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May 2021 – FIRE & EMS LAW Newsletter

[NEWSLETTER IS NOT PROVIDING LEGAL ADVICE.]

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MAY 2021 NEWSLETTER - 7 RECENT CASES REVIEWED

FIRE & EMS LAW – MONTHLY NEWSLETTERS. If you would like to receive free newsletter, just send me an e-mail.
NATIONAL FIRE ACADEMY / FESHE CLASSES. Items used by Prof. Bennett in courses; posted on Scholar@UC: [BROUSE: Lawrence Bennett].

- **FIRE & EMS LAW – RECENT CASE SUMMARIES / LEGAL LESSONS LEARNED (2021):** Case summaries since 2018 from monthly newsletters
- **FIRE & EMS LAW** - RECENT CURRENT EVENTS (2021)
- **FIRE & EMS LAW - OFFICER DEVELOPMENT –** AMERICAN HISTORY / LEGAL LESSONS LEARNED (2021)
- **EMS LAW, COMMUNITY PARAMEDICINE & OTHER BEST PRACTICES (2020, Third Edition):** (2nd Edition 2018; (ISBN: 978-1-949104-03-5); 1st Edition 2012)

File: Chap. 1, American Legal System

FL: FATAL MVA I-95 – PD SEIZED PHONE PERSON TAKING PHOTOS - $1,000 JURY VERDICT – IMMUNE FALSE ARREST

On April 20, 2021 in James P. Crocker v. Deputy Sheriff Steve E. Beatty, Martin County Sheriff's Office, in his individual capacity, the U.S. Court of Appeals for the 11th Circuit (Atlanta, GA) held (2 to 1) that the police officer enjoys immunity from false arrest since he had parked his car on shoulder of I-95 (a "limited access" highway) and refused to leave the scene until his cell phone was returned. The Court noted: "In his affidavit, Crocker said that he stood in the median 'taking photographs and recording video . . . of the crashed vehicle, the first responders and the jaws of life.' Asked in his deposition, 'What were you taking pictures of?' Crocker replied, 'The overall scene, overturned vehicle, firemen.' And when asked if he had 'a specific reason' for taking pictures of the accident scene, Crocker said: 'I really didn't have a clear and present agenda. I do remember seeing beer bottles laying there and I do remember photographing the beer bottles.'"

> "[W]e hold (1) that Crocker's First Amendment claim is barred by qualified immunity, (2) that his false-arrest claims fail because Beatty had probable cause to arrest him, and (3) that his excessive-force claim fails on the merits and, in any event, is barred by qualified immunity.
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> Because Crocker's car was parked on the shoulder of I-95, a "limited access facility," the district court held that Beatty had probable cause to arrest him. And although Crocker might initially have been covered by the Good Samaritan exception, the court held that he no longer qualified by the time he encountered Beatty, at which point he was standing 40–50 feet away from the crash scene and merely observing it. We agree with the district court that Officer Beatty had probable cause to arrest Crocker."

Note: The officer is still liable, however, for jury verdict (Oct. 3, 2018) of $1000 compensatory damages for seizing the cell phone, which the 11th Circuit in decision (April 2, 2018) held was a violation of 4th Amendment.

> "Crocker, however, had no involvement with the car accident that he had photographed. He was merely a curious passerby. When Beatty approached Crocker and took his iPhone before speaking, there was no indication whatsoever that Crocker would have soon deleted the photographs and videos he had just taken the time to capture himself. We conclude that no reasonable law enforcement officer would have believed that the evidence on Crocker's iPhone was at risk of imminent destruction at the time of the seizure… Under these facts (viewed in the light most favorable to Crocker), we determine that Beatty violated Crocker's Fourth Amendment rights when he seized the iPhone. We further determine that these rights were clearly established at the time of the seizure such that Beatty is not entitled to qualified immunity."
> https://media.ca11.uscourts.gov/opinions/pub/files/201713526.pdf

Facts:

“When Deputy Sheriff Steven Beatty arrived at the scene of a fatal car crash on I-95 in south Florida, he saw James Crocker standing in the median taking photos of the accident with his phone. Beatty seized Crocker’s phone and told him to drive away. When Crocker refused to leave without his phone, Beatty arrested him and left him in a hot patrol car for about 30 minutes.

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James Crocker was driving north on I-95 through Florida when he saw an overturned vehicle in the median. Crocker pulled over to the shoulder and got out of his car to see if he could help. Ten to fifteen other people did the same. As law-enforcement and emergency personnel began to arrive, Crocker and the other onlookers moved away. Crocker then stood 40–50 feet from the accident scene and about 125 feet from his own vehicle. Crocker and other bystanders took pictures of the scene with their phones.

Martin County Deputy Sheriff Steven Beatty approached Crocker and confiscated his phone—Crocker says ‘without warning or explanation.’ When Crocker asked whether it was illegal to photograph the accident scene, Beatty replied: ‘[N]o, but now your phone is evidence of the State.’ Beatty instructed Crocker to drive to a nearby weigh station to wait. Crocker didn’t leave; instead, he offered to delete the pictures from his phone. Beatty again told Crocker to go to the weigh station and that someone from the Florida Highway Patrol would follow up with him about his phone. Crocker again refused, telling Beatty: ‘I’ve been a law-abiding citizen of this town for 20 something years, [and] I deserve to be treated with dignity and respect.’

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At that point, Beatty informed Crocker that he was under arrest for resisting an officer. Crocker then offered to leave—but, he said, not without his phone. Beatty handcuffed Crocker and escorted him toward his patrol car. Along the way,Crocker told Beatty: “[S]ir , I’ve been personal friends with [Sheriff] Will Snyder over 25 years, I employ over a hundred people in this town, [and] I’ve never broken the law.” Beatty responded: “I don’t care who you know or how many people you employ, you’re going to jail.” After placing Crocker in the patrol car, Beatty turned off the air conditioning. Outside, it was about 84° Fahrenheit,3 and inside the patrol car,Crocker became hot and uncomfortable. He sweated profusely, experienced some trouble breathing, and felt anxious. Beatty left Crocker for a short while, and when he returned to the car Crocker begged for airand said he was “about to die.” Beatty responded, “[I]t’s not meant to be comfortable sir,” and left Crocker where he was.

