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JULY 2021 – FIRE & EMS LAW Newsletter

[NEWSLETTER IS NOT PROVIDING LEGAL ADVICE.]

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

CASES (2018 – Present). See online library of cases: [BROUSE: Lawrence Bennett].

JULY NEWSLETTER: 8 RECENT CASES REVIEWED

File: Chap. 1, American Legal System

PA: IMMUNITY / 5th AMENDMENT - BILL COSBY CONV. VACATED – DA's UNCONDITIONAL PROMISE

On June 30, 2021, in Commonwealth of Pennsylvania v. William Henry Cosby Jr., the Supreme Court of Pennsylvania, Middle District, held (4 to 3) that Cosby's 5th Amendment rights were violated when the Montgomery County District Attorney made "an unconditional promise of non-prosecution." Crosby was later indicted just prior to expiration of 12-year statute of limitations by new DA, who read Crosby's 4 depositions in a civil lawsuit brought by female victim, where he testified about giving pills to other women, and the DA located 19 prior victims (going back 15 to 22 years).

> "For the reasons detailed below, we hold that, when a prosecutor makes an unconditional promise of non-prosecution, and when the defendant relies upon that guarantee to the detriment of his constitutional right not to testify, the principle of fundamental fairness that undergirds due process of law in our criminal justice system demands that the promise be enforced.
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> Cosby was forced to sit for four depositions. That he did not—and could not—choose to remain silent is apparent from the record. When Cosby attempted to decline to answer certain questions about Constand, Constand's attorneys obtained a ruling from the civil trial judge forcing Cosby to answer. Most significantly, Cosby, having maintained his innocence in all matters and having been advised by a number of attorneys, provided critical evidence of his recurring history of supplying women with central nervous system depressants before engaging in (allegedly unwanted) sexual activity with them—the very assertion that undergirded Constand's criminal complaint….
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> For these reasons, Cosby's convictions and judgment of sentence are vacated, and he is discharged."

Dissent by Justice Thomas G. Saylor:

> "I respectfully disagree with the majority's determination that the press release issued by former District Attorney Bruce Castor contained an unconditional promise that the Commonwealth would not prosecute Appellant in perpetuity…. I read the operative language –'District Attorney Castor declines to authorize the filing of criminal charges in connection with this matter' --as a conventional public announcement of a present exercise of prosecutorial discretion by the temporary occupant of the elected office of district attorney that would in no way be binding upon his own future decision-making processes, let alone those of his successor."

Legal Lesson Learned: This is a very usual decision, finding that a DA's Press Release and comments to defense counsel amounted to a "transactional immunity" agreement, binding other DAs during the 12-year statute of limitations. In fire service, arson investigators

seeking to obtain immunity for a key witness should consider asking Prosecutors to grant "use and derivative use" immunity, not "transactional immunity."

> "Use and derivative use immunity is more common (used by both state and federal prosecutors) and narrower than transactional immunity. It prevents the prosecution from using the witness's statements ('use') or any evidence derived from those statements ('derivative use') against the witness in a criminal prosecution. In theory, use and derivative use immunity provides as much protection as the witness not testifying." NOLO- Legal Encyclopedia, regarding immunity exchange testimony
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> See June 30, 2021 article on the case: "All Your Questions About Bill Cosby's Overturned Verdict, Answered."

File: Chap. 2, Safety

OH: SCHOOL TEACHERS CARRY FIREARMS - MUST TAKE 25-HOURS TRAINING REQUIRED FOR SECURITY GUARDS

On June 23, 2021, in Erin Gabbard et al. v. Madison Local School District Board of Education, the Ohio Supreme Court held (4 to 3) that the School Board cannot authorize 10 teachers to carry concealed firearms while on duty unless they first comply with Ohio Peace Officer Training Commission (OPATC) training requirements for armed security officers: 700 hours, instead of 24-hours, at an approved OPOTC training facility.

"A person might be hired as a teacher, but when that person agrees to go armed while teaching, his or her duties expand to encompass additional duties akin to those normally performed by special police officers and security guards.

