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Feb. 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 - 14 RECENT CASES REVIEWED

File: Chap. 1, American Legal System

WA: BURN BAN – SMALL FIRE – PD NEEDED WARRANT, "COMMUNITY CARETAKING" EXCEPTION DOESN'T APPY

On Jan. 26, 2021, in State of Washington v. Troy C. Restvedt, the Court of Appeals of the State of Washington (Division II) held (2 to 1; unpublished opinion) that the trial court trial court improperly ruled that the emergency aid function of the community caretaking exception applied to the officers' warrantless search of the property and reversed the homeowners convictions for violating the no burn ordinance and resisting arrest. The dissenting justice agreed with the trial court judge that no search warrant was required.

> "[T]he community caretaking exception is not the only exception to the warrant requirement. If officers were addressing a fire that was out of control, the exigent circumstances exception to the warrant requirement could have applied. *See State v. Rawley*, 13 Wn. App. 2d 474, 479, 466 P.3d 784 (2020). But here there was no evidence of any exigent circumstances

Facts:

> "In August 2018, the Lewis County Board of County Commissioners and Lewis County Fire Marshal passed Resolution 248, which expanded preexisting burn restrictions for all of unincorporated Lewis County. The City of Centralia also instituted a total burn ban.
>
> [From Dissenting opinion. "A drought combined with unusually high temperatures in summer 2018 created very dry conditions in western Washington. Fire danger was particularly high that summer. There was at least one wildfire on the Olympic Peninsula, an unusual event west of the Cascades. That wildfire became large enough to create smoky conditions in Seattle. Both Lewis County and the city of Centralia, like almost all local governments, had total burn bans in place. Troy C. Restvedt's property backed up against Seminary Hill, an area dense with large trees.']
>
> On August 17, 2018, the local fire department was called to Restvedt's residence in Centralia because of a report of an illegal burn. The person the fire department contacted responded aggressively and acted like he did not know that a burn ban was in effect.
>
> Later, Centralia police officers Andrew Huerta and John Dorff responded to another report of an illegal burn at Restvedt's residence. When they arrived, the officers smelled wood-burning smoke and saw smoke coming from the backyard area of the property. After walking to the backyard area, they saw a fire when looking in between two tarps that blocked the view of the area. The officers entered the area and encountered a man later identified as Restvedt and another man sitting by a small fire.
>
> Huerta advised Restvedt that there was a burn ban in effect and asked him to extinguish the fire. Restvedt became agitated and began to argue with Huerta about the fire. Restvedt eventually dumped two buckets of water on the fire while continuing to argue.
>
> Huerta then asked Restvedt for his name. Restvedt responded by cursing at Huerta and ordering the officers off his property. Both officers informed Restvedt that he was under arrest because of the fire. Huerta attempted to handcuff Restvedt, but Restvedt backed away and swatted at Huerta's hands. Restvedt fell, and Huerta finally was able to handcuff him.
>
> The State charged Restvedt with third degree assault, resisting arrest, and violating Lewis County Resolution 248.

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The trial court denied Restvedt's motion to suppress and dismiss. The court stated its reasoning in an oral ruling that the officers' entry onto Restvedt's property was justified under the community caretaking exception to the warrant requirement. The court entered written findings of fact consistent with the facts stated above, and entered the following conclusions of law:

> 2.1 The officers had a legitimate emergency concern in ensuring the defendant's fire was out during a county-wide burn ban.
>
> 2.2 The facts surrounding the fire department's report to dispatch and the smell of smoke the officers noticed when they got out of their vehicle was enough to justify the warrantless entry to the back part of the defendant's yard where the fire pit was located.

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The facts outlined above were presented at trial. The jury convicted Restvedt of resisting arrest and violating Lewis County Resolution 248. The jury acquitted him of third degree assault.

***

Restvedt argues that Huerta's and Dorff's warrantless entry into his backyard was a pretext for a criminal investigation. The State contends that the entry was motivated by an ongoing emergency. We agree with Restvedt.

***

Here, the evidence showed that Huerta and Dorff had a legitimate concern that the fire might spread to the trees in the nearby Seminary Hill nature area. The trial court made findings that there were dried leaves and flammable construction material near the fire and that the trees on Seminary Hill were only 15-20 feet away from the fire. These findings arguably support the trial court's conclusion that '[t]he officers had a legitimate emergency concern in ensuring the defendant's fire was out during a county-wide burn ban.' CP at 103. However, the officers' observations were made only after they had entered Restvedt's property. Therefore, these findings and the conclusion do not address whether that entry was lawful.

The trial court's ultimate conclusion that the officer's entry onto Restvedt's property was justified depends on the threshold question of whether the entry was a pretext for a criminal investigation. *Boisselle*, 194 Wn.2d at 11. The trial court did not specifically address this question.

***

Because the officer's actions were not totally divorced from the detection and investigation of criminal activity, we conclude that the warrantless entry into Restvedt's backyard was a pretext for a criminal investigation and therefore did not fall within the emergency function of the community caretaking exception to the warrant. The officers' entry was not *solely* motivated by a perceived need to provide immediate emergency aid.

Accordingly, we hold that the trial court erred in ruling that the emergency aid function of the community caretaking exception applied to the officers' warrantless search.

***

It is important to recognize that if the officers genuinely were interested only in the risk of the fire spreading, they had a readily available alternative: obtaining a warrant. One officer could have worked on requesting a warrant while the other officer kept a close eye - from a public street - on the fire. The officers also could have asked for permission to enter and talk to Restvedt about the danger of maintaining the fire, as the fire department previously had attempted, rather that entering without permission.

***

We reverse the trial court's order denying Restvedt's suppression motion related to the warrantless entry into Restvedt's backyard and remand for the trial court to dismiss Restvedt's convictions for resisting arrest and violating Lewis County Resolution 248."

Legal Lesson Learned: The dissenting judge agreed with the trial court that the police did not need a search warrant to enter the property.

Note: Dissenting Judge's opinion:
"The trial court concluded that given what the officers knew when they arrived, that there was a burn ban because of severe fire danger, that Restvedt was ignoring a fire department demand that he not burn fires in his backyard, that the fire department had asked for police assistance, that there were large trees nearby, and that they smelled smoke as soon as they arrived, this warranted them walking on the gravel driveway toward the backyard. Once they were near the backyard, they saw the fire through hanging tarps. All of this warranted them entering the backyard because they had 'a legitimate emergency concern in ensuring the defendant's fire was out during a county-wide burn ban' under the community caretaking exception to the warrant requirement."

File: Chap. 1, American Legal System

IOWA: ARSON – MOTORCYCLE HELMET / GLOVES / SUIT SMELLED GAS – USE NYLON EVIDENCE BAGS IF AVAILABLE

On Jan. 21, 2021, in State of Iowa v. Patrick Ryan Thompson, the Court of Appeals of Iowa upheld (3 to 0) the jury conviction for murder and arson; while the smell of gasoline on the defendant's motorcycle suit, helmet and gloves, when evidence reached the state crime lab "none of the items had traces of gasoline." The trial judge properly refused to give the jury instruction on "spoliation."

"The nylon bags are expensive, and departments do not always have them. In this case, while waiting for a warrant to collect the evidence, which took more than two hours, law enforcement officials attempted to locate a nylon bag and were unable to do so. The items were placed in a paper bag and then placed in the trunk of the collecting officer's car. When the paper bag was delivered to the lab for testing, it was placed in a nylon bag. Later, when the bag was opened, the smell of gasoline had dissipated.

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Thompson has failed to show there was an intentional destruction of evidence to necessitate a spoliation instruction.

Facts:

"At 12:24 a.m. on May 15, 2017, the Guthrie County Sheriff's Department was alerted to a house fire. Guthrie Center and Panora Fire Departments were dispatched to the scene. The Guthrie Center home belonged to Shirley Exline, who shared the home with her adult son, William Long, a grandchild, P.E., and a great grandchild, S.C. The two children perished in the fire. Patrick Thompson was charged with two counts of murder in the first degree, in violation of Iowa Code sections 707.1 and 707.2(1)(b) (2017), and arson in the first degree, in violation of Iowa Code sections 712.1 and 712.2(1)(b).

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The record shows that the Iowa Department of Human Services was involved with the family, investigating allegations of child sex abuse against both James and N.E. [unnamed person]. Cell phone records reveal that

James and his wife, Christene, were angry with Shirley [owner of house that was burned]. Those records also show James and Thompson discussed taking action to disable the vehicles that were available to Shirley, to prevent her from appearing for the next juvenile court hearing in the sex-abuse case set to occur on May 21, 2017. James stated he could not disable the cars himself nor could he transport Thompson to Shirley's home because he needed an alibi. Thompson's text messages show he volunteered that he could drive his motorcycle to Shirley's home wearing a helmet, park a few blocks away, and walk to the home.