Sometime later, a Florida Highway Patrol trooper came by, opened the car’s door, and asked Crocker for his driver’s license. Crocker pleaded with her for help, too. Shortly thereafter, Crocker says, the trooper spoke to Beatty, who returned to the car and turned the AC back on. In total, Crocker was left in the hot patrol car for somewhere between 22 and 30 minutes, after which Beatty drove him to the local jail. County officials eventually released Crocker, returned his phone to him, and dropped the ‘resisting an officer’ charge. Crocker didn’t seek any medical attention in the aftermath of his arrest.

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To sum up: Because (1) the law on Crocker's First Amendment claim wasn't clearly established, (2) Beatty had probable cause to arrest Crocker, and (3) Beatty didn't use excessive force in the course of arresting Crocker (and the law underlying Crocker's excessive-force claim wasn't clearly established, in any event), Beatty was entitled to qualified immunity. The district court properly granted summary judgment to him on that basis."

DISSENT IN PART (Circuit Judge Martin): "I agree with the majority that Deputy Beatty had probable cause to arrest Mr. Crocker for violating Florida Statute § 316.1945(1)(a)(11). As a result, Mr. Crocker's Fourth Amendment false arrest claim is barred by qualified immunity. Also, since Deputy Beatty had probable cause to arrest Mr. Crocker, his state law false arrest claim fails as well. But I part ways with the majority as to Mr. Crocker's First and Fourteenth Amendment claims. I do not think Deputy Beatty can properly be granted qualified immunity on either of those claims, so I would reverse the District Court's grant of summary judgment on those issues. I therefore respectfully dissent.

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The majority says the law underlying Mr. Crocker's First Amendment claim was not clearly established at the time Deputy Beatty seized his phone. Id. at 10–11. Specifically, the majority opinion says this Court's opinion in Smith v. City of Cumming, 212 F.3d 1332 (11th Cir. 2000), does not obviously apply to the facts here. Maj. Op. at 10–15. But I think the majority cabins Smith too narrowly. In my view, Smith clearly establishes that Mr. Crocker had a right to photograph the accident scene and I would therefore reverse the grant of qualified immunity to Deputy Beatty on this claim.

Legal Lesson Learned: Seizing a by-standers cell phone is violation of 4th Amendment unless there is reasonable believe the cell phone photos or videos contain evidence of crime.

Note: See 11th Circuit decision in Smith v. City of Cumming (May 30, 2020):

"As to the First Amendment claim under Section 1983, we agree with the Smiths that they had a First Amendment right, subject to reasonable time, manner and place restrictions, to photograph or videotape police conduct. The First Amendment protects the right to gather information about what public officials do on public property, and specifically, a right to record matters of public interest."

See the Oct. 5, 2018 article, "Federal jury finds Martin sheriff's deputy made illegal seizure when taking crash bystander's phone."

"The jury of six women and one man in U.S. District Court deliberated for only an hour Wednesday before deciding Deputy Steven Beatty, a 29-year veteran of the Martin County Sheriff's Office, violated county resident James Crocker's civil rights when the deputy grabbed the traffic accident bystander's cellphone saying any photos taken are state's evidence."

File: Chap. 2, LODD

PA: ARSON CONV. SET ASIDE (3 FF LODD 1995) – ATF PAID REWARDS 2 WIT – NEW FED. CASE, NOT DOUBLE JEOPARDY

On April 13, 2021, in United States of America v. Gregory Brown, Jr., the U.S. Court of Appeals for Third Circuit (Philadelphia) held 3-0 that the defendant, serving a life sentence for starting fire in his mother's apartment on Feb. 14, 1995 to collect renters' insurance can be re-tried, this time in Federal court. Three firefighters were killed when a staircase collapsed. The state convictions were set aside 20 years after the convictions, when it was discovered that two witnesses were paid rewards by the ATF post trial ($10,000 and $5,000) even though they testified that no rewards were expected. This time he was indicted in Federal court destruction of property by fire resulting in death under 18 U.S.C. §844(i).

"[R]etrying a defendant because the conviction was reversed for trial error is not a second jeopardy. Regardless of whether it proceeds in state or federal court, Brown's second prosecution does not violate the Double Jeopardy Clause. The District Court did not err in denying Brown's motion to dismiss the indictment and his motion to compel discovery on the dual-sovereignty issue, so we will affirm.

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> The Double Jeopardy Clause says that no person shall 'be subject for the same offence to be twice put in jeopardy of life or limb.' U.S. Const. amend. V. But the clause's prohibition against a second prosecution for the same offense is not absolute. Two examples are relevant here. First, under the trial-error rule, the Double Jeopardy Clause 'does not prevent the government from retrying a defendant who succeeds in getting his first conviction set aside, through direct appeal or collateral attack, because of some error in the proceedings leading to conviction.' Lockhart v. Nelson, 488 U.S. 33, 38 (1988). Second, the dual-sovereignty principle allows a federal indictment for the same conduct punished under state law—and vice versa—because the two prosecutions, under different sovereigns, are not 'for the same offence.' U.S. Const. amend. V; Gamble, 139 S. Ct. at1965–66."

Facts:

> [From Press article, Feb. 14, 1995.] PITTSBURGH (AP) "The first of the city's female firefighters to die in the line of duty was an eight-year veteran who had shown her dedication through volunteer work, visiting stressed-out emergency workers to offer an ear and a shoulder to cry on. ``Now we need it ourselves, ″ Fire Capt. Tom Reinheimer said. Firefighters Patricia Conroy, Marc Kolenda and Thomas Brooks died Tuesday while searching a burning house for survivors. A stairway collapsed, trapping all three in the family room. The fire burned through the hose, leaving them without water to fight the blaze, Fire Chief Charles Dickinson said."
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> Around midnight on February 14, 1995, firefighters responded to a fire at Brown's residence. Brown's mother, Darlene Buckner, had been renting the home since 1990. Brown, who was seventeen years old at the time, lived there with his mother and several

family members. After arriving on the scene, six firefighters entered the basement, where the fire had originated. Several of the firefighters became trapped and [three] died when a staircase collapsed.

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The Bureau of Alcohol, Tobacco, Firearms and Explosives ('ATF') opened an investigation. Chemical samples from the basement confirmed the presence of gasoline, and investigators located a gas can close to what an expert testified was the fire's origin. ATF concluded that the fire was intentionally set and offered a $15,000 reward for information leading to arrest and conviction. A witness, Keith Wright, came forward with testimony undermining Brown's alibi that he had been shopping with his mother at the time of the fire. Another witness, Ibrahim Abdullah, said Brown later confessed that he had started the fire.

