FEB. 2025 – FIRE & EMS LAW NEWSLETTER

[NEWSLETTER IS NOT PROVIDING LEGAL ADVICE.]


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Prof. Bennett (former vol. firefighter / EMT-B at 3 FDs) with his Pet Therapy dog, FRYE.

14 RECENT CASES

ALSO POSTED WITH PRIOR CASES AT SCHOLAR@UC [click Actions]:
https://doi.org/10.7945/j6c2-q930

Chap. 1 – American Legal System, incl. Fire Codes, Investigations, Arson	**SUP CT: CONGRESS CAN BAN TIKTOK**
Chap. 2 – Line Of Duty Death / Safety	***
Chap. 3 – Homeland Security, incl. Active Shooter, Cybersecurity	**DC: CAPITAL ATTACK – PD INJURED**
Chap. 4 – Incident Command, incl. Training, Drones, Communications	***
Chap. 5 – Emergency Vehicle Operations	**OH: "HONOR RIDE" – CIVILIAN DIES**
Chap. 6 – Employment Litigation, incl. Work Comp., Age, Vet Right	**NJ: FF BROKE ANKLE – ORDIN. DISAB.** **WV: HEAR. LOSS – 17.5% COAL MINER**
Chap. 7 – Sexual Harassment, incl. Preg. Discrimination, Gay Rights	**DC: GENDER IDENT. – TRUMP ORDER**
Chap. 8 – Race / National Origin Discrimination	**AL: BC - FD DOC. INCOMPLETE**
Chap. 9 – Americans With Disabilities Act	***
Chap. 10 – Family Medical Leave Act, incl. Military Leave	***
Chap. 11 – Fair Labor Standards Act	**SUP. CT – PREPOND.-OF-EVIDENCE**
Chap. 12 – Drug-Free Workplace, inc. Recovery	**WA: STUDENT DEAD – SUE UNIV.**
Chap. 13 – EMS, incl. Comm. Param., Corona Virus	**MN: "BLS" UPCHARGED AS "ALS"**

CA: COVID 19– NO RELIGIOUS ACCOM
CA: COVID-19 –VOL. RETIRED

Chap. 14 – Physical Fitness, incl. Heart Health ***
Chap. 15 – Mental Health, incl. CISM, Peer Support ***
Chap. 16 – Discipline, incl. Code of Ethics, Social Media, Hazing **WV: AMB CO. - $3.3M TAXES – CONV.**

Chap. 17 – Arbitration, incl. Mediation, Labor Relations **IL: CBA – INJURED FF – PT RATE**

Chap. 18 – Legislation, incl. Public Records ***

ONLINE RESOURCES – EDUCATION / TRAINING

- **2025: FIRE & EMS LAW – RECENT CASE SUMMARIES / LEGAL LESSONS LEARNED**: Case summaries since 2018 from monthly newsletters: **https://doi.org/10.7945/j6c2-q930.**

  Updating 18 chapters of my textbook, FIRE SERVICE LAW (Second Edition; 2017): **http://www.waveland.com/browse.php?t=708**

- **2025: FIRE & EMS LAW – CURRENT EVENTS**: **https://doi.org/10.7945/0dwx-fc52**

- **2025: AMERICAN HISTORY – LEGAL LESSONS LEARNED FOR FIRE & EMS**: **https://doi.org/10.7945/av8d-c920**

File: Chap. 1, American Legal System

U.S. SUP. CT. - CONGRESS CAN BAN TIKTOK – TRUMP DELAY

On January 17, 2025, in TikTok Inc, et al. v, Merrick B. Garland, Attorney General, the United States Supreme Court held (9 to 0; per curiam decision – not authored by any individual Justice), that Congress did not violate the First Amendment when it passed the Protecting Americans from Foreign Adversary Controlled Applications Act will make it unlawful (effective Jan. 19, 2025) for companies in the United States to provide services to distribute, maintain, or update the social media platform TikTok, unless U. S. operation of the platform is severed from Chinese control. [The ban now delayed by President Trump.] https://www.supremecourt.gov/opinions/24pdf/24-656_ca7d.pdf

The Court wrote:

> "TikTok is a social media platform that allows users to create, publish, view, share, and interact with short videos overlaid with audio and text. Since its launch in 2017, the

platform has accumulated over 170 million users in the United States and more than one billion worldwide. Those users are prolific content creators and viewers. In 2023, U. S. TikTok users uploaded more than 5.5 billion videos, which were in turn viewed more than 13 trillion times around the world.

Opening the TikTok application brings a user to the 'For You' page —a personalized content feed tailored to the user's interests. TikTok generates the feed using a proprietary algorithm that recommends videos to a user based on the user's interactions with the platform. Each interaction a user has on TikTok—watching a video, following an account, leaving a comment—enables the recommendation system to further tailor a personalized content feed.

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TikTok Inc.'s ultimate parent company is ByteDance Ltd., a privately held company that has operations in China. ByteDance Ltd. owns TikTok's proprietary algorithm, which is developed and maintained in China. The company is also responsible for developing portions of the source code that runs the TikTok platform. ByteDance Ltd. is subject to Chinese laws that require it to 'assist or cooperate' with the Chinese Government's 'intelligence work' and to ensure that the Chinese Government has 'the power to access and control private data' the company holds. H. R. Rep. No. 118–417, p. 4 (2024) (H. R. Rep.); see 2 App. 673–676.