***

Thompson drove a motorcycle and wore a motorcycle suit, helmet, and gloves. The morning after the fire, Thompson directed N.E. to deliver the suit, helmet, and gloves to a friend who lived nearby. When law enforcement officials arrived at the friend's home to collect the evidence, they reported it smelled of gasoline. There is no dispute that the proper collection method would be to place the evidence in a nylon bag. The nylon bags are expensive, and departments do not always have them. In this case, while waiting for a warrant to collect the evidence, which took more than two hours, law enforcement officials attempted to locate a nylon bag and were unable to do so. The items were placed in a paper bag and then placed in the trunk of the collecting officer's car. When the paper bag was delivered to the lab for testing, it was placed in a nylon bag. Later, when the bag was opened, the smell of gasoline had dissipated.

The record reveals that the motorcycle suit, helmet, and gloves were not placed in the preferred nylon bag. However, there were efforts made to obtain a nylon bag. There is no evidence in the record that the failure to obtain a nylon bag was intentional, and we will not elevate that failure to 'tantamount to intentional destruction.' Accordingly, the district court did not abuse its discretion in finding the evidence insufficient to generate a jury instruction on the spoliation inference and in refusing to instruct the jury on spoliation."

Legal Lesson Learned: A jury instruction on "spoliation" is only required under Iowa law when there has been an intentional act of destruction. Other states may require when evidence is loss due to negligence.

Note: Under Iowa case law: "Spoliation involves more than destruction of evidence. Application of the concept requires an intentional act of destruction. Only intentional destruction supports the rationale of the rule that the destruction amounts to an admission by conduct of the weakness of one's case." *State v. Langlet*, 283 N.W.2d 330, 333 (Iowa 1979).

List of other states that require when evidence is loss due to negligence.

File: Chap. 2, LODD / Safety

MI: ENGINE PROTECTING MVA SITE – CIVILIAN DRIVER, TEXTING - RAN INTO ENGINE - 10-30 YEARS, DEATH OF PASSENGER

On Jan. 14, 2021, in People of the State of Michigan v. Charles Edward Horn, the State of Michigan Court of Appeals, held (3 to 0; unpublished opinion) that the jury properly convicted the driver of reckless driving causing death (back seat passenger) and reckless driving causing impairment of a bodily function (defendant's daughter). The driver was texting his daughter's former boyfriend, telling him to stay away from her, when he ran into the back of the engine.

"Phone records showed that defendant's cell phone sent a text message at 11:01:34 p.m. The crash was called in at 11:02:08 p.m. The jury heard uncontested evidence that the average perception or response time is between 1.5 and 1.6 seconds and that defendant—assuming that he was proceeding at the speed limit—had 34 seconds from the time he entered onto the highway until the scene of the crash approximately .6 miles down the highway from the on-ramp, which was more than enough time to bring the vehicle to a complete stop or to change lanes. The fire truck was bright yellow, parked in a standard technique to assure the safety

of emergency responders, and had its emergency lights flashing, as did at least one other emergency response vehicle. The roadway was straight, and there was good visibility that night. Despite this, there was no evidence suggesting that defendant ever perceived the fire engine or that he attempted to brake or change lanes to avoid a collision. Given this evidence, the jury could fairly conclude that the defendant was operating the vehicle 'with wanton disregard of the potential consequences, i.e., death and serious injury.'"

Facts:

"Christopher Skupny, a paramedic with the Northville City Fire Department, testified that he responded to a rollover motor-vehicle accident occurring shortly before 11:00 p.m. on May 29, 2017, on the I-94 expressway. A Department of Natural Resources officer was already on site and his vehicle's flashing lights remained activated. The Ypsilanti Fire Department also responded with a small pickup truck and a bright yellow fire truck. Both vehicles also kept their emergency lights on. The fire engine angled itself partially in the shoulder of the traffic lane and partially in the road itself. After Skupny had stabilized the patient from the initial accident, he observed the fire engine 'lurch forward,' and he heard 'a very loud but very short bang, like an explosion' and realized that another vehicle had crashed into the fire truck. Three individuals in that vehicle were in critical condition.

***

Matthew Tingley, a road-patrol officer with the MSP, responded to the scene after the second crash and assisted with the investigation. Trooper Tingley testified that there was no evidence of skid marks or gouge marks that would suggest that defendant tried to brake or swerve. The trooper also described it as 'a long, straight, intact roadway.' There was nothing preventing a driver from transferring to the clear lane to avoid the fire truck. In defendant's vehicle, Trooper Tingley found a cell phone wedged in between the dashboard and the windshield. He identified it as defendant's phone because of a picture on the home screen, and he deactivated it to preserve the battery, securing the phone in evidence. The ensuing investigation revealed that defendant had been 'texting back and forth' with another individual, DB, 'most of that day and night.' Law enforcement obtained a search warrant for the text messages, and discovered that defendant sent a text message to DB at 11:01:34 p.m. The distance from the on-ramp to the crash scene was approximately .6 miles. The trooper calculated that, driving at the speed limit, it would take approximately 34 seconds to travel this distance. The crash was called in at 11:02:08 p.m.

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DB also testified for the prosecution, confirming that he and defendant had repeatedly communicated by text message and phone on the night of the crash. Defendant's daughter was DB's ex-girlfriend. DB described defendant as being upset and claimed that defendant had used 'fighting words' because defendant wanted him to leave his daughter alone."

Legal Lesson Learned: Texting while driving can have deadly consequences.

File: Chap. 2, LODD / Safety

DE: FIRE STATION "ROLLING BROWN OUTS" – 3 LODDs – FED. LAWSUIT DISMISSED – RISK DEATH INHERENT IN JOB

On Jan. 6, 2021, in Firefighter Brad Speakman, et al. v. Dennis P. Williams, et al., the U.S. Court of Appeals for the 3rd Circuit, held (3 to 0; non precedential) that the U.S. District Court judge properly granted defense motion to dismiss the lawsuit brought by the estates and survivors of the three deceased firefighters: Lieutenant Christopher

Leach, Senior Firefighter Jerry Fickes, and Senior Firefighter Ardythe Hope, and the three injured firefighters: Firefighter Brad Speakman, Senior Firefighter Terrance Tate, and Lieutenant John Cawthray. The five defendants were: (1) Dennis P. Williams (who served as Mayor of Wilmington from 2013 to 2017); (2) James M. Baker (Williams's predecessor, who was Mayor from 2001 to 2013); (3) Anthony S. Goode (WFD Chief of Fire from 2013 until 2017); (4) William Patrick, Jr. (Chief of Fire from 2007 until 2013); and (5) the City of Wilmington.

> "Applying Collins, [U.S. Supreme Court decision in Collins v. Harker Heights, 503 US 115 (1992) where sanitation worker died by fumes in manhole, and Court held that lawsuit by spouse alleging violation of U.S. Constitution, Due Process Clause was properly dismissed] we have concluded that, while the Due Process Clause does not guarantee public employees certain minimal levels of safety and security, 'a government employee may bring a substantive due process claim against his employer if the state compelled the employee to be exposed to a risk of harm not inherent in the workplace.' Kedra, 876 F.3d at 436 n.6 (citing Kaucher, 455 F.3d at 430-31; Eddy v. V.I. Water & Power Auth., 256 F.3d 204, 212-13 (3d Cir. 2001)). We agree with the District Court that the risk of injury or death is inherent to a firefighter's job and that any increase in risk on account of either the "rolling bypass" policy, the alleged understaffing, or any other alleged misconduct on the part of Defendants did not alter the fundamental nature of this inherent risk. See, e.g., Estate of Phillips v. D.C., 455 F.3d 397, 407 (D.C. Cir. 2006) ('[The Fire Chief's] deliberate indifference may have increased the Firefighters' exposure to risk, but the risk itself—injury or death suffered in a fire—is inherent in their profession.')"