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We conclude that R.C. 2923.122(D)(1)(a) does not clearly constitute a legislative grant of power for school boards to authorize their employees to go armed so long as the employees undergo whatever training a board might deem advisable.

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Unlike other state legislatures that have responded to more recent calls to arm teachers and other school staff by enacting legislation that is specifically tailored to that issue, see, e.g., Kan.Stat.Ann. 75-7c10(d)(1), S.D.Codified Laws 13-64-1, Tenn.Code Ann. 49-6-815, and Tex.Educ.Code Ann. 37.0811, the General Assembly has not done so. 3.

Footnote 3. There is currently pending in the General Assembly a bill that would exclude from R.C. 109.78(D)'s training-or-experience requirement teachers and other school employees whom a school board authorizes to carry a firearm while on duty. See 2021 H.B. No. 99. As introduced, the bill states an express intention to overrule the Twelfth District Court of Appeals' decision below in this case.

Legal Lesson Learned: Fire & EMS departments should issue a policy on whether on duty personnel may possess firearms, and minimum training required.

See this Dec. 1, 2019 article: "Fire Law: Should Firefighters Be Armed?" Curt Varone explains the challenges of the decision to allow members of a fire department to carry a firearm while on duty.

File: Chap. 3, Homeland Security

CA: FALSE CREDIT RECORDS – AFTER 9/11, CO. OFFERED "POTENTIAL MATCH" U.S. TREASURY LIST TERRORISTS

On June 25, 2021, in TransUnion LLC v. Sergio Ramirez, et al., the U.S. Supreme Court held (5 to 4) that only individuals who could prove they suffered "concrete harm" can sue TransUnion for violation of federal Fair Credit Reporting Act when they are falsely identified as matching someone with same fire & last name on U.S. Treasury "Specially Designated Nationals" list of terrorists, and narcotics traffickers. After the attacks on 9/11, TransUnion began selling to banks, auto dealers and other businesses a "potential match" to a name on the U.S. Treasury's list. TransUnion did not compare birth dates, middle initials, Social Security numbers, or any other available identifier routinely used to collect and verify credit-report data. After 6-day trial, the jury found a willful violation of Fair Credit Reporting Act and awarded each class member (8,185 class members), $984.22 in statutory damages (about $8 million total) and $6,353.08 in punitive damages (about $52 million total). The Court majority set aside the verdict, and remanded case – only Plaintiff, who was denied an auto loan, and others who can prove a "concrete harm" are entitled to damages.

Note: This case was reviewed since employers, including Fire & EMS conducting background checks on applicants, must be cautious of credit reports and give applicants time to correct errors.

Justice Brett Kavanaugh wrote the majority opinion:

> "When this litigation arose, Name Screen worked in the following way: When a business opted into the Name Screen service, TransUnion would conduct its ordinary credit check of the consumer, and it would also use third-party software to compare the consumer's name against the OFAC [U.S. Treasury's Office of Foreign Assets Control] list. If the consumer's first and last name matched the first and last name of an individual on OFAC's list, then TransUnion would place an alert on the credit report indicating that the consumer's name was a "potential match" to a name on the OFAC list. TransUnion did

not compare any data other than first and last names. Unsurprisingly, TransUnion's Name Screen product generated many false positives. Thousands of law-abiding Americans happen to share a first and last name with one of the terrorists, drug traffickers, or serious criminals on OFAC's list of specially designated nationals.

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Sergio Ramirez learned the hard way that he is one such individual. On February 27, 2011, Ramirez visited a Nissan dealership in Dublin, California, seeking to buy a Nissan Maxima. Ramirez was accompanied by his wife and his father-in-law. After Ramirez and his wife selected a color and negotiated a price, the dealership ran a credit check on both Ramirez and his wife. Ramirez's credit report, produced by TransUnion, contained the following alert: '***OFAC ADVISOR ALERT - INPUT NAME MATCHES NAME ON THE OFAC DATABASE.' App. 84. A Nissan salesman told Ramirez that Nissan would not sell the car to him because his name was on a 'terrorist list.'Id., at 333. Ramirez's wife had to purchase the car in her own name.

