College of Engineering & Applied Science

Open Learning Fire Service Program
2850 Campus Way Drive
745 Baldwin Hall
Cincinnati OH 45221-0071

Phone (513) 556-6583

SEPTEMBER 2021 – FIRE & EMS LAW Newsletter

[NEWSLETTER IS NOT PROVIDING LEGAL ADVICE.]

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

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

WATCH VIDEO: I serve on IAFC's Terrorism & Homeland Security Committee; D.C. Fire Chief John Donnelly has made an amazing video.
Sept. 2, 2021: DC - Jan. 6, 2021: Events at the U.S. Capitol as told by DC FEMS [VIDEO]

16 RECENT CASES REVIEWED

File: Chap. 1, American Legal System

U.S. SUPREME COURT: COVID-19 – CDC NOT AUTHORIZED BY CONGRESS TO STOP TENANTS FROM BEING EVICTED

On Aug. 26, 2021, in Alabama Association of Realtors, et al. v. Department of Health and Human Services, et al., the U.S. Supreme Court held (6 to 3) in a Per Curiam opinion (not signed by a single Justice) that the Centers For Disease Control under President Biden had no authority when it issued a memorandum to prohibit evictions from Aug. 3, 2021 to Oct. 3, 2021in states with counties that had very high COVID-19 rates. The CDC sought to extend the 2020 Congressional moratorium [issued during Trump Administration] which had expired in July, 2021, claiming the CDC had this power under the long-standing federal statute which gives CDC powers concerning fumigation, disinfection, sanitation, pest extermination, contaminated animals. The plaintiff Associations represent landlords in Alabama and Georgia, and they sued in U.S. District Court in D.C. and federal judge issued an injunction to stop CDC moratorium; the U.S. sought a stay in the U.S. Supreme Court, which denied the stay.

> "In March 2020, Congress passed the Coronavirus Aid, Relief, and Economic Security Act to alleviate burdens caused by the burgeoning COVID–19 pandemic. Pub. L. 116–136, 134 Stat. 281. Among other relief programs, the Act imposed a 120-day eviction moratorium for properties that participated in federal assistance programs or were subject to federally backed loans. §4024, id., at 492–494. When the eviction moratorium expired in July, Congress did not renew it.
>
> Concluding that further action was needed, the CDC decided to do what Congress had not. See 85 Fed. Reg. 55292 (2020). The new, administratively imposed moratorium went further than its statutory predecessor, covering all residential properties nationwide and imposing criminal penalties on violators.
>
> ***
>
> If a federally imposed eviction moratorium is to continue, Congress must specifically authorize it."

Facts:

> "Realtor associations and rental property managers in Alabama and Georgia sued to enjoin the CDC's moratorium. The U. S. District Court for the District of Columbia granted the plaintiffs summary judgment, holding that the CDC lacked statutory authority to impose the moratorium. Alabama Assn. of Realtors v. Department of Health and Human Servs., 2021 WL 1779282, *10 (May 5, 2021).
>
> ***
>
> The applicants not only have a substantial likelihood of success on the merits—it is difficult to imagine them losing. The Government contends that the first sentence of §361(a) gives the CDC broad authority to take whatever measures it deems necessary to control the spread of COVID–19, including issuing the moratorium. But the second sentence informs the grant of authority by illustrating the kinds of measures that could be necessary: inspection, fumigation, disinfection, sanitation, pest extermination, and destruction of contaminated animals and articles. These measures directly relate to

preventing the interstate spread of disease by identifying, isolating, and destroying the disease itself. The CDC's moratorium, on the other hand, relates to inter-state infection far more indirectly: If evictions occur, some subset of tenants might move from one State to another, and some subset of that group might do so while infected with COVID–19. See 86 Fed. Reg. 43248–43249. This downstream connection between eviction and the interstate spread of disease is markedly different from the direct targeting of disease that characterizes the measures identified in the statute. Reading both sentences together, rather than the first in isolation, it is a stretch to maintain that §361(a) gives the CDC the authority to impose this eviction moratorium."

Dissent [Justice Breyer, with Sotomayor, and Kagan]:

"First, it is far from 'demonstrably' clear that the CDC lacks the power to issue its modified moratorium order. The CDC's current order is substantially more tailored than its prior eviction moratorium, which automatically applied nationwide. Justified by the Delta-variant surge, the modified order targets only those regions currently experiencing sky-rocketing rates. 86 Fed. Reg. 43244, 43245, 43250 (2021).If a covered county 'no longer experiences substantial or high levels of community transmission,' the order 'will no longer apply' there. Id., at 43250.

***

Second, the balance of equities strongly favors leaving the stay in place. Applicants say they have lost 'thousands of dollars' in rental income. See Application 32. That in-jury is lessened by the moratorium order's directive that tenants have an obligation to make 'as close to the full rent payment' as possible. 86 Fed. Reg. 43245. And to compensate for the shortfall, Congress has appropriated more than $46.5 billion to help pay rent and rental arrears. See §501, 134 Stat. 2070–2078 (appropriating $25 billion); American Rescue Plan Act, 2021, Pub. L. 117–2, §3201(a)(1), 135 Stat. 54 (appropriating $21.5 billion more). It may, as applicants say, take time to get that money—and that is an injury."

Legal Lesson Learned: The Court's majority are obviously conservative; Congress can now act to implement a moratorium if it so chooses.

Note: Amicus Brief [twenty-two states and District of Columbia filed Amicus brief supporting the CDC memorandum.]

"Eviction protections have been key public health tools to slow the spread of the virus. They ensure individuals have a space to isolate, and they prevent vulnerable individuals from being forced out onto the street, into shelters, or into the homes of family or friends, potentially exposing themselves and others to the virus. Forty-four states—from Alabama to California and Hawaii to Montana—have implemented eviction protections of some sort during the pandemic."

See article (Aug. 26, 2021): "Supreme Court blocks Biden's COVID-19 eviction moratorium in a blow to renters."

File: Chap. 1, Homeland Security

U.S. SUPREME COURT: DEPORTATIONS BACK TO MEXICO - TX, MO. WIN INJUNCTION, TRUMP POLICY RESTARTED

On Aug. 24, 2021, in Biden, President of U.S. v. Texas & Missouri, the U.S. Supreme Court denied the U.S. Government's application to stay a nationwide injunction issued on Aug. 13, 2021 by Federal District Court Judge in Texas in a lawsuit filed by states of Texas and Missouri. U.S. District Court Judge Matthew J. Kacsmaryk, Northern District of Texas, held a one-day evidentiary hearing and found that President Biden's Secretary of Department of Homeland Security, in cancelling President Trump's 2018 Migrant Protection Protocols [which had deported 68,000 aliens by Dec. 31, 2020] "failed to consider the warnings by career DHS personnel that 'the suspension of the MPP along with other policies, would lead to a resurgence of illegal aliens attempting to illegally' cross the border."

The Supreme Court's order:

> BIDEN, PRESIDENT OF U.S., ET AL. V. TEXAS, ET AL. The application for a stay presented to Justice Alito and by him referred to the Court is denied. The applicants have failed to show a likelihood of success on the claim that the memorandum rescinding the Migrant Protection Protocols was not arbitrary and capricious… Our order denying the Government's request for a stay of the District Court injunction should not be read as affecting the construction of that injunction by the Court of Appeals. Justice Breyer, Justice Sotomayor, and Justice Kagan would grant the application.

Facts [from U.S. District Matthew J. Kacsmaryk decision]

> "Texas and Missouri have suffered injuries because of the increased numbers of aliens present in their states.
>
> ***
>
> [ALIENS GOING TO MISSOURI] Texas is a border state. But Missouri also faces an increased number of aliens due to the termination of MPP. Statistically, for every 1,000 aliens who remain unlawfully in the United States, fifty-six end up residing in Missouri.
>
> ***
>
> [DRIVERS LICENSES] As a result of the termination of MPP, some aliens who would have otherwise been enrolled in MPP are being released or paroled into the United States and will obtain Texas driver's licenses…. Each additional customer seeking a Texas driver's license imposes a cost on Texas…. Missouri likewise faces a cost of verifying lawful immigration status for each additional customer seeking a Missouri driver's license.
>
> ***
>
> [EDUCATION] Texas estimates that the average funding entitlement for 2021 will be $9,216 per student in attendance for an entire school year….For students qualifying for bilingual education services, it would cost Texas $11,432 for education per child for attendance for an entire school year. Id. The total costs to Texas (and Missouri) of providing public education for illegal alien children will rise in the future as the number of illegal alien children present in the State increases.

***

[HEALTH CARE] Texas funds three healthcare programs that require significant expenditures to cover illegal aliens: the Emergency Medicaid Program, the Family Violence Program, and the Texas Children's Health Insurance Program. App. 450. Texas is required by federal law to include illegal aliens in its Emergency Medicaid Program. 42 C.F.R. § 440.255(c). Texas also incurs costs for uncompensated care provided by state public hospital districts to illegal aliens….The total costs to the State will increase as the number of aliens within the state increases. Id. 51. Missouri is similarly situated.

***

[LAW ENFORCEMENT & CORRECTIONS] In one year alone, the Texas Department of Criminal Justice housed 8,951 illegal alien criminals for a total of 2,439,110 days at a cost of over $150 million, with less than $15 million reimbursed by the federal government…. "[T]o the extent the number of aliens in [Texas Department of Criminal Justice] custody increases, TDCJ's unreimbursed expenses will increase as well."

***

[HUMAN TRAFFICING] Some aliens who would have otherwise been enrolled in MPP are victimized by human traffickers in Texas…. Missouri is likewise a destination and transit State for human trafficking of migrants from Central America who have crossed the border illegally.

Nationwide Injunction:

"For the reason stated above, the Court finds that Plaintiffs have proven their APA and statutory claims by the preponderance of the evidence. Accordingly, it is ORDERED:

1. Defendants and all their respective officers, agents, servants, employees, attorneys, and other persons who are in active concert or participation with them are hereby PERMANENTLY ENJOINED and RESTRAINED from implementing or enforcing the June 1 Memorandum.

2. The June 1 Memorandum is VACATED in its entirety and REMANDED to DHS for further consideration.

3. Defendants are ORDERED to enforce and implement MPP in good faith until such a time as it has been lawfully rescinded in compliance with the APA and until such a time as the federal government has sufficient detention capacity to detain all aliens subject to mandatory detention under Section 1255 without releasing any aliens because of a lack of detention resources.