Facts:

> [NIOSH Fire Fighter Fatality Investigation Report F2016-18, November 9, 2018: "On September 24, 2016, a 41-year-old lieutenant and a 51-year-old senior fire fighter died due to a floor collapse in a row house at a structure fire. Two other fire fighters were critically injured. One of the injured fire fighters, a 48-year-old female died on December 1, 2016, due to injuries sustained from the collapse and exposure to fire in the basement. Another fire fighter spent 40 days in a metropolitan hospital before being released. Two other fire fighters received burns during fireground operations and one fire fighter sustained an ankle injury. All three were treated and released from the hospital on the same day."]
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> ***
>
> "'Plaintiffs allege the injuries sustained were proximately caused by the policies and actions of Defendants regarding 'rolling bypass' [as well as understaffing and misrepresentations concerning their policies and actions,] which Plaintiffs contend violate their substantive due [process] rights guaranteed by the Fourteenth Amendment of the United States Constitution." Id. (citing JA115).
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> ***
>
> As the District Court recognized, 'the Supreme Court has 'always been reluctant to expand the concept of substantive due process because guideposts for responsible decision making in this [uncharted] area are scarce and open-ended.' Speakman, 440 F. Supp. 3d at 382 (quoting Collins, 503 U.S. at 125). In Collins, the Supreme Court relied on this reluctance to decide that the Due Process Clause does not provide 'a remedy for a municipal employee who is fatally injured in the course of his employment because the city customarily failed to train or warn its employees about known hazards in the workplace.' Collins, 503 U.S. at 117. 'Neither the text nor the history of the Due Process Clause supports petitioner's claim that the governmental employer's duty to provide its employees with a safe working environment is a substantive component of the Due Process Clause.' Id. at 126. Addressing the plaintiff's deliberate indifference theory, the Collins Court was unpersuaded that 'the city's alleged failure to train its employees, or to warn them about known risks of harm, was an omission that can properly be characterized as arbitrary, or conscience shocking, in a constitutional sense.' Id. at 128 (also explaining that Due Process Clause should not be interpreted to impose federal duties analogous to those imposed by state tort law and that such reasoning applies with special force to claims asserted against public employers because state law generally governs substance of employment

relationship). 'Decisions concerning the allocation of resources to individual programs . . . and to particular aspects of those programs . . . involve a host of policy choices that must be made by locally elected representatives, rather than by federal judges interpreting the basic charter of Government for the entire country.' Id. at 128-29."

Legal Lesson Learned: Station brown outs are most unfortunate, but Federal courts will not interfere with local government decisions on budgets and allocations of resources.

Note: Jan. 8, 2021: Oakland, CA has recently announced plans for browning out stations.
On Dec. 16, 2019: Woman Gets 30 Years in Arson That Killed 3 Delaware Firefighters

File: Chap. 3, Homeland Security, incl. Active Shooter, Cybersecurity

File: Chap. 4, Incident Command, incl. Training, Drones, High Tech

File: Chap. 5, Emergency Vehicle Operations

File: Chap. 6, Employment Litigation

ME: TOWN'S CHARTER REQUIRES EMPLOYEES & VOL. FF TO RESIGN IN ORDER TO RUN FOR ELECTION – FED. JUDGE UPHOLDS

On Jan. 21, 2021, in Megan Casey, et al. v. Town of Yarmouth, U.S. District Court Judge George Z. Singal, U.S. District Court, District of Maine held that the Town's Charter Amendment is constitutional based on the "balancing" test in U.S. Supreme Court's decision in Pickering v. Board of Education, 391 U.S. 563 (1968). The Charter Amendment was passed by referendum of voters in Nov. 2018, supported by a group calling itself "Yarmouth Citizens for Responsible Government.," seeking to avoid any conflict of interest by prohibiting any Town employee [apparently this includes volunteer firefighters], current teachers from serving on Council. Judge also held that the volunteer firefighter Mark Reinsborough [as well as his wife, and his father, a former volunteer firefighter] lacked "standing" since none expressed a current intent to run for Council.

"[T]he Supreme Court in Pickering 'declared that citizens do not surrender their First Amendment rights by accepting public employment.' Lane v. Franks, 573 U.S. 228, 231 (2014) (describing Pickering). However, the Court found that it was necessary "to . . . balance between the interests of the [employee], as a citizen, in commenting upon matters of public concern and the interest of the [government], as an employer, in promoting the efficiency of the public services it performs through its employees.' Pickering, 391 U.S. at 568.

Facts:

"Plaintiff Mark Reinsborough is employed by Yarmouth as a volunteer firefighter…. He is interested in running for the Yarmouth Town Council, but does not want to have to choose between service on the Council and his work as a volunteer firefighter. (Id.) If he were to leave his volunteer firefighter position, it would have negative ramifications for his state-issued EMT license. (Id.) He asserts that he 'might decide,

after careful deliberation, to publicly support a candidate for town council who is an employee of the town or the school department,' but also acknowledges that he 'might decide not to.'

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Plaintiff Thomas Reinsborough is a former Councilor and volunteer firefighter…. He is married to Elizabeth Reinsborough and is the father of Mark Reinsborough…. In 1992, during the elder Reinsborough's simultaneous tenures on the Council and with the fire department, he voted to accept a gift of exercise equipment for the exclusive use of Town employees, and he was the lone vote against a request from the Fire Chief to develop specifications and bids for a new fire truck…. Reinsborough also cast a vote, in 1993, against recommending the budget for approval at the Town Meeting…. Now, he would like to be able to decide for himself whether or not to vote for his son, his wife, Casey, or any other Town or school department employee who might run for Town Council in the future.

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In November 2018, the following amendment (the "Charter Amendment" or the "Amendment") was adopted by a referendum vote:

> Councilpersons ~~Councilmen~~ shall be qualified voters of the town and shall reside in the town during their term of office. They shall hold no office of emolument or profit under the town charter or ordinances. No Councilor shall hold any other paid office or position of employment with the Town or Department of
> Education (School Department) during the term for which the Councilor was elected to the Council. If a Councilor or Councilor-Elect shall fail to meet any of these qualifications, the Town Council shall, by resolution, declare the office of that Councilor or Councilor-Elect vacant.

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[T]he Court declines to find that the Town's resign-to-serve law burdens [Meghan] Casey's political speech. Rather, Casey, like all other Town and school department employees, remains free to campaign, advocate, and vote in local elections. Rather than restrain her speech rights, the Charter Amendment instead directly burdens Casey's ability to serve another term while she remains employed by the Yarmouth School Department and, at most, indirectly burdens her ability to run for another term. However, it is well-established that "[c]andidacy does not rise to the level of a fundamental right." Torres-Torres v. Puerto Rico, 353 F.3d 79, 83 (1st Cir. 2003) (per curiam); see also Claussen, 826 F.3d at 385 (holding that neither "the right to assume or hold office once elected" nor "the right to be a candidate for office" is a fundamental right).

***

Turning first to the three Reinsborough Plaintiffs, the Court finds that none of the Reinsboroughs have expressed a present or imminent desire to support a specific candidate affected by the Amendment. Instead, each has taken pains to disclaim any present intention to vote for a particular candidate, opting instead to keep an open mind as to how to cast any future ballot involving the Town Council. Nonetheless, they are opposed to any narrowing of the field of possible candidates, whether they would support those candidates or not. On the record presented, the Court concludes that none of Reinsborough Plaintiffs have established that they have actually endured, or will imminently endure, a specific injury from the Amendment.

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The balancing tests laid out in Pickering and Anderson [Anderson v. Celebrezze, 460 U.S. 780 (1983)] allow for an intermediate level of scrutiny that seeks to balance governmental interests against individual First Amendment rights."

Legal Lesson Learned: In many states, there are statutes prohibiting elected officials from voting on matters that could be a "conflict of interest." It is rather unusual to see a Charter that prohibits public employees from also serving on Council.

Note: The ACLU of Maine brought this lawsuit, and in their Aug. 27, 2019 Press Release stated: "Courts have consistently held that restrictions like the one adopted by Yarmouth must serve a substantial public interest, and Maine law even specifically anticipates that school teachers can and will serve as municipal officers. In August 2017, the town's own legal counsel concluded that prohibiting town or school employees from serving on the town council could violate their First Amendment rights."

See: Ohio Ethics Commission Opinion 91-002 (Aug. 21, 1991)

"[T]he Revised Code do not prohibit a city council member from serving as an unpaid volunteer paramedic with the fire department of the city, provided he receives no definite and direct personal pecuniary benefit from such service; and, (3) Division (D) of Section 102.03 of the Revised Code prohibits a city council member who serves as an unpaid volunteer paramedic with the fire department of the city from voting, deliberating, participating in discussions, or otherwise using the authority or influence of his office, either formally or informally, with regard to matters affecting the fire department and its personnel."

File: Chap. 6, Employment Litigation

PA: PROSTATE CANCER – FF DENIED WORKERS COMP – CANCER IS MORE FROM AGE - NOT GROUP I CARCINOGENS

On Jan. 6, 2021, in Michael Malone v. Workers' Compensation Appeal Board (City of Philadelphia), the Commonwealth Court of Pennsylvania held (3 to 0; unreported decision) that the finding by the Workers Compensation Judge that the firefighters' expert witness failed to show that prostate cancer is caused by Group 1 carcinogens. In 2011, the State enacted a statutory presumption for firefighter cancer, but firefighters must still introduce evidence that the firefighter's particular cancer [prostate cancer] is caused by the job.

"In the March 2, 2018 Decision, the WCJ found that Claimant did not establish that his prostate cancer was caused by his work as a firefighter and denied the Claim Petition. In doing so, the WCJ found Claimant's testimony wholly credible, noting that Employer did not dispute Claimant's description of his firefighting duties and experiences, presumably including the exposure to smoke and diesel exhaust of which Claimant testified. (Mar. 2, 2018 WCJ Decision, FOF ¶ 8.) Concerning the medical testimony, the WCJ found that Claimant's evidence did not establish that any IARC Group 1 carcinogens are known to cause prostate cancer.