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Local, state, and federal authorities formed a joint prosecution team and brought Brown's case in state court. In 1997, Brown and Buckner proceeded before a consolidated jury trial. The joint prosecution team consisted of an Assistant District Attorney for Allegheny County and an Assistant U.S. Attorney. The prosecution's witnesses denied receiving payment or having been promised payment in exchange for their testimony. The jury convicted Brown on three counts of second-degree murder, two counts of arson, and one count of insurance fraud. Brown was sentenced to three consecutive terms of life imprisonment for each murder conviction and a consecutive term of 7.5 to 15 years' imprisonment for the arson convictions.

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Meanwhile, the Innocence Institute at Point Park University filed a Freedom of Information Act ('FOIA') request with ATF, asking for all records relating to the payment of reward money in Brown's case. In response to the FOIA request, ATF provided two canceled checks, with identifying information redacted, showing it had made payments of $5,000 and $10,000 in August 1998 relating to the fire. The Innocence Institute then contacted one of the witnesses, Abdullah, who said he received $5,000 from an ATF agent after Brown's trial…. Soon after, counsel for Brown located another witness, Wright, who acknowledged receiving $10,000 from ATF for his testimony.

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Upon remand to the state trial court, Brown moved to dismiss the charges on double-jeopardy grounds. While that motion was pending, a federal grand jury indicted Brown, charging him with destruction of property by fire resulting in death under 18 U.S.C. §844(i). The Commonwealth then filed a motion for nolle prosequi to dismiss the state charges. The state court granted the motion and dismissed the state charges.

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Here, the prosecution's failure to disclose the witnesses' compensation demonstrates only 'an overzealous effort to gain a conviction from the first jury and not ... an attempt to subvert [Brown]'s 'valued right' by bringing the case before a second jury.' Coleman,

862 F.2d at 458. Indeed, Brown concedes that the prosecution's conduct was intended to protect its key witnesses, without whom, he suggests, the state 'did not have a case.' Appellant's Br. 64. The prosecution's intent behind the misconduct, according to Brown, was to shore up its case, not have it dismissed."

Legal Lesson Learned: Double jeopardy does not apply to second charges in Federal court, after state charges were set aside. When ATF or other agency offers a reward for information on an arson, the Prosecution must disclose to defense counsel at trial whether any witnesses will be paid the reward.

Note: See article on the case:

"Court rules Pa. man can be re-tried for allegedly setting blaze that killed 3 firefighters. The man's previous convictions for the deaths of three Pittsburgh firefighters were overturned 20 years into his prison sentences." (April 15, 2021)

Chap. 3 – Homeland Security, incl. Active Shooter, Cybersecurity
Chap. 4 – Incident Command, incl. Training, Drones, High Tech
Chap. 5 – Emergency Vehicle Operations

Chap. 6, Employment Litigation

OH: PROMOTION EXAM CAPTAIN – "DISTRACTED, BORED, SLEEPING" EVALUATORS – BUT NO RIGHT TO PROMOTION

On April 14, 2021, in State of Ohio, Ex Rel. Jeffrey Neal v. City of Cincinnati, the Ohio Court of Appeals, First Appellate District (Hamilton County) held (3 to 0) that the trial court improperly ordered the City to promote Lt. Neal, Cincinnati Fire Department. Even if the testing process was flawed in the oral portions (tactical and interview portions} by distracted evaluators, he failed to show a "clear legal right" to the promotion. In addition, he scored 42nd out of 54 applicants, with only the top 25 qualifying for promotion.

"Lt. Neal disputed his exam results, specifically challenging the administration of the tactical and interview portions. These portions of the exam involved, among other things, Lt. Neal orally responding to questions posed by assessors. He alleged that the interruptions began during the tactical portion, after an assessor's phone went off. Because the phone was located across the room in a backpack, the assessor waltzed over to the backpack, rummaging around before locating the phone to silence it. Incredibly, the assessor allegedly spent considerable time reading texts from the phone before wandering back to the table. And once there, the phone repeatedly vibrated, prompting the distracted assessor to engage with the phone and respond to messages, while presumably ignoring Lt. Neal. All of this occurred during an exam where phones were not permitted (for obvious reasons, as this episode illustrates).

These distractions allegedly spilled over to the interview portion as well. At one point, an assessor was responding to a text message during the entirety of Lt. Neal's answer to a question. To make matters worse, another assessor allegedly dozed off for some period of time. In sum, Lt.Neal concludes that these repeated distractions placed him at a considerable disadvantage for the tactical and interview portions of the exam because, so far as he is aware and the record discloses, other applicants did not encounter similar distractions. As a result, he challenges the legitimacy of the testing process.

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But therein lies the problem: Lt. Neal did not request a new exam. Nor is that the relief the trial court granted. Instead, Lt. Neal requested—and the trial court ordered—that he be promoted to captain. R.C. 124.45 thus fails to support the relief ordered by the trial court, which explains Lt. Neal's avoidance of that provision.

It also is worth pausing for a moment to further illustrate the disconnect between a flawed testing environment and awarding Lt. Neal the promotion. Given Lt. Neal's scores during the untainted portions of the test, they suggest that he would not have qualified for promotion even under an ideal testing environment."

Facts:

"Lt. Neal joined the Cincinnati Fire Department in 1998, earning a promotion to lieutenant in 2010. In 2015, the department began accepting internal applications for fire captain and, pursuant to R.C. 124.45, the city administered promotional exams as part of that process. Lt. Neal applied for the advancement and participated in the promotional exam, which consisted of five sections. The first two sections presented objective, multiple choice questions; whereas the remaining three were subjective, involving tactical, interview, and written components. Lt. Neal's rankings for the first four sections varied between 39 and 43, and he ranked 14in the fifth section—yielding a final rank of 42 out of 54 candidates. The city of Cincinnati (respondent here) ultimately promoted the 25 highest scoring candidates, passing over Lt. Neal.

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Lt. Neal complained to the Civil Service Commission and requested that the commission remedy the situation by promoting him to fire captain. But after looking into the matter, the commission denied his request.

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Lt. Neal then brought this mandamus action against the city, seeking an order requiring the promotion. After a two-day bench trial, the court agreed with Lt. Neal and ordered the city to promote him to captain, along with back pay and attorneys' fees.