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For 1,853 of the class members, TransUnion provided misleading credit reports to third-party businesses. We conclude that those 1,853 class members have demonstrated concrete reputational harm and thus have Article III standing to sue on the reasonable-procedures claim. The internal credit files of the other 6,332 class members were not provided to third-party businesses during the relevant time period. We conclude that those 6,332 class members have not demonstrated concrete harm and thus lack Article III standing to sue on the reasonable-procedures claim."

Dissent: Justice Clarence Thomas:

Here, in a 7-month period, it is undisputed that nearly 25 percent of the class had false OFAC-flags sent to potential creditors. Twenty-five percent over just a 7-month period seems, to me, 'a degree of risk sufficient to meet the concreteness requirement.' Ibid. If 25 percent is insufficient, then, pray tell, what percentage is?"

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Ultimately, the majority seems to pose to the reader a single rhetorical question: Who could possibly think that a person is harmed when he requests and is sent an incomplete credit report, or is sent a suspicious notice informing him that he may be a designated drug trafficker or terrorist, or is not sent anything informing him of how to remove this inaccurate red flag? The answer is, of course, legion: Congress, the President, the jury, the District Court, the Ninth Circuit, and four Members of this Court. I respectfully dissent."

Legal Lesson Learned: Credit reporting companies need to improve their process of confirming that an individual is the same person as U.S. Treasury list. Likewise, Fire & EMS should give applicants adequate opportunity to correct any false information on their credit records.

See U.S. Treasury list for Special Designated Nationals And Blocked Persons List (SDN) Human Readable Lists

"As part of its enforcement efforts, OFAC publishes a list of individuals and companies owned or controlled by, or acting for or on behalf of, targeted countries. It also lists individuals, groups, and entities, such as terrorists and narcotics traffickers designated under programs that are not country-specific. Collectively, such individuals and companies are called "Specially Designated Nationals" or "SDNs." Their assets are blocked and U.S. persons are generally prohibited from dealing with them. View more information on Treasury's Sanctions Programs.

71. How Can I Get The OFAC Alert Off My Credit Report?
Answer

A consumer has the right under the Fair Credit Reporting Act (FCRA), 15 U.S.C. 1681 et seq., to request the removal of incorrect information on his/her credit report. To accomplish this, consumers should contact the credit reporting agency or bureau that issued the credit report. For more information on consumers' rights under the FCRA, visit the Federal Trade Commission's website or the Consumer Financial Protection Bureau at 855-411-2372.

Chap. 4 – Incident Command, incl. Training, Drones, High Tech
Chap. 5 – Emergency Vehicle Operations
Chap. 6 – Employment Litigation, incl. Work Comp, Disability
Chap. 7 – Sexual Harassment, incl. Pregnancy Discrimination, Gay Rights
Chap. 8 – Race / National Origin Discrimination
Chap. 9 – Americans With Disabilities Act
Chap. 10 – Family Medical Leave Act, incl. Military Leave
Chap. 11 – Fair Labor Standards Act, incl. Equal Pay Act

File: Chap. 12, Drug-Free Workplace

CO: MARIJUANA - 44 STATES ALLOW USE – U.S. SUPREME COURT JUSTICE THOMAS: FEDS ARE "HALF-IN, HALF OUT"

On June 28, 2021, in Standing Akimbo, LLC et al. v. United States, filed a dissent when the Court declined to hear appeal (requires 4 Justices to hear an appeal) of a medical marijuana dispensary in Colorado, that under Federal law cannot deduct cost of doing business from IRS taxes. His dissent pointed out that "36 States allow medicinal marijuana use and 18 of those States also allow recreational use."