***

As we have discussed, the WCJ's decision not to credit Dr. Singer's testimony was an exercise of discretion accompanied by a reasoned explanation, and it must, therefore, stand. We conclude that Claimant has not met his initial burden of demonstrating general causation under Section 108(r) of the Act, and he has not established that his cancer is an occupational disease under that section.

Facts:

"Claimant was diagnosed with prostate cancer in October 2010.

***

Claimant worked for Employer from 1983 to 2011 as a firefighter and lieutenant. (*Id.* at 1503-04.) At the time he was hired, Claimant underwent a physical examination that showed no signs of cancer. (*Id.* at 1503-

05.) Throughout his employment, on at least five separate occasions, he underwent similar examinations without signs of cancer. (*Id*. at 1504.) During most of his tenure with Employer, he was assigned to work at fire stations at which at least two diesel-powered vehicles were present. (*Id*. at 1505.) After Claimant joined Employer's Ladder 20 in 2009, Employer installed a system to capture diesel fuel emissions, but no such system was in place at any of Claimant's previous work locations. (*Id*. at 1506.) Claimant stated that he often noticed diesel fuel emissions present in indoor air at the stations where he worked, as evidenced by black soot on the walls and ceilings. (*Id*.) Throughout his career, Claimant was present in enclosed spaces of the firehouses while the diesel engines in the vehicles were routinely run at the beginning of each shift, and where diesel exhaust was present. (*Id*. at 1507-08.)

***

At many of those fires, Claimant sometimes wore a self-contained breathing apparatus (SCBA), which provides clean, breathable air to the wearer for a limited time. (*Id*. at 1509-10, 1513.) Employer's requirements for the use of SCBA, and Claimant's use thereof, increased over the course of his career. (*Id*. at 1511-13.) Throughout his career, however, there were various firefighting activities involving exposure to smoke for which Claimant was not required to wear, and did not wear, an SCBA.

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In support of the Claim Petition, Claimant presented two reports by physicians concerning his exposure to carcinogens at work and the potential results thereof. Claimant first presented a report by Dr. Singer. After reviewing Claimant's medical history, Dr. Singer concluded that Claimant's "exposure to carcinogens while working for [Employer] was a substantial contributing factor in the development of his prostate cancer." (R.R. at 3.) As to the sources of such carcinogens, Dr. Singer identified Claimant's exposure at fires to smoke, dust, and soot without an SCBA, and diesel exhaust from trucks at the stations where Claimant worked. (*Id*. at 1-2.) Smoke contains several substances identified by the International Agency for Research on Cancer (IARC) as "Group 1 carcinogens," meaning they have been definitively confirmed to cause cancer in humans. (*Id*. at 3; *see id*. at 6.) IARC Group 1 carcinogens "in smoke include arsenic, asbestos, benzene, benzo(a)pyrene, 1,3-betadiene, formaldehyde[,] and soot." (*Id*. at 3.) Additionally, common IARC Group 2A carcinogens (which are shown to be likely human carcinogens) found in smoke include creosote, PCBs, polycyclic aromatic hydrocarbons, and styrene. (*Id*.; *see id*. at 6.) Dr. Singer noted that Claimant had no family history of prostate cancer. (*Id*. at 3.) He also identified several scientific studies linking prostate cancer to firefighting. (*Id*.)

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Claimant next presented a report by Virginia M. Weaver, M.D., a professor of environmental health sciences and medicine at Johns Hopkins University.[7] Dr. Weaver opined that, based on her review of research on occupational exposure, firefighters are exposed to many recognized carcinogens, including numerous IARC Group 1 carcinogens. (*Id*. at 5-8.)

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Employer presented the deposition testimony and report of Tee L. Guidotti, M.D., who is board certified in internal medicine, pulmonary medicine, and occupational medicine. (*Id*. at 1034-35.) Dr. Guidotti also has a nonmedical degree in toxicology, has training in epidemiology, and has conducted research on cancer risk among firefighters. (*Id*. at 1035-36, 1040-42.) Dr. Guidotti evaluated and opined on Dr. Singer's methodology and the validity of his expert opinions. He stated that Dr. Singer's method for reviewing and relying on the various epidemiologic studies Dr. Singer cited was not a sufficient method for determining general causation, *i.e.*, whether a certain carcinogen is capable of causing a certain type of cancer. (*Id*. at 1084-85.) Dr. Guidotti discussed the importance of using a particular methodology when investigating whether a given agent causes a specific disease. (*Id*. at 1040, 1046-47.) Upon reviewing Dr. Singer's opinions, Dr. Guidotti could not discern any methodology employed by Dr. Singer, nor did Dr. Guidotti

believe that Dr. Singer gathered enough evidence to render an opinion on the etiology of any particular disease. (*Id*. at 1046-47, 1053, 1098.) He also noted that IARC Group 1 carcinogens are each related to different types of cancer, and that Dr. Singer did not appear to discuss which of those listed carcinogens are related to which types of cancer. (*Id*. at 1087-90.) Dr. Guidotti opined that Dr. Singer had not sufficiently reviewed information on general causation in order to offer an opinion about specific causation, *i.e*., the cause of Claimant's cancer in particular, which was the same opinion Dr. Singer offered in numerous other cases involving prostate cancer in firefighters. (*Id*. at 1429-30.)

***

Finally, Employer introduced a report by Janet L. Stanford, Ph.D., an epidemiologist who studies prostate cancer.[10] Dr. Stanford explained that observational studies have identified several risk factors that are associated with prostate cancer. (*Id*. at 1434.) These "include age, race/ethnicity, and family history of prostate cancer." (*Id*.) The median age of diagnosis with prostate cancer is 67. (*Id*.) Diagnosis at a younger age does not necessarily suggest an environmental cause, because diseases with genetic causes tend to present at an earlier age. (*Id*. at 1435.)

***

In the March 2, 2018 Decision, the WCJ found that Claimant did not establish that his prostate cancer was caused by his work as a firefighter and denied the Claim Petition. In doing so, the WCJ found Claimant's testimony wholly credible, noting that Employer did not dispute Claimant's description of his firefighting duties and experiences, presumably including the exposure to smoke and diesel exhaust of which Claimant testified. (Mar. 2, 2018 WCJ Decision, FOF ¶ 8.) Concerning the medical testimony, the WCJ found that Claimant's evidence did not establish that any IARC Group 1 carcinogens are known to cause prostate cancer. (*Id*. ¶ 9.) On this issue, the WCJ found Employer's medical expert witness, Dr. Guidotti, credible and Claimant's expert, Dr. Singer, not credible. (*Id*.)"

Legal Lesson Learned: Even though PA has a statutory presumption, the firefighter must still present expert testimony connecting his particular cancer with occupational exposures.

Note: PA Supreme Court explained in another case involving malignant melanoma where workers comp was granted. "In other words, the claimant must produce evidence that it is **possible** that the carcinogen in question caused the type of cancer with which the claimant is afflicted." See City of Phila. Fire Dep't v. Workers' Comp. Appeal Bd. (Sladek), 195 A.3d 197 (Pa. 2018) (Sladek II).

See PA Statutory Presumption:

> Section 301(f) was added to the Act by Section 2 of the Act of July 7, 2011, P.L. 251, and provides, in pertinent part, as follows:
>
> "Compensation pursuant to cancer suffered by a firefighter shall only be to those firefighters who have served four or more years in continuous firefighting duties, who can establish direct exposure to a carcinogen referred to in section 108(r) relating to cancer by a firefighter and have successfully passed a physical examination prior to asserting a claim under this subsection or prior to engaging in firefighting duties and the examination failed to reveal any evidence of the condition of cancer. The presumption of this subsection may be rebutted by substantial competent evidence that shows that the firefighter's cancer was not caused by the occupation of firefighting. . . . The presumption provided for under this subsection shall only apply to claims made within the first three hundred weeks [after the last date of employment in an occupation or industry to which a claimant was exposed to the hazards of disease]."

File: Chap. 6, Employment Litigation

NY: APPLICANT TO FDNY – 5 POINTS "RESIDENCY CREDITS" – AMENDED TAX RETURN INSUFFICIENT PROOF RESIDENCY

On Dec. 28, 2020, in John P. Atwell v. New Your City Fire Department, et al., Justice Carol E. Edmead, Supreme Court of the State of New York (New York County), 2020 NY Slip Op 34353(U), dismissed the applicant's petition to overturn the decision of the FD's Candidate Investigation Division (CID); the Notice Of Examination Notice advised applicants that amended tax returns are not sufficient proof of residency in the city. His score on the Computer-Based Test of 99, without the 5 extra residency points, moved him on the hiring list from 552 to 5594.