Conspicuously absent in this case is the source of any legal right or duty. As Lt. Neal frames it, he deserved 'a competitive examination that was administered competently, properly, fairly and in accordance with Ohio law.' But he points to no statute or ordinance providing a right or duty for this promotion. And as we have recently explained, '[f]or mandamus to lie, the duty 'must be specific, definite, clear and unequivocal.' ' State ex rel. Lanter,1st Dist. Nos. C-190708 and C-190720, 2020-Ohio-

4973, 160 N.E.3d 796, at ¶ 20, quoting State ex rel. Karmasu v. Tate, 83 Ohio App.3d 199, 205, 614 N.E.2d 827 (4th Dist.1992). In Lanter, this court found certain language in a city ordinance 'too vague to create a clear legal duty,' id., but at least the applicant there pointed to a city ordinance. By contrast, Lt. Neal identifies no ordinance or other authority as the source of any legal right or duty. We cannot excuse the lack of a clear duty, or else we dangerously expand the mandamus power."

Legal Lesson Learned: These examiners should be reprimanded and removed from further promotion boards.

Note: In the Lanter case referenced by the Court, State of Ohio, Ex Re. Timothy Lanter v. City of Cincinnati (Oct. 21, 2020) concerned a mandamus action filed by Cincinnati Police Sergeant Timothy Lanter; where the Ohio Court of Appeals reversed a trial judge who had granted relief to the Sergeant.

"This dispute arises over an episode allegedly colored by racist overtones. Daryl Spivey, an African-American, worked as a security guard at a building where the elevators cannot be accessed without entering a security code. Needing to use those elevators, Sergeant Lanter approached Mr. Spivey and asked him to enter the security code. Mr. Spivey complied, but he alleges that Sergeant Lanter responded with: 'Thanks, boy, I appreciate it.' Mr. Spivey immediately complained to his supervisor and filed a discrimination complaint with the CCA.

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The [trial judge in the Hamilton County Court of Common Pleas] overturned the CCA's report in the administrative review, determining that the CCA's findings were not supported by a preponderance of substantial evidence, in part pointing to the conflicting stories of Mr. Vandehatert. But the court dismissed Sergeant Lanter's mandamus petition because the administrative appeal provided an adequate remedy at law. The City appealed the trial court's review of the CCA's report, prompting Sergeant Lanter to cross-appeal the dismissal of the mandamus petition.

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[The Ohio Court of Appeals] ruled:

The city of Cincinnati created the Citizen Complaint Authority (CCA) as part of a settlement agreement to a federal lawsuit alleging racial discrimination within the Cincinnati Police Department. The purpose of the CCA is to provide independent review, reporting, and recommendations concerning citizen complaints about police conduct. After the CCA sustained a charge of discrimination against Cincinnati police sergeant Timothy Lanter, the police department investigated the matter anew and rejected the CCA's conclusions, which meant that Sergeant Lanter suffered no adverse employment consequences. Nevertheless, he initiated this litigation seeking to overturn the CCA's recommendation, and the trial court obliged. We conclude, however, that the trial court lacked subject matter jurisdiction because the matter before the CCA cannot qualify as a 'quasi-judicial' proceeding capable of review by a common pleas court."

File: Chap. 6, Employment Litigation

MO: CARDIAC ARREST AT FORD MOTOR – COMPANY EMER. RESP. TEAM INADEQUATE - WORK COMP. ONLY REMEDY

On April 13, 2021, in Nancy J. Ducoulombier v. Ford Motor Company, the Missouri Court of Appeal (Western District) held (3 to 0) that the trial court properly granted Ford Motor Company's motion for summary judgment. The wife's sole remedy is Worker's Compensation, not a jury trial seeking damages, even if the Ford Company's Emergency Response Team members were slow in calling 911, or slow in moving the patient to a location where responding EMS could being treatment.

> "Appellant's petition alleges that Ford's negligence caused Mr. Ducoulombier's death. More specifically, it alleges that Ford failed to have properly trained responders for Mr. Ducoulombier's on-site medical emergency, failed to ensure that the employees who administered CPR to Mr. Ducoulombier were properly trained, failed to equip its employees and Emergency Response Team members with proper equipment and devices to be used in Mr. Ducoulombier's cardiac life support, and failed to plan for interfacing with community EMS responders for on-site emergencies thereby hindering EMS responders in reaching Mr. Ducoulombier. Further, that Ford did not provide enough Emergency Response Team members within various areas of the plant so as to properly respond to Mr. Ducoulombier, and did not provide the Emergency Response Team members it had with appropriate vehicles to transport Mr. Ducoulombier to a rendezvous point. Finally, that Ford failed to timely notify community EMS responders of Mr. Ducoulombier's medical emergency and request their assistance in rendering care.
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> Based on the factual allegations set forth in Appellant's pleadings, the same is true here. Mr. Ducoulombier's presence and purpose for being on Ford's premises on February 25, 2016, was solely due to his employment. As such, exclusive statutory authority to consider the cause and extent of alleged injuries arising from Mr. Ducoulombier's presence at his workplace lies with the Labor and Industrial Relations Commission."

Facts:

> "The petition alleged that on February 25, 2016, Appellant's husband, Emil Albert Ducoulombier, Jr. was found unresponsive on a work platform at Ford by fellow employee, Jackson Stubbs. Stubbs performed chest compressions. Daniel B. Goodman was the second person to reach the side of Mr. Ducoulombier, and he performed mouth-to-mouth ventilation while Stubbs performed chest compressions. Shawn Newman and Mike Davis, members of the Ford Emergency Response Team, were next to arrive at the scene with an AED device which they utilized on Mr. Ducoulombiertwice. At 11:30 a.m., a call was dispatched to Claycomo Fire Department. While en route, Claycomo Fire Department EMT-Paramedic, Eric Miles, requested mutual aid from Pleasant Valley Fire. Upon arrival at the Ford Plant, Claycomo Fire was met by Ford security and directed to a rendezvous point where they waited for the Ford Emergency Response Team to bring Mr. Ducoulombier to them. When the Emergency Response Team arrived at the rendezvous point, it was several minutes before the Claycomo Fire Department EMT-Paramedics began treatment on Mr. Ducoulombier. EMT-Paramedic Miles and FF/EMT William

Wesley Pulse attempted to establish an airway. Thereafter, Pleasant Valley FF/EMT-Paramedic, Steve Winfrey, arrived on the scene with Marc Wachter, CPE, at which point EMT-Paramedic Miles assigned EMT-Paramedic Winfrey the task of establishing an airway.

