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# JUNE 2021 – FIRE & EMS LAW Newsletter

[NEWSLETTER IS NOT PROVIDING LEGAL ADVICE.]

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**FIRE & EMS LAW – MONTHLY NEWSLETTERS.** If you would like to receive free newsletter, just send me an e-mail.

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## JUNE NEWSLETTER: 9 RECENT CASES REVIEWED

Chap. 1 – American Legal System, incl. Fire Codes, Fire Invest.

Chap. 2 – Line Of Duty Death / Safety

Chap. 3, Homeland Security, incl. Active Shooter, Cybersecurity, Immigration

## U.S. SUP. CT – ALIEN IN US 8 YEARS, 3 KIDS – INS "STOP THE CLOCK" 10-YR STAT. – SINGLE NOTICE, HEARING DATE

On April 29, 2021, in Agusto Niz-Chavez v. Garland, Attorney General, the U.S. Supreme Court (6 to 3; majority opinion by Justice Neil Gorsuch), held that the Immigration and Naturalization Service is required by statute to issue a single Notice of Removal that includes date / location of removal hearing before an Immigration Judge. Mr. Niz-Chavez deportation cancelled; now has another hearing before Immigration Judge. Aliens residing in U.S. for 10 or more years may seek "Cancellation of removal" under 8 U.S. Code 1229b, if they have been of good moral character and they can establishes that removal would result in exceptional and extremely unusual hardship to the alien's spouse, parent, or child, who is a citizen of the United States or an alien lawfully admitted for permanent residence. Mr. Niz-Chavez is a citizen of Guatemala who in 2005 unlawfully entered the United States through the southern border, and eventually settled in Detroit. INS sent him two Notices of Removal - first notice of Removal, 8 years after he arrived in U.S. (March 26, 2013) did not specify the date of his removal hearing in Detroit. The second Notice (May 29, 2013) did specify the hearing date (June 25, 2013; then rescheduled 4 years later, Sept. 13, 2017; ordered deported Nov. 8, 2017).

> "Anyone who has applied for a passport, filed for Social Security benefits, or sought a license understands the government's affinity for forms. Make a mistake or skip a page? Go back and try again, sometimes with a penalty for the trouble. But it turns out the federal government finds some of its forms frustrating too. The Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA),110 Stat. 3009–546, requires the government to serve 'a notice to appear' on individuals it wishes to remove from this country. At first blush, a notice to appear might seem to be just that—a single document containing all the information an individual needs to know about his removal hearing. But, the government says, supplying so much information in a single form is too taxing. It needs more flexibility, allowing its officials to provide information in separate mailings (as many as they wish) over time (as long as they find convenient). The question for us is whether the law Congress adopted tolerates the government's preferred practice.
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> Our only job today is to give the law's terms their ordinary meaning and, in that small way, ensure the federal government does not exceed its statutory license. Interpreting the phrase 'a notice to appear' to require a single notice—rather than 2 or 20 documents—does just that…. At one level, today's dispute may seem semantic, focused on a single word, a small one at that. But words are how the law constrains power. In this case, the

law's terms ensure that, when the federal government seeks a procedural advantage against an individual, it will at least supply him with a single and reasonably comprehensive statement of the nature of the proceedings against him. If men must turn square corners when they deal with the government, it cannot be too much to expect the government to turn square corners when it deals with them."

Facts:
Following is from 6th Circuit decision; Oct. 24, 2019: "Niz-Chavez was born in Tajumulco, San Marcos, Guatemala in 1990. Prior to his arrival in the United States, he lived in Tajumulco with his family. He is the sixth of eight children in his family. Niz-Chavez and his family lived together on land that they owned without issue until around 2002. Around that time, a land dispute arose between Niz-Chavez's family and villagers from Ixchiguan, a neighboring village.

> Niz-Chavez testified that Ixchiguan villagers murdered his brother-in-law during this dispute. Two years later, the dispute escalated again when fifty armed Ixchiguan villagers arrived at the land and took possession of the land by threatening Niz-Chavez's family, advising them that 'if they found a member of [his] family [on the land], they were going to kill him or her.' (September 13, 2017 Hearing Transcript, A.R. 197.) His family has not returned to the disputed land, and his parents now live on a piece of land about an hour from the land that the Ixchiguan villagers forcibly took. Some of Niz-Chavez's siblings also remain in Guatemala. Niz-Chavez testified that his family still receives threats from the Ixchiguan villagers, but he is not aware of any further acts of violence attempted or carried out against his family.
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> Niz-Chavez left Guatemala and arrived in the United States in 2005. After residing in Harrison, Virginia, for two years, Niz-Chavez moved to Detroit, Michigan, in 2007, where he has lived ever since. He is now the father of three children, who are United States citizens. Regarding a potential return to Guatemala, Niz-Chavez testified that he was concerned that the Ixchiguan villagers would learn of his return and, believing that he was in the country to reclaim the stolen and, kidnap or kill him. He also expressed concern that the village of Tajumulco would force him to fight in a land war against the Ixchiguan villagers.
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> On March 26, 2013, Niz-Chavez was served with a notice to appear before an IJ [Immigration Judge] in Detroit at a date and time to be determined later. On May 29, 2013, he received a notice of hearing in removal proceedings, which stated that the hearing in his case was scheduled on June 25, 2013, at the immigration court in Detroit. Niz-Chavez appeared at the hearing, conceded removability, and stated his intent to seek both withholding of removal and protection under the Convention Against Torture. Eventually, a hearing on the merits of his case was held before an IJ on September 13, 2017, with an oral decision issued by the IJ on November 8, 2017.
>
> The IJ denied Niz-Chavez's application for withholding of removal and his application for relief under the Convention Against Torture. The IJ granted Niz-Chavez thirty days to voluntarily depart the country and advised him of his right to appeal to the BIA. The IJ found that Niz-Chavez failed to establish that he was subject to past persecution or that he could not avoid future persecution in Guatemala by relocating within the country, findings which are fatal to a claim for withholding of removal. The IJ also found that

Niz-Chavez had not established that government officials in Guatemala acquiesce to any sort of torture, as is required for a claim under the Convention Against Torture.

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The BIA [Board of Immigration Appeals] affirmed the IJ's decision and denied the motion to remand, finding that Niz-Chavez was not eligible for cancellation of removal under the Pereira decision.

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Here, the BIA found that it was not more likely than not that Niz-Chavez would be tortured with official acquiescence were he to return to Guatemala. The BIA found that even if the land feud violence were to occur and be considered severe enough to constitute torture, Niz-Chavez failed to show that it would occur with government acquiescence."

6th Circuit denied his appeal:

"Convention Against Torture

Under this court's precedent, an applicant who seeks relief under the Convention Against Torture must show that it is 'more likely than not that he would be tortured if removed to the proposed country of removal.' Zhao v. Holder, 569 F.3d 238, 241 (6th Cir. 2009); see also 8 C.F.R. § 1208.16(c)…. This court requires more to show government acquiescence. Specifically, we have held that without testimony that establishes that government actors participated in, consented to, or willfully ignored the violence, the record does not compel a conclusion that the government acquiesced to torture. Id.at 502. Here, no testimony establishes that the government was willfully ignoring the land feud violence that occurs in Guatemala. As the government notes, record evidence demonstrates that the occurrence of land feud violence is actually decreasing in Guatemala, and there is no testimony that the government has ignored the problem. Moreover, as discussed above, the record also does not compel the conclusion that Niz-Chavez would be subjected to violence at all, let alone violence amounting to torture that occurs with government acquiescence."