"Once comprehensive, the Federal Government's current approach is a half-in, half-out regime that simultaneously tolerates and forbids local use of marijuana. This contradictory and unstable state of affairs strains basic principles of federalism and conceals traps for the unwary. ***A prohibition on intrastate use or cultivation of marijuana may no longer be necessary or proper to support the Federal Government's piecemeal approach."

Facts [from 10th Circuit decision, April 7, 2020:

"The Internal Revenue Service (IRS) is responsible to enforce the federal tax code against marijuana businesses operating legally under state law. This led to a civil audit of Peter Hermes, Kevin Desilet, Samantha Murphy, and John Murphy (collectively, the 'Taxpayers') to verify their tax liabilities for their medical-marijuana dispensary, Standing Akimbo, LLC. The IRS was investigating whether the Taxpayers had taken improper deductions for business expenses arising from a 'trade or business' that 'consists of trafficking in controlled substances.' 26 U.S.C. § 280E. But claiming to fear criminal prosecution, the Taxpayers declined to provide the audit information to the IRS. This left the IRS to seek the information elsewhere—it issued four summonses for plant reports, gross-sales reports and license information to the Colorado Department of Revenue's Marijuana Enforcement Division (the 'Enforcement Division'), which is the state entity responsible for regulating licensed marijuana sales.

In Colorado federal district court, the Taxpayers filed a petition to quash the summonses. The government moved to dismiss the petition and to enforce the summonses. The district court granted the motion to dismiss and ordered the summonses enforced. Exercising jurisdiction under 28 U.S.C. § 1291, we affirm."]

Legal Lesson Learned: Fire Departments should consider adopt policies that requires firefighters to disclose any prescription for medicinal marijuana use, and the duty restrictions for such firefighters.

Note: June 29, 2021: Mexico's supreme court decriminalizes recreational use of cannabis

Sept. 23, 2020: "Can Fire Departments Prohibit Firefighter Off-Duty Medical Marijuana Use?"

Feb. 5, 2020: "Marijuana in the Fire Service: Up in Smoke, Part II."

File: Chap. 13, EMS

CA: ENTERING HOME WITHOUT WARRANT – NOT FOR ARREST MINOR OFFENSE – OK FOR EMERGENGY MEDICAL

On June 23, 2021, in Arthur Gregory Lane v. California, the U.S. Supreme Court held (9 to 0) in opinion by Justice Elena Kagan that the Fourth Amendment ordinarily requires that police officers get a warrant before entering a home without permission. But important to Fire & EMS, an officer may make a warrantless entry when "the exigencies of the situation" create a

compelling law enforcement need. In this case, Mr. Lane was driving his vehicle with loud noise, and when State Patrol tried to pull him over near his home, he drove into his garage – where he was arrested for driving under influence and failure to stop. The Court rejected the State's argument that the pursuit of a suspected misdemeanant always qualifies as an exigent circumstance authorizing a warrantless home entry. The state trial court judge had denied defendant's motion to suppress, and this was upheld by California Court of Appeal; now the case will be sent back to California and the prosecutor will likely dismiss all charges.

"The flight of a suspected misdemeanant does not always justify a warrantless entry into a home. An officer must consider all the circumstances in a pursuit case to deter-mine whether there is a law enforcement emergency. On many occasions, the officer will have good reason to enter—to prevent imminent harms of violence, destruction of evidence, or escape from the home. But when the officer has time to get a warrant, he must do so—even though the misdemeanant fled.

***
One important exception is for exigent circumstances. It applies when 'the exigencies of the situation make the needs of law enforcement so compelling that [a] warrantless search is objectively reasonable.' King, 563 U. S., at 460 (internal quotation marks omitted). The exception enables law enforcement officers to handle 'emergenc[ies]'—situations presenting a 'compelling need for official action and no time to secure a warrant.' Riley, 573 U. S., at 402; Missouri v. McNeely, 569 U. S. 141, 149 (2013). Over the years, this Court has identified several such exigencies. An officer, for example, may 'enter a home without a warrant to render emergency assistance to an injured occupant[,] to protect an occupant from imminent injury,' or to ensure his own safety."

