

7/18/2019

LEGAL LESSONS LEARNED – CASES FROM MY FIRE & EMS LAW NEWSLETTERS

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Lawrence T. Bennett, Esq.
Program Chair
Fire Science & Emergency Management
Cell 513-470-2744
Lawrence.bennett@uc.edu

Supplement my two textbooks:

TEXTBOOK: [EMS LAW \(Second Edition\): June 2018](#); FREE ONLINE TEXTBOOK: (ISBN: 978-1-949104-03-5); (First Edition, 2012, MBS Direct, Columbia, MO).

TEXTBOOK: [FIRE SERVICE LAW \(Second Edition\)](#): Jan. 2017 (ISBN 978-1-4786-3397-6); Waveland Press: (First Edition – Prentice Hall, 2008)

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Chap. 1 American Legal System; Fire Code Enforcement

IL: COMMERCIAL BUILDING FIRE ALARMS MUST GO DIRECT TO 911 DISPATCH – ORDINANCE REQ. ONE PROVIDER UPHELD

On July 15, 2019, in [Alarm Detection Systems, Inc. v. Orland Fire Protect District, et al](#), the U.S. Court of Appeals for 7th Circuit held (3 to 0) that ordinances by several Villages were lawful and no violation of Sherman Antitrust Act.

“ADS worries that without introducing competition against Tyco the alarm-system market will stagnate; Tyco will have little reason to innovate and more flexibility to charge high prices. We are not unsympathetic to the point, in theory. But ADS had its chance at trial to demonstrate to the district court that its alternative methods can work in an RSS system, and it did not. And no one should lose sight of the fact that competition for the exclusive contract is competition.”

Facts:

“In 2014, citing safety concerns, the Villages passed ordinances that require commercial buildings to send fire-alarm signals directly to the local 911 dispatch center. This decision, sensible as it may seem, comes at an economic cost: either by design or due to technological restraints, the ordinances allow only one alarm-system provider to operate in the Villages. That provider is Tyco Integrated Security, LLC. It services the area pursuant to an exclusive agreement with the Villages’ dispatch center, Orland Fire Protection District.

The logistics of the fire-alarm systems are important to this appeal. Each account's system has essentially three parts: heat or smoke detectors, a panel, and a transmitter. When a detector goes off, it sends an alert to the panel. The panel then connects to the transmitter. The transmitter, in turn, sends a radio signal to one of two places: (1) a central-supervising station run by the alarm-system provider (the 'CSS model'); or (2) a remote-supervising station operated by the local dispatch center (the 'RSS model'). Which model applies depends on the account and its provider's arrangement or, as here, what the local ordinance requires.

Here, the district court found, after carefully reviewing the record evidence and hearing testimony, that implementing an RSS protocol, which the Ordinances do mandate on their face, required an exclusive arrangement with an alarm-system provider. This was true, according to the district court, as a technological and economic matter. Radio signals operate on one frequency that is licensed by a provider. So to ensure that accounts can send signals directly to the dispatch center, as an RSS protocol requires, the accounts and the center must share a provider—that is, there must be exclusivity.

Orland Fire and Tyco's deal has only a one-year, renewable term, and nothing we know of forecloses ADS from making a bid to Orland Fire for another deal."

Legal Lessons Learned: The Court of Appeals upheld the findings of the U.S. District Court judge, who held a 6-day bench [non-jury] trial, and referenced NFPA 72 and the safety need for an exclusive fire-alarm provider.

IL: SUICIDE - U.S. SUP. CT. NOT TAKE APPEAL – SUICIDE BY ATTORNEY
ON ANTI-DEPRESSANTS - FDA DID NOT APPROVE LABEL

On May 28, 2019, in [Wendy B. Dolin v. GlaxoSmithKline, LLC](#), the U.S. Supreme Court declined to hear the appeal of widow of 57-year old attorney who committed suicide after taking Paxil. Thereby leaving in place the decision of the U.S. Court of Appeals for the 7th Circuit, which had set aside \$3 million jury verdict for widow.

On Aug. 22, 2018, the [7th Circuit held that Food and Drug Administration refused](#) to allow the manufacturer to added to Paxil label a warning that the drug may lead to increase in suicide of not only patients under 24, but also in older adults. The FDA wanted the same, uniform warning on all anti-depressant drugs.

“GSK asked the FDA for permission to modify the paroxetine label as plaintiff argues was needed. The FDA said no, repeatedly. Federal law thus preempted plaintiff's Illinois-law claim that GSK should have warned of a risk of adult suicidality on the paroxetine label in 2010. GSK added a similar warning in 2006, and the FDA ordered that GSK remove that label and replace it with a class-wide SSRI warning in 2007.”

Legal Lessons Learned: FDs should have a drug-free workplace policy that requires disclosure of anti-depressant medication that could affect performance of their duties.

[See IAFC Position: Drug and Alcohol-Free Awareness, including:](#)

“Any personnel using over-the-counter or prescription medications where potential side effects that may reasonably affect the performance of their duties have been identified by a healthcare provider or manufacturer’s packaging should report their use to their supervisor when they are functioning in a capacity responsible for emergency and non-emergency operations. Upon notification, supervisors should, in the case of prescription medications, direct personnel to obtain appropriate documentation from the prescribing healthcare provider attesting to the medication’s safety while performing the essential duties of the fire service position. In the case of over-the-counter medications, supervisors should contact the fire department physician or other health care provider to consult on the potential side effects. Personnel should refrain from engaging in such activities until the appropriate release is obtained.”

IL: BILLING FOR FD SERVICES – ORDINANCE LAWFUL TO BILL NON-RESIDENTS

On March 28, 2019, in [The City of Effingham, Illinois v. Diss Truck & Repair, LLC](#), the Appellate Court of Illinois - Fifth District, held (3 to 0) that the Fire Department may bill for these services for a non-resident. “After reviewing the legislative history, both before and after the enactment of the statute, we conclude that the legislature’s intent in allowing a municipality to seek reimbursement for firefighting services provided to nonresidents was to eliminate the taxpayer’s burden for such services; the intent was to allocate the cost of the services to nonresidents so that the citizens of the municipality were not forced to bear the cost of services performed on behalf of those not paying taxes to the municipality.”

Legal Lessons Learned: Soft billing of residents deemed lawful.

[See my case analysis.](#)

IA: STATE SUP. CT. UPHOLDS STATUTE - NO PAYROLL DEDUCT. OF UNION DUES – LIMITED COLLECTIVE BARG. LESS 30% PUB SAFETY

On May 17, 2019, in [AFSCME Iowa Council 61, et al. v. State of Iowa and Iowa Public Employment Relations Board](#), the Iowa Supreme Court held (4 to 3) that the 2017 statute was constitutional.

“Our role is to decide whether constitutional lines were crossed, not to sit as a super legislature rethinking policy choices of the elected branches. We conclude the 2017 amendments withstand the constitutional challenges. The plaintiffs concede there is no constitutional right to public-sector collective bargaining or payroll deductions. The parties agree the equal protection claims are reviewed under the rational basis test. The legislature could reasonably conclude that the goal of keeping labor peace with unions comprised of at least thirty percent public safety employees, and the greater risks faced by emergency first responders, justified the classification. We hold the legislative classifications are not so overinclusive or underinclusive as to be unconstitutional under our highly deferential standard of review. We further hold the amendments do not violate constitutional rights of freedom of association. Public employees remain free to belong to the same unions. Accordingly, we affirm the district court's summary judgment.”

Legal Lessons Learned: Collective bargaining for fire & police has been addressed by many state legislatures. [The U.S. Supreme Court’s Janis decision on June 27, 2018](#), - “States and public-sector unions may no longer extract agency fees from nonconsenting employees” - may lead other states to also limit employer deduction of union dues.

See footnote 4 of the Majority’s decision:

As of 2018, twenty-eight states require collective bargaining. Eric J. Brunner & Andrew Ju, *State Collective Bargaining Laws and Public-Sector Pay*, 72 ILR Rev. 480, 487 (2019) [hereinafter Brunner & Ju]. Fifteen states allow state employers to decide whether or not to collectively bargain. *Id.* The range of topics public employees are able to bargain over varies from state to state, as does the employees' ability to compel arbitration in the event of an impasse. Raskin-Ortiz & Martin at 4-10. Of the states that require or permit collective bargaining, Alabama, Delaware, Idaho, Kentucky, Oklahoma, Rhode Island, and Wyoming have separate bargaining rights for police officers and/or firefighters. *Id.* Three states—North Carolina, South Carolina, and Virginia—prohibit collective bargaining for any public employees. Brunner & Ju at 487. Arizona and Texas limit collective

bargaining to police officers and firefighters, while Georgia limits collective bargaining rights to firefighters alone. *Id.*

See also this article: [“Union Dues Deductions – Tips for Public Employers”](#)

TX: APARTMENT FIRE - DRUG PARAPHERNALIA IN “PLAIN VIEW” - PD CALLED IN, SEARCH WARRANT – METH CONVICTION UPHELD

On May 16, 2019, in [Casey Allen Martin v. State of Texas](#), the Court of Appeals of Texas, Second Appellate District (Fort Worth) held (3 to 0) the trial court properly denied the defendant’s motion to suppress the methamphetamine.

“Fire broke out in appellant Casey Allen Martin’s apartment, and firefighters entered to battle the blaze. Firefighters saw drug paraphernalia inside, and they called police in to observe the scene. Officers then obtained a search warrant, which led to the discovery of the methamphetamine that was the basis for Martin’s conviction. In one issue, Martin appeals the denial of his motion to suppress. Martin does not dispute that the fire permitted firefighters to enter the apartment. But he contends that the same exigent circumstances did not also authorize officers to enter and observe, in plain view, the same contraband that firefighters had already seen. Because we disagree, we affirm.

Legal Lessons Learned: The “Plain View Rule” is alive and well. The police probably could have seized the meth and the firearm without a search warrant, but getting the warrant “virtually guaranteed” that a motion to suppress would be denied.

CO: ARSON - \$3M LOSS TO HOTEL BEING BUILT- NO SECURITY FENCE, NO INSURANCE

On March 1, 2019, in [Praetorian Insurance Company v. Axia Contracting, LLC and 255 Blackhawk Hospitality, LLP](#), U.S. District Court Judge William J. Martinez, District of Colorado, granted summary judgment to the insurance company. “On summary judgment, the parties seek clarity from this Court on whether, under the Policy, Defendants’ failure to maintain a protective device, a six-foot fence enclosing the entire job site, which was listed in an endorsement and schedule attached to the contract, relieves Praetorian of its obligation to pay for Defendants’ losses due to fire.... For the reasons discussed below, the Court will grant Praetorian’s Motion for Summary Judgment (‘the Motion’), direct entry of judgment, and terminate this case.”

Legal Lessons Learned: FDs should encourage owners of large construction sites to enclose the site with fencing and nighttime lights.

[See my case analysis.](#)

MD: GOVT IMMUNITY – COUNTY 911 SYSTEM DOWN 3 HOURS – RESIDENT DIED

On Feb. 22, 2019, in [Raul T. Aristorenas, et al. v. Montgomery County, Maryland](#), the Court of Appeals Appeals of Maryland, held (3 to 0) in unreported decision upheld the dismissal of the lawsuit by Circuit Court trial judge: “The [trial] court concluded that the allegations did not state a claim for negligence—which underlies both the wrongful death and the survival claims—because the County is immune from suit and the individual defendants did not owe a duty to Mr. Somarriba or Marlon. We agree and affirm.”

Legal Lessons Learned: This is a tragic case – amazing there was no back up system, or ability to have another 911 Center pick up the calls.

[See my case analysis.](#)

U.S. SUPREME COURT: EXECUTION – INMATE NOT ENTITLED TO HAVE IMAM PRESENT IN DEATH CHAMBER

On Feb. 7, 2019, in [Jefferson S. Dunn, Commissioner, Alabama Department of Corrections v. Dominique Hakim Marcelle Ray](#), the majority of Justices [5 to 4] overturned 11th Circuit’s Feb. 6, 2019 stay of execution of Ray, who has raped and murdered a 15-year old girl in 1995. Ray had asked Alabama prison officials to allow an imam to be in the death chamber, but only correction employees are allowed, including a long employed Christian chaplain. [The State of Alabama then executed the prisoner on Feb. 7, at 10:12 pm.]

Legal Lessons Learned: The Supreme Court’s five “conservative” Justices have made it clear that last minute stays of execution are not favored.

[See my case analysis.](#)

See [Feb. 7, 2018 article, “Alabama Executes Muslim Inmate Who Wanted Imam Present.”](#) “Ray was convicted in 1999 after another man, Marcus Owden, confessed to his role in the crime and implicated Ray. Owden told police that they had picked the girl up for a night out on the town and then raped her. Owden said that Ray cut the girl’s throat. Owden pleaded guilty to murder, testified against Ray and is serving a life sentence without parole. A jury recommended the death penalty for Ray by an 11-1 vote.”

See [Feb. 8, 2019 Washington Post article: “Abortion, Death Penalty, Religion: Late-Night Rulings Show New Alliances At Supreme Court.”](#)

MA: SPRINKLERS - DRUG REHAB HOUSE WITH 8 PATIENTS – COURT UPHOLDS FIRE CODE

On Jan. 29, 2019, in [Crossing Over, Inc. et al. v. City of Fitchberg](#), Justice Rosemary Connelly, MA Superior Court upheld the [July 14, 2017 decision of the “Automatic Sprinkler Appeals Board”](#) which held:

Based upon the aforementioned findings and reasoning, the Board hereby upholds the Order of the Fitchburg Fire Department and requires the installation of an adequate system of sprinklers throughout all portions of the subject building used and/or occupied for boarding or lodging purposes....”

Justice Connelly denied the property owner’s motion to reverse the Board, holding that the Board’s decision is legal, supported by the record, and the Board has not exceeded its authority. The court will give deference to the Board’s reasonable interpretation of its own statute.”

Legal Lessons Learned: Sprinkler ordinances save lives.

[See my case analysis.](#)

PA: ARSON – DEFENDANT SMELLED OF GASOLINE, TRAINED ARSON DOG ALERTED

On Jan. 11, 2019, in [Commonwealth of Pennsylvania v. Jamat Ali Manzoor](#), the Superior Court of PA (3 to 0) upheld the jury conviction on two counts of arson, and insurance fraud.

Legal Lessons Learned: Evidence of trained arson K-9 alerting for accelerants to admissible in arson trial.

[See my case analysis.](#)

U.S. SUPREME COURT: QUALIFIED IMMUNITY FOR POLICE OFFICERS – DOMESTIC VIOLENCE ARREST

On Jan. 7, 2019, in [City of Escondido, California v. Mart Emmons](#), the U.S. Supreme Court (9 to 0), in a per curiam decision [not authored by a specific Justice], reversed the 9th Circuit without the need to even hear oral argument. The Court held: “As to Officer Craig, the Ninth Circuit also erred. As we have explained many times: ‘Qualified immunity attaches when an official’s conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.’ *Kisela v. Hughes*, 584 U. S. ___, ___ (2018) (per curiam). The Court of Appeals made no effort to explain how that case law prohibited Officer Craig’s actions in this case.”

Legal Lessons Learned: Great decision on “qualified immunity” for emergency responders. [See my case analysis:](#)

See also Chap. 13: Aug. 14, 2018 decision by 7th Circuit in [Billie Thompson v. Lance Cope](#) where Indianapolis police called EMS to help with person found naked, running in street, high on amphetamines, and combative. EMS administered a sedative – Versed - patient stopped breathing, and was revived; he ultimately died 8-days later. The Court held (3 to 0), “The paramedic is entitled to qualified immunity on the excessive force claim. Case law did not (and does not) clearly establish that a paramedic can violate a patient-arrestee’s Fourth Amendment rights by exercising medical judgment to administer a sedative in a medical emergency.”

KY: "RIGHT TO WORK" STATUTE UPHELD; SIMILAR TO U.S. SUPREME COURT DECISION IN *Janis*

On Nov. 15, 2018, in [Fred Zuckerman, As Representative Of The General Drivers, Warehousemen And Helpers Local Union No. 89 v. Matthew G. Bevin, Governor](#), the Kentucky Supreme Court (4 to 3) upheld the statute: "we hold that the Unions' constitutional challenges to the Act are without merit. In this area of economic legislation, the legislature and the executive branch make the policy, not the courts."

Legal Lessons Learned: Fire & EMS departments, not only in Kentucky, but in all states must now follow the U.S. Supreme Court's decision, June 27, 2018, in [Janus v. American Federation of State, County, and Municipal Employees, Council 31](#), which held (5 to 4), "Under Illinois law, public employees are forced to subsidize a union, even if they choose not to join and strongly object to the positions the union takes in collective bargaining and related activities. We conclude that this arrangement violates the free speech rights of nonmembers by compelling them to subsidize private speech on matters of substantial public concern."

[See my case analysis.](#)

See IAFF statement in response to the *Janus* decision:

General President Harold Schaitberger issued this statement on the Supreme Court 5-4 decision overruling decades of precedent in the case of [Janus v AFSCME Council 31](#):

Washington, DC – "The Janus v AFSCME Council 31 case was pushed by forces that want to take away the voices of fire fighters and the power of all public employee unions. The intent is to handicap unions in our ability to improve members' lives and to weaken the political power of public employees.

"We know the potential negative impacts that could come from the Supreme Court's decision in *Janus*, however we are ready to take the best punch and deliver some blows ourselves to those that want to see fire fighters and their unions weakened.

"While the Janus decision is another attack on organized labor, every attack can be turned into an opportunity, and we are determined not to let this decision hold us back from our important mission. The IAFF has operated successfully under *Janus*-like rules in right-to-work and non-collective bargaining states for decades. We have proven that you can have strong affiliates that deliver better pay, health care, retirement security, health and safety provisions and a voice in keeping their communities safe in these tough environments.

"We represent more than 85 percent of all professional fire fighters and paramedics in the U.S. because we consistently demonstrate our value, through our strong affiliates, that being union fire fighters provides a significantly better standard of living and safer working environment than those who are not union. We believe that difference will become even more stark, and we are working to represent that small percentage of fire fighters who aren't in our union so that we can raise their standard of living and increase their ability to have a strong voice in public safety.

“This case was intended as a political push to eliminate the power of people who work to support their families and the power of their unions. But instead, the *Janus* case is activating an army of union leaders to better engage their members.”

WI: FOREST FIRE – INSURANCE COMPANY HAS LIMITED LIABILITY OF \$500,000

On Oct. 30, 2018, in [SECURA Insurance, A Mutual Company v. Lyme St. Croix Forest Company, LLC, et al.](#), the Wisconsin Supreme Court reversed the trial court, and the Wisconsin Appeals Court, and held (7 to 0): “Despite the fact that the fire crossed several property lines, Secura contends it was a single, uninterrupted cause of the alleged damages. *** We conclude that the fire at issue constitutes a single occurrence pursuant to the CGL [Commercial General Liability] policy. Consequently, the \$500,000 per-occurrence limit for property damage applies.”

Legal Lessons Learned: The logging equipment company, which paid for insurance against this type of loss, must feel that its insurance company has treated their customer like “manure.” Insurance policies are often difficult to interpret. Fire & EMS departments should invite their liability insurance carrier(s) in for a discussion about what is covered and what is not covered.

[See my case analysis.](#)

OH: FIRE CODE VIOLATIONS - COURT MAY ORDER INSPECTION OF UNOCCUPIED BUILDING

On Oct. 11, 2018, in [City of Cleveland v. James Grunt, Jr.](#), the Ohio Court of Appeals for Cuyahoga County held (3 to 0) that a judge on the Cleveland Municipal Court – Housing Division had authority to allow warrantless inspections of the property to confirm that owner is complying with Cleveland Building Department requirements. “[W]e find no cases in Ohio directly on point, i.e., discussing the constitutionality of ordering a property inspection as a condition of CCS. However, we find guidance in R.C. 2951.02, which authorizes warrantless searches during an offender’s misdemeanor CCS under certain circumstances.”

Legal Lessons Learned: This decision can be helpful precedence in Ohio for communities struggling with empty properties.

[See my case analysis.](#)

OH: AUTOPSY REPORTS NOT PUBLIC RECORDS – ONGOING INVESTIGATION, BUT JOURNALISTS CAN READ

On Sept. 19, 2018, in [The State Ex Rel. Cincinnati Enquirer v. Pike County General Health District, et al.](#), the Ohio Supreme Court held (5 to 0) that: “the function of R.C. 313.10(D) is to give journalists limited access to records that

are not public records. If a journalist could review only autopsy reports that are public records, then he would have no greater access than the general public, and R.C. 313.10(D) would be a dead letter.”

Legal Lessons Learned: The Cincinnati Enquirer may next seek reimbursement of attorney fees. Fire & EMS departments, when requested to produce documents that may not be “public records” (for example, HIPAA-protected EMS run reports), should consult legal counsel before deciding whether to release the documents.

[See my case analysis:](#)

Note: [On Nov. 13, 2018, arrests were made:](#) “Pike County: Wagner Family Arrested In The Rhoden Family Massacre.... Arrested and charged with murder and a slew of other charges were Angela Wagner, 48, her husband George ‘Billy’ Wagner, 47, and their two sons, George Wagner IV, 27, and Edward ‘Jake’ Wagner, 26.”

**TX: FREE SPEECH - PD OFFICER LAWSUIT MAY PROCEED - FIRED
ORGANIZING POLICE ASSOCIATION [\[also filed, Chap. 16\]](#)**

On Aug. 31, 2018, in [Marcus Mote v. Debra Walthall](#), the U.S. Court of Appeals for 5th Circuit held (3 to 0) that Police Chief Debra Walthall is not entitled to qualified immunity, and Officer Mote’s lawsuit against her may proceed. Officer Mote sought before he was fired to organize police officers with the City of Corith, TX into a “Corith Police Officers Association” [no collective bargaining rights under TX law], affiliated with the Texas Municipal Police Association. The Court wrote, “The First Amendment protects the right of all persons to associate together in groups to ‘advanc[e] beliefs and ideas.’ Put another way, ‘the [F]irst [A]mendment protects the right of all persons to associate together in groups to further their lawful interests.’ When groups gather together for this purpose, ‘it cannot be seriously doubted’ that they comprise associations protected by the First Amendment. *** We conclude that Mote’s right to speak in furtherance of forming the CPOA was clearly established as an integral part of his association rights. *** We agree with the district court that Mote’s association and speech rights to engage in the activities he alleged were clearly established. We therefore DISMISS the appeal.”

Legal Lessons Learned: Very strong opinion concerning free speech rights of public employees. Fire & EMS departments should adopt a “Social Media” policy that recognizes free speech rights, but also cautions members to not publicly discuss internal matters.

OH: DYING DECLARATION IN BACK OF AMBULANCE ADMISSIBLE IN MURDER TRIAL [also filed Chap. 13]

On July 25, 2018, in [State v. Fred Taylor](#), 2018-Ohio-2921, the Ohio Court of Appeals for Summit County, upheld (3 to 0) his conviction of felony murder of Javon Knaff.

“Mr. Knaff’s repeated statements concerning the fact that he was dying, coupled with the severity of his condition, demonstrate his awareness of his impending death at the time that he stated, ‘Fred shot [me].’ Consequently, this statement was admissible as a dying declaration.”

Legal Lessons Learned: Document on your EMS run report the actual words spoken by the patient; a “dying declaration” is admissible in evidence. Recording the words on your run report can help prosecution reach a plea agreement.

MI: HOMEOWNER CONV. ARSON – NO “MIRANDA WARNING” REQUIRED, SPOKE TO PD INFORMANT

On July 24, 2018, in [Cynthia Marie Stewart-Matzen v. Shawn Brewer](#) [Deputy Warden, Michigan state prison], U.S. District Court judge David M. Lawson, Eastern District of Michigan, Case No. 15-13050 denied prisoner’s petition for writ of habeas corpus:

“The petitioner was not entitled to Miranda warnings when she was questioned by an informant at a restaurant or when questioned by Detective Morey in connection with her unemployment benefits because she was not in “Miranda custody.”