U.S. Supreme Court decision – deportation cancelled

"For more than a century, Congress has afforded the Attorney General (or other executive officials) discretion to allow otherwise removable aliens to remain in the country. An alien seeking to establish his eligibility for that kind of discretionary relief, however, must demonstrate a number of things. A nonpermanent resident, for example, must show that his removal would cause an 'exceptional and extremely unusual hardship' to close relatives who are U. S. citizens or lawful permanent residents; that he is of good moral character; that he has not been convicted of certain crimes; and that he has been continuously present in the country for at least 10 years. 8 U. S. C. §1229b(b)(1).

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The last item on this list lies at the crux of this case. Originally, an alien continued to accrue time toward the presence requirement during the pendency of his removal proceedings. With time, though, some came to question this practice, arguing that it gave

immigrants an undue incentive to delay things. See, e.g., In re Cisneros-Gonzales, 23 I. & N. Dec. 668, 670–671 (BIA 2004). In IIRIRA, Congress responded to these concerns with a new 'stop-time' rule. Under the statute's terms, 'any period of continuous . . . presence in the United States shall be deemed to end . . . when the alien is served a notice to appear.' §1229b(d)(1).

All of which invites the question: What qualifies as a no-tice to appear sufficient to trigger the stop-time rule? IIRIRA defines a notice to appear as 'written notice . . . specifying' several things. §1229(a)(1). These include the nature of the proceedings against the alien, the legal authority for the proceedings, the charges against the alien, the fact that the alien may be represented by counsel, the time and place at which the proceedings will be held, and the consequences of failing to appear."

Dissent – Opinion by Justice Brett Kavanaugh

"If Congress actually wanted to require a single document to stop the 10-year clock, Congress easily could have (and surely would have) said so. After all, the statute supplies comprehensive and detailed instructions about how the Government must serve a notice to appear and what information must be included. But the statute never says that all the required information must appear in a single document."

**Legal Lesson Learned: The majority opinion is now the law of the land; INS can "stop the clock" on the 10-year "Cancellation of Removal" statute, only when they provide a single Notice that includes the date / place of removal hearing.**

Note:

8 U.S. Code § 1229b - Cancellation of removal; adjustment of status:

(b) Cancellation of removal and adjustment of status for certain nonpermanent residents

(1) In general

The Attorney General may cancel removal of, and adjust to the status of an alien lawfully admitted for permanent residence, an alien who is inadmissible or deportable from the United States if the alien—

(A)

has been physically present in the United States for a continuous period of not less than 10 years immediately preceding the date of such application;

(B)

has been a person of good moral character during such period;

(C)

has not been convicted of an offense under section 1182(a)(2), 1227(a)(2), or 1227(a)(3) of this title, subject to paragraph (5); and

(D)

establishes that removal would result in exceptional and extremely unusual hardship to the alien's spouse, parent, or child, who is a citizen of the United States or an alien lawfully admitted for permanent residence.

**Convention Against Torture:**

1984 – UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.
Ratified by U.S. in 1994.

**Asylum Manual - Relief Under CAT:**

"Relief under the Convention Against Torture (CAT) is the third form of relief an individual fearing persecution can seek. Like withholding of removal, it can only be granted by an Immigration Judge (IJ), and not by an Asylum Officer.

An applicant bears the burden of demonstrating that it is more likely than not that they will be tortured if removed to their country of origin. The Board of Immigration Appeals (BIA) has found that torture 'must be an extreme form of cruel and inhuman punishment' that 'must cause severe pain or suffering.' There are no bars to eligibility for relief under CAT.

The advantage of CAT is that there are no bars to eligibility. Therefore, since the treaty itself does not contain any bars to its mandate of non-return, aggravated felons can make claims for relief if they fear torture. Additionally, applicants are not required to establish that their fear of torture is on account of race, religion, nationality, political opinion, or membership in a particular social group."

Chap. 4 – Incident Command, incl. Training, Drones, High Tech

Chap. 5 – Emergency Vehicle Operations

File: Chap. 6, Employment Litigation, incl. Workers Comp, Disability

## NY: FF RIGHT SHOULDER INJURIES – NONE QUALIFY FOR "ACCIDENTAL DISABILITY RETIREMENT [75% TAX FREE]

On May 20, 2021, In the Matter of Bernard McGoey v. Thomas P. DiNapoli, as State Comptroller, 2021 NY Slip Op 3235 (N.Y. App. Div. 2021), the Appellate Division of the Supreme Court of the State of New York, held (3 to 0) that the New York State and Local Police and Fire Retirement System correctly held that the three incidents, including being hit by ice from building, were part of the normal risks of firefighting, and did not constitute "accidents" within the meaning of state statute, which requires proof of "a sudden, fortuitous mischance,

unexpected, out of the ordinary, and injurious in impact." Under NY law, if he has proven an injury from an accident, he would receive a tax-free pension of 75% of their final average salary.

> "Petitioner does not dispute, and the record indeed establishes, that petitioner was engaged in the performance of his ordinary firefighting duties during each of the foregoing incidents.
>
> *** It also is well established that encountering smoke, water, tangled hose lines, reduced visibility and debris — as well as the corresponding threat of tripping or falling due to such conditions … are all risks inherent in the performance of a firefighter's duties….

Facts:

> "In 2017, petitioner — a firefighter — filed an application for accidental disability retirement benefits alleging that he was permanently disabled as a result of injuries to his right shoulder that, in turn, were sustained during seven different incidents occurring between 2006 and 2017. The New York State and Local Police and Fire Retirement System denied petitioner's application upon the ground that the incidents did not constitute accidents within the meaning of Retirement and Social Security Law § 363. At the requested hearing and redetermination that followed, petitioner withdrew four of the seven incidents, and the sole issue distilled to whether the incidents occurring in June 2006, January 2009 and March 2010 qualified as accidents. The Hearing Officer denied petitioner's application, finding, among other things, that the cited incidents occurred during the course of petitioner's routine employment duties and were risks inherent in the performance of those duties. Respondent upheld the Hearing Officer's determination, and petitioner thereafter commenced this CPLR article 78 proceeding to challenge respondent's determination.
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> With respect to the June 2006 incident, the record reflects that petitioner was engaged in overhauling a structure fire, i.e., looking for hot spots in a charred and smoky room by using a hooked pole to tear down the ceiling of the structure. As petitioner moved backwards along the path that he initially used to enter the room, he fell over two boxes and sustained injuries to his right shoulder, right arm and neck. Although petitioner testified that the boxes were not there when he first entered the room and that he did not see them prior to his fall, he acknowledged that, although he was focused on the ceiling above him, he was 'looking' behind him 'with [his] feet' by utilizing 'a slide-step motion' as he moved backwards.
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> Turning to the January 2009 incident, petitioner responded to a residential structure fire in the middle of the night and encountered heavy smoke and fire coming from the front door and side windows of the residence. As petitioner attempted to free two hose lines that had frozen together due to the extreme cold, he was struck on his right shoulder, right arm and neck by a large piece of ice that had dislodged from an awning or overhang located approximately 20 feet above where petitioner was standing. Petitioner acknowledged that, in extreme cold, water can freeze on the exterior of a building and form ice within a matter of minutes, that icicles form on buildings during the winter and that it is not out of the ordinary for icicles to fall off of buildings. Petitioner suggested, however, that the water used to suppress the fire was being sprayed inside of the structure — the implication being that the

offending piece of ice did not form on the building's exterior during the course of the firefighting efforts.