> "Here, there was plainly a 'rational basis' for the CID's decision to deny Atwell's application for a residency credit, since the evidence in the administrative record regarding Atwell's alleged NYC residency only included his amended tax return. As noted earlier, the rules set forth in the NOA [Notice Of Examination] plainly provided that the FDNY would not consider amended tax returns as proof of residency. *See* verified answer, exhibit 1. Therefore, the court concludes that the CID's decision to deny Atwell's application for a residency credit on his FDNY examination was not arbitrary and capricious. For all of the foregoing reasons, the court denies so much of Atwell's Article 78 petition as pertained to the FDNY's denial decision."

Facts:

> "In 2017, Atwell took FDNY Exam No. 7001 and received a score of 99, which was enhanced by a five-point 'residency credit' to a total score of 104. *Id*., ¶ 8. However, the FDNY's candidate investigation division (CID) subsequently determined that Atwell was not entitled to receive the residency credit because he submitted inadequate and/or improper documents to demonstrate that he was a resident of New York City during the required time period. *See* verified answer, ¶¶ 50-60. As a result, a member of the CID called Atwell on January 29, 2019 to inform him that his documentation was unacceptable and that his test score would be reduced. *See* verified petition, ¶ 10; exhibit C. Thereafter, the CID sent DCAS [Department of Citywide Administrative Services] notifications dated April 11 and 25, 2019 to withdraw Atwell's residency credit, and to recalculate his test score and his position on the FDNY's waiting list for future employment. *Id*., ¶ 13; exhibit E.
>
> ***
>
> During January 2019, Atwell had unsuccessfully attempted to provide the CID with alternate proof of residency; however, the CID notified him via email that it rejected his documentation as improper. *See* verified petition, ¶¶ 11-23; exhibits C, D. After the CID sent the aforementioned notice to DCAS on April 11, 2019, Atwell emailed the FDNY's CID deputy commissioner on May 15, 2019 to protest the decision not to accept his alternate proof of residency. *Id*., ¶ 14; exhibit F. On May 20, 2019, the CID deputy commissioner responded by email to reiterate the FDNY's support for the CID's decision. *Id*. On June 6, 2019, Atwell's counsel submitted a letter to the CID deputy commissioner requesting an appeal of its decision to reject his documentation and deny him the residency credit. *Id*., ¶ 15; exhibit G. On July 15, 2019, the CID deputy commissioner sent Atwell's counsel a letter that again reaffirmed its determination. *Id*., ¶ 17; exhibit S."

Legal Lesson Learned: Applicants need to read and follow the Notice of Examination; if he had "alternate proof of residency" he should have submitted it at the time of the exam.

File: Chap. 7, Sexual Harassment, incl. Pregnancy Discrimination, Gay Rights

File: Chap. 8, Race Discrimination

NY: SYRACUSE 1980 CONSENT DECREE – FED. JUDGE WON'T DISSOLVE – BUT DROP SEPARATE HIRING LISTS

On Jan. 12, 2021, in Lee Alexander, Mayor of Syracuse, et al. v. Victor S. Bahou, as President of the Civil Service Commission of the State of New York, et al., U.S. District Court Judge David, U.S. District Court for Northern District of New York, denied the U.S. Government's motion to dissolve the 1980 Consent Decree, but did amend the Decree that had allowed the City for past 40 years to hire police and fire applicants off of separate hiring lists for minority and female applicants, instead of hiring by the State of New York "rule of three" from one list. Instead of separate hiring lists, the City can give added points to minority and female applicants similar to points they award for residents.

> "Syracuse's goal throughout this litigation is an admirable one. Its dedication to combating racial and sex discrimination within its police and fire departments even after forty years of effort is worthy of commendation. The work of remedying the city's past discriminatory hiring practices is far from over, and contrary to the government's arguments, the Court will not deprive the city of its tools for continuing in its labors. However, the government has made an adequate showing that the city's practice of using separate eligibility lists for women and African American candidates for police and fire work, a practice empowered by the consent decree, violates Title VII. The Court cannot allow its authority to be used to circumvent federal law, and accordingly the government's motion to modify the consent decree must be granted in part.
>
> ***
>
> It can hardly be disputed that the separate eligibility lists use different cutoff scores, and therefore violate the 1991 amendment, because their purpose is to ensure that an African American or female candidate who would not otherwise have scored within the top three eligible applicants for a position would still be hirable. In other words, a non-African American male's score for consideration needs to fall within the top three, but an African American or female's score need not.

Facts:

> "Both the city and the [U.S.] Department of Justice ('the government') filed causes of action in 1978 and 1980, respectively, seeking to challenge the civil service hiring requirements imposed by New York State…. Those causes of action both fundamentally argued that the imposed hiring requirements unconstitutionally disfavored African Americans and women in the police and fire departments, although the government also looked to take the city to task for its own culpability in its hiring disparities.
>
> Ultimately, the parties reached a settlement in 1980, resulting in a consent decree (the 'consent decree') that had the effect of permitting Syracuse to institute a hiring preference for African American and women candidates notwithstanding the civil service requirements. Some forty years later, the government has moved to modify—and ultimately dissolve—the consent decree under Federal Rule of Civil Procedure ("Rule") 60(b)(5).
>
> ***
>
> Essentially, the Syracuse plaintiffs objected to the practical consequences of New York Civil Service Law's requirement that all appointments to the police and fire departments must come from the three eligible candidates with the highest scores on the civil service exam. *Id*. That requirement, colloquially called the 'rule of three,' is currently codified in New York Civil Service Law § 61 ("§ 61").
>
> To bring about that goal, the city gave African Americans a hiring preference "on an interim basis to achieve the goal of hiring [African Americans] for 25% of all entry-level firefighter and police officer hires." *Id*. ¶ 7.

As for women, the consent decree's long-term goal remained simple enough: ‘to utilize females in all ranks within the fire and police departments in numbers approximating their interest in and ability to qualify’ for those positions. Consent Decree ¶ 8

On March 27, 1980, the Court formally approved the consent decree. Decree Order 17. After the decree was approved, Syracuse began to maintain at least two lists of eligible candidates: a ‘general list’ and a list of African American candidates. *Vivenzio v. City of Syracuse*, 611 F.3d 98, 101-02 (2d Cir. 2010) (describing the city's hiring procedures in response to challenge by rejected white male firefighter applicants).

***

At any rate, according to Syracuse, its preference regime has resulted in demographic breakdowns for the police department as follows: 10.32% of all police officers are African American while 17.40% of all officers are female; 1.92% of all police sergeants are African American while 5.77% are female; no lieutenants are African American although 15% are female; no captains are either African American or female; and 20% of all police chiefs are African American, although none are female.

As for the demographics of the fire department, Syracuse claims the following: 22.8% of all firefighters are African American while 4.7% are female; 4.6% of fire lieutenants are African American while 1.5% are female; 10% of all fire captains are African American while none are female; and 13.6% of all fire chiefs are African American while 4.5% are female.

By contrast, the most recent data available estimates that African Americans make up 27.9% of Syracuse's labor force, and women make up 52.8%.

***

In 1991, Congress made it unlawful under Title VII for employers "in connection with the selection or referral of applicants or candidates for employment[,] . . . to adjust the scores of, use different cutoff scores for, or otherwise alter the results of, employment[-]related tests on the basis of race, color, religion, sex, or national origin." 42 U.S.C. § 2000e-2(*l*).

The [U.S.] government argues that Syracuse violates Title VII by using different cutoff scores for the civil service examination in the form of separate lists of African American and female candidates such that a score that merits consideration for a member of those groups would not merit consideration for a non-African American male.

***

As a result, the use of separate eligibility lists in the context in which Syracuse uses them is prohibited by Title VII, and the government has successfully proven that a change in legal circumstances merits a modification to the consent decree.

As a result, Syracuse may continue to institute hiring preferences, and indeed may even continue to maintain separate eligibility lists for African Americans and women. But should it do so, it must be ready to defend those eligibility lists on their merits without the consent decree's protection.

***

CONCLUSION:

Syracuse's goal throughout this litigation is an admirable one. Its dedication to combating racial and sex discrimination within its police and fire departments even after forty years of effort is worthy of commendation. The work of remedying the city's past discriminatory hiring practices is far from over, and contrary to the government's arguments, the Court will not deprive the city of its tools for continuing in its labors. However, the [U.S.] government has made an adequate showing that the city's practice of using

separate eligibility lists for women and African American candidates for police and fire work, a practice empowered by the consent decree, violates Title VII. The Court cannot allow its authority to be used to circumvent federal law, and accordingly the government's motion to modify the consent decree must be granted in part."

Legal Lesson Learned: Congress in 1991 amended Title VII of the Civil Rights Act to prohibit use of different cut off scores based on race or gender.

Note: The Federal judge in this case commented:

"In 1991, Congress made it unlawful under Title VII for employers 'in connection with the selection or referral of applicants or candidates for employment[,] . . . to adjust the scores of, use different cutoff scores for, or otherwise alter the results of, employment[-]related tests on the basis of race, color, religion, sex, or national origin.' 42 U.S.C. § 2000e-2(*l*)."