Legal Lessons Learned: If suspect in arson case is not in custody, then Miranda warnings not required.

U.S. SUPREME COURT – UNION “FAIR SHARE” FEES – REQUIRES EMPLOYEE SPECIFIC CONSENT

On June 27, 2018, in [Janus v. American Federation of State, County, And Municipal Employee, Council 32, et al](#), the U.S. Supreme Court (5 to 4) held in opinion by Justice Alito:

“Under Illinois law, public employees are forced to subsidize a union, even if they choose not to join and strongly object to the positions the union takes in collective bargaining and related activities. We conclude that this arrangement violates the free speech rights of nonmembers by compelling them to subsidize private speech on matters of substantial public concern.”

Legal Lessons Learned: Fire & EMS Departments with unions need to dialog with their union officers about getting written authorization from each employee to deduct “fair share” or other union fees. [See also IAFF Statement](#), and [Blog](#).

U.S. SUPREME COURT: SEARCH WARRANT REQUIRED FOR CELL TOWER DATA, UNLESS EMERGENCY

On June 22, 2018, in [Carpenter v. United States](#), the U.S. Supreme Court (5 to 4), in opinion by Chief Justice Roberts, held that a search warrant is normally required to track a person's cell phone location, but also recognized an emergency exception.

“Further, even though the Government will generally need a warrant to access CSLI [cell-site location information], case-specific exceptions may support a warrantless search of an individual's cell-site records under certain circumstances. ‘One well-recognized exception applies when “the exigencies of the situation” make the needs of law enforcement so compelling that [a] warrantless search is objectively reasonable under the Fourth Amendment.’ *Kentucky v. King*, 563 U. S. 452, 460 (2011) (quoting *Mincey v. Arizona*, 437 U. S. 385, 394 (1978)). Such exigencies include the need to pursue a fleeing suspect, protect individuals who are threatened with imminent harm, or prevent the imminent destruction of evidence. 563 U. S., at 460, and n. 3. As a result, if law enforcement is confronted with an urgent situation, such fact-specific threats will likely justify the warrantless collection of CSLI. Lower courts, for instance, have approved warrantless searches related to bomb threats, active shootings, and child abductions. Our decision today does not call into doubt warrantless access to CSLI in such circumstances. While police must get a warrant when collecting CSLI to assist in the mine-run criminal investigation, the rule we set forth does not limit their ability to respond to an ongoing emergency.”

Legal Lessons Learned: Fire & EMS Departments in emergency situations – for example, when conducting search for a missing person who may be carrying a cell phone – may still coordinate with law enforcement and get cell tower information without a search warrant. [Note: Justice Kennedy announced his retirement on June 27, 2018; he has been the “swing vote” in many 5 to 4 decisions. Future cases involving access to electronic records will undoubtedly get to the U.S. Supreme Court.]

PA: DOT EMPLOYEE FIRED FOR FACEBOOK POSTS ON BAD SCHOOL BUS DRIVERS – REINSTATED [also filed, Chap. 16]

On June 12, 2018, in [Rachel L. Carr v. Commonwealth of Pennsylvania / Department of Transportation and Civil Service Commission](#), the Commonwealth Court of Pennsylvania held (3 to 0) that the employee's FACEBOOK posts about local school bus drivers were “inappropriate” but were protected since it “touched on a matter of public concern.” The Court wrote: “After a thorough review of the record and a conscientious analysis of the factors articulated by the United States Supreme Court, we conclude that the Department's generalized interest in the safety of the traveling public does not outweigh Carr's specific interest in commenting on the safety of a particular bus driver. While Carr's comments are undoubtedly inappropriate, such comments still receive protection under the First Amendment.”

Legal Lessons Learned: Fire & EMS Departments should have a Social Media Policy that clearly advises personnel that their “Free Speech rights” are limited when discussing FD internal matters.

NY: NYPD / FDNY TRADEMARKS – CITY SUING “COP SHOP”

On June 7, 2018, in [The City Of New York v. Blue Rage Inc, d/b/a THE COP SHOP, and Salvatore Piccolo & Susan Piccolo](#), a United States Magistrate Judge in Central Islip, New York, held in a pre-trial dispute that the City does not need to disclose the profits it makes on its merchandise, or its contributions to non-profit organizations.

Legal Lessons Learned: [Protect your trademarks](#). “Under trademark law, the amount of statutory damages can range from a low of \$1,000 for innocent infringement to a high of \$2,000,000 for willful infringement.” 15 U.S.C. § 1117(c).

OH: FIRE LOSS INSURANCE – CLEVELAND MUST RETURN \$175,000

DEPOSITED WITH CITY

On May 31, 2018, in [WRRS, L.L.C. v. City of Cleveland](#), the Court of Appeals for 8th Appellate District (County of Cuyahoga), 2018 Ohio 2129, held (3 to 0):

“The Board's 2012 decision, however, does preclude the City from continuing to withhold the \$175,000 WRRS deposited with the City pursuant to Ohio's fire loss statute. In 2012, the Board [of Building Standards] found the WRRS property to be in compliance after the fire. The City could have appealed from the 2012 decision, but chose not to do so. Thus, the City is now precluded under res judicata from challenging the Board's 2012 decision. As a result, the City is ordered to return the \$175,000 to WRRS.”

Legal Lessons Learned: Under Ohio Revised Code 3929.86, “Fire loss claims,” for claims in excess of \$5000, insurance companies must first deposit payment with political subdivision.”

“(A) No insurance company doing business in this state shall pay a claim of a named insured for fire damage to a structure located within a municipal corporation or township in this state where the amount recoverable for the fire loss to the structure under all policies exceeds five thousand dollars, unless the company is furnished with a certificate pursuant to division (B) of this section, and unless there is compliance with the procedures set forth in divisions (C) and (D) of this section.”

SC: ARSON INVESTIGATOR “EXPERT” – 1YEAR OF EXPERIENCE - ARSON

DOG ALSO QUALIFIED

On April 11, 2018, in [The State v. Paula Reed Rose](#), the South Carolina Court of Appeals affirmed (3 to 0) the conviction of Ms. Rose of third-degree arson, filing a false police report, burning personal property to defraud an insurer, and making a false insurance claim to obtain benefits for fire loss, for which the trial court sentenced her to a cumulative term of five years' home incarceration with five years' probation.”

LEGAL LESSONS LEARNED: There is no specific “time on the job” requirement to be qualified as an expert in origin and cause.

U.S. SUPREME COURT: LANDMARK DECISION ON QUALIFIED IMMUNITY – ONLY IF CLEAR CONSTIT. VIOL. [also filed, Chap. 2]

On April 2, 2018, in [Andrew Kisela v. Amy Hughes](#), the U.S. Supreme Court reversed the 9th Circuit and held (7 to 2) the police officer who shot Amy Hughes should have been dismissed from the lawsuit: “Here, the Court need not, and does not, decide whether Kisela violated the Fourth Amendment when he used deadly force against Hughes. For even assuming a Fourth Amendment violation occurred—a proposition that is not at all evident—on these facts Kisela was at least entitled to qualified immunity. Qualified immunity attaches when an official’s conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.”

Legal Lessons Learned: Justices sent a message that qualified immunity protects police officers from personal liability unless conduct clearly unjustified.

See [New York Times article on this decision](#): “The court’s decision was unsigned and issued without full briefing and oral argument, an indication that the majority found the case to be easy.”

TX: MURDER TRIAL FOR KILLING A POLICE OFFICER – POLICE MAY ATTEND TRIAL IN UNIFORM

On March 27, 2018, in [Shelton Denoria Jones v. Lorie Davis, Director, Texas Department of Criminal Justice](#), the U.S. Court of Appeals for 5th Circuit, held (3 to 0) that the defendant was not deprived of a fair trial in state court: “the record before us does not suggest the police presence intimidated the jury or disrupted the factfinding process in any way.”

LEGAL LESSONS LEARNED: Helpful decision – no evidence of jury intimidation by having emergency responders in uniform, watching a jury trial. Before showing up in uniform, please discuss with your Chief and the prosecutor, who may want to review with trial judge, prior to start of trial.

IL: DEPUTY FIRE CHIEF FIRED - WARNED ABOUT “POLITICAL COMMENTARY” ON FACEBOOK [also filed, Chap. 16]

On Jan. 11, 2018, in [Richard Banske v. City of Calumet City, U.S. District Court, Northern District of Illinois](#) (Case No. 17C5263), Judge Harry D. Leinenweber granted City’s motion to dismiss. “[A] policymaking employee may be discharged ‘when that individual has engaged in speech on a matter of public concern in a manner that is critical of superiors or their stated policies.’ Hagan, 867 F.3d at 826 (quoting Kiddy-Brown v. Blagojevich, 408 F.3d 346, 358 (7th Cir. 2005)). *** Without well pled factual allegations, the Court is left to guess whether Banske’s at-issue speech touches upon a subject of public concern. This the Court will not do. The Complaint fails to establish that Banske engaged in constitutionally protected speech, so it fails to state a claim upon which relief may be granted.”

Legal Lessons Learned: Fire, EMS, police and other public employees have only limited First Amendment rights under the “balancing test” of [U.S. Supreme Court’s decision in Pickering v. Board of Education, 391 U.S. 563 \(1968\)](#).

Pickering decision: “Appellant Marvin L. Pickering, a teacher in Township High School District 205, Will County, Illinois, was dismissed from his position by the appellee Board of Education for sending a letter to a local newspaper in connection with a recently proposed tax increase that was critical of the way in which the Board and the district superintendent of schools had handled past proposals to raise new revenue for the schools. *** In sum, we hold that, in a case such as this, absent proof of false statements knowingly or recklessly made by him, a teacher's exercise of his right to speak on issues of public importance may not furnish the basis for his dismissal from public employment. *** Footnote 3: It is possible to conceive of some positions in public employment in which the need for confidentiality is so great that even completely correct public statements might furnish a permissible ground for dismissal.”

Chap. 2 Line Of Duty Death; Safety

KY: VOL. FF INJURED LEG & KNEE ON ICE – WORKERS COMP. FOR MEDICAL, BUT NO WAGE LOSS – FF IS SELF-EMPLOYED

On July 12, 2019, in [Ken Lashley v. Kentucky Volunteer Fire Department, et al.](#), the Kentucky Court of Appeals held (3 to 0; unpublished opinion) that the Administrative Law Judge correctly determined that the firefighter is not entitled to any wage loss reimbursement since he owns his own business and is self-employed without wages.

“As a volunteer firefighter, his average weekly wage is based on his other ‘regular employment.’ KRS 342.140(3). In this case, Appellant is self-employed.... The ALJ held that because Appellant owned his own business, he did not have wages from regular employment. In other words, Appellant could not claim money earned as the owner of the business as wages for the purpose of calculating his average weekly wage.”

Facts [from [KY Workers Comp Board decision of March 1, 2019](#)]

“Lashley filed a Form 101, on July 13, 2018 alleging he injured his left leg and knee when he slipped on ice and snow on January 18, 2018. KYVFD filed a Form 111 on July 27, 2018 admitting Lashley sustained a work-related injury, but indicated there is a dispute as to the benefits owed. A Benefit Review Conference (‘BRC’) was held on November 14, 2018.

Legal Lesson Learned: Kentucky statute, like many states, will award volunteer firefighters their loss wages based on wages of their “regular employment.” This self-employed firefighter will have his medical expenses covered.

[The Administrative Law Judge awarded “temporary total disability \(‘TTD’\) based upon the state minimum benefit in effect for the date of injury, medical benefits, and placed the claim in abeyance until Lashley reaches maximum medical improvement \(‘MMI’\). The ALJ noted Lashley has not yet reached MMI.”](#)

MI: RESTAURANT OPERATORS CLAIM THAT “ORIGIN & CAUSE” RPT. CHANGED TO “INCENDARY” TO DEFLECT ATTENTION FD DEFICIENCIES - LODD / \$3,500 OSHA FINE

On July 10, 2019, in [George Marvaso et al. v. John Adams et al.](#), U.S. District Court Judge Linda V. Parker denied the defense motion to dismiss by the Fire Marshal, the Fire Chief, and his father, the former Fire Chief, holding the “Court concludes that Plaintiffs plead sufficient facts to support their §1983 claim against Defendants and that Defendants are not entitled to qualified immunity.”

Facts:

“On May 8, 2013, shortly before 8:15 a.m., a fire broke out in the kitchen of Marvaso's Italian Grille (‘Marvaso's’), a restaurant located on Wayne Road in Westland, Michigan. Plaintiffs George and Mary Marvaso leased and operated Marvaso's, as well as an adjacent pool hall and charity poker facility called

Electric Stick. Their son, Plaintiff George F. Marvaso, was an employee of Electric Stick. No one was inside Marvaso's or Electric Stick when the fire broke out. Wayne-Westland Fire Department Firefighter Brian Woehlke died from smoke and soot inhalation while fighting the fire.

Officials from the Wayne-Westland Fire Department initially investigated the fire, refusing the Michigan State Police Department's offer to conduct the fire origin and cause investigation. The Wayne-Westland Fire Marshal ... John Adams ('Fire Marshal Adams'), conducted an on-scene investigation which revealed no accelerants. Investigators who investigated the fire for the companies that insured the buildings' landlord and the tenant businesses classified the cause of the fire as 'undetermined.'

Between May 8, 2013 and June 30, 2013, the Michigan Occupational Safety and Health Administration ('MIOSHA') investigated Woelke's death, conducting its 'closing conference' with Wayne-Westland Fire Department officials on the latter date. The Fire Chief for the Wayne-Westland Fire Department at the time was Defendant Michael J. Reddy Jr. ('Fire Chief Reddy'). During the meeting between MIOSHA and the city's fire department officials, MIOSHA indicated it would be issuing citations to the fire department for safety violations resulting in Woelke's death. On August 30, 2013, MIOSHA issued a citation to the City of Westland for a 'serious' violation of health and safety regulations. The City subsequently acknowledged the citation and agreed to pay the \$3,500 penalty assessed against it.

[Plaintiffs' allege in their Amended Complaint that in] mid-November 2013, Fire Marshal Adams submitted an alleged false fire origin and cause report to the Michigan State Police ('MSP') and Wayne County Prosecutor's Office, which triggered an MSP homicide investigation resulting in search warrants being executed for Plaintiffs' homes. Fire Marshal Adams' announcement that the fire had an incendiary cause and that the Michigan State Police would be opening a homicide investigation into Woelke's death was widely reported in the statewide news media.

As of the date Plaintiffs filed their Amended Complaint in this action, however, no arrests had been made in connection with the fire.”

Legal Lessons Learned: This lawsuit may now proceed to pre-trial discovery.

Read [NIOSH Firefighter Fatality Report F2013-14](#): “Career Probationary Fire Fighter Runs Out of Air and Dies in Commercial Structure Fire—Michigan.”

“On May 8, 2013, a 29-year-old male career probationary fire fighter died after running out of air and being trapped by a roof collapse in a commercial strip mall fire. The fire fighter was one of three fire fighters who had stretched a 1½-inch hoseline from Side A into a commercial strip mall fire. The hose team had stretched deep into the structure under high heat and heavy smoke conditions and was unsuccessful in locating the seat of the fire. The hose team decided to exit the structure. During the exit, the fire fighter became separated from the other two crew members. The incident commander saw the two members of the hose team exit on Side A and called over the radio for the fire fighter. The fire fighter acknowledged the incident commander and gave his location in the rear of the structure. The fire fighter later gave a radio transmission that he was out of air. A rapid intervention team was activated but was unable to locate him before a flashover occurred and the roof collapsed. He was later recovered and pronounced dead on the scene.”

IL: FF PRIOR HEART ISSUES - PATIENT DROPPED ON STRETCHER – LINE-OF-DUTY PENSION, LIFETIME HEALTH INSURANCE

On May 28, 2019, in [Patrick Cronin v. Village of Skokie](#), the Appellate Court of Illinois, First District, held (3 to 0) that the retired firefighter was properly awarded lifetime health insurance.

“In summary, because Mr. Cronin was awarded a line-of-duty disability pension by the Pension Board, he met the requirements of section 10(a) of the Benefits Act—that he suffered a catastrophic injury in the line of duty—as a matter of law. Mr. Cronin also met the requirements of section 10(b): the only work-related incident that was presented as a cause of his injury was his act of holding the stretcher as a cardiac patient was dropped onto it and he presented uncontradicted evidence that he reasonably believed he was responding to an emergency. Accordingly, Mr. Cronin is entitled to benefits under the Act, and the circuit court properly granted summary judgment in favor of Mr. Cronin and against the Village.”

Legal Lessons Learned: The Illinois statute applies even to firefighters with a prior heart issue.

NJ: FF ACCIDENTAL DEATH BENEFITS - ONLY FOR THOSE WHO DIED WHILE IN “ACTIVE SERVICE”

On March 26, 2019, in [Scott Rogow \(Deceased\) v. Board of Trustees, Police And Firemen’s Retirement System](#), the Superior Court of New Jersey / Appellate Division held (3 to 0) in an unpublished opinion: “Accordingly, we conclude the Board properly determined that Rogow was ineligible for accidental death benefits because he was not a member in active service at the time of his death, as required by N.J.S.A. 43:16A-10, but was retired and receiving an accidental disability retirement allowance. The legislative history supports the Board's decision.”

[Read my case analysis.](#)

IL: FF WITH PROSTATE CANCER - DENIED COVERAGE

On Nov. 14, 2018, in [Clifford A. Ekkert v. Illinois Workers Compensation Commission and Village of Oak Brook](#), the Appellate Court of Illinois, Second District, Workers Compensation Division, held (5 to 0) that firefighter Ekkert is not covered by workers comp: “claimant did not adequately set forth and develop an argument as to why the ultimate decision of the Commission was contrary to the manifest weight of the evidence.”

Legal Lessons Learned: A firefighter with prostate cancer, seeking workers compensation, needs to consult a board-certified expert in urology. The statutory presumption is rebuttable by employer’s expert witness.

[See my case analysis.](#)

PA: SKIN CANCER - FF DID NOT SHOW SCIENTIFIC EVIDENCE CONNECTING TO JOB

On Oct. 18, 2018, in [City Of Philadelphia Fire Department v. Workers' Compensation Appeal Board \(Appeal of Scott Sladek\)](#), the Supreme Court of Pennsylvania (sitting in Eastern District, Philadelphia) held (4 to 3) that a firefighter with skin cancer must present scientific evidence to Workers Comp Board that his malignant melanoma is a type of cancer caused by the Group 1 carcinogens. The City's expert, "Dr. Guidotti, testified that there is considerable epidemiological evidence to support a causative relationship between malignant melanoma of the skin and sunlight exposure (sunburn), but no similar evidence to support a causative connection between malignant melanoma and the inhalation of any substance."

Legal Lessons Learned: There are [statutory presumption statutes in many states](#); some cover specific cancers, such as leukemia, non-Hodgkin lymphoma, brain cancer, bladder cancer, and gastrointestinal cancer. Other statutes do not specify the specific cancers, and epidemiological evidence may be required to win a workers comp claim.

PA: Q-SIREN LAWSUIT DISMISSED – DID NOT PROVE WAS "UNREASONABLY DANGEROUS"

On Aug. 20, 2018, in [Ronald Dunlap and Carl Roel v. Federal Signal Corporation, et al.](#), the Superior Court of Pennsylvania, held (2 to 1) that the trial court properly granted summary judgment to the siren manufacturer. The Court wrote: "Plaintiff firefighters' acoustics expert, Mr. Struck, presented an alternative siren design that would afford greater protection for firefighters from hearing loss by adding a Bromley Shroud, which would direct the noise to the front of the fire truck and away from the cab. However, he focused solely on the benefits of the shrouded design to the firefighters occupying the cab of the firetruck; he did not opine whether that design would protect the public."

Legal Lesson Learned: Hearing loss is a serious issue in fire and EMS; hearing protection should be worn when the siren is activated.

PA: HEARING LOSS LAWSUIT DROPPED - PLANITIFF'S ATTORNEY MUST PAY DEF. ATTORNEY FEES

On June 20, 2018, in [Gerald Carroll, et al. v. Federal Signal Corporation, et al.](#), the U.S. Court of Appeals for the 3rd Circuit (Philadelphia) held (3 to 0) that plaintiffs' attorney must pay \$127,823.47 in attorney fees.

"Although attorneys' fees and costs are typically not awarded when a matter is voluntarily dismissed with prejudice, we conclude that such an award may be granted when exceptional circumstances exist. Exceptional circumstances include a litigant's failure to perform a meaningful pre-suit investigation, as well as a repeated practice of bringing meritless claims and then dismissing them with prejudice after both the opposing party and the judicial system have incurred substantial costs. Because such exceptional circumstances are present in this case, the District Court's award will be affirmed."

Legal Lessons Learned: Hearing loss is a real issue in fire & EMS - wear hearing protection.

See [NFPA 1582](#). See also these research articles, “[Hearing Loss Prevention and a Survey of Firefighters](#),” “[Hearing Conservation For Firefighters](#),” [Audiology Today \(Nov / Dec. 2012\)](#): “This hearing loss is irreversible, but preventable by using hearing protection or managing the noise and noise exposure. Unfortunately, audiologists see this population only after the hearing loss has become debilitating.”

MD: PART-TIME EMS INJURED FOOT ON DUTY – AVERAGE WEEKLY WAGE

On June 1, 2018, in [Justin Stine v. Montgomery County, Maryland](#), the Court of Special Appeals of Maryland, held (3 to 0) that he is entitled to a jury trial to determine average weekly wage, which may include wages earned working for private ambulance company rather than merely the wage he earned as a part-time EMT in the 14-weeks prior to the injury.

Legal Lesson Learned: helpful decision for part-time EMT, who has second part-time job while also going to school.

U.S. Department of Justice: Improvements In Public Safety Officer Benefits Program

On May 15, 2018, the [U.S. Department of Justice issued Press Release](#), summarizing the following improvements:

- “Heart Attack, Stroke, and Vascular Rupture Claims: The new rule helps implement a change in the law that reduces the need in many cases for families to submit difficult-to-find and costly medical records for their loved ones. This regulatory change alone positively impacts nearly one-third of the PSOB death claims filed each year.
- Filing Process: The new rule includes administrative updates to make filing claims more straightforward and less burdensome for survivors and public safety agencies.
- Law Enforcement and Firefighter Trainees: Recognizing the dangerous nature of law enforcement and fire suppression, and the rigorous training required to help keep communities safe, the new rule clarifies the coverage of certain individuals fatally or catastrophically injured during formal training provided by law enforcement and fire academies.
- September 11th Exposure Claims: The new rule facilitates the PSOB Program’s medical examiners’ review of the nearly 150 claims pending for certain public safety officers who responded to the September 11th attacks to assist in rescue, recovery, and clean-up efforts, and who were exposed to hazards and toxins resulting from the attacks.”

Legal Lessons Learned: Hopefully these new rules will expedite review of pending claims, including claims by public safety officers who responded to the Sept. 11 terrorist attacks and were exposed to toxins.

KY: LINE OF DUTY DEATH – “STEP CHILD” ENTITLED TO FREE TUITION AT STATE COLLEGES

On June 1, 2018, in [Miles Devon Skeens v. University of Louisville](#), the Commonwealth of Kentucky Court of Appeals (3 to 0) held that a stepchild qualifies as a “child” under Kentucky Revised Statutes (“KRS”) 164.2841 which grants free tuition at state-supported schools for survivors of firefighters killed in the line of duty.

Legal Lesson Learned: Great decision; what was University of Louisville thinking?

VA: FIREMAN’S RULE – REFRIGERATOR EXPLODED – PD / VOL. FF CAN’T SUE MANUFACTURER

On April 13, 2018, in [Brian Colbert v. Norcold, Inc.](#), the U.S. Court of Appeals for the 4th Circuit held (3 to 0; unpublished opinion): “we agree with the district court: the Fireman’s Rule applies to products liability claims, and Norcold’s conduct was not willful or wanton.”