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The final incident occurred in March 2010 when petitioner slipped or stepped in what he surmised was a depression in the pavement of the alleyway adjacent to the structure fire to which he was responding — causing him to lose his footing and experience discomfort in his right shoulder and right arm. At the time of the incident, multiple hose lines were being used to fight the fire, and petitioner described the positioning of those hose lines as 'look[ing] like spaghetti.' According to petitioner, he was 'looking down and watching where [he] was walking,' but the smoke in the alleyway reduced visibility, and whatever it was that caused him to lose his footing was 'covered with water, debris, and the hose lines.'

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As such, substantial evidence supports respondent's finding that the June 2006 and March 2010 incidents did not constitute accidents within the meaning of the Retirement and Social Security Law.

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We reach a similar conclusion regarding the January 2009 incident. Given petitioner's experience with fighting fires in winter conditions, his admitted awareness regarding the ease with which ice may form on a building's exterior under extremely cold temperatures and the weather conditions existing on the morning of the fire — as evidenced by, among other things, the frozen hose lines that petitioner was attempting to free when he was injured — the hazard encountered by petitioner, i.e., falling ice, 'could have been reasonably anticipated' (*Matter of Stancarone v DiNapoli*, 161 AD3d 144, 148-150 [2018]), notwithstanding petitioner's testimony that smoke obscured his view of the exterior of the residence. Hence, substantial evidence supports respondent's finding that this incident was not an accident (*see id*. at 148).

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In light of the foregoing, respondent's denial of petitioner's application for accidental disability retirement benefits will not be disturbed."

**Legal Lesson Learned: To receive a tax-free pension of 75% of final average salary, the firefighter had to prove injury from a sudden, unexpected occurrence that was not a risk inherent in the job.**

Note:
See article: NEW YORK COURTS CLARIFY DEFINITION OF 'ACCIDENT' FOR DISABILITY RETIREMENT PURPOSES (Oct. 12, 2018):

> "In New York State, police officers and firefighters who are rendered permanently disabled as the result of an on-the-job 'accident' are eligible to receive a tax-free pension of 75% of their Final Average Salary. To qualify, the first responder needs to demonstrate that their work injury meets the definition of an 'accident" as defined over time by New York State courts. An 'accident' is a

sudden, unexpected occurrence that was not a risk inherent in the work performed. For years, this definition of an 'accident' has been fraught with ambiguity and has led to inconsistent decisions, many of which involve cases where the employee was injured as the result of a misstep or fall.

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On February 13, 2018, the New York State Court of Appeals – the highest court in New York – decided two important cases involving applications for accidental disability retirement benefits. In Kelly v. DiNapoli and Sica v. DiNapoli, the Court ruled that it would no longer require injured workers to demonstrate that they were injured as the result of a hazard that was not 'readily observable.' Previously, applications for accidental disability retirement benefits were often denied simply because the hazard that caused the disabling injury was deemed 'readily observable,' even if the injured worker did not actually see it at the time of their injury."

File: Chap. 6, Employment Litigation, incl. Workers Comp, Disability

## NJ: FF INJURED KNEE - SLIPPED ICE AT FIRE – PRE-EXISTING ARTHRITIS - "ACCIDENTAL DISABILITY" DENIED

On May 20, 2021, in Matthew Davis v. Board of Trustees, Police And Firemen's Retirement System, the Superior Court of New Jersey, Appellate Division, Davis v. Bd. of Trs. (N.J. Super. App. Div. 2021), in unpublished decision, held (3 to 0) that the firefighter was not entitled to extra "accidental" disability benefits, only ordinary disability, since the 2015 injury was caused by the arthritis and lack of stability in his right knee from the 2005 skiing accident and ACL surgery.

> "The Board stated that, under Gerba v. Board of Trustees, Public Employees' Retirement System, 83 N.J. 174, 186 (1980), an individual does not qualify for accidental disability benefits if the disability is caused by an underlying condition, which has not been directly caused, but is only aggravated or ignited by the traumatic event. The Board concluded that the evidence showed that the 2015 incident merely aggravated or ignited Davis's long-standing pre-existing arthritis. Therefore, he is not entitled to accidental disability retirement benefits. There is sufficient credible evidence in the record to support the Board's findings."

Facts:

> "Matthew Davis appeals from a final decision of the Board of Trustees (Board), Police & Firemen's Retirement System (PFRS), which found that he is not entitled to accidental disability retirement benefits pursuant to N.J.S.A. 43:16A-7. We affirm.

In October 1999, Davis began working as a firefighter and emergency medical technician (EMT) in the Township of Westhampton. In December 2005, while skiing, Davis injured his right knee. He was diagnosed with a torn anterior cruciate ligament (ACL), and thereafter he had patellar tendon autograft ACL reconstructive surgery.

During that procedure, the doctor removed a third of Davis's right kneecap and grafted it to the injured ACL. Thereafter, Davis had physical therapy. In July 2006, Davis completed a functional capacity evaluation, and he was cleared to return to work without any restrictions. Davis returned to work. He also took on additional responsibilities, including membership in the Burlington County Response and the New Jersey Urban Search and Rescue teams.

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On March 7, 2015, at approximately 2:00 a.m., Davis and other firefighters were dispatched to a fire in Willingboro. At the time, it was extremely cold, and the ground was covered with snow and ice. The firefighters needed water to fight the fire. Davis grabbed a wrench and ran to the hydrant to turn on the water. As Davis was running, he slipped and fell on the ice, landing on his right knee and hand. He attempted to get back on his feet but fell and again landed on his right knee.

Davis drove himself to a hospital in Mount Holly for treatment. At the hospital, an X-ray was taken. It was negative for fractures but showed changes due to the previous ACL repair, as well as certain degenerative changes. Davis was referred to an orthopedic surgeon, who prescribed cortisone injections and physical therapy. Davis continued to have pain and swelling of the right knee.

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In May 2015, Davis had arthroscopic surgery on his right knee. The surgeon informed Davis that, during the procedure, he cleaned up scar tissue from the 2006 ACL surgery. After the surgery, Davis continued going to physical therapy and received additional cortisone injections. In October 2015, Davis was found to have achieved maximum medical improvement (MMI). He was given a medical release.