See also law review article by former General Counsel of EEOC:

THE CIVIL RIGHTS ACT OF 1991 AND EEOC ENFORCEMENT

"On November 21, 1991, a new era of aggressive civil rights enforcement was introduced when President Bush signed the Civil Rights Act of 1991 (the Act) into law.

***

Section 106 of the Civil Rights Act of 1991 prohibits practices often referred to as 'within group scoring' or 'race norming.' The Act makes it unlawful to adjust scores, to use different cutoff scores, or to alter the results of 'employment related' tests on the basis of race, color, religion, sex or national origin.144 The practice of score adjustment arose as a means of alleviating the disparate impact of certain selection tests. It had been adopted by some employers and test developers in lieu of the more difficult task of developing valid, non-discriminatory selection procedures.145"

File: Chap. 9, ADA

AL: FF HEARING LOSS ONE EAR / TUMOR – FIRED, NO ACCOMMODATION – FAILED TO FILE EEOC CHARGE WITHIN 180 DAYS OF FIRING

On Jan. 21, 2021, in Anthony M. Milner v. The City of Montgomery, Alabama, U.S. District Court Judge Myron H. Thompson, U.S. District Court for the Middle District of Alabama (Northern Division) granted the defense motion to dismiss, holding that under Americans With Disabilities Act he had to file EEOC charge within 180 days of firing, not when his appeal to City Personnel Department was denied. Even if the EEOC online charging portal was shut down during the federal government's closure [December 22, 2018, and January 25, 2019] when President Trump and Congress could not agree on an appropriations bill, either Milner or his attorney could have filed the charge by mail.

"Milner received notice of his termination [on July 2] 2018. He was told to return his equipment, and his dismissal was reflected in payroll. *See* Termination Documents (doc. no. 12-2) at 2-3. The 180-day clock to file his charge with the EEOC began to run at that point. His appeal through the city's personnel department did not toll the running of this limitations period."

Facts:

"Based on the allegations of the complaint, during the period at issue, Milner worked as a lieutenant in the Montgomery Fire/Rescue service, a division of the City of Montgomery. He was placed on sick leave in July 2017 for a tumor affecting his hearing. After surgery, he lost hearing in his left ear entirely. He requested an

accommodation for this hearing loss and was refused. When a doctor employed by Montgomery Fire/Rescue declined to approve his return to work, the city's mayor signed a memorandum, indicating his 'decision to dismiss Fire Lieutenant A.M. Milner from employment with the Montgomery Fire Department,' effective July 2, 2018.

***

Milner appealed his dismissal to the city's personal department and lost, effective October 26, 2018. He filed a charge of discrimination with the EEOC on March 28, 2019. *See* Complaint (doc. no. 1) at ¶ 47. After the EEOC denied his charge as untimely, *see* EEOC Documents (doc. no. 12-1) at 1, he brought the present suit.

***

He also argues that equitable tolling should apply because he 'was informed that termination of his employment was not final until October 26, 2018,' when his appeal ended. Complaint (doc. no. 1) at ¶ 29. In response to the court's request for more information about this allegation, Milner clarified that he 'was told by General Sams (Director of Public Safety) in a conversation in his office that my termination was not final until the appeal process was completed, and that if the appeal process was successful, my employment could possibly be fully reinstated.' Affidavit of Anthony Milner (doc. no. 20-1) at 2.

***

Milner has not shown the extraordinary circumstances necessary for equitable tolling to apply. Before his deadline ran in late December 2018 or early January 2019, the complaint alleges that his counsel did two things: 'began attempts to use the EEOC's online portal in order to file a charge of discrimination,' and 'telephoned the Birmingham, Alabama, office of the EEOC and held for 52 minutes before being instructed by an EEOC representative in Birmingham to use the EEOC portal to schedule an appointment for an in-person or telephone interview for [Milner].' Complaint (doc. no. 1) at ¶¶ 33-34. It is undisputed that Milner or his counsel could have submitted his EEOC charge by mail regardless of the availability of the online portal. *See* 29 C.F.R. § 1601.8 (2018) ('A charge may be made in person or by mail at any office of the Commission or with any designated representative of the Commission.')

***

Equitable tolling is available 'where the complainant has been induced or tricked by his adversary's misconduct into allowing the filing deadline to pass.' *Irwin v. Dep't of Veterans Affs.*, 498 U.S. 89, 96 (1990). But on the totality of the facts presented here, Milner's conversation with Sams is insufficient to meet this standard. In particular, the evidence reflects that Milner retained counsel (at least by early December 2018, if not earlier) long before the deadline for filing his EEOC charge elapsed (in late December 2018 or early January 2019)."

Legal Lesson Learned: EEOC filing timelines are not extended when employee seeks internal appeal.

Note: See EEOC guidance: "Time limits for filing a charge with EEOC generally will not be extended while you attempt to resolve a dispute through another forum such as an internal grievance procedure, a union grievance, arbitration or mediation before filing a charge with EEOC. Other forums for resolution may be pursued at the same time as the processing of the EEOC charge."

Note: See IAFC Guide To Implementing NFPA 1582: Category B Medical Condition: "A condition that, based on its severity or degree, could preclude hire but only if despite the condition the candidate 'can perform the essential job tasks without posing a significant safety and health risk to themselves, members, or civilians'."

See NFPA on hearing loss (9/27/2016 amendment). Category B medical conditions shall include the following: (1) Unequal hearing loss ….

File: Chap. 9, ADA

PA: CADET WITH PROSTHETIC LEG – FAILED EMS TESTING ON PATIENT CARE PROTOCOLS – ADA LAWSUIT DISMISSED

On Jan. 6, 2021, in Chase Frost v. City of Philadelphia, the U.S. Court of Appeals for the Third Circuit, held (3 to 0; non precedential decision) that the U.S. District Court judge properly granted summary judgment for the City in its decision to terminate the cadet.

> "Frost alleges that he was terminated from the 2016 Fire Academy because of his disability. The District Court held that although Frost met his initial burden to establish a prima facie case of wrongful termination, he failed to establish that the City's nondiscriminatory reason for his termination, because of his failed re-test, was pretextual. We agree that Frost cannot show pretext.
>
> ***
>
> He has not produced a cadet who failed a re-test and was treated more favorably than him. In fact, all other cadets who failed re-tests were also terminated. Other cadets who are not similarly situated cannot be used to establish pretext. Frost has not offered any other reason to believe that the City's proffered reason for his termination was pretextual."

Facts:

> "While working as a volunteer firefighter in 2007, Frost was involved in a rescue that resulted in burns to over 60% of his body and the loss of his left arm and lower right leg. He uses various prosthetics, swapping them out in response to different tasks. After the accident, Frost became a certified paramedic and applied to be a Fire Services Paramedic for the City. All Philadelphia Fire Service Paramedics must graduate from the Fire Academy Paramedic Program. To participate in the Fire Academy, all paramedic candidates must successfully complete a medical examination.
>
> Prior to the start of the 2015 Fire Academy, Frost's personal physicians opined that he could safely perform all of the exercises required by the program. However, the City's doctor, who was responsible for providing medical clearance, was not satisfied with the personal doctor's opinions. Consequently, he asked a physical therapist to test Frost's ability to perform four additional exercises. By the start of the 2015 Fire Academy, the physical therapist had not yet evaluated Frost and the City's doctor neither approved nor denied Frost's application. Without medical clearance, Frost could not participate in the 2015 Fire Academy.
>
> The physical therapist ultimately failed to conduct the four exercises requested by the City's doctor. However, the therapist evaluated Frost and endorsed his ability to safely participate in the Fire Academy. After receiving the therapist's report, the City's doctor medically cleared him and approved his participation in the 2016 cadet class. On September 12, 2016, Frost started the program.
>
> As part of the Fire Academy, cadets are tested on patient care protocols, an essential part of being a paramedic. The Fire Academy's code of conduct states that in order to graduate, cadets must pass every protocol quiz with a minimum score of 80%. If a cadet fails a protocol quiz, the Fire Academy's re-test policy permits one re-test.
>
> Frost received a failing grade of 70% on Protocol Quiz 1. As a result, Frost and the other cadets who failed received "mediation," at which instructors met with them and reviewed their answers. The City also offered Frost and the other cadets additional tutoring before the following day's re-test. Frost did not attend the extra

tutoring session. On September 22, Frost retook Protocol Quiz 1 and again received a score of 70%. That same day, the City terminated his employment and dismissed him from the Fire Academy, citing its re-test policy.

***

Frost contends that the City failed to hire him on account of his disability when it did not permit him to enter the 2015 Fire Academy. The District Court held that Frost could not establish the second prong of a prima facie case because he was not qualified for the job at that time. We agree.