4. To ensure compliance with this order, starting September 15th, 2021, the Government must file with the Court on the 15th of each month, a report stating (1) the total monthly number of encounters at the southwest border; (2) the total monthly number of aliens expelled under Title 42, Section 1225, or under any other statute; (3) Defendants' total

detention capacity as well as current usage rate; (4) the total monthly number of "applicants for admission" under Section 1225; (5) the total monthly number of "applicants for admission" under Section 1225 paroled into the United States; and (6) the total monthly number of "applicants for admission" under Section 1225 released into the United States, paroled or otherwise.

5. This injunction is granted on a nationwide basis."

Legal Lesson Learned: A powerful win for the states of Texas and Missouri, and other states that are incurring costs from illegal aliens.

Note: The Administrative Procedures Act provides that "[t]he reviewing court shall . . . hold unlawful and set aside agency action, findings, and conclusions found to be . . . arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A).

See article: Aug. 25, 2021: "Supreme Court allows revival of Trump-era 'Remain in Mexico' asylum policy."

File: Chap. 1, American Legal System

OK: ARSON INVESTIGATORS OBTAINED ARREST WARRANT – NO LIABILITY WHEN FEDERAL ARSON CASE DROPPED

On Aug. 10, 2021, in David Anthony Ciempa v. City of Del City, Oklahoma, the U.S. Court of Appeals for the 10th Circuit (Denver, Colorado) held (3 to 0) that U.S. District Court properly dismissed the pro se [not represented by an attorney] lawsuit for "malicious prosecution" against Deputy Fire Chief Jeff Keester and police officer [Major] Zion Williams; an arrest warrant for arson had been obtained from a state judge based on probable cause, there were no false statements in warrant affidavit; the federal arson charges were dropped because of an uncooperative witness, not because arson defendant was innocent.

"In particular, the court said the criminal case was dismissed due to an uncooperative victim, not because Mr. Ciempa was actually innocent. *See id.* at 802-03 (explaining that to qualify as a favorable termination, a dismissal must indicate the accused's innocence or at least be inconsistent with guilt). It also noted that the state judge had determined there was probable cause for the arrest and prosecution, and that Mr. Ciempa could not show the investigators procured the warrant by knowingly or recklessly relying on false information. *See Sanchez v. Hartley*, 810 F.3d 750, 754 (10th Cir. 2016) (recognizing a plaintiff can establish a malicious prosecution constitutional violation by showing "officers . . . knowingly or recklessly rel[ied] on false information to institute legal process . . . result[ing] in an unreasonable seizure"). It further concluded Mr. Ciempa could not establish malice, which requires "a substantial showing of deliberate falsehood or reckless disregard for truth," *Snell v. Tunnell*, 920 F.2d 673, 698 (10th Cir. 1990). The

court therefore granted summary judgment based on qualified immunity. Mr. Ciempa appealed the malicious prosecution ruling."

Facts:

"In November 2015, Deputy Fire Chief Jeff Keester and Major Zion Williams ('the investigators') of the Del City, Oklahoma Fire Department were called to investigate a house fire. They suspected an accelerant or an incendiary device caused the fire. Easton Gibbs, an occupant of the home, reported that a loud crash awakened him. He went to the southeast bedroom, which was in flames, and saw a hole in the window. The investigators later recovered from that room the remnants of a bottle with a rag stuffed inside, which they believed was a Molotov cocktail. A forensics report could not rule out that the bottle had contained an accelerant.

The investigators learned that Mr. Ciempa had threatened Mr. Gibbs. They also learned from Donna Spegal, the grandmother of one of Mr. Ciempa's children, that on the night of the fire, Mr. Ciempa had confessed to starting the fire, had burns on his left hand, and bragged that he had 'burned Easton out,' ROA, Vol. 3 at 96. Ms. Spegal told Major Williams that she and her daughter were 'terrified' of Mr. Ciempa, *id.*, and Mr. Gibbs indicated that he, too, was 'afraid' of Mr. Ciempa, *id.* at 160.

Based on the investigation, Deputy Chief Keester and a detective prepared a warrant affidavit to arrest Mr. Ciempa. A state judge found probable cause. Mr. Ciempa was arrested and charged with First Degree Arson, but the case was dismissed due to an 'uncooperative victim,' *id.* at 152 (capitalization omitted).

***

The district court granted summary judgment to the investigators on the malicious prosecution claim because there was no evidence to support any of the elements, which require proof that '(1) the defendant caused the plaintiff's . . . prosecution; (2) the original action terminated in favor of the plaintiff; (3) no probable cause supported the original arrest . . . or prosecution; (4) the defendant acted with malice; and (5) the plaintiff sustained damages,' *Wilkins v. DeReyes*, 528 F.3d 790, 799 (10th Cir. 2008).

***

We affirm the district court's judgment.

Legal Lesson Learned: Arson investigators wisely obtained an arrest warrant based on probable cause.

File: Chap. 1, American Legal System

CA: FIRE MARSHAL FIRED – RETALIATION - JURY AWARDED HIM $4M – COURT: $1 MILLION & $100,000 OR NEW TRIAL

On July 1, 2021, in Jason Briley v. City of West Covina, the Court of Appeal of the State of California, Second Appellate District (Division Four), held (3 to 0) that the jury verdict in favor

of the former Fire Marshal for retaliation was affirmed; in June 2014 he complained that City Mgr. had approved building permit for a development before building plans passed fire inspection. He was fired Sept. 2015 after city investigated him for using profanity in speaking to an employee at Victoria Secret after a fire alarm, and again using profanity talking to employees at a CrossFit gym. On appeal, the city claimed he failed to exhaust his administrative remedy before filing lawsuit by not first appealing his firing to the City's Human Relations Commission; but trial court judge, and the Court of Appeals held that this would have been a waste of time since the HR Commission merely makes a recommendation to the same City Manager that fired him. However, Court of Appeals found $4 million jury verdict was excessive; several months after he was fired he was hired as Fire Marshall at City of Murrieta [resigned 10 months later] and testified he suffered little emotional damage.

> "On cross-examination, Briley confirmed he had experienced 'the gamut of emotions' anyone would experience upon being terminated. He further revealed that he had seen a counselor once or twice, but reported no mental health issues. The City's counsel noted that Briley had obtained a position as a fire marshal with the City of Murrieta subsequent to his termination and asked Briley if his decision to leave this position after about 10 months is what truly bothered him. In response, Briley admitted he had 'walked away' from this fire-service position, but claimed that what bothered him were West Covina's false allegations against him.
>
> ***
>
> Based on our review of the record, and in our collective experience, the jury [which awarded him $500,000 economic damages; $2 million past non-economic damages and $1.5 million in future non-economic damages], could have awarded Briley no more than $1 million for past noneconomic damages reflecting the distress, financial uncertainty, and sleep-related issues he experienced in the aftermath of his termination. We further conclude the jury could have awarded no more than $100,000 for Briley's future noneconomic damages, reflecting the largely diminished effects of his termination in the wake of the jury's verdict. While these amounts remain high in relation to the evidence of Briley's harm, we may not insert our own assessment for that of the jury; instead, we ask only what amount the jury could reasonably have awarded. (See Bigler-Engler, supra, 7 Cal.App.5th at 299.) Accordingly, we vacate the past and future noneconomic damages awards and remand for a new trial on those issues, unless Briley accepts a reduction of the awards to $1 million and $100,000, respectively. (See id., at 306.)"

Facts:

> "The case proceeded to trial, and the jury found for Briley and awarded him about $4 million, including $2 million in past noneconomic damages and $1.5 million in future noneconomic damages.
>
> We conclude that [City Manager] Whithorn's involvement in the underlying dispute, on one hand, and his expected role in deciding Briley's appeal, on the other, violated the requirements of due process and therefore excused Briley from proceeding with his administrative appeal [to City's Human Relations Commission]. We also find no reversible evidentiary error by the trial court.

***

We hold only that as a matter of due process, an official whose prior dealings with the employee have created substantial animosity and whose own conduct and character are central to the proceeding may not serve as a decisionmaker. Under the totality of the circumstances here, we conclude Briley was excused from exhausting the City's administrative appeal procedure.

***

However, we agree with the City that the $3.5 million noneconomic damages award -- comprising $2 million in past and $1.5 million in future noneconomic damages -- was so excessive as to suggest it resulted from passion or prejudice. We therefore vacate the awards for past and future noneconomic damages and remand for a new trial on these issues, unless Briley accepts a reduction of the awards to $1 million and $100,000, respectively. In all other respects, the judgment is affirmed."

Legal Lesson Learned: Retaliation claims can result in very large jury verdicts.

File: Chap. 1, American Legal System

U.S. SUPREME COURT: UNANIMOUS DECISION - SEARCH & SEIZURE DRUNK DRIVER UPHELD – COMMUNITY SAFETY

On June 1, 2021, in United States v. Cooley, the U.S. Supreme Court held (9 to 0) that the trial court judge improperly granted defense motion to suppress the meth found in the driver's truck, and reversed the 3-judges on the 9th Circuit (San Francisco) that found the search illegal. Justice Steven Breyer wrote the unanimous opinion of the court, which focused on the health and welfare of the Tribal police officer and the Indian reservation where the driver was pulled over.

"The second exception we have just quoted fits the present case, almost like a glove. The phrase speaks of the protection of the 'health or welfare of the tribe.' To deny a tribal police officer authority to search and detain for a reasonable time any person he or she believes may commit or has committed a crime would make it difficult for tribes to protect themselves against ongoing threats. Such threats may be posed by, for instance, non-Indian drunk drivers, transporters of contraband, or other criminal offenders operating on roads within the boundaries of a tribal reservation. As the Washington Supreme Court has noted, '[a]llowing a known drunk driver to get back in his or her car, careen off down the road, and possibly kill or injure Indians or non-Indians would certainly be detrimental to the health or welfare of the Tribe.'"State v. Schmuck, 121 Wash. 2d 373, 391, 850 P. 2d 1332, 1341, cert. denied, 510 U. S. 931 (1993).

***

Finally, we have doubts about the workability of the standards that the Ninth Circuit set out. Those standards require tribal officers first to determine whether a suspect is non-Indian and, if so, allow temporary detention only if the violation of law is 'apparent.' 919

F. 3d, at 1142. The first requirement, even if limited to asking a single question, would produce an incentive to lie. The second requirement—that the violation of law be 'apparent'—introduces a new standard into search and seizure law. Whether, or how, that standard would be met is not obvious."