Thereafter, Davis had two fitness-for-duty evaluations. The results of the evaluations were consistent with the MMI determination. Davis was cleared to return to work with restrictions on lifting and climbing ladders with weights. Although the fire department offers light duty, Davis was informed he could not return to work as a fireman.

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In December 2015, Davis submitted an application for accidental disability retirement pursuant to N.J.S.A. 43:16A-7. He claimed that he was permanently disabled as a result of the 2015 accident. In February 2017, the Board denied the application. The Board found that Davis's disability was due to a pre-existing disease alone or a pre-existing disease that was aggravated or accelerated by the work effort.

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Davis filed an administrative appeal, and the Board referred the matter to the Office of Administrative Law for a hearing before an Administrative Law Judge (ALJ). At the

hearing, Davis presented testimony from Arthur Becan, M.D. and Jeffrey F. Lakin, M.D. testified for the Board. Both witnesses are orthopedic surgeons, and they both performed physical examinations of Davis. Dr. Lakin is board-certified; Dr. Becan is not.

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The ALJ determined that the issue presented was 'whether the traumatic event was the substantial factor in causing [Davis's] permanent disability.' The ALJ found that Davis was eligible for accidental disability retirement benefits. The ALJ determined that 'the work effort alone, or in combination with his degenerative disease, did not cause Davis's disability. Rather, [the] unexpected fall [in March 2015] was the substantial cause of [Davis's] permanent disability.'

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The Attorney General filed exceptions to the ALJ's initial decision, and Davis filed a response to the exceptions…. The Board concluded that Davis was not entitled to accidental disability retirement benefits because his underlying condition, long-standing pre-existing arthritis, had "aggravated or ignited" the pain he experienced from the March 2015 accident.

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In Richardson v. Board of Trustees, Police & Firemen's Retirement System, 192 N.J. 189, 212-13 (2007), the Court noted that to obtain accidental disability benefits, the PFRS member must show:

> 1. that he [or she] is permanently and totally disabled;
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> 2. as a direct result of a traumatic event that is
> a. identifiable as to time and place,
>
> b. undesigned and unexpected, and
>
> c. caused by a circumstance external to the member (not the result of pre-existing disease that is aggravated or accelerated by the work);
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> 3. that the traumatic event occurred during and as a result of the member's regular or assigned duties;
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> 4. that the disability was not the result of the member's willful negligence; an[d]
>
> 5. that the member is mentally or physically incapacitated from performing his [or her] usual or any other duty.

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Here, the Board did not dispute that Davis met all of the Richardson criteria for eligibility, except for the requirement that he show his disability was "not the result of pre-existing disease that is aggravated or accelerated by the work . . . ." 192 N.J. at 213. The Board determined that Davis's disability did not meet this requirement.

> The Board noted that Davis had an underlying condition that was 'traumatically induced' by his skiing accident in 2005, which compromised his knee and created a 'stability issue.' The Board stated that Dr. Lakin had 'reliably explained' that the 2005 injury was followed by intense pain and ACL reconstructive surgery, which predisposed Davis to arthritis. Dr. Lakin had testified that the ACL surgery left Davis with 'less of a cushion in the knee' and, as a result, 'the knee is never the same.'
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> ***
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> An agency's decision to accept or reject an expert's testimony is conclusive on appeal so long as that decision is reasonably made. Oceanside Charter Sch. v. N.J. State Dep't of Educ., 418 N.J. Super. 1, 9 (App. Div. 2011) (citing In re Application of Howard Sav. Bank, 143 N.J. Super. 1, 9 (App. Div. 1976)). Here, the Board reasonably determined, from its review of the record, that Dr. Lakin's testimony and opinion was more persuasive than that of Dr. Becan. The Board provided sufficient reasons for its decision."

**Legal Lesson Learned: This was a classic "battle of the experts." An agency's decision to accept or reject an expert's testimony will generally be upheld by Courts on appeal.**

File: Chap. 6, Employment Litigation, incl. Workers Comp, Disability

## LA: CITY MUST PAY $1.6 BACKPAY TO CURRENT / RETIRED FF – STATE LAW REQ. "LONGEVITY" PAY AFTER 3 YEARS

On May 13, 2021, in Arnold Lowther, et al. v. Town of Bastrop, the Supreme Court of Louisiana held (6 to 1) that the City must pay $1,673,805 in backpay to 32 current and former firefighters; Louisiana law states that firefighters will receive longevity pay after three continuous years of service.

> "The action requested by the Firefighters' amended petition for a writ of mandamus is the City's ministerial duty to appropriate funds necessary to satisfy the May 2019 judgment as required by La. Const. art. VI, § 14(A)(2)(e), La. R.S. 33:1992(A), La. R.S. 33:1992(B), and La. R.S. 33:1969.[6] Accordingly, we find the Firefighters' allegations that the City has failed to perform this duty state a valid cause of action."

Facts:

> "In 2008, thirty-two current and former firefighters ('the Firefighters') filed suit against their employer, the City of Bastrop ('the City'), alleging the City's pay practices violated state law. In 2014, the trial court issued a declaratory judgment ordering the City to create a compliant uniform salary plan. For nearly two years, the City failed to enact this plan. Subsequently, by judgment dated December 19, 2016, the trial court adopted the Firefighters' proposed salary plan backdated to January 2005. On May 6, 2019, following a trial on quantum, judgment for back wages was rendered in favor of the Firefighters for the aggregate amount of $1,673,805.91 ('the May 2019 judgment').
>
> ***

The Firefighters sought to enforce the May 2019 judgment by filing a writ of mandamus. The City filed an exception of no cause of action arguing the Firefighters are statutorily and constitutionally prohibited from using a writ of mandamus as an alternative means to execute a judgment against a political subdivision. In their amended petition, the Firefighters averred the City has a ministerial duty to: 1) pay the Firefighters the amount owed in satisfaction of the May 2019 judgment; and/or 2) appropriate the funds necessary to pay the Firefighters as mandated by applicable law. The trial court sustained the City's exception of no cause of action and dismissed the Firefighters' amended petition for a writ of mandamus with prejudice.

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On review, the court of appeal succinctly observed the issue turned on whether the action requested by the Firefighters' writ of mandamus is ministerial in nature. *Lowther v. Town of Bastrop*, 53,586, p. 4 (La.App. 2 Cir. 9/23/20), 303 So.3d 681, 686. Citing La. Const. art. XII, § 10(C) and La. R.S. 13:5109(B)(2), the court of appeal concluded that the '[p]ayment of a judgment is not a ministerial act.' *Id*., 53,586, p. 6, 303 So.3d at 607. Thus, no cause of action lies because the Firefighters may not enforce the May 2019 judgment by a writ of mandamus - an appropriation of funds must be authorized by the City. *Id*., 53,586, pp. 6-7, 303 So.3d at 687.

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Mandamus may lie against a political subdivision when the duty to be compelled is ministerial and not discretionary. In *Hoag*, this Court observed that the relevant consideration is 'whether the act of appropriating funds to pay the judgment ... is a purely ministerial duty for which mandamus would be appropriate.' 04-0857, p. 6, 889 So.2d at 1023. Because the duty to pay the Firefighters is statutorily and constitutionally mandated, it is ministerial in nature.

