suit against the State, so State immunity does not preclude jurisdiction over Taylor's claims. And, because the record contains evidence from which a reasonable factfinder could infer malice, Pinkard is not entitled to summary judgment on State-agent-immunity grounds.
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> [On July 31, 2016] Ronnie Taylor returned from an out-of-town trip to find his cabin burned to the ground. State Deputy Fire Marshal Greg Pinkard suspected that Taylor had started the fire himself in a scheme to collect insurance money. Pinkard conveyed this suspicion to Taylor's insurance companies and to local prosecutors, who charged Taylor with arson and tampering with evidence. In his report to prosecutors, Pinkard indicated that Taylor had 'admitted' to maintaining the fire and destroying evidence.
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> Once the transcript of Pinkard's conversation with Taylor surfaced, however, it became clear that Taylor had not actually confessed responsibility for the fire. Prosecutors dropped the charges against him, and Taylor responded by filing this lawsuit, claiming among other things that Pinkard maliciously prosecuted and defamed him. Pinkard argued below that Taylor's claims against him are barred by the doctrines of State immunity and State-agent immunity. The trial court rejected Pinkard's arguments and ruled that Taylor's claims should be heard by a jury. Pinkard then filed a petition for a writ of mandamus in this Court, asking us to overturn the trial court's ruling. We deny his petition because the trial court was correct to hold that (1) Taylor's claims against Pinkard are not barred by State immunity and (2) Pinkard's eligibility for State-agent immunity involves disputed factual questions. In holding that Taylor's claims are not barred by State immunity, we overrule an erroneous aspect of our recent decision in *Barnhart v. Ingalls*, 275 So.3d 1112 (Ala. 2018), and its progeny, which incorrectly held that State immunity can block suits against individual State employees that seek damages only from a State employee's personal assets."

Legal Lesson Learned: Arson investigators, in their reports to prosecutors, must use extreme care in describing the defendant's admissions.

File: Chap. 1, American Legal System

AK: DEF. ENDANGERED FF – 60 MONTHS PRISON - TIMBER THEFT – FAILED REPORT FIRE HE STARTED NAT. FOREST

On May 27, 2022, in United States of America v. Jacob Edward Walls, the U.S. Court of Appeals for the Eight Circuit (St. Louis, Missouri) held (3 to 0) that trial court properly sentenced the defendant pursuant to the federal Sentencing Guidelines to the maximum of 60 months since he didn't report the fire to cover up his illegal timber harvesting. Jacob Walls pleaded guilty to willfully setting fire to public lands, in violation of 18 U.S.C. § 1855. The fire started when he "burn the debris using two different fires with accelerant from a 'Jerry Can.'" When the fire spread, he left the scene and did not report the spreading fire. A resident notified Park Service, and firefighters working in difficult terrain after dark saved the neighbor's home.

> "At the time he committed the instant offense, Walls was living in a cabin adjacent to the Buffalo National River in northern Arkansas. Walls was on probation for a possession-of-methamphetamine offense and had a warrant out for his arrest. Walls's cabin was in the vicinity of a structure called the Indian House, a large wooden house built in the 1900s. Chuck and Carol Biding owned the Indian House and lived in another home nearby but would often stay there overnight…. Ultimately, the fire burned to within approximately 35 yards of the Indian House.
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> Fenn Wimberly, the fire management supervisor for the Buffalo National River, testified that the fire occurred in a 'pretty remote area of the park' with 'steep, rugged terrain, lots of rocks, [and] lots of drop-offs.' … Wimberly further testified that "[w]e prefer not to take action on a wildfire after dark," calling it "really risky business," *id.* at 17, because it would be "easy for somebody to fall in a hole, get backed up in a fence, fall off a rock," or to be injured by a falling dead tree, *id.* at 10. Despite these risks, the firefighters engaged the fire in the dark because the fire threatened the Indian House and other structures.
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> The PSR [Presentence Report] also applied a two-level increase pursuant to § 2K1.4(b)(1). This provision is triggered when the relevant offense was committed to cover up another offense. Its application was based on the finding that Walls set the fires in order to conceal his illegal timber harvesting. Walls's criminal history score totaled 15 points, including two points for committing the offense while on probation. Thus, Walls's criminal history category was VI. After a three-level reduction for acceptance of responsibility, his total offense level was 23, correlating to a Guidelines sentencing range of 92 to 115 months' imprisonment. As the statutory maximum sentence for his offense was 60 months' imprisonment under U.S.S.G. § 5G1.1(a), this became his Guidelines sentence.
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> At sentencing, the district court heard from counsel and Walls and noted that Walls had requested a downward variance. The court explained its weighing of the sentencing factors under 18 U.S.C. § 3553(a). The court found that the fire had created a risk of

death or serious bodily injury to the firefighters and that Walls had created that risk knowingly. The court adopted the PSR and its Guidelines calculations without change and imposed the statutory maximum sentence of 60 months' imprisonment."