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There is no doubt that, for more than 170 million Americans, TikTok offers a distinctive and expansive outlet for expression, means of engagement, and source of community. But Congress has determined that divestiture is necessary to address its well-supported national security concerns regarding TikTok's data collection practices and relationship with a foreign adversary. For the foregoing reasons, we conclude that the challenged provisions do not violate petitioners' First Amendment rights."

Legal Lesson Learned: Fire & EMS departments should review their computer systems that contain protected information, including patient health information, to help prevent "hacking" and unauthorized copying.

Note: See Jan. 17, 2025: "Justice Department Statements on Supreme Court's Decision in TikTok, et al. v. Garland." https://www.justice.gov/opa/pr/justice-department-statements-supreme-courts-decision-tiktok-et-al-v-garland

Jan. 22, 2025: "TikTok still not available on app stores after Trump's executive order: What we know." https://www.usatoday.com/story/tech/2025/01/22/tiktok-ban-download-app-stores-update/77872210007/

DC: CAPITAL – POLICE INJURED PEPPER SPRAY - PARDONS

On Jan. 17, 2024, in United States of America v. Jeffrey Scott Brown, the U.S. Court of Appeals for the D.C. Circuit (3 to 0) upheld the conviction of Brown (and two others) for violation of federal law – use of a "dangerous or deadly weapon" - by spraying police officers with pepper spray during the attack on the U.S. Capitol on Jan. 6, 2021. Brown was sentenced to 54 months in prison [now pardoned by President Trump].
https://media.cadc.uscourts.gov/opinions/docs/2025/01/23-3074-2094718.pdf

The Court held:

> "Given the record in this case, sufficient evidence supported the jury's finding that Schwartz, Brown, and Maly each used pepper spray as a deadly or dangerous weapon, and that Schwartz also used a chair as a deadly or dangerous weapon.
>
> ***
> Officers testified that they felt such intense pain when sprayed on January 6th. For example, Officer Christopher Boyle stated that he felt a '9 or 10 out of 10' level of pain when he was pepper sprayed on the Lower West Terrace…. Sergeant Jason Mastony testified that chemical irritants absorbed through his uniform so his 'legs and [his] arms [we]re on fire.' …The effects of the chemical irritants, including 'burning' 'skin irritation[,]' lingered for about a week, and he felt particular pain when he showered or tried to change his contact lenses…. That is because pepper spray is water-based and 'reactivates with water.' … Officer David Pitt testified that he had 'severe burning for the following three days in [his] hands' and 'in various places' from 'when [he] was sprayed with various sprays in the tunnel.' … Finally, Sergeant Phuson Nguyen described that, when he showered the night of the 6th, 'the chemical[s] [from the spray] soak[ed] through [his] pore[s] and it start[ed] burning, and basically [his] whole body was burning.' … That evidence provided a sufficient basis for a rational jury to find that the pepper spray Schwartz, Brown, and Maly used was capable of causing extreme pain, especially given the officers' testimony that they felt a '9 or 10 out of 10' on a pain scale and that their limbs were 'on fire' and 'burning.' Considering the intensely factual nature of an inquiry into the extent of pain caused by violent conduct, the evidence in this case, and the credibility judgments involved, there is no basis for this court to overturn the jury's verdict by finding as a matter of law that the evidence came up short."

Legal Lesson Learned: Fire & EMS should review their protocol on treating patients who have been pepper sprayed, remembering that it "reactivates with water."

> Note: See article on this case. "DC Circuit side-eyes Capitol rioter's argument that pepper spray is not a dangerous weapon."
> https://www.courthousenews.com/dc-circuit-side-eyes-capitol-rioters-argument-that-pepper-spray-is-not-a-dangerous-weapon/

File: Chap. 5, Emergency Vehicle Operations

OH: "HONOR RIDE" – CIVILIAN FALLS OUT ENGINE - DIED

On Jan. 23, 2025, in Amanda Luke, Administrator of the Estate of Marguerite Appel v. Short Creek Joint Fire District,et al., the Court of Appeals of Ohio, Seventh District (Jefferson County) held (2 to 1) that trial court should have dismissed the firefighters, the Fire District and the political subdivisions served by the joint Fire District in the death of civilian who fell out of rear of engine during honor ride of her step-brother (former Fire Chief). The deceased voluntarily rode in crowded back seat of the engine without a seat belt and encouraged more passengers to enter and take the empty seat. A man crying at the scene who had been in the fire truck told the Deputy Fire Chief that Ms. Appel was standing holding the door and she grabbed the wrong handle. There was no proof of negligence in operating the engine (15-25 mph), and the driver and other firefighters who allowed crowded engine were not "reckless."
https://www.supremecourt.ohio.gov/rod/docs/pdf/7/2025/2025-Ohio-203.pdf

The Court wrote:

> "Defendants-Appellants Short Creek Joint Fire District and two employees appeal the decision of the Jefferson County Common Pleas Court denying their motion for summary judgment. They claimed immunity in the lawsuit filed by Appellee Amanda Luke, individually and as administrator of the Estate of Marguerite Appel (the decedent)…. The political subdivision [which is served by the Fire District] argues there was no evidence of negligence as required for the immunity exceptions involving the operation of a motor vehicle or the performance of a proprietary function, arguing there was no breach of a duty that proximately caused the decedent's injury. In arguing the lack of duty for negligence, the political subdivision emphasizes the primary assumption of the risk doctrine and argues there was no showing of recklessness as required to defeat the doctrine. We agree and find the political subdivision was entitled to summary judgment….The employees contend they are immune because their performance was not reckless as required to invoke the recklessness exception to employee immunity. It is also argued their performance was not manifestly outside the scope of employment, while pointing out this exception was not invoked by Appellee below. We agree and find the employees were entitled to summary judgment.
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> Chief Manbeck noted the department provided civilian rides in the past, such as driving the youth baseball team in a small parade when they won a championship and the softball team for a similar reason; Spiderman also rode in a fire truck for a Fourth of July parade. He was also aware such services were provided by one of the prior fire districts before the merger into a joint district…. He said SCJFD had no specific policy on civilian rides, seat belts, or abiding by recommendations from a named publication….He pointed out state law does not require seat belts for backseat passengers and it is legal to sit on the floor in the back of the truck, regardless of what a manufacturer's warning label states.
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> ***

At the very least, these riders assume the risks of normal driving movements incurred as a result of the position they placed themselves, even if they do not assume the risk of abnormal driving movements. [Emphasis in court decision.]

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We conclude a person voluntarily riding in a crowded fire truck after choosing to occupy the space by the door without a seat or seat belt and then encouraging more passengers to enter instead of taking the empty seat, primarily assumes the specific risk of falling out if they lean on the door as the truck navigates a curve after the door handle is accidentally activated by the plaintiff (or another person)."

Dissent:

"I would find that Appellants owed Ms. Appel a general duty of care to ensure her safety on the firetruck after John Sebring, a volunteer firefighter, encouraged her to board the firetruck after Ms. Appel expressed concern about the overcrowding on the truck.}

Legal Lesson Learned: Tragic event that could have been avoided. Civilians or firefighters riding in a fire engine should all be using seat belts.

File: Chap. 6, Employment Litigation

NJ: FF BROKE ANKLE – ORDIN. DISAB., NOT "UNEXPECTED"

On Jan. 17, 2025, in Roberto Villarreal-Rio v. Board of Trustees, Police and Fireman's Retirement System, the Superior Court of New Jersey, held (2 to 0; unpublished decision) that the retirement board properly held the firefighter was not entitled to Accidental Disability Retirement (72.7%), but only Ordinary Disability Retirement (43.6%); must be a traumatic event injured because of an "unexpected happening." https://www.njcourts.gov/system/files/court-opinions/2025/a0585-22.pdf

The Court held:

"On September 22, 2017, petitioner, along with the Captain and another firefighter, responded to a call for an electrical fire in a basement. According to petitioner, when they arrived at the scene, a bookshelf was blocking the door to the basement. Therefore, the Captain asked him to retrieve additional feet of hose from the truck so they could access another entrance to the basement to reach the fire. The truck was parked at the bottom of the driveway, about one hundred feet from the building. As he returned with the extra feet of hose, petitioner stated he twisted his ankle and fell on the driveway. He stated that he did not recall what caused him to twist his ankle.

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> Here, petitioner has not demonstrated an 'unexpected happening' that caused him to injure his ankle. He testified regarding his training and the specific duties of his job which included loading and unloading equipment, laying and connecting hoses, and preparing for the delivery of water discharge lines…. The evidence reflects petitioner was performing his usual job duties when he was injured. Dragging a hose up a driveway is not an unexpected event in his line of work."

Legal Lesson Learned: Under NJ statute and case law, public employees are only entitled to enhanced retirement for traumatic injuries from "unexpecting happening" such as a police officer shot pursuing a suspect or a librarian hit by falling bookshelf while restocking books.

> Note: See NJ public employee retirement bulletin. https://www.nj.gov/treasury/pensions/documents/factsheets/fact15.pdf

File: Chap. 6, Employment Litigation

WV: HEARING LOSS – 17.5% COAL MINER – NO ADDED PPD

On Jan. 14, 2025, in Wilburn T. Preece, Jr. v. Kermit Volunteer Fire Department, the Supreme Court of Appeals of West Virginia held (5 to 0) that the WV Workers' Compensation Board properly denied the Fire Chief's claim for progressive hearing loss on Sept. 11, 2023. In 2015 he was awarded 17.5% permanent partial disability (PPD) from his years working as a coal miner. He became full time Fire Chief in 2014 and in 2020 claimed 23% PPD (responded to 90% of the 300 – 500 calls per year). The Board rejected his claim on Sept. 11, 2023, after the Chief was examined by two experts – neither found fire service was clearly the cause of additional hearing loss. The Chief appealed to the WV Intermediate Court of Appeals, which upheld the Board on March 25, 2024. https://cases.justia.com/west-virginia/supreme-court/2025-24-266.pdf?ts=1736880091

The State Supreme Court wrote:

> "The claimant argues that the ICA was clearly wrong in finding that the report of Joseph Touma, M.D., was insufficient to establish that his occupation, as the fire chief, caused additional hearing loss. The claimant asserts that Dr. Touma's report is the only credible medical evidence of record concerning whether he has additional noise induced impairment as a result of his work. As such, the claimant believes that Dr. Touma's recommended impairment award of 23% should have been granted by the ICA. The employer counters by arguing that Dr. Touma did not consider the claimant's nonoccupational factors that could contribute to hearing loss. Because the Board of Review found that Dr. Touma's report was unpersuasive on the basis that he failed to consider whether the claimant's progressive hearing loss was due to causes other than

occupational noise exposure, the employer contends that the ICA correctly affirmed the Board of Review's order."