Facts:

"Late at night in February 2016, Officer James Saylor of the Crow Police Department was driving east on United States Highway 212, a public right-of-way within the Crow Reservation, located within the State of Montana. Saylor saw a truck parked on the westbound side of the highway. Believing the occupants might need assistance, Saylor approached the truck and spoke to the driver, Joshua James Cooley. Saylor noticed that Cooley had 'watery, bloodshot eyes' and 'appeared to be non-native.' App. to Pet. for Cert. 95a. Saylor also noticed two semiautomatic rifles lying on the front seat. Eventually fearing violence, Saylor ordered Cooley out of the truck and conducted a pat down search. He called tribal and county officers for assistance. While waiting for the officers to arrive, Saylor returned to the truck. He saw a glass pipe and plastic bag that contained methamphetamine. The other officers, including an officer with the federal Bureau of Indian Affairs, then arrived. They directed Saylor to seize all contraband in plain view, leading him to discover more methamphetamine. Saylor took Cooley to the Crow Police Department where federal and local officers further questioned Cooley.

In April 2016, a federal grand jury indicted Cooley on drug and gun offenses. See 21 U. S. C. §841(a)(1); 18 U. S. C. §924(c)(1)(A). The District Court granted Cooley's motion to suppress the drug evidence that Saylor had seized. It reasoned that Saylor, as a Crow Tribe police officer, lacked the authority to investigate nonapparent violations of state or federal law by a non-Indian on a public right-of-way crossing the reservation.

The Government appealed. See 18 U. S. C. §3731. The Ninth Circuit affirmed the District Court's evidence-suppression determination. The Ninth Circuit panel wrote that tribes 'cannot exclude non-Indians from a state or federal highway' and 'lack the ancillary power to investigate non-Indians who are using such public rights-of-way.' 919 F. 3d 1135, 1141 (2019). It added that a tribal police officer nonetheless could stop (and hold for a reasonable time) a non-Indian suspect, but only if (1) the officer first tried to determine whether 'the person is an Indian,' and, if the person turns out to be a non-Indian, (2) it is 'apparent' that the person has violated state or federal law. Id., at 1142."

Legal Lesson Learned: Very helpful to have a unanimous opinion upholding a search and focused on the safety of the officer and the community he protects.

File: Chap. 3, Homeland Security

SC: MASS KILLING OF 9 AT CHARLESTON CHURCH – DEATH PENALTY – DOMESTIC TERROIST- NO INSANITY DEFENSE

On Aug. 25, 2021, in United States of America v. Dylann Storm Roof, three judges sitting on 4th Circuit panel [lead prosecutor in case is now 4th Circuit judge, so judges from three other Circuit heard the appeal: 8th Circuit Judge Duane Benton, Sixth Circuit Judge Ronald Lee Gilman and Third Circuit Judge Kent Jordan] held 3 to 0 (Per Curiam 149-page decision; not signed by one judge) that his conviction and death sentence is affirmed. Dr. Ballenger [Court appointed psychiatrist] noted that Roof compared himself to a terrorist who successfully murdered people as a 'purely political act." The psychiatrist found that Roof was competent to stand trial [with full IQ of 125] even if he did have some level of autism. Roof fired his court-appointed attorneys and represented himself at the trial and at the sentencing hearing.

> "No cold record or careful parsing of statutes and precedents can capture the full horror of what Roof did. His crimes qualify him for the harshest penalty that a just society can impose. We have reached that conclusion not as a product of emotion but through a thorough analytical process, which we have endeavored to detail here. In this, we have followed the example of the trial judge, who managed this difficult case with skill and compassion for all concerned, including Roof himself. For the reasons given, we will affirm."

Facts:

"In 2015, Dylann Storm Roof, then 21 years old, shot and killed nine members of the historic Emanuel African Methodist Episcopal Church ("Mother Emanuel") in Charleston, South Carolina during a meeting of a Wednesday night Bible-study group. A jury convicted him on nine counts of racially motivated hate crimes resulting in death, three counts of racially motivated hate crimes involving an attempt to kill, nine counts of obstructing religion resulting in death, three counts of obstructing religion involving an attempt to kill and use of a dangerous weapon, and nine counts of use of a firearm to commit murder during and in relation to a crime of violence. The jury unanimously recommended a death sentence on the religious-obstruction and firearm counts, and he was sentenced accordingly. He now appeals the convictions and sentence. Having jurisdiction under 28 U.S.C. § 1291 and 18 U.S.C. § 3595(a), we will affirm.

***

On June 17, 2015, twelve parishioners and church leaders of Mother Emanuel—all African Americans—gathered in the Fellowship Hall for their weekly Bible-study. Around 8:16 p.m., Roof entered the Fellowship Hall carrying a small bag that concealed a Glock .45 semi-automatic handgun and eight magazines loaded with eleven bullets each. The parishioners welcomed Roof, handing him a Bible and a study sheet. For the next 45 minutes, Roof worshipped with the parishioners. They stood and shut their eyes for closing prayer. Roof then took out his gun and started shooting. Parishioners dove under tables to hide. Roof continued shooting, reloading multiple times. After firing approximately seventy-four rounds, Roof reached one parishioner who was praying aloud. He told her to 'shut up' and then asked if he had shot her yet. (J.A. at 5017.) She said no. Roof responded, 'I'm going to leave you here to tell the story.' (J.A. at 5017.) Roof left the church around 9:06 p.m. When police arrived, seven of the twelve parishioners were dead. Two others died soon after. Roof killed Reverend Sharonda

Coleman-Singleton, Cynthia Hurd, Susie Jackson, Ethel Lee Lance, Reverend Depayne Middleton-Doctor, Reverend Clementa Pinckney, Tywanza Sanders, Reverend Daniel Simmons, Sr., and Reverend Myra Thompson.

***

After obtaining a written Miranda waiver, two FBI agents interviewed Roof for about two hours. He confessed: 'Well, I did, I killed them.' (J.A. at 4265.) He also laughingly stated, 'I am guilty. We all know I'm guilty.' (J.A. at 4308.) … He explained that he shot the parishioners with a Glock .45 handgun he had bought two months earlier.

Calling himself a 'white nationalist,' he told agents that he 'had to do it' because 'black people are killing white people every day' and 'rap[ing] white women.' (J.A. at 4269, 4282.) The agents asked whether he was trying to start a revolution. Roof responded, 'I'm not delusional, I don't think that[,] you know, that something like what I did could start a race war or anything like that.' (J.A. at 4284.) Later in the interview, however, he agreed that he was trying to 'bring . . . attention to this cause' and 'agitate race relations' because '[i]t causes friction and then, you know, it could lead to a race war.' (J.A. at 4301, 4329-30.) Roof explained that he targeted Charleston for his attack because of its historic importance and, after researching African American churches in Charleston on the internet, he chose to attack parishioners at Mother Emanuel because of the church's historic significance. At one point in the interview, he said, 'I regret doing it a little bit' because 'I didn't really know what I had, exactly what I've done.' (J.A. at 4302-03.) But his meticulous planning for the murder spree contradicts that statement.

***

Before trial, defense counsel gave notice of their intent to call an expert on Roof's mental health at the penalty phase. The government then obtained permission to have its own expert, Dr. Park Dietz, examine Roof. During a visit with Dr. Dietz, Roof learned for the first time that his lawyers intended to call an autism expert to say that Roof was on the autism spectrum. The news upset him. He underwent a "substantial mood change" and became "oppositional." (J.A. at 538, 544.) Soon after, he sent a letter to the prosecution, accusing his attorneys of misconduct. He said, "what my lawyers are planning to say in my defense is a lie and will be said without my consent or permission."

***

Dr. Ballenger [Court appointed psychiatrist] testified that Roof [with full-scale IQ of 125 and verbal IQ of 141] likely suffers from social anxiety disorder and schizoid personality disorder and that Roof might have some autistic spectrum traits but does not suffer from a psychotic process. Defense counsel pressed Dr. Ballenger on what the defense perceived to be his failure to fully consider the effects of Roof's alleged ASD [autism spectrum disorder]. Dr. Ballenger explained that the pertinence of any ASD diagnosis was already captured in his evaluation of Roof's mental state and ability to assist counsel as required under the competency standard."

***

[After his conviction, Court asked Dr. Ballenger to examine him again before Roof testified at the sentencing hearing.] Dr. Ballenger testified that mental illness did not control Roof's

decision-making; that Roof's decision to reject mental health evidence was instead a logical extension of his political and social beliefs. In support, Dr.
Ballenger noted that Roof compared himself to a terrorist who successfully murdered people as a 'purely political act.'"

Legal Lesson Learned: The defendant is first person in U.S. ever sentenced to death by a federal jury for a federal hate crime.

Note: Watch his videotaped confession to FBI agents (6/18/2015)
See Aug. 26, 2021 article on the decision: "Charleston killer Dylann Roof's death penalty upheld by federal appeals court."

Federal Hate Crime: 18 U.S.C. § 249(a)(1) provides:
(1) Offenses involving actual or perceived race, color, religion, or national origin.—
Whoever, whether or not acting under color of law, willfully causes bodily injury to any person or, through the use of fire, a firearm, a dangerous weapon, or an explosive or incendiary device, attempts to cause bodily injury to any person, because of the actual or perceived race, color, religion, or national origin of any person—
(A)
shall be imprisoned not more than 10 years, fined in accordance with this title, or both; and
(B) shall be imprisoned for any term of years or for life, fined in accordance with this title, or both, if—
(i)
death results from the offense; or
(ii)
the offense includes kidnapping or an attempt to kidnap, aggravated sexual abuse or an attempt to commit aggravated sexual abuse, or an attempt to kill.

File: Chap. 4, Incident Command

NY: STRUCTURE FIRE, TWO DEAD – INCIDENT COMMANDER NO LIABILITY - NO "SPECIAL DUTY" OWED RESIDENTS

On Aug. 26, 2021, in Christopher M. (Administrator of Estate of Heather M. and T.M.) v. Christopher J. Mineo, Assistant Fire Chief of Yorkville Fire Department, et al., the Supreme Court of New York, Fourth Department, held (5 to 0) that the lawsuit was properly dismissed concerning the Jan. 18, 2018 structure fire in upstairs apartment. Plaintiff alleged the Assistant Chief called other volunteer fire departments but was "grossly negligent" in not seeking mutual aid from the career Utica Fire Department located 6 miles from the scene.