LEGAL LESSONS LEARNED: Police officers and firefighters in Virginia can only seek workers comp (no damages for pain & injury, loss of consortium, etc.) unless proof of willful or wanton misconduct, or gross negligence, by the product manufacturer.

See also [March 12, 2015 decision of 10th Circuit in Chester W. Peake v. Central Tank Coatings](#), where several Kansas firefighters were injured by exploding box of paint thinner: “The undisputed material facts are that several hours after Central Tank completed its work on the roof [of the city’s water tower] and left the site, the wooden members of the tower caught fire, fell to the ground, caught the surrounding grass on fire and eventually spread to the tires of the trailer. This domino chain of events was unforeseeable. *** A large, unmarked metal container box was mounted to the wood deck of the trailer. It was used by the crew to store various tools, oxygen/acetylene tanks, and other materials, including paint thinner.” The Court held that the firefighters could not sue the company for damages, since here is “no evidence that Central Tank knew that the storage of paint thinner was dangerous.”

See also this [article about the Kansas case](#): “Notably, a sizable minority of states (18) do not currently apply the Fireman’s Rule... and have either explicitly declined to adopt, rejected, limited, or failed to address it... These states are Alabama, Colorado, Florida, Maine, Massachusetts, Michigan, Minnesota, Montana, New Jersey, New York, North Carolina, North Dakota, Oregon, Pennsylvania, South Carolina, Vermont, West Virginia, and Wyoming.”

NY: FDNY RECRUIT DIED DURING PHYSICAL EXERCISES – LAWSUIT DISMISSED - HEART CONDITION

On April 10, 2018, in [Sherita Sears v. The City of New York](#), the Appellate Division of the Supreme Court of State of New York (5 to 0) denied the death claim, holding: “Plaintiff is not entitled to recover under GML § 205–a, as the injuries decedent sustained were not the type of occupational injury that Labor Law § 27–a was designed to protect, but rather, arose from risks unique to firefighting work (Williams v. City of New York, 2 N.Y.3d 352, 368, 779 N.Y.S.2d 449, 811 N.E.2d 1103 [2004]).”

Legal Lessons Learned: The New York statute requires proof of “neglect, omission, willful or culpable negligence.”

[New York Consolidated Laws, General Municipal Law - GMU § 205-a](#). Additional right of action to certain injured or representatives of certain deceased firefighters

“In addition to any other right of action or recovery under any other provision of law, in the event any accident, causing injury, death or a disease which results in death, occurs directly or indirectly as a result of any neglect, omission, willful or culpable negligence of any person or persons in failing to comply with the requirements of any of the statutes, ordinances, rules, orders and requirements of the federal, state, county, village, town or city governments or of any and all their departments, divisions and bureaus, the person or persons guilty of said neglect, omission, willful or culpable negligence at the time of such injury or death shall be liable to pay any officer, member, agent or employee of any fire department injured, or whose life may be lost while in the discharge or performance at any time or place of any duty imposed by the fire commissioner, fire chief or other superior officer of the fire department, or to pay to the wife and children, or to pay to the parents, or to pay to the brothers and sisters, being the surviving heirs-at-law of any deceased person thus having lost his life, a sum of money, in case of injury to person, not less than ten thousand dollars, and in case of death not less than forty thousand dollars, such liability to be determined and such sums recovered in an action to be instituted by any person injured or the family or relatives of any person killed as aforesaid.”

U.S. SUPREME COURT: LANDMARK DECISION ON QUALIFIED IMMUNITY – ONLY IF CLEAR CONSTIT. VIOL. [also filed, Chap. 1]

On April 2, 2018, in [Andrew Kisela v. Amy Hughes](#), the U.S. Supreme Court reversed the 9th Circuit and held (7 to 2) the police officer who shot Amy Hughes should have been dismissed from the lawsuit: “Here, the Court need not, and does not, decide whether Kisela violated the Fourth Amendment when he used deadly force against Hughes. For even assuming a Fourth Amendment violation occurred—a proposition that is not at all evident—on these facts Kisela was at least entitled to qualified immunity. ‘Qualified immunity attaches when an official’s conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.’”

LEGAL LESSONS LEARNED: Very helpful decision, not only for police officers, but for all emergency responders who may be sued arising out of split-second decisions. The 7-Justices sent a message that qualified immunity protects police officers from personal liability unless conduct clearly unjustified.

See [New York Times article on this decision](#): “The court’s decision was unsigned and issued without full briefing and oral argument, an indication that the majority found the case to be easy.”

TX: MURDER TRIAL FOR KILLING A POLICE OFFICER – PD MAY BE AT TRIAL IN UNIFORM [also filed, Chap. 1]

On March 27, 2018, in [Shelton Denoria Jones v. Lorie Davis, Director, Texas Department of Criminal Justice](#), the U.S. Court of Appeals for 5th Circuit, held (3 to 0) that the defendant was not deprived of a fair trial in state court: “the record before us does not suggest the police presence intimidated the jury or disrupted the factfinding process in any way.”

LEGAL LESSONS LEARNED: Helpful decision – no evidence of jury intimidation by having emergency responders in uniform, watching a jury trial. Before showing up in uniform, please discuss with your Chief and the prosecutor, who may want to review with trial judge, prior to start of trial.

PA: SEAGRAVE FIRE APPARATUS – INSURANCE COMPANIES MUST DEFEND ON HEARING LOSS CLAIMS

On March 26, 2018, in [Seagrave Fire Apparatus, LLC v. CAN D/B/A Continental Casualty Company, et al.](#), the Superior Court of Pennsylvania held (3 to 1) that several insurance companies that insured Seagrave must defend Seagrave under their contracts for firefighter hearing loss claims.

LEGAL LESSONS LEARNED: Insurance companies are obligated per terms of their contracts to defend Seagrave against the many pending claims.

See, for example, this [2015 lawsuit filed on behalf of 34 New Jersey firefighters](#).

Chap. 3 Homeland Security; Active Shooter

CT: SANDY HOOK ELEMENTARY SCHOOL - LAWSUITS MAY PROCEED / VIOLENT ADS BY GUN MFG.

On March 14, 2019 in [Donna L. Soto, Administratrix \(Estate of Victoria L. Soto\), et al. v. Bushmaster Firearms International, et al.](#), the Connecticut Supreme Court (4 to 3) reinstated the lawsuit brought by families of nine of the 20 children and six adults killed in the elementary school. The Court held: “The plaintiffs have offered one narrow legal theory, however, that is recognized under established Connecticut law. Specifically, they allege that the defendants knowingly marketed, advertised, and promoted the XM15-E2S for civilians to use to carry out offensive, military style combat missions against their perceived enemies. Such use of the XM15-E2S, or any weapon for that matter, would be illegal, and Connecticut law does not permit advertisements that promote or encourage violent, criminal behavior.”

[See my case analysis.](#)

PA: SANCTUARY CITY / ICE - 3rd CIRCUIT HOLDS FED. GOVT CANNOT WITHHOLD FORMULA GRANT

On Feb. 15, 2019, in [City of Philadelphia v. Attorney General Of The United States Of America](#), the U.S. Court of Appeals held (3 to 0), “Concluding that Congress did not grant the Attorney General this authority, we hold that the Challenged Conditions were unlawfully imposed. Therefore, we will affirm the District Court’s order to the extent that it enjoins enforcement of the Challenged Conditions against the City of Philadelphia. We will vacate part of the order, however, to the extent that it exceeds the bounds of this controversy.”

Legal Lessons Learned: The DoJ is likely to seek review by U.S. Supreme Court.

[See my case analysis.](#)

NY: JUVENILE TERRORIST – CAN’T DEPORT, BECAME U.S. CITIZEN WHEN FATHER BECAME CITIZEN

On Sept. 13, 2018, in [Mohammed Khalid v. Jefferson Sessions, U.S. Attorney General](#), the U.S. Court of Appeals for Second Circuit [N.Y.], held (3 to 0): “We hold that the short, temporary physical separation caused by Khalid’s time in federal pretrial juvenile detention did not strip Khalid’s father of his ‘physical custody’ of Khalid as that term is used in 8 U.S.C. §1431(a), and that consequently, Khalid is a U.S. citizen.

Legal Lessons Learned: Citizenship is a great privilege. Congress needs to consider revising the Immigration laws so that those convicted of terrorism are not automatically granted citizenship when their parent becomes a citizen.

See article, "[Mohammad Hassan Khalid given five years in jail for his part in jihadist plot](#)," Khalid, the youngest person at 15 to be prosecuted for terrorism in the US, found guilty of involvement in conspiracy by 'Jihad Jane' to kill Swedish artist. Khalid, a Pakistani migrant living in Maryland, was 15 years old when he first began chatting on the internet with Colleen LaRose, the Philadelphia housewife who called herself "Jihad Jane". LaRose, who is serving a 10-year prison sentence for her part in the conspiracy, drew him into a plan to kill the Swedish artist Lars Vilks, who had drawn the head of the prophet Muhammad on the body of a dog.

U.S. SUPREME COURT: PRESIDENT TRUMP'S "TRAVEL BAN" ON 8 NATIONS LAWFUL

On June 26, 2018, in [Trump, President Of The United States v. Hawaii, et al.](#), the U.S. Supreme Court (5 to 4), in decision by Chief Justice Roberts, held that President has the authority under federal statutes to ban travel to USA of citizens from 8 countries with weak travel clearance processes: Chad, Iran, Iraq, Libya, North Korea, Syria, Venezuela, and Yemen.

"By its plain language, §1182(f) grants the President broad discretion to suspend the entry of aliens into the United States. The President lawfully exercised that discretion based on his findings—following a worldwide, multi-agency review—that entry of the covered aliens would be detrimental to the national interest. And plaintiffs' attempts to identify a conflict with other provisions in the INA, and their appeal to the statute's purposes and legislative history, fail to overcome the clear statutory language."

Legal Lessons Learned: The Congress has granted President great powers to protect our national security.

NY: EMPLOYEES OF BATTERY PARK CITY AUTHORITY MAY SUE BUILDING OWNER FOR 9/11 INJURIES

On June 6, 2018, in [In Re: World Trade Center, Lower Manhattan Disaster Site Litigation](#), the U.S. Court of Appeals for Second Circuit held (3 to 0) that 18 workers who became sick as a result of working in lower Manhattan after the Sept. 11 terrorist attacks may proceed with their lawsuit against building owner, the public benefit corporation Battery Park City Authority. The 2nd Circuit decision followed confirmation by State of New York's highest court (NY Court of Appeals) that the 2009 "Jimmy Nolan" statute (named after recovery worker) allowing time-barred lawsuits for one additional year against public benefit corporations was lawful.

Legal Lessons Learned: The 18 workers will finally get their day in court, or will negotiate a settlement. There reportedly have been 12,000 claims settled against various defendants.

PA: PHILADELPHIA IS "SANTUARY CITY" - WINS INJUNCTION – ENTITLED FED. POLICE GRANT

On June 6, 2018, in [The City of Philadelphia v. Attorney General of United States](#), a federal judge has issued an 89-page opinion holding that \$1.6 million in police grant funds may not be withheld.

Legal Lessons Learned: The U.S. Department of Justice will likely appeal this decision to the 3rd Circuit. Fire & EMS must likewise deal with aliens, and Congress needs to enact legislation concerning 11 million undocumented aliens.

U.S. SUP. COURT: DRUG DEALER E-MAILS STORED BY MICROSOFT IN IRELAND – CASE MOOT

On March 30, 2018, in [Microsoft Corp. v. United States](#), the U.S. Solicitor General has filed a motion asking the Court to dismiss the case as moot, and advised the Court that DoJ has obtained a new search warrant against Microsoft for e-mails stored in their facility in Ireland under the new "Cloud Act." The Solicitor General wrote, "The CLOUD Act resolves the question presented by specifying that a service provider responding to a Section 2703 order must produce information within its 'possession, custody, or control, regardless of whether such * * * information is located within or outside of the United States.' CLOUD Act § 103(a). The United States has obtained a new warrant under the CLOUD Act, and Microsoft's sole objection—that the prior warrant was impermissibly extraterritorial—no longer applies. The United States respectfully submits that this case is now moot."

LEGAL LESSONS LEARNED: Congress has enacted the "Cloud Act" so that search warrants on Microsoft and other companies must be honored, even if the e-mail information is stored in a facility outside the USA. In some case, our national security demands access to this information.

NY: NYPD SURVEILLANCE OF MUSLIMS – FOIA - DO NOT NEED TO EVEN DISCLOSE RECORDS EXIST

On March 29, 2018, In the [Matter of Talib W. Abdur-Rashid and Samir Hashmi v. New York City Police Department, et al.](#), the State of New York Court of Appeals held (4 to 3): "The issue presented is whether an agency may decline to acknowledge that requested records exist in response to a Freedom of Information Law request ... when necessary to safeguard statutorily exempted information. Under these circumstances, we hold that it may and therefore affirm the Appellate Division order, which reached the same conclusion."

LEGAL LESSONS LEARNED: Surveillance records are protected from disclosure; don't need to even confirm existence of intelligence records.

[See article on this decision.](#)

U.S. SUP. COURT: HAMAS BOMBINGS IN ISRAEL – CAN'T SEIZE ANCIENT IRANIAN TABLETS IN CHICAGO

On Feb. 21, 2018, in [Rubin v. Islamic Republic of Iran](#), the U.S. Supreme Court held (8 to 0; Justice Kagan did not participate) that 30,000 ancient clay tablets held at University of Chicago cannot be seized to pay \$71.5 million judgement against Iran. Justice Sotomayor wrote, “Where the FSIA goes so far as to divest a foreign state or property of immunity in relation to terrorism related judgments, however, it does so expressly. See §§1605A, 1610(a)(7), (b)(3), (f)(1)(A); §201(a) of the TRIA. Out of respect for the delicate balance that Congress struck in enacting the FSIA, we decline to read into the statute a blanket abrogation of attachment and execution immunity for §1605A judgment holders absent a clearer indication of Congress’ intent.”

LEGAL LESSONS LEARNED: Congress can amend FSIA to clarify that Iran is a sponsor of terrorists, and their property in USA can be subject to seizure.

[See article on the decision](#): “Wednesday’s ruling is also likely to dictate the outcome of a similar dispute pending before the justices in which four different groups of plaintiffs representing those injured in other allegedly Iran-backed attacks are seeking to enforce court judgments by seizing \$17.6 million in assets held by Iranian government-owned Bank Melli.”

Chap. 4 Incident Command; Training; Drones

CA: WILDLAND FIRE IN NATIONAL FOREST – WATER TRUCK RAN OVER FF SLEEPING AT BASE CAMP – NO AUTOMATIC GOVT IMMUNITY

On July 15, 2019, in [Rebecca Megan Quigley v. Garden Valley Fire Protection District, et al.](#), the Supreme Court of California held (7 to 0), the Court reversed the Court of Appeals which had held that the base camp management team and their Fire Departments were automatically protected from liability by CA governmental immunity statute.

“If the Court of Appeal determines that section 850.4 immunity was not adequately raised in defendants’ answer, the case should be remanded to permit the trial court to decide whether to exercise its discretion to allow the belated assertion of the defense after the commencement of the trial.”

Facts:

“In September 2009, a wildfire known as the Silver Fire broke out in the Plumas National Forest. Employees of two local fire protection districts managed a base camp set up at a local fairground for the firefighting response. The base camp management team allowed firefighters resting in between firefighting shifts to sleep in tents and sleeping bags near a portable shower unit. Plaintiff Rebecca Megan Quigley, a United States Forest Service firefighter, was sleeping in this area when she was run over by a water truck servicing the shower unit. She sustained serious and permanent injuries.

She alleged that defendants were negligent in permitting firefighters to sleep in the area where she was run over, without roping the area off or posting signs forbidding vehicles from entering. She claimed defendants had thereby created a ‘dangerous condition’ of public property, for which public entities may be held liable under section 835 of the Government Code.

Legal Lessons Learned: The injured Federal firefighter was covered by workers comp, but under CA broad governmental immunity statute, she will have a difficult time obtaining damages from these California commanders or their fire department.

“[Government Code section 850.4\(section 850.4\)](#), the provision at issue in this case, establishes one such immunity: ‘Neither a public entity, nor a public employee acting in the scope of his employment, is liable for any injury resulting from the condition of fire protection or firefighting equipment or facilities or,’ with the exception of certain motor vehicle accidents, ‘for any injury caused in fighting fires.’ Section 850.4 was enacted at the recommendation of the Law Revision Commission. The commission’s report to the Legislature explained section 850.4’s purpose as follows: ‘There are adequate incentives to careful maintenance of fire equipment without imposing tort liability; and firemen should not be deterred from any action they may desire to take in combatting fires by a fear that liability might be imposed if a jury believes such action to be unreasonable.’”

GA: DRONE VIDEO ADMISSIBLE - SHOWS ARREST DURING DEMONSTRATION WAS LAWFUL

On March 28, 2019, in [John Ruch v. Sergeant Michelle McKenzie](#), U.S. District Court judge Michael L. Brown, US District Court, Northern District of Georgia / Atlanta, granted motion for summary judgment for Sergeant McKenzie, writing: “The video footage shows Plaintiff step off the sidewalk in one location, walk around a group of people watching and filming the fight, and step back onto the sidewalk — directly into the area where Defendant stood protecting the officers making arrests. (Id. at minute mark 3:58.) Contrary to Plaintiff’s allegations, he was not standing still at the time of his arrest. He was moving toward the area Defendant was trying to secure.”

Legal Lessons Learned: Videos can sometimes lead to dismissal of lawsuit.

Read [my analysis of case](#).

OH: MJ FOUND IN HOUSE FIRE – DRUG DETECTIVE NEEDED WARRANT – SCENE WAS SAFE

On Aug. 24, 2018, in [State of Ohio v. Albert N. Smith](#), the Court of Appeals for Fifth Appellate District (Licking County) held (3 to 0) that the trial court judge properly granted defendant’s motion to suppress the marijuana and other evidence. “Det. Thomas testified that he was assured the fire was out, and the home was safe for him to enter Det. Thomas also stated that he was not told that any of the evidence was in danger of being damaged by smoke, water or fire. Based on the foregoing, we do not find exigent circumstances existed that required or allowed for a warrantless search of the premises. We therefore find no error in the trial court’s suppression of the evidence collected in this matter.”

Legal Lessons Learned: If the structure fire has been extinguished, and the property deemed safe to enter, FD should continue to secure the property, while PD gets a search warrant.

Chap. 5 Emergency Vehicle Operations

TX: EMT LOST CONTROL AMBULANCE - INJURED ROAD GRADER – MAX LIAB. OF NOT-FOR-PROFIT CO. IS \$100K

On May 23, 2019, in Jose Roel Garcia v. Jesse Perez and South Texas Emergency Care Foundation, Inc., the Court of Appeals of Thirteenth District, Corpus Christi held (3 to 0)

“Thus, we conclude that Garcia’s argument that STEC is not an emergency service organization because it is not operated by volunteer members is not supported by the statute. Accordingly, we reject this argument.”

Legal Lessons Learned: Helpful to have a statutory cap on liability for volunteer and not-for-profit emergency response organizations. This may also reduce the cost of insurance.

LA: EMER. LIGHTS USED, BUT NO SIREN – CHILD NON BREATHER RUN - NO STATUTORY IMMUNITY

On Feb. 22, 2019, in Nunzio Inzina & Emily Inzina v. Troy Guitreau, et al., the State of Louisiana, Court of Appeal, First District (3 to 0) held that “because the trial court's finding that Mr. Guitreau's emergency lights were insufficient to warn motorists of his approach was not manifestly erroneous, the trial court properly determined that the ‘reckless disregard’ (or ‘gross negligence’) standard does not apply. Mr. Guitreau does not meet the requirements of 32:24(C) and therefore his actions must be assessed under an ordinary negligence standard.”

Legal Lessons Learned: If you are in an accident responding to an emergency, and your siren was on, keep it on when calling dispatch to report the accident – the 911 Dispatch recording will help avoid litigation and liability.

See [my case analysis](#).

IL: STATE IMMUNITY STATUTE PROTECTS PRIV. & PUBLIC AMBULANCES – ONLY IF PATIENT ON BOARD

On Feb. 1, 2019, in Roberto Hernandez v. Lifeline Ambulance, LLC and Joshua M. Nicholas, the Appellate Court of Illinois (First District; Fifth Division) held (2 to 1): “As the ambulance driven by Nicholas was not transporting a patient to a health care facility at the time of the collision with the vehicle driven by the plaintiff, section 3.150(a) of the EMS Act does not provide Nicholas or Lifeline with immunity from liability for any negligent acts or omissions which proximately resulted in damages to the plaintiff.

Legal Lessons Learned: The Illinois immunity statute broadly includes non-emergency transports, but not so broad as to cover driving ambulance to pick up a patient. Hopefully the ambulance company’s private insurance will cover both the company and its employee.

See [my case analysis](#).

OH: CHILD KILLED BY LOOSE FIRE HOSE – NO WILLFUL OR WANTON MISCONDUCT / NFPA GUIDELINES

On Jan. 18, 2019 in [Linda H. Ogburn, etc., Appellant, v. City of Toledo](#), Appellee., Court of Appeals of Ohio, Sixth District, Lucas County:

“The evidence contained in the record by way of deposition testimony reveals that the city removed the safety nets on its fire engines to facilitate firefighter safety, based upon incidents in which TFRD firefighters were tripped by the nets when they were attempting to utilize fire hoses. According to TFRD's fire maintenance officer, the nets also slowed down firefighting efforts that are time-sensitive in nature. As a result, TFRD decided to remove the safety nets and install holsters in their place. The holsters that were installed eliminated the trip hazard presented by the nets, while at the same time facilitating expedient use of the fire hoses. Since the nets were removed and the holsters installed, the city has safely completed over one million runs without a fire hose coming loose from a fire engine. To us, the fact that over one million runs have taken place without incident demonstrates that injury to others does not ordinarily follow from the removal of safety nets and installation of the holsters.”

Legal Lessons Learned: Secure your fire hoses; avoid similar tragedies.

See also [March 7, 2017 article: “Hose Alert: A Firefighter's Commonsense Solution to a Serious Problem.”](#)

See also [Jan. 29, 2010 article from MA: “Woman struck by flailing fire hose dies.”](#)

See also [Sept. 15, 2006 article from PA: “Jury awards \\$5 million to families in fire hose accident.”](#)

Note: Ohio public employees are protected by indemnification statute they acted in “good faith.” [Ohio Revised Code 2744.07](#): “The political subdivision has the duty to defend the employee if the act or omission occurred while the employee was acting both in good faith and not manifestly outside the scope of employment or official responsibilities. *** Except as otherwise provided in this division, a political subdivision shall indemnify and hold harmless an employee in the amount of any judgment, other than a judgment for punitive or exemplary damages, that is obtained against the employee in a state or federal court or as a result of a law of a foreign jurisdiction and that is for damages for injury, death, or loss to person or property caused by an act or omission in connection with a governmental or proprietary function, if at the time of the act or omission the employee was acting in good faith and within the scope of employment or official responsibilities.”

Likewise, “reckless” driving by fire or EMS can lead to personal liability if case is not settled by the political subdivision. In *Anderson v. Massillon*, involving aerial truck killing elderly driver and his grandson, the Ohio Supreme Court in 2012 held that the aerial driver and the Captain were not entitled to immunity, but the City was immune. [See video from scene.](#)

[The Supreme Court held: “R.C. 2744.02\(B\)\(1\)\(b\)](#) provides a political subdivision with a full defense to liability for injuries caused by the operation of a fire department vehicle while engaged in duty at a fire, proceeding toward a place where a fire is in progress or is believed to be in progress, or answering any other emergency alarm if its operation does not constitute willful or wanton misconduct. R.C. 2744.03(A)(6)(b) provides immunity to employees of a political subdivision for acts that are not committed in a wanton or reckless manner.”