He was found unresponsive on a work platform at Ford by fellow employee, Jackson Stubbs. Stubbs performed chest compressions. Daniel B. Goodman was the second person to reach the side of Mr. Ducoulombier, and he performed mouth-to-mouth ventilation while Stubbs performed chest compressions. Shawn Newman and Mike Davis, members of the Ford Emergency Response Team, were next to arrive at the scene with an AED device which they utilized on Mr. Ducoulombiertwice. At 11:30 a.m., a call was dispatched to Claycomo Fire Department.While en route, Claycomo Fire Department EMT-Paramedic, Eric Miles, requested mutual aid from Pleasant Valley Fire. Upon arrival at the Ford Plant, Claycomo Fire was met by Ford security and directed to a rendezvous point where they waited for the Ford Emergency Response Team to bring Mr. Ducoulombier to them. When the Emergency Response Team arrived at the rendezvous point, it was several minutes before the Claycomo Fire Department EMT-Paramedics began treatment on Mr. Ducoulombier. EMT-Paramedic Miles and FF/EMT William Wesley Pulse attempted to establish an airway. Thereafter, Pleasant Valley FF/EMT-Paramedic, Steve Winfrey, arrived on the scene with Marc Wachter, CPE, at which point EMT-Paramedic Miles assigned EMT-Paramedic Winfrey the task of establishing an airway.Paramedic Winfrey performed oral suctioning on Mr. Ducoulombier, revealing several tobacco packets in Mr. Ducoulombier's oropharynx. At the hospital, Mr. Ducoulombier was declared brain dead. Life support was withdrawn, and Mr. Ducoulombier died on February 29, 2016.

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Approximately two years prior tofiling this petition, Appellant had filed a claim for workers' compensation benefits with the Division of Workers' Compensation. Therein she alleged that Mr. Ducoulombier, "during the course and scope of his employment, suffered an injury by accident at work that resulted in Employee's death, whereby the workplace event was the prevailing factor in causing Employee's death." On December 28, 2016, Ford filed an "Answer to Claim for Compensation." Therein, Ford admitted "that it was operating under and subject to Missouri workers' compensation law on 2/25/16," admitted that Mr. Ducoulombier was Ford's employee on that date but denied 'each and every other allegation in the Claim for Compensation.' This claim remained pending at the time Appellant filed her petition in the circuit court alleging negligence against Ford.

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Appellant contends that the cause of Mr. Ducoulombier's incapacitation, which occurred while he was working, is completely irrelevant to an inquiry into whether the Labor and Industrial Relations Commission has statutory authority in this matter because Appellant's claims involve Ford's actions after the incapacitation. We disagree.

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> We find that Appellant fails to establish substantial grounds for believing that manifest injustice or miscarriage of justice occurred when the circuit court granted Ford's motion for summary judgment. Upon Ford raising the affirmative defense that the Workers' Compensation Law governed Appellant's claims, and moving for summary judgment on that issue, the trial court was tasked with determining whether Appellant's claims involved the employer/employee relationship. As Appellant's petition alleged that Mr. Ducoulombier became incapacitated while at work and thereafter suffered additional injury on Ford's premises due to Ford's negligence, we find no evident, obvious, or clear error in the circuit court's conclusion that Appellant's claims involved the employer/employee relationship such that the Labor and Industrial Relations Commission had exclusive authority to determine whether Mr. Ducoulombier's injury and death arose out of and in the course of his employment. Appellant's point on appeal is denied. The circuit court's judgment is affirmed."

Legal Lesson Learned: For workplace injuries and death, workers comp. is normally the exclusive remedy.

Note: Some states allow lawsuits against employers for "intentional torts." Ohio has a very limited statute. Ohio Revised Code 2745.01, "Liability of employer for intentional tort - intent to injure required - exceptions."

> (A) In an action brought against an employer by an employee, or by the dependent survivors of a deceased employee, for damages resulting from an intentional tort committed by the employer during the course of employment, the employer shall not be liable unless the plaintiff proves that the employer committed the tortious act with the intent to injure another or with the belief that the injury was substantially certain to occur.
> (B) As used in this section, "substantially certain" means that an employer acts with deliberate intent to cause an employee to suffer an injury, a disease, a condition, or death.
> (C) Deliberate removal by an employer of an equipment safety guard or deliberate misrepresentation of a toxic or hazardous substance creates a rebuttable presumption that the removal or misrepresentation was committed with intent to injure another if an injury or an occupational disease or condition occurs as a direct result.
> (D) This section does not apply to claims arising during the course of employment involving discrimination, civil rights, retaliation, harassment in violation of Chapter 4112. of the Revised Code, intentional infliction of emotional distress not compensable under Chapters 4121. and 4123. of the Revised Code, contract, promissory estoppel, or defamation.

Chap. 7 – Sexual Harassment, incl. Pregnancy Discrimination, Gay Rights

File: Chap. 8, Race Discrimination

MA: LT. MISTAKENLY LEFT "N" WORD VOICEMAIL - RACE COMPLAINT - THREATS "GO POSTAL" – FF REINSTATED

On April 27, 2021, in Town of Brookline v. Gerald Alston, et al., the Supreme Judicial Court of Massachusetts (Chief Justice Scott L. Kafker), after 6 years of litigation, upheld the Civil Service Commission and a trial court's decision to reinstate the firefighter. The Civil Service Commission, after a 10-day evidentiary hearing (14 witnesses; 280 exhibits) ordered him reinstated; the Town appealed to a Superior Court judge, who held for the firefighter; the Town then filed this appeal and lost again. In 2016, plaintiff was fired for refusing to comply with three (3) return to work conditions as recommended by psychiatrist retained by Town: "First, Alston would have to receive monthly treatment from a psychiatrist and weekly treatment with a therapist. Second, there would have to be reasonable workplace accommodations that reduced the level of stress for Alston. Third, Alston would have to undergo random drug screening for two years after he returned to work."

