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March 2021 – FIRE & EMS LAW Newsletter

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Updating 18 Chapters in Prof. Bennett's textbook: FIRE SERVICE LAW (2017)

Free Online Library of Case Summaries: 2018 – Present

NEWSLETTER - 18 RECENT CASES REVIEWED

File: Chap. 1 – American Legal System

IA: CITY CODE OFFICER NOT PROTECTED 1St AMENDMENT "FREEDOM OF SPEECH" – OFFICIAL DUTIES - FIRED

On Feb. 24, 2021, in David R. Christensen v. City of Sergeant Bluff, U.S. District Court Chief Judge Leonard T. Strand, U.S. District Court for the Northern District of Iowa (Western District), granted the city's motion for summary judgment. City was installing underground wiring to 220 duplex houses and agreed to not require any city permits. State Fire Marshall informed the city that all meter installations had to be approved by a state inspector, since plaintiff didn't have electrical certification. Plaintiff is not protected under First Amendment freedom of speech since his job duties include reporting possible code violations to state officials. Case remanded to state court on his claims of violation of Iowa whistleblower and state code enforcement laws.

> "[S]ee also Garcetti v. Ceballos, 547 U.S. 410, 421 (2006) "We hold that when public employees make statements pursuant to their official duties, the employees are not speaking as citizens for first Amendment purposes, and the Constitution does not insulate their communications from employer discipline."
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> Christensen's report of electrical violations to the regional state electrical inspector was also made pursuant to his position as the City Inspector/Code Enforcement Officer. *Compare McGee v. Public Water Supply, Dist. No. 2 of Jefferson County, Mo.*, 471 F.3d 918, 921 (8th Cir. 2006) (concluding district manager of public water supply district who expressed concerns over the district's compliance with environmental regulations made the statements as part of his official duties); *Batz v. City of Sebring*, 794 F. App'x 889, 898 (11th Cir. 2019) (concluding city fire chief spoke as an employee when he made complaints about various city officials undermining his efforts to enforce fire safety rules at a historical building owned by persons with connections to the city council and administration); *Morris v. Philadelphia Housing Authority*, 487 F. App'x 37, 40 (3d Cir. 2012) (concluding an executive assistant's complaints up the chain of command about legality of housing authority's actions fell within his job duties); *Lyons II*, 875 F.3d at 1175 (noting that court's analysis in *Kincade v. City of Blue Springs*, 64 F.3d 389 (8th Cir. 1995) that city engineer's complaints about a dam's funding and safety issues that were made pursuant to an assignment from his employer and in his capacity as city engineer and that were deemed protected would not suffice under *Garcetti*)."

Facts:

> "The City terminated Christensen's employment on April 2, 2018. The parties dispute the specific reasons for the termination but agree that it relates to Oak Hills. Oak Hills is in the north part of the City and was originally developed as air base housing. It is now a subdivision with 220 duplex units and some single-family units. The area was once a source of community pride but, after years of neglect, it had started to become blighted. Sometime prior to March 2014, when Lincoln was hired as City Administrator, the City began a series of discussions with Oak Hills owners about rehabilitation. Brian Redshaw was the City Administrator at this time. Defendants state that early in the negotiation process, the parties discussed updating the electrical service in each of the units at Oak Hills so that the City could provide underground service and eliminate certain transformers. They state this proposal required Oak Hills to adhere to the International Property Management Code in completing its portion of the electrical upgrade and contemplated that the City would waive inspection fees for the life of the project."
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> Footnote 5: In another part of their statement of facts, defendants state the decision to terminate Christensen's employment was based on the 'lack of oversight' at Oak Hills combined with Christensen's five-year failure to obtain his electrical certification. Doc. 20-1 at 4. The full quote from William Gaukel's deposition (cited by both parties) is:

‘There were several reasons. The lack of oversight at Oak Hills was probably the straw that broke the camel's back, but there was a - again, a continued pattern of not taking direction, not following through, not continuing to move things forward as the City had requested that it became apparent to, I think, everybody involved that Dave wasn't going to get it done and it was time that we had to move on and find somebody that would come in and take care of it and follow through with the needs of the City.’

***

After more than two years of negotiations, the parties signed the Oak Hills Rehabilitation Plan on August 11, 2016. With regard to upgrading electrical work, the agreement required the use of licensed, registered contractors. When work was completed, the owners were to notify the City's Code Enforcement Officer (Christensen) to inspect the work. The parties dispute whether adherence to the International Property Maintenance Code was required. Christensen notes that Iowa has its own electrical code and regulations. The agreement states: "Electrical work for the rehabilitation . . . will not require permits or additional fees." Docs. 20-2 at 58-59; 28-3 at 81-82. Christensen believes this is violation of Iowa law and states numerous electrical projects were performed illegally without a permit. Defendants state that the agreement worked as contemplated for more than a year. When a unit was upgraded, the contractor would call the City to deliver a meter. Electrical meters require a permit and inspection. Christensen or another Public Works employee would go to the property and confirm that the meter socket was appropriately wired. The City would then install the meter.

***

In October 2017, the state fire marshal called the City Clerk asking if Christensen had his electrical certification. The Clerk informed the marshal that Christensen was not certified and the marshal informed her that until he got his certification, the state would need to do electrical inspections. This did not cause any immediate problems because Oak Hills did not request any meters between October 2017 and March 2018.

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On March 19, 2018, Kevin Lacey, a local contractor, called Christensen and asked for two electric meters for Oak Hills. Christensen called Lincoln to remind him that because he did not have his electrical certification, the state would have to do the inspections. Lincoln [Aaron Lincoln, City Administrator], told Christensen to have Lacey call the state inspector. Christensen states he again informed Lincoln that the Oak Hills Agreement was in violation of Iowa law and that the City and the mayor could be liable. Defendants deny Christensen made such a statement. Christensen also informed the regional state electrical inspector, Mike Decker, of electrical code violations at Oak Hills and the City knew Christensen had spoken with him concerning these violations. This conversation did not explicitly involve the Oak Hills agreement or permit waivers, but improper installation methods that the inspector had overlooked and that Christensen had noticed or been made aware of by others.

***

Because the remaining claims arise under Iowa law, and I find that it would not be appropriate to exercise supplemental federal jurisdiction over those claims, this case is hereby **remanded** to the Iowa District Court for Woodbury County.”

Legal Lessons Learned: This case is now remanded to Iowa state court where plaintiff may seek to prove to a jury that the city violated State whistleblower laws and State code enforcement laws.

Note: The U.S. Supreme Court in *Garcetti v. Ceballos*, 547 U.S. 410, 421 (2006), greatly limited the ability of public employees to sue in Federal court for retaliation in violation of the First Amendment “freedom of speech.” Ceballos was a LA County Supervising attorney, who was re-assigned after questioning the accuracy of Deputy Sheriff’s search warrant application and writing a memo documenting his concerns. The

U.S. Supreme Court held [5 to 4]: "Proper application of our precedents thus leads to the conclusion that the First Amendment does not prohibit managerial discipline based on an employee's expressions made pursuant to official responsibilities. Because Ceballos' memo falls into this category, his allegation of unconstitutional retaliation must fail."

File: Chap. 1, American Legal System

OH: OHIO ETHICS COMMISSION – HELPFUL NEW VIDEO – PUBLIC OFFICIALS & GIFTS OF "SUBSTANTIAL VALUE"

Feb. 22, 2021:
See helpful new training video provided by The State of Ohio Ethics Commission.
See also: "The first quarter edition of The Voice of Ethics has been issued! I hope you enjoy it and as always, please feel free to contact me if I can be of any assistance."
Both kindly sent to me by:

Susan Willeke
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Legal Lesson Learned: Golf outings, sports or theater tickets, vacations, jewelry have been items deemed items of "substantial value" by the Ohio Ethics Commission; when in doubt, consult with the Commission.

Note: See Ohio Ethics Commission publication: **Gifts and the Ohio Ethics Law**.

See also Advisory Opinions on **Conflict of Interest**, and advisory opinions on **Gifts** provided by the State of Ohio Ethics Commission.

Ohio Revised Code:
102.01 Public officers – ethics definitions
2921.43 Soliciting or accepting improper compensation.

File: Chap. 1, American Legal System

VA: FED. FIREARMS LAW – MISD. DOMESTIC VIOLENCE CONV. - LIFETIME BAN – VOL. FF MUST GET EXPUNGED

On Feb. 22, 2021, in Robert Timothy Harley v. Robert M. Wilkinson, Acting Attorney General of United States , the U.S. Court of Appeals for the Fourth Circuit held (2 to 1) that federal courts have no authority to amend the life-time ban imposed by Congress in 1996 on possession of a firearm by anyone convicted of "misdemeanor crime of domestic violence" (18 USC 922 (g)(9)). His only remedy is to seek expungement of the conviction in Virginia, or a pardon from the President.

"Harley argues that the district court improperly conducted its as-applied analysis under the Second Amendment because the court failed to consider Harley's personal history following his conviction. He contends that his individual characteristics, namely, the long passage of time since his misdemeanor conviction and his exemplary life in the many years since his conviction, render Section 922(g)(9) unconstitutional as applied to him.

***

Harley's suggested approach is fundamentally flawed because it effectively would create an exception to the statute that does not exist. The statute imposes a flat prohibition, with no reference to individual circumstances occurring after the disqualifying conviction. Despite its power to do so, Congress did not provide a sunset clause or a good behavior exception to the statute."

Facts:

> "After graduating from high school in 1980, Harley joined the Fairfax County Department of Public Works (the County) as an unskilled laborer. Throughout his thirty-year career with the County, Harley was promoted numerous times, eventually rising to the rank of Industrial Electrician II. He also earned three advanced job-related certifications during his tenure. After retiring from the County, Harley began his own business as a licensed electrician.
>
> In addition to his employment with the County, Harley served for decades as a volunteer firefighter and an emergency medical technician. He ultimately became the fire captain for the Dale City Volunteer Fire Department. Harley also was a member of the Department's board of directors. He won numerous awards for service related to his work as a volunteer firefighter.
>
> In 1993, Harley pleaded guilty to misdemeanor assault and battery of a family member, in violation of Virginia Code § 18.2-57.2, based on an altercation he had with his then-wife. In an affidavit admitted into evidence in the present case, Harley's ex-wife stated that she continued a 'friendly relationship' with Harley after the incident, and that they are "still friends to this day." Harley has not been convicted of any other crimes since the 1993 conviction. However, as noted above, Harley remains prohibited under 18 U.S.C. § 922(g)(9) from possessing a firearm based on that conviction.

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> We also observe that the definition of 'misdemeanor crime of domestic violence' applicable in Section 922(g)(9) narrowly defines the category of prohibited individuals, by requiring that the underlying conviction have 'as an element, the use or attempted use of physical force.' 18 U.S.C. § 921(a)(33)(A)(ii). The definition of a 'misdemeanor crime of domestic violence' also requires that the conviction have been secured through a jury trial with counsel, or after an intelligent waiver of a defendant's constitutional rights. *Id.* § 921(a)(33)(B). And the statute provides that the firearm prohibition no longer applies, with some exceptions, if the domestic violence misdemeanor conviction 'has been expunged or set aside' or if 'the person has been pardoned or has had civil rights restored.' *Id.* § 921(a)(33)(B)(ii). These requirements

demonstrate Congress' ability and willingness to place limitations on a statutory prohibition. Thus, we will not depart from the text of the statutory scheme to create by judicial fiat an exception to Section 922(g)(9)."

Legal Lesson Learned: Congress enacted this statute in 1996 in response to an increase in use of firearms in domestic violence cases.

Note: See these additional facts [from Dissenting Opinion by Circuit Judge Julius N. Richardson]

> "Nearly thirty years ago, Harley paid a $75 fine after pleading guilty to a misdemeanor domestic assault charge under Virginia Code § 18.2-57.2. As Harley alleges, [t]he charge was based on a single, one off incident[:] Mr. Harley and his wife had an argument while she was inside a SUV and he was standing outside the vehicle. He stood on the running board and reached into the vehicle to turn it off, and she pushed him. He reached inside the vehicle to hold on and, in so doing, he grabbed her arm…. During the incident, there 'was no punching, slapping, hitting, or violence.' *Id*. While Harley and his wife later separated and divorced, they 'remained on friendly and amicable terms working collaboratively to successfully raise their children.' *Id*. Harley provided an affidavit from his ex-wife supporting his version of the incident underlying his conviction. J.A. 23-24.
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> The government, citing a police report, suggests that Harley's actions were more serious and perhaps not a lone incident. *See* Appellee Br. 3; J.A. 73. Maybe so. But the district court ignored the conduct underlying the conviction, believing it was not germane, and granted summary judgment for the government. In doing so, the court disregarded Harley's particular conviction.
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> Harley plausibly claims that § 922(g)(9) cannot be constitutionally applied to him as an individual with a nearly thirty-year-old misdemeanor conviction for recklessly causing an offensive touching. We should not categorically reject that claim. Accordingly, I respectfully dissent."