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The ministerial nature of the duty of the City to pay the Firefighters does not change to a discretionary one simply because the Firefighters obtained a monetary judgment confirming and quantifying the City's payment obligation. Adopting such a distinction would allow the City to disregard its mandatory obligations pursuant to La. Const. art. VI, § 14(A)(2)(e), La. R.S. 33:1992(A), La. R.S. 33:1992(B), and La. R.S. 33:1969 under the guise that a court-issued mandamus compelling performance of these ministerial duties violates the separation of powers doctrine. *See Jazz Casino*, 16-1663, p. 13, 223 So.3d at 497; *New Orleans Fire Fighters*, 13-0873, p. 20, 131 So.3d at 424. This result would defeat the very purpose of the express constitutional protections to which the Firefighters are entitled.

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DECREE

For the foregoing reasons, the judgment of the trial court sustaining the City's exception of no cause of action is reversed, and the matter is remanded for further proceedings consistent with this opinion.

**REVERSED AND REMANDED."**

**Legal Lesson Learned: The court-ordered back pay award must be honored.**

Note: On March 20, 2021, the City held a special election and citizens voted for a 1.4 mil property tax to pay the judgment.

See also: May 6, 2019: "Bastrop ordered to pay more than $1.6 million to firemen after lawsuit."

April 22, 2019: TV video interview current Mayor, "Bastrop firefighters fighting for their pay, the mayor says they deserve it."

File: Chap. 6, Employment Litigation, incl. Workers Comp, Disability

## LA: HEARING LOSS – GRADUAL LOSS OVER CAREER - MED. COVERAGE, BUT NOT PERMANENT PARTIAL DIABILITY

On March 24, 2021, in James J. Hartman, Jr. vs. Bernard Parish Fire Department & FARA, the Louisiana Supreme Court held (7 to 0) that a gradual loss of hearing by a District Chief does not meet the state's statute requiring an explosion or other permanent hearing loss "solely due to a single traumatic accident." He is entitled to continuing medical coverage.

> "Applying instead the clear and unambiguous words of the statute, we find that the medical evidence in this case establishes that Mr. Hartman's hearing loss did not result solely from a single traumatic accident and, thus, he is not entitled to permanent partial disability benefits pursuant to La. R.S. 23:1221(4)(p)."

Facts:

> "James J. Hartman, Jr. has been employed by the St. Bernard Parish FireDepartment since May 25, 1990, and (as of the date of the filing of his claim) remains on the job, serving as a District Chief. He has never been disabled from performing the duties of his position.
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> During the course of his employment with the Fire Department, Mr. Hartman was exposed to injurious levels of noise, which resulted in permanent hearing loss. The Department was informed of Mr. Hartman's hearing loss on September 20, 2006. He underwent audiograms on January 24, 2008, April 10, 2014, March 1, 2017, and September 27, 2017. Each test showed a gradual increase in hearing loss. The last audiogram, performed by Dr. Daniel Bode on September 27, 2017, shows a 42.2% binaural hearing loss.
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The statute at issue in this case is La. R.S. 23:1221(4), which sets forth the conditions for an award of permanent partial disability benefits under the LWCA. It provides, in pertinent part:

> In the following cases, compensation shall be solely for anatomical loss of use or amputation and shall be as follows: (p) In cases not falling within any of the provisions already made, where the employee is seriously and permanently disfigured or suffers a permanent hearing loss solely due to a single traumatic accident..., compensation not to exceed sixty-six and two-thirds percent of wages not to exceed one hundred weeks maybe awarded ….

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In short, Mr. Hartman would require the court re-write the language of La. R.S.23:1221(4)(p) so as to provide disability benefits for permanent hearing loss 'solely due to a series of single traumatic accidents,' or to 'multiple single traumatic accidents.' This the court is not free to do."

**Legal Lesson Learned: The state statute limits partial disability compensation only if caused by a single traumatic accident. Time to "lobby" the legislature to broaden the statute.**

Note:

**Ohio Revised Code: Section 4123.57 | Partial disability compensation.**

> "For the permanent and total loss of hearing, one hundred twenty-five weeks; but, except pursuant to the next preceding paragraph, in no case shall an award of compensation be made for less than permanent and total loss of hearing."

See also "Get the Benefits You Deserve If you Experience Work- Related Hearing Loss in Ohio":

> "Under workers' compensation law in Ohio, hearing loss is a scheduled loss, meaning compensation is awarded based on a set schedule. Depending on the extent of your hearing loss, you may obtain benefits for a specific number of weeks:
>
> - 25 weeks for permanent and total loss of hearing in one ear
> - 125 weeks for complete loss of hearing in both ears
>
> No award is made for anything less than permanent and total loss of hearing in at least one ear. Your benefits can include compensation for up to 100% of the statewide average weekly wage. This amount is determined annually."

File: Chap. 7, Sexual Harassment

# PA: FEMALE FF TERMINATED BY VOLUNTEER FD – FED. CASE DISMISSED – VOL. FD NOT SEC. 1983 "STATE ACTOR"

On May 18, 2021, in Annie M. Papa v. Neshannock VFD, et al., U.S. Senior District Court Judge Joy Flowers Conti, U.S. District Court for Western District of Pennsylvania, granted the Volunteer Fire Department's motion to dismiss the federal lawsuit, since this is a private fire company and not involved in "state action" when terminating a volunteer firefighter; her claims are remanded to state court.

> "In this case, Papa failed to allege any plausible basis for 'state action' with respect to the conduct at issue in the amended complaint. The actions of which she complains occurred within the scope of her membership obligations in the Neshannock VFD. The crux of her § 1983 claims is that the Neshannock VFD's internal disciplinary procedures were improper. As the Supreme Court made clear in *Rendell-Baker*, internal disciplinary decisions of a private volunteer organization do not become state action -- even if the organization itself is heavily involved in a state function. The court concludes that the § 1983 claims are subject to dismissal at this stage of the case."

Facts:

> "Papa applied for membership in the Neshannock VFD in 2016, when she was a student at Westminster College. She graduated at the top of her class in firefighting training, was certified as a Firefighter One by the Commonwealth of Pennsylvania, and achieved full membership in the Neshannock VFD. The membership of the Neshannock VFD is overwhelmingly male. Papa alleges that several male members of the Neshannock VFD resented that an enthusiastic female was showing them up. She believes that defendants formed a plan to force her out.
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> In January 2020, defendant Justin Aller ("Aller") reported that Papa cut her own leg so that she could practice doing sutures. Deputy Shaffer authored a memo to the Neshannock VFD Board mischaracterizing Papa's actions. Papa contends that the January 2020 accusation was false and motivated by sex-based animus; she avers that she accidentally was cut earlier that evening and provided self-care based upon her experience as a licensed EMT. Papa was not directly informed about the allegation, but learned that her membership would be terminated without a hearing. Papa confronted the allegations through counsel. In February 2021, the Neshannock VFD issued a letter to Papa indicating that her 'recent activity' was detrimental to the health and safety of others and herself. Papa believed that the incident had been resolved and continued her volunteer duties.
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> On July 20, 2020, at 1:00 a.m., Papa was seen on surveillance cameras removing a Self-Contained Breathing Apparatus from the station. Plaintiff was terminated from her membership in the Neshannock VFD on July 27, 2020, after a special meeting. Papa contends that borrowing equipment was a common occurrence, she made no effort to hide her activity, and the incident was used as a pretext to terminate her membership due

to sex-based animus and in retaliation for standing up to the Neshannock VFD after the January 2020 incident. She alleges that she was terminated without a hearing or opportunity to tell her side of the story, and the termination impacts her career objective to become a professional firefighter. Papa believes that false and misleading allegations against her were widely published to the Neshannock VFD membership and the local community.