> "The underlying dispute in this case began with a racist comment, apparently on a misplaced telephone call. As Lieutenant Paul Pender was in a car driven by his son, he was cut off by a stranger. Pender referred to the person as a "fucking n----r." Unbeknownst to him, Pender had not properly hung up from a previous call, and he left a record of what he said on the voicemail of fellow firefighter Gerald Alston. Alston is African- American; Pender, his supervisor at the time, is Caucasian. A tumultuous six years of litigation and acrimony ensued, culminating in 2016 with Pender receiving his third promotion since leaving the voicemail and Alston being fired by the town of Brookline (town).
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> [W]e conclude that there is substantial evidence to support the commission's determination that the town acted arbitrarily and capriciously and in violation of 'Alston's rights under the civil service law to be treated fairly 'without regard to . . . race.' Considering Pender's racist comment, the retaliatory actions, and the town's continuously insensitive and inappropriate, if not outright discriminatory, responses, the commission's findings constitute 'such evidence as a reasonable mind might accept as adequate to support' the conclusion that the town caused Alston's unfitness preventing his return to work."

Facts:

> [The Voicemail Incident; read full opinion for subsequent facts.]
>
> "The issue presented is whether the Civil Service Commission (commission) [represented by Assistant Attorney General] can consider evidence related to a racially hostile or retaliatory work environment when assessing whether a municipality had just cause to terminate a tenured civil service employee.
>
> ***
>
> Early in 2010, Alston suffered an injury while on duty that kept him out of work. On May 30, 2010, Pender called Alston to check on his well-being, but the call went to Alston's voicemail. Pender thought that he had ended the call but in fact had not. As a result, Pender left the voicemail on Alston's telephone in which he said 'fucking n----r.'

Footnote 3: At the time he used the racial slur, Pender was in a car with his son driving. The commission credited Pender's testimony that Pender used the slur to refer to another driver, not Alston. Pender has described the driver at whom he directed the slur on various occasions as ‘a young black kid,’ a ‘black or Hispanic’ male, and ‘some young gangbanger.’

Alston's wife listened to the voicemail first and then told Alston to listen to it. Alston was shocked and hurt by the slur. Unsure whether the voicemail included the slur, Pender called Alston numerous times that same day and in the ensuing days; Alston never returned his calls. Pender testified that he also told other firefighters what happened and ‘sort of expressed relief [to them] that . . . [Alston] was [his] buddy and [he was] sure nothing was going to happen.’

***

Pender and Alston spoke by telephone on July 8, and Pender told Alston that the slur was not intended for him but was directed at "some young gangbanger" who had cut him off in traffic. This further upset Alston, who ended the call. Pender called Alston again two days later and repeated his explanation of the context in which he made the slur. He also told Alston that reporting the incident to O'Reilly was the most stupid thing Alston could have done and asked Alston, "Do you want me to lose my job?"

***

On July 28, Alston sent a formal complaint to the then fire chief, Peter Skerry. Skerry immediately notified the town's director of human resources, Sandra DeBow. Two days later, on July 30, Alston, his wife, Skerry, O'Reilly, and town counsel met to address the complaint. Alston played the voicemail at the meeting. After hearing the message, Skerry determined that Pender's use of the slur was a fireable offense and told Alston that he would fight for Pender's termination. Alston responded that he did not want Pender terminated. Skerry also told Alston that Pender would be ineligible for a promotion and assured Alston that the department took his complaint seriously. That day, Pender was transferred to another station.

DeBow began an investigation into the incident.[4] As part of her investigation, she interviewed Pender on August 2. During that interview, Pender admitted using the slur but maintained that it was not directed at Alston. On August 16, DeBow issued her investigative report, which concluded that Pender's use, during a work-related call, of ‘profanity and a well-recognized, racially-inflammatory term rises to the level of conduct unbecoming to a firefighter as it would tend to lower the service in the estimation of the [p]ublic, and further that such conduct is also prejudicial to good order.’ DeBow recommended progressive discipline, Pender's permanent transfer, mediation between Alston and Pender, development of an antidiscrimination policy, and antidiscrimination training, including training on supervisors having a duty to report incidents.

On August 17, the day after DeBow issued her report, the town's board of selectmen (board) held a closed-door disciplinary hearing for Pender. Alston was not called as a witness and did not appear before the board. Skerry recommended that Pender be

suspended for four tours (the equivalent of eighty-four hours of lost pay). The board rejected Skerry's recommendation and chose to suspend Pender for two tours with another two tours held in abeyance pending no further misconduct.[5] Pender served his two-tour suspension between August 30 and September 6.

Footnote 6: Pender's two-tour suspension equated to a loss of forty-two hours of pay. In 2013, however, Pender and the town entered a settlement agreement in which the town gave Pender forty-two hours of vacation time. Pender alleged that this time was the result of long-standing issues over vacation time with the town and not related to his 2010 suspension, but neither Pender nor the town was able to provide any documentation to support that contention.

On September 10, four days after he completed his suspension, Pender was promoted to temporary fire captain.[7]

Footnote 7: Pender was promoted as part of a series of promotions to fill vacancies after a deputy chief position opened. His name was at the top of the civil service list for the temporary captain position.

Alston learned of the promotion on September 15 and immediately called DeBow to voice his objection, particularly given Skerry's representations at the July 30 meeting that Pender would not be promoted. Alston also expressed his agitation with Pender's promotion when speaking with Skerry on October 12.

***

Alston commenced a lawsuit in Federal court in December 2015 against the town, the union, and various town officials, alleging civil rights violations under Federal law. A Federal judge concluded that Alston could not bring any claims that he either brought or could have brought in the Norfolk litigation. Alston v. Brookline, 308 F. Supp. 3d 509, 516 (D. Mass. 2018). The judge granted summary judgment in favor of the town on Alston's remaining claims, concluding that there was no genuine dispute of material fact that the town did not discriminate against Alston. Alston vs. Brookline, U.S. Dist. Ct., No. 15-13987-GAO (D. Mass. Apr. 2, 2020). Rather, the judge concluded that the town fired Alston because 'he repeatedly declined to attend meetings he was invited to or present evidence of his own about his ability to return to work.' Id. Alston's appeal from the summary judgment decision currently is pending.

***

Racist and retaliatory acts, combined with an arbitrary and capricious response by the employer, may be found to be sufficient to support a determination that the discharge was unjustified. A civil service employee has greater job protection than most other employees as reflected in the just cause provision, and additional procedural and job-specific rights."

Legal Lesson Learned: Words matter; most unfortunate set of facts.

Note: The Court in Footnote 23 wrote: "We emphasize today what should no longer need to be said in 2021 -- the use of "n----r" has absolutely no place in any workplace environment in the Commonwealth, including among those subject to the civil service laws."