File: Chap. 2, Safety

OH: FIRE CHIEF ALMOST HIT - THIRD-DEGEE FELONY - DRIVER SLEEPING AT GAS STATION SPEAD AWAY FROM DEPUTY SHERIFF

On Feb. 22, 2021, in State of Ohio v. David A. Zitney, the Court of Appeals for Twelfth Appellate District (Clinton County), 2021 Ohio 466, held (3 to 0) that the drivers' conduct, failing to comply with officer's order or signal, and speeding away from the gas station caused a "substantial risk of serious physical harm to others" and was therefore a third-degree felony. The jury conviction was affirmed; the defendant must serve 3-year sentence.

> "Testimony from Deputy Abbitt and Fugate [Don Fugate, Fire Chief, Massie Township] demonstrated that appellant's actions on October 19, 2019 created a strong possibility of serious physical harm to those individuals present at the Shell gas station and to those motorists traveling along State Route 73 when appellant fled from the gas station. Appellant drove through and exited the parking lot of a commercial establishment where other individuals were present at an excessive rate of speed. Appellant did not brake before entering the roadway and proceeded to drive at a high rate of speed, sometimes on the wrong side of the road against traffic. As Fugate explained, the area where appellant entered the highway was a 'high traffic area' and the roadway where appellant drove in the incorrect lane was curvy and hilly. In fact, the bridge appellant drove on had an inclining peak, which made it difficult to see if traffic was approaching on the other side of the bridge. Indeed, as Deputy Abbitt explained, traffic was observed traveling in both

directions on State Route 73 during her pursuit of appellant. Appellant was driving at such a rapid speed that the deputy was unable to catch up to appellant, despite traveling more than 100 m.p.h."

Facts:

"A jury trial commenced on June 16, 2020. At trial, the state presented testimony from Karen Abbitt, a deputy with the Clinton County Sheriff's Office, and from Don Fugate, the chief of the Massie Township Fire Department. Deputy Abbitt testified that around 8:00 a.m. on October 19, 2019, she was dispatched to a Shell gas station located near the intersection of State Route 73 and Interstate 71 in Clinton County, Ohio to do a welfare check on a man sleeping in his pickup truck. Deputy Abbitt arrived at the gas station in her marked police cruiser and in uniform. The gas station was busy, with multiple cars and people in the parking lot.

Deputy Abbitt parked her police cruiser near the pickup truck and approached the vehicle on foot. As she approached, Deputy Abbitt recognized appellant. Appellant, who was initially parked, put his vehicle in drive and began pulling away from the deputy. Deputy Abbitt gave multiple verbal commands for appellant to stop and knocked on the bed of his truck to get his attention. Appellant momentarily stopped his truck, cracked his driver's window, and yelled something at Deputy Abbitt.

[Fire Chief] Fugate, who was present at the gas station, heard Deputy Abbitt's commands for appellant to stop his vehicle. Fugate walked over to assist the deputy and, when he observed appellant try to drive away, stepped in front of the truck, holding his arm out in a 'stop' signal. Appellant briefly paused before continuing to edge his truck towards Fugate. Fugate eventually stepped aside in order to protect his own safety. Thereafter, while Deputy Abbitt was in physical contact with the side of appellant's truck, appellant quickly sped away. Appellant exited the parking lot of the gas station at a high rate of speed, without stopping before entering the roadway. Appellant's exit of the Shell station was caught on the gas station's surveillance camera.

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After pursuing appellant for approximately two miles, Deputy Abbitt crashed her cruiser into a cornfield when she overcorrected to avoid striking another vehicle. Although the deputy was not injured in the crash, her police cruiser sustained more than $20,000 in damages.

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The jury found appellant guilty of failing to comply with the order or signal of a police officer and found that appellant caused a substantial risk of serious physical harm to persons or property. Appellant was sentenced to 36 months in prison and his driver's license was suspended for ten years.

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Appellant does not dispute that the state proved beyond a reasonable doubt that he failed to comply with an order or signal of a police officer. He maintains, however, that the offense is a misdemeanor of the first degree, rather than a third-degree felony, as "the finding contained in R.C. 2921.331(C)(5)(a)(ii), which elevated the offense * * *, was not supported by sufficient evidence and was against the manifest weight of the evidence."

***

Pursuant to R.C. 2921.331(B), '[n]o person shall operate a motor vehicle so as willfully to elude or flee a police officer after receiving a visible or audible signal from a police officer to bring the person's motor vehicle to a stop.' If the offender's operation of the motor vehicle "caused a substantial risk of serious physical harm to persons or property," the offense is a third-degree felony. R.C. 2921.331(C)(5)(a)(ii).

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In the present case, after reviewing the record, weighing inferences and examining the credibility of the witness, we find that appellant's conviction is supported by sufficient evidence and is not against the weight of the evidence. The state presented testimony and evidence from which the jury could have found all the essential elements of the offense, including the disputed element of substantial risk of serious physical harm to persons or property, proven beyond a reasonable doubt. Testimony from Deputy Abbitt and Fugate demonstrated that appellant's actions on October 19, 2019 created a strong possibility of serious physical harm to those individuals present at the Shell gas station and to those motorists traveling along State Route 73 when appellant fled from the gas station. Appellant drove through and exited the parking lot of a commercial establishment where other individuals were present at an excessive rate of speed. Appellant did not brake before entering the roadway and proceeded to drive at a high rate of speed, sometimes on the wrong side of the road against traffic. As Fugate explained, the area where appellant entered the highway was a 'high traffic area' and the roadway where appellant drove in the incorrect lane was curvy and hilly. In fact, the bridge appellant drove on had an inclining peak, which made it difficult to see if traffic was approaching on the other side of the bridge. Indeed, as Deputy Abbitt explained, traffic was observed traveling in both directions on State Route 73 during her pursuit of appellant. Appellant was driving at such a rapid speed that the deputy was unable to catch up to appellant, despite traveling more than 100 m.p.h."

Legal Lesson Learned: This is a felony conviction, not a misdemeanor, because the defendant caused a substantial risk of serious physical harm.

Note: See Ohio Revised Code 2917.13, Misconduct at emergency:

(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;

(2) Hamper the lawful activities of any emergency facility person who is engaged in the person's duties in an emergency facility;

(3) Fail to obey the lawful order of any law enforcement officer engaged in the law enforcement officer's duties at the scene of or in connection with a fire, accident, disaster, riot, or emergency of any kind.

File: Chap. 3, Homeland Security

IL: FBI 2-YEAR INVESTIGATION – USED "CONFIDENTIAL HUMAN SOURCE" – JURY CONVICTION

On Feb. 18, 2021, in United States of America v. Joseph D. Jones and Edward Schimenti, U.S. District Court Judge Andrea R. Wood, U.S. District Court for the Northern District of Illinois (Eastern Division) denied the defendants' motion for judgment of acquittal or alternatively for a new trial. The FBI investigation started based on internet posts by the two defendants and lasted for two years with both undercover FBI agents and a "confidential human source" tape recording their conversations with the defendants. The FBI paid the source for expenses, and after the trial obtained FBI Headquarters permission to pay him $50,000.

"Muhamed [the confidential himan source] also testified at trial. He explained that he was born in Iraq and had worked for the United States Department of Defense in Iraq between 2004 and 2009. (Tr. 1220-22.) He moved to the United States in 2014 as a refugee. (Tr. 1221.) Muhamed testified that he first spoke to the FBI in the summer of 2016 when FBI agents came to his home to interview him about a report that he had an ISIS flag on his car. (Tr. 1223.) Subsequently, Muhamed followed up with the FBI, told an FBI supervisor that he loved to work with the government and was a law

enforcement supporter, interviewed with the FBI, and began working as a confidential human source. (Tr. 1224-25.) Muhamed further testified that he never asked the FBI for anything in exchange for his cooperation, the FBI never offered him anything in exchange for his cooperation, and he did not expect to get anything for his cooperation. (Tr. 1225.) According to Muhamed, the FBI had given him some money but only for fuel, a cheap car, parking, and moving out from his old apartment after the case. (Tr. 1226.)

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But Defendants have not identified any particular testimony given by Muhamed that they claim was exaggerated or outright false—other than his motives for testifying. Given that the jury did hear evidence regarding pretrial payments to Muhamed, even if some of the detail may have been omitted to inaccurate, and the speculative nature at least at the time of trial, of any post-trial request for payment to Muhamed, the Court cannot conclude that the additional information would have been material and not cumulative.

Facts:

"Joseph Jones and Edward Schimenti (together, 'Defendants') were the subjects of a Federal Bureau of Investigation ('FBI') investigation lasting more than two years that involved several undercover agents and a fictitious terrorist network claiming association with the Islamic State in Iraq and Syria ('ISIS'). Both Defendants subsequently were indicted on charges of conspiring to provide material support to a terrorist organization—specifically, trying to provide equipment and personnel to ISIS—in violation of 18 U.S.C. § 2339B(a)(1). Schimenti was also charged with knowingly making materially false statements to the FBI involving international terrorism, in violation of 18 U.S.C. § 1001(a)(2), based on his post-arrest interview. A jury convicted Defendants of all charges. Defendants now seek judgments of acquittal pursuant to Federal Rule of Criminal Procedure 29 or, alternatively, a new trial pursuant to Federal Rule of Criminal Procedure 33…. For the following reasons, the Court denies Defendants' motions.

***

Jury selection in this case began on May 28, 2019 and continued through May 31, 2019. Two and a half weeks later, the parties gave closing arguments. In between, the jury heard testimony from 15 witnesses and saw more than one hundred exhibits admitted into evidence. The witnesses included: Jamil Jaffer, an expert on terrorism; Cassandra Carnright, the FBI case agent for the investigation; Hamath Muhamad, a congregant at Defendants' mosque; Kelly Turnipseed, Schimenti's ex-girlfriend; Abdulhakeem (pseyduonym), an undercover FBI agent; Bilal Sharif (pseudonym,) an undercover FBI agent; Muhamed, the FBI's confidential human source [Footnote 1]; Rateesha Darden, Jones's former girlfriend; Victor Rodriguez, an FBI explosives expert; Thad Boertje, an FBI agent who interviewed Schimenti following his arrest; Marc Sageman, a terrorism expert retained by Defendants; J'Laine Johnson, Schimenti's aunt; Bernetta Jones, Jones's mother; Keara Jones, Defendant Jones's wife; and Joseph Jones, testifying in his own defense. Among the exhibits accepted into evidence were numerous covert recordings of Jones and Schimenti interacting with individuals who unbeknownst to them were working with the FBI as undercover agents and informants. The jury both heard the recordings and were provided transcripts of the conversations. After considering this evidence during two days of deliberations, the jury returned its guilty verdicts on June 20, 2019.

Footnote 1: Generally, a "confidential human source" is a civilian undercover source (like a confidential informant) who works with the FBI but is not an FBI agent.

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The FBI also introduced Muhamed to Schimenti. (Tr. 402.) Muhamed obtained a job with Schimenti's employer, spoke with Schimenti at work, and began meeting with Schimenti outside of work in December 2016. (Tr. 413-18.) Shortly thereafter, Muhamed began establishing a 'legend' (that is, a fake backstory), which was that he had a brother named Ahmed who lived in Syria to fight for ISIS. (Tr. 419-20.) Muhamed

eventually told Schimenti that he wanted to travel to fight for ISIS with his brother, and Schimenti offered to help. (Tr. 421-22.) Muhamed told Schimenti that he needed cell phones that ISIS fighters would use to avoid drone strikes and to create improvised explosive devices. (Tr. 424-26.)

***

In late February 2017, Schimenti introduced Muhamed to [defendant] Jones. (Tr. 426.) Schimenti described Jones to Muhamed as a 'trusted brother' who had 'helped two other brothers travel overseas.' (Tr. 427.) Both Schimenti and Jones obtained phones to give to Muhamed. (Tr. 438-47.) The evidence at trial showed that Schimenti and Jones both understood that the phones would be used for bombs. (*Id*.) Jones introduced Muhamed to Bilal [FBI undercover agent] to facilitate Muhamed's travel to fight for ISIS. (Tr. 437-38.) On April 7, 2017, Schimenti, Jones, and Muhamed met for a final meal. (Tr. 447.) Then, they dropped Muhamed off at the airport, where they understood he would travel to Syria to support ISIS. (*Id*.) Schimenti asked Muhamed to send him a video of him killing someone when he arrived. (*Id*.) Five days later, on April 12, 2017, Jones and Schimenti were arrested. (Tr. 448.)