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On April 7, 2021, the court issued an order to show cause why the § 1983 claims should not be dismissed for failure to plead 'state action' and the remaining state law claims remanded to the state court (ECF No. 22). In particular, the court instructed the parties to address decisions 'which appear to indicate that the internal disciplinary decisions of a private organization such as Neshannock VFD do not constitute state action even if the organization itself is heavily involved in a state function.' *Id*. at 2.

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The court will first address the § 1983 claims, because those claims provide the only basis for this court's removal jurisdiction. To prevail on her § 1983 claims, Papa must plead: (1) she has been deprived of a right, privilege or immunity secured by the Constitution or laws of the United States; and (2) the conduct color of state law. 42 U.S.C. § 1983.

The § 1983 statutory requirement of action 'under color of state law' is identical to the 'state action' requirement of the Fourteenth Amendment. *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 929 (1982). The 'state action' requirement 'reflects judicial recognition of the fact that 'most rights secured by the Constitution are protected only against infringement by governments.'" *Id*. at 936 (1982) (quoting *Flagg Bros., Inc. v. Brooks*, 436 U.S. 149, 156 (1978)). 'This fundamental limitation on the scope of constitutional guarantees 'preserves an area of individual freedom by limiting the reach of federal law' and 'avoids imposing on the State, its agencies or officials, responsibility for conduct for which they cannot fairly be blamed.'" *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614, 619 (1991) (quoting *Lugar*, 457 U.S. at 936-37).

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Acts of private contractors do not become 'state action' simply because the private entity is performing a public contract. *Kach*, 589 F.3d at 648. The actual conduct that forms the basis for the claim must be 'fairly attributable to the State.' *Rendell-Baker*, 457 U.S. at 838. In *Rendell-Baker*, the Supreme Court explained: '[A] State normally can be held responsible for a private decision only when it has exercised coercive power or has provided such significant encouragement, either overt or covert, that the choice must in law be deemed to be that of the State.' *Rendell-Baker*, 457 U.S. at 840. The Supreme Court emphasized that acts of private contractors 'do not become acts of the government by reason of their significant or even total engagement in performing public contracts.' *Id*. at 841. The Court explained that the employment 'relationship between the school and its teachers and counselors is not changed because the State pays the tuition of the students.' *Id*. A private school, even though its income was derived primarily from public

sources and it was regulated by public authorities, was not acting under color of state law when it discharged employees. *Id*."

**Legal Lesson Learned: Vol. fire departments are not generally considered "state actors" under 42 U.S.C. 1983 in federal lawsuits; they may be sued in State courts.**

Chap. 8 – Race / National Origin Discrimination

Chap. 9 – Americans With Disabilities Act

Chap. 10 – Family Medical Leave Act, incl. Military Leave

File: Chap. 11, FLSA & Equal Pay Act

## IL: CITY OF CHICAGO MAILROOM EMPLOYEE – "EQUAL PAY" CASE DISMISSED – DUTIES NOT SAME FF, OTHERS

On May 20, 2021, in Angela D. Boyd v. City of Chicago, U.S. District Court Judge Charles P. Kocoras, U.S. District Court for Northern District of Illinois, Eastern District, granted the City's motion to dismiss this lawsuit, and also the motion of her union, AFSCME Council 31.

> "Boyd's duties specifically included picking up and dropping off mail and boxes at various City locations. Despite these distinct duties, Boyd alleges that she was paid less than three other men. First, she alleges that she was paid less than Mr. Romell Short, a concrete laborer, who was paid $40.20 an hour. Second, she alleges that she was paid less than Mr. Michael Evans, a City Assistant Commissioner, who was paid an annual salary of over $90,000. And third, Boyd alleges that another man—a firefighter—was paid an annual salary of over $100,000. *** Put simply: Boyd alleges no facts to support an inference that the three men at issue completed equal work that required similar skill, effort, or responsibility. That is fatal to Boyd's Amended Complaint."

Facts:

> "This is an Equal Pay Act case where Plaintiff Angela Boyd, a mailroom employee, broadly alleges that the City of Chicago's Department of Fleet and Facility Management paid her less than her male counterparts for equal work. Boyd also alleges that AFSCME Council 31, a labor union that represents public employees, is also liable to her for damages in part because AFSCME proposed and entered into an agreement with the City

that established Boyd's pay rate. Boyd's duties specifically included picking up and dropping off mail and boxes at various City locations.

***

But what about the alleged comparators that Boyd uses to try to state a claim? Well, the Court will unpackage those comparators in turn. First, Boyd alleges that Mr. Romell Short, a concrete laborer, also picked up and dropped off mail. The Court does not have to consider any extrinsic evidence or take judicial notice of anything to take Boyd at her word that Mr. Short was a concrete laborer in addition to handling mail. As the title would imply, the Court finds it fair to surmise that concrete work is a difficult, skilled trade. Second, Boyd alleges that another man, a firefighter, was paid over $100,00 a year to pick up and drop off mail. But, again, this man fought fires in addition to dealing with the mail. Presumably, this means that this man runs into burning buildings as part of his job. That is nowhere close to the 'same work' as Ms. Boyd. What about the third comparator? Well, Mr. Michael Evans was an 'Assistant Commissioner,' which entitled him to a salary of over $90,000. That too is different than being a mailroom employee because it entails distinct management and oversight responsibilities. Taken individually or together, these differences entirely undercut the adequacy of Boyd's Amended Complaint. *See Spencer v. Virginia State Univ.*, 224 F. Supp. 3d 449, 457 (E.D. Va. 2016) ('As a result, the Court cannot find that Plaintiff's proposed comparators supply a logical, analytical basis to support a plausible wage discrimination claim under the EPA.')."