The Intermediate Court of Appeals described the Chief's prior work history.

> "In 2014, Mr. Preece began working as fire chief full-time for the KVFD. In a previous claim, Mr. Preece was granted a 17.5% PPD award in 2015 for occupational hearing loss related to his employment with another employer for whom he worked as a coal miner. Mr. Preece filed an Employees' and Physicians' Report of Occupational Hearing Loss dated August 25, 2020; indicating that he has occupational hearing loss due to noise exposure related to his employment at KVFD.
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> ***
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> Mr. Preece was deposed on May 13, 2022. Mr. Preece indicated that his job as fire chief required him to be at the fire station on a daily basis. Mr. Preece testified that he answered 90% of the calls received by the fire department and that during the calls he would be exposed to loud noise from the sirens. Mr. Preece further testified that the fire department answers between 300 and 500 calls each year and that answering a call could take between twenty and thirty minutes wherein he would be exposed to the noise from the engine and siren.
>
> ***
> Mr. Preece was evaluated by David Phillips, M.D., who drafted a report dated December 14, 2022. Dr. Phillips found that Mr. Preece had a total of 22% whole person impairment ("WPI") related to hearing loss. Dr. Phillips noted that Mr. Preece has a medical history of diabetes, hypertension, and elevated cholesterol, all of which can contribute to progressive hearing loss. Thus, Dr. Phillips attributed 17.5% of Mr. Preece's hearing loss to prior mining occupational noise exposure and 4.5% to nonoccupational factors. Dr. Philips did not acknowledge Mr. Preece's employment at KVFD or opine about any potential impairment related to noise exposure from KVFD.
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> On March 29, 2023, Mr. Preece was examined by Joseph Touma, M.D. Dr. Touma found that Mr. Preece had a total of 23% WPI for hearing loss related to occupational noise exposure. Dr. Touma's report indicates that adjustments were made for non-noise related impairment, but the report does not give any further details regarding those adjustments. Dr. Touma opined that Mr. Preece's worsening hearing loss "may" be due to subsequent noise exposure from his new work environment with KVFD. Dr. Touma further opined that Mr. Preece had no preexisting conditions that could have contributed to his progressive hearing loss." https://www.courtswv.gov/sites/default/pubfilesmnt/2024-03/23-ICA-446_MD.pdf

Legal Lesson Learned: Hearing loss is clearly an issue in the fire service; wearing hearing protection on all emergency runs should be mandatory. To prove workplace loss, claimants should retain an expert who will record load noise exposure at fire and other scenes.

File: Chap. 7, Sexual Harassment

DC: GENDER IDENTITY – TRUMP EXEC ORDER – US SUP CT

Jan. 20, 2025: President Trump's Executive Order - DEFENDING WOMEN FROM GENDER IDEOLOGY EXTREMISM AND RESTORING BIOLOGICAL TRUTH TO THE FEDERAL GOVERNMENT – can modify federal advice to schools and employers on "single-sex spaces" such as bathrooms. However, employers must still follow U.S. Supreme Court's 2020 decision "making it illegal for an employer to rely on an employee's sex [gay; trans] when deciding to fire that employee." uch https://www.whitehouse.gov/presidential-actions/2025/01/defending-women-from-gender-ideology-extremism-and-restoring-biological-truth-to-the-federal-government/?utm_medium=email&utm_source=web_app&utm_campaign=digest

Executive Order includes the following:

> "The prior Administration argued that the Supreme Court's decision in *Bostock v. Clayton County* (2020), which addressed Title VII of the Civil Rights Act of 1964, requires gender identity-based access to single-sex spaces under, for example, Title IX of the Educational Amendments Act. This position is legally untenable and has harmed women. The Attorney General shall therefore immediately issue guidance to agencies to correct the misapplication of the Supreme Court's decision in *Bostock v. Clayton County* (2020) to sex-based distinctions in agency activities. In addition, the Attorney General shall issue guidance and assist agencies in protecting sex-based distinctions, which are explicitly permitted under Constitutional and statutory precedent.

The U.S. Supreme Court in Bostock v. Clayton County, on June 15, 2020 held (6 to 3; majority opinion by Justice Neil Gorsuch):

> "Today, we must decide whether an employer can fire someone simply for being homosexual or transgender. The answer is clear. An employer who fires an individual for being homosexual or transgender fires that person for traits or actions it would not have questioned in members of a different sex. Sex plays a necessary and undisguisable role in the decision, exactly what Title VII forbids."
> https://www.supremecourt.gov/opinions/19pdf/17-1618_hfci.pdf

Justice Gorsuch reviewed three cases where employees were fired:

> "Few facts are needed to appreciate the legal question we face. Each of the three cases before us started the same way: An employer fired a long-time employee shortly after the employee revealed that he or she is homosexual or transgender—and allegedly for no reason other than the employee's homosexuality or transgender status.
>
> [1] Gerald Bostock worked for Clayton County, Georgia, as a child welfare advocate. Under his leadership, the county won national awards for its work. After a decade with

> the county, Mr. Bostock began participating in a gay recreational softball league. Not long after that, influential members of the community allegedly made disparaging comments about Mr. Bostock's sexual orientation and participation in the league. Soon, he was fired for conduct 'unbecoming' a county employee.
>
> [2] Donald Zarda worked as a skydiving instructor at Altitude Express in New York. After several seasons with the company, Mr. Zarda mentioned that he was gay and, days later, was fired.
>
> [3] Aimee Stephens worked at R. G. & G. R. Harris Funeral Homes in Garden City, Michigan. When she got the job, Ms. Stephens presented as a male. But two years into her service with the company, she began treatment for despair and loneliness. Ultimately, clinicians diagnosed her with gender dysphoria and recommended that she begin living as a woman. In her sixth year with the company, Ms. Stephens wrote a letter to her employer explaining that she planned to 'live and work full-time as a woman' after she returned from an upcoming vacation. The funeral home fired her before she left, telling her 'this is not going to work out.'"