***

Also pertinent to Defendants' post-trial motions is certain evidence disclosed after trial that Defendants claim calls into question the credibility of key Government witnesses. Specifically, eight days after the jury returned its verdicts, the FBI paid Muhamed $3,000 in cash for his services. (Jones's Post-Trial Mot., Ex. 1, Expense Tracker [*], Dkt. No. 249-1.) Two weeks later, on July 12, 2019, the FBI paid Muhamed an additional $47,000 in cash. (*Id*.) No information regarding a potential post-trial payment had been disclosed to Defendants prior to trial.

> [*] The expense tracker appears to show that Muhamed's stipend included, among other things, a down payment of $1,200 for a car, three car payments of $400 each, a security deposit of $925, payments for three months of rent totaling $2,775, and a month's worth of "per diem" expenses
>
> totaling $2,130. (Jones's Post-Trial Mot., Ex. 2, Expense Tracker, Dkt. No. 249-2.) The spreadsheet also reflects $5,575 for "amount service" prior to trial—the same category used for the $50,000 post-trial payment and not attributable to any specific reimbursement. (*Id*.)

***

As discussed below, [FBI Special Agent] Carnright has acknowledged that she considered making a request to FBI management for Muhamed to be paid earlier in the investigation, and even raised the possibility with one of the Assistant United States Attorneys on the case, but the attorney told her 'to wait until after the resolution of the case.' (Aff. of Cassandra Carnright ("Carnright Aff.") ¶ 4, Dkt. No. 235.) When Defendants learned of the post-trial payment, they successfully petitioned the Court to order discovery and an evidentiary hearing. At the hearing, Carnright testified that she never informed Muhamed that he would be paid for his participation in the FBI investigation until she made the first $3,000 payment. (Show Cause Hr'g Tr. 32-33, Dkt. No. 250.)

***

Given that the jury did hear evidence regarding pretrial payments to Muhamed, even if some of the detail may have been omitted to inaccurate, and the speculative nature at least at the time of trial, of any post-trial request for payment to Muhamed, the Court cannot conclude that the additional information would have been material and not cumulative.

***

Defendants' argument also fails because the Court cannot find that the newly discovered evidence would probably lead to an acquittal in the event of a retrial. The newly discovered evidence might weaken the Government's case and complicate their narrative that Muhamed participated in the investigation based

solely on his patriotism. But it does not rise to the level of probable acquittal. The Court notes that the jury did hear evidence calling into question the purity of Muhamed's motives for participating in the FBI investigation. At the time of the investigation, Muhamed was a legal refugee with permission to work; he became a legal permanent resident only after he started working with the FBI. (Tr. 405-06.) Carnright testified at trial that the FBI helped Muhamed with his green card application—Muhamed asked the FBI why his application was taking so long, and the FBI inquired with the Department of Homeland Security. (Tr. 407.) Carnright further testified that the Department of Homeland Security had 'misinformation' that Muhamed was a member or supporter of ISIS (which the FBI corrected) and that Muhamed's fingerprints were registered with the Department of Defense, delaying his immigration application (which the FBI helped to resolve.) (Tr. 407-08.) And the FBI arranged for a United States customs officer to come to a meeting where Muhamed was present to confirm to Muhamed that his application was being processed and was on the right track. (Tr. 1758-62.) In light of this substantial evidence tending to impeach Muhamed's motives regarding the investigation, the Court finds it even less likely that testimony regarding the possibility of a financial reward would have swayed the jury's decision.

***

Footnote 9: The Government suggests that because the payments to Muhamed before trial were not benefits and Carnright never told Muhamed to expect future benefits, the Government did not err in failing to disclose the information. This Court disagrees. Of course, whether the information would have been admitted into evidence is a matter separate from whether it should have been disclosed to the defense. The Court can imagine arguments for at least some of the information to be excluded. But the Court never got the chance to consider the propriety of allowing the jury to hear the details of the pretrial payments or Carnright's plans for a post-trial payment."

Legal Lesson Learned: The Court's decision gives great insight on how FBI conducted their two year investigation, and used a confidential human source.

Note: See DoJ Press Release after jury conviction (June 21, 2019): "Two Suburban Chicago Men Convicted of Conspiring to Provide Material Support to ISIS."

File: Chap. 5, Emergency Vehicle Operations

MS: VOL. FF IN ACCIDENT ON CALL – QUALIFIED IMMUNITY WAVED SINCE HIS ATTORNEY DIDN'T RAISE 14 MONTHS

On Feb. 22, 2021, in Brenda Cook v. Amos Taylor, the Court of Appeals of the State of Mississippi, held (6 to 1) that the trial judge improperly granted summary judgment to the volunteer firefighter, finding that his attorney "waved" the statutory defense by not asserting it in his answer to the complaint, or for 14 months of pre-trial discovery.

"Under the MTCA [Mississippi Tort Claims Act], a governmental employee is entitled to qualified immunity if, while engaged in 'activities relating to . . . fire protection,' he did not act 'in reckless disregard of the safety and well-being of any person' while engaged in those activities. Miss. Code Ann. § 11-46-9(1)(c).[1] The MTCA defines 'employee[s]' to include 'firefighters who are members of a volunteer fire department that is a political subdivision,' Miss. Code Ann. § 11-46-1(f) (Supp. 2017), and it defines 'political subdivision' to include a 'volunteer fire department that is a chartered nonprofit corporation providing emergency services under contract with a county or municipality.' Miss. Code Ann. § 11-46-1(i).

***

For the reasons stated, we therefore find that the circuit court abused its discretion by implicitly allowing Taylor to amend his answer when it proceeded to grant Taylor's motion for summary judgment based upon a qualified immunity defense. We further find that Taylor waived his qualified immunity affirmative defense as a matter of law. Accordingly, the circuit court's judgment is reversed, and this case is remanded for further proceedings on Cook's negligence and negligence per se complaint against Taylor."

Facts:

"The record reflects that Taylor is a certified first responder and volunteer firefighter with the Marks volunteer fire department (Marks VFD). On September 14, 2017, at 1:48 p.m., the Quitman County Sheriff's Department received a report of an accident on Highway 3 in Vance. An emergency tone was sent to all available Lambert and Marks fire department units. Taylor was working at his maintenance job with the City of Marks when the emergency tone came across his eDispatch unit. He left work and headed to the Marks VFD station but found the fire truck had already pulled away. Taylor drove toward the scene of the crash in his personal vehicle.

On the way, Cook and Taylor were involved in an automobile accident on Highway 3. Cook and Taylor were both traveling southbound on Highway 3. Cook was attempting to make a left turn onto Riverside Road at a time when Taylor was in the northbound lane attempting to overtake and pass Cook. Their vehicles collided. The front right side of Taylor's vehicle and the front left side of Cook's vehicle were damaged in the collision.

Cook sued Taylor, individually, on March 2, 2018, in the Quitman County Circuit Court. She sought actual and compensatory damages for injuries she allegedly received as a result of the collision. She alleged causes of action for negligence and negligence per se. According to the allegations of Cook's complaint, she was attempting to make a left turn off of Highway 3, and Taylor was 'following too closely on the highway at a high rate of speed when he began his attempt to overtake and pass [Cook] in the left lane [and] . . . violently collided with the side of [Cook's] car as [she] attempted the left turn.' She further alleged that Taylor was inattentively operating his vehicle and that he was negligent per se for violating certain rules of the road, including Mississippi Code Annotated section 63-3-1201 (Rev. 2013), which prohibits "reckless driving." Section 63-3-1201 provides that "[a]ny person who drives any vehicle in such a manner as to indicate either a willful or a wanton disregard for the safety of persons or property is guilty of reckless driving.'

***

Taylor filed his answer on March 14, 2018, raising eight affirmative defenses, including an affirmative defense under Mississippi Rule of Civil Procedure 12(b)(6) that Cook's complaint failed to state a claim against him upon which relief could be granted. Taylor did not indicate anywhere in his answer that he was acting in his capacity as a volunteer firefighter for Marks VFD when the accident occurred, nor did Taylor assert any defense that he was entitled to qualified immunity under the Mississippi Tort Claims Act (MTCA), Miss. Code Ann. § 11-46-9 (Supp. 2016), or that he was entitled to any other protection available under the MTCA.

***

On May 16, 2019, Taylor filed his motion for summary judgment asserting that he was entitled to qualified immunity under the MTCA. Cook asserted in her response that Taylor waived the affirmative defense of qualified immunity when he failed to plead it in his answer and then extensively participated in litigation before raising it in his summary judgment motion fourteen months later. Taylor filed his rebuttal in support of his summary judgment motion on July 1, 2019.

***

On July 10, 2019, Taylor filed a motion to amend his answer, requesting 'permission to amend his Answer to assert qualified immunity as a defense.' In her response, Cook asserted that Taylor admitted that he 'failed to raise the defense of qualified immunity in his [a]nswer which must be specifically pled,' that Taylor did not file 'any defenses to properly raise the defense of qualified immunity' in his answer, and that Taylor 'should [not] be allowed to raise the defense at this late stage.'

The circuit court did not rule on Taylor's motion to amend his answer.

On August 15, 2019, the circuit court entered its order granting Taylor's motion for summary judgment, finding that he was entitled to qualified immunity pursuant to section 11-46-9(1)(c) and "that based on the facts most favorable to [Cook], [Taylor] did not act 'in reckless disregard of the safety and well being' of Cook." Cook appealed.

***

REVERSED AND REMANDED."

Legal Lesson Learned: Qualified immunity is an "affirmative defense" and should normally be asserted early in the litigation process, and if lawsuit not dismissed, in many jurisdictions FF can take an immediate appeal.

File: Chap. 6, Employment Litigation

WA: FF HEART ATTACK - STATUTORY PRESUMPTION – LATER MORE STENTS - ALSO COVERED, ATTORNEY FEES

On Feb. 9, 2021, in Calvin Johnson v. Department of Labor And Industries, the Court of Appeals of the State of Washington (Division II) ruled (3 to 0) that the State's statutory presumption of firefighter heart attacks covers workers comp. not only for the first heart attack in 2015, but also for subsequent need in 2016 for further stents; he is also entitled to reimbursement of attorney fees for his successful appeal of the denial of coverage on the second event. The statutory presumption applies to "any heart problems, experienced within seventy-two hours of exposure to smoke, fumes, or toxic substances, or experienced within twenty-four hours of strenuous physical exertion due to firefighting activities."

"On April 15, 2015, Johnson had a myocardial infarction, commonly referred to as a heart attack. He had experienced physical exertion and exposure to diesel fumes before the heart attack. After Johnson filed an accident report to open a claim, the Department applied to Johnson's claim the presumption that heart problems arising 72 hours from exposure to fumes or 24 hours from exertion are occupational diseases. It then allowed Johnson's claim under RCW 51.32.185. The Department provided treatment and other benefits to Johnson. The Department then closed Johnson's claim on January 21, 2016, with no permanent or partial disability.

***

We hold that under the facts presented and the plain language of RCW 51.32.185(9)(a), Johnson's claim to reopen was a claim for benefits entitling him to an award of attorney fees and costs incurred before the Board. Because Johnson is entitled to a fee award, we affirm the superior court's order requiring the Department to pay Johnson reasonable attorney fees and costs incurred before the Board. We also award Johnson reasonable appellate fees and costs as the prevailing party in this appeal."

Facts:

"Firefighter Calvin Johnson appealed the Department of Labor and Industries' (Department) denial of his claim to reopen his benefits under RCW 51.32.185. Initially the Department denied his claim to reopen under RCW 51.32.185, the presumptive occupational disease statute. Johnson appealed to the Board of Industrial Insurance Appeals (Board). The Board reversed the denial and remanded to the Department to grant Johnson's application to reopen his claim.

***

On April 15, 2015, Johnson had a myocardial infarction, commonly referred to as a heart attack. He had experienced physical exertion and exposure to diesel fumes before the heart attack. After Johnson filed an accident report to open a claim, the Department applied to Johnson's claim the presumption that heart problems arising 72 hours from exposure to fumes or 24 hours from exertion are occupational diseases. It then allowed Johnson's claim under RCW 51.32.185. The Department provided treatment and other benefits to Johnson. The Department then closed Johnson's claim on January 21, 2016, with no permanent or partial disability.