Justice Brett Kavanaugh's concurring opinion:
"Importantly, moreover, the Court's opinion does not disturb the long-settled rule that pursuit of a fleeing felon is itself an exigent circumstance justifying warrantless entry into a home. See United States v. Santana, 427 U. S. 38, 42–43 (1976); cf. Stanton v. Sims, 571 U. S. 3, 8, 9 (2013) (per curiam). In other words, the police may make a warrantless entry into the home of a fleeing felon regardless of whether other exigent circumstances are present."

Justice Clarence Thomas' concurring opinion:
"I also write to point out that even if the state courts on remand conclude that the officer's entry here was unlawful, the federal exclusionary rule does not require suppressing any evidence…. Establishing a violation of the Fourth Amendment, though, does not automatically entitle a criminal defendant to exclusion of evidence. Far from it."

Chief Justice John Roberts' concurring opinion:
"As our precedent makes clear, hot pursuit is not merely a setting in which other exigent circumstances justifying warrantless entry might emerge. It is itself an exigent circumstance. And we have never held that whether an officer may enter a home to complete an arrest turns on what the fleeing individual was suspected of doing before he took off, let alone whether that offense would later be charged as a misdemeanor or felony. It is the flight, not the underlying offense, that has always been understood to justify the general rule: 'Police officers may enter premises

without a warrant when they are in hot pursuit of a fleeing suspect.' Kentucky v. King, 563 U. S. 452, 460 (2011). The Court errs by departing from that well-established rule."

Legal Lesson Learned: Fire & EMS may continue to request police assistance to make a warrantless entry where there is a medical emergency.

File: Chap. 13, EMS

GA: POSSIBLE BID RIGGING - EMS CONTRACT - WIRETAP / SEARCH WARRANT ON ATTY – DA QUALIFIED IMMUNITY

On June 22, 2021, in Kevin A. Ross, Esq., Kevin Ross Public Affairs, LLC, The Law Practice of Kevin . Ross, LLC v. Robert James, Dekalb County District Attorney and William C. Nix, the U.S. Court of Appeals for 11th Circuit (Atlanta), held 3 to 0 (unpublished decision) that the trial court properly granted summary judgment to the DA and the DA's investigator in lawsuit by Ross alleging violation of his 4th Amendment rights (42 U.S.C. 1983). since they were both entitled to qualified immunity.

> "Kevin Ross is an attorney and political consultant who has managed several political campaigns, including Burrell Ellis's 2008 campaign for DeKalb County Chief Executive Office ('CEO'). Robert James, then the District Attorney for DeKalb County, Georgia, applied for and obtained a wiretap authorization to intercept and record Ross's telephone communications on the basis that there was probable cause to believe that Ross; Ellis, then CEO for DeKalb County; and others were committing 11 criminal offenses, including extortion, bribery, and '[c]onspiracy in restraint of free and open competition in transactions with state or political subdivision," i.e., bid rigging. Doc. 111-1 at 3. The application included an affidavit by William Nix, an investigator for the DeKalb County District Attorney's Office ('DA's Office'), setting forth factual allegations supporting the request for a wiretap.
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> About a month after the DA's Office received the wiretap authorization, it applied for and obtained a search warrant for Ross's home and office. The application included a supporting affidavit, also by Nix. The search warrant affidavit was largely identical to the wiretap affidavit, except it also included information obtained from the wiretap.
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> Ultimately, the investigation resulted in no charges against Ross.
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> A reasonable officer could conclude that these multiple conversations between Ross, Ellis, and Walton, the confidential source, indicated a tacit agreement to influence the bidding process for the EMS and PM Contracts. And Ellis made overt acts to further that goal by

attempting to persuade the EMS Contract selection committee to permit exceptions sought by Ross's client and placing two members, Alvarado and Saunders, on the selection committee for the PM Contract. This, among other information set out in the affidavits, could lead a reasonable officer to believe that Ross was engaged in a conspiracy to restrain free and open competition in violation of Ga. Code Ann. § 16-10-22(b).