[Case was settled by the City in 2008 for \\$362,000.](#)

CA: DRUNK DRIVER RAN INTO FIRE ENGINE – MUST PAY FULL RESTITUTION, EVEN IF FD INSURED

On Jan. 15, 2019, in [The People v. Christian A. Zuniga](#), the Court of Appeal of California, First Appellate District, held 3 to 0 [unpublished opinion], “We have carefully reviewed the entire record in accordance with our *Wende* obligations, and we conclude there are no arguable issues on appeal that require further briefing. (See *People v. Birkett* (1999) 21 Cal.4th 226, 245-247 [victim entitled to restitution in the ‘full amount of the loss caused by the crime, regardless of whether, in the exercise of prudence, the victim had purchased private insurance that covered some or all of the same losses’].)”

Legal Lessons Learned: Great lesson for this drunk driver. The Insurance company may be entitled to a refund, if this defendant ultimately pays full amount.

[See my case analysis.](#)

OH: EMER. VEH. OPERATOR ENTITLED TO IMMUNITY – BACKED OVER WALKER – NOT “RECKLESS”

On Oct. 9, 2018, in [Riehm v. Green Springs Rural Volunteer Fire Dept.](#), 2018-Ohio-4075, the Ohio Court of Appeals for Third District (Seneca County), held (2 to 1) that the trial court improperly denied the fire department, and firefighter Seth T. Knieriemen’s motions for summary judgment. “As to Knieriemen individually, he could still be liable if his conduct constituted recklessness. Recklessness implies conduct that is substantially greater than negligence. Knieriemen’s failure to follow standard operating guidelines does not establish a genuine issue of material fact as to whether there was more than negligence here, particularly where he did not see, and perhaps could not have seen, Lorri. Knieriemen’s conduct could certainly be considered negligent, but not substantially greater than negligent. Therefore, we find that the trial court also erred on this issue.”

Legal Lessons Learned: Tragic accidents can be avoided if SOGs are followed, including using a backer.

MI: AMBULANCE STRUCT DEBRIS IN ROADWAY, EMT INJURED – NOT ENTITLED TO UNINSURED MOTORIST INSURANCE COVERAGE

On Feb. 27, 2018, in Jeremy [Drouillard v. American Alternative Insurance Company](#), the Court of Appeals of Michigan held (2 to 1) that the insurance policy which was purchased by ambulance company does not cover such an accident. “[T]he plain language of the contract provides uninsured motorist coverage to Drouillard [EMT passenger] only if the unidentified pickup truck caused an object to hit the insured ambulance, and not vice versa. Reviewing the pertinent section as a whole, the language cannot reasonably be understood in any other way. Importantly, Drouillard and Schoenberg [EMT driver] both admitted that the building materials were stationary at

the time of the accident, and Schoenberg agreed that, as the driver of the ambulance, she struck the materials in the roadway. Therefore, this is not a situation in which a hit-and-run vehicle caused an object to hit the insured ambulance, and Drouillard is not entitled to uninsured motorist benefits under the terms of the policy.”

Legal Lessons Learned: Ask your insurance carrier how they would respond to a similar claim; if they would deny the claim, then get the insurance carrier to amend your policy or find a new carrier.

Chap. 6 Employment Litigation

PA: CAN'T RETIRE AT AGE 50 -CITY AND UNION IN CBA ESTABLISHED MINIMUM AGE AT 55

On March 25, 2019, in [Joseph C. Bongivengo v. City of New Castle Pension Plan Board and The City of New Castle](#), the Commonwealth Court of Pennsylvania held (3 to 0): “This ruling also disposes of Bongivengo’s argument that the City violated Section 607(e) of Act 205 because it did not engage in collective bargaining before it implemented the new age and years of service requirements. As noted above, the City and the Union did collectively bargain for the age and years of service requirement, as first reflected in the 1992 CBA and subsequently in every CBA thereafter.”

Legal Lessons Learned: City and Union agreement controls minimum retirement age.
[See my case analysis.](#)

OH: FF CANCER - LUMBAR SPINE LYMPHOMA – CITY CONTESTED – FF FILED FOR COSTS / ATTY FEES, CITY LATE IN RESPONDING, MUST PAY

On May 23, 2019, in [Robert T. Rodgers v. City of Rocky River, et al.](#), 2010 Ohio 2006 (Ohio App, 2019), the Ohio Court of Appeals for Cuyahoga County (3 to 0), upheld the trial court’s order that City reimburse the firefighter for his costs and attorney fees of \$3,734.45.

“[W]e note that the plain language of R.C. 4123.512(F) authorizes the award of attorney fees and costs against ‘the employer’ who contests an injured worker’s right to participate in the workers’ compensation system after an injured worker’s right to participate is established. The statute does not differentiate between public and private employers, unlike in R.C. 4123.01(B) where the legislature provided different definitions of “employers” — public (political subdivisions) and private. This demonstrates that the legislature had the ability to establish immunity for political subdivisions or public employers from an award of attorney fees and costs, but elected not to do so.

Legal Lessons Learned: City failed to timely appeal award of costs and attorney fees; no statute protects city from liability for court cost and attorney fees.

IL: FF KIDNEY CANCER – WORK. COMP. GRANTED – EXPERT WITNESS CAUSED BY JOB, NOT OBESITY & HYPERTENSION

On May 10, 2019, in [City of Peoria v. Illinois Workers' Compensation Commission \(Bryan Grant\)](#), the Appellate Court of Illinois, Third District, Workers Comp Division, held (5 to 0) that the firefighter's cancer was caused by the job.

“By finding that the petitioner’s workplace exposures to carcinogenic gases caused his kidney cancer, the Illinois Workers’ Compensation Commission did not make a finding that was against the manifest weight of the evidence.”

Legal Lessons Learned: Many states, including Illinois, have now enacted a statutory presumption on FF cancer. But some employers are contesting claims, particularly if FF has poor health history.

See also [this article on 2017 case](#) involving Illinois firefighter who suffered a heart attack. “In this case, the petitioner was an obese smoker, mildly diabetic, and with a family history of heart disease.”

The Court further quoted the bill sponsor as saying, “[s]o don’t think it’s conclusive that simply because you have lung cancer, you’re going to get compensation of the Worker’s Compensation Act. What we’re saying is, we’ll get you to the hearing. Then the other side can bring in evidence that you smoked for thirty (30) years and therefore, it wasn’t a result of the actions taken at work.” *Id.* at 82. *Johnston v. Illinois Workers’ Comp. Comm’n*, 2017 IL App (2d) 160010WC.

NJ: FF’s BACK INJURY - PLASTIC CHAIR COLLAPSED - PRIOR BACK ISSUES – NOT “ACCIDENTAL” DISABILITY, ONLY “ORDINARY” DISAB.

On May 10, 2019, in [Terrence Crowder v. Board of Trustees, Police & Firemen’s Retirement System](#), the Superior Court of New Jersey, Appellate Division, held (2 to 0) that Deputy Chief was not entitled to 72.7% accidental disability retirement, only “ordinary” disability retirement (43.6%).

“The 2008 incident was not the direct cause of Crowder’s disability. Rather, as the ALJ correctly found, Crowder’s preexisting degenerative condition, which was aggravated by the 2008 incident, was the essential significant or the substantial contributing cause of his disability.”

Legal Lessons Learned: Aggravating a pre-existing degenerative condition does not meet the requirements of the state statute. Suggestion - get rid of plastic chairs in the station.

See this article on the case, [“Former Camden firefighter loses court fight over disability retirement benefits.” \(May 14, 2019\).](#)

“According to the state Treasury’s website, an ordinary disability retirement pays 43.6 percent of an employee’s salary averaged over his or her last three years of service. In contrast, an accidental disability retirement pays 72.7 percent of the base salary at the time of the ‘traumatic event.’”

MI: FIRE CHIEF RESIGNED, TOWNSHIP ISSUED PRESS RELEASE - NOT DEFAMATION OR “FALSE LIGHT”

On Feb. 26, 2019, in [Richard Marinucci v. Charter Township of Northville, et al.](#), State of Michigan Court of Appeals, held (3 to 0) in an unpublished decision, “Further, plaintiff offers no evidence to show that informing the public that he had resigned was unreasonable or highly objectionable. Although plaintiff contends that the

statements made to the media placed him in a false light, plaintiff does not explain how the statements negatively affected him.”

Legal Lessons Learned: When a Fire Chief resigns, the employer may report this fact to the press. Avoid financial situations where there may be an “appearance of impropriety.”

[See my case analysis.](#)

KS: WORKERS COMP – 2008 & 2010 BACK INJURIES –COVERED SINCE FILED CLAIM 2 YEARS OF LAST PAYMENT

On Feb. 8, 2019, in [Paul H. Schneider v. City of Lawrence](#), the Court of Appeals of State of Kansas (3 to 0), overturned the Workers Compensation Board, and granted the firefighter’s claim for coverage of two on-duty back injuries (2008; 2010). Kansas statute requires workers comp request for a hearing be filed within 3 years of the injury, or “within two years of the date of the last payment of compensation.” The Court held, “Here, because Schneider received compensation from the City in December 2015 and in January 2016 and because he filed his applications for hearings in January 2016, his applications under the revived two-year statute of limitations were timely.”

Legal Lesson Learned: Workers comp statutes of limitation are designed to require prompt disclosure of workplace injuries. The City may decide to appeal this decision to the Kansas Supreme Court.

[See my case analysis.](#)

Note: [See Aug. 4, 2017 article: “Ohio General Assembly Alters Statute of Limitation for Workers’ Compensation Claims”](#)

“As part of the biennial budget process the Ohio General Assembly passed House Bill 27 to create the workers compensation budget for 2018-2019. In addition to establishing the budget the bill also amended sections of the Ohio Revised Code that relate to workers compensation law. Mainly among the changes, the bill shortens the statute of limitations for an employee to file a workers compensation claim against Ohio Employers.

Current law requires an employee to bring a workers’ compensation claim within two years from the date of injury or death. Effective September 29, 2017, all workers compensation claims must be filed within one year from the date of injury or death. After that date, if new claims are not brought within the one year limitation the claim will be forever barred and there can be no recovery. All claims with a date of injury after September 29, 2017 are subject to the new limitation. The amendment attempts to strike a balance between allowing a sufficient time for a claim to be brought while not prejudicing employers by allowing claims to be filed long after any contemporaneous evidence has since vanished.”

OH: FIRE CHIEF’S AGE / ADA LAWSUIT DISMISSED – DIDN’T FILE WITH EEOC – MUST EXHAUST ADMINISTRATIVE REMEDIES

On Dec. 6, 2018, in [Jay W. Keller v. City of Bucyrus](#), U.S. District Court Judge James S. Gwin, granted the City’s motion to dismiss. “Plaintiff Keller claims that Defendants discriminated against him because of his age and his

disability in violation of federal law by requiring him to complete a physical examination. However, Plaintiff needed to file his age and disability discrimination claims with the Equal Employment Opportunity Commission ('EEOC') before bringing this lawsuit. Because Plaintiff has not exhausted his administrative remedies, the Court dismisses his federal discrimination claims without prejudice.”

Legal Lessons Learned: (1) FDs should have written policy regarding when personnel on leave will be required to pass medical or physical fitness for duty testing, and any retraining of job skills; and (2) must timely file EEOC charge to pursue federal ADA case.

[See my case analysis:](#)

See [U.S. Department of Justice Web](#):

“Filing a Complaint with the Equal Employment Opportunity Commission.

If you think you have been discriminated against in employment on the basis of disability, you should contact the [U.S. Equal Employment Opportunity Commission](#) (EEOC). A charge of discrimination generally must be filed within 180 days of the alleged discrimination. You may have up to 300 days to file a charge if there is a State or local law that provides relief for discrimination on the basis of disability. However, to protect your rights, it is best to [contact the EEOC](#) promptly if discrimination is suspected. After your complaint is filed with the EEOC, the EEOC investigates the charge. If the EEOC determines that there is reasonable cause to believe that the charge is true, the EEOC attempts to conciliate or settle the charge. If conciliation is unsuccessful, the EEOC refers charges against state and local government employers to the Department of Justice. The Department of Justice makes a determination whether to bring a lawsuit based on the charge. If it decides not to bring a lawsuit, the Department issues to the charging party a notice of right to sue. Charges against private employers are retained by the EEOC for a determination of whether to bring a lawsuit based on the charge or issue a notice of right to sue.”

PA: HOSPITAL EMPLOYEE RECORDS HACKED; EMPLOYEES MAY SUE
HOSPITAL [also filed, Chap. 13]

On Nov. 21, 2018, in [Barbara A. Dittman, et al. v. UPMC d/b/a The University of Pittsburgh Medical Center, et al.](#), the PA Supreme Court ruled (4 to 3), the lawsuit was reinstated against the hospital. “We hold that an employer has a legal duty to exercise reasonable care to safeguard its employees’ sensitive personal information stored by the employer on an internet-accessible computer system.”

Legal Lessons Learned: This is an important decision that will now proceed to trial or settlement. Hopefully this decision will prompt employers in PA, and other states, including Fire & EMS agencies, to review their electronic data safeguards with IT experts.

[See my case analysis.](#)

U.S. SUPREME COURT: AGE DISCRIMINATION ACT APPLIES PUBLIC
AGENCIES – EVEN LESS 20 EMPLOYEES

On Nov. 6, 2018, in [Mount Lemmon Fire District v. Guido, et al.](#), the U.S. Supreme Court (8 to 0) held: “that state and local governments are ‘employer[s]’ covered by the ADEA regardless of their size” [while private employers are only covered if have 20 or more employees].

Legal Lessons Learned: The two former Captains may now proceed with their lawsuit. Fire & EMS departments, when conducting layoffs, should carefully document their rationale for any layoffs not involving the “last hired.”

[See my case analysis:](#)

See [9th Circuit decision](#):

“John Guido and Dennis Rankin were both hired in 2000 by Mount Lemmon Fire District, a political subdivision of the State of Arizona. Guido and Rankin served as full-time firefighter Captains. They were the two oldest full-time employees at the Fire District when they were terminated on June 15, 2009, Guido at forty-six years of age and Rankin at fifty-four.”

Note: Ohio has enacted the [Ohio Data Protection Act, effective Nov. 2, 2018](#) (to be in Ohio Revised Code 1354.01-05), which provides companies with an affirmative defense to lawsuits involving release of personal information, if the company has a written cybersecurity program that conforms to the NIST Cybersecurity Framework.

See [Sept. 20, 2018 article, “New Ohio law incentivizes businesses that comply with cybersecurity programs.”](#)

TN: FIRE CHIEF FIRED – AT-WILL EMPLOYEE –COUNTY CAN’T GRANT CIVIL SERVICE PROTECTION

On Oct. 19, 2018, in [William Smallwood v. Cocke County Government](#), the U.S. Court of Appeals for 6th Circuit (Cincinnati, OH), held (3 to 0) in an unpublished opinion, that the District Court properly granted summary judgment to the County. “Regardless of whether Smallwood’s termination was politically motivated, as Fire Chief, he could be terminated for political reasons.”

Legal Lessons Learned: At-will employees may be terminated without a hearing.

NY: AMBULANCE BACK STEP NOT LOWERED - FF ENTITLED TO ACCIDENTAL RETIREMENT BENEFITS [also filed, Chap. 13]

On Sept. 6, 2018, [In The Matter Of Gregg A. Loia v. Thomas P. Di Napoli, State Comptroller](#), the NY Supreme Court, Appellate Division (Third Judicial Department) held (3 to 0) the injured firefighter is entitled to accidental retirement benefits since the back step of the ambulance had not been lowered by EMS personnel, and he suffered an “accident” on the “malfunctioning piece of equipment that was designed, under normal circumstances, to promote safety.”

Legal Lessons Learned: Fire & EMS personnel should document any on the job injury (including, in this case, photos of the ambulance step) and obtain statements from others on the scene. It is unfortunate that a dispute over disability retirement benefits has been in litigation since 2012.

MD: PARAMEDIC WITH DEGENERATIVE KNEE TEARS – JURY FOUND WORK RELATED – COURT UPHOLDS

On Aug. 30, 2018, in [Baltimore County v. Michael Quinlan](#), the Court Of Special Appeals Of Maryland, held (3 to 0) that his menisci tears are work related. The Court wrote: “In sum, Mr. Quinlan met the statutory requirements of LE § 9-502(d)(1) by establishing at trial that the degenerative menisci tears were an occupational disease through testimony that showed That repetitive kneeling and squatting is (1) a regular part of a paramedic’s job and (2) a risk factor for developing menisci tears, which Dr. Cochran explained are ‘part of the continuum of osteoarthritis. ‘.... This was sufficient evidence for the jury to determine that, ‘but for the work-related activities [,]’ his condition would not have developed.... We will not second guess the jury’s fact finding on appeal.”

Legal Lessons Learned: Expert testimony particularly critical for claims involving degenerative knee or other similar conditions.

LA: FREE SPEECH CASE NOT DISMISSED - TWO PARAMEDICS FIRED AFTER LETTER TO BOARD ABOUT MGT [also filed, Chap. 13]

On July 18, 2018, in [Patrick Alan Benfield & Brian Warren v. Joe Magee, et al.](#), U.S. District Court Judge Elizabeth Foote, Western District of Louisiana, held that a lawsuit by two paramedics fired by Desoto Parish EMS may proceed to trial. They were fired after Warren wrote a letter to a member of the Desoto Parish Police Jury (they appoint the Board of Commissioners of the Desoto Parish EMS). The Judge ruled: “The motion [to dismiss] is DENIED as to Warren’s free speech claim because the facts alleged establish that his letter was protected speech.”

Legal Lessons Learned: First Amendment free speech cases are increasing being permitted to go to the jury. Fire & EMS Departments should thoroughly document reasons for termination, including employees who serve “at will.”

WY: VOLUNTEER FIREFIGHTERS MAY BE IN UNION – STATE STATUTE [also filed, Chap. 18]

On July 6, 2018, in [IAFF Local 5058 v. Gillette / Wright / Campbell County Fire Protection Joint Powers Board, and IAFF Local 5067 v. Teton County and Town of Jackson](#), the Wyoming Supreme Court held (5 to 0) that the two new unions were not properly elected, and the Fire Districts did not need to negotiate collective bargaining agreements, because the “volunteer” and “pool” firefighters all receive pay for making runs.

“The district courts in both cases held that the Wyoming Collective Bargaining for Fire Fighters Act’s definition of ‘fire fighters’ includes volunteers because they are ‘paid members of . . . regularly constituted

fire department[s].’ Consequently, the district courts concluded that IAFF Local 5058 and IAFF Local 5067, which were formed by and consist of only full-time, career fire fighters, were not properly constituted bargaining units under the Act. We affirm.

Legal Lessons Learned: Drafting of legislative language is very important, along with creating a clear “legislative history” to avoid any question about whether volunteer and part-time firefighters can be covered in a collective bargaining agreement.

NJ: BOROUGH CANNOT ENFORCE \$5,000 PENALTY – PROB. POLICE OFFICER JOINS ANOTHER PD

On June 21, 2018, in [Borough of Madison v. Kevin Marhefka](#), the Superior Court of New Jersey / Appellate Division (2 to 0) held “As the Borough's complaint sought only to collect that unenforceable \$5000 penalty, the complaint was properly dismissed with prejudice regardless of whether the penalty was negotiated with the PBA.”

Legal Lessons Learned: Penalties for resigning to take a new job are often challenged, and difficult to enforce, as compared to reimbursement for training costs and equipment. Some states impose training costs on the new public employer, such as [NJ \(2013 statute\)](#).

40A:14-178 Liability for training costs; terms defined.

1. a. Whenever a person who resigned as a member of a county or municipal law enforcement agency is appointed to another county or municipal law enforcement agency, the police department of an educational institution pursuant to P.L.1970, c.211 (C.18A:6-4.2 et seq.), a State law enforcement agency or the New Jersey Transit Police Department pursuant to section 2 of P.L.1989, c.291 (C.27:25-15.1) within 120 days of resignation, and that person held a probationary appointment at the time of resignation or held a permanent appointment for 30 days or less prior to resignation, the county or municipal law enforcement agency, educational institution or State law enforcement agency appointing the person, or the New Jersey Transit Corporation, is liable to the former county or municipal employer, as appropriate, for the total certified costs incurred by the former employer in the examination, hiring, and training of the person.

VA: THROAT CANCER – RETIRED FF GETS WORKERS COMP – BUT NOT HEALTH INSURANCE

On June 7, 2018, in [Eddie R. Jones, Sr. v. Commonwealth of Virginia](#), the VA Supreme Court (7 to 0) held: “Throat cancer is properly considered an occupational disease which arose out of Jones’s employment. He is entitled to and has been awarded benefits under the Workers’ Compensation Act. However, the occupational disease did not result in a disability while Jones was still carrying out his duties as a firefighter. Therefore, he is not entitled to insurance benefits under Code § 9.1-401(B), because he does not meet the definition of a ‘disabled person’ under the Act.”

Legal Lessons Learned: At least 34 states have now enacted statutory presumptions, with wide variety of coverages. This case illustrates the importance of clear statutory language about disability benefits when cancer is detected after retirement.

See these resources:

[IAFF Fire Fighters, “Winning and Improving Presumption Laws”](#)

[National League of Cities, Assessing State Firefighter Cancer Presumption Laws & Current Firefighter Cancer Research, 2009](#)

[First Responder Center for Excellence, Presumptive Legislative for Firefighter Cancer](#)

PA: BREAST CANCER – RETIRED FF GETS MEDICAL COVERAGE BACK TO DATE OF RETIREMENT

On June 1, 2018, in [City of Pittsburg and UPMC Benefit Management Systems, Inv. v. Workers Compensation Appeal Board \(Flaherty\)](#), the Commonwealth Court of Pennsylvania upheld (3 to 0) the Board, “holding that Anne Marie Flaherty (Claimant) gave notice to Employer within 21 days of when she knew or should have known that her cancer was work-related. Because Claimant gave notice within 21 days, she was entitled to benefits from September 10, 2004, the date she left work due to her injury, as opposed to September 23, 2011, the date she filed her claim petition.”

Legal Lessons Learned: Timely notice of claim is important, even with statutory presumption.

U.S. SUP. COURT – ENFORCES ARBITRATION AGREEMENTS – EMPLOYEE CAN'T SUE [also filed, Chap. 17]

On May 21, 2018, in [Epic Systems Corp. v. Lewis](#), the U.S. Supreme Court (5 to 4), 584 U.S. ____ (2018), in a decision written by newly appointed Justice Gorsuch, held:

“Should employees and employers be allowed to agree that any disputes between them will be resolved through one-on-one arbitration? Or should employees always be permitted to bring their claims in class or collective actions, no matter what they agreed with their employers? As a matter of policy these questions are surely debatable. But as a matter of law the answer is clear. In the Federal Arbitration Act, Congress has instructed federal courts to enforce arbitration agreements according to their terms—including terms providing for individualized proceedings.”

Legal Lessons Learned: This decision is one of the most important businesses cases before the Court. Many employers, including private ambulance companies, will now be encouraged to have new hires sign an arbitration document.

[AFL-CIO President Richard Trauma was quoted](#), “Five justices on the Supreme Court decided that it is acceptable for working people to have their legal rights taken away by corporations in order to keep their jobs.”

Note: see [Jan. 15, 2019 U.S. Supreme Court decision in New Prime, Inc. v. Oliveira](#), **Holding:** A court should determine whether the Federal Arbitration Act’s Section 1 exclusion for disputes involving the “contracts of employment” of certain transportation workers applies before ordering arbitration; here, truck driver Dominic Oliveira’s independent contractor operating agreement with New Prime Inc. falls within that exception. **Judgment:** [Affirmed](#), 8-0, in an opinion by Justice Gorsuch on January 15, 2019. Justice Ginsburg filed a concurring opinion. Justice Kavanaugh took no part in the consideration or decision of the case.