Legal Lesson Learned: The U.S. Supreme Court decision in Bostock still applies to all employers, including Fire & EMS. As the Court wrote: "An employer who fires an individual merely for being gay or transgender defies the law."

File: Chap. 8, Race Discrimination

AL: BLACK CAPT – NOT PROM. BC – FD DOC. INCOMPLETE

On Jan. 24, 2025, in Demetrius Webb v. City of Homewood, Alabama, et al., U.S. District Court Chief Judge R. David Proctor, Northern District of Alabama, Southern Division, denied the City's motion for summary judgment. Retired Captain Webb's racial discrimination lawsuit will proceed to trial. In September and October 2020, two Battalion Chief positions became available (4 BC positions on FD); two whites were promoted under Fire Chiefs' new process - no outside interviews, only Fire Chief's matrix of skills (plaintiff scored lowest of 8 applicants; all other BC were medics). The city submitted a matrix showing all scores by the Fire Chief, EXCEPT the matrix did not include scores of the two promoted. https://cases.justia.com/federal/district-courts/alabama/alndce/2:2023cv01098/186589/44/0.pdf?ts=1737802006

The Court wrote:

> "The Battalion Chief position was previously selected by a panel of individuals who interviewed the candidates and evaluated their mission statements….However, when Chief Hill became the Fire Chief in 2020, he decided to do away with the old method because he was concerned that the process of selecting a Battalion Chief was too

subjective…. Chief Hill devised his new method for selecting the Battalion Chief position sometime in or around September or October 2020….The new method consisted of an interview by him (as opposed to an interview by a panel) …, a review of the applicants' resumes … and the creation of a matrix where the applicants' qualifications were assigned a number value for various levels of qualifications….Regarding the new method, Chief Hill testified that he primarily looked at the applicants' scores in the matrix and secondarily looked at their resumes….Chief Hill acknowledged that although he interviewed the candidates, the interviews were 'not really' a factor in the selection process.

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In his deposition, Chief Hill testified that he conducted only one interview and considered the candidates for both positions instead of creating two separate applicant pools…. A Homewood FD document shows the matrix scores of the Battalion Chief candidates as follows: Adam Ashworth, 27; Alexander Glover, 28; Robert Harris, 22; Keith Headrick, 23; Mark Shannon, 29; and Demetrius Webb, 18.

***

However, despite Chief Hill's testimony and Homewood's summary judgment argument, the matrix that Homewood submitted into evidence does not include Broadhead and Everson or their scores…. When asked in his deposition, Chief Hill testified that he thought Everson 'was close to' the score of 29 …, which is the highest score recorded in the matrix. However, Homewood has not provided any Rule 56 evidence to confirm this. Further, while Everson's matrix score was discussed briefly, Chief Hill did not provide any information regarding Broadhead's matrix score or why he was not included on the matrix Homewood submitted into evidence. So, while the matrix indicates that Plaintiff received a score of 18 …, which is the lowest score among the other candidates on the matrix, there is no way to compare Plaintiff's score to those of Broadhead or Everson. Plaintiff raised these discrepancies in his Response to Defendants' Motion for Summary Judgment. (Doc. # 39 at 17). Homewood made no effort to refute or even respond to this argument. (See Doc. # 41).

***

Moreover, although Chief Hill testified that he primarily relied on the matrix scores, when asked in his deposition why Broadhead and Everson were promoted over Plaintiff to the position of Battalion Chief, he discussed Broadhead and Everson's leadership skills (Doc. # 32-2 at 51, 54) and made no mention of their matrix scores. If Chief Hill had not testified that he looked primarily at the matrix scores when selecting the Battalion Chief position, there may be an argument that the court could overlook the issue that a matrix that did not reference the scores of the incumbents was submitted into evidence. However, Homewood has provided both incomplete (and potentially contradictory) evidence. Despite the fact that Chief Hill testified that promotion decisions for the Battalion Chief position are primarily based on the internal matrix system, neither of the two white candidates selected were included on the internal matrix system sheet that Homewood provided in its evidentiary submissions. Further, when asked why he selected

> them for the Battalion Chief positions, Chief Hill did not indicate Broadhead or Everson's scores."

Legal Lesson Learned: FD relying on a matrix to justify promotion decision, must include all candidates on the matrix document.