"We affirm for reasons stated in the decision at Supreme Court. We write only to note that, inasmuch as plaintiff correctly concedes in his appellate brief that the amended complaint fails to allege the existence of a special duty, the court properly granted those parts of the motions of defendants Nicholas Morosco, individually, and as Assistant Fire Chief of the Yorkville Fire

Department, the Yorkville Fire and Hose Company, Inc., and the Village of Yorkville, seeking to dismiss the sixth cause of action, which is against Morosco for gross negligence…. "Without a [special] duty running directly to the injured person[,] there can be no liability in damages, however careless the conduct or foreseeable the harm" (*Lauer v City of New York*, 95 N.Y.2d 95, 100 [2000]). Thus, contrary to plaintiff's contention, even if we accept as true the allegation that Morosco was grossly negligent and we accord plaintiff the benefit of every possible favorable inference (*see Leon v Martinez*, 84 N.Y.2d 83, 87-88 [1994]), 'in the absence of a special duty there can be no liability' (*Rennix v Jackson*, 152 A.D.3d 551, 554 [2d Dept 2017])."
Facts [from April 24, 2018 article].
"Notice of claim filed in fatal Yorkville fire.

> A relative of the Yorkville woman and child killed in a fire earlier this year is taking legal action, claiming the village fire department did not do enough to save their lives.
> Heather Mishlanie and her 6-year-old daughter Taylor were killed after the Jan. 18 fire ravaged their upstairs apartment at 95 Campbell Ave.
>
> The Yorkville Fire Department, which had command, and the Whitesboro Fire Department were the initial responders, while 911 records show three others were called approximately seven minutes later. That did not include the Utica Fire Department, which has a fire station fewer than 2 miles from the Campbell Avenue residence.
>
> That decision to call only volunteer fire departments cost 'valuable' time and, ultimately, the lives of Heather and Taylor Mishlanie, according to the notice of claim from Christopher Mishlanie, who is Taylor Mishlanie's father and Heather Mishlanie's ex-husband.
>
> 'If Utica was called and allowed access into that building, we could've had different results here," said attorney David Longeretta, who is representing Christopher Mishlanie.'"

Legal Lesson Learned: In the absence of a "special duty" [such as EMS treating a patient], the Assistant Fire Chief and his fire department and village enjoy immunity from liability.

> Note: Watch the Oral Argument before the Justices (May 27, 2021) (Links to an external site.)

File: Chap. 6, Employment Litigation

OH: BATTALION CHIEF's 1st AMENDMENT RIGHTS - NEW CHIEF LACKED EMS CE HOURS – LAWSUIT PROCEED

On Sept. 1, 2021, in Sean DeCrane v. Edward Eckart, in his official and individual capacities; City of Cleveland, the U.S. Court of Appeals for the 6th Circuit (Cincinnati) held (3 to 0) that a retired Cleveland Battalion Chief's lawsuit may proceed against the City and the Assistant Safety

Director for retaliation, and trial court correctly denied the Safety Director's motion for summary judgment since he does not enjoy qualified immunity. The Battalion Chief was a candidate for Fire Chief, and when not selected, he warned the city that the new Fire Chief [Daryl McGinnis, who later was suspended and then retired], lacked continuing education hours for his EMT certificate. Someone in the Training Division [not DeCrane] then leaked to the Press about the new Fire Chief's lack of CE hours, and Sean DeCrane claims retaliation started against him.

> "Someone in the City of Cleveland's fire department leaked embarrassing information to the media about its chief's insufficient training hours. Sean DeCrane, the director of the Fire Training Academy, was not that person. But, according to DeCrane, Edward Eckart thought he was. DeCrane alleges that Eckart facilitated several harmful personnel actions against him because of this mistaken belief—all in violation of the First Amendment. Eckart's response? He argues that the First Amendment does not protect speech made as part of an employee's government job, see Garcetti v. Ceballos, 547 U.S. 410, 421–22 (2006), and that DeCrane would have leaked the information pursuant to his job duties as the training director. The district court denied Eckart qualified immunity on this argument, holding that our precedent clearly established that DeCrane would have tipped off the media as a private citizen rather than a public employee. We agree and affirm this part of the court's decision. We dismiss Eckart's other two arguments for lack of jurisdiction in this appeal's interlocutory posture."

Facts:

> "DeCrane started as a firefighter with the City of Cleveland's Division of Fire in the 1990s, eventually working his way up to battalion chief. In August 2012, DeCrane became the director of training at the city's Fire Training Academy.
>
> The same year, DeCrane applied to be the chief of the Division of Fire. He went through a two-step interview process—an interview with a panel followed by one with the mayor. The panel included Eckart, an assistant director in the Department of Public Safety that oversees the Division of Fire. After the panel rated DeCrane second behind Daryl McGinnis, the mayor chose McGinnis to be the next chief. In early 2013, Eckart informed DeCrane of the decision. During their call, DeCrane said he was surprised by this choice. He told Eckart that McGinnis had fallen behind in his required continuing-education hours. When confronted with this claim, McGinnis assured Eckart that his training was up to snuff.
>
> McGinnis was lying. Someone tipped off the media about McGinnis's deficient training. Six months after his promotion, a reporter asked for his training records. McGinnis then came clean that his training was, in fact, inadequate. The city put him on leave the next month; he resigned a day or two later. The ensuing media coverage reflected poorly on the city.
>
> DeCrane did not leak the tip about McGinnis's deficient training, which was an open secret in the Division of Fire. According to DeCrane, however, Eckart mistakenly believed that he was the leak's source. DeCrane contends that Eckart (among others) subjected him to a three-year campaign of retaliation for this misperceived leak. DeCrane

was not disciplined or demoted. But he says that he endured four types of retaliatory actions.

***

1. Lack of Promotions. DeCrane alleges that he received no further promotions because of the mistaken belief that he was the leaker. Chief McGinnis's abrupt departure left a vacancy at the top. Although DeCrane applied for the position, Patrick Kelly began serving as the interim chief in August 2013. Kelly received the promotion even though DeCrane's interview score from a few months earlier had been higher. In late 2013, DeCrane interviewed to be the permanent chief, but Kelly received that appointment too.

DeCrane was next passed over for assistant chief in early 2015. A panel ranked him last of eleven candidates. In May 2015, DeCrane confronted Eckart about his lack of promotions. When DeCrane suggested that Eckart thought that he had disclosed McGinnis's training deficiencies to the media nearly two years earlier, Eckart allegedly slammed his fist on a table and shouted '[y]ou have to admit it's pretty coincidental' that the leak occurred a few months after DeCrane alerted him of the issue. DeCrane Dep., R.145, Page 260. (Eckart disputes this account.)

Chief Kelly resigned later that year. DeCrane interviewed to be the interim chief. Angelo Calvillo was appointed instead. DeCrane was passed over a final time when the city named Calvillo the permanent chief in April 2016.

2. Misconduct Charges. DeCrane next alleges that he faced unfounded misconduct charges because of the mistaken belief that he leaked McGinnis's training deficiencies. In January 2015, a firefighter named Larry Moore filed a complaint alleging that, on DeCrane's orders, a captain asked him to record Training Academy information inaccurately. Eckart directed the Office of Integrity Control, Compliance, and Employee Accountability (which goes by 'OIC') to investigate the complaint. He tasked the OIC with reviewing not just Moore's specific allegations but also the Training Academy's general recordkeeping practices. The OIC recommended that the city bring charges against DeCrane (among others) for the wrongdoing alleged by Moore and the failure to keep accurate records. Yet, after the OIC interviewed DeCrane in October 2015, Jim Votypka, the OIC head, informed Eckart that Moore's allegations of intentional wrongdoing 'could not be substantiated.' Mem., R.139-17, PageID 9309. DeCrane was nevertheless brought in for a second interview (an unusual occurrence) about two months later in December 2015. Eckart questioned DeCrane about McGinnis: 'How/why did you know Daryl McGinnis was deficient at continuing education for EMT?' Eckart Dep., R.140, PageID 9641.

The same month as this interview, state auditors reviewed the Training Academy's records and concluded that they were "exceptionally well kept and complete." Review, R.147-19, PageID 11693. Given the Academy's history of sloppy recordkeeping, this finding came as good news. A short time later, Votypka told Eckart that the Academy's recordkeeping was 'now efficient, organized and in keeping with a professional organization.' Mem., R.139-18, PageID 9320. Rather than dismiss the charges against

DeCrane, however, Eckart sat on them. He did not notify DeCrane of their dismissal until December 2016, a year after the favorable audit.

3. Other Academy Issues. DeCrane next suggests that the city undermined his work at the Training Academy in retaliation for the alleged leak of McGinnis's deficient training. After news broke of the issue in August 2013, the mayor ordered an audit of all training records for all firefighters. On the day of the order, a group that included Eckart seized the Academy's records. The city had never before confiscated records in such dramatic fashion. Despite requests that the records be returned, the Academy also did not receive them back for months. DeCrane claims that the seizure slowed his efforts to improve the Academy's poor recordkeeping.

In 2014, the city also tried (but failed) to outsource firefighter training to a local college. Eckart initiated and oversaw that process. According to a declaration from Chief Kelly, Eckart offered to drop the outsourcing efforts if Kelly replaced DeCrane as the Training Academy's director. (Kelly disputed his own account in a second declaration, but we must resolve this conflict in DeCrane's favor.)

4. Last-Day Event. DeCrane alleges a final retirement-related slight tied to the belief that he was the leaker. When he retired from the Division of Fire in September 2016, his coworkers threw him the standard last-day party. Calvillo, who by then was the chief, had a policy requiring certain events to receive prior approval. DeCrane's party was shut down because it purportedly did not comply with this policy.

***

A First Amendment claim requires DeCrane to identify protected speech. See Rudd, 977 F.3d at 513. DeCrane faces what might look like an obvious problem in this regard: he did not engage in the media leak that he claims to be protected. Instead, he alleges that Eckart wrongly believed that he was the leaker. Do public employees have a right not to be disciplined for perceived speech that they do not engage in? The Supreme Court recently answered 'yes.' If an official punishes an employee for speech protected by the First Amendment, the employee may sue under § 1983 even if the official made a mistake about the speaker's identity. See Heffernan v. City of Paterson, 136 S. Ct. 1412, 1418 (2016); see also Dye v. Off. of Racing Comm'n, 702 F.3d 286, 299–300 (6th Cir. 2012).