MD: COLLECTIVE BARGAINING – COUNTY MUST BARGAIN OVER CHANGE IN HEALTH INSURANCE BENEFITS

On March 28, 2018, in [O’Brien Atkinson, et al. v. Anne Arundel County](#), the Court of Appeals of Maryland, held (3 to 0) that the County cannot unilaterally change health benefits; case is remanded to trial court. “We leave it to the parties and trial court, applying the balancing test on remand, to ascertain the scope of collective bargaining rights over health insurance benefits as mandated under §§ 811 and 812 of the Charter.”

LEGAL LESSONS LEARNED: The County Charter mandated collective bargaining and arbitration.

RI: “DISABLED” FF IS VIDEOTAPED WEIGHT LIFTING – DISABILITY PENSION BENEFITS TERMINATED [also filed, Chap. 16]

On Feb. 21, 2018, in [John Sauro v. James Lombardi, in his capacity as Treasurer of the City of Providence, et al.](#), the State Supreme Court held, “we conclude that the decision of the trial justice declaring that the plaintiff’s pension benefits should be reinstated and he should be placed on a waiting list to resume active service was erroneous, overlooked material evidence, and was clearly wrong.”

LEGAL LESSONS LEARNED: Accidental disability pension benefits are for those with a continuing workplace injury; cases like this can lead to public perception of pension fraud.

See this [TV story and undercover video of retiree lifting weights](#).

Chap. 7 Sexual Harassment; Pregnancy Discrimination

TX: DEP. FIRE CHIEF RESIGNED AFTER HE FACED TWO SEXUAL HARASSMENT INVEST – LAWSUIT DISMISSAL UPHELD

On July 10, 2019, in [Carlos Mandujano v. City of Pharr, Texas](#), the U.S. Court of Appeals for the Fifth Circuit held (3 to 0; unpublished opinion) that the U.S. District Court judge had properly dismissed his lawsuit claiming the City’s investigations created a hostile work environment and resulted in his “constructive discharge.”

“Mandujano’s sex-discrimination claim rests on a theory that the City’s investigations into him created a hostile work environment and resulted in his constructive discharge. To state a claim of constructive discharge, a plaintiff must allege that working conditions became ‘so intolerable that a reasonable person would have felt compelled to resign.’ Pa. State Police v. Suders, 542 U.S. 129, 147 (2004). Mandujano’s initial complaint did not plausibly allege that this occurred.”

Facts:

“Carlos Mandujano was formerly employed as a deputy fire chief by appellee City of Pharr (the ‘City’). In early 2014, the City opened an investigation into Mandujano for sexual harassment, apparently based on letters of complaint submitted by City Fire Marshal Jacob Salinas, Deputy Fire Chief Carlos Arispe, and Assistant Fire Marshal Dagoberto Soto. The letters reportedly accused Mandujano of sexually harassing a former City employee, Blanca Cortez. Denying that he harassed anyone, Mandujano alleges that Ms. Cortez had told him that he looked like a ‘pollito’ (Spanish for ‘chick’) and, on two other occasions, had referred to him as a ‘hot young boss.’ According to Mandujano, he responded to Ms. Cortez’s comments by telling her that he did not like the ‘pollito’ comment and advising her to be professional.

In August 2015, the City opened another investigation into Mandujano concerning ‘the same subject matter as the prior investigation.’ Later that month, Mandujano made a complaint to the City Manager ‘about harassment by two deputy chiefs who were creating a negative and hostile work environment through further statements and commentary by the two individuals in connection with the [February 2014] sexual harassment complaints and continued through the date of [Mandujano’s complaint to the City Manager].’ Mandujano alleges that in September 2015, the Fire Chief told him ‘that a sexual harassment finding would be made against [Mandujano] even though there was no evidence to support such a finding.’ Mandujano resigned from the Fire Department on November 13, 2015.”

Legal Lessons Learned: Fire & EMS departments, like other employers, have an obligation to investigate claims of sexual harassment; individuals being investigated may obviously feel uncomfortable, but that does not support a claim of hostile workplace.

PA: PHILADELPHIA FD – FIRST FEMALE DEPUTY COMM. – LAWSUIT FOR HOSTILE WORKPLACE DISMISSED

On July 9, 2019, in [Diane M. Schweizer v. City of Philadelphia](#), U.S. Magistrate Judge Jacob P. Hart granted the City's motion for summary judgment.

“At her deposition, Schweizer admitted time and time again that she had no facts to support her belief that her gender underlay the treatment of which she complained. She may indeed have developed a hunch that she would have been treated better if she had been a man, but this is not enough to survive summary judgment.”

Facts:

[See [June 4, 2014 article, “Diane Schweizer To Become Philadelphia’s First Female Deputy Fire Commissioner.”](#)]

“Schweizer maintains that she was subjected to a hostile work environment in the position of Deputy Commissioner of Administrative Services.... She alleges that she was repeatedly excluded from management meetings which were relevant to her work responsibilities.... She also points to the fact that she was the only Deputy Commissioner with no ‘command’ function to perform during the Pope’s September, 2015, visit to Philadelphia, and was excluded from the planning and operational meetings pertaining to this visit. Id. at 26(f).

The following incidents are also said by Schweizer to have contributed to the hostile work environment she has alleged: (a) there was no locker room or bathroom in the building ‘for women of her rank’, although there was a woman’s restroom she could share with female staff; (b) she was assigned to share a one-desk office with David Beatrice for three months, whereas the three male Deputy Commissioners had offices of their own; (c) she had less support staff than the three male Deputy Commissioners; (d) she was given an old and damaged Ford Taurus, while the three male Deputy Commissioners had new Ford Expeditions; (e) she was ‘denied and given less recognition and respect at staff meetings, photo shoots and press conferences’ than the male Deputy Commissioners were given. Complaint at ¶12.

[[The Court referred to her deposition testimony](#) about meeting with new Fire Commissioner Adam Thiel, who was appointed on April 12, 2016.]

“As is also noted above, in Schweizer’s June 9, 2016, email to Commissioner Thiel asking for a meeting, she wrote that she stepped down as Deputy Commissioner ‘due to a hostile work environment’ and that nothing had changed....Nor did she mention any specific incident.

Further, regarding Schweizer’s June 10, 2016, meeting with Commissioner Theil, the following interchange occurred at her deposition:

Q. Did you mention discrimination during that meeting?

A. No.

Q. Did you mention that you were being subjected to a hostile work environment based on your gender?

A. No.

Q. Did you attribute to him – did you say anything to give him an inkling that you were complaining that you were being mistreated because you were a female?

A. No

Q. Okay. Did you say anything to Commissioner Thiel to give him any indication that you believed that you were retaliating – being retaliated against because you were a female?

A. No.

Q. Did you make any statement to Commissioner Thiel that you believed that you were being retaliated against because you made prior complaints of discrimination?

A. No.”

Legal Lessons Learned: [The EEOC’s description of workplace harassment](#) includes following: “Petty slights, annoyances, and isolated incidents (unless extremely serious) will not rise to the level of illegality. To be unlawful, the conduct must create a work environment that would be intimidating, hostile, or offensive to reasonable people.”

IL: CHICAGO FEMALE MEDICS (5) SUE FOR INADEQUATE INVEST – MAY SEE COMPLAINT / INVESTIGATION FILE OF MALE RIDE-ALONG

On July 9, 2019, in [Jane Does 1-5 v. City of Chicago](#), U.S. District Court Magistrate Judge Sunil R. Harjani granted the plaintiffs’ motion to compel the City to produce a male student’s allegation that the City’s fire department’s employee sexual assaulted and harassed him during an observational ride-along.

“Differing treatment of one gender’s sexual misconduct allegations, compared to the other gender’s treatment, has been found to indicate ‘an informal yet established custom or policy of discrimination’ against one gender while treating the other gender’s complaints more seriously. Hicks v. Sheahan, No. 03 C 0327, 2004 WL 3119016, at *18 (N.D. Ill. 2004).”

Facts:

“Specifically, Plaintiffs’ motion seeks the student’s complaint, the OIG Report, witness statements, documents detailing the allegations, and documents that reflect the outcome of the investigation into the student’s allegation.

Plaintiffs argue that these documents are relevant to compare how Defendant treats male versus female sexual misconduct complainants. *** Here, the Complaint’s [Monell \[Monell v. Dep’t of Social Services, 436 U.S. 658 \(1978\)\]](#) claim alleges, in part, that Defendant had a discriminatory policy or practice of failing to adequately investigate and discipline its employees accused of sexual misconduct.

Legal Lessons Learned: Courts favor pre-trial discovery. The U.S. Supreme Court in *Monell* held that municipalities can be liable under § 1983 for deprivations pursuant to official policy or entrenched practices. **Monell v. Department of Social Services, 436 U.S. 658 (1978).**

“To prevail on a Monell claim, a plaintiff must show that: ‘(1) the City had an express policy that, when enforced, causes a constitutional deprivation; (2) the City had a widespread practice that, although not authorized by written law or express municipal policy, is so permanent and well settled as to constitute a custom or usage within the force of law; or (3) plaintiff’s constitutional injury was caused by a person with final policymaking authority.’”

AL: PREGNANT EMT- SEEKS “LIGHT DUTY” - EEOC SUPPORTING HER APPEAL TO 11TH CIRCUIT

On Feb. 11, 2019, in [Kimberly Michell Durham v. Rural / Metro Corporation](#), the Equal Employment Opportunity Commission has filed an amicus brief with the 11th Circuit (Atlanta), arguing:

“The PDA [Pregnancy Discrimination Act] does not categorically bar employers from maintaining a policy of accommodating only a subset of employees, including those employees with on-the-job injuries. See [U.S. Supreme Court’s 2015 decision in *Young v. UPS*] 135 S. Ct. at 1349-51. However, *Young* allows that a jury may find that an employer’s policy of accommodating only some employees is a pretext for pregnancy discrimination.” [Page 31]

Legal Lessons Learned: This is an important case for the fire service, and may eventually reach the U.S. Supreme Court. See [my case analysis](#).

Note: Numerous civil rights groups, including a Better Balance, The National Women’s Law Center and the National Employment Law Project, have [filed amicus briefs urging the 11th Circuit to reverse the Federal District court’s decision](#). See also [Feb. 22, 2019 article, “11th Circuit Pregnancy Bias Case Tests 2015 Supreme Court Ruling.”](#)

IL - 12 FEMALES FAILED FITNESS TESTING IN CHICAGO FD PARAMEDIC RECRUIT SCHOOL MAY SUE

On Jan. 14, 2019, in [Jennifer Livingston, et al. v. City of Chicago](#), U.S. District Court Judge Sara L. Ellis, held: “Because the Non-Filing Plaintiffs can rely on the single-filing rule to bring their claims based on the charges filed by other plaintiffs in this case, the Court denies the City’s motion to dismiss.”

Legal Lessons Learned: Physical fitness tests, whether during Recruit School or prior to hiring, that have an adverse impact on females, should be validated by an expert.

[See EEOC guidance](#), “Use of tests and other selection procedures can also violate the federal anti-discrimination laws if they disproportionately exclude people in a particular group by race, sex, or another covered basis, unless the employer can justify the test or procedure under the law.”

[See EEOC June 13, 2018 press release](#): “CSX Transportation to Pay \$3.2 Million To Settle EEOC Disparate Impact Sex Discrimination Case... According to the EEOC's lawsuit, CSXT conducted isokinetic strength testing as a requirement for workers to be hired for various jobs. The EEOC said that the strength test used by CSXT, known as the ‘IPCS Biodex’ test, caused an unlawful discriminatory impact on female workers seeking jobs as conductors, material handler/clerks, and a number of other job categories. The EEOC also charged that CSXT used two other employment tests, a three-minute step test seeking to measure aerobic capacity and a discontinued arm endurance test, as a requirement for selection into certain jobs, and that those tests also caused an unlawful discriminatory effect on female workers.”

AL: PREGNANT EMS – NOT ENTITLED TO LIGHT DUTY, COMPANY POLICY ONLY IF INJURED ON THE JOB

On Oct. 9, 2018, in [Kimberly Michelle Durham v. Rural/Metro Corporation](#), Case No. 4:16-CV-01604-ACA, U.S. District Court Judge granted summary judgment to the employer. Three male EMTs had been granted light duty for injuries to their backs while lifting patients. The court held, “Rural/Metro contends that Ms. Durham must offer substantial evidence of employees placed on light duty assignment who were injured off the job in order to survive summary judgment. This court agrees.”

Legal Lessons Learned: Some are urging Congress to broaden the Pregnancy Discrimination Act; [see also EEOC Enforcement Guidance On Pregnancy Discrimination](#).

MI: FEMALE CAPTAIN NOT SELECTED AS FIRE CHIEF – LACK OF INCIDENT COMMAND

On Aug. 30, 2018, in [Ona Lee Aguilar v. City of Saginaw and IAFF Local 102](#), the State of Michigan Court of Appeals held 3 to 0 (in unpublished opinion) upheld the dismissal of her lawsuit by trial court. “Aguilar is one of a small number of female employees of the Saginaw Fire Department (SFD) and has dealt with harassment and hostility over the years as she worked her way up the ranks in a male-dominated field. Aguilar’s suit, however, was based solely on the city’s 2013 failure to name her as acting or interim fire chief and its 2014 failure to hire her as the city’s permanent fire chief. The evidence supports that Aguilar’s union discriminated against her and those parties reached a settlement. Although the evidence also supports that Aguilar continues to work in a hostile environment, Aguilar has not created a triable question of fact on her discrimination claims. Accordingly, we are bound to affirm.”

Legal Lessons Learned: Lack of experience in Incident Command is a legitimate, nondiscriminatory reason for not selecting an applicant for Fire Chief.

LA: SEXUAL HARASSMENT COMPLAINT PROMPTLY INVESTIGATED – OFFENDER WARNED

On June 5, 2018, in [Shelita Tucker v. United Parcel Service, Inc.](#), the U.S. Court of Appeals for the 5th Circuit, held (3 to 0) in an unpublished opinion that the federal district judge properly granted summary judgment to UPS:

“We agree with the district court that Tucker failed to discharge her burden to raise a fact issue in this regard. UPS's remedial actions stopped the sexual harassment, and McCaleb neither spoke to nor touched Tucker again. Although McCaleb's presence at work made her feel uncomfortable, Tucker said she was still able to perform her duties.”

Legal Lessons Learned: Fire & EMS employers should likewise get statements, investigate and take prompt corrective action.

FL: FEMALE CANDIDATE FOR FIRE CHIEF NOT SELECTED – NOT GENDER DISCRIMINATION, BOTH CANDIDATES HIGHLY QUALIFIED

On Jan. 19, 2018, in [Shari Hall v. Marion County Board of County Commissioners](#), the District Court of Appeal of State of Florida, 5th District, held that: “Appellant failed in her burden of proving the county offered pretextual reasons, and thus failed to establish a case of gender discrimination using circumstantial evidence.” Case was remanded so Court can next dispose of retaliation claim.

Legal Lessons Learned: Two well-qualified qualified candidates for Fire Chief; no proof of gender discrimination. Caution when current Chief tells subordinate that they are likely the next Chief.

Chap. 8 Race Discrimination

FL: DOCTOR COMPLAINED ABOUT MEDICAL CLEARANCE OF FF – NOT PROTECTED FIRST AMENDMENT SPEECH

On March 1, 2019, in [Nancy King v. Board of County Commissioners, Polk County](#), the U.S. Court of Appeals for the 11th Circuit (Atlanta) held (3 to 0) that U.S. District Court judge properly granted summary judgment to Polk County. “She did not engage in speech protected by the First Amendment, however, because she spoke as an employee and not as a private citizen.”

Legal Lessons Learned: Public employees have limited First Amendment rights; reverse discrimination not proven.

[See my case analysis.](#)

MI: DETROIT – CITY WIDE LAYOFFS - 11 FF LAWSUIT AGAINST UNION DISMISSED, FOLLOWED CBA

On Feb. 4, 2019, in [Eric Peeples, et al. v. City of Detroit, et al](#), Civil Action No. 13-13858, U.S. District Court Judge Dean F. Cox, Eastern District of Michigan (Southern District), granted the motion for summary judgment filed by Detroit Fire Fighters Association, Local 344, finding: “Plaintiffs have no direct evidence of race discrimination. In opposing the Union's motion, Plaintiffs have not presented any statistical evidence to this Court.” The Judge, however, did not require Plaintiffs to reimburse Union for its attorney fees: “The Court also concludes that the Union has not shown that an award of attorney fees against the Plaintiffs themselves is warranted in this case. *Christiansburg Garment Co. v. EEOC*, [434 U.S. 412 \(1978\)](#) (A district court may, in its discretion, award attorney fees to a prevailing defendant in a Title VII case upon a finding that the plaintiff's action was frivolous, unreasonable, or without foundation, even though not brought in subjective bad faith). Such awards against Title VII plaintiffs are rare, and this Court does not believe one is warranted here.”

Legal Lessons Learned: Plaintiffs failed to establish Title VII liability for City or the Local.

[See my case analysis.](#)

MD: AIRPORT HIRED LATINO AS FIRE CHIEF - AFRICAN-AMERICAN'S LAWSUIT MAY PROCEED

On Jan. 19, 2018, in [Gregory C. Lawrence v. Maryland Aviation Administration](#), U.S. District Court for District of Maryland, Judge Richard D. Bennett denied the motion to dismiss filed by the Maryland Aviation Administration. “Plaintiff alleges that despite his experience and “stellar qualifications” for the position, he was not hired; instead, plaintiff alleges, “[t]he person hired was a Latino male, substantially less qualified for the position than Mr. Lawrence.”

Legal Lessons Learned: Title VII claim may now proceed to pre-trial discovery.

U.S. SUPREME COURT: AFFIDAVIT FROM JUROR WHO VOTED FOR DEATH SENTENCE - PRISONER HEARING

On Jan. 19, 2018, in [Gregory C. Lawrence v. Maryland Aviation Administration](#), U.S. District Court for District of Maryland, Judge Richard D. Bennett denied the motion to dismiss filed by the Maryland Aviation Administration. "Plaintiff alleges that despite his experience and "stellar qualifications" for the position, he was not hired; instead, plaintiff alleges, "[t]he person hired was a Latino male, substantially less qualified for the position than Mr. Lawrence."

LEGAL LESSONS LEARNED: Title VII claim may now proceed to pre-trial discovery; Court relied on plaintiff's history with the Airport FD, including lawsuit which led to his initial hiring, plus his termination and then second lawsuit resulting in his reinstatement.

NY: FDNY'S FORMER EEOC OFFICER SUES FOR RACE DISCRIMINATION – LAWSUIT MAY PROCEED

On Jan. 2, 2018, in [Lyndelle T. Phillips, Esq. v. The City of New York, et al](#), U.S. District Court Senior Judge Jack B. Weinstein, held that the City's motion to dismiss is denied and her lawsuit may proceed. "After observing plaintiff during her extended examination by the court, defendants' motion for summary judgment on plaintiffs Section 1981 claim is denied. A jury could find her to be a credible witness who took her job at the FDNY seriously and performed satisfactorily. Discrimination, and not poor job performance, a jury could conclude, was the reason for her termination by the FDNY.

Legal Lessons Learned: The lawsuit may proceed. The judge referenced the Vulcan Society case.

Note: [In March, 2014, the City settled the lawsuit](#) with the Vulcan Society for \$98 million.

Chap. 9 Americans With Disabilities Act

VA: FF With PTSD – MOVED TO DAY SHIFT TEMPORARILY - BUT LATER MOVED BACK TO 24/48 SHIFT - LAWSUIT TO PROCEED

On July 8, 2019, in [David Webb v. Chesterfield County, Virginia aka Chesterfield Fire And EMS](#), U.S. District Court Judge John A. Gibney, Jr. denied the County's motion to dismiss, finding that the firefighter has alleged sufficient facts to proceed on his claim for failure to accommodate under Americans With Disabilities Act.

“Under the ADA, an employer discriminates against an employee by failing to ‘mak[e] reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability ... unless [the employer] can demonstrate that the accommodation would impose an undue hardship on the operation of the business [.] 42 USC 12112(b)(5)(A).”

Facts:

“Webb began working as a firefighter with Chesterfield Fire in 2003. In late 2015 or early 2016, Webb began to suffer from PTSD. His doctor informed him that some symptoms, such as insomnia, depression, and panic attacks, would be very severe for three to five years, and that extended periods of downtime or idleness would aggravate his PTSD.

Webb informed Chesterfield Fire that his doctor recommended that he stop working 24-hour shifts to avoid aggravating his PTSD. Webb asked Chesterfield Fire to assign him to a ‘day work’ shift where he would work normal, daytime hours adding up to 40 hours per week.... Chesterfield Fire agreed, and Webb worked ‘day work’ hours without incident until late 2017.

At that time, Chesterfield Fire switched Webb back to 24-hour shifts.... His supervisor refused to schedule Webb for ‘day work’ shift, but did not provide a reason. Instead, his supervisor asked, ‘What are we to do with the next 25 employees who need accommodation?’... Chesterfield Fire placed another fireman on ‘day work’ shift to replace Webb.”

Legal Lessons Learned: PTSD is a real issue in fire service. Studies have found that anywhere between approximately 7 percent and 37 percent of firefighters meet criteria for a current [diagnosis of PTSD](#). “[Development of PTSD in Firefighters](#),” (June 10, 2019).

TX: PARAMEDIC INJURED ANKLE ON ICE COMING TO WORK - OFF 13 DAYS – LATER FIRED FOR MISSING SHIFTS – LAWSUIT DISMISSED

On July 3, 2019, in [Michael Bankhead v. Lifeguard Ambulance Service of Texas](#), U.S. District Court Judge John McBryde granted the employer's motion for summary judgment.

“In this case, plaintiff has not shown that he suffered from a disability under the ADA. In fact, he pleaded that his injury was only temporary... (plaintiff injured his foot on January 13, 2017, wore a boot to stabilize his ankle, and was cleared to return to work on January 26, 2017). In his summary judgment response, he mentions that he has diabetes.... But, even if true, simply having a diagnosis does not amount to proof that one has an impairment under the ADA.”

Facts:

“Lifeguard is a nationwide company providing air and ground ambulance services.... Lifeguard has specific policies concerning attendance and punctuality of employees.... Employees must report to their shifts regularly and be on time.... Plaintiff began working for Lifeguard on May 9, 2016, as a paramedic.... On August 24, 2016, plaintiff received a written warning for being absent from his shifts on May 17, June 10, August 9, and August 21, 2016.... On December 2, 2016, plaintiff received a corrective action form noting that he had been absent on November 29, 2016, and that the problem was a recurring one....

On January 13, 2017, plaintiff was scheduled to work a 24-hour shift beginning at 8:00 a.m.... Plaintiff failed to report to work or call his immediate supervisor.... His manager attempted to contact plaintiff but could not reach him. He also attempted to contact plaintiff's emergency contact person but was unable to reach her. Later in the day, plaintiff contacted his manager to say that he had injured his ankle when he slipped on ice on his way to work....

On January 16, 2017, Lifeguard's human resources manager attempted to contact plaintiff. She followed up with an email advising plaintiff that she would need documentation regarding his medical condition and that he did not qualify for leave under the Family and Medical Leave Act since he had been employed for less than 12 months.... The email cautioned that plaintiff's employment status was pending a decision as to whether his absences were approved... On January 18, 2017, the human resources manager again emailed plaintiff, saying that she had expected to hear from him regarding his work status and since she had not, plaintiff had been removed from his next scheduled shift... Ultimately, the human resources manager reviewed medical documentation provided by plaintiff and determined that he had suffered a minor injury. Taking into consideration plaintiff's prior attendance issues, his employment was terminated effective January 26, 2017.