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For the foregoing reasons, we conclude that James and Nix are entitled to qualified immunity from Ross's § 1983 suit. Thus, we affirm the district court's judgment."

Legal Lesson Learned: District attorneys and their investigators enjoy "qualified immunity" when conducting an investigation, even if no criminal charges are brought. Fire & EMS likewise enjoy qualified immunity when conducting their official duties in most states, <u>unless their actions constitute willful or wanton misconduct</u>.

For example, see Ohio Revised Code: Section 4765.49 | Emergency medical personnel and agencies - immunity.

(A) A first responder, emergency medical technician-basic, emergency medical technician-intermediate, or emergency medical technician-paramedic is not liable in damages in a civil action for injury, death, or loss to person or property resulting from the individual's administration of emergency medical services, unless the services are administered in a manner that constitutes willful or wanton misconduct.

File: Chap. 13, EMS

TX: COVID-19 VACCINATION – FEDERAL JUDGE: HOSPITAL NURSES IN TEXAS CAN BE REQUIRED TO GET THE SHOTS

On June 12, 2021, in Jennifer Bridges, et al. v. Houston Methodist Hospital, U.S. District Court Judge Lynn N. Hughes, dismissed a lawsuit filed by 100 nurses and others, challenging the Texas hospital system's requirement that 26,000 employees all needed to receive a COVID-19 vaccine as a condition of staying employed, with only a couple of narrow exemptions—based on a medical condition or a sincerely held religious belief.

"Texas law only protects employees from being terminated for refusing to commit an act carrying criminal penalties to the worker…. Receiving a COVID-19 vaccination is not an illegal act, and it carries no criminal penalties. [Bridges] is refusing to accept inoculation that, in the hospital's judgment, will make it safer for their workers and the patients in Methodist's care."

Legal Lesson Learned: Fire & EMS departments should consult with legal counsel regarding the law in your state.

See this June 15, 2021 article, "Mandatory Vaccination Policy Lawsuit Update: Nurses Take a Shot Against Hospital, But Judge Jabs Back."

Note: In Ohio, there is a "public policy exception" where an employer can be held liable for terminating an "at will" employee in violation of a clear public policy protected by federal or state law [such as firing employee who contacted OSHA, or for filing a workers comp claim]. **On June 22, 2021, an Ohio law firm recently wrote**: "It is unlikely based on current law that mandating COVID-19 vaccinations violates public policy in Ohio. But that is only under current law. As of this newsletter, pending Ohio legislation would ban vaccine requirements not just for COVID-19, but all vaccines."

Chap. 14 – Physical Fitness, incl. Light Duty
Chap. 15 – CISM, incl. Peer Support, Mental Health
Chap. 16 – Discipline, incl. Social Media

File: Chap. 16, Discipline

CA: UNION PRES. MEDICAL LEAVE BAD BACK - RAN 8-MILE RACE - FIRING TOO HARSH, RETALIATION – LIGHT DUTY

On June 16, 2021, in City of South Pasadena v. Public Employment Relations Board (Owen Cliff Snider), the California Supreme Court declined to hear the City's appeal; on Feb. 26, 2021 the Court of Appeals (3 to 0; unpublished decision), held for the firefighter, finding that while some discipline may have been appropriate, the Administrative Law Judge and the Public Employment Relations Board correctly held that firing was too harsh, and punishment appeared to be in retaliation for Union's filing an unfair labor charge when FD ordered the firefighter back to work on a city light duty policy which was not in Collective Bargaining Agreement.

> "Although we uphold PERB's finding that the City's decision to *terminate* Snider was a form of retaliation for the exercise of his rights to bargain over the light-duty policy, our conclusion does not imply that the City could not have subjected Snider to *some form* of discipline without running afoul of the MMBA."