***

After his claim closed, Johnson had persistent pain symptoms. At first, his doctors thought it was gall bladder pain, and Johnson underwent gall bladder surgery on January 29. AR at 485-87. Johnson continued to have pain after the surgery so he went to the emergency room on February 3. The doctor at the emergency room determined that Johnson had findings consistent with a new myocardial event. According to Johnson's doctor, the new event did *not* occur within 24 hours of exertion at work or within 72 hours of exposure to fumes. Johnson's doctor believed the 2016 problem was one that carried forth from his event in 2015, which the doctor did not think had ever resolved. In other words, the doctor believed that the 2016 problem arose from the 2015 event.

***

The industrial administrative appeals judge (ALJ) considered whether the heart condition was an aggravation of the occupational disease for which Johnson's original claim had been filed or a new event unrelated to the occupational disease. The ALJ issued a proposed decision and order finding that Johnson's condition after claim closure in January 21, 2016, was an aggravation of the April 2015 event, noting that the 'preponderance of the evidence was persuasive that Mr. Johnson's occupational disease worsened and became aggravated after January 21, 2016.' Administrative Record (AR) at 212.

***

The Board adopted the ALJ's proposed decision and order, reversed the Department's order denying Johnson's application to reopen his claim, and remanded to the Department to grant his application to reopen the claim.

***

Under a narrow exception for firefighters, a firefighter is entitled to an award of attorney fees and costs when (1) a "determination involving the presumption" has been appealed and (2) the Board has issued a 'final decision [that] allows the claim for benefits.' RCW 51.32.185(9)(a)."

Legal Lesson Learned: The State of Washington's statutory presumption applies to heart attacks, and subsequent heart problems.

Note: See State of Washington statute: RCW 51.32.185, "Occupational diseases – presumption of occupational disease for firefighters and fire investigators."

(1)(a) In the case of firefighters as defined in RCW 41.26.030(17) (a), (b), (c), and (h) who are covered under this title and firefighters, including supervisors, employed on a full-time, fully compensated basis as a firefighter of a private sector employer's fire department that includes over fifty such firefighters, and public employee fire investigators, there shall exist a prima facie presumption that: (i) Respiratory disease; (ii) any heart problems, experienced within seventy-two hours of exposure to smoke, fumes, or toxic substances, or experienced within twenty-four hours of strenuous physical exertion due to firefighting activities; (iii) cancer; and (iv) infectious diseases are occupational diseases under RCW 51.08.140.

File: Chap. 6, Employment Litigation

NV: LIGHT DUTY - CAPTAIN SHOULDER INJURY - REFUSED LIGHT DUTY AFTER SURGERY – TTD PAYMENTS STOPPED

On Feb. 4, 2021, in Vance Taylor v. Truckee Meadows Fire Protection District, the Supreme Court of the State of Nevada, held (3 to 0) that the FD's offer of temporary, light-duty employment (40-hour work week; secretarial duties) was reasonable and in compliance with Nevada law. even if the new schedule required they get a babysitter, and even if he found the secretarial work to "demeaning or humiliating to him." The Court held that the workers comp administrator was justified in terminating the firefighter's temporary total disability benefits.

"Taylor contends that the temporary, light-duty employment offer of secretarial work was not 'substantially similar' to his preinjury position in location, hours, or benefits and was thus not a reasonable offer in accordance with NRS 616C.475. He further argues that the offer was not reasonable because it involved different job duties and a different chain of command than his preinjury position and because it was humiliating work. We disagree.

***

Notwithstanding the requirement to consider a light-duty employment offer's schedule, we conclude that the light-duty job offered to Taylor was substantially similar to his preinjury firefighter job in terms of hours. Taylor's preinjury employment required that he work 48 hours on and 96 hours off. The offered light-duty job required Taylor to work a typical administrative schedule, from 8 a.m. to 5 p.m. Monday through Friday,

totaling 40 hours a week. Although the administrative schedule was not identical to Taylor's firefighter schedule, it also did not require him to work unusual hours or an atypical timetable.

***

We further reject Taylor's contention that the administrative position was demeaning or humiliating to him. Secretaries and their assistants perform the necessary everyday tasks that are required to run organizations and businesses. The mere fact that an employee feels that a position is beneath him or her does not make the offer unreasonable or invalid."

Facts:

"In April 2016, while working as a fire captain for respondent Truckee Meadows Fire Protection District (TMFPD), appellant Vance Taylor severely injured his shoulder during a training exercise. Taylor filed a claim for workers' compensation and received temporary total disability (TTD) benefits through respondent Alternative Service Concepts, LLC (ASC). While he awaited surgery on his shoulder, in lieu of TTD benefit payments, Taylor accepted light-duty work at TMFPD's administrative office, where he worked as a secretary Monday through Friday from 8 a.m. to 5 p.m. This position required Taylor to complete data entry

and other filing projects under the supervision of the administrative office's secretary. Three months after his injury, Taylor underwent surgery on his shoulder and began receiving TTD benefits again.

***

In September 2016, after Taylor's doctors released him to light duty, TMFPD offered Taylor temporary, light-duty employment in the same administrative position he filled prior to surgery, Taylor refused the light-duty employment offer, claiming that the offer did not comply with Nevada law, as it changed his work schedule and required him to perform tasks and duties that are "humiliating and unlawful." Because TMFPD extended a temporary, light-duty employment offer to Taylor, ASC terminated Taylor's TTD benefits at that time.

***

Taylor administratively appealed ASC's decision to terminate his TTD benefits. He argued that the light-duty position was not substantially similar to his preinjury position in respect to location, hours, wage, supervisors, and job duties. The hearing officer upheld ASC's termination of benefits, finding that TMFPD made a valid offer of temporary, light-duty employment, which Taylor rejected. Taylor appealed that decision, and the appeals officer affirmed the hearing officer's decision. Taylor then petitioned the district court for judicial review, claiming that the denial of TTD benefits was erroneous. The district court denied Taylor's petition for judicial review, and this appeal followed.

***

Under NRS 616C.475(8), the temporary, light-duty employment offered by the employer must (1) be '*substantially similar* to the employee's position at the time of his or her injury in relation to the *location* of the employment and the *hours* the employee is required to work'; (2) '[p]rovide[ ] a *gross wage* that is . . . *substantially similar* to the gross wage the employee was earning at the time of his or her injury'; and (3) '[have] the *same employment benefits* as the position of the employee at the time of his or her injury.' NRS 616C.475(8)(a)-(c) (emphases added). The purpose of NRS 616C.475(8) is to ensure that the employer makes a legitimate offer of employment, rather than one that imposes an unreasonable burden on the employee. *See EG & G Special Projects, Inc. v. Corselli,* 102 Nev. 116, 119, 715 P.2d 1326, 1328."

Legal Lesson Learned: The Nevada statute is designed to 'encourage" employees to accept light duty and get back to full duty as soon as possible.

Note: The FD offered him same gross wages during light duty.

> "The gross wage that Taylor would have received if he had accepted the temporary, light-duty employment offer was an average of his past 12-week wage history and amounted to $10,115 a month. Taylor argues that the light-duty employment offer was invalid because it did not include overtime pay and did not provide an ability to bank holiday compensatory time. The record shows, however, that the 12-week period used to calculate the offered wage included two holidays, as well as a significant amount of overtime pay—189 hours to be exact. We conclude that because holiday time and overtime pay were included in this gross wage, the light-duty position provided a substantially similar wage and the same employment benefits as the preinjury position."

File: Chap. 6, Employment Litigation

IL: "CATASTROPHIC INJURY" – LIFETIME HEALTH INSURANCE UNDER STATE LAW – CITY CAN'T RE-DEFINE QUALIFICATIONS

On Feb. 1, 2021, in IAFF Local 50 v. The City of Peoria, the Appellate Court of Illinois (Third District) held (3 to 0) that the Circuit Court of Peoria County properly awarded summary judgment to the IAFF, holding that the City cannot enact an ordinance that seeks to define (and therefore limit) the state's Public Safety Employee Benefits Act (Act), particularly after Illinois Supreme Court has already reviewed the state law and its legislative history.

> "Peoria City Code § 2-350(b) (amended June 12, 2018). 'Catastrophic injury' is defined as '[a]n injury, the direct and proximate consequences of which permanently prevent an individual from performing any gainful work.' *Id*. 'Gainful work' is defined as '[f]ull- or part-time activity that actually is compensated or commonly is compensated.' *Id*. "Injury" is defined as: 'A traumatic physical wound *** directly and proximately caused by external force ***, chemicals, electricity, climatic conditions, infectious disease, radiation, virus, or bacteria, but does not include:
>
> (1) Any occupational disease; or
> (2) Any condition of the body caused or occasioned by stress or strain.
>
> ***
>
> We conclude that the City's definitions of 'catastrophic injury,' 'injury,' and 'gainful work' were inconsistent with the substantive requirements of the Act, and the ordinance was not a valid exercise of home rule authority."

Facts:

> "The Public Safety Employee Benefits Act (Act) (820 ILCS 320/1 *et seq*. (West 2018)) provides that a city must pay 'the entire premium of [its] health insurance plan' for a full-time firefighter, the firefighter's spouse, and the firefighter's dependents if the firefighter suffers a catastrophic injury or is killed in the line of duty. 820 ILCS 320/10(a) (West 2018). The Act does not define the terms 'injury' or 'catastrophic injury.'
>
> ***
>
> The City passed an ordinance on June 12, 2018, amending section 2-350 of the Peoria City Code. Peoria Ordinance No. 17584 (approved June 12, 2018). The ordinance amended the application procedures for those seeking the Act benefits in the City, and it also defined terms used but not defined in section 10 of the Act, specifically defining 'injury,' 'gainful work,' and 'catastrophic injury.'
>
> ***
>
> The circuit court held that the Union had associational standing and granted summary judgment in favor of the Union. The circuit court held that the terms 'catastrophic injury' and 'injury' as used in Act were 'not ambiguous when considering the full text of [section 10] along with the [j]udicial opinions construing and defining those terms.'
>
> ***
>
> In *Krohe [v. City of Bloomington*, 204 Ill. 2d 392 (2003)], the Illinois Supreme Court found that the phrase 'catastrophic injury' as used in section 10(a) of the Act was ambiguous. *Krohe*, 204 Ill. 2d at 397. In *Krohe*, a firefighter who had been awarded a line-of-duty disability pension brought a declaratory judgment action seeking to have the city pay his and his family's health insurance premiums pursuant to section 10(a) of the Act. *Id*. at 394. The city declined to pay, arguing that the firefighter did not have a 'catastrophic injury' as required by section 10(a) of the Act. *Id*. at 396. The court found that, while the statute was facially ambiguous, the legislative history was unambiguous, and the court ruled that the legislative intent was for the phrase 'catastrophic injury' in section 10(a) of the Act to be synonymous with an injury resulting in a line-

of-duty disability under section 4-110 of the Illinois Pension Code (Code) (40 ILCS 5/4-110 (West 2018)). *Krohe*, 204 Ill. 2d at 400.

> *[Krohe* - Footnote 1]: 'Line of duty disability pensions are paid to firefighters who "as the result of sickness, accident or injury incurred in or resulting from the performance of an act of duty or from the cumulative effects of acts of duty, [are] found * * * to be physically or mentally permanently disabled for service in the fire department." 40 ILCS 5/4-110 (West 2000).'

***

After the Illinois Supreme Court has construed a state statute, 'that construction becomes, in effect, a part of the statute and any change in interpretation can be effected by the General Assembly if it desires so to do.' *Village of Vernon Hills v. Heelan*, 2015 IL 118170, ¶ 19 (quoting *Mitchell v. Mahin*, 51 Ill. 2d 452, 456 (1972))."

Legal Lesson Learned: Cities under their "home rule" authority cannot enact an ordinance limiting or defining health benefits provided under state statute.

File: Chap. 7, Sexual Harassment

GA: TRANSGENDER FIRE CHIEF – LAWSUIT DISMISSED – EEOC CHARGE NOT SUBMITTED UNDER OATH – "AT WILL" EMPLOYEE

On Jan. 28, 2021 in Rachel Mosby v. City of Byron, Georgia, U.S. District Court Judge Clay D. Land granted the City's motion to dismiss; plaintiff's EEOC Charge was never signed under oath (not "Verified" as required by federal law); also Judge held that the plaintiff is an "at will" employee not protected by a civil service commission. Chief Mosby was fired 18 months after first coming to work for her rural fire department as a woman.