“The impairment's impact must be permanent or long term. *Toyota Motor Mfg., Ky., Inc. v. Williams*, [534 U.S. 184](#), 198 (2002). An impairment does not include a transitory injury that has no permanent effect on the plaintiff's health. *Williamson v. Am. Nat'l Ins. Co.*, [695 F.Supp.2d 431](#), 448 (S.D. Tex. 2010). A broken leg is a standard example of an intermittent episodic injury not constituting an impairment for purposes of the ADA. *Vande Zande v. Wise. Dep't of Admin.*, [44 F.3d 538](#), 544 (7th Cir. 1995); *Street v. Maverick Tube Corp.*, No. 4:15-CV-2736, 2016 WL 5711338, at *6 (S.D. Tex. June 17, 2016), adopted, 2016 WL 3948106 (July 19, 2016) (broken foot and limp for several weeks not a disability under the ADA).”

Legal Lessons Learned: Impairment under ADA must be permanent or long term; even a broken leg does not qualify as a “disability.”

Under ADA, a “disability” is defined as: "(A) a physical or mental impairment that substantially limits one or more major life activities of such individual; (B) a record of such an impairment; or (C) being regarded as having such an impairment." 42 U.S.C. § 12102(1).

WI: INJURED ANKLE – GIVEN “LIGHT DUTY” BUT TENNIS SHOES NOT ALLOWED – LAWSUIT MAY PROCEED

On Feb. 27, 2019, in [Keith Daniel v. City of Minneapolis](#), the Supreme Court of MN held (5 to 2), “To give effect to the plain language of the workers’ compensation act and the human rights act, we hold that an employee can pursue claims under each act because each act provides a distinct cause of action that redresses a discrete type of injury to an employee.”

Legal Lessons Learned: FD dress policies, including policies on “station shoes” may need to be modified to “reasonably accommodate” a firefighter on light duty for an ankle injury. This case will now go to a jury trial, unless settled.

[See also article about case.](#)

LA: BACK INJURY, RETIRING FF FAILED TO TIMELY FILE FOR DISABILITY BENEFITS

On Nov. 21, 2018, in [Brian Mule v. St. Bernard Parish Fire Department](#), the Court of Appeal, 4th District held (3 to 0) that Office of Workers Compensation trial judge properly ruled that the employee was not entitled to supplemental benefits: “Mr. Mule waited more than seven years after this May 22, 2009 injury to pursue his claim for indemnity benefits. The OWC, having reviewed the record, exhibits and listening to the testimony of Mr. Mule and Ms. Bradbury, held that Mr. Mule did not establish that he was lulled into not filing a claim within the prescriptive period under the totality of the circumstances.”

Legal Lessons Learned: Fire & EMS personnel, injured on the job and facing disability retirement, should consult with a workers comp. expert regarding filing requirements for workers comp indemnity benefits.

CO: DEPUTY SHERIFF WITH DIABETES – INSULIN DEPENDENT – U.S. DOJ SETTLES LAWSUIT

On [May 15, 2018, the U.S. Department of Justice issued a Press Release](#) about the agreement with the City and County of Denver:

“The Justice Department today announced that it reached an agreement with the City and County of Denver, Colorado, (Denver) to resolve its lawsuit alleging that the Denver Sheriff Department discriminated against a

long-time Deputy Sheriff on the basis of his disability, insulin-dependent diabetes. The Justice Department's complaint alleges that Denver failed to engage in an interactive process with the employee to determine an appropriate accommodation, failed to reasonably accommodate his disability, and then terminated him, in violation of the Americans with Disabilities Act (ADA). Under the agreement, Denver will revise its reasonable accommodation policies and procedures, and will conduct training on the ADA for Sheriff Department supervisors, command staff, and human resources personnel. In addition, Denver will pay \$100,000 in compensatory damages to the employee."

Legal Lessons Learned: Fire & EMS departments must also "engage in an interactive process" when an employee appears to have a disability, including exchange of medical information between employee's physician and the department's doctor.

Chap. 10 Family Medical Leave Act

U.S. DEPT. LABOR – HEALTHY PERSON DONATING ORGAN ENTITLED TO FMLA LEAVE

On Aug. 28, 2018, the [U.S. Department of Labor issued Opinion No. FMLA2018-2- A](#). “This letter responds to your request for an opinion letter concerning whether organ-donation surgery can qualify as a ‘serious health condition’ under the Family and Medical Leave Act of 1993 (FMLA). As discussed below, we conclude that it can.”

Legal Lessons Learned: Helpful to have an Opinion Letter that may encourage others to be organ donors.

OH: DAYTON FD RECRUIT – REVOKED FROM CLASS AFTER KNEE INJURY – NO FMLA VIOLATION [also filed, Chap. 14]

On Feb. 9, 2018 in [Shawn N. Geisel v. City of Dayton, et al.](#), Ohio Court of Appeals for Second Circuit (Montgomery County) held (3 to 0) that the FD had the authority to remove him from the recruit class and ‘demote’ him back to EMT. “We do not mean to imply that Geisel could not reapply for the position, but only that his appointment to Firefighter Recruit was a self-contained opportunity that did not entail a right to be reappointed or to continue as a recruit until he could complete the training program.”

LEGAL LESSONS LEARNED: Dayton Civil Services rules treat a FF recruit as a probationary employee; when injured in recruit school, can be “demoted” back to EMT-B and placed on light duty.

Chap. 11 Fair Labor Standards Act

U.S. DEPT. OF LABOR: PROPOSED NEW RULE – ITEMS NOT INCLUDED IN “REGULAR RATE OF PAY”

On March 28, 2019, the [U.S. Department of Labor \(Department\)](#) announced a proposed rule to amend 29 CFR part [778](#) to clarify and update regular rate requirements under section 7(e) of the Fair Labor Standards Act (FLSA).

“The FLSA generally requires overtime pay of at least one and one-half times the regular rate of pay for hours worked in excess of 40 hours per workweek. Regular rate requirements define what forms of payment employers include and exclude in the “time and one-half” calculation when determining workers’ overtime rates. Under current rules, employers are discouraged from offering more perks to their employees as it may be unclear whether those perks must be included in the calculation of an employees’ regular rate of pay. The proposed rule focuses primarily on clarifying whether certain kinds of perks, benefits, or other miscellaneous items must be included in the regular rate. Because these regulations have not been updated in decades, the proposal would better define the regular rate for today’s workplace practices.

The Department proposes clarifications to the regulations to confirm that employers may exclude the following from an employee’s regular rate of pay:

- the cost of providing wellness programs, onsite specialist treatment, gym access and fitness classes, and employee discounts on retail goods and services;
- payments for unused paid leave, including paid sick leave;
- reimbursed expenses, even if not incurred “solely” for the employer’s benefit;
- reimbursed travel expenses that do not exceed the maximum travel reimbursement permitted under the Federal Travel Regulation System regulations and that satisfy other regulatory requirements;
- discretionary bonuses;
- Benefit plans, including accident, unemployment, and legal services; and
- Tuition programs, such as reimbursement programs or repayment of educational deb

The proposed rule also includes additional clarification about other forms of compensation, including payment for meal periods, ‘call back’ pay, and others.

Legal Lessons Learned: This new rule will hopefully provide more clarification for Fire & EMS Departments and avoid litigation about “regular rate” of pay.

See, for example, [DoL Advisory Opinion FLSA2018-5 \(Jan. 5, 2018\)](#) regarding a Fire Department’s calculation of “regular rate of pay” concerning annual bonuses, such as certification pay, education pay, and longevity pay.

NC: FLSA – NONPROFIT, PRIVATE VOL. FD – NOT ELIGIBLE OVERTIME EXEMPTION – NOT “PUBLIC AGENCY”

On Nov. 8, 2018, the [U.S. Department of Labor issued Opinion Letter FLSA 2018-24](#), concluding: “Based on the facts you have provided, the nonprofit, privately owned fire departments that you describe are not public agencies within the meaning of Section 7(k) and are therefore not entitled to its partial overtime exemption.”

Legal Lessons Learned: When in doubt, it is helpful to seek an “official” Opinion Letter; helps avoid litigation. These North Carolina nonprofit FDs must therefore continue to pay overtime to employees working over 40 hours in a work week. They don’t enjoy the “7(k) exemption” which allows public-sector FDs, for example, to pay overtime after 212 hours in a 28-day pay period (after 53 hours in a work week).

[See my analysis of the case.](#)

See [IAFF Manual \(page 8\)](#); court cases involving 7k exemption.

NY: MEAL ALLOWANCES FOR FDNY EMS – MUST BE INCLUDED IN CALCULATING “REGULAR RATE OF PAY”

On March 26, 2018, in [Chaz Perry et al. v. City of New York](#), U.S. District Court for Southern District of New York, Federal District Judge Vernon S. Broderick held that the City must include meal allowances when calculating the “regular rate” of pay for overtime, just as City does for night shift differential pay. In this lawsuit by over 2,600 FDNY paramedics, EMTs and Fire Inspectors, other claims in the lawsuit, including compensable work performed before and after Plaintiffs’ shifts, will go to trial.

Legal Lessons Learned: Overtime pay is calculated by not only your hourly rate, but also other bonuses received, such as paramedic bonus and night shift differential.

See [U.S. Department of Labor, Fact Sheet No. 23, and regulations.](#)

U.S. DOL: FD CONTRACTS WITH PRIVATE COMPANY FOR EMS – EMT CAN’T VOLUNTEER IF PERFORMING SAME SERVICES

On Jan. 5, 2018, the [U.S. Department of Labor issued Opinion Letter FLSA 2018-16, re-affirmed a 2009 Opinion Letter](#): “You [ask] whether the EMTs paid by the VFC’s contractor may continue to ‘volunteer’ as EMTs for the VFC without being compensated in accordance with the FLSA. The answer to this question depends on whether the VFC is considered to be an employer of the paid staff members. If the VFC is in fact deemed to be an employer (along with the contractor) of the paid staff members, the EMTs could not ‘volunteer’ to the VFC the same services that they perform for pay for the contractor.

Legal Lessons Learned: FLSA Opinion Letters are helpful, but as in this matter are not always definitive. Fire & EMS Departments are also encouraged to meet “face to face” with Wage & Hour staff and get their informal feedback, and consider retaining Legal Counsel experienced with FLSA issues.

Chap. 12 Drug-Free Workplace

MD: FF TERMINATED FOR ALCOHOL – GIVEN SECOND CHANCE – PRE-TERMINATION HEARING

On Oct. 19, 2018, in [Darryl K. Lewis, Jr. v. City of Baltimore Civil Service Commission, et al](#), the Circuit Court for Baltimore City, held (3 to 0) in unreported decision that the firefighter was provided due process, affirming the Hearing Officer’s findings: “The Hearing Officer’s Recommendation states, ‘Procedural due process was afforded in that Lewis received notice of the underlying charges and an opportunity to be heard at a pre-termination hearing. He received sufficient notification of the outcome of that hearing and was advised of his right to this investigation.’”

Legal Lesson Learned: “[After Care Contracts](#)” and other forms of last chance agreements are enforceable, and procedural due process rights were followed in this case.

Note: Consider in such agreements a requirement that the employee enroll in a continuing care program, such as AA. The SW Ohio Critical Incident Stress Management Team has a group of recovering firefighters helping other firefighters, EMERGENCY RESPONDERS IN NEED.

Chap. 13 EMS

IN: UNRESP. DRIVER – DRIVES OFF WHEN MEDIC SEES REVOLVER – CONV. WITHOUT GUN FOUND – MEDIC’S FIREARM KNOWLEDGE

On July 15, 2019, in [Evan Michael Sapp v. State of Indiana](#), the Court of Appeals (3 to 0) upheld the jury’s conviction, even though no firearm was ever recovered. He received 12-year sentence as a serious violent felon, based on prior burglary conviction.

“We likewise reject Sapp’s broader argument that no reasonable trier of fact could have found from the evidence presented that what Osborne saw was a firearm (i.e., not a toy).

Osborne, who had decades of experience with guns, testified in considerable detail about the gun that he saw, including its color, that it was a revolver, similar to one he owned, and had a ‘trap door’ feature consistent with small caliber pistols. Transcript Vol. II at 232, 235. He also said that, when he saw it, he did not think it was a toy and, in fact, was afraid for his safety when Sapp appeared to be reaching for it.”

Facts:

“On June 13, 2018 at approximately 7:30 a.m., a 911 caller reported that a man was asleep or unconscious in the driver’s seat of a running Dodge Ram pickup truck parked in an alley behind her house and that she had tried to wake him, but he was unresponsive. First to arrive at the scene were three Terre Haute firefighters and paramedics, including Matthew Osborne. The driver’s side window of the pickup truck was about halfway down, and the driver’s head was slumped over and resting on the top of the steering wheel. Osborne approached the vehicle, and while about ten feet away, Osborne yelled to the driver, later identified as Sapp, asking if he was alright. Osborne wondered if the person had suffered a stroke or some other medical emergency. Sapp immediately woke up and replied, yah, yah I’m okay.’

At the two-day September 2018 jury trial, the State called various witnesses, including Osborne.... Osborne read from his statement that he had given to police a few hours after the incident, where Osborne described the gun that he had seen as follows:

“It was a black revolver approximately six-inch barrel, looked to be small caliber. Had a brown and white handle on it and it, it had one of the trap doors for just to re-load it. So that’s kind a how I saw that it was a small caliber handgun. It’s from my experience, what I’ve seen on some of those smaller ones.”

Legal Lessons Learned: Paramedic’s long experience with firearms, and his written report to police shortly after the EMS run, were powerful evidence.

Note: Under prior Indiana case law, a firearm does not need to be recovered to convict for unlawful possession.

“Sapp acknowledges that our courts have sustained a conviction in circumstances when the firearm was not located after the defendant’s arrest but urges that, unlike where a defendant displayed or used a weapon, he did nothing “to signify or imply that the item [in his truck]was a ‘firearm.’” Id. at 5. We disagree... Footnote 1: See e.g., Gray v. State, 903 N.E.2d 940, 943 (Ind. 2009).

CA: FLIGHT PARAM. KILLED HELICOPTER CRASH – ONLY WORKERS COMP - CAN'T SUE HELICOPTER CO. - "SPECIAL EMPLOYEE"

On May 24, 2019, in [Brooke Juarez v. Rogers Helicopters, Inc., et al.](#), the Court of Appeals for California, Fifth Appellate District, held (3 to 0) in an unpublished decision, the trial court properly granted summary judgment to the helicopter company; the deceased paramedic was a "general employee" of American Airborne company, and a "special employee" of Rogers Helicopter, and therefore workers compensation was the sole remedy for the wife of the deceased paramedic.

"In sum, based on the facts and circumstances of this case, since SkyLife was Juarez's special employer, SkyLife's general partners, American Airborne and Rogers Helicopters, are also Juarez's special employers. As such, respondents are all immune from tort liability and the trial court properly granted summary judgment in their favor."

Legal Lessons Learned: Flight paramedics may be considered "dual employees" in many states; and workers comp. is their sole remedy for injury or death in those states.

[See article on the crash.](#)

[See trial court's summary judgment decision.](#)

[See this article about air care helicopter crashes;](#)

"Of course, if the crash was caused by a defect in the helicopter, the crew case may proceed against the helicopter manufacturer. But there are legal challenges to be overcome there as well. A federal statute of repose known as the General Aviation Revitalization Act, or GARA, bars claims against the manufacturer if the helicopter is older than 18 years. And beneath their shiny paint, most of the helicopters now in service date back to the 1970s. (In case you're wondering, GARA protects not just US helicopter manufacturers, but foreign helicopter manufacturers too.)"

KY: DRIVER / POSS. STROKE - REFUSED TREATMENT - PD TOOK McDONALDS – KILLED WALKING HWY – QUALIF. IMMUNITY

On May 24, 2019, in [Lisa K. Williams v. City of Georgetown, KY, et al.](#), the U.S. Court of Appeals for 6th Circuit, in an unpublished opinion, held (2 to 1).

"This case presents tragic facts without a legal remedy. *** Although it is true that 'an officer's duty exists even after the custodial relationship has ended,' Davis, 143 F.3d at 1025, it does not extend in perpetuity. Plaintiff admits that the officers concluded Burns was not a danger to himself or others. Calling an ambulance and giving Burns a ride to McDonald's does not strike us as the deliberate indifference described in Davis. 143 F.3d at 1027; see also Salyers, 534 F. App'x at 460. There was no constitutional violation."

Legal Lessons Learned: Fire & EMS Departments should have a written policy about patient refusals that includes handling situations where the individual can not be safely left at the scene (such as MVA, with no ride home).

See attached [Policy on "High Risk" and "Low Risk" refusals.](#)

CA: CHILD CHOKING, MOTHER CALLED 911 - ONLY SPOKE SPANISH – IMMUNITY - NO REQ. THAT DISPATCHERS MUST SPEAK SPANISH

On May 20, 2019, in [Dylan Tellez v. City of Pomona](#), the Court Of Appeal of California, Second Appellate District / Division One held (3 to 0) in an unpublished decision, that the lawsuit against the City of Pomona was properly dismissed by the trial court.

“That one person fails on an occasion to understand another is an everyday occurrence between even the best intentioned. And it appears from Dylan’s allegations that the police officers’ decision not to wait for an ambulance saved his life. A city cannot be held liable simply for failure to provide translators in its 911 call centers....”

Legal Lessons Learned: 911 Centers do not have to employ Spanish-speaking dispatchers. There are translation services available for dispatch centers.

See for example: [“How to Break the 9-1-1 Language Barrier,”](#) “According to Gallegos, the LanguageLine system is built into the CAD system, so the ECO just has to push a button to be connected. The LanguageLine is used in call centers statewide and falls under the New Mexico Department of Finance and Administration.”

HHS OPINION: CLINIC PROVIDE FREE HOME VISITS – CHF / COPD PATIENTS – NOT FED. ANTI-KICKBACK

On March 6, 2019, [the HHS Office of Inspector General issued Advisory Opinion No. 19-03.](#)

“Requestor [clinic] has developed a program to provide free, in-home follow-up care to certain patients who it certifies are at higher risk of admission or readmission to a hospital. Under the Current Arrangement, Requestor offers in-home care to patients with congestive heart failure (‘CHF’) who qualify for participation, and under the Proposed Arrangement, Requestor would expand the program to qualifying patients with chronic obstructive pulmonary disease (‘COPD’). According to Requestor, the goals of both Arrangements are to increase patient compliance with discharge plans, improve patient health, and reduce hospital inpatient admissions and readmissions.

Legal Lessons Learned: Community Paramedicine programs are rapidly expanding throughout the Nation.

PA: ATTEMPTED MURDER CONV. UPHELD - EMT TESTIFIED ABOUT VICTIM’S COMMENTS ABOUT WHO SHOT HIM

On Feb. 22, 2019, in [Commonwealth of Pennsylvania v. Gregory Mack](#), the Superior Court of PA held (3 to 0) that the jury conviction is affirmed. One of the issues on appeal was veracity of the EMT who testified at the criminal trial:

“Moreover, at trial, the emergency medical technician (EMT) who transported the victim to the hospital testified that the victim told him that his friend shot him; on appeal, Appellant claims the testimony was

invalid and lacked veracity because the EMT did not make a record of the conversation or subsequently inform the police of it.”

Legal Lessons Learned: EMS should document a victim’s statement concerning who shot him, either on the EMS run report or on a supplemental report. This helps avoid issues on appeal.

OH: DUI - BLOOD DRAW BY NURSE UNCONSCIOUS DRIVER LAWFUL - PD NO TIME FOR SEARCH WARRANT

On Feb. 12, 2019 in [State of Ohio v. Richard Barnhart, Jr.](#), Court of Appeals of Ohio, Fourth Appellate District – Meigs County, held (3 to 0) that trial court properly allowed into evidence the results of the blood draw. The Court write: “[B]ased upon the totality of the circumstances, we conclude that the blood sample obtained from Appellant, which was taken while he was unconscious at the hospital and being prepared for transfer to another facility, was both lawful and constitutionally valid pursuant to Ohio’s Implied Consent statute, as well as both the consent and exigent circumstances exceptions to the warrant requirement.”

Legal Lessons Learned: Implied consent statutes are an important part of highway safety.
[See my case analysis.](#)

WA: PATIENT WITH CHEST PAIN REFUSED TRANSPORT - FORCIBLY TAKEN TO HOSPITAL – NO QUALIFIED IMMUNITY

On Jan. 11, 2019, in [El-Fatih P. Nowell v. Trimmed Ambulance, LLC, et al](#), U.S. District Court Judge Robert S. Lasnik (Seattle, WA), denied EMS defendants’ motion for summary judgments on most of the allegations of “involuntary detention and transport to a medical facility.”

Legal Lessons Learned: When EMS are faced with the difficult decision on whether to forcibly transport a patient, consider first calling the hospital emergency department and getting medical clearance to transport.

OH: 911 DISPATCHES FOR DRUG OVERDOSES –NOT HIPPA PROTECTED UNLESS DISCLOSES PHI

On Dec. 14, 2018, in [Rachel L. Dissell v. City of Cleveland](#), the Ohio Court of Claims appointed a Special Master to advise the Court on request for records by a reporter for the The Plain Dealer newspaper. The Special Master concluded that Computer Aided Dispatch records, including addresses where EMS responded, be released under Ohio Public Records Act. “Upon consideration of the pleadings and attachments, I recommend that the court order respondent to provide requester with a copy of the EMS/Fire CAD event summary records, as submitted under seal.”

Legal Lessons Learned: In producing CAD or other records on EMS calls, be very careful to exclude any “Protected Health Information.” If in doubt, advise requester that info is HIPAA protected and will only be revealed to Court under seal.

PA: HOSPITAL EMPLOYEE RECORDS HACKED; EMPLOYEES MAY SUE HOSPITAL [also filed, Chap. 6]

On Nov. 21, 2018, in [Barbara A. Dittman, et al. v. UPMC d/b/a The University of Pittsburgh Medical Center, et al.](#), the PA Supreme Court ruled (4 to 3), the lawsuit was reinstated against the hospital. “We hold that an employer has a legal duty to exercise reasonable care to safeguard its employees’ sensitive personal information stored by the employer on an internet-accessible computer system.”

Legal Lessons Learned: This is an important decision that will now proceed to trial or settlement. Hopefully this decision will prompt employers in PA, and other states, including Fire & EMS agencies, to review their electronic data safeguards with IT experts.

Note: Ohio has enacted the [Ohio Data Protection Act, effective Nov. 2, 2018 \(to be in Ohio Revised Code 1354.01-05\)](#), which provides companies with an affirmative defense to lawsuits involving release of personal information, if the company has a written cybersecurity program that conforms to the NIST Cybersecurity Framework.

See [Sept. 20, 2018 article, “New Ohio law incentivizes businesses that comply with cybersecurity programs.”](#)

OH: PUBLIC RECORDS REQUEST – INCLUDING EMS INJURED ON JOB – CITY’S DELAY UNREASONABLE, PAY \$8,812 ATTORNEY FEES

On Nov. 14, 2018, in [Cleveland Association Of Rescue Employees – Local 1975 v. City of Cleveland](#), the Ohio Court of Appeals for Cuyahoga County, held (3 to 0) held that the City must reimburse CARE \$8,812.50 in attorney fees. “This court finds that the city’s failure to respond to the records request by releasing the requested records in this case was unreasonable. The city’s two-month delay in producing some of the records and more than five-month delay in producing all the requested records constitutes a failure to respond within a reasonable time.”

Legal Lessons Learned: Public records act statutes require prompt response; political subdivision should promptly produce readily available records, such Fire & EMS job descriptions and certifications.

KY: STERNUM RUB ON PATIENT WHO HAD BECOME UNRESPONSIVE – CAN’T SUE EMS FOR ASSAULT

On Oct. 9, 2018, in [Troy K. Scheffler v. Alex Lee, et al.](#), the U.S. Court of Appeals for the 6th Circuit (Cincinnati, OH) held (3 to 0) that the U.S. District Court had properly granted summary judgment and dismissed the lawsuit against EMT Michael Carroll. “Scheffler consented to medical care by asking to be taken to the hospital and by willingly entering the ambulance with the EMTs, and there is no indication that Scheffler withdrew or limited that consent. Carroll performed the sternum rub as part of that care.”