File: Chap. 11, FLSA

U.S. SUP. CT – ALL COURTS - PREPONDRANCE-OF-EVIDENCE

On Juan. 15, 2023, in EMD Sales, Inc., et al. v. Faustino Sanchez Carrera, the Court held (9 to 0) that employers, when sued by employees claiming they were improperly classified as exempt from overtime pay, will be judged by the normal standard in civil litigation – "preponderance-of-the-evidence." The Court reversed the U.S. Court of Appeals for the 4th Circuit (Richmond, VA) which required proof of an exemption by "clear-and-convincing evidence." Employers in 4th Circuit, including fire & EMS - Maryland, North Carolina, South Carolina, Virginia, and West Virginia – will now be held to same standard as rest of the nation. The lawsuit involved EMD Sales, Inc., is a distributor of Latin American, Caribbean, and Asian food products to chain and independent grocery stores, operating in the Washington, D.C. metropolitan area. The company paid salesmen commissions (up to 6.6%; some earned over $100,000) but no overtime; under FLSA regulations "outside salesman" and exempt. After a nine-day bench trial, the U.S. District Court judge ruled for employees and the 4th Circuit affirmed. The U.S. Supreme Court reversed the 4th Circuit on the standard of proof required [case will likely be re-tried].
https://www.supremecourt.gov/opinions/24pdf/23-217_9o6b.pdf

The Court held:

> "We hold that the preponderance-of-the-evidence standard applies when an employer seeks to show that an employee is exempt from the minimum-wage and overtime-pay provisions of the Fair Labor Standards Act. The employees argue that we should still affirm because they would not qualify as outside salesmen even under a preponderance standard. But our usual practice is to leave matters of that sort for remand. We see no persuasive reason to stray from that usual practice here. We therefore reverse the judgment of the Court of Appeals and remand the case for further proceedings consistent with this opinion."

Legal Lesson Learned: Fire & EMS managers, when deciding "close questions" about FLSA exemptions – such as which senior officers are exempt from overtime – should consult with experienced FLSA legal counsel.

> Note: See Jan. 15, 2025 article: "US Supreme Court boosts companies' defense in wage lawsuits." https://www.reuters.com/legal/government/us-supreme-court-boosts-companies-defense-wage-lawsuits-2025-01-15/

:The unanimous ruling, opens new tab penned by Justice Brett Kavanaugh could make it easier for some businesses to defend against lawsuits, including many class actions, claiming that workers were improperly exempted from the federal Fair Labor Standards Act (FLSA)."

Company may have an uphill battle during retrial. Read the brief by U.S. Solicitor General: https://www.supremecourt.gov/DocketPDF/23/23-217/326778/20240924155125392_2024.09.24%20EMD%20v%20Carrera%20-%20Brief%20for%20Respondents.pdf

"Respondents presented evidence that they did not and could not make sales at chain stores. Rather, when they serviced chain stores, they replenished stock based on 'sales terms already negotiated by management,' and 'their time was spent only on promotion and inventory-management activities— restocking and rearranging products, issuing credits, taking orders—that were incidental to sales made at higher levels.'"

File: Chap. 12, Drug-Free Workplace

WA: ALCOHOL – FRAT - STUDENT DEAD – CAN SUE UNIV.

On Jan. 21, 2025, in Hector Martinez and Jolayne Houtz, husband and wife and co-personal representatives of the Estate of Samuel H. Marinez v. Washington State University, Gamma Chi Chapter of Alpha Tau Omega Fraternity, et al., the Court of Appeals of Washington, Division 1 held (3 to 0) that the lawsuit should be reinstated against the University, and not just against the Gamma Chi fraternity. The university can be sued because it has a "special relationship" with its recognized fraternal organizations – a similar legal doctrine to the duty of EMS when transporting a patient, or a jail holding a prisoner. https://cases.justia.com/washington/court-of-appeals-division-i/2025-83853-9.pdf?ts=1737494121

The Court wrote:

"Samuel 'Sam' Martinez died of acute alcohol poisoning in November 2019 following a hazing ritual at a fraternity house located near the Pullman campus of Washington State University (WSU). Sam's estate representatives and parents Hector Martinez and Jolayne Houtz (collectively Estate) appeal summary judgment dismissal of their lawsuit against WSU. WSU contends that it owed no duty to protect Sam. Because WSU has a special relationship with its recognized fraternal organizations, we conclude that it owed a duty to use reasonable care to control the fraternity and protect Sam from the foreseeable harms of fraternal hazing and alcohol misuse. We reverse and remand.

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During the ritual [on Nov. 11, 2019] Sam drank straight from the bottle. After 30 to 45 minutes in the live-out house, the event moved to Gamma Chi's chapter house, where the drinking continued. Sam 'tried to shotgun a beer' and drank 'clear hard alcohol.' He began 'slurring his words' and 'lost coordination.' After seeing Sam 'getting visibly more intoxicated,' Oswald 'cut him off' around 11:00 p.m., telling Sam, 'Hey, let's take a break for a little bit.' Sam eventually passed out on a couch in Oswald's room. 'He was asleep for a while, woke back up, and was still visibly drunk.' So, Oswald and another fraternity member carried Sam to the bathroom and tried to force him to vomit for 5 to 10 minutes. Their efforts failed. A few people then helped Oswald move Sam to the basement, 'where a variety of pledges were already asleep.' They placed Sam on a couch, where he remained 'for the rest of the night.' Oswald said he checked on Sam 'two to three times' before going to bed around 3:00 a.m. on November 12. Hours later at about 9:00 a.m., Gamma Chi member Soreano found Sam face down on the couch with vomit in his mouth and unresponsive. He called 911 and tried to resuscitate Sam. Paramedics arrived but ceased their efforts to resuscitate Sam soon after. The medical examiner determined Sam died from 'acute ethanol intoxication' at about 4:30 a.m. on November 12, 2019. His femoral blood alcohol concentration measured 0.372. Sam had just turned 19 years old in October."

Legal Lesson Learned: Fire & EMS responders are all too familiar with deaths by students in fraternities and elsewhere from acute ethanol intoxication. Perhaps this decision will "get the attention" of University officials who have responsibilities concerning fraternities.