> "This record, as it stands today, does not contain a verified charge, and 'the statute mandates that charges be made under oath or affirmation.' *Vason*, 240 F.3d at 907. Since 'verification is an absolute condition precedent to suit' under Title VII (and the ADA) in this circuit, Mosby's lack of verification demands one simple ruling—she did not satisfy an absolute condition precedent before filing her lawsuit. *See Vason v. City of Montgomery*, 86 F. Supp. 2d 1130, 1133 (M.D. Ala. 2000), *aff'd*, 240 F.3d 905 (alteration adopted). Consequently, Mosby's Title VII and ADA claims are barred as a matter of law."

Facts:

> "Because many of the substantive facts aren't important to the particular issues before the Court, a lengthy factual narrative is unnecessary. However, what is important, is that Plaintiff Rachel Mosby served as the City of Byron's Fire Chief for 11 years until she was terminated.
>
> ***
>
> Before filing a lawsuit that concerns violations of Title VII or the ADA, Congress explicitly and unmistakably mandated that a plaintiff submit a Charge of Discrimination to the Equal Employment Opportunity Commission which 'shall be in writing under oath or affirmation and shall contain such information and be in such form as the Commission requires.' 42 U.S.C. § 2000e-5(b). In addition to Congress' charge-filing requirement, the Commission's regulations mandate that "[a] charge . . . *shall be verified*." 29 C.F.R. § 1601.9 (emphasis added).
>
> ***

This record, as it stands today, does not contain a verified charge, and "the statute mandates that charges be made under oath or affirmation." *Vason*, 240 F.3d at 907. Since "verification is an absolute condition precedent to suit" under Title VII (and the ADA) in this circuit, Mosby's lack of verification demands one simple ruling—she did not satisfy an absolute condition precedent before filing her lawsuit.

***

Since the City's Personnel Polices clearly say that Mosby is an at-will employee and they are silent as to any for-cause requirement, the City is correct that Mosby did not have a property interest in her employment when the City terminated her, and the Court GRANTS the City's dismissal motion as to Mosby's due process claims.

***

Pleading issues aside, a public official, like Mosby, cannot recover for defamation unless she can prove that "the statement was made with `actual malice'—that is with knowledge that it was false or with reckless disregard of whether it was false or not." [Doc. 10, p. 19 (quoting *Sullivan*, 376 U.S. at 279-80)]. Importantly, she never points out which statements were false."

Legal Lesson Learned: EEOC charges must be "verified" (signed under oath); "at will" employees may be terminated without cause; public officials cannot sue for defamation without proof of "malice." If this case had gone to trial, the jury might have seriously questioned the actions of the employer.

Note: See: Feb. 19, 2021: "Judge dismisses discrimination lawsuit by transgender fire chief."
SAVANNAH, Ga. — A federal judge has dismissed a discrimination lawsuit by a transgender fire chief who led a rural Georgia city's fire department for more than a decade, then got fired 18 months after first coming to work as a woman."
See also: "Federal judge dismisses discrimination lawsuit by transgender fire chief in Georgia."

File: Chap. 8, Race / National Origin Discrimination

MA: AFRICAN AMERICAN FF – FIRED "UNFIT FOR DUTY" – LAWSUIT DISMISSED AGAINST CITIZEN NOT ON TOWN BOARD OF SELECTMEN

On Feb. 19, 2021, in Gerald Alston v. Stanley Spiegel, the U.S. Court of Appeals for the First Circuit (Boston), held (3 to 0) that the U.S. District Court properly dismissed Alston's race discrimination, retaliation case against a nonmember of the Town of Brookline Board of Selectmen who fired him from the Brookline Fire Department. Stanley Spiegel is not on the Board, but is a citizen elected as a member of the 240 member "Town Meeting."

"On February 13, 2015, Alston was placed on paid administrative leave. He asserts that despite the Selectmen's publicly conciliatory stance toward him, 'they tacitly encouraged their unofficial surrogates, including advisory committee member and town meeting member, Stanley Spiegel to smear Mr. Alston and undermine public support for him.' Just over a year later — on February 16, 2016 — the Board terminated Alston's paid administrative leave. Alston was formally dismissed from his firefighter position by unanimous vote of the Board on October 5, 2016.

***

We need go no further. For aught that appears, Spiegel was at most a peripheral player in the evolving saga of Alston's difficulties with the Town, the Board, and the Department. Alston has had three opportunities to plead his claims against Spiegel, and he has come up empty. There simply are no facts pleaded in the SAC sufficient to ground a reasonable inference that Spiegel is liable to Alston for any of the wrongs alleged. Put

bluntly, the facts set forth are too meager to lift Alston's claims over the threshold of conjecture. We therefore affirm the judgment of the district court dismissing Alston's claims. We retain appellate jurisdiction over Alston's appeal insofar as it relates to his claims against other defendants."

Facts:

"Alston is a black firefighter who began working for the Brookline Fire Department (the Department) in 2002. On May 30, 2010, Paul Pender, a lieutenant in the Department, left a voicemail on Alston's telephone in which he used a racial slur when referring to Alston. Alston reported the lieutenant's comment to the Department's chief operating officer, but the Department took no corrective action. The Department did, however, communicate to Pender that Alston had reported the incident. Pender responded by telling Alston that reporting him 'was the stupidest thing [Alston] could have ever done.'

***

Alston further alleges that, in early 2014, the Town arranged for a psychiatrist to deem Alston "unfit for duty" and placed him on unpaid leave with the intent to terminate his employment. In December of that year, Alston's case received wider publicity in the media. Thereafter, Alston says, the Town retaliated against him by giving Spiegel access to Alston's personnel file.

***

On February 13, 2015, Alston was placed on paid administrative leave. He asserts that despite the Selectmen's publicly conciliatory stance toward him, 'they tacitly encouraged their unofficial surrogates, including advisory committee member and town meeting member, Stanley Spiegel to smear Mr. Alston and undermine public support for him.' Just over a year later — on February 16, 2016 — the Board terminated Alston's paid administrative leave. Alston was formally dismissed from his firefighter position by unanimous vote of the Board on October 5, 2016.

***

Spiegel is an elected Town Meeting member and an appointed member of the Advisory Committee. Alston alleges that Spiegel has frequent contact with the Board and that (until Alston sued him) he acted as an 'unofficial surrogate' for the Board.

***

According to the SAC [Second Amended Complaint], Spiegel distributed a 'letter to the editor,' by email, to members of the Town Meeting on September 19, 2013. The letter, authored by a retired black fire lieutenant, had been passed out at a public meeting the day before by Selectwoman Nancy Daly. It attacked Alston's credibility and cast him in a negative light. In the same email, though, Spiegel directed Town Meeting members to a quote from Selectwoman Daly taken from that day's local newspaper in which she cautioned against a rush to judgment before the remainder of the facts relevant to Alston's complaint could be made public. Spiegel echoed Daly's sentiments about reserving judgment and noted only that the letter provided some 'additional insight.'

***

We begin with Alston's race discrimination claim. One insurmountable obstacle that blocks this claim is that the SAC [Second Amended Complaint] never alleges that Spiegel's conduct was motivated by Alston's race. Nothing in the SAC suggests that Spiegel considered Alston's race either when deciding to distribute the letter or when confronting Alston supporters. Nor does the SAC include any allegation of racial animus on Spiegel's part. In the absence of such allegations, Alston has utterly failed to make out a claim for racial discrimination under section 1981. See Fantini v. Salem State Coll., 557 F.3d 22, 33-34 (1st Cir. 2009).

***

Nor does the SAC allege that Spiegel had any contact at all with Alston (personal or professional) or that Alston even knew who Spiegel was. One swallow does not a summer make, and the two unconnected events described in the SAC cannot plausibly be characterized as a campaign of harassment sufficient to chill the speech of a 'reasonably hardy individual[].' Agosto-de-Feliciano, 889 F.2d at 1217.

***

Because the SAC fails to plead any factual support for the existence of a conspiracy, the district court's dismissal of Alston's section 1985 claims was unimpugnable.?

Legal Lesson Learned: There was no proof of racial discrimination, retaliation, or conspiracy by this elected member of the Town Meeting.

File: Chap. 8, Race / National Origin Discrimination

IL: CHICAGO FF / PUERTO RICO - "HOSTILE WORK ENVIRONMENT" PROCEED– MADE INTERNAL COMPLAINTS

On Feb. 18, 2021, in Robert G. Alamo v. The City of Chicago, et al., U.S. District Court Judge Sharon Johnson Coleman, U.S. District Court for the Northern District of Illinois (Eastern Division) held that the lawsuit by the former fighter, may proceed against the City on his claim of "hostile workplace environment" since he made complaints to Supervisors and to Internal Affairs. His other claims in the lawsuit of national origin, race and disabilities discrimination were dismissed; he was fired after being diagnosed as "unfit for duty" (PTSD).

"On September 13, 2011, Alamo reported for duty at Engine 55. He was not feeling well, so he decided to go to the bunkroom to lie down, at which time he told a coworker to come get him if a call came in. Later that day, Captain Pat Stefan awakened Alamo by pushing and shaking him, and shouting 'Mother fucker get up. You missed the run. You motherfucker. You lazy mother fucker. You piece of shit.' Alamo testified that during this altercation, Captain Stefan told him he did not like 'his kind.' He also testified that 'I believe Captain Stefan called me a spic.' During this incident, Captain Stefan chest bumped Alamo resulting in a contusion. After this incident, Alamo called the police department and filed a report. Two days after the incident with Captain Stefan, Alamo went on a medical 'lay-up' for what Alamo described as chest pains, stress, and anxiety. Alamo testified that while he was on lay-up, other firefighters harassed him at his home during 'wellness checks.'

***

Alamo has presented evidence that he complained to his supervisors of the harassment. For example, on a form in evidence dated January 2, 2012, Alamo explains why he believes he was subjected to a hostile work environment based on the September 2011 events with Captain Stefan and that he had also submitted a Form 2 to the Internal Affairs Division ('IAD'). Alamo also filed a Form 2 to the IAD dated February 22, 2013 explaining that Captain Stefan stated he didn't like Alamo's 'kind.' Other evidence of notice includes Lieutenant Bliss' testimony that after Alamo informed him of the incident with Captain Stefan, Bliss called Chief Steven Chikerotis to review the incident. Further, Alamo testified at his deposition that he turned in numerous Form 2s to his chain of command about the harassment and that he reported the racial slurs and that other firefighters were throwing away his food to his supervisor Lieutenant Bliss."

***

Looking at the totality of the evidence, it is 'significant that the harassment occurred in an atmosphere where firefighters live and serve together and in which mutual interdependence is an essential factor in effectiveness and, at times, survival.' *Alamo*, 864 F.3d at 551.

Facts:

"Alamo, who is Latino and was born in Puerto Rico, began working for the Chicago Fire Department ('CFD') in February 2006, six months after he returned home from active combat duty in Afghanistan. Between October 2009 and March 2012, Alamo was assigned to Engine 55. Alamo testified at his deposition that shortly after he began working at Engine 55, a co-worker called him racially-charged names like 'fucking Puerto Rican' and 'spic' on an almost daily basis. Alamo further testified that while working at Engine 55, co-workers tampered with his personal property and threw away his food. He also testified that he was temporarily assigned to other fire stations more than his co-workers. At his deposition, Alamo stated that he reported this misconduct to his supervisor Lieutenant Charlie Bliss.

***

In March 2012, Alamo submitted authorizations to return to work signed by his treating physicians. Thereafter, the CFD requested more medical documentation and that Alamo undergo psychological testing, which took place in May 2012. After Alamo was cleared to go back to work in February 2013, he was assigned to Engine 81, which significantly increased the time it took him to commute to work. Alamo avers that Lieutenant Michael Daniels told him that he had been moved to Engine 81 because he behaved badly. Alamo further contends that after he returned to work in February 2013, he was written up for many infractions despite not having any serious issues between 2006 and 2011.

***

In 2015, Alamo was transferred to Third District, Rescue 1 Tower Ladder 63, where his supervisors warned him that they had 'heard about his reputation.' During his time at Tower Ladder 63, Alamo requested to become certified for the Office of Fire Investigations, but had to use vacation time to attend the course.

***

In 2016, Alamo was under considerable stress and a superior officer advised him to go on another medical lay-up. In early 2017, the CFD's medical director Dr. William Wong requested that Alamo undergo a fitness for duty evaluation based on Alamo's medical lay-ups for stress, his erratic behavior observed by medical staff and other CFD employees, and his disciplinary record. In February 2017, the CFD's medical department concluded that Alamo was not fit to return for duty. In July 2017, the CFD sent Alamo a letter stating that he needed to either resign or go on an unpaid medical leave of absence because he was not fit to return to duty and had exhausted all of his paid medical leave allowed under the relevant collective bargaining agreement ('CBA'). Alamo did not choose either of these options, but expressed his desire to go back to work. On August 9, 2017, the CFD terminated Alamo's employment.