Legal Lessons Learned: Thoroughly document reasons for a sternum rub, or other medical procedures.

NY: FF FELL WHEN AMBUL. BACK STEP NOT LOWERED – ACCIDENTAL DISAB. CLAIM UPHELD [also filed, Chap. 6]

On Sept. 6, 2018, in [The Matter Of Gregg A. Loia v. Thomas P. Di Napoli, State Comptroller](#), the NY Supreme Court, Appellate Division (Third Judicial Department) held (3 to 0) the injured firefighter is entitled to accidental retirement benefits since the back step of the ambulance had not been lowered by EMS personnel, and he suffered an “accident” on the “malfunctioning piece of equipment that was designed, under normal circumstances, to promote safety.”

Legal Lessons Learned: Fire & EMS personnel should document any on the job injury (including, in this case, photos of the ambulance step) and obtain statements from others on the scene. It is unfortunate that a dispute over disability retirement benefits has been in litigation since 2012.

NJ: PARAMEDIC STUDENT WAS GIVEN 6-MONTH EXTENSION TO COMPLETE CLINICALS – NO FURTHER EXTENSIONS

On Sept. 4, 2018, in [The Matter Of Denial Of Waiver For Alberto Sanchez](#), the Superior Court of New Jersey, Appellate Division, held (2 to 0 in unpublished opinion) that State EMS Board properly refused to grant an extension of total training time. “Despite obtaining an extension [of six months to complete clinicals], Sanchez failed to timely complete his clinical training by not participating in at least five cardiac arrest resuscitations and not successfully performing at least five defibrillations and synchronized cardioversions. N.J.A.C. 8:41A-2.6(a)(9) and (10). He only participated in three cardiac arrests, and failed to complete any defibrillations or cardioversions. *** The OEMS denied the waiver [of 36-month total training time] request on March 6, 2017, because under N.J.A.C. 8:41A -2.4, his training could not be extended beyond February 6, 2017– thirty-six months of his starting date – and there were public health concerns if he was allowed more time.”

Legal Lesson Learned: Courts are generally very reluctant to overturn decisions of State agencies, such as EMS Boards, regarding the protection of health of the public.

OK: VERY EXPENSIVE TRANSPORT BY HELICOPTER – PATIENTS CAN'T SUE, FED. STATUTE

On Aug. 31, 2018, in [Susan Schenberger, Lacy Stidman and Johnny Trent v. Air Evac EMS, Inc. and Air Evac EMS, Inc.](#), the U.S. Court of Appeals for the 10th Circuit, held (3 to 0) that the lawsuit was properly dismissed: “Like the district court in this case, we have previously recognized that [Airline Deregulation Act] preemption may sometimes produce harsh results for potential plaintiffs seeking redress for perceived unfair treatment by air-ambulance carriers. *See Cox*, 868 F.3d at 906-07. Yet, we felt constrained to observe that ‘[s]uch policy considerations . . . are beyond the purview of [the courts]’ and ‘must be addressed to Congress.’ *Id.*; *see also Ferrell v. Air EVAC EMS, Inc.*, ___ F.3d ___, No. 17-2554, 2018 WL 3886688, at *3 (8th Cir. Aug. 16, 2018) (‘We may not refuse to apply ADA preemption merely because we do not believe it would be sound public policy to enforce the statute Congress enacted.’).”

Legal Lessons Learned: Air ambulance rates, like many other medical charges, can indeed be very expensive, but the remedy is with Congress.

NY: ALLERGIC REACTION TO DOG BITE – PATIENT DIED – EMD PROTOCOL WAS NOT FOLLOWED, NO GOV'T IMMUNITY

On August 16, 2018, in [Christine Lynch v. Town of Greenburg and Greenburg Police Department Emergency Medical Service](#), the NY Supreme Court, County of Westchester (Judge Lawrence E. Ecker), denied the defendants' motion for summary judgment. “In fact, despite being told that the decedent was having an allergic reaction to the dog, Marcello acknowledged that he did not consider whether the attack was an allergic attack, versus another form of asthma incident. He also specifically stated that he never considered giving the decedent any medication to address an allergic reaction.” The Court also noted poor affidavit from EMS Supervisor: “Despite acknowledging that ‘this action sounds in medical malpractice’ . . . , defendants do not submit a physician's or EMT expert affirmation specifically addressing the precise medical treatment rendered to the decedent. Instead, defendants rely upon the affidavit of an EMT Supervisor who offers generalized, conclusory statements to the effect that EMS protocols permit EMTs to exercise discretion, without ever addressing any of the specifics of defendants' actions in this case. In fact, the specific protocols are not discussed or explained, the actual medical actions taken by the first responders are not delineated or compared to protocols, specific examples of acts of discretion by the first responders are not provided, and there is no express support for the medical care that was given.”

Legal Lessons Learned: Follow EMS protocol, or explain on EMS run report why the protocol was not followed.

IN: SEDATIVE FOR NAKED PATIENT RUNNING IN STREET – DIED - QUALIFIED IMMUNITY FOR EMS

On Aug. 14, 2018, in Billie [Thompson v. Lance Cope](#), 7th Circuit, the Court held (3 to 0), “The paramedic is entitled to qualified immunity on the excessive force claim. Case law did not (and does not) clearly establish that a

paramedic can violate a patient-arrestee's Fourth Amendment rights by exercising medical judgment to administer a sedative in a medical emergency." Indianapolis police called EMS to help with person found naked, running in street, high on amphetamines, and combative. EMS administered a sedative; patient died 8-days later.

Legal Lessons Learned: Qualified Immunity protects police, fire, EMS personnel from personal liability.

See [my case analysis](#):

See also U.S. Supreme Court's Jan. 7, 2019 decision, in [City of Escondido, California v. Mart Emmons](#), (9 to 0), in a per curiam decision [not authored by a specific Justice], reversed the 9th Circuit without the need to even hear oral argument. The Court held: "As to Officer Craig, the Ninth Circuit also erred. As we have explained many times: 'Qualified immunity attaches when an official's conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.'"

OH: DYING DECLARATION BY VICTIM IN BACK OF AMBULANCE ADMISSIBLE IN MURDER TRIAL [also filed Chap. 1]

On July 25, 2018, in [State v. Fred Taylor](#), 2018-Ohio-2921, the Ohio Court of Appeals for Summit County, upheld (3 to 0) his conviction of felony murder of Javon Knaff.

"Mr. Knaff's repeated statements concerning the fact that he was dying, coupled with the severity of his condition, demonstrate his awareness of his impending death at the time that he stated, 'Fred shot [me].' Consequently, this statement was admissible as a dying declaration."

Legal Lessons Learned: Document on your EMS run report the actual words spoken by the patient; a "dying declaration" is admissible in evidence. Recording the comments on your run report can help prosecution reach a plea agreement.

LA: FREE SPEECH CASE NOT DISMISSED - TWO PARAMEDICS FIRED AFTER LETTER TO BOARD ABOUT MGT [also filed, Chap. 6]

On July 18, 2018, in [Patrick Alan Benfield & Brian Warren v. Joe Magee, et al.](#), U.S. District Court Judge Elizabeth Foote, Western District of Louisiana, held that a lawsuit by two paramedics fired by Desoto Parish EMS may proceed to trial. They were fired after Warren wrote a letter to a member of the Desoto Parish Police Jury (they appoint the Board of Commissioners of the Desoto Parish EMS). The Judge ruled: "The motion [to dismiss] is DENIED as to Warren's free speech claim because the facts alleged establish that his letter was protected speech."

Legal Lessons Learned: First Amendment free speech cases are increasing being permitted to go to the jury. Fire & EMS Departments should thoroughly document reasons for termination, including employees who serve “at will.”

KY: EMT WHISTLEBLOWER – ALLEGED TRANSPORTS NOT MEDICALLY NECESSARY – BUT FAILED TO PROVIDE SPECIFICS

On June 21, 2018 in [United States of America ex rel. Jessica N. Stripe v. Powell County Fiscal Court](#), U.S. District Court Judge Karen Caldwell, Lexington, Kentucky, dismissed a “whistleblower” lawsuit by an EMS employee.

“Stipe was employed in a care provider role as an EMT and she does not allege that her job involved any work related to billing or that it gave her detailed or specialized knowledge of PCFC's billing practices.... Accordingly, Stipe lacks the specialized knowledge necessary to invoke the exception to Rule 9(b).”

Legal Lessons Learned: Whistleblowers alleging fraudulent “up charging” must include in their complaint specific information about particular EMS runs where Medicare was overbilled. With specifics, the U.S. Attorney can launch an investigation of the complaint that has been filed under seal.

[See U.S. Department of Justice report](#): “Of the \$3.7 billion in settlements and judgments reported by the government in fiscal year 2017, \$3.4 billion related to lawsuits filed under the qui tam provisions of the False Claims Act. During the same period, the government paid out \$392 million to the individuals who exposed fraud and false claims by filing a qui tam complaint.”

VA: AMMONIA CAPSULES FOUND IN NOSE OF DECEASED JAIL INMATE - LAWSUIT AGAINST NURSE, OTHERS MAY PROCEED

On May 31, 2018, in [Benjamin M. Andrews, Administrator of Estate of Zachary Tuggle v. Sheriff C.T. Woody, et al.](#), a U.S. District Court Judge for Eastern District of Virginia (Richmond Division), issued two memorandum, holding (1) jail nurse and other jail personnel will not be granted summary judgment; and (2) that defense expert report of Dr. William J. Brady will not be admitted.

Legal Lessons Learned: EMS in this case properly documented to unusual conditions they observed.

The U.S. Supreme Court has instructed judges to carefully screen reports of proposed “experts.” *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579 (1993); *Kumho Tire Co. v. Carmichael*, 526 U.S. 137 (1999). [Federal Rules of Evidence were adopted to further clarify review of proposed expert written reports](#):

(B) *Witnesses Who Must Provide a Written Report.* Unless otherwise stipulated or ordered by the court, this disclosure must be accompanied by a written report—prepared and signed by the witness—if the witness is one retained or specially employed to provide expert testimony in the case or one whose duties as the party's employee regularly involve giving expert testimony. The report must contain:

(i) a complete statement of all opinions the witness will express and the basis and reasons for them;

(ii) the facts or data considered by the witness in forming them;

(iii) any exhibits that will be used to summarize or support them;(iv) the witness's qualifications, including a list of all publications authored in the previous 10 years;

(v) a list of all other cases in which, during the previous 4 years, the witness testified as an expert at trial or by deposition; and

(vi) a statement of the compensation to be paid for the study and testimony in the case.

OH: 911 "GOOD SAMARITAN" LAW – DRUG OVERDOSE, CAN AVOID PROSECUTION IF CALL 911, GET TREATMENT [also filed, Chap. 18]

On May 18, 2018, in [State of Ohio v. Andrew Melms](#), the Court of Appeals For Second District (Montgomery County), held (3 to 0) that an overdose victim, arrested with six gel caps of fentanyl, was not eligible for immunity; he was in jail and did not enroll in treatment within the 30-day limit set under the new Ohio statute enacted in 2016. The Court urged the Ohio General Assembly to modify the law: “Granted Melms seemingly was an ideal candidate for immunity, but for the clear and unambiguous 30-day window set forth by the legislature. The remedy lies with the legislature to either eliminate the 30-day restriction or to provide for the exercise of judicial discretion, particularly in those cases of the most vulnerable, often indigent, incarcerated individuals who are unaware of the time limit until after counsel is appointed on the drug offense. In our view, an immediate legislative fix is warranted so that this legislation achieves its laudable goals.”

Legal Lessons Learned: The “911 Good Samaritan” immunity statute is to encourage drug users and their associates to call 911 for an overdose, and to promptly seek treatment (can receive immunity only twice).

Note: 911 Dispatchers are required to inform overdose patients about the new law:

R.C. 128.04 provides as follows:

(A) Public safety answering point personnel who are certified as emergency service telecommunicators under section 4742.03 of the Revised Code shall receive training in informing individuals who call about an apparent drug overdose about the immunity from prosecution for a minor drug possession offense created by section 2925.11 of the Revised Code.

(B) Public safety answering point personnel who receive a call about an apparent drug overdose shall make reasonable efforts, upon the caller's inquiry, to inform the caller about the immunity from prosecution for a minor drug possession offense created by section 2925.11 of the Revised Code.

MI: DYING DECLARATION BY VICTIM TO PARAMEDIC – ADMISSIBLE IN MURDER TRIAL

On April 19, 2018, in [State of Michigan v. Christopher Tank](#), the State of Michigan Court of Appeals, upheld the jury conviction (3 to 0), holding “there was no plain error in admitting the victim’s dying declaration identifying defendant as his assailant.”

Legal Lessons Learned: Dying declarations are admissible; include victim’s exact words in “quotes” in the EMS run report.

MI: CPR – NO NEED TO PERFORM WHEN PATIENT CLEARLY DEAD - LIVIDITY, NO PULSE

On April 12, 2018, in [Eusebio Saldana v. Nathan Smith and Sanilac County Sheriff’s Office](#), the State of Michigan Court of Appeals held (3 to 0; unpublished decision) that the police officer “exercised his discretion based on his experience and training in identifying Michael's condition and acting according to those conclusions.”

Legal Lessons Learned: Michigan statues protect police & EMS from liability, unless proof of gross negligence.

OH: DRUNK DRIVER - URINE / BLOOD TESTS IN EMERGENCY ROOM BY ORDERS OF PHYSICIAN - NO 4TH AMENDMENT VIOL. BY PD

On March 26, 2018, in [John W. Gold v. City of Sandusky, et al.](#), U.S. Magistrate Judge for the U.S. District Court, Northern, OH, issued a Memorandum Opinion and Order dismissing the civil rights lawsuit filed against the City, police officers, and ER medical staff, holding: “To the extent Plaintiff argues the officers violated his Fourth Amendment rights in the insertion of the catheter or in taking his blood, such a claim fails for the reasons stated above. That is, there is no evidence the catheter was placed, or blood drawn, at the request of the police. Rather, it was medical personnel who made the decision and performed the action.”

LEGAL LESSONS LEARNED: Blood and urine may be obtained in ER for medical reasons, without patient consent; police may obtain a search warrant for use in criminal case.

OH: AMBULANCE IN MVA – EMT DRIVER SPEEDING, PASSING IN NO PASSING ZONE, NO LIGHTS & SIREN [also filed, Chap. 5]

On Jan. 2, 2018, in [Folmer v. Meigs County Commissioners, et al.](#), 2018-Ohio- 31, 4th Appellate District (Meigs County), the Court held that the EMS driver may have been negligent when transporting a patient traveling over 20 mph above posted speed limit, with no lights or siren, and attempted to pass vehicle in no passing lane, hitting oncoming vehicle. While the lawsuit may proceed against Meigs County EMS, the EMS driver enjoys immunity from personal liability since plaintiff did not alleged he “acted with malicious purpose, bad faith, or recklessness under R.C. 2744.03(A)(6)(b).”

Legal Lessons Learned: If transporting without lights and siren, then EMS driver must obey speed limit and no passing zone. The EMS driver was fortunate the plaintiff did not allege he was driving in “wanton or reckless manner.

Chap. 14 Physical Fitness

NY: FDNY RECRUIT DIED DURING PHYSICAL EXERCISES – HEART CONDITION [also filed, Chap. 2]

On April 10, 2018, in [Sherita Sears v. The City of New York](#), the Appellate Division of the Supreme Court of State of New York (5 to 0) denied the death claim, holding: “Plaintiff is not entitled to recover under GML § 205–a, as the injuries decedent sustained were not the type of occupational injury that Labor Law § 27–a was designed to protect, but rather, arose from risks unique to firefighting work (*Williams v. City of New York*, 2 N.Y.3d 352, 368, 779 N.Y.S.2d 449, 811 N.E.2d 1103 [2004]).”

Legal Lessons Learned: [The New York statute](#) requires proof of “neglect, omission, willful or culpable negligence.”

New York Consolidated Laws, General Municipal Law - GMU § 205-a. Additional right of action to certain injured or representatives of certain deceased firefighters “In addition to any other right of action or recovery under any other provision of law, in the event any accident, causing injury, death or a disease which results in death, occurs directly or indirectly as a result of any neglect, omission, willful or culpable negligence of any person or persons in failing to comply with the requirements of any of the statutes, ordinances, rules, orders and requirements of the federal, state, county, village, town or city governments or of any and all their departments, divisions and bureaus, the person or persons guilty of said neglect, omission, willful or culpable negligence at the time of such injury or death shall be liable to pay any officer, member, agent or employee of any fire department injured, or whose life may be lost while in the discharge or performance at any time or place of any duty imposed by the fire commissioner, fire chief or other superior officer of the fire department, or to pay to the wife and children, or to pay to the parents, or to pay to the brothers and sisters, being the surviving heirs-at-law of any deceased person thus having lost his life, a sum of money, in case of injury to person, not less than ten thousand dollars, and in case of death not less than forty thousand dollars, such liability to be determined and such sums recovered in an action to be instituted by any person injured or the family or relatives of any person killed as aforesaid.”

OH: DAYTON FD RECRUIT – REMOVED FROM CLASS AFTER KNEE INJURY – NO FMLA VIOLATION [also filed, Chap. 10]

On Feb. 9, 2018 in [Shawn N. Geisel v. City of Dayton, et al.](#), Ohio Court of Appeals for Second Circuit (Montgomery County) held (3 to 0) that the FD had the authority to remove him from the recruit class and ‘demote’ him back to EMT. “We do not mean to imply that Geisel could not reapply for the position, but only that his appointment to Firefighter Recruit was a self-contained opportunity that did not entail a right to be reappointed or to continue as a recruit until he could complete the training program.”

Legal Lessons Learned: Dayton Civil Services rules treat a FF recruit as a probationary employee; when injured in recruit school, can be “demoted” back to EMT-B and placed on light duty.

Chap. 15 Critical Incident Stress Management

IL: PTSD –COURT ORDERS DISABILITY PENSION - CHICAGO PARAMEDIC'S TRAUMATIC WORK EXPERIENCES

On Feb. 1, 2019, in [Leah Siwinski v. The Retirement Board of the Fireman's Annuity and Benefit Fund of the City of Chicago](#), the Appellate Court of Illinois (First District) held (3 to 0), "In summary, because the manifest weight of the evidence showed that the plaintiff sustained PTSD arising from an act or acts of duty while working for CFD, and as a result, was disabled from performing any of her assigned duties, we reverse the decision of the Board that denied her a duty disability pension, and reverse the decision of the circuit court, which confirmed the Board's decision."

Legal Lesson Learned: PTSD is a recognized disability issue in the emergency services.

See also [April 13, 2018 article](#): Study: More firefighters died by suicide than in the line of duty in 2017 - A study found that 103 firefighters and 140 police officers died by suicide in 2017, compared to 93 firefighter and 129 officer line-of-duty deaths.

[See my case analysis.](#)

MN: PTSD – NEW STATUTORY PRESUMPTION THAT PTSD IS WORKPLACE

[Effective Jan. 1, 2019, the new state statute](#), "post-traumatic stress disorder was reclassified as an occupational disease for first responders. That includes police officers, firefighters, paramedics, emergency medical technicians, and nurses who provide emergency medical services outside of a medical facility."

Legal Lessons Learned: Several states have enacted similar statutes. See "[Update: Workers' Comp Coverage for Firefighters.](#)"

See [also this report](#):

- So far in 2018, of 103 state bills dealt with workers compensation provisions for first responders and only 6 bills past passed "true occupational presumption for PTSD." [Washington State](#), Florida, Vermont, Hawaii, New Jersey, and New Hampshire enacted inclusion of the PTSD presumption into their workers' compensation legislation.
- In 2017, Colorado passed a bill recognizing PTSD as compensable under workers compensation. Then the state passed a bill allowing the treatment of PTSD using medical marijuana.
- South Carolina created a \$500,000 fund to help fund first responders out of pocket medical costs related to the treatment of PTSD.
- Texas passed an act that eases the burden for first responders filing PTSD claims, requiring the lower standard of proof: "preponderance of evidence" and without the need to declare medical impairment.
- New York included PTSD references in the 2018 budget that would allow first responders to claim personal injury based on "extraordinary work-related stress" [Hanson & Watson, "Addressing the Emergence of PTSD Presumption: Issues and Solutions" pdf].

See also [Jan. 17, 2019 article from Massachusetts: “Critical incident intervention for first responders bill signed into law.”](#)

[See my case analysis.](#)

NJ: PTSD – POLICE OFFICERS MUST PROVE EXPERIENCED “TERRIFYING” & “UNEXPECTED” EVENT

On June 5, 2018, in [Christopher Mount v. Board of Trustees, Police and Fireman’s Retirement System](#), the New Jersey Supreme Court (7 to 0) held in two cases (1) that police officer who observed three teenagers burned to death in MVA may have a claim; but (2) police hostage negotiator has no claim when SWAT Team killed the assailant. “Although the shooting was clearly devastating to Martinez -- an officer exemplary for his professionalism and compassion in highly stressful circumstances -- it was not “undesigned and unexpected....”

Legal Lessons Learned: PTSD accidental disbenefit ability claims, with no physical injury, are particularly difficult for courts interpreting state statutes.

Chap. 16 Discipline

IL: RESIDENCY – FF FIRED – PAST THREE YEARS DID NOT RESIDE IN VILLAGE – MAIL DROP LOCATION IS NOT RESIDENCY

On May 29, 2019, in [John Cannici v. Village of Melrose Park](#), the Appellate Court of Illinois, First District, 2019 IL App (1st) 181422-U, held (3 to 0) that the fire fighter was properly terminated for violating residency ordinance.

“The Board did not indicate that it found fault with Cannici’s earlier arrangement where he lived in the [Melrose Park] Norwood house for a majority of the week and would spend his weekends at the Orland Park house. Although this arrangement included physical absence from the Norwood house for ‘some’ of the time, this was not a violation of the residency ordinance as he still lived in the Norwood house for the majority of his time and treated it as his primary home or abode. However, when he leased the Norwood house to the Cichons, he no longer used the Norwood house as his primary home and spent practically no time in the Norwood house, except the time spent picking up his mail.”

Legal Lessons Learned: Some states, such as Ohio, have enacted statutes that have set aside municipal residency requirements.

See article, [“Ohio Supreme Court rules against city residency requirements,”](#) June 10, 2009,

[Ohio Supreme Court opinion:](#)

“R.C. 9.481(B)(1) states that ‘no political subdivision shall require any of its employees, as a condition of employment, to reside in any specific area of the state.’ The issue in this case is whether R.C. 9.481 was enacted pursuant to the authority granted to the General Assembly by Section 34, Article II of the Ohio Constitution. If it was so enacted, its provisions override any conflicting law of a political subdivision, including residency requirements imposed by municipalities pursuant to the Home Rule Amendment, Section 3, Article XVIII of the Ohio Constitution. We hold that R.C. 9.481 was enacted pursuant to the authority granted by Section 34 and that the local laws before us in this case therefore cannot stand.”

Ohio communities can adopt ordinance requiring firefighters and police officers to live in the county, or an adjacent county.

[9.481 Residency requirements prohibited for certain employees.](#)

(b) To ensure adequate response times by certain employees of political subdivisions to emergencies or disasters while ensuring that those employees generally are free to reside throughout the state, the electors of any political subdivision may file an initiative petition to submit a local law to the electorate, or the legislative authority of the political subdivision may adopt an ordinance or resolution, that requires any individual employed by that political subdivision, as a condition of employment, to reside either in the county where the political subdivision is located or in any adjacent county in this state.

[9.61 Residency not required for fire chief.](#)

(B) Nothing in the Revised Code requires, or shall be construed to require, that the fire chief of a firefighting agency reside in the territory of the firefighting agency.