***

We close by reiterating our ruling's narrow scope. Eckart made just one argument as to why the media leak was not protected speech: because it would have fallen within DeCrane's job duties. Eckart did not argue that he could reasonably believe that he could discipline employees for violating a seemingly neutral policy banning unauthorized speech to the media. Cf. Heffernan, 136 S. Ct. at 1419. Nor did he ask us to consider the circumstances in which a public employer may have such a media policy or the manner in which to analyze this constitutional question. We thus do not consider these issues; we resolve only the Garcetti argument presented to us."

Legal Lesson Learned: Important decision. While firefighters and police officers only have "limited" First Amendment rights to post information on social media concerning internal FD matters, but if a city official retaliates against an employee for speech protected by the First Amendment, the employee may sue even if the official *incorrectly* believed the employee had leaked information to the press.

> Note: See Sept. 2, 2021 article, "Federal appellate court upholds First Amendment case brought by retired Cleveland battalion chief."
> See Aug. 4, 2013 article, "Cleveland Fire Chief Daryl McGinnis retires two weeks after being relieved of duties." "A city review of McGinnis' training records revealed that between 2009-12 he had completed only 22 of the required 40 hours of continuing education. The city reported the information a week after The Plain Dealer asked to review his training records."

File: Chap. 6, Employment Litigation

MD: BALTIMORE – PENSION 20 YEARS TO 25 YEARS – COLA – BUT CITY MUST PAY $31 MILLION PRIOR RETIREES

On Aug. 16, 2021, in Robert F. Cherry, Jr. et al. v. Mayor and City Council of Baltimore City, the Court of Appeals of Maryland, held (7 to 0) in a class action that the city made "reasonable and necessary prospective changes" to protect the retirement plan for current firefighters and police officers. "Most notably, it replaced a variable post-retirement cost-of-living adjustment that was based entirely on the investment performance of Plan assets with a guaranteed, tiered cost-of-living adjustment that is not market-driven." Service time was also expanded.

> "Over the course of time, governing bodies of large cities face many challenges. One such challenge that some cities and other local governments may confront is how to change a public pension plan that is actuarially unsound. Often, the public employees who participate in these plans are represented by unions that register legitimate objections to proposed modifications. Taking such action in the face of opposition by public employees can be difficult politically. The challenge is magnified when the city is in dire financial straits. In such a situation, the city may have to choose between the lesser of two evils: change the plan without the consent, and to the consternation, of employees who have devoted their careers to public service; or keep the plan as is and put the city deeper into debt, perhaps even risking financial ruin. In 2010, Baltimore City faced this choice.

The record makes clear that the City took no pleasure in modifying the Plan with the enactment of Ordinance 10-306. The City was faced with a lose-lose proposition: either change the terms of the Plan and incur the wrath of its members, or allow the unsustainable Plan eventually to consume itself from within, harming the Plan members and all City residents. The City opted for the former approach. As to the Active Sub-class, Ordinance 10-306's changes made reasonable and necessary prospective changes. Thus, the City did not breach its contract with the Active Sub-class. However, the Ordinance retrospectively divested Retired and Retirement-Eligible members of the benefits they had earned by reaching Service Retirement

eligibility. The City breached its contract with those Sub-classes and is liable for damages to the members as calculated and ordered by the circuit court."

Facts:

> "After a bench trial, the circuit court ruled that the City breached its contract with the Retired and Retirement-Eligible Sub-classes, finding that Ordinance 10-306 retrospectively divested the members of those sub-classes of benefits they had earned. The court awarded more than $30 million in damages to members of the Retired and Retirement-Eligible Sub-classes. However, the circuit court found no breach of the City's contract with the Active Sub-class, ruling that, as to the Active members, Ordinance 10-306 did not affect vested benefits, but rather made permissible prospective changes to the Plan. Finding no factual or legal errors in the circuit court's rulings, we affirm its judgment in all respects.
>
> ***
>
> On January 2, 2018, the circuit court, on cross-motions for summary judgment, ruled that the City breached its contract with the Retired Sub-class and Retirement-Eligible Sub-class members by removing the Variable Benefit feature of the Plan and replacing it with an age-tiered COLA, and that a trial was necessary to calculate the damages suffered by these Plan members. The circuit court based its ruling on its determination that members of the Retired and Retirement-Eligible Sub-classes, having satisfied all of the contractual conditions precedent to receipt of benefits under the Plan prior to the adoption of Ordinance 10-306, held vested rights to Plan benefits that the City could not lawfully unilaterally diminish or impair.
>
> ***
>
> With respect to the Active Sub-class, the circuit court ruled that, under City of Frederick v. Quinn, 35 Md. App. 626 (1977), the City had the power to unilaterally modify the terms of the Plan, including the benefits provided, so long as (i) such modifications were prospective and not retrospective and (ii) reasonable. The court further concluded that, as to the Active Sub-class, the modifications were prospective because members of the Active Sub-class had not yet fulfilled the conditions precedent to be eligible to receive benefits under the pre-10-306 structure. Therefore, the Active members did not have a vested right to receive the Variable Benefit when they reached retirement eligibility. The circuit court concluded that a trial would be necessary to determine whether Ordinance 10-306's modifications, as to the Active Sub-class, were reasonable.
>
> ***
>
> As discussed below, we agree with the circuit court as to both conclusions."

Legal Lesson Learned: Changing retirement plans can be painful and impact morale of current employees, but may be lawful under state laws.

> Note: See Aug. 16, 2021 article, "Baltimore police and fire unions frustrated by appeals court ruling upholding city's right to raise retirement age."

> "The Court of Appeals ruling affirmed the lower court's computation of $31 million in damages to retirees who had already earned their pensions…. The lawsuit came after the city, facing a staggering budget shortfall following the 2008 financial crises, changed its pension plan to require police and firefighters to serve 25 years instead of 20 in order to retire and get benefits."

File: Chap. 7, Sexual Harassment

NB: FEMALE FF - DENIED "OUTSIDE" INVESTIGATION BY COURT - CAPTAIN NEVER ABANDONED CREW

On Aug. 16, 2021, in Amanda Benson v. City of Lincoln, Shawn Mahler, et al., Senior District Judge Richard G. Kopf, U.S. District Court for District of Nebraska, who is presiding over plaintiff's pending lawsuit claiming sexual harassment over the years by Captain Shawn Mahler denied the plaintiff's request for a preliminary injunction and hearing. The judge denied her three requests: "(1) order the City of Lincoln to immediately initiate disciplinary proceedings against Mahler; (2) enjoin Mahler from assignment/dispatch to any fire scene during the pendency of disciplinary proceedings; and (3) appoint an independent, third-party investigator to investigate Plaintiff's complaint about Mahler's actions at the recent warehouse fire." The judge found that no firefighter or officer at that scene of the warehouse fire confirmed her allegation that Captain Mahler had "abandoned" her and no one reported any safety concerns to the Safety Officer. Federal courts are not "super-personnel departments."

"The relief requested in Plaintiff's Motion is not to remedy discriminatory employment practices, but to impose directives upon LFR regarding whom it should discipline, whom it should send to fire scenes, and whom to investigate—issues in which federal courts should not be involved…. *See Gardner v. Wal-Mart Stores, Inc.*, 2 F.4th 745, 748-49 (8th Cir. 2021) (federal courts are not super-personnel departments who reexamine an employer's business decisions).

***

The evidence shows that, with the exception of Plaintiff, no person on Mahler's and Plaintiff's crew, nor the Incident Commander or the Safety Officer, believed that Mahler was a Ventilation Group Supervisor, that Mahler abandoned Plaintiff and her crew in a dangerous situation, or that Mahler was duty-bound to direct or supervise Plaintiff and her crew. In short, there is no evidence that Plaintiff and Mahler were anything more than peers in the incident at issue. The court declines to grant an injunction against Mahler for failing to direct, supervise, and protect when he was under no duty to do so. The equities of this situation simply do not warrant preliminary injunctive relief."

Facts:

> "1. Plaintiff is a Firefighter/EMT for Lincoln Fire & Rescue ("LFR"). She has served in that role since July 2013. (Filing 114-1, Plaintiff's Aff. ¶ 2 (hereinafter "Plaintiff's Aff.").)

2. Shawn Mahler is named as an individual defendant, and Plaintiff's Third Amended Complaint contains numerous allegations of discriminatory and retaliatory conduct by Mahler over the past several years. (Filing 94, Third Amended Complaint.)

3. Mahler works as a Captain at Fire Station No. 8. (Plaintiff's Aff. ¶ 3.) Plaintiff is assigned to Fire Station No. 1. (Plaintiff's Aff. ¶ 2.) Regardless of their assignment to different stations, when both of their stations report to the same fire or accident scene, Plaintiff can end up being under Mahler's supervision. This can occur multiple times a day or week. (Plaintiff's Aff. ¶ 3.)

4. On April 26, 2021—four days after Plaintiff had reported Mahler for retaliatory behavior when he allegedly disparaged her to another firefighter— Plaintiff and Mahler were both dispatched to a cardboard storage warehouse fire in Lincoln, Nebraska.

***

9. At the scene, Truck 8 (Mahler's crew), was assigned to ventilation tasks after working on cutting the power to the warehouse.

***

10. At this point, Plaintiff's crew (Truck 1) had already safely entered and exited the warehouse on their own. Plaintiff then asked the IC if he would like Truck 1 to assist with ventilation. The IC replied, "Yeah, if you can—if you can hook up with Truck 8, you can assist with ventilation getting one of those [overhead] doors open."

***

12. After reviewing the audio recording of the incident, LFR Chief Engler concluded:

> [I]t is indisputable that Captain Mahler and Acting Captain Benson were operating in a peer capacity at the Incident. The ventilation task consisted of opening the overhead door. Once the overhead door was open, there was no ongoing assignment to ventilate.
> . . . .
> Acting Captain Benson, acting as a supervisor at the Incident, had the same expectations and rank as all other Captains at the Incident, was expected to follow safety guidelines and policies, and had a responsibility to keep her crew safe.