See also this article on the case: "Brookline Appeals Superior Court Ruling On Firefighter Alston" (Oct. 3, 2019).
See also this NASCAR article: "Kyle Larson has been Fired. NASCAR driver saying N-word was 'offensive and unacceptable" (April 14, 2020).

Chap. 9 – Americans With Disabilities Act
Chap. 10 – Family Medical Leave Act, Military Leave

File: Chap. 11, FLSA

MO: FLSA CLASS ACTION MAY PROCEED – 400+ FF – SPECIALTY PAY NOT ADDED TO "REGULAR RATE OF PAY"

On March 30, 2021, in Craig Adams and Joseph Knopp, individually and on behalf of similarly situated plaintiffs v. City of Kansas, Missouri, U.S. Magistrate W. Brian Gaddy denied the City's motion to decertify the class action, where 474 firefighters submitted consent forms to join the class action (91 firefighters who did not receive the specialty pay since 2016 were with agreement dropped from the case). The Complaint, filed in 2019, alleges that City failed to increase the firefighters "regular rate of pay" for those FF receiving specialty pay, including members of the Hazards Material Team (3%); members of ARFF receive a 5% pay increase; Instructors (10%); FTO's (5%); EST maintaining cardiac monitors and hydraulic cots (10%); cross trained FF / EMS assigned to combined rescue and Squad (3%).

> "The Court notes the more than 400 collective action members have been and continue to be represented by the same law firm. Throughout more than two years of litigation, counsel has sought and continues to seek relief on behalf of the collective action members.
>
> ***
>
> Here, the Court concludes collective adjudication reduces the burden on Plaintiffs through the pooling of resources and efficiently resolves common issues of law and fact arising from the City's application of a pay policy. Not only would it be impractical or difficult for each collective action member to pursue his or her FLSA claim individually, the legal questions and common factual issues lend themselves to resolution through common evidence. By permitting this matter to proceed as a collective action, the result will be one judgment. Whereas, decertification could result in hundreds of individual trials. See Kautsch, 2008 WL 294271, at *4; see also Shoots, 325 F.R.D. at 279-80. Accordingly, the issues will be efficiently resolved for the parties and the Court."

Facts:

"Plaintiffs Craig Adams and Joseph Knopp are employed as firefighters with Defendant City of Kansas City, Missouri ('the City'). In January 2019, Plaintiffs, on behalf of themselves and others similarly situated, filed this matter in the Circuit Court of Jackson County, Missouri, alleging the City erroneously calculated overtime pay for firefighters, violating the Fair Labor Standards Act ('FLSA').

***

In November 2019, Plaintiffs moved for conditional certification of an FLSA collective action, which the City opposed. Docs. 23-24, 27, 29. In January 2020, the Honorable John T. Maughmer, United States Magistrate Judge, granted Plaintiffs' motion and conditionally certified a collective action consisting of current and former firefighters employed by the City who received certification or incentive pay at any time since January 10, 2016. Doc. 45. Pursuant to the Court's Order, those firefighters were notified of the collective action and instructed to submit a consent form if they wanted to join the collective action. *Id*. at 7. According to Plaintiffs' counsel, 474 individuals submitted consent forms by the April 14, 2020 deadline.

***

On August 21, 2020, the City filed motions asking the Court to remove individuals from the conditionally certified collective action and decertify the collective action….
The City claims collective adjudication would violate its due process rights because the collective action members' claims and damages are 'so divergent.' Doc. 536, at 6. The City contends it will need to take each collective action member's deposition and will need to review time clock and other records. *Id*. The City's argument, however, ignores that Plaintiffs allege the City erroneously calculated overtime pay in violation of the FLSA. Doc. 1-1. As discussed *supra*, the collective action members' FLSA claims are not based upon different facts or employment settings."

Legal Lesson Learned: Case will now proceed to trial. **See the Complaint.**

Note: See this helpful U.S. Department of Labor, Wage & Hour instructions on "regular rate of pay" (Dec. 2019):

"Under the FLSA, the regular rate includes 'all remuneration for employment paid to, or on behalf of, the employee.' The FLSA (29 USC § 207(e)) provides an exhaustive list of types of payments that can be excluded from the regular rate of pay when calculating overtime compensation. Unless specifically noted, payments that are excludable from the regular rate may not be credited towards overtime compensation due under the FLSA. Additional information regarding exclusions from the regular rate may be found in the regulations, 29 C.F.R. § 778.200-.225."

Chap. 12 – Drug-Free Workplace

NC: DIVISION CHIEF'S DUI CONVICTION – NOT ELIGIBLE TWO PROMOTIONS 2019 – TITLE VII (RACE) DISMISSED

On April 1, 2021, in Kevin Coppage v. City of Raleigh, U.S. District Court Chief Judge Richard E, Myers, II, United States District Court for the Eastern District of North Carolina, granted the City's motion to for partial dismissal of the Amended Complaint. The plaintiff, a Division Chief (highest ranking African-American on the fire department), was convicted of an off-duty DUI on July 10, 2019. In Oct. 2019, he was denied promotion to Assistant Fire based the FD's Administrative Directive of March 21, 2019 that employees are current promotion lists are ineligible upon conviction. On November 29, 2019, plaintiff applied for the position of Division Chief of Service and was again denied based on his DUI conviction. In Dec. 2019, he filed EEOC charge claiming he was denied seven (7) promotions because of his race.

> "On or about March 4, 2019, when Plaintiff was off duty, he was charged with 'driving under the influence' ('DUI'); he was eventually convicted of the charge on or about July 10, 2019. On or about March 21, 2019, the Fire Department's Office of the Fire Chief published an Administrative Directive titled, 'Impaired Driving Offenses,' which directed that '[a]n employee . . . [who] is eligible for promotion on a concurrent promotional list will be ineligible for the current promotion if charged and convicted with an impaired driving offense.' While the Administrative Directive was published with an effective date of March 1, 2019, the Office of the Fire Chief issued two other policies on March 21, 2019 that had effective dates of March 21, 2019. Plaintiff believes that the Office of the Fire Chief had never issued new policies with effective dates prior to the publication date and that the purpose of backdating the 'Impaired Driving Offenses' Administrative Directive was to provide a racially neutral pretext for denying Plaintiff further promotions. Plaintiff also believes that the Fire Department has promoted white firefighters who have been subject to the March 2019 Administrative Directive.
>
> ***
>
> Plaintiff's [Dec. 2019 EEOC] charge of discrimination lists only the discrete acts of failures to promote [on 7 occasions] and does not mention Defendant's treatment of other non-white firefighters, statistics concerning non-white employees in the Department, or the application of the Administrative Directive to Plaintiff or any other employee.
> ***
> The court must conclude that the factual allegations in the Amended Complaint are not reasonably related to the factual allegations in the charge of discrimination and, therefore, the Plaintiff's hostile work environment claim has exceeded the scope of the EEOC charge. As such, Plaintiff fails to state a plausible second claim for relief having failed to exhaust required administrative remedies."