File: Chap. 13, EMS

MN: "BLS" UPCHARGED AS "ALS" - WHISTLEBLOWER

On Jan. 24, 2025, in United States of America and the State of Minnesota, ex rel. Ashley Mothershed v. Mayo Clinic Ambulance, United States District Court Judge Donovan W. Frank denied the Mayo Clinic motion to dismiss the false claim case (but dismiss duplicative counts of submitting false records). The whistleblower is an experienced ambulance coding employee; in her lawsuit she provided numerous examples of inflated charges. Pre-trial discovery will now proceed (when federal government intervenes, whistleblowers typically receive 15% to 30% of the recovery by federal government). https://cases.justia.com/federal/district-courts/minnesota/mndce/0:2022cv00602/199430/91/0.pdf?ts=1737802391

The Court wrote:

"Mothershed is an experienced professional in ambulance coding compliance…. Mayo is a Minnesota-based, non-profit organization that provides ambulance transport services in both Minnesota and Wisconsin.… In November 2020, Mothershed began

working remotely for Mayo's billing department….She worked for Mayo from November 2020 through June 2021, and then again from September 2021 through May 2022….As a biller in Mayo's billing department, Mothershed used information from

Mothershed brings this qui tam action on behalf of the United States of America and the State of Minnesota against Mayo under the federal False Claims Act ('FCA') and the Minnesota False Claims Act ('MFCA.).

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Mothershed alleges that Mayo had three schemes for submitting false claims: (1) failing to review whether ambulance transports were medically necessary; (2) inaccurately reporting the level of services provided by upcoding non-emergency transports to emergency transports; and (3) inaccurately reporting the level of services provided by upcoding basic life support ('BLS') services to advanced life support ('ALS') services.

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As for knowledge, Mothershed alleges many conversations with her supervisors at Mayo about the problems with this billing practice. Her supervisors ignored her suggestions and told her to keep billing this way, even at times telling her to go back and change her codes. These actions demonstrate, at a minimum, a reckless disregard because Mayo was aware of the substantial and unjustifiable risk that they might have been submitting false claims, but they ignored those warnings by Mothershed. Thus, Mothershed sufficiently alleges knowledge.

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Mothershed provides two specific examples of this practice. Patient LS-3 was suffering from diarrhea, abdominal pain, nausea, and vomiting…. An ALS crew was dispatched to respond to the call, consisting of one Paramedic and one EMT-Basic….Dispatch marked the call type as 'BLS.'… Upon arriving at the scene, the EMT-Basic performed an assessment of the patient…. No ALS interventions were conducted during the call…. Mayo billed the transport as ALS instead of BLS.

Patient LS-5 was found on the floor not making sense and reported experiencing weakness…. An ALS crew was dispatched to respond to the call, consisting of one Paramedic and one EMT-Basic….Dispatch marked the call type as 'BLS.' Upon arriving at the scene, the EMT-Basic performed an assessment of the patient….No ALS interventions were conducted during the call…. Mayo billed the transport as ALS instead of BLS."

Legal Lesson Learned: Up charging BLS services as ALS can lead to litigation by both whistleblowers and by federal and state governments.

Note: See Jan. 17, 2025 U.S. Department of Justice report, "False Claims Act Settlements and Judgments Exceed $2.9B in Fiscal Year 2024."

> "In 1986, Congress strengthened the False Claims Act by increasing incentives for whistleblowers to file lawsuits alleging false claims on behalf of the government. These whistleblowers, or qui tam, actions comprise a significant percentage of the False Claims Act cases that are filed. Qui tam cases may be pursued by the government or the whistleblower, and this past year, significant recoveries were obtained by both. When a qui tam action is successful, the whistleblower, also known as the relator, typically receives a portion of the recovery ranging between 15% and 30%. The 979 qui tam suits filed in fiscal year 2024 breaks the prior record set in 2013, and this past year, the Justice Department reported settlements and judgments exceeding $2.4 billion in these and earlier-filed qui tam suits."

File: Chap. 13, EMS

CA: COVID-19 – DENIED RELIGIOUS ACCOM – FF POOR DOC

On Jan. 22, 2025, in Josh Sattley v. The City of Beverly Hills, the California Court of Appeals, Second District, Second Division held (3 to 0; unpublished decision) that the firefighter / EMT was properly fired after 11 years on the job; his request for religious accommodation was merely one sentence - "He had a sincerely held religious belief or practices that conflicted with a stated job requirement (mandatory Covid vaccination)." The City's HR Director met with each of the firefighters seeking religious accommodations; 14 were granted, and 6 denied (5 then got vaccinated, only Sattley refused). There was no proof that his social media posts criticizing the City played any role in his termination.
https://www4.courts.ca.gov/opinions/nonpub/B334048.PDF

The Court wrote:

> "An employee's inability to perform the essential tasks of his or her job is a legitimate, nondiscriminatory reason to terminate the employee.
>
> ***
> On September 28, 29, and 30, 2021, the city's human resources director, Shelley Ovrom, met individually with each of the firefighters, including appellant, to determine which of the firefighters were eligible for a religious accommodation. Fourteen firefighters were granted an accommodation, four withdrew their requests, and six firefighters' requests were denied. Of the six firefighters whose requests were denied, all except Sattley later submitted proof of vaccination. Because Sattley did not have an approved ccommodation or exemption, he was placed on administrative leave on October 1, 2021. Ovrom and Chief Barton decided to place Sattley on leave because he was no longer qualified to perform his job under the health order…. Sattley received a due process (Skelly) hearing, and the hearing officer recommended Chief Barton proceed with termination of Sattley's employment. On March 9, 2022, Chief Barton terminated Sattley, effective March 11, 2022.