***

14. No members of Plaintiff's or Mahler's crew considered any action by Mahler to be abandoning them in an environment immediately dangerous to life or health. (Filing 132-3, Roberts Dec. ¶ 12; Filing 132-4, Hurley Dec. ¶ 11; Filing 132-5, Borchers Dec. ¶ 12; Filing 132-6, Dyer Dec. ¶ 12; Filing 132-7, Love Dec. ¶ 12.) Plaintiff's crew was able to navigate and enter and exit the warehouse multiple times through the same door without danger, and her crew members had no immediate concerns regarding their own safety or the safety of their crew. Plaintiff's crew believed that visibility and safety conditions in the warehouse continued to improve as time went on in response to the fire-suppression tasks performed by the various LFR crews. (Filing 132-3, Roberts Dec. ¶ 14; Filing 132-4, Hurley Dec. ¶ 13.) Battalion Chief Smith also observed the crews at the incident enter

and exit without danger. As Safety Officer, he had no immediate concerns regarding the safety of the crews at the incident and observed conditions improve as well. (Filing 132-2, Smith Dec. ¶ 12.).

15. As the Safety Officer, Smith always makes contact with all crews once they exit a structure. He made contact with Plaintiff's Truck 1 crew outside of the warehouse and checked to see if there were any injuries and that they were all right. Plaintiff reported everything was fine and reported no issues. (Filing 132-2, Smith Dec. ¶ 13.)

16. If any Captain felt that the environment at the incident was putting any of their crew in jeopardy, then that Captain had the responsibility to safely exit the structure with the crew and immediately contact the IC under LFR management policies or reference sources. (Filing 132-2, Smith Dec. ¶ 14; Filing 132-3, Roberts Dec. ¶ 15; Filing 132-4, Hurley Dec. ¶ 14; Filing 132-5, Borchers Dec. ¶ 16; Filing 132-6, Dyer Dec. ¶ 16; Filing 132-7, Love Dec. ¶ 15.) Following the incident, LFR Command fielded no complaints or safety concerns about Mahler from any personnel at the incident other than Plaintiff. (Filing 132-1, Engler Dec. ¶ 22.)

***

To the extent Plaintiff requests that the court enjoin Mahler's retaliatory or discriminatory conduct, Plaintiff has failed to show that Mahler engaged in any such conduct in this instance. The evidence shows that, with the exception of Plaintiff, no person on Mahler's and Plaintiff's crew, nor the Incident Commander or the Safety Officer, believed that Mahler was a Ventilation Group Supervisor, that Mahler abandoned Plaintiff and her crew in a dangerous situation, or that Mahler was duty-bound to direct or supervise Plaintiff and her crew. In short, there is no evidence that Plaintiff and Mahler were anything more than peers in the incident at issue."

Legal Lesson Learned: Federal courts will issue injunctions only when there is a threat of "irreparable harm."

Note: See Aug. 20, 2021 article: "Federal judge denies request for injunction, independent review in firefighter's lawsuit."

> "In 2018, Benson sued, alleging that the city turned a blind eye to complaints about a hostile work environment, exonerated employees who contributed to it and failed to take steps to fix it. The lawsuit followed two others by then-Capts. Brian Giles and Troy Hurd, alleging they faced retaliation for reporting harassment of female firefighters. In 2019, a federal jury awarded Hurd $1.1 million. The judgment later was reduced by a judge, and the city agreed to pay Hurd $600,000 to avoid a second trial."

File: Chap. 7, Sexual Harassment

UT: FEMALE BATTALION CHIEF – DEMOTED, TERMINATED – SEXIST COMMENTS SUPERIORS - LAWSUIT MAY PROCEED

On Aug. 10, 2021, in Martha Ellis v. Salt Lake City Corp, et al., U.S. District Court judge Jill N. Parrish granted plaintiff's motion to reinstate her Equal Protection claim based on her 2016 demotion from Battalion Chief / Fire Marshal to Captain, and termination on March 17, 2017. The judge referenced her 22-year career with Salt Lake City Fire Department, the first and only female to hold rank of chief officer, and cited numerous offensive comments, including her immediate Supervisor [Deputy Chief] who allegedly "suggested that Ellis 'throw tampons' at her employees if they got 'whiney' and referred to other women in the Fire Department as 'bitches' and called them 'bitchy.'"

> "Here, Ellis has included sufficient factual allegations in her Complaint to state a plausible prima facie case of discriminatory demotion. First, she is a woman and is therefore within a protected group. Second, she alleges that she was adversely affected by the demotion because she lost rank and her pay was reduced. *See* ECF No. 54 at ¶131. Third, she alleges that she was qualified for the position from which she was demoted because she had held the position for seven years, had obtained postgraduate education, and had an exemplary employment record, including having won various awards. *See id.* at ¶¶ 20-26. Finally, it can be reasonably inferred from the Complaint that the City did not eliminate the position after Ellis was demoted from it. This is because Ellis alleges that the city improperly failed to reinstate her to her former position even after the Civil Service Commission overturned her demotion. *See id.* at ¶¶ 176-178. Accordingly, the court reinstates Ellis's Section 1983 claim for discriminatory demotion."

Facts:

> "Ellis resides in Salt Lake County, Utah. She had an exemplary career as a firefighter. She was employed by the Salt Lake City Fire Department ('SLCFD' or 'Fire Department') for twenty-two years until Defendant Salt Lake City Corp. ('the City') terminated her employment on or about March 17, 2017. Ellis served as a Battalion Chief for seven years, from May 7, 2009 to May 2016. As Battalion Chief, Ellis held the position of Fire Marshall from May 7, 2009 through October 17, 2014. She then held the position of Division Chief of Logistics and Emergency Manager and Fire Intelligence Liaison Officer from October 2014 to May 2016. Ellis was the first and only woman to attain the rank of chief officer with the SLCFD. She was also the most decorated female in the Fire Department, receiving a Golden Spanner Award in 1996, a Chief's Certificate of Merit in 2005 and the Chief's Recognition Medal in 2011. Ellis holds a Master's Degree from the Naval Postgraduate School and earned a fellowship to Harvard University's Senior Executives in State and Local Government Program.
>
> ***
>
> In 2009, when Ellis was ranked Battalion Chief and held the position of Fire Marshal, Ellis applied for a Deputy Chief position, which was just one rank above Battalion Chief. Fire Chief Kurt Cook ("Cook" or "Chief Cook") passed her over for the promotion. Instead Defendants Karl Lieb ("Lieb") and Brian Dale ("Dale"), fellow SLCFD Battalion Chiefs and both men, were promoted. Ellis complained to Chief Cook because she felt

they were less qualified than she. Chief Cook responded that he planned to elevate her position, the Fire Marshal position, to an executive position if he could find funding for a third Deputy Chief position. He then appointed Ellis to the Executive Team. However, when Ellis applied for the third Deputy Chief position in 2012, she was not promoted. Instead, Cook promoted Dan Walker, a less-qualified male co-worker, over Ellis. Ellis complained to Chief Cook, who later admitted that he had decided to promote Walker over Ellis before the candidate interviews had been conducted. Ellis reported the discrimination to Melissa Green ("Green"), the City's Equal Employment Opportunity Program Manager in April 2012. The Deputy Chief position was then terminated and replaced with an equivalent position titled the Assistant Chief of Operations. The City chose Battalion Chief McCarty ("McCarty") over Ellis to fill the position. McCarty was sworn in on January 10, 2014.

***

On or about November 21, 2013, Chief Cook assigned Dale as Ellis's supervisor. The following month Dale held an 'expectations meeting' with Ellis. He gave no indication that her job performance was in question, but suggested that she had been too aggressive in an email to the Department Head of Engineering and that she should not communicate to Chief Cook directly, but needed to communicate through him or Lieb. No other Battalion Chiefs, all men, were subject to the same policy. Also during that meeting, Dale made several derogatory comments. Dale suggested that Ellis 'throw tampons' at her employees if they got 'whiney'; Dale referred to other women in the Fire Department as 'bitches' and called them 'bitchy.'

***

In September 2014, Ellis applied for a position as the Assistant Chief of Administration. Again, SLCFD passed over Ellis at the recommendation of Dale and Lieb. That position instead went to a less experienced and less educated male co-worker, Rusty McMicken ("McMicken"). Ellis met with Cook, Dale, and Lieb to discuss their choice. They informed her that they did not hire her because she had not demonstrated sufficient humility during her interview and because she lacked experience. Ellis told Cook she believed that they were treating her unfairly because of her gender. Cook said that was 'bullshit' and that she should stop trying to play the victim.

***

On November 25, 2014, Ellis filed a charge of gender discrimination and retaliation with the Equal Employment Opportunity Commission ("EEOC"). Ellis identified the above-mentioned instances of discrimination including: (1) Dale's sexist comments to Ellis and other women in the Fire Department; (2) Dale's written warning; and (3) Ellis's failure to receive promotions in 2012 and 2014. Ellis also reported that the Department had retaliated against her because she reported the gender discrimination to the City. The City became aware of the charge no later than January 26, 2015.

***

On April 28, 2015, Ellis applied for the Chief position by submitting her application to Mayor Becker and his chief of staff, David Everett, and requesting a meeting. Everett

responded that a new Fire Chief had already been selected and that 'given [her] pending EEO claims . . . meeting with the Mayor directly is not advisable.'

***

In November 2015, Dale's assistant accused Ellis of creating a hostile work environment. Also in November, Dale, Lieb, and McMicken tried to reassign one of Ellis's subordinates to a different Battalion Chief, instructing her not to inform Ellis of the change.

***

Following Ellis's demotion [2016], the Fire Department offered Ellis two options: continue to work for McMicken or go back to Operations as a station captain at Fire Station 12. Ellis chose Operations even though Ellis had not served in Operations for over 13 years and thus had not received any training regarding fire ground tactics or using first responder equipment. Because of a hand injury, Ellis went on FMLA leave starting May 13, 2016. During her leave, Ellis fell into a clinical depression and entered into unpaid medical leave. During her leave, the City gave the Fire Station 12 position to another person. On January 11, 2017, Ellis filed her amended complaint in state court, initiating this proceeding.

***

Ellis appealed her demotion to the Salt Lake City Civil Service Commission ('CSC'). The CSC held a two-day evidentiary hearing on February 1-2, 2017 and took the matter under advisement. During that period, Ellis requested additional unpaid leave. Instead the Fire Department ended Ellis's leave and told her to return to work on March 1, 2017, or face termination. Ellis asked the City to consider her mental and physical health. The Fire Department refused to grant her a further extension, requiring her to return to work immediately. The Department's refusal was contrary to how Cook and Dale had been treated during similar periods.