***

The record also shows that the culmination of this harassment unreasonably interfered with Alamo's work performance because shortly after his interaction with Capitan Stefan and on the heels of the co-worker harassment, Alamo went on a voluntary medical lay-up for what he described and chest pains, stress, and anxiety."

Legal Lesson Learned: Internal complaints of hostile work environment, whether complaints about Supervisors or about fellow firefighters, should be promptly investigated and corrective action documented.

File: Chap. 8 – Race / National Origin Discrimination

MI: PALESTINIAN FF – NATIONAL ORIGIN CLAIMS UNPROVEN – ALLOWED BEARD, AND TO WORK NIGHTS DURING RAMADAN

On Feb. 4, 2021, in Alaa Saade v. City of Detroit, et al. U.S. District Judge Judith E. Levy granted the defendants motion for summary judgment. His claims of national origin discrimination, including not being promoted and disciplined for delaying ambulance response, dismissed for lack of proof. He was allowed when hired to wear a beard, and his claim of not being accommodated during Ramadan was proven false – he was allowed to work Night Shift.

> ***"Failure to Promote***
> In 2016, Plaintiff applied for job that would have led to a promotion to the rank of Shift Supervisor Grade II. (ECF No. 31, PageID.224.) He states that he was selected from many other candidates to take a written test and participate in an oral interview. Plaintiff states that he was the only candidate with a college degree, which was listed as one of the preferred job requirements.
> [Court]: Plaintiff admitted in his deposition that he was unsuccessful at the oral interview portion of the selection process…. Specifically, when asked if it was possible another candidate got the position because they outscored Plaintiff in other categories of the application, Plaintiff admitted, "I have no idea. Anything is possible…." Plaintiff was asked what evidence he had to support his claim of discrimination and he stated, "I don't have any evidence of that. Just what I feel happened because of the way it happened, so." (*Id*.) This is not enough to sustain a claim of discrimination.
>
> ***
> ***March 27, 2017 Discipline***
> On March 27, 2017, Plaintiff received a charge of discipline for delaying a run. During that time period, the City of Detroit's EMS response times were an ongoing issue within the department….When response times exceeded eight minutes, the run would be flagged and reviewed for compliance with EMS's policy to have an ambulance in motion within one minute of a call….
>
> At 6:42 am that morning while Plaintiff was on duty, a run came in for an attempted suicide. Before the paramedics were notified of the run, another employee, Jeff Gaglio, arrived early for work on his shift and relieved Plaintiff's partner Nataki Vickers. As Gaglio and Plaintiff (who was driving the ambulance) began pulling out into the driveway for the run, Plaintiff saw his shift relief, Chris Photiades, arrive at work. Plaintiff turned the ambulance around to switch with Phiotades. Phiotades and Gaglio then took the run, and arrived on the scene at 6:51 am—nine minutes after the run came in.
>
> [Court]: Accordingly, an unserved six-hour suspension and discipline letter are not sufficient to establish a materially adverse employment action. Therefore, Plaintiff has not established a prima facie case of discrimination for this claim.
>
> ***April 2017 Ramadan Accommodation Request***
> [Court]: Defendants' motion for summary judgment contains e-mail exhibits indicating that Plaintiff was granted accommodations during Ramadan in 2017. For example, on Wednesday May 17, 2017, Jason Bestard, the Administrative Lieutenant for the City of Detroit Fire Department EMS Division wrote to Plaintiff: 'In order to accommodate your request, you will be moved to the NIGHTS 1 shift as a FLOAT PARAMEDIC for the dates, May 28 through June 20th. You will return to your regular shift Sunday, June 25th…. These dates covered the entire period for which Plaintiff sought an accommodation in his initial email to his supervisors."

Facts:

> "Plaintiff is a practicing Muslim man, who is of Middle Eastern and Palestinian descent. (ECF No. 1, PageID.4.) Plaintiff began working for Defendant City of Detroit as an Emergency Medical Technician (EMT) in April 2014. (ECF No. 32, PageID.1540.) He attended and completed the Emergency Medical Services (EMS) training academy program and was promoted to the position of a paramedic with the City's EMS department in February 2016. (*Id*.)
>
> ***
>
> There is no material question of fact for a jury to decide on this question [of failure to accommodate]. Indeed, all of the evidence presented indicates that Plaintiff was accommodated. Accordingly, he has not set forth a prima facie case on this claim. Plaintiff's motion for summary judgment is denied on this claim, and the City's motion is granted."

Legal Lesson Learned: Plaintiffs in establishing a "prima facie" case of discrimination has the burden of proof to demonstrate a material adverse change in the terms of his employment.

File: Chap. 9, Americans With Disabilities Act

File: Chap. 10, Family Medical Leave Act, Military Leave

File: Chap. 11, Fair Labor Standards Act

CA: $3.4M FLSA SETTLEMENT – FF CASH IF DON'T USE MEDICAL BENEFITS - "REGULAR RATE" PAY IMPACT

On Feb. 8, 2021, in Eric Kelley, et al. v. City of San Diego, U.S. District Court Judge Gonzalo P. Curiel, U.S. District Court for Southern District of California, approved this settlement; if a firefighter's spouse has medical coverage from the spouse's employer, the City pay the firefighter "cash-in-lieu" of using City's insurance. In a 2016 decision by the U.S. Court of Appeals for the 9th Circuit, *Flores v. City of San Gabriel*, 824 F.3d 890, 895 (9th Cir. 2016), the City of San Gabriel provided a "Flexible Benefit Plan" where a designated monetary amount was furnished to each employee for purchase of medical, vision and dental benefits. Employees could decline the purchase of medical benefits on proof of alternate coverage, such as spouse's medical coverage. 9th Circuit held that these guaranteed cash payments (42% - 47%; over $1,000 per month) must be treated like other guaranteed employee payments [such as annual Medic bonuses] to increase the "regular rate" of pay when calculating overtime pay.

"The Parties now move for the Court to approve the Settlement Agreement, which provides that the City will pay a total sum of $3,400,000, comprised of three elements: A payment of back overtime of $1,575,000, liquidated damages of $1,575,000, and a payment by the City of $250,000 towards Plaintiffs' attorney's fees and litigation costs.

***

This case involves a wage-and-hour class action, wherein Plaintiffs are non-exempt City of San Diego employees of the City' Fire Department who argue that they are entitled to overtime compensation under the Fair Labor Standards Act ("FLSA"), 29 U.S.C. § 201, *et seq*. and seek unpaid overtime compensation, liquidated damages, and reasonable attorney's fees on the basis of the Ninth Circuit decision *Flores v. City of San Gabriel*, 824 F.3d 890, 895 (9th Cir. 2016). *Flores* held that employees who did not spend the whole of their allocated flex benefit plan dollars received the unused portions as cash, sometimes referred to as 'cash-in-lieu' ('CIL') payments, and that the employee's CIL payments must be included in the calculation of the regular rate of pay for overtime payments under FLSA. *Flores*, 824 F.3d at 901-02. *Flores* additionally held that the total value of flex benefit dollars provided by the flexible benefits plan ("FBP") became eligible for inclusion in the regular rate of pay when calculating overtime payments under FLSA because it was not a 'bona fide' plan. *Id*. at 903."

Facts:

> "Here, Plaintiffs allege that the City (1) failed to comply with *Flores* by not including CIL payments in the regular rate of pay when calculating overtime compensation, and not including all FBP payments in the regular rate of pay because such payments were not made pursuant to a "bona fide plan"; (2) violated the FLSA through its system of using compensatory time off ("CTO") to compensate Plaintiffs for overtime hours worked because the City's cash payments for unused CTO were not paid at the FLSA's regular rate of pay; (3) failed to properly count all hours worked by firefighters due to its 'Cycle Time' system; and (4) used a divisor and multiplier methodology that miscalculated the regular rate of pay.
>
> ***
>
> Here, after evaluating the Settlement Agreement under the totality of circumstances described above, the Court finds it to be a fair and reasonable resolution of a bona fide dispute over FLSA provisions. Accordingly, the Court GRANTS Plaintiff's motion for approval of settlement."

Facts in *Flores v. City of San Gabriel* case:

> "'Plaintiffs' are current or former police officers employed by the City of San Gabriel, California ('City'). The Plaintiffs brought suit against the City for violations of the Fair Labor Standards Act ('FLSA'), 29 U.S.C. §§ 201-19, alleging that the City failed to include payments of unused portions of the Plaintiffs' benefits allowances when calculating their regular rate of pay, resulting in a lower overtime rate and a consequent underpayment of overtime compensation. The Plaintiffs asserted that the City's violation of the FLSA was 'willful,' entitling them to a three-year statute of limitations for violations of the Act, and sought to recover their unpaid overtime compensation and liquidated damages.
>
> ***
>
> The City provides a Flexible Benefits Plan to its employees under which the City furnishes a designated monetary amount to each employee for the purchase of medical, vision, and dental benefits. All employees are required to use a portion of these funds to purchase vision and dental benefits. An employee may decline to use the remainder of these funds to purchase medical benefits only upon proof that the employee has alternate medical coverage, such as through a spouse. If an employee elects to forgo medical benefits because she has alternate coverage, she may receive the unused portion of her benefits allotment as a cash payment added to her regular paycheck.
>
> ***
>
> In 2009, an employee who declined medical coverage received a payment of $1,036.75 in lieu of benefits each month. This amount has increased each year, so that employees who declined medical coverage received $1,112.28 in 2010, $1,186.28 in 2011, and $1,304.95 in 2012. This payment appears as a designated line item on an employee's paycheck and is subject to federal and state withholding taxes, Medicare taxes, and garnishment.

***

Rather, because its payments of the Plaintiffs' unused benefits are not tied to hours worked or amount of services provided by the Plaintiffs, the City reasons, the payments are properly excluded under § 207(e)(2). This is a question of first impression in this and other circuits. While a close question, we conclude that the City's cash-in-lieu of benefits payments may not be excluded under § 207(e)(2) and therefore must be included in the calculation of the Plaintiffs' regular rate of pay."

Legal Lesson Learned: If your FD pays "cash-in-lieu" payments for unused medical or other benefits, consult with Legal Counsel and U.S. Department of Labor on its impact on the "regular rate" of pay for your personnel.

Note: See U.S. Department of Labor revised regulations. 29 CFR § 778.215, Conditions for exclusion of benefit-plan contributions under section 7(e)(4).
See Aug. 11, 2016 article from California law firm about *Flores* decision.

File: Chap. 12, Drug- Free Workplace

File: Chap. 13, EMS

MD: GOOD SAMARITAN IMMUNITY – DRUG USERS PASSED OUT IN VEHICLE - 911 CALLED, REFUSED EMS

On Feb. 24, 2021, in Damian Gerety and Brian Antkowiak v. State of Maryland, the Court of Special Appeals of the State of Maryland, held 3 to 0 that the convictions for possession of heroin are reversed, based on the state's Good Samaritan immunity statute.

"We hold that because the police were present at the scene and discovered the evidence supporting the charges "solely as a result" of a call for medical assistance, Mr. Gerety and Ms. Antkowiak were immune from prosecution, and we reverse the convictions.

***

Put another way, § 1-210 asks a different question: why were officers at the scene in the first place? If they were there solely as a result of a call for emergency medical assistance, the caller and recipient(s) of assistance are immune from prosecution for the listed charges, whatever evidence might properly have been seized."

Facts:

"This case probes the boundaries of the immunity provisions of Maryland's Good Samaritan Law, Maryland Code (2002, 2018 Repl. Vol.), § 1-210 of the Criminal Procedure Article ('CP"). That statute grants immunity from arrest, charge, and prosecution for certain drug and alcohol related crimes, and for sanctions flowing from those crimes, when the evidence supporting the charges is obtained "solely as a result" of a person seeking or receiving medical assistance for a suspected drug or alcohol overdose.

***

The circuit court denied the motions, convicted each of the single charge, and sentenced each to time served. We hold that because the police were present at the scene and discovered the evidence supporting the charges 'solely as a result' of a call for medical assistance, Mr. Gerety and Ms. Antkowiak were immune from prosecution, and we reverse the convictions.