**Legal Lesson Learned: The plaintiff obviously does not do the same work as those she used to compare her pay - a concrete laborer, fire fighter, Assistant Commissioner.**

Chap. 12 – Drug-Free Workplace

File: Chap. 13, EMS

## WV: AMBULANCE ROLL OVER - 2 KILLED, EMT'S LAWSUIT HOSP. DISMISSED – MEDICAL CERT. OF MERIT REQUIRED

On May 20, 2021, in Crystal G. Brown and Tri-State Ambulance, Inc. v. Ohio Valley Health Services & Education Corporation; Ohio Valley Medical Center; et al., the State of West Virginia Supreme Court of Appeals, Brown v. Ohio Valley Health Servs. & Educ. Corp. (W. Va. 2021, held (3 to 0) that the lawsuit was properly dismissed since the West Virginia code of medical professional liability requires both patients and others suing a health care provider 30 days prior written notice, and a certificate of merit by a qualified health care provider. The EMT in her lawsuit claimed the hospital knew but failed to disclose that transporting the patient to a

Columbus, OH hospital was not medically necessary to save his life and that dangerous weather was approaching; the Ambulance company's insurance provider sought reimbursement for its settlement costs.

> "That Petitioner Brown was not the patient does not preclude application of the MPLA. [Medical Professional Liability Act]. In syllabus point 5 of *Osbourne v. United States*, 211 W. Va. 667, 567 S.E.2d 677 (2002), we held that the Act 'permits a third party to bring a cause of action against a health care provider for foreseeable injuries that were proximately caused by the health care provider's negligent treatment of a tortfeasor patient.' In reaching this holding, we observed that, in defining 'medical professional liability.'"

Facts:

> "On December 16, 2016, Petitioner Crystal G. Brown, an emergency medical technician employed by Petitioner Tri-State Ambulance, Inc. ("Tri-State Ambulance"), was required to transport a patient from Respondent Ohio Valley Medical Center ("OVMC") to a hospital in Columbus, Ohio. On the way to Ohio, due to adverse weather conditions, Petitioner Brown wrecked. Two passengers in Petitioner Brown's ambulance—the patient and another employee of Tri-State Ambulance—were killed in the accident.
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> Petitioners filed suit against respondents on December 17, 2018, asserting causes of action for 'negligence, carelessness, and/or recklessness' and equitable subrogation. In support of their negligence claim, petitioners alleged that OVMC knew but failed to disclose that transporting the patient was not medically necessary to save his life and that dangerous weather conditions were approaching. This failure to disclose deprived Petitioner Brown of the information necessary to determine whether the trip should have been made that night. Petitioner Brown alleged that, as a result, she suffered bodily injury and physical and mental pain, and she alleged that she will continue to endure physical and mental pain and suffering and emotional distress. She also claimed lost wages and loss of earning capacity.
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> ***
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> In support of the equitable subrogation claim, Tri-State Ambulance alleged that it incurred losses by paying its deductible to its insurer and attorney's fees and costs in connection with litigation initiated by other passengers in the ambulance. Because Tri-State Ambulance's insurer settled the lawsuits, Tri-State Ambulance claimed its insurer is a partially subrogated insurer entitled to reimbursement by respondents. Tri-State Ambulance asserted that the insurance company 'is subrogated to the rights of Tri-State Ambulance [] as against [respondents] to the extent of these costs.'
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> ***
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> Respondents filed an answer and served discovery. Then, on June 27, 2019, they moved to dismiss petitioners' complaint. Respondents argued that dismissal was proper because petitioners' claims were governed by the Medical Professional Liability Act ('MPLA' or the 'Act') and petitioners failed to comply with the Act's pre-suit notice requirements.

Further, with regard to petitioners' equitable subrogation claim, respondents argued that petitioners failed to join them in the prior lawsuits, so petitioners had ‘no right to subrogation or contribution.’

Petitioners argued in response that their claims were not covered by the MPLA; rather, liability was alleged to ‘stem[] from the working conditions [respondents] created by utilizing emergency services in severe weather when no emergency actually existed.’

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Following a hearing held on December 18, 2019, the circuit court granted respondents' motion to dismiss. The court found that ‘the crux of circumstances which set the events into motion and [about] which [petitioners] complain was a decision made by one or more of the [respondent] health care providers which the [c]ourt finds was a healthcare decision and within the definition of 'health care'" provided in the MPLA. Thus, the court continued, petitioners were required to have complied with the MPLA's pre-suit notice requirements, and their failure to do so deprived the court of subject matter jurisdiction. Accordingly, the court dismissed petitioners' complaint without prejudice by order entered on January 27, 2020.

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The Act provides that ‘no person may file a medical professional liability action against any health care provider without complying with’ certain pre-suit notice requirements. W. Va. Code § 55-7B-6(a). Petitioners do not dispute that respondents are ‘health care providers’ under the Act. *See id*. § 55-7B-2(g). Rather, the issue is whether petitioners have filed a ‘medical professional liability action.’ Under the Act, ‘medical professional liability’ is defined broadly to mean any liability for damages resulting from the death or injury of a person for any tort or breach of contract based on health care services rendered, or which should have been rendered, by a health care provider or health care facility to a patient. It also means other claims that may be contemporaneous to or related to the alleged tort or breach of contract or otherwise provided, all in the context of rendering health care services.

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Applying these definitions to petitioners' complaint, it is clear that they have stated claims that fall within the purview of the MPLA. Petitioners' negligence claim is predicated on respondents' decision to transport the patient to another healthcare facility. As set forth above, the Act specifically includes ‘medical transport’ within the definition of ‘health care.’ *See id*. And, as the Act includes within the definition of ‘medical professional liability’ those claims that ‘may be contemporaneous to or related to the alleged tort or breach of contract or otherwise provided, all in the context of rendering health care services,’ petitioners' equitable subrogation claim, arising from these same circumstances, also falls within its ambit. *Id*. § 55-7B-2(i).”

**Legal Lesson Learned: Lawsuit dismissed since EMT and her attorney didn’t provide the Certificate of Merit required by the Medical Professional Liability statute. Similar statutes can be found throughout U.S.**

Note: See this article on the roll over.

**Two Dead After Ambulance Rollover** (Dec. 17, 2016):

> CAMBRIDGE, OH- Two people died early Saturday morning after an ambulance lost control and overturned several times, according to a release from the Cambridge Post of the Ohio Highway Patrol.
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> According to the release, shortly after 2 a.m. an ambulance, registered to Tri State Ambulance, was transporting a patient on I-70 westbound near milepost 176 when it lost control, drove off the left edge of the interstate and overturned multiple times.
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> At the time of the crash, a patient and four emergency medical personnel were in the ambulance. A patient and one of the emergency personnel, both in the patient care area of the ambulance, were killed in the crash. The three other emergency personnel sustained minor injuries, which were treated at Southeastern Medical Center.
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> Killed in the crash were the patient, Dennis Calvert, 64, of Wheeling West Virginia, and emergency personnel Charles McMahan, 39, of New Matamoras. Injured in the crash were the driver, Crystal Brown, 33, of Proctor, West Virginia, passengers Jennifer Rothwell, 32, of Wheeling, West Virginia, and Randi Watson, 37, of Glen Easton, West Virginia.