Facts:

> "Defendant hired Plaintiff to work for the Raleigh Fire Department in May 1994. Since that time, Plaintiff has received numerous commendations and awards; for example, in 2009, Plaintiff was recognized as 'Firefighter of the Year' by the American Legion, Raleigh Post. In addition, Plaintiff has been promoted from firefighter to captain, then

ultimately from captain to his current position as a division chief, only the third African American to receive such promotion in the Fire Department's history. During his time as Captain, he also served as a Recruit Academy instructor where he trained both new recruits and veteran firefighters. Since his last promotion in 2017, Plaintiff has been the only African American Division Chief employed by the Defendant.

During this period, Plaintiff also earned his master's degree in Crisis Management and Disaster Management, and he is currently pursuing his doctorate in Executive Leadership and Organizational Development. Plaintiff believes he has more relevant educational and professional experience than any other Division Chief in the Fire Department.

***

In October 2019, Plaintiff communicated to his supervisors that he wanted to be considered for the role of Assistant Chief, which requires the following qualifications: (a) bachelor's degree or equivalent (applicants may substitute additional relevant experience for the required education); (b) at least ten years of progressively responsible relevant experience (applicants may substitute additional relevant education for the required experience); (c) knowledge of spreadsheet software and word processing software; and (d) a regular driver's license (Hazmat operations preferred, Firefighter II preferred, Instructor certification preferred, Inspector certification preferred). Plaintiff met or exceeded all of the required qualifications to serve as Assistant Chief at the time he sought the position but, citing Plaintiff's March 2019 DUI charge, Defendant did not promote Plaintiff and, instead, promoted a white male, Ronny Mizell, to the position. Mr. Mizell had less relevant educational experience, fewer relevant credentials, and less professional experience than Plaintiff. Plaintiff believes that Mr. Mizell did not meet the requirements for the position as stated in the job description.

***

Defendant seeks dismissal of a portion of Plaintiff's first claim, to the extent Plaintiff bases it on conduct occurring before March 6, 2019, the date set forth in Plaintiff's charge of discrimination filed with the Equal Employment Opportunity Commission (‘EEOC’).

***

Plaintiff counters that his claims are not based on conduct alleged to have occurred before March 6, 2019, and his hostile work environment claim is both plausible and viable, in that it falls within the scope of his EEOC charge. Defendant replies that, under prevailing law, Plaintiff has not exhausted his administrative remedies, as required, since the EEOC charge does not encompass the hostile environment claim; in the alternative, Defendant contends the conduct Plaintiff alleges for his harassment claim is not objectively severe or pervasive.

***

Plaintiff's charge of discrimination, a copy of which is attached to the Amended Complaint, states in its ‘particulars’ section: ‘Since on or around March 6, 2019, I believe I have been harassed and discriminated against, because of my race, Black. I have

inquired/expressed interest in at least seven (7) positions, but I have been overlooked for advancement opportunities.'

***

The court finds Plaintiff's harassment claim exceeds the scope of his charge of discrimination and, thus, Plaintiff has failed to exhaust the required administrative remedies for his second claim for relief.

***

Plaintiff also alleges that the Administrative Directive related to "Impaired Driving Offenses" has been applied to deny him promotions but has not been likewise applied to white employees. Am. Compl. . ¶ 60.

***

The alleged conduct, while serious, is neither severe nor frequent (four promotion denials between 2012 and 2017 and two denials in 2019 based on the Administrative Directive), not physically threatening, and is not '[so] extreme [as] to amount to a change in the terms and conditions of employment.' *Sunbelt Rentals*, 521 F.3d at 315 (4th Cir. 2008) (quoting *Faragher v. City of Boca Raton*, 524 U.S. 775, 788 (1998)). In other words, Plaintiff has failed to allege that he suffered 'situations that a reasonable jury might find to be so out of the ordinary as to meet the severe or pervasive criterion. That is, instances where the environment was pervaded with discriminatory conduct 'aimed to humiliate, ridicule, or intimidate,' thereby creating an abusive atmosphere." *Id*. at 316 (quoting *Jennings v. Univ. of North Carolina*, 482 F.3d 686, 695 (4th Cir. 2007)); *see also Perkins*, 936 F.3d at 209 (evidence of disparate treatment in the application of benefits, rankings, shift assignments, approval of overtime, and enforcement of workplace rules, together with denials of several promotion requests by Black employee while whites were granted promotions, was insufficient to rise to the level of the severity and pervasiveness required to constitute a hostile workplace)."

Legal Lesson Learned: FDs may adopt DUI policy prohibiting promotion based on a DUI conviction.

Note: See article on San Antonio policy (Jan. 15, 2015): "Fire dept. changes rules after firefighter DWI arrests. The change in protocol comes after three firefighters were arrested for suspected drunk driving during a seven-week period last summer."

> "SAFD has increased suspension lengths for firefighters arrested for Driving While Intoxicated. A first DWI arrest now results in a 60-day suspension and mandatory alcohol abuse counseling. This suspension length is four times longer than the 15-day suspension previously given for a first offense. A second DWI arrest results in termination."

See this article on firefighter DUIs in California, written by Retired Captain Rafael Ortiz, Los Angeles County Fire Department. "What Happens if a Firefighter Drinks/Drives in their Personal Life?"

"Typical Costs and Consequences of First Offense DUI.

These would be without any aggravated circumstances, such as collision, injury, etc.

- Attorney Fees: $8,500.00
- Court fines/fees: $1,500.00
- Court mandated classes: $500.00
- Additional insurance of: $1200.00 (per year for three years)
- 6 months restricted license
- Time off work during DMV license suspension (typically 30 days)
- Attend eight classes at Alcohol Anonymous – 12 hours
- Attend ten classes for Alcohol Awareness – 30 hours
- Suspension or discharges from Fire Department or various lesser charges

The point is, if you want to be a firefighter (or remain a firefighter), don't drink and drive."