Facts [from the Court of Appeals decision]:
"In October 2014, Snider injured his back while trying to lift a patient during an emergency call. Although Snider initially felt well enough to remain on duty, he soon afterwards suffered a severe back spasm that required him to visit the emergency room. He returned to work approximately one month later, after he had been placed on Injured on Duty (IOD) status (i.e., paid leave for an 'on-the-job' injury). IOD status is the City's terminology for temporary total disability status under Labor Code section 4850.

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Snider testified that he aggravated his back injury in December 2015 while he was observing a demonstration from another firefighter. He testified that standing still for extended time periods could cause his back to spasm and that he could not stand up the day after the demonstration. Snider's supervisor, Captain Chris Szenczi, instructed Snider to see his back doctor to assess his condition.

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Snider visited Dr. Costigan, the back specialist he had been seeing ever since he suffered his previous back injury. During the administrative proceedings, Snider testified that Dr. Costigan told him: 'I'll take you off work. Come back in six weeks. And when you start to feel better, increase your exercise.' Snider provided the paperwork he received from Dr. Costigan to the City and was placed on IOD status once again.

As was the case when Snider previously suffered on-the-job injuries, no one from the City expressly instructed Snider to limit his physical activities or to notify the City if his condition improved before his next appointment with Dr. Costigan, which was scheduled for February 2, 2016.

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> On Saturday, January 30, 2016, Snider and his wife participated in the Spartan Race, which is an approximately eight-mile run over varied terrain with obstacles. Snider's wife registered both of them for the event in October 2015, before Snider re-injured his back. Snider testified that he initially did not feel as though he could complete the race following his back injury, but eventually felt well enough to resume his regular activities at some point during his leave. After the race, Snider's wife posted photographs of herself from the race on a social media site, none of which featured Snider; Snider himself did not post any photographs from the race. The race sponsor later posted the finishing times for Snider and his wife on his wife's social media account.
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> On January 31, 2016, Captain Szenczi also participated in the Spartan Race with his wife; at that time, Szenczi was not aware that Snider had participated in the race too. That evening, Captain Szenczi's wife showed him online pictures of Snider's wife at the race, and Captain Szenczi thought that one of those photographs was oriented in an unusual way and suspected that Snider's wife may have intentionally edited Snider's face out of the picture.
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> Around late March or early April 2016, Snider tore the meniscus in his right knee, causing him to be placed on IOD status again. On or about April 27, 2016, Snider received messages from Department employees stating that Captain Szenczi was telling others that Snider could be fired for participating in the Spartan Race. In late April or early May 2016, Snider called Captain Szenczi, acknowledged running the Spartan Race, and asked Captain Szenczi whether he had told others that doing so would get him fired. Captain Szenczi denied making those comments. Captain Szenczi thereafter reported this

conversation to Deputy Chief Riddle, who in turn reported it to Chief Mario Rueda in early May 2016.

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Sometime after this conversation, Deputy Chief Riddle contacted Snider and directed him to report to the Department for a light-duty assignment. Snider agreed to report for duty but said he wanted to consult with legal counsel because there was no light-duty policy in the negotiated agreement between the City and the Association. While Snider was preparing to return to work, Deputy Chief Riddle called to tell him that he no longer needed to immediately report for duty.

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At Snider's direction, on May 11, 2016, counsel for the Association sent a letter to City Human Resources (HR) Manager Mariam Ko, asserting that the City had no established policy of assigning light duty to employees represented by the Association, and demanded that the City bargain over the negotiable effects of such a policy before implementation.

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On May 23, 2016, the City responded via letter, asserting that the decision to give light-duty assignments was not subject to bargaining.

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On June 5, 2016, in accordance with City protocol for investigations, Ko [City Human Resources (HR) Manager Mariam Ko] hired an outside investigator to determine whether Snider had engaged in misconduct…. At some point thereafter, the investigator produced a 35-page report of his findings regarding Snider's conduct. After reviewing that report, Chief Rueda concluded that Snider had engaged in misconduct.