The West Virginia Medical Professional Liability Act provides:

> "(b) At least thirty days prior to the filing of a medical professional liability action against a health care provider, the claimant shall serve by certified mail, return receipt requested, a notice of claim on each health care provider the claimant will join in litigation. The notice of claim shall include a statement of the theory or theories of liability upon which a cause of action may be based, and a list of all health care providers and health care facilities to whom notices of claim are being sent, together with a screening certificate of merit. The screening certificate of merit shall be executed under oath by a health care provider qualified as an expert under the West Virginia rules of evidence and shall state with particularity: (1) The expert's familiarity with the applicable standard of care in issue; (2) the expert's qualifications; (3) the expert's opinion as to how the applicable standard of care was breached; and (4) the expert's opinion as to how the breach of the applicable standard of care resulted in injury or death. A separate screening certificate of merit must be provided for each health care provider against whom a claim is asserted. The person signing the screening certificate of merit shall have no financial interest in the underlying claim, but may participate as an expert witness in any judicial proceeding. Nothing in this subsection may be construed to limit the application of Rule 15 of the Rules of Civil Procedure.

Chap. 14 – Physical Fitness, incl. Light Duty

Chap. 15 – CISM, incl. Peer Support, Mental Health

File: Chap. 16, Discipline

## NV: AT-WILL HOSPITAL PARAMEDIC - TERMINATED WITHIN 1-YR PROBATIONARY PERIOD – LAWSUIT DISMISSED

On May 13, 2021, in Todd P. Evans v. Lander County Hospital District, d/b/a Battle Mountain General Hospital, U.S. District Court Judge Larry R. Hicks, U.S. District Court, District of Nevada, held that the paramedic did not file or otherwise orally make a complaint of FLSA violation, and he was an at-will employee that can be terminated without cause by the hospital.

> "Again, based on Evans' testimony, the Court finds that Evans' statements during the April 2019 meeting do not constitute filling a complaint with the BMGH as contemplated by the FLSA anti-retaliation statute. The content of this meeting was the financial and economic status of the EMS Department and was focused on how Evans' suggested alterations to the department, including transitioning the volunteer EMTs to paid staff, would make the department more fiscally responsible and increase staff. While Evans did address the FLSA and again suggested that the volunteer program may be violating the federal statute, he did not specify an illegality related to the program and did not provide Trustee Roberts with any documentation related to the FLSA. A reasonable employer would have seen Evans' statements as an attempt to recruit a board member to support his budget proposal, not an assertion of the employment rights of the volunteer EMTs in the program. Accordingly, his statements cannot be considered a filed complaint under the FLSA anti-retaliation statute.
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> Evans' fourth cause of action alleges Defendant breached its oral employment contract in which BMGH agreed to pay Evans a salary of $115,000.00 per year plus a travel stipend of no more than $500.00 per month. ECF No. 1 ¶¶ 55-58. Defendant argues that it could not have breached an employment contract that did not exist as Evans was an at-will employee. Having reviewed the record, there can be no dispute that Evans was an at-will employee."

Facts:

> "In late 2018, Evans interviewed for a full-time paramedic position at BMGH…. During his in-person interview, he became aware that two other positions, a part-time paramedic and an EMS Education Coordinator, were also available…. Evans then called his interviewer, and soon-to-be supervisor, EMS Director Myra Wall, to propose a position where he take all three positions and work three 24-hour shifts in a row. [Footnote 1.]

Footnote 1: During the 72-hour shift, Evans testified he remained at the hospital in the living quarters, and when he was not 'on calls,' he was developing education materials, developing protocols, and sleeping, at his discretion.

Director Wall told Evans that she would need to discuss his proposal with Human Resources Director Kathy Freeman and that she would get back to him…. Ultimately, Director Freeman called Evans and offered him his proposed position (full-time paramedic, part-time paramedic, and EMS Education Coordinator) for $27.50 per hour…. Evans testified that neither Director Wall nor Director Freeman indicated that his employment would be governed by a contract…. Evans testified that his proposal included that he would work the three-day shift for a five-year period….While there is some dispute as to how his final pay rate was determined, (whether it was 'renegotiated' and at what time), he was ultimately put into BMGH's system as a salaried employee at $115,00.00 per year…. And Evans began working in the EMS department in late November 2018.

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At some time between November 2018 and January 2019, Evans became aware that the EMS Department was operating in the 'red.' ECF No. 26-3 at 37. In approximately January 2019, Evans and Director Wall met with CEO Bleak, during which Evans proposed that the hospital hire the volunteer EMTs, thereby maximizing revenue by allowing the department to take more ground transfers…. Evans suggested that this proposal would also avoid any potential violation to the Fair Labor Standards Act ('FLSA').

***

Evans testified that around March of 2019 EMT Mikel Harris asked him if he would like to speak with his cousin, Spencer Roberts, who was a member of the BMGH board of trustees. ECF No. 26-3 at 50. Evans testified that Director Wall then set up the meeting with Trustee Roberts and that he just attended. *Id*. In April 2019, Evans and Director Wall had an informal chat with Trustee Roberts, during which Evans presented a spreadsheet of different configurations of staffing that could be presented to the Board at the upcoming budget meeting. *Id*. at 50-51. Evans testified that his FLSA concerns came up during this meeting, but he did not give Trustee Roberts any FLSA paperwork….

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On May 1, 2019, CEO Bleak, Director Freeman, and Director Wall held a meeting with Evans to discuss his behavior…. During the meeting, CEO Bleak discussed Evans breaching the 'chain of command' when he went to Trustee Spencer, being insubordinate to Director Wall, to remain within his job description, and to not speak with others about hospital business.

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Following this meeting, Evans approached EMT Mikel Harris and told him 'if he happened to run into his cousin, would he please ask him to stop using my name because I got my ass chewed.' *Id*. at 67. EMT Harris relayed the message to Trustee Roberts,

who felt Evans' conduct was retaliatory and aggressive…. CEO Bleak became aware of the confrontation between EMT Harris and Evans and called Evans on May 4, 2019…. Evans confirmed that he had made the statement and CEO Bleak placed Evans on administrative leave while an investigation was conducted.

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CEO Bleak began investigating Evans' behavior and found that he had yelled at Director Wall in the presence of others; failed to follow direct orders from Director Wall; was belittling and demeaning to a former employee, Christy Trujillo, had called her a 'bitch,' and that when she left her position with the hospital, had articulated that she felt TC treated her differently and rudely because she is a woman…. Based on his investigation, CEO Bleak determined that Evans should be terminated…. Director Freeman called Evans on May 10, 2019 and informed him that he was being terminated for insubordination and insolent behavior… Evans subsequently received a formal termination letter.

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In Nevada, there is a presumption that employment is at-will. *See Yeager v. Harrah's Club, Inc.*, 897 P.2d 1093, 1095 (Nev. 1995). Evans argues that when BMGH created a position for him that had not previously existed and changed his salary from hourly to salaried plus a monthly travel stipend, BMGH showed it intended to contract with him. He also alleges that when he proposed taking all three open positions (full-time paramedic, part-time paramedic, and EMS Education Coordinator), he said he would do it for 5-years. However, an email exchange between Evans and Human Resources Director Kathy Freeman directly articulates to Evans that he was an at-will employee."

**Legal Lesson Learned: At will employees can be terminated, with or without cause.**

Chap. 17 – Arbitration, incl. Mediation, Labor Relations

Chap. 18 – Legislation