Legal Lesson Learned: The sentencing judge properly included the risk of firefighters when imposing the sentence.

Note: Federal Sentencing Guidelines:
"The Federal Sentencing Guidelines are non-binding rules that set out a uniform sentencing policy for defendants convicted in the United States federal court system that became effective in 1987. The Guidelines provide for 'very precise calibration of sentences, depending upon a number of factors. These factors relate both to the subjective guilt of the defendant and to the harm caused by his facts.' *Payne v. Tennessee*, 501 U.S. 808, 820 (1991).
The Guidelines are not mandatory, because they may result in a sentence based on facts not proven beyond a reasonable doubt to a jury, in violation of the Sixth Amendment. *United States v. Booker*, 543 U.S. 20 (2005). However, judges must consider them when determining a criminal defendant's sentence. When a judge determines within his or her discretion to depart from the Guidelines, the judge must explain what factors warranted the increased or decreased sentence. When a Court of Appeals reviews a sentence imposed through a proper application the Guidelines, it may presume the sentence is reasonable. *Rita v. United States*, 127 S.Ct. 2456 (2007)."

Chap. 2 – Line Of Duty Death / Safety
Chap. 3 – Homeland Security, incl. Active Shooter, Cybersecurity, Immigration
Chap. 4 – Incident Command, incl. Training, Drones, Communications
Chap. 5 – Emergency Vehicle Operations
Chap. 6 – Employment Litigation, incl. Work Comp., Disability, Vet Rights
Chap. 7 – Sexual Harassment, incl. Pregnancy Discrimination, Gay Rights
Chap. 8 – Race / National Origin Discrimination
Chap. 9 – Americans With Disabilities Act
Chap. 10 – Family Medical Leave Act, incl. Military Leave
Chap. 11 – Fair Labor Standards Act
Chap. 12 – Drug-Free Workplace, inc. Recovery
Chap. 13 – EMS, incl. Community Paramedicine, Corona Virus

File: Chap. 13

MS: EMS ON SCENE 16 MINUTES – VICTIM SHOT 3 TIMES – P'S MD EXPERT - NO EMER. MED. EXP. - DISQUALIFIED

On May 12, 2022, in Marcus Walker, on behalf of the wrongful death beneficiaries of De'Aubrey Rajheem Roscoe v. City of Indianola, Medstat EMS, Inc. et al., U.S. District Court Judge for the Northern District of Mississippi granted Medstat's motion to exclude plaintiff's expert, Obie McNair, MD. On April 24, 2019, Roscoe had been shot three times, and one of the bullets had perforated the deceased's liver and right lung, thereby causing a collapsed lung

('pneumothorax' in medical terms) and bleeding in the space between the lung and the chest cavity (a 'hemothorax"). Defendant MedStat's crew members treated Roscoe for sixteen minutes at the scene, and then left the scene in an ambulance heading toward the local hospital, where he died. Plaintiff's expert is a physician who is board-certified in internal medicine and pulmonary medicine, but has no experience, education, or background related to emergency medicine or the standards at play when treating patients in the field and on ambulances.

> "Defendant [paramedic Jonathan] Upp dressed Roscoe's wounds, and then transferred him to a stretcher and into the back of the ambulance …. Defendant Upp administered oxygen via a non-rebreather mask at 8:20 p.m., and then attempted unsuccessfully to obtain vascular access at 8:21 p.m…. He then attempted to gain peripheral access via an intraosseous device at 8:23 p.m. and 8:24 p.m. but both attempts failed because the catheters bent …. Defendant Upp then noticed that Roscoe was becoming short of breath and that the right side of his chest was moving less than the left side of his chest; this led Defendant Upp to suspect that there was air in the chest cavity that was exerting pressure on the lung …. He successfully performed a needle decompression to let the air escape the chest cavity…. At 8:24 p.m., Upp noticed that Roscoe was in respiratory distress and attempted to intubate him, but this attempt failed because Roscoe was suffering from lockjaw …. Upp and Walda began transporting Roscoe at 8:27 p.m., and they arrived at the hospital at 8:31 p.m…. Roscoe was pronounced dead at 8:56 p.m.
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> During his deposition, Dr. McNair was also asked about his professional opinion, as stated in his written report on this case, that '[t]he EMS breached the standard of care and/or protocol by staying on scene 16 minutes' [*Id.* at 11]. When asked to support that contention by citing to a protocol or other literature that would establish the standard of care espoused by Dr. McNair, he did not do so and instead responded more generally that his opinion was based on his experience, education, and training *[Id]*.
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> During his depositional testimony, Dr. McNair repeatedly acknowledged his lack of knowledge in the field of emergency medicine…. He unequivocally stated that he was not a paramedic, and has neither experience nor education in the field of emergency medicine…. He likewise failed to cite to any literature or published works pertaining to emergency medicine…. Dr. McNair also conceded that the standard of care for pulmonology and internal medicine--the disciplines in which he does possess specialized knowledge, experience, and training--is different from the standard of care for paramedicine …. Without specialized knowledge of that field, Dr. McNair's opinion is simply irrelevant for the matter at hand, regardless of his medical degree and experience in what might at best be considered an adjacent area of focus. Therefore, because Dr. McNair's opinion lacks relevance for the facts of this case, he is not qualified-under the jurisprudential standards articulated above-to present his testimony. The Plaintiffs assertion that 'Dr. McNair's testimony will assist the trial jury to understand the hospital care and treatment Roscoe needed'… is equally immaterial because this case relates to emergency medical care in the field and on an ambulance, not hospital care and treatment.