KS: IAFF ATTORNEY HELPED FF IN GRIEVANCE - NOT HIS PERSONAL COUNSEL

On March 25, 2019, in [Randall Austin Ester v. Christopher Buell, et al.](#), U.S. Magistrate Judge Gwynne E. Birzar, U.S. District Court for Kansas, denied plaintiff's motion to have IAFF Local 64 attorney disqualified from representing IAFF in his racial discrimination lawsuit. The Magistrate held, "The totality of the evidence, viewed in conjunction with the caselaw, weighs against formation of an attorney-client relationship. Written documents identify Mr. Brown as 'attorney for the union.'"

Legal Lessons Learned: IAFF Local's attorney is not personal attorney for grievant.

[See my case analysis.](#)

MA: NEPOTISM - FIRE CHIEF'S NIECE AND BROTHER ON FD – RESIGNED PENDING AN INVESTIGATION

On Jan. 19, 2019, in [Kevin Robinson v. Town of Marshfield, et al.](#), U.S. District Court Judge Nathaniel M. Gorton granted the Town's motion for summary judgment, and dismissed the former Fire Chief's lawsuit: "The Chief has not met his burden of showing intentional interference. First, defendants' conduct does not rise to the level of spiteful or malignant purpose because there was a legitimate interest in temporarily removing the Chief during the investigation of his alleged ethical misconduct. Moreover, even if this Court assumes arguendo that the Chief has met his prima facie burden of showing improper motive through age discrimination, the Chief has failed to show that such discrimination was the controlling factor in the alleged interference."

Legal Lessons Learned: Fire Chiefs, in states that do not prohibit close family members on their FD, must be extremely careful to avoid even an "appearance" of conflicts of interest.

[See list of state statutes on Nepotism](#): "Some states may take a broader approach by denying any relative of a qualifying official from being hired by the same branch of government. Other states might more narrowly prevent a public official from having direct supervisory or hiring authority over a relative. A legislator even advocating on behalf of a relative before a hiring or appointing authority might be a violation in some states."

See also [Ohio Ethics Commission – Information Sheet No. 1](#), RESTRICTIONS ON NEPOTISM OR HIRING FAMILY MEMBERS.

NJ: STATE POLICE LAB OFFICER INDICTED; FALSELY CERTIFIED HE HAD CALIBRATED DUI EQUIPMENT

On Nov. 13, 2018, in [State v. Eileen Cassidy](#), the New Jersey Supreme Court held: "The Court considers the admissibility of breath test results produced by Alcotest machines not calibrated using a thermometer that produces temperature measurements traceable to the standards set by the National Institute of Standards and Technology

(NIST).... The Special Master determined that the State had not shown that other states' practices revealed general acceptance of the reliability of Alcotest results without the use of a NIST-traceable thermometer. Because the Special Master's findings are supported by substantial credible evidence in the record, the Court adopts them."

Legal Lessons Learned: False certifications can lead to unwarranted convictions, and criminal charges. EMS personnel must likewise follow EMS protocols, or patient injury or death may occur; false EMS run reports can also lead to termination of employment and even criminal charges.

[See my analysis of the case.](#)

TN: FF REINSTATED - SCUFFLE AT OFF-DUTY RALLY / FIREARM - REINSTATED - CHARGES NOT PROVEN

On Oct. 10, 2018, in [Paul Zachary Moss v. Shelby County Civil Service Board](#), the Court of Appeals of Tennessee (at Jackson) held (3 to 0) that the Civil Service Board is reversed, and firefighter is reinstated to Shelby County Fire Department. "Appellant contends that the decision upholding his termination should be reversed due to a violation of his due process rights. We agree and reverse.... Further, [Mr. Moss on appeal noted] that the 'two charges asserted in the *Loudermill* notice were proven to be without factual basis as Chief Benson and Chief Burress both acknowledged that Mr. Moss gave notice of being taken to the Memphis Police Department on the night of the events and Mr. Moss had not been convicted of a felony.'"

Legal Lessons Learned: Due process requires proof of the specific charges; if the FD had also included a charge of "conduct unbecoming" this case may have had a different result.

TX: FREE SPEECH - PD OFFICER LAWSUIT MAY PROCEED - FIRED ORGANIZING POLICE ASSOCIATION [\[also filed, Chap. 1\]](#)

On Aug. 31, 2018, in [Marcus Mote v. Debra Walthall](#), the U.S. Court of Appeals for 5th Circuit held (3 to 0) that Police Chief Debra Walthall is not entitled to qualified immunity, and Officer Mote's lawsuit against her may proceed. Officer Mote sought before he was fired to organize police officers with the City of Corinth, TX into a "Corinth Police Officers Association" [no collective bargaining rights under TX law], affiliated with the Texas Municipal Police Association. The Court wrote, "The First Amendment protects the right of all persons to associate together in groups to 'advanc[e] beliefs and ideas.' Put another way, 'the [F]irst [A]mendment protects the right of all persons to associate together in groups to further their lawful interests.' When groups gather together for this purpose, 'it cannot be seriously doubted' that they comprise associations protected by the First Amendment. *** We conclude that Mote's right to speak in furtherance of forming the CPOA was clearly established as an integral part of his association rights. *** We agree with the district court that Mote's association and speech rights to engage in the activities he alleged were clearly established. We therefore DISMISS the appeal."

Legal Lessons Learned: Very strong opinion concerning free speech rights of public employees. Fire & EMS departments should adopt a “Social Media” policy that recognizes free speech rights, but cautions members to not publicly discuss internal matters.

FL: TWO DISPATCHERS FIRED – DID NOT ALERT POLICE OF “HIGH HAZARD” PERSON – POLICE OFFICER KILLED

On June 13, 2018, in [Darryl Newman, Gwendolyn Forehand v. Consolidated Dispatch Agency](#), the U.S. Court of Appeals for the 11th District (Atlanta, GA), held (3 to 0) in an unpublished opinion:

“We are unpersuaded by the Appellants’ argument that their termination was arbitrary because there was no CDA [the Agency] protocol requiring them to check the ‘premises hazard’ tab, they were never warned of a requirement to look at ‘premises hazards,’ and no other PSCOs had been fired for failure to access the tab. Even if clicking on the tab was discretionary, the Appellants were nevertheless required to gather and disseminate pertinent information, pertinent information was available to them, and they failed to access it. They were aware of this responsibility based on their two decades of experience, and they knew how to access the ‘premises hazard’ tab. Moreover, there is no evidence that any other PSCO’s failure to open the tab resulted in the death of a first responder.”

Legal Lessons Learned: Fire, EMS and Police must be warned of high hazard locations. Please share this case with your 911 Dispatch agency, and confirm they have a protocol in place and it is followed 100% of time.

[See news report and TV video](#) of this terrible scene: “Police identify gunman, Florida deputy killed in shootout.”

PA: DOT EMPLOYEE FIRED FOR FACEBOOK POSTS ON BAD SCHOOL BUS DRIVERS – REINSTATED [also filed, Chap. 1]

On June 12, 2018, in [Rachel L. Carr v. Commonwealth of Pennsylvania / Department of Transportation and Civil Service Commission](#), the Commonwealth Court of Pennsylvania held (3 to 0) that the employee’s FACEBOOK posts about local school bus drivers were “inappropriate” but were protected since it “touched on a matter of public concern.” The Court wrote: “After a thorough review of the record and a conscientious analysis of the factors articulated by the United States Supreme Court, we conclude that the Department’s generalized interest in the safety of the traveling public does not outweigh Carr’s specific interest in commenting on the safety of a particular bus driver. While Carr’s comments are undoubtedly inappropriate, such comments still receive protection under the First Amendment.”

Legal Lessons Learned: Fire & EMS Departments should have a Social Media Policy that clearly advises personnel that their “Free Speech rights” are limited when discussing FD internal matters.

TX: CAPTAIN SUPENDED FOR NOT SUBMITTING DOCTOR'S REPORT – REVERSED, FD FAILED TO DISCIPLINE IN 180 DAYS

On April 17, 2018, in [Steven Dunbar v. City of Houston](#), the State of Texas in the Fourteenth Court of Appeals, held that the Captain's 10-day suspension is reversed. The "Department was aware of the violation not later than August 2014, and thus, his suspension more than 180 days later is void

Legal Lessons Learned: Texas statute requiring discipline within 180 days must be strictly followed; the clock begins to run when the department FIRST becomes aware of the violation.

TN: FIREFIGHTER FIRED FOR MAKING SEXUALLY HARASSING PHONE CALLS ON DUTY – NO RETALIATION

On March 23, 2018, in [Joseph Sweat v. City of McMinnville](#), the Court of Appeals of Tennessee At Nashville, held (3 to 0) that the trial court properly dismissed the firefighter's lawsuit, since he was unable to prove that the City's proffered reasons for the discharge was pretextual, including: "Although Plaintiff never acknowledged that he made sexually harassing phone calls, he admitted in his deposition that at one time, firefighters kept a 'list on the desk of the fire station' containing the names of single women that they had gotten off the internet, and that he called one of these women 'to talk.'"

LEGAL LESSONS LEARNED: FD may impose discipline, even if the firefighter is one of the 27 firefighters who signed memo about safety issues.

RI: FF VIDEOTAPED WEIGHT LIFTING – DISABILITY PENSION BENEFITS TERMINATED [also filed, Chap. 6]

On Feb. 21, 2018, in [John Sauro v. James Lombardi](#), in his capacity as Treasurer of the City of Providence, et al., the State Supreme Court held, "we conclude that the decision of the trial justice declaring that the plaintiff's pension benefits should be reinstated and he should be placed on a waiting list to resume active service was erroneous, overlooked material evidence, and was clearly wrong."

Legal Lessons Learned: Accidental disability pension benefits are for those with a continuing work-place injury; cases like this lead to public perception of pension fraud.

[See TV story and undercover video of retiree lifting weights.](#)

WA: CAPTAIN FIRED, INTERNAL E-MAILS ON RELIGION – LAWSUIT REINSTATED, NO FD POLICY

On Jan. 25, 2018, in [Jonathan J. Sprague v. Spokane Valley Fire Department, et al.](#), the Supreme Court of the State of Washington, held (5 to 4) that "Sprague has met his initial burden to show that SVFD's restrictions on his speech violated the First Amendment. On remand, the burden will shift to SVFD to show by a preponderance of the

evidence that it would have reached the same decision as to respondent's employment termination even in the absence of the protected conduct.”

Legal Lessons Learned: FDs should have a written electronic communications policy, including prohibition on e-mails that can be disruptive to workplace.

[See article on the case.](#)

IN: STATE BOARD REVOKES DEPUTY CHIEF'S FF CERTIFICATES – CHILD EXPLOITATION & PORN CONVICTION

On Jan. 17, 2018, in [State Of Indiana Board Of Firefighting And Personnel Standards v. John T. Cline](#), the Court of Appeals of Indiana held that the Board's decision to revoke his certifications as a Firefighter was affirmed, since he failed to file a timely appeal. “To effect statutory compliance, Cline was required to file the agency record or file a motion for an extension of time by May 9, 2016. He did not do so and the trial court should have dismissed the petition for judicial review.”

Legal Lessons Learned: In filing an appeal, deadlines must be met unless there are extenuating circumstances.

IL: SOCIAL MEDIA POSTS - DEPUTY FIRE CHIEF FIRED AFTER “POLITICAL COMMENTARY” ON FACEBOOK

On Jan. 11, 2018, in [Richard Banske v. City of Calumet City](#), U.S. District Court, Northern District of Illinois (Case No. 17C5263), Judge Harry D. Leinenweber granted City's motion to dismiss. “[A] policymaking employee may be discharged ‘when that individual has engaged in speech on a matter of public concern in a manner that is critical of superiors or their stated policies.’ Hagan, 867 F.3d at 826 (quoting Kiddy-Brown v. Blagojevich, 408 F.3d 346, 358 (7th Cir. 2005)). *** Without well pled factual allegations, the Court is left to guess whether Banske's at-issue speech touches upon a subject of public concern. This the Court will not do. The Complaint fails to establish that Banske engaged in constitutionally protected speech, so it fails to state a claim upon which relief may be granted.”

Legal Lessons Learned: Fire, EMS, police and other public employees have only limited First Amendment rights under the “balancing test” of [U.S. Supreme Court's decision in Pickering v. Board of Education, 391 U.S. 563 \(1968\)](#).

Pickering decision: “Appellant Marvin L. Pickering, a teacher in Township High School District 205, Will County, Illinois, was dismissed from his position by the appellee Board of Education for sending a letter to a local newspaper in connection with a recently proposed tax increase that was critical of the way in which the Board and the district superintendent of schools had handled past proposals to raise new revenue for the schools. *** In sum, we hold that, in a case such as this, absent proof of false statements knowingly or recklessly made by him, a teacher's exercise of his right to speak on issues of public importance may not furnish the basis for his dismissal from public employment. *** Footnote 3: It is possible to conceive of

some positions in public employment in which the need for confidentiality is so great that even completely correct public statements might furnish a permissible ground for dismissal.”

Chap. 17 Arbitration / Mediation

IL: CT OVERTURNS ARBITRATOR – PURGING POLICE DISCIPLINE RECORDS IS VIOLATION OF STATE’S PUBLIC POLICY

On March 29, 2019, in [City of Chicago v. Fraternal Order of Police, Chicago Lodge No. 7](#), the Illinois Appellate Court (1st District) held (3 to 0) that an arbitrator’s decision upholding FOP’s grievance must be set aside.

“The arbitration award requiring destruction of the records pursuant to section 8.4 of the CBA clearly violated well-defined Illinois public policy requiring the proper retention of important public records.”

Facts:

“The records at issue are complaint register files (CR files). CR files are produced in the course of investigations by the Civilian Office of Police Accountability (COPA) and the CPD’s Bureau of Internal Affairs (Internal Affairs) of alleged misconduct by CPD officers. COPA and Internal Affairs had the authority to recommend to the CPD superintendent disciplinary action for violations of CPD rules and regulations.

Future CBAs continued to include some version of section 8.4, including the 2007-12 CBA at issue in this case, which provided, in relevant part:

‘All disciplinary investigation files, disciplinary history card entries, Independent Police Review Authority and Internal Affairs Division disciplinary records, and any other disciplinary record or summary of such record other than records related to Police Board cases, will be destroyed five (5) years after the date of the incident or the date upon which the violation is discovered, whichever is longer[.]’

The City’s destruction of records pursuant to section 8.4 ceased following a federal court’s 1991 order in a civil rights case, which required the City to cease destroying CR files. Thereafter, other federal district court judges began entering similar orders as a matter of - 3 - routine, and the City sought to eliminate section 8.4 from the CBA during negotiations with the FOP.

Meanwhile, in October 2014, the City notified the FOP that the City intended to comply with requests under the Freedom of Information Act (FOIA) (5 ILCS 140/1 et seq. (West 2014)), from the Chicago Tribune and Chicago Sun-Times for CR files dating back to 1967. The FOP sought a preliminary injunction in the circuit court on the basis that disclosure of the CR files during arbitration would interfere with the FOP’s ability to obtain relief in arbitration. In December 2014, the circuit court granted the FOP’s request for a preliminary injunction barring the release of the CR files to maintain the status quo until the FOP’s claims under the CBA were adjudicated.

In December 2015, the United States Department of Justice (DOJ) opened an investigation into the CPD's use of force policies. The City informed the arbitrator of the pendency of the DOJ investigation and requested guidance on how the City should respond to the DOJ's requests for the production of misconduct and disciplinary records.

In January 2017, the DOJ issued its report. Among its conclusions, the DOJ found that section 8.4's 'document destruction provision not only may impair the investigation of older misconduct, but also deprives CPD of important discipline and personnel documentation that will assist in monitoring historical patterns of misconduct.' A local police accountability task force (Task Force) was also formed to evaluate the CPD's practices separately from the DOJ's investigation. The Task Force also concluded that section 8.4 was problematic and likely violated Illinois law."

The arbitration award requiring destruction of the records pursuant to section 8.4 of the CBA clearly violated well-defined Illinois public policy requiring the proper retention of important public records. The award ignored the requirements of the Local Act and obviates the local record commission's authority to determine what records should be destroyed or maintained. Further, the award required the City to destroy records related to alleged police misconduct without regard to the statute's explicit concerns for those records' 'administrative, legal, research or historical value.' 50 ILCS 205/10 (West 2016)."

Legal Lessons Learned: Purging of disciplinary records, even if authorized under a CBA, can result in public records litigation.

The Court referenced a Chicago FD case where an arbitrator was overturned based on public policy. [Chicago Fire Fighters Union Local No. 2 v. City of Chicago](#), 323 Ill. App. 3d 168, 176-77 (2001):

"In May 1997, CFD Internal Affairs Division ('IAD') Executive Assistant Mark Edinburg learned of the existence of a videotape of an unauthorized retirement party held on April 12, 1990, at the CFD firehouse known as Engine 100. The videotape depicted firefighters drinking alcoholic beverages inside the firehouse; leaving the firehouse in fire trucks to respond to fire calls; some participants making offensive racial, gender and ethnic slurs; and some engaging in other conduct such as exposing their bare buttocks and genitals. Edinburg viewed the videotape on May 9, 1997. *** This matter calls upon the court to address a serious matter of public policy affecting the health, safety and welfare of the citizens of the city of Chicago. *** The conduct at issue in the present case was recorded on video-tape and reveals public safety workers in an on-going state of intoxication, some participants setting about to perform their duties by way of responding to an alarm for a fire. Nevertheless, the arbitrator ordered reinstatement and barred all discipline and sanctions without considering the merits of the case. Firefighters have the extraordinary responsibility for carrying out the well-stated public policy of safe and effective fire prevention. Firefighters must be prepared to respond immediately to emergency conditions at all times, and in all weather conditions, whenever the alarm bell in the firehouse sounds. For these reasons, and for all of the reasons cited by our supreme court in AFCSME II, 173 Ill. 2d 299 et seq., we adhere to our original opinion as set forth above."]

NY: MINIMUM MANNING PER SHIFT - ARBITRATION - 15 FF / SHIFT – 8 CAPTAINS DEMOTED IN 2015

On Feb. 1, 2019, [City of Watertown v. Watertown Professional Firefighters Association, Local 191](#), 2019 NY Slip Op 00753, the New York Supreme Court, Appellant Division, overturned a lower court's decision and held (5 to 0) that any changes in minimum manning shall go to arbitration under the collective bargaining agreement. "Contrary to the City's contention, the staffing provisions do not operate to mandate a total number of firefighters that must be employed; rather, they relate solely to the minimum number of firefighters required to be present during shifts and regular operations...."

Legal Lessons Learned: Courts favor arbitration regarding CBA disputes, unless it involved items that are clearly management right (such as lay-offs).

[See my case analysis.](#)

Note: The City has reportedly decided to ask New York's highest court [Court of Appeals – 7 Justices] to hear their appeal. See Feb. 5, 2019 article: "[City to Take Firefighters Union to NY Supreme Court.](#)" "WATERTOWN — Three days after losing a lower court's ruling, the city is taking steps to take an arbitration case against the city's firefighters' union to the state's highest court. *** Coming out of a lengthy executive session, Mayor Joseph M. Butler Jr. said on Monday night the City Council agreed to file the appeal with the Court of Appeals, the state's highest court.... With the highest court granting just a few of those requests, the city must petition the Court of Appeals and convince the seven-judge panel to take the case because the lower court's decision was unanimous. 'It's a long shot,' the mayor said."

See also Feb. 7, 2019 article: "[Lawyer Fees For Watertown Fire Department Dispute Nearing \\$800,000.](#)"

Feb. 1, 2019: [NY - Watertown Firefighters Win Legal Victory](#)

U.S. SUPREME COURT: ARBITRATION BINDING ON ACCOUNTANT – EMPLOYEE THEREFORE CAN'T SUE

On May 21, 2018, in [Epic Systems Corp. v. Lewis](#), the U.S. Supreme Court (5 to 4), 584 U.S. ____ (2018), in a decision written by newly appointed Justice Gorsuch, held:

"Should employees and employers be allowed to agree that any disputes between them will be resolved through one-on-one arbitration? Or should employees always be permitted to bring their claims in class or collective actions, no matter what they agreed with their employers? As a matter of policy these questions are surely debatable. But as a matter of law the answer is clear. In the Federal Arbitration Act, Congress has instructed federal courts to enforce arbitration agreements according to their terms—including terms providing for individualized proceedings."

Legal Lessons Learned: Many employers, including private ambulance companies, will now be encouraged to have new hires sign an arbitration document.

[AFL-CIO President Richard Trauma was quoted](#), “Five justices on the Supreme Court decided that it is acceptable for working people to have their legal rights taken away by corporations in order to keep their jobs.”

Note: see Jan. 15, 2019 [U.S. Supreme Court decision in New Prime, Inc. v. Oliveira](#), **Holding:** A court should determine whether the Federal Arbitration Act’s Section 1 exclusion for disputes involving the “contracts of employment” of certain transportation workers applies before ordering arbitration; here, truck driver Dominic Oliveira’s independent contractor operating agreement with New Prime Inc. falls within that exception. **Judgment:** [Affirmed](#), 8-0, in an opinion by Justice Gorsuch on January 15, 2019. Justice Ginsburg filed a concurring opinion. Justice Kavanaugh took no part in the consideration or decision of the case.

Chap. 18 Legislation

WY: STATE STATUTE, VOLUNTEER FF WHO GETS PAID PER RUN ENTITLED TO BE IN THE UNION [also filed, Chap. 6]

On July 6, 2018, in [IAFF Local 5058 v. Gillette / Wright / Campbell County Fire Protection Joint Powers Board, and IAFF Local 5067 v. Teton County and Town of Jackson](#), the Wyoming Supreme Court held (5 to 0) that the two new unions were not properly elected, and the Fire Districts did not need to negotiate collective bargaining agreements, because the “volunteer” and “pool” firefighters all receive pay for making runs.

“The district courts in both cases held that the Wyoming Collective Bargaining for Fire Fighters Act’s definition of ‘fire fighters’ includes volunteers because they are ‘paid members of . . . regularly constituted fire department[s].’ Consequently, the district courts concluded that IAFF Local 5058 and IAFF Local 5067, which were formed by and consist of only full-time, career fire fighters, were not properly constituted bargaining units under the Act. We affirm.”

Legal Lessons Learned: Drafting of legislative language is very important, along with creating a clear “legislative history” to avoid any question about whether volunteer and part-time firefighters can be covered in a collective bargaining agreement.

OH: 911 “GOOD SAMARITAN LAW” – AVOID PROSECUTION IF CALL 911 - TREATMENT IN 30 DAYS [also filed, Chap. 13]

On May 18, 2018, in [State of Ohio v. Andrew Melms](#), the Court of Appeals For Second District (Montgomery County), held (3 to 0) that an overdose victim, arrested with six gel caps of fentanyl, was not eligible for immunity; he was in jail and did not enroll in treatment within the 30-day limit set under the new Ohio statute enacted in 2016. The Court urged the Ohio General Assembly to modify the law: “Granted Melms seemingly was an ideal candidate for immunity, but for the clear and unambiguous 30-day window set forth by the legislature. The remedy lies with the legislature to either eliminate the 30-day restriction or to provide for the exercise of judicial discretion, particularly in those cases of the most vulnerable, often indigent, incarcerated individuals who are unaware of the time limit until after counsel is appointed on the drug offense. In our view, an immediate legislative fix is warranted so that this legislation achieves its laudable goals.”

Legal Lessons Learned: The “911 Good Samaritan” immunity statute is to encourage drug users and their associates to call 911 for an overdose, and to promptly seek treatment (can receive immunity only twice).

Note: 911 Dispatchers are required to inform overdose patients about the new law:

R.C. 128.04 provides as follows:

(A) Public safety answering point personnel who are certified as emergency service telecommunicators under section 4742.03 of the Revised Code shall receive training in informing individuals who call about an apparent drug overdose about the immunity from prosecution for a minor drug possession offense created by section 2925.11 of the Revised Code.

(B) Public safety answering point personnel who receive a call about an apparent drug overdose shall make reasonable efforts, upon the caller's inquiry, to inform the caller about the immunity from prosecution for a minor drug possession offense created by section 2925.11 of the Revised Code.