***

On October 23, 2019, around 6:30 p.m., a man identifying himself only as Charles called 911 from the parking lot of a Dunkin Donuts on Camp Meade Road in Linthicum Heights. The dispatcher asked if he needed 'police, fire, or ambulance' and he responded, 'I was trying to get a police car.' He then told the dispatcher that a man and a woman were inside a parked SUV and appeared to be "either sleeping or they are really highed out." He provided the make and model of the vehicle, as well as the license plate number. In response, the dispatcher said, 'let me get the paramedics on the line.' Charles told the paramedics, 'I don't know if they're just sleeping, or-or they're really high-you know, really high.' At the end of the call, he said, 'I'm pretty sure they're okay; you know what I mean?' He added, 'I don't want to knock on their window and frighten them.' He asked if he needed to stay at the scene and the dispatcher told him he was free to go.

***

Anne Arundel County Police Officer Sam Silva responded to the Dunkin Donuts for a 'report of a check a sick or injured subject.' Emergency medical technicians from the fire department were on the scene already. An EMT advised Officer Silva that the SUV was no longer in the parking lot, but believed it had moved to a parking lot across the street, the lot serving a Checkers restaurant.

Officer Silva responded to that location while the medics remained behind. He discovered two people, later identified as Mr. Gerety and Ms. Antkowiak, in the front seats of an SUV. Mr. Gerety was in the driver's seat. Both were 'nodding out,' which Officer Silva knew to be 'a symptom of recent drug use.' He knocked on the passenger window[2] and Ms. Antkowiak lowered it. Officer Silva asked if they needed medical assistance and both parties responded 'No.' Officer Silva explained that he was there because a citizen reported that they were 'passed out in their vehicle' and 'was concerned for their wellbeing.' Mr. Gerety 'continued to nod in and out,' causing Officer Silva to ask him again if he was all right. Mr. Gerety responded 'Yeah, I'm good.'

***

Two other officers monitored the vehicle while Officer Silva ran Mr. Gerety's name (and the false name provided by Ms. Antkowiak) through computer databases. He discovered that Mr. Gerety had 'outstanding warrants' for his arrest. Officer Silva returned to the vehicle, directed Mr. Gerety to step out, and placed him under arrest.

***

The police searched the area around the driver's seat and found a 'clear triangular capsule' containing suspected cocaine. At that point, the police directed Ms. Antkowiak to get out of the vehicle, and Officer Silva conducted a full search of the SUV. He uncovered 'multiple colored and clear capsules containing an off-white powder substance' suspected to be heroin and Fentanyl; 'multiple clear, triangular vials containing a white, rock-like substance' suspected to be crack cocaine; 'several small trashcans containing a white, rock-like substance'; 'multiple unmarked pills'; 'several glass jars, with pink lids' containing suspected cocaine; a syringe; and a glass pipe.

***

The defense took the position that because the only concern raised by the 911 caller was the safety of Mr. Gerety and Ms. Antkowiak, who appeared to be high and possibly unconscious, the police response resulted directly from the call, so they fell within the immunity provisions of the law.

The State responded that the defendants were not immune under the agreed facts because they did not receive medical assistance—in fact, they refused it—and therefore were not actually experiencing a medical emergency. Alternatively, the State argued 'inevitable discovery' based upon Mr. Gerety's outstanding warrants, which justified a search of the vehicle independent of the welfare check.

***

Thus, between 2014 and 2015, the legislature extended immunity to a recipient of medical assistance, even if they did not suffer a medical emergency, so long as the person seeking medical attention reasonably believed the recipient was experiencing a drug or alcohol induced medical emergency. This change encourages drug users and bystanders alike to call 911 at the first sign of distress without fear that if they are mistaken about the extent of the emergency, that they could face criminal consequences for minor drug and alcohol offenses. That purpose was served here. Charles, a citizen with no apparent connection to Mr. Gerety or Ms. Antkowiak, called 911 to report his concern that they were passed out because they were 'really high.'

Although Charles asked initially for police to respond, the 911 operator understood this as a medical emergency call and connected Charles with the fire department. Officer Silva also was dispatched to the scene, but his purpose was to perform a welfare check, as his notes reflected and as he advised Mr. Gerety and Ms. Antkowiak. Section 1-210(c) does not require a citizen to evaluate the subject of a call medically, nor does it require there to be an emergency after all—the statute requires only that the caller act on a reasonable belief that the subject is experiencing a drug or alcohol induced medical emergency. That is exactly what happened here and, to its credit, the State does not contend otherwise."

Legal Lesson Learned: Many states have enacted Good Samaritan statutes to encourage drug users and others to call 911.

Note: "Although the Minnesota statute was enacted the same year as CP § 1-210 and the Pennsylvania statute followed passage of the Maryland bill, the Illinois and Vermont statutes preceded our Good Samaritan. Virginia makes explicit in its Good Samaritan statute that if the request for medical assistance is made during the execution of a search warrant or during an arrest, the immunity provisions don't apply. *See* Va. Code Ann. § 18.2-251.03.C (immunity protections do not apply 'to any person who seeks or obtains emergency medical attention for himself or another individual, or to a person experiencing an overdose when another individual seeks or obtains emergency medical attention for him, *during the execution of a search warrant or during the conduct of a lawful search or a lawful arrest*) (emphasis added)."

File: Chap. 13, EMS

MD: SWAT TRAINING IN POOL – CPR - BAG VALUE MASK MISSING, PD DIED – NOT FED. CASE – DIDN'T "SHOCK CONSCIOUS"

On Feb. 22, 2021, in Rebeca Sable v. Baltimore County Government, et al., United States Magistrate Judge J. Mark Coulson granted the defendants' motion to dismiss the County and two Medics since facts alleged in their complaint, while possibly showing negligence, did not meet the U.S. Supreme Court's "shock the conscious" test for alleged Federal violations of the Due Process Clause of 14th Amendment, as required by U.S. Supreme Court in *County of Sacramento v. Lewis*, 523 U.S. 833, 848 (1998). The Magistrate Judge, however, will give plaintiffs one last opportunity to file an amended complaint with additional facts, noting that the Medics enjoy qualified immunity under Maryland statute for mere negligence.

"As the training neared its conclusion, program facilitators instructed the participants to tread water for ten minutes. *Id*. During this exercise, Mr. Sable went underwater and remained there for approximately ten seconds before being removed from the pool. *Id*. Once on the pool deck, BCPD Officer Sean Dietz ('Officer

Dietz'), another medic, rendered assistance by patting Mr. Sable on the back and instructing him to 'cough it up.' *Id*. Medic Sloman 'observed Mr. Sable to be cyanotic in the face, with fluid coming from his mouth, without a pulse, and apneic." *Id*. BCPD medics provided Medic Sloman with a bag valve mask manual resuscitator and O2 bottle to begin treating Mr. Sable, **but the mask was missing from the unit**. [Emphasis added.]

For this reason, the manual resuscitator was inoperable for several additional minutes while medics searched for, and eventually obtained, a mask. *Id*. at 5. BCPD medics provided Mr. Sable with additional medical treatment, including the administration of five milligrams of epinephrine. *Id*.

***

There is no dispute that Officers Dietz and Luck are public officials…. While Plaintiffs contend Defendants actions constitute ministerial acts, this Court finds that the Officer Defendants actions as alleged are clearly discretionary. The Officer Defendants exercised 'judgment in the absence of a hard and fast rule' in supervising, implementing, and responding to the events that unfolded at the SWAT aquatic training exercise…. Accordingly, the Court agrees with the Officer Defendants that they are immune from liability for state common law torts."

Facts:

"According to the operative Amended Complaint, on May 6, 2018, Mr. Sable took part in a SWAT aquatic training exercise in Baltimore County, Maryland…. The BCPD Tactical Team facilitated the program at the Community College of Baltimore County ('CCBC') campus…. Mr. Sable, a York City, Pennsylvania police officer, participated in the program to become part of the York County, Pennsylvania Quick Response Team…. BCPD took responsibility for medical care during the event, and provided medical equipment, medics, lifeguards, and staff to attend to the health of the participants…. Baltimore County Fire Department ('BCFD') was stationed on scene for patient transportation as needed.

***

Pursuant to the training, Mr. Sable and other participants completed a series of physically demanding exercises in and out of the pool. *Id*. Among these exercises, program facilitators instructed Mr. Sable—while clothed in a long-sleeved shirt, pants and boots—to hold a ten-pound weight on his shoulders and tread water for two minutes. *Id*. Observers witnessed Mr. Sable struggle to remain above water. … And, when Mr. Sable exited the pool, a BCFD transport unit medic ('Medic Sloman') noted that Mr. Sable's lips appeared cyanotic and his face pale …. Nonetheless, Mr. Sable jogged around the pool. BCPD Officer Demetris Luck ('Officer Luck'), a medic, jogged alongside Mr. Sable….

***

As the training neared its conclusion, program facilitators instructed the participants to tread water for ten minutes. *Id*. During this exercise, Mr. Sable went underwater and remained there for approximately ten seconds before being removed from the pool. *Id*. Once on the pool deck, BCPD Officer Sean Dietz ('Officer Dietz'), another medic, rendered assistance by patting Mr. Sable on the back and instructing him to "cough it up…. " Medic Sloman 'observed Mr. Sable to be cyanotic in the face, with fluid coming from his mouth, without a pulse, and apneic…." BCPD medics provided Medic Sloman with a bag valve mask manual resuscitator and O2 bottle to begin treating Mr. Sable, but the mask was missing from the unit…. For this reason, the manual resuscitator was inoperable for several additional minutes while medics searched for, and

eventually obtained, a mask…. BCPD medics provided Mr. Sable with additional medical treatment, including the administration of five milligrams of epinephrine….

***

Mr. Sable was then transported by ambulance to Johns Hopkins Bayview Medical Center ('Bayview'). *Id*. Mr. Sable's cardiac activity was re-established after nineteen minutes of CPR and seven doses of epinephrine. *Id*. Upon arrival at Bayview's emergency department, Mr. Sable's heart rate was recorded as 106 BPM and his blood pressure was recorded as 218/34…. As a result, Mr. Sable was diagnosed with cardiac arrest… Three days later, on May 9, 2018, Mr. Sable died as a result of cardiac arrhythmia.

***

The United States Court of Appeals for the Fourth Circuit, in *Waybright v. Frederick County*, embraced these overarching principles concerning substantive due process and observed that the Supreme Court has, for half a century now, marked out executive conduct wrong enough to register on a due process scale as conduct that 'shocks the conscience,' and nothing less. The shocks-the-conscience test turns on degree of fault. For a due process challenge to executive action to succeed, the general rule is that the action must have been 'intended to injure in some way unjustifiable by any government interest.' As to 'negligently inflicted harm,' it is 'categorically beneath the threshold of constitutional due process.' And as to 'culpability falling within the middle range, following from something more than negligence but less than intentional conduct,' the Court has allowed that it may have constitutional implications, but only in special circumstances. As to what those special circumstances are, the Court has issued no general rule except that judges should proceed with 'self-restraint' and 'utmost care,' and make 'an exact analysis' of the circumstances presented 'before any abuse of power is condemned as conscience shocking.'

***

The Due Process Clause of the Fourteenth Amendment 'does not purport to supplant traditional tort law.' *Collins v. City of Harker Heights*, 503 U.S. 115, 128 (1992) (citation omitted). The Supreme Court has repeatedly rebuffed attempts to do so. *See County of Sacramento v. Lewis*, 523 U.S. 833, 848 (1998) ('[T]he due process guarantee does not entail a body of constitutional law imposing liability whenever someone cloaked with state authority causes harm.'); *DeShaney v. Winnebago County Dep't of Soc. Servs.*, 489 U.S. 189, 202 (1989) ('[T]he Due Process Clause of the Fourteenth Amendment . . . does not transform every tort committed by a state actor into a constitutional violation.').

***

Given the lenient standard of Federal Rule of Civil Procedure 15—that 'the court should freely give leave when justice so requires'—the Court will dismiss Plaintiffs' Amended Complaint without prejudice and afford Plaintiffs the ability to amend their complaint. Fed. R. Civ. P. 15(a)(2). Plaintiffs' prior amendments (ECF No. 27-2) functioned to add an additional defendant and claims to the complaint. Because the instant motion is the first test of the adequacy of Plaintiffs' complaint, Plaintiffs shall have one additional opportunity to amend. If desired, Plaintiffs shall file another amended complaint within thirty (30) days of this opinion."

Legal Lesson Learned: The U.S. Supreme Court's "shock the conscious" standard for Federal constitutional claims has greatly limited plaintiffs' attempts to shirt the qualified immunity defense in state courts.