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Sattley's allegations of his alleged bona fide religious belief consisted of one sentence: 'He had a sincerely held religious belief or practices that conflicted with a stated job requirement (mandatory Covid vaccination).' … Because Sattley failed to adequately plead a bona fide religious belief that conflicted with the health order, the trial court properly sustained the city's demurrer to this cause of action…. Sattley's addition [in reply brief] of the denomination of 'Christian' does not clarify his religious objection, as he had already described his religion as "Mormon/Christian" in his November 2021 DFEH charge.

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Sattley argues he engaged in protected activity during the fall of 2021 when he criticized the city's COVID personnel policies on social media and filed this lawsuit…. Sattley fails to point to a specific social media post that he believed was the basis for his termination."

Legal Lesson Learned: If you are seeking religious accommodation, need to provide details about your faith and your history of objection to vaccinations.

File: Chap. 13, EMS

CA: COVID-19 – RELIGIOUS ACCOM – FF VOL. RETIRED

On Jan. 22, 2025, in Mark Alan Clark v. City of Los Angeles, the California Court of Appeals, Second District, Second Division held (3 to 0; unpublished decision) held he was not "constructively discharged." He was permitted to work from home as the FD's equipment superintendent and voluntarily retired prior to finding out if his religious accommodation was granted. "Given the city's indefinite excusal of Clark from working in person, receiving a vaccine, and getting tested for COVID-19, no reasonable employer would have felt resignation was Clark's only option." He retired on March 31, 2022, at age 55, while his request for religious accommodation was pending. After Clark voluntarily retired the city granted all pending exemption requests. https://www4.courts.ca.gov/opinions/nonpub/B335656.PDF

The Court wrote:

"Clark worked remotely from home starting in June 2021 due to his wife's medical condition. He applied for and was granted modified intermittent family medical leave. Clark had a telephone conversation with Assistant Chief Richard Fields on December 1, 2021, in which Fields personally permitted Clark to continue to work remotely until March 2022. After that time, Clark would have to take early retirement or return to working in person. Fields told Clark that his religious exemption request was still under review. Clark was also informed that if his request for exemption was denied, it could be appealed to the Fire Chief.

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> The city's formal approval of Clark's request for accommodation during the time of his employment was not necessary for the city to reasonably accommodate Clark, who was permitted to work from home from March 2020 through March 2021 and from June 2021 through March 2022. He attended work in person for one day on March 30, 2022, the day before his retirement. Clark did not allege he was ever required to test for COVID-19 or receive a vaccine…. The city was not required to rapidly implement Clark's preferred solution. Its decision to permit him to work from home, and not require him to get vaccinated or test for COVID-19 during the pendency of his accommodation request, was reasonable."

Legal Lesson Learned: The firefighter's voluntary retirement ended any need to accommodate him.

File: Chap. 16, Discipline

WV: OWNER STAT EMS – $3.3M UNPAID TAXES – CONV.

On Jan. 2, 2025, in United States of America v. Christopher Smyth, U.S. District Court Chief Judge Frank W. Volk denied the defendant's request for a downward departure from the federal sentencing guidelines. He was convicted by a jury on May 3, 2024 by a federal jury in Beckley, West Virginia, for failing to pay the taxes withheld from employees' wages at an ambulance service he operated and for obstructing the IRS. Judge Volk was not impressed by the argument that the defendant was motivated by a desire to protect his community by continuing critical emergency services. "Simply put, Mr. Smyth could have paid the trust fund taxes he had already collected from STAT EMS employees. He redirected the funds elsewhere." Mr. Smith will be sentenced on March 3, 2025.
https://www.wvsd.uscourts.gov/sites/wvsd/files/opinions/MOO_20250102_5_22-cr-00182.pdf

The Court wrote:

> "Mr. Smyth contends his criminal conduct was motivated by a desire to protect his community by continuing critical emergency services. [ECF 148 at 4]. He claims STAT EMS lacked sufficient funds to pay the trust fund taxes, inasmuch as it earlier absorbed two failed ambulance companies. [Id. at 3–4]. He further contends the IRS acknowledged the importance of the services by foregoing levy against STAT EMS or liquidating its assets. [Id. at 4]. For these reasons, he seeks the subject departure and a downward variance.
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> ***
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> Mr. Smyth's decades-long dodge of his taxpayer obligations deprived the Sovereign of monies used to fund essential governmental services. It is our elected representatives who hold the privilege and responsibility for funding decisions. Instead of permitting those policy decisions to be made by the ones to whom the power is reserved, however, Mr.

Smyth made his own funding allocation. And he seeks a reduction for doing so. The approach is quite distorted.

Mr. Smyth also contends his crimes resulted from insufficient funds after absorbing two failed ambulance services in 2014. [ECF 148 at 3–4]. That is inaccurate. His tax crimes started long prior. [See PSR at 5]. The trial surfaced not only Mr. Smyth's failure to pay his trust fund taxes, but also his decision to pay himself, his family, his friends, and the businesses they operated. Mr. Smyth also managed to meet his tax obligations shortly after coming under criminal investigation. Simply put, Mr. Smyth could have paid