***

Frost alleges that he was terminated from the 2016 Fire Academy because of his disability. The District Court held that although Frost met his initial burden to establish a prima facie case of wrongful termination, he failed to establish that the City's nondiscriminatory reason for his termination, because of his failed re-test, was pretextual. We agree that Frost cannot show pretext."

Legal Lesson Learned: It is unfortunate that this disabled cadet failed the patient protocol exam, but this is an essential job requirement.

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

File: Chap. 11, FLSA

NY: FDNY VEHICLE MAINTENANCE EMPLOYEES - CLAIM NOT PAID WORKING PRE-SHIFT OR LUNCH PERIOD – CASE TO TRIAL

On Jan. 8, 2021, in Christopher Viera, et al. v. City of New York, U.S. Magistrate Judge Stewart D. Aaron, U.S. District Court, Southern District of New York, held that neither the Plaintiffs, nor the City are entitled to summary judgment. While there is an established process for employees to submit overtime hours into "Citytime" computer system, the employees claim that they often must start work early to locate and move vehicles, and also do work during their 30-minute lunch breaks, and that their Supervisors have directed them to not submit overtime unless it was "pre-approve."

"The City submits an expert declaration asserting that over 94% of the overtime requests that Plaintiffs submitted in CityTime during the relevant time period were approved.

***

For its part, Defendant argues that it is entitled to summary judgment on Count I because 'it is undisputed that the allegedly uncompensated work time at issue in this case was not reported to the City through its timekeeping system, and therefore, the City did not have the requisite knowledge to establish liability.' (Def.'s Mem. at 4.) 'The City has made this [same] argument repeatedly in FLSA overtime litigation in this District and it has been unanimously rejected.' *Lawtone-Bowles*, 2020 WL 2833366, at *4. Here, as in *Lawtone-Bowles*, the record evidence—including Plaintiffs' testimony that their supervisors, *e.g.*, assigned pre-shift and mealtime work tasks, reviewed time sheets on a weekly basis, and gave instructions not to submit overtime requests for work that was not pre-approved (*see* Pls.' Mem. at 10, 12)—could, if credited, allow '[a] reasonable factfinder [to] conclude that Plaintiffs worked uncompensated overtime, that Defendant

had actual or constructive knowledge of this time, and that Defendant discouraged the reporting of accurate overtime that was not pre-approved.'"

Facts:

"Plaintiffs are FDNY employees who have held the civil service title of Motor Vehicle Operator ('MVO') at some point since June 21, 2016, and have been assigned to the Fleet Services Bureau ('Fleet Services') and/or the Technical Services Bureau ('Tech Services') for some or all of that time period.

***

The duties and responsibilities of Tech Services MVOs[2] include operating motor vehicles, maintaining motor vehicles, performing motor vehicle inspections and light maintenance on vehicles, and transporting medical oxygen tanks and other Emergency Medical Service ("EMS') supplies to and from the oxygen tank refill center and firehouses/EMS stations throughout the City. (Def.'s Counter 56.1 ¶ 7; Pls.' Counter 56.1 ¶ 14.) The duties and responsibilities of Fleet Services MVOs include operating motor vehicles, maintaining motor vehicles, performing motor vehicle inspections and light maintenance on vehicles, transporting fire apparatus and ambulances between firehouses/EMS stations and repair facilities for routine maintenance or when the vehicles need repair, and transporting employees between FDNY locations. (Def.'s Counter 56.1 ¶ 6; Pls.' Counter 56.1 ¶ 15.)

***

Normally, MVOs are scheduled for 8.5-hour shifts, inclusive of an unpaid thirty-minute meal period, with two regularly scheduled days off per week. (Def.'s Counter 56.1 ¶ 4; Pls.' Counter 56.1 ¶¶ 22-23.) At present, due to the COVID-19 pandemic, Plaintiffs assigned to Tech Services are temporarily scheduled to work four days per week in 10.5 hour shifts, inclusive of an unpaid thirty-minute meal period. (Def.'s Counter 56.1 ¶ 5; Pls.' Counter 56.1 ¶ 25.)

***

CityTime is the City's proprietary electronic timekeeping and payroll system, which the vast majority of City employees use to record their work time. (Pls.' Counter 56.1 ¶ 28.) The FDNY has required Plaintiffs to use the CityTime timekeeping system since 2007. (Def.'s Counter 56.1 ¶ 22; Pls.' Counter 56.1 ¶ 30.) Plaintiffs used CityTime to clock in when they arrived at their assigned work location and clock out when they left their assigned work location. (Def.'s Counter 56.1 ¶ 26.) All minutes from the time that a Plaintiff punched in at his work location to the time he punched out at his work location were captured in CityTime. (*Id*.)

However, under the City's pay system, Plaintiffs were not compensated for all of their time recorded in CityTime; instead, under a default 'pay-to-schedule' system, they were paid according to their regular shifts, unless they indicated there was an exception to that schedule—*i.e.*, unless they indicated that they had worked overtime or had taken time off. (*See id*. ¶ 27.) Any time recorded in CityTime that fell outside of an employee's regular work schedule would be reflected in CityTime as 'noncompensable' unless the employee submitted an overtime request for that time and that request was approved. (*See* Def.'s Counter 56.1 ¶ 28; Pls.' Counter 56.1 ¶ 34.) Plaintiffs knew how to submit requests for overtime payment in CityTime. (Pls.' Counter 56.1 ¶ 72.) In addition, supervisors had the capability to submit overtime requests on behalf of the employees they supervised. (Def.'s Counter 56.1 ¶ 29.)

***

Each Plaintiff testified that he regularly performed work prior to his shift. (*See* Viera Tr. 24-25, 63-64, 70, 98-99; Mints Tr. 35, 42-47, 49-51, 59; Sparks Tr. 55, 71, 74-75, 82-83, 86-88; Graham Tr. 52, 54, 60-63.[4]) This work included, for example, locating and moving the vehicle he was to drive on any given day, inspecting the vehicle (*e.g.*, tire pressure, fluids and lights) and/or warming up the vehicle. (*See id*.) Because the City has a record of when each Plaintiff clocked in every day, Plaintiffs contend that they can calculate

from the City's own records the exact amount of back pay they are due for the work they performed prior to the beginning of their shifts. (*See* Pls.' 56.1 ¶ 39 & Lanier 10/12/20 Decl., ECF No. 74-9.)

***

Each Plaintiff also testified that he regularly performed work during his uncompensated meal periods. (*See* Viera Tr. 78-79, 82; Mints Tr. 35, 63-64, 68, 70; Sparks Tr. 100, 102, 106; Graham Tr. 82-83.) Plaintiffs asserted that this work was made necessary by, for example, the volume of their work and/or the logistical difficulty of parking their vehicles in order to eat. (*See id*.)

***

The City denies having any knowledge of Plaintiffs' performance of uncompensated pre-shift work, asserting that Plaintiffs knew how to submit requests for overtime and in fact had been compensated for overtime work performed outside of their scheduled shifts. (*See* Def.'s Counter 56.1 ¶¶ 33-36.) The City likewise asserts that employees were compensated for performing work during their meal periods if they submitted overtime requests within CityTime to receive compensation, or if the City otherwise became aware of their work.[5] (*See* Def.'s Counter 56.1 ¶¶ 44-47.) The City submits an expert declaration asserting that over 94% of the overtime requests that Plaintiffs submitted in CityTime during the relevant time period were approved. (*See* Erath Decl., ECF No. 78-29, ¶ 11(G).)

***

For the foregoing reasons, Plaintiffs' motion for summary judgment (ECF No. 71) and Defendant's motion for summary judgment (ECF No. 75) are DENIED."

Legal Lesson Learned: It appears that this case is headed to trial, unless the parties can settle.

File: Chap. 12, Drug-Free Workplace

PA: PHILADELPHIA CANNOT OPEN A "SAFEHOUSE" WHERE DRUG ADDICTS CAN USE DRUGS – VIOL. FEDERAL LAW

On Jan. 12, 2021, in Safehouse, a Pennsylvania nonprofit corporation, et al. v. U.S. Department of Justice, the U.S. Court of Appeals for the Third Circuit, held (2 to 1) that the U.S. District Court improperly held that Safehouses conduct would not violate the Controlled Substance Act of 1970, and denied the Government's motion for declaratory judgment.

"The opioid crisis is a grave problem that calls for creative solutions. Safehouse wants to experiment with one. Its goal, saving lives, is laudable. But it is not our job to opine on whether its experiment is wise. The statute forbids opening and maintaining any place for visitors to come use drugs. Its words are not limited to crack houses. Congress has chosen one rational approach to reducing drug use and trafficking: a flat ban. We cannot rewrite the statute. Only Congress can. So we will reverse and remand for the District Court to consider the RFRA counterclaim."