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On June 9, 2016, at Snider's direction and on behalf of the Association, the Association's legal counsel filed a UPC alleging that the City violated the MMBA by refusing to bargain the effects of its decision to implement a light-duty policy. Ko, Deputy Chief Riddle, and Chief Rueda acknowledged knowing that the Association filed this UPC.

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On September 29, 2016, the PERB Office of the General Counsel issued a complaint alleging that the City began giving light-duty assignments to Department employees without first affording the Association the opportunity to bargain over the decision and/or the effects of that decision.

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On October 3, 2016, Chief Rueda issued Snider a ‘Notice of Intent to Terminate’ that accused Snider of dishonesty, abusing sick leave, violating City policies, and willful acts of bad faith. In particular, the Notice stated that Snider knew he was not supposed to be doing anything physically strenuous while on leave, he failed to notify his supervisors that

he felt well enough to return to duty earlier, and he attempted to hide his participation in the race.

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After the [pre-disciplinary] *Skelly* meeting [***Skelly v. State Personnel Board* (1975) 15 Cal. 3d 194**] , Chief Rueda sustained the charges against Snider, and the City issued a 'Notice of Termination, Accusation and Statement to Respondent' on December 2, 2016.

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[Administrative Law Judge]: On January 22 and 23, 2018, ALJ Eric Cu conducted a formal hearing in this matter…. In particular, the ALJ found that Snider established a prima facie case of retaliation because: (1) The fact that "the City took important steps towards terminating Snider's employment soon after significant developments in either the light duty dispute" or the UPC case relating thereto 'strongly support[ed] Snider's retaliation claim….' The ALJ recommended that PERB issue an order: barring the City from retaliating against Snider because of his protected activities; rescinding Snider's termination and reinstating him with payment for 'any financial losses suffered as a direct result of his termination, including back pay, augmented by interest at a rate of 7 percent per annum.'

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[PERB]: On January 30, 2020, PERB adopted the ALJ's proposed decision as its own, and also found that 'Snider engaged in protected activity by serving as Association President' and that 'the weight of the evidence suggests that Snider's termination was inconsistent with the City's historical use of a progressive discipline policy on both informal and formal levels.'

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[Court of Appeals]: For the reasons discussed below, we conclude that substantial evidence on the record considered as a whole supports PERB's finding that Snider established a prima facie case of retaliation, although we disagree with PERB's finding that the investigator's failure to interview certain witnesses suggests the City intended to retaliate against Snider for his protected activities. We also uphold PERB's rejection of the City's affirmative defense.

In contrast, because the undisputed facts demonstrate that Snider did misuse his leave time, we conclude that PERB abused its discretion in issuing a remedial order entirely preventing the City from considering that misconduct as a basis for discipline. Thus, we modify PERB's decision such that the City is no longer required to expunge from its records the investigative report and all references to that report and to the Notice of Intent to Terminate and the Notice of Termination."

Legal Lesson Learned: Fire Department policy on injury leave should clearly discuss limitations physical exercise and other strenuous activities; a light duty policy is an effective management tool to encourage return to full duty.

Calif. Supreme Court order: South Pasadena, City of v. Public Employment Relations Board (Snider) Case Number S268086

See June 21, 2021 article: "The City of South Pasadena illegally dismissed a firefighter"| Supreme Court denies review | The South Pasadena;

See IAFF: "Owen 'Cliff' Snider v. City of South Pasadena, California -
"In this Guardian Policy case, the City of South Pasadena terminated Local 3657 President Cliff Snider, in retaliation for his union leadership activities. President Snider was enforcing the right to bargain over changes in working conditions, first by requesting to bargain, and later by filing an Unfair Labor Practice (ULP) charge over the City's refusal to bargain. After an earlier back injury, and while he was on paid sick leave, Snider participated in an 8-mile 'Spartan Race.' Chief Mario Rueda terminated Snider on the asserted grounds of dishonesty, abuse of sick leave, bad faith, and failure to notify a supervisor that he felt well enough to return to duty."

Chap. 17 – Arbitration, incl. Mediation, Labor Relations
Chap. 18 – Legislation