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For the reasons stated above, the Court finds that Dr. McNair fails to meet the requirements for expert testimony as articulated in Federal Rule of Evidence 702 and the *Dcmbert, Kumho Tire, Curds,* and *Wilson* cases. Thus, the Court concludes that exclusion of his testimony is warranted, and that the Medical Defendants' Motion to Exclude Plaintiffs Expert Obie McNair, M.D., shall be GRANTED."

Legal Lesson Learned: Plaintiff's expert witness lacked knowledge of protocol of paramedics.

File: Chap. 17, Labor Relations

NY: NEW SICK LEAVE POLICY – FD MUST BARGAIN - DOCTOR'S NOTE AFTER 2 WORKDAYS SICK, WAS 3 DAYS

On May 25, 2022, in the Matter of Village of Scarsdale v. New York State Public Employment Relations Board, et al., 2022 NY Slip Op 03392, the Supreme Court of New York, Second Department, held (4 to 0) that the Board properly held that the new "Sick Leave Management Program" (SLMP) was a change in work conditions that must be bargained, including (a) doctor's note after 2 missed work days, rather than three work days; (b) new rules on off-duty employment on sick leave; (c) eligibility for voluntary overtime; (d) quarterly and annual counseling for excessive sick leave.

"Proceeding pursuant to CPLR article 78 to review so much of a determination of the New York State Public Employment Relations Board dated April 10, 2017, as affirmed those portions of a decision of an administrative law judge dated September 23, 2015, which, after a hearing, found that the petitioner violated Civil Service Law § 209-a(1)(d) by issuing certain provisions of a sick leave management program, and directed the petitioner, inter alia, to rescind those provisions, and, in effect, cross petition by the New York State Public Employment Relations Board to enforce those portions of its determination.

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On April 7, 2014, the Village of Scarsdale Fire Department (hereinafter the Fire Department) issued a revised sick leave policy, and a new 'Sick Leave Management Program' (hereinafter SLMP). Shortly after the Fire Department issued the SLMP, the Uniformed Firefighters Association of Scarsdale, Inc., Local 1394, IAFF, AFL-CIO (hereinafter the Union), which represents the employees affected by the SLMP, filed an improper practice charge against the Village of Scarsdale with the New York State Public Employment Relations Board (hereinafter PERB). The Union claimed, in effect, that certain provisions of the SLMP constituted changed 'terms and conditions of employment' within the meaning of Civil Service Law § 201(4), which were subject to mandatory negotiation under the Taylor Law, and could not be imposed unilaterally by the Village. The Union alleged that by unilaterally implementing the new rules and procedures for the usage of sick leave in the Fire Department the Village violated Civil Service Law § 209-a(1)(d).

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> As relevant to this appeal, the ALJ found that the Village had violated Civil Service Law § 209-a(1)(d) by unilaterally implementing the provisions of the SLMP that (1) altered and increased the number of circumstances for which an employee would be required to obtain a physician's note; (2) required quarterly counseling sessions with a supervisor for any employee who had used more than two sick days within a six-month period; (3) required employees who had been designated as Excessive Sick Leave Users (hereinafter ESLU) to attend an annual counseling session with the Fire Chief to determine the employee's ESLU status for the upcoming year and to determine possible discipline at the discretion of the Fire Chief, up to and including termination; and (4) provided that an ESLU final designation may affect an employee's eligibility for voluntary overtime and off-duty employment.
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> Contrary to the Village's contention, PERB's determination that the subject provisions constituted a change in the terms and conditions of employment and, thus, was subject to mandatory negotiation was consistent with its prior determinations regarding the assignment of overtime and regulation of off-duty employment (*see Matter of Rochester Police Locust Club, Inc. [City of Rochester]*, 36 PERB ¶ 3003; *Matter of Ulster County Sheriff's Empls. Assn. [Ulster County Sheriff]*, 27 PERB ¶ 3028)."