Note: Other Federal cases involving training deaths have similarly applied the "shock the conscious" standard. See *Waybright v. Frederick County*, 528 F.3rd 199 (4th Cir. 2008), where recruit died in training on very hot day and call to 911 was delayed. **"**This conduct is a far cry from shocking the conscience. It was, rather, as the Board of Inquiry concluded, an under-reaction — that is, a misjudgment. Whether it was a negligent misjudgment is not for us to say, but misjudgments such as these are "categorically beneath the threshold of constitutional due process." *County of Sacramento [v. Lewis]*, 523 U.S. at 849, 118 S.Ct. 1708.

See also training death of Baltimore recruit Racheal Wilson in a townhouse live burn: Virginia Dean Slaughter v. City of Baltimore (4th Circuit, 2012).

"The facts alleged in this case reveal a sad story that might well support state tort claims or other state law claims. But to treat the Fire Department's conduct as a substantive due process violation would be to constitutionalize a state tort claim, which must only be done in the rarest of cases. As we observed in *Waybright*, 'where a claim sounds both in state tort law and substantive due process, state tort law is the rule and due process the distinct exception.' 528 F.3d at 205."
See also NIOSH Fire Fighter Fatality Report F2007-09 on death of Racheal Wilson: "Career Probationary Fire Fighter Dies While Participating in a Live-Fire Training Evolution at an Acquired Structure – Maryland."

File: Chap. 13, EMS

DE: EMT SLIP & FALL IN PARKING LOT – "FIREMAN'S RULE" DOES NOT APPLY - CAN SUE PARKING LOT OWNER

On Feb. 2, 2021, in Brandilyn Biggs v. Roberta C. Hall and B Merion II 1303 Wilmington, LLC, Judge Andrea L. Rocanelli, Superior Court of the State of Delaware, denied the defense motion for summary judgment, holding that the Fireman's Rule does not apply to the EMT and she may sue parking lot owner for damages (including pain & suffering).

"The Firefighter's Rule shall not be extended to EMTs under the circumstances of this case. Biggs was owed the duty of reasonable care. Viewing the facts in the light most favorable to Biggs, there is a genuine issue of material fact regarding whether AB Merion was negligent in its duty to maintain the Parking Lot. Therefore, AB Merion is not entitled to summary judgment."

Facts:

"Plaintiff Brandilyn Biggs ('Biggs') is an emergency medical technician ('EMT') for St. Francis Hospital in Wilmington, Delaware. This lawsuit involves two separate incidents: a motor vehicle accident on October 15, 2015 and a slip and fall on February 6, 2016. This decision addresses only the February 6, 2016 incident involving real property owned, managed and/or maintained by Defendant AB Merion II 1303 Wilmington, LLC ('AB Merion').

***

Biggs contends that she was injured in the parking lot of AB Merion's Delaware Avenue apartment building ('Parking Lot') when Biggs was dispatched to render medical assistance to a person in the vicinity of the Parking Lot. According to Biggs, she slipped and fell on ice while searching the Parking Lot for the individual who needed medical attention. Biggs contends that AB Merion was negligent by failing to maintain the Parking Lot in a safe condition for pedestrians.

***

AB Merion requests that this Court enter judgment in its favor as a matter of law on the grounds that AB Merion's duty to Biggs as an EMT was merely to refrain from willful or wanton conduct rather than to satisfy the ordinary duty of reasonable care. According to AB Merion, Delaware's 'Firefighter's Rule' [Footnote 1] is applicable to an EMT such as Biggs. AB Merion contends that there are no genuine issues of

material fact in dispute. Biggs opposes extension of the Firefighter's Rule to an EMT under these circumstances and also opposes summary judgment on the grounds that there are genuine issues of material fact in dispute. [Footnote 1: The rule was known as the 'Fireman's Rule' but the Court will use the gender neutral term 'firefighter' throughout.]

***

The Firefighter's Rule 'bars firefighters from recovering from private parties for injuries sustained in the course of carrying out their professional duties.' The Firefighter's Rule was adopted in Delaware by the Superior Court in 1988. *Carpenter v. O'Day* involved a firefighter who was injured at the scene of a fire. Consistent with standard procedures, Carpenter was ripping down interior walls of a burning building to prevent the fire from spreading. While pushing and pulling at plywood to tear down walls, Carpenter injured her back. The Delaware Superior Court held that the landowner was not responsible for Carpenter's injuries. Rather, recovery for the injured firefighter was limited to worker's compensation benefits.

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The Court held that the duty owed to firefighters responding to an emergency is to refrain from injuring the firefighter intentionally or by willful and wanton misconduct and to provide notice of hidden dangers of which the landowner is aware. The *Carpenter* Court emphasized that 'a *fire[fighter]* may not recover when he [or she] is injured from the very risk, created by the defendant's act of negligence, that required his [or her] professional assistance and presence at the scene.' The Court explained that adoption of the Firefighter's Rule was supported by (i) common law land-entrant classification of a firefighter; (i) assumption of the risk by the firefighter; and (iii) public policy concerns. First, firefighters enter the property during an emergency and the property owner cannot make the property reasonably safe for the firefighters under the emergency situation. Second, a firefighter assumes the risks inherent in firefighting. Third, public policy precludes recovery for the very risk that required the firefighter to be present at the property.

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The principles supporting the Firefighter's Rule are not applicable here. First, when Biggs entered the Parking Lot she was not a trespasser and she was not a guest. Second, Biggs did not assume the risk of slipping and falling in the Parking Lot by responding as an EMT to a call for medical assistance. Third, any public policy concerns militate in favor of requiring that parking lots be properly maintained so that persons who are authorized to use those parking lots will not be injured.

Accordingly, Biggs was owed the duty of reasonable care. This is the common law standard. The standard of care required of all defendants in tort actions is that of a reasonably prudent [person]. There are no exceptions which apply that change the standard of care applicable here."

Legal Lesson Learned: In many states, including Ohio, the Fireman's Rule normally would not allow fire, EMS or police to sue property owner for injuries; their sole remedy is workers comp.

Note: The Ohio Supreme Court in *Torchik v. Boyce*, 121 Ohio St.3d 440, 2009-Ohio-1248 (March 25, 2009) did allow a deputy sheriff to sue the contractor who built the deck on a house and the steps collapsed as the deputy investigated a burglar alarm. "Firefighters and police do not assume a special risk of injury from the work of independent contractors when the risk of being injured by the contractor's negligence applies equally to all. It would be illogical to insulate an independent contractor from a negligence claim simply because the person injured happened to be a police officer or firefighter acting in the scope of his or her official duties."

Some states have abolished the Fireman's Rule. For example, see Florida:Section 112.182 - "Firefighter rule" abolished.

(1) A firefighter or properly identified law enforcement officer who lawfully enters upon the premises of another in the discharge of his or her duty occupies the status of an invitee. The common-law rule that such a firefighter or law enforcement officer occupies the status of a licensee is hereby abolished. (2) It is not the intent of this section to increase or diminish the duty of care owed by property owners to invitees. Property owners shall be liable to invitees pursuant to this section only when the property owner negligently fails to maintain the premises in a reasonably safe condition or negligently fails to correct a dangerous condition of which the property owner either knew or should have known by the use of reasonable care or negligently fails to warn the invitee of a dangerous condition about which the property owner had, or should have had, knowledge greater than that of the invitee. Fla. Stat. § 112.182

Some states, like New York, have modified the Fireman's Rule to allow lawsuits for violations of building and fire codes. See summary of law enforcement cases.

File: Chap. 14, Physical Fitness, incl. Light Duty

File: Chap. 15, CISM, incl. Peer Support, Mental Health

File: Chap. 16, Discipline

IL: HORSEPLAY – CHICAGO FF GRABBED GENITALS OF MEDIC PROBIE – FF FIRED – MEDIC'S FED. CASE DISMISSED

On Feb. 23, 2021, in Patrick Blake v, William Regan and The City of Chicago, U.S. District Court Judge Manish S. Shan, U.S. District Court for the Northern District of Illinois (Eastern Division), granted the defendants' motion to dismiss; horseplay conduct was basis of discipline, improper, but facts don't support a Federal claim of "deprivation of constitutional rights."

> "After Chicago firefighter William Regan was found not guilty of battery in state court, former paramedic-trainee Patrick Blake filed this Section 1983 lawsuit against Regan, alleging that Regan seized Blake in violation of the Fourth Amendment when Regan grabbed Blake's genitals. Blake also filed *Monell* and indemnification claims against Regan's employer, the City of Chicago. For the reasons stated below, the defendants' motions to dismiss are granted.
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> Since Blake fails to allege a deprivation of constitutional rights under color of state law, his § 1983 claims against Regan and the City of Chicago fail.
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> ***

The allegations of the complaint make it certain that Blake was free to leave and Regan acted out of private authority. Blake's § 1983 claims against Regan and the City are dismissed with prejudice. Blake's state-law indemnification claim is based on the same conduct as his constitutional claim. A tort judgment is a prerequisite to any claim of payment under the Illinois Tort Immunity Act, and Blake cannot obtain one if he fails to allege a constitutional tort. *See* 745 ILCS § 10/9-102.

Facts:

"Patrick Blake attended college to be a paramedic…. As part of his training, he interned at the Chicago Fire Department…. Firefighter William Regan was Blake's instructor and superior…. One evening, while at the dinner table at the station, Regan asked Blake if Blake wanted to get in the shower together….Regan said that there was a pool in the basement, and that he could teach Blake how to swim and play the game Marco Polo naked…. Regan put his hand on Blake's left leg and grabbed Blake's genitals….
Blake did not consent to the touching…. Regan's touching was not a personal matter, was not motivated by personal animosity, and was not for sexual gratification…. Rather, an accepted culture of 'hazing and horseplay' existed within the Chicago Fire Department, and Regan's actions were meant to assert his authority, enforce the department's chain-of-command, initiate Blake into the fire department's culture, and test Blake's willingness to be a part of the team…. As an example of this culture, Blake cited a separate lawsuit, where five paramedics established enough facts of sexual harassment and battery within the Chicago Fire Department to proceed to trial…. *see Doe 1 et al. v. City of Chicago*, No. 18-cv-03054 (N.D. Ill.). ECF No. 404.[2] Blake also alleges that another fire captain sexually battered a deliveryman, and that the captain's coworkers lied to investigators to cover up the misconduct….

Blake informed fire department personnel of Regan's conduct and told at least four battalion chiefs that he wanted to report it…. The chiefs and other fire department personnel tried to stop Blake…. They said it was 'just firehouse horseplay' and that Regan wanted to apologize…. One chief said Regan 'was just playing around.' They also tried, but failed, to stop Blake from calling the police…. When the police arrived, the battalion chiefs and other fire department personnel discredited Blake's story and lied to the police about what happened, claiming that they didn't know who allegedly touched Blake….

The State of Illinois charged Regan with battery…. During the trial, Blake testified that Regan made inappropriate comments towards him at dinner, that Regan touched him in a sexual manner, and that Blake tried to and eventually moved his leg away from Regan…. Blake felt 'shocked' and 'basically frozen' in response to Regan's actions…. Regan was terminated from his position but found not guilty at trial….

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Blake alleges that Regan's conduct deprived him of his rights under the Fourth Amendment, which protects people against "unreasonable searches or seizures" by the government. U.S. Const., amend. IV.[5] A person is "seized" by the government if, "in view of all the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave." *United States v. Mendenhall*, 446 U.S. 544, 554 (1980). A seizure involving physical force occurs when the government official restrains a person's freedom to walk away. *Terry v. Ohio*, 392 U.S. 1, 16 (1968).

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Regan made inappropriate sexual comments to Blake about showering and swimming, and then touched Blake's leg and grabbed Blake's genitals without his consent…. These allegations amount to battery under Illinois state law. *See* 720 ILCS § 5/12-3. However, they do not amount to a seizure under the Fourth Amendment. Regardless of whether or not Regan was Blake's teacher, Regan did not physically restrain Blake from leaving, and Blake did not submit to Regan's authority.

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True, Blake froze when Regan grabbed him, but the encounter must be assessed in its entirety. *See Acevedo*, 457 F.3d at 725. Blake's complaint pleads that he extricated himself from Regan without limitation on his movement. He was not seized for purposes of the Fourth Amendment.

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Since Blake fails to allege a deprivation of constitutional rights under color of state law, his § 1983 claims against Regan and the City of Chicago fail."

Legal Lesson Learned: Horseplay in this case crossed the line; what a terrible example of inappropriate conduct by a training officer.

File: Chap. 17, Arbitration/ Mediation, Labor Relations

File: Chap. 18, Legislation