***

On May 18, 2017, the CSC overturned Ellis's May 2016 demotion. The CSC found that the allegations used to justify the demotion were not sustained by the record and that they appeared to be an attempt to manufacture misconduct and to justify disciplinary action when there were no performance issues. Although the CSC overturned her demotion, the City refused to reinstate Ellis to her position.

***

The parties had not previously briefed the specific issue of Ellis's demotion and its viability as a Section 1983 claim. Having now been fully briefed on the issue, the court agrees with Ellis that it should amend its prior order and reinstate her Section 1983 claim insofar as it is premised on her demotion."

Legal Lesson Learned: Inappropriate, sexist comments can lead to EEOC charges and litigation.

File: Chap. 8, Race Discrimination

NY: FDNY – SCBAs – FD NOW FOLLOWING OSHA NO BEARD REQUIREMENT – ADA LAWSUIT BY BLACK FF DISMISSED

On June 9, 2021, in Salik Bey, Terrel Joseph, Steven Seymour, Clyde Phillips v. City of New York, the U.S. Court of Appeals for the Second District (New York City), held (3 to 0) that the U.S. District Court incorrectly found a violation of the ADA for enforcing a strict grooming policy.

> "The fact that no adverse safety events were reported during the period when the FDNY permitted the Firefighters to avoid shaving does not now preclude the FDNY from enforcing the respiratory-protection standard as written. Nor does the fact that the FDNY previously permitted the Firefighters to maintain short beards. The regulation at issue is of OSHA's devising, not the FDNY's.
>
> ***
>
> At bottom, OSHA's regulations are binding on the FDNY and prohibit the accommodation that the Firefighters seek. That ends the matter. Of course, the Firefighters retain the ability to present their evidence to OSHA if they continue to believe that the respiratory-protection standard is unduly restrictive; but it is OSHA to which such a challenge should be directed, not the FDNY, and not the courts."

Facts:

> "Plaintiffs are four Black firefighters who suffer from a skin condition that causes pain and sometimes scarring when they shave their facial hair. They allege that the FDNY discriminated against them in violation of the ADA, Title VII, and various other laws because the FDNY refused to offer them a medical accommodation to the department's grooming policy, which requires firefighters to be clean shaven in the areas where an oxygen mask or 'respirator' seals against their skin. The FDNY premised its refusal on a binding OSHA safety regulation, which prohibits facial hair from 'com[ing] between the sealing surface of the [mask] and the [wearer's] face' to ensure that the respirator achieves a proper seal.29 C.F.R. § 1910.134(g)(1)(i)(A).
>
> The United States District Court for the Eastern District of New York (Weinstein, J.) granted summary judgment in favor of the plaintiffs on their ADA claim, reasoning that OSHA has interpreted its regulation to permit medical accommodations and that the record clearly indicates that the proposed accommodation is reasonable and will not present an undue hardship on the FDNY. The district court granted summary judgment to the FDNY on all other issues, including the plaintiffs' Title VII claim.
>
> On the parties' cross-appeals, we reverse the district court's decision on the plaintiffs' ADA claim, holding that the OSHA regulation unambiguously prohibits the plaintiffs' proposed accommodation and that a binding federal regulation presents a complete defense to an ADA failure-to-accommodate claim. For the same reasons, we also affirm the district court's grant of summary judgment in favor of the FDNY on the plaintiffs' Title VII claim."

Legal Lesson Learned: OSHA regulations are being enforced by FDNY and the Court.

> Note: The Court recognized prior decisions may have required accommodations. "Footnote 7. The Firefighters identify several cases involving similar disputes between firefighters and fire departments that they see as supporting an alternative outcome. But those cases are distinguishable as they either stated that OSHA regulations were not binding on the defendant fire department, see Potter v. District of Columbia, 558 F.3d 542, 553 (D.C. Cir. 2009) (Williams, J., concurring); Fitzpatrick v. City of Atlanta, 2 F.3d 1112, 1121 (11th Cir. 1993), or failed to mention OSHA regulations altogether, see generally Kennedy v. District of Columbia, 654 A.2d 847 (D.C. 1994)."

File: Chap. 13

CO: PARAMEDIC INJECTED KETAMINE - POLICE ARREST – PATIENT UNCONSCIOUS 3 DAYS – LAWSUIT PROCEED

On Aug. 10, 2021, in Elijah McKnight v. Sheriff Tyler Brown, et al., U.S. Magistrate Judge S. Kato Crews, U.S. District Court for the District of Colorado, denied Paramedic Marshall Cloud and other defendants' motion to stay all discovery, and dismiss the lawsuit on the basis of qualified immunity.

> The Court wrote: "The Plaintiff in this case spent three days unconscious and required machine assistance to help him breathe. He is deserving of answers regarding why this happened and whether anyone is to be held responsible.
>
> ***
>
> Finally, although Defendants are dismissive of the 'lofty' public interest in the prompt and efficient handling of litigation, they do not address Plaintiff's argument regarding the public's interest in the use of Ketamine by first responders. The Court takes judicial notice of the local and national attention this issue has garnered. To be sure, this is not the only case in this district (involving the use of Ketamine) to arise during the week of August 18, 2019. The case of *Estate of McClain by and through McClain v. City of Aurora, Colorado*, involves a similar fact pattern, albeit with the City of Aurora Police Department. This Court agrees with Magistrate Judge N. Reid Neurieter that, 'it is not in the interest of the public or in the interest of justice to 'put on the back burner' discovery in a case that raises significant questions about [Arapahoe County's] policing and paramedic practices.' *Estate of McClain*, 2021 WL 307505, at *4."

Legal Lesson Learned: Watch the video of Aug. 20, 2019 arrest of the plaintiff; would your EMS protocol allow Ketamine to be used?

Note: This is bodycam footage from the Aug. 20, 2019 arrest of Elijah McKnight by Arapahoe County deputies, and South Metro Fire.

See Sept. 2, 2021 article: "Elijah McClain indictment: Case against Aurora police officers and paramedics comes down to intent, experts say." McClain was on his way to a convenience store on Aug. 24, 2019, when someone called 911 to report a suspicious person. When the 23-year-old refused to stop walking after being contacted by three Aurora police officers, they tackled him to the ground, threw on handcuffs and used a now-banned chokehold. Paramedics then injected him with far more ketamine than is required for a person of McClain's size. The Aurora man suffered cardiac arrest on the way to the hospital, where he was later declared brain dead. He died Aug. 30, 2019, after being removed from life support."

File: Chap. 16, Discipline

TX: FF LAWSUIT DISMISSED - FIRED FOR NOT DISCLOSING HE WAS FIRED 10-YEARS EARLIER ANOTHER FD - THEFT

On Aug. 26, 2021, in Brandon Lewis v. Fire Chief Larry DiCamillo, Stafford Fire Marshal's Office and City of Stafford, the Court of Appeals of Texas, First District, held (3 to 0) that trial court properly dismissed the lawsuit.

"On September 4, 2018, Lewis was terminated from his position as an Inspector/Investigator with the Stafford Fire Department. About two weeks before, on August 22nd, Chief Di Camillo received information from Peter E. Alvarado, the Emergency Management Coordinator for the Stafford Fire Marshal's Office, about Lewis's prior employment with the Missouri City Fire Department. Alvarado had been informed by the Missouri City Fire Marshal's Office ("MCFMO") that Lewis was not allowed to conduct business or aid in investigations in Missouri City because Lewis, previously an intern with the MCFMO, was fired from the Missouri City Fire Department after being accused of stealing a book. Alvarado reviewed Lewis's employment files and found that Lewis did not list his previous work for the Missouri City Fire Department on his applications, his personal history statement, or his resume. Alvarado provided this information to Chief Di Camillo in a signed, written memorandum (the 'August 22nd Memorandum').

***

The 'overarching statutory purposes' of Chapter 614's requirements [signed complaint] are to (1) reduce the risk that adverse employment actions will be based on unsubstantiated complaints, and (2) ensure the affected employee receives sufficient information to enable him to defend against the allegations. *Id.* Lewis was provided detailed information in both the August 22nd Memorandum and the Complaint Notification to allow him to investigate the allegations against him related to his failure to

disclose his prior employment on his City of Stafford applications. He was also afforded ample opportunity to defend himself against these allegations during the appeal process."

Facts:

"On the same day[of his termination' Chief Di Camillo provided Lewis with an 'Administrative Investigation FD 18-001 (FD AI 18-00),' which stated that Chief Di Camillo had reviewed the complaint 'alleging omission of work history during the application and background process for employment and falsification of a TCOLE document' and agreed with Alvarado's findings. As a result, Chief Di Camillo terminated Lewis's employment. Chief Di Camillo informed Lewis of his right to appeal the termination either in writing or in person to Chief Di Camillo within five business days, or by September 11th. And Lewis signed a document indicating he had received the 'Notification of Complaint for Untruthfulness' and, '[a]dditionally, . . . ha[d] been provided a copy of the complaint.'

***

Lewis appealed his termination to Chief Di Camillo on September 6th, three business days before his deadline to do so. On September 11th, Chief Di Camillo sustained the original decision to terminate Lewis's employment and informed Lewis of his right to appeal the termination to the City of Stafford City Council. Lewis elected not to pursue an appeal to the City Council.

***

Lewis alleges that appellees failed to perform a necessary ministerial act and acted outside their authority by failing to provide him with a signed complaint- the August 22nd Memorandum-within a reasonable time after it was filed in violation of Section 614.023 of the Texas Government Code. *See* TEX. GOV'T CODE § 614.023(a). Lewis admits he received the August 22nd Memorandum on September 4th, the day he was terminated, but contends the 13-day delay was unreasonable and denied him a reasonable opportunity to collect evidence to defend himself before he was terminated. He contends that the reasonableness of this 13-day delay is a fact question that precluded the trial court from granting appellees' plea to the jurisdiction.