Facts:

"Though the opioid crisis may call for innovative solutions, local innovations may not break federal law. Drug users die every day of overdoses. So Safehouse, a nonprofit, wants to open America's first safe-injection site in Philadelphia. It favors a public-health response to drug addiction, with medical staff trained to observe drug use, counteract overdoses, and offer treatment. Its motives are admirable. But Congress has

made it a crime to open a property to others to use drugs. 21 U.S.C. § 856. And that is what Safehouse will do.

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Safehouse wants to try a new approach to combat the opioid crisis. It plans to open the country's first safe-injection site. Safehouse is headed by José Benitez, who also runs Prevention Point Philadelphia. Like Prevention Point and other sites, Safehouse will care for wounds, offer drug treatment and counseling, refer people to social services, distribute overdose-reversal kits, and exchange used syringes for clean ones. But unlike other sites, Safehouse will also feature a consumption room. Drug users may go there to inject themselves with illegal drugs, including heroin and fentanyl. The consumption room is what will make Safehouse unique—and legally vulnerable.

When a drug user visits the consumption room, a Safehouse staffer will give him a clean syringe as well as strips to test drugs for contaminants. Staffers may advise him on sterile injection techniques but will not provide, dispense, or administer any controlled drugs. The user must get his drugs before he arrives and bring them to Safehouse; he may not share or trade them on the premises. The drugs he consumes will be his own.

After he uses them, Safehouse staffers will watch him for signs of overdose. If needed, they will intervene with medical care, including respiratory support and overdose-reversal agents. Next, in an observation room, counselors will refer the visitor to social services and encourage drug treatment.

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Because Safehouse knows and intends that its visitors will come with a significant purpose of doing drugs, its safe-injection site will break the law. Although Congress passed § 856 to shut down crack houses, its words reach well beyond them. Safehouse's benevolent motive makes no difference. And even though this drug use will happen locally and Safehouse will welcome visitors for free, its safe-injection site falls within Congress's power to ban interstate commerce in drugs."

Legal Lesson Learned: Amsterdam and other locations in Europe proved "safe sites" for drug use, but in U.S. this violates federal law.

Note: See Report – "Drug Consumption Rooms In Europe."

"Clients generally report low levels of public drug use, particularly during the hours when DCR [drug consumption room] facilities are open. Respondents indicated that the main reasons for attending DCR facilities included safety, social interaction, and police avoidance. Clients rely heavily on the social functions of the DCR –many clients who have their own home or other private place to use their drugs still choose to regularly access DCR services and to maintain contact with peers."

File: Chap. 13, EMS

CO: EMS USED KETAMINE - 500 MILLIGRAMS – POLICE PRISONER WHO DIED – LAWSUIT PROCEED – GRAND JURY

On Jan. 29, 2021, in Estate of Elijah Javon McClain v. City of Aurora, Colorado, U.S. Magistrate Judge N. Reid Neureiter denied the defense motion to delay discovery in this civil lawsuit, even though the State Attorney General has publicly announced that he will be presenting evidence to a grand jury regarding possible criminal misconduct of police and EMS involving the death of 23-year old Elijah McClain during an arrest walking home from

convenience store, and put into a choke hold. The Colorado Department of Public Health and Environment has also publicly confirmed they are examining the conduct of the EMS.

> "It is not in the interest of the public or in the interest of justice to 'put on the back burner' discovery in a case that raises significant questions about the City of Aurora's policing and paramedic practices. It may be that there is nothing constitutionally wrong with the conduct that eventually led to Mr. McClain's death. If so, then the public will be better served by knowing that hard reality, as fairly determined by the judicial process, sooner rather than later. In short, a stay of discovery is not appropriate in this case."

Facts:

[Facts from Aug. 11, 2021 article: "What We Know About the Killing of Elijah McClain."]

> "Last August, police officers in Aurora, Colorado, approached 23-year-old Elijah McClain as he walked home from a convenience store. The Aurora Police Department later said that a 911 caller had reported a 'suspicious person' in a ski mask, and that when officers confronted McClain — who was not armed and had not committed any kind of crime — he 'resisted arrest.' In the 15 minutes that followed, the officers tackled McClain to the ground, put him in a carotid hold, and called first responders, who injected him with ketamine. He had a heart attack on the way to the hospital, and died days later, after he was declared brain dead.
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> On Tuesday, July 28, CBS Denver reported that the Colorado Department of Public Health and Environment is reopening an investigation into how a paramedic came to inject McClain with 500 milligrams of ketamine during his violent arrest, and its connection to his subsequent death. The department said new information about how the drug was administered has recently come to light.."
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> [Facts from Court's decision.]

"Upon learning that the Colorado Attorney General announced a grand jury would be investigating Elijah McClain's death, on January 11, 2021, the Court *sua sponte* ordered the Parties to brief any effect this investigation has on whether discovery should be stayed … which they did on January 19, 2021.

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Finally, the interests of persons not parties to the civil litigation and the public interest are not harmed by moving forward with the case. To the contrary, the Court can take judicial notice that this case has received widespread attention locally, state-wide, and nationally. The public, too, has a strong interest in knowing the answers to the same difficult questions being posed by Mr. McClain's family.

Legal Lesson Learned: Pre-trial discovery in the civil suit may now process, including depositions of police officers and EMS; these emergency responders may decide to refuse to testify under 5th Amendment protection against self-incrimination until the criminal investigation is resolved.

Note: Read this entire Aug. 11, 2021 article: "What We Know About the Killing of Elijah McClain."

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

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

File: Chap. 16, Discipline

IL: FD CAPTAIN DRUGGED YOUNG MALE FF WITH CIALIS AND KETAMINE – SEX ASSAULT - 36 YEARS IN PRISON

On Jan. 22, 2021, in The People of The State of Illinois v. David J. Dunn, the Illinois Court of Appeals for the Fourth District, 2021 IL App (4th) 180552-U, held (3 to 0) that jury properly convicted the Captain; at his going away party, before leaving to Alaska to become a Fire Chief, he put Cialis in victim's beer, and then ketamine, and videotaped his assaulting the victim.

> "Based upon the testimony, the evidence presented at trial, at some point in the evening in question, this defendant, by his own admission, put Cialis in the victim's beer. That was obviously designed for one purpose and one purpose only. The victim became intoxicated, the defendant then introduced ketamine into his system, and when the crowd dispersed, the defendant raped the victim and videotaped it, that reprehensible, deplorable offense. So the history, character, and condition of the defendant, in looking at the circumstances surrounding the offense, indicates that a sentence in excess of the minimum on counts three and four is appropriate."

Facts:

> "The evidence presented at trial, both direct evidence and circumstantial evidence, plus the inferences drawn therefrom, would lead a reasonable jury to conclude defendant, in fact, knew T.C. was incapable of giving knowing consent to sexual acts. First, defendant admitted to putting Cialis in T.C.'s beer. A reasonable inference to be drawn from such conduct was that defendant wanted to ensure T.C. would have an erection later that night because defendant knew his plan included incapacitating T.C. Next, defendant knew T.C. was so intoxicated that he was unable to stand or walk on his own. Defendant removed his clothes because T.C. was unable to do so. Further, defendant knew T.C. was vomiting from being so intoxicated and therefore, believed T.C. would benefit from IV fluids and an anti-nausea medication. Lewis described T.C. as being 'out of it,' so, there is no reason not to believe defendant knew that as well.
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> Not only had T.C. been slipped Cialis and was very intoxicated, but he had also been given ketamine, as evidenced by the substance found in the IV bag and in his urine. It was reasonable for the jury to infer from the evidence that defendant administered ketamine through T.C.'s IV. It was also reasonable to assume, given defendant's medical background, that he knew exactly what ketamine would do to T.C. As T.C. described it, and as Dr. Reifsteck explained, T.C. was rendered helpless and motionless, yet he still had a sense of what was happening. T.C. testified he could do nothing to stop it. The jurors saw T.C.'s condition during the time in question on the video and could evaluate it for themselves. We find, based on the State's evidence, it was not unreasonable for the jury to infer that defendant knew exactly what these substances would do to T.C., his level of unconsciousness should have been apparent to defendant, and that defendant knew T.C. was unable to give knowing consent to any sexual acts.
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> The prosecutor showed T.C. a video that was taken in the bedroom. T.C. identified himself as laying supine on the bed with an IV in his arm. T.C. identified the person administering masturbation to him as defendant. The video showed T.C. make an arm movement, which he described as swatting motion, as he tried to swat at the camera when he heard camera noises. He said he remembers these events 'very clearly,' but he felt paralyzed and could not move. T.C. identified the noises on the video as defendant performing oral sex on him. He said: 'I can't move, and I'm being raped.' Lying next to him on the bed was a pink item and a bottle of lubricant. T.C. could not identify those items but he said, when he woke up, he felt covered in some kind of lubricant. The prosecutor asked him: '[W]as this consensual at all?' T.C. responded: 'Not at all.'"

Legal Lesson Learned: The 36-year sentence reflects the seriousness of the defendant's conduct.

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

File: Chap. 18, Legislation