Legal Lesson Learned: Under New York law, these substantial changes in sick leave policy had to be collectively bargained.

File; Chap. 17, Labor Relations

FL: IAFF PRESIDENT, 2 LTs – RETALIATION - AFTER UNFAIR LABOR CHARGE - ANNUAL PHYSICALS OMITTED KEY TESTS

On May 19, 2022, in Lakeland Profession Firefighters Local 4173 v. City of Lakeland, Hearing Officer Robert W. Hanson with the State of Florida Public Employees Relations Commission, after a hearing, issued a Recommended Order that the FD: (a) immediately rescind the written reprimand issued against Union President Shannon Turbeville; (b) expunge all personnel files concerning the reprimand; (c) immediately return two Lieutenants, Matthew Burns and Michael Gilman, to their original stations; (d) pay the Union's attorney fees. The Union President was reprimanded after he asked to bargain over why Life Span company, that provided annual physicals were omitting testing required under CBA and NFPA 1582. "The omitted tests and screenings included a chest x-ray, various cancer screenings, a tuberculosis skin test, a pulmonary function test, and infectious disease screenings."

> "Based on my findings of fact, and the totality of the testimony and evidence submitted at the hearing, I conclude that the decision to discipline Turbeville was directly related to his protected concerted activity.

In fact, in the written reprimand, Turbeville's protected activities were plainly stated as reasons for the City's decision to take action against him. The written reprimand identified as a basis for discipline that Turbeville raised questions about the annual fire fighter physicals, Life Scan, and the terms of the CBA, and that he requested a meeting with Green to discuss those same issues. Fire Chief Riley admitted that Turbeville's statements in the January 11 request to bargain about the City making unilateral changes related to Life Scan was the basis for the written reprimand.

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Thus, Turbeville's request to bargain ultimately resulted in a MOU that clarified annual fire fighter physicals. Therefore, the statements in the request to bargain were not baseless allegations.

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Because the City did not have legitimate grounds to discipline Turbeville, it has not demonstrated by a preponderance of the evidence that notwithstanding the existence of factors relating to his protected activity, it would have made the same decision. Therefore, the City committed an unfair labor practice in violation of section 447.501 (1)(a) and (b), Florida Statutes, when it issued the written reprimand to Union President Turbeville.

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Turbeville filed the initial unfair labor practice (ULP) charge challenging his written reprimand on April 16, 2021. Lieutenant Burns provided a sworn statement in support of the charge…. Fire Chief Riley reviewed the sworn statement submitted by Burns on or around April 16, when he read the ULP charge…. Eighteen days after the ULP charge was filed, on May 4, Burns was notified by Battalion Chief Maddox that he would be transferred from Station 1 to Station 6.

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Turning to the second prong of the Pasco test, I note that the reasons given for the transfers of Burns and Gilman were pretextual. The City's reasons for the transfers are not supported by facts. Therefore, they do not serve as a legitimate ground for the transfers. Further, the City's efforts to create evidence post hoc to justify the transfers seriously undermines its arguments. Hence, the City has not demonstrated by a preponderance of the evidence that notwithstanding the existence of factors relating to protected activity, it would have made the same decision to transfer Burns and Gilman. Accordingly, based on the totality of the circumstances and reasonable inferences drawn from the record as a whole, I conclude that the City committed an unfair labor practice in violation of section 447.501(1)(a) and (b), Florida Statutes, when it transferred Burns and Gilman to other stations."

Legal Lesson Learned: Retaliation for lawful Union activities is a serious charge; transferring a Lt. 18 days after he submitted a sworn statement in support of Union President's unfair labor charge is very questionable management decision. The City may decide to appeal to the full Commission.

Note: See May 20, 2022 article, “Lakeland cited for unfair labor practices in retaliation against fire department employees.”

> "I'm humbled by the overwhelming support I've received from my family, friends and co-workers, and the superior legal representation graciously provided by the International Association of Fire Fighters," Turbeville said in a statement. "My priority as union president remains the same: To work collaboratively with the City to fairly represent the firefighters that the citizens of Lakeland have entrusted with their lives."

Chap. 18 – Legislation