***

But the Texas Supreme Court rejected similar arguments in *Staff* [*Colorado County v. Staff*, 510 S.W.3d 435 (Tex. 2017)]. Here, like in *Staff*, Lewis was provided a copy of the complaint on the same day he was terminated. The Texas Supreme Court explicitly stated in *Staff* that Section 614.023 does not require a complaint to be served before discipline is imposed. 510 S.W.3d at 454. Also here, like in *Staff*, Lewis's termination was conditioned on his right to appeal to both Chief Di Camillo and the City of Stafford City Council. As stated in *Staff*, the statute does not require the employee be given a pre-termination opportunity to be heard. *Id.* Finally, Lewis argues his receipt of the August 22nd Memorandum on the day of his termination was unreasonable because an investigation had already been conducted and termination was recommended by the time he received the complaint. But, per *Staff*, the statute does not require an employee be afforded an opportunity to participate in the investigative process. *Id.*

The "overarching statutory purposes" of Chapter 614's requirements are to (1) reduce the risk that adverse employment actions will be based on unsubstantiated complaints, and (2) ensure the affected employee receives sufficient information to enable him to defend against the allegations. *Id.* Lewis was provided detailed information in both the August 22nd Memorandum and the Complaint Notification to allow him to investigate the allegations against him related to his failure to disclose his prior employment on his City of Stafford applications. He was also afforded ample opportunity to defend himself against these allegations during the appeal process."

Legal Lesson Learned: Fire service applicants must honestly complete application form, including disclosure of prior Fire Department or other employer terminations. A best practice also includes asking applicants to authorize prior employers in writing to disclose their employment and disciplinary records.

File: Chap. 16, Discipline

MA: FIRE CHIEF FINED $10,000 BY STATE ETHICS COMMISSION – HELPED GET HIS SON GET HIRED ON FD

On Aug. 5, 2021, the Massachusetts Ethics Commission issued a Press Release: "Wellesley Fire Chief Richard DeLorie has admitted to violating the conflict of interest law by participating in the town's hiring of his son as a firefighter and using his official position to alter the hiring process to favor his son. DeLorie paid a $10,000 civil penalty, signed a disposition agreement approved by the State Ethics Commission, and waived his right to contest the Commission's findings."

Facts:

"DeLorie's son passed the firefighter entrance exam in 2018, when Wellesley had three entry-level firefighter openings. DeLorie disclosed in writing to his appointing authority, the Board of Selectmen, that his son had taken the exam and notified the Board that he would not participate in any capacity in the firefighter review and selection process. Nevertheless, DeLorie participated in the process on multiple occasions.
DeLorie designated the assistant fire chief to manage the hiring process. A panel consisting of the assistant chief, the town human resources director and staff, the president of the firefighters union, and a ranking member of the Fire Department interviewed eight firefighter candidates, including DeLorie's son. Members of the interview panel selected three candidates to recommend to the Board of Selectmen for appointment as firefighters. DeLorie's son was not selected.

After DeLorie was informed that the interview panel did not select his son, he criticized the panel's selections and instructed the assistant chief to halt the hiring process while he conferred with members of the Board of Selectmen. DeLorie then contacted the chair and

vice chair of the Board of Selectmen and criticized the hiring process and the candidates selected and praised the qualifications of his son and another unsuccessful candidate. In emails to the vice chair, DeLorie expressed concern that the interview panel did not consider the community involvement of the candidates. The chair reminded DeLorie that DeLorie had recused himself from the hiring process and needed to stay recused from the process. DeLorie, however, emailed the vice chair a scan of the front page of a 2003 local newspaper showing DeLorie and his son, then age 10, helping to serve Thanksgiving meals to seniors as an example of his son's community involvement.

In a subsequent email to the chair and vice chair, DeLorie claimed the assistant chief and the union had agreed to hold a second round of interviews. The union in fact did not request the additional interviews. After the second round of interviews, which focused on community involvement, DeLorie's son was among the three candidates selected to be recommended for appointment as firefighters. DeLorie then sought the chair's and vice chair's support for the interview panel's new selections. The chair again reminded DeLorie that he had recused himself from the hiring process.

At this point in the hiring process, an additional firefighter position became available and the Board of Selectmen directed the interview panel to conduct a third round of interviews. DeLorie's son was one of the finalists following the third round of interviews and the Board of Selectmen appointed him as a firefighter.

***

The conflict of interest law generally prohibits public employees from participating in matters in which they or members of their immediate family have a financial interest. Although DeLorie was not involved in the candidate interviews, he violated this prohibition by participating in the firefighter hiring process multiple times, including by criticizing the interview panel's initial candidate selections and the overall process, directing the assistant chief to halt the process, praising his son's qualifications, and seeking support from the chair and vice chair of the Board of Selectmen for the appointment of his son.

In addition, the conflict of interest law prohibits public employees from using their official positions to provide themselves or others with unwarranted privileges or benefits that are not otherwise available. DeLorie violated this prohibition by intervening as fire chief to have the hiring process halted and redirected to favor his son."

Legal Lesson Learned: Recusal means stay completely out of the hiring process.

Note: See Aug. 5, 2021 article, "Wellesley Fire Chief Richard DeLorie Fined $10,000 For Helping Son Get Hired As Firefighter."

File: Chap. 17, Arbitration

NB: UNION PRES. FIRED - ASSAULT IN BAR, "WHITE POWER" – ARBITRATOR REVERSES, 5 SHIFT SUSPENSION

On Aug. 6, 2021, in City of Omaha v. Professional Firefighters Association of Omaha, Local 385, AFL-CIO, the Nebraska Supreme Court held (6 to 0) that the arbitrator's decision reinstating Union President Steve LeClair must be enforced; the city failed to prove that the arbitration award because the arbitrator exceeded her powers. The City appealed to state District Court, which dismissed the City's appeal and ordered the City to reimburse union for $16,000 in attorney fees for filing a "frivolous" appeal. The Nebraska Supreme Court agreed that termination was too harsh, but set aside the attorney fees award.

> "Equally quick work can be made of the City's claim that the arbitrator exceeded her powers by 'substitut[ing] her own discipline.' Brief for appellant at 31. This objection is aimed at the arbitrator's order that LeClair should lose five shifts of backpay for his actions. The City claims the arbitrator did not have the power to craft her own discipline for LeClair's actions. The City, however, has not directed us to authority that supports its argument."

Facts:

> "On November 9, 2018, LeClair was off duty and socializing at a bar in Omaha, Nebraska. R.J., an African-American patron at the bar, alleged that at some point during that night, LeClair made sexually suggestive comments to her and then later approached her, said the words 'white power,' and struck her in the back.
>
> After R.J. filed complaints regarding the incident, LeClair was charged with assault and battery and disorderly conduct. He pleaded no contest to the charges and was sentenced to 6 months' probation.
>
> In addition to the criminal charges, the City also pursued an internal investigation. After the conclusion of the internal investigation, the City issued a letter to LeClair in April 2019 informing him that the City was discharging him from employment. LeClair promptly informed the City that he was invoking his right under the collective bargaining agreement between the City and the union (CBA) to challenge his discharge in arbitration.
>
> Arbitration Hearing.
>
> The parties agreed to an arbitrator, and a hearing was held before her in August 2019. The arbitration hearing lasted 3 days. Over 20 witnesses testified, and the arbitrator received nearly 100 exhibits. We provide only a brief summary of the evidence presented at the hearing that is relevant to this appeal.

***

LeClair testified at the arbitration hearing. He denied ever engaging in racial discrimination during his life. Regarding the November 9, 2018, incident, LeClair denied 'hitting on' R.J. or making any sexual advances toward her. He acknowledged that he elbowed R.J. and said 'what white power,' but he also denied there was any racial animus or violence intended. LeClair testified that earlier in the evening, he had been discussing white nationalist groups with his colleagues. He claimed he was attempting to make a negative statement about those groups, but that R.J. was not a part of his earlier conversations and that his statement was 'not the right venue, not the right person, not the right frame of mind,' and a mistake he regretted. He also testified that he did not realize the extent of the force he exerted on R.J. when he made contact with her.

***

First, the arbitrator concluded that the City did not conduct a fair and impartial investigation. The arbitrator found several aspects of the City's investigation problematic. She concluded that City officials wanted R.J. to file a complaint and pressured her to do so, that City officials had tried to withhold security video of the incident at the bar from LeClair, and that the City violated the CBA by not providing him with a pretermination hearing in front of an impartial City decisionmaker.

***

The arbitrator also noted that the City had imposed only minor discipline when other firefighters had committed public misconduct. In particular, she noted that another firefighter had received only a 1-day suspension when he, while on duty and in uniform, 'liked' a post on Facebook that 'denigrated Black Lives Matter and characterized [Barack] Obama as a terrorist.'

Finally, the arbitrator found that the degree of discipline was not commensurate either with the seriousness of LeClair's offense or with his record of past service. Here, the arbitrator found important that there had been no other complaints regarding LeClair in his career, that the only prior discipline he had received was a single reprimand for being late for work in 2011, and that he had been active in the community and had worked for the inclusion of minorities in the fire department.

The arbitrator concluded that the City did not have just cause to terminate LeClair's employment and ordered his reinstatement with backpay. The arbitrator did find that LeClair should be disciplined 'for his violations of the contract and his act of insubordination,' and accordingly, she stated that his award of backpay should not include pay for the five shifts he missed while on administrative leave.

***

Shortly after the arbitrator issued her decision, the City filed an application to vacate the arbitration award in district court, asserting that the arbitrator had engaged in prejudicial misconduct, demonstrated partiality or bias, exceeded her powers in various respects, and acted with manifest disregard for the law. It also alleged that the arbitrator's decision violated public policy.

Following a hearing at which it received as evidence both the record of the arbitration and the arbitrator's decision, the district court issued an order denying the City's application to vacate.

***

In a later order, the district court granted the union's request for attorney fees and costs. It explained that the arbitrator's decision could be vacated only for certain, limited reasons and not for mere legal or factual error. The district court concluded that the City presented claims of legal and factual error "dressed up as" bases for which arbitration awards can be reviewed. Consequently, it found that the City's application to vacate the arbitration decision was frivolous and entered judgment in favor of the union for $16,020, the amount the union incurred in attorney fees and costs in resisting the City's application.

***

[Nebraska Supreme Court ruling.] On this issue, we, for the first time in this case, part company with the district court. Although we have found that the City's arguments that the arbitration award should have been vacated lacked merit, we disagree with the district court that the City's position was so lacking in merit to be deemed frivolous. Because we find that the City's attempt to vacate the arbitration award was not frivolous, the district court erred in awarding attorney fees and costs pursuant to § 25-824. We reverse that portion of the district court's decision."

Legal Lesson Learned: Courts generally enforce arbitrator decisions.

Note: See Aug. 11, 2021 article, "Nebraska Supreme Court Sides With Omaha Fire Union Chief In Dispute With City appeal the discipline to an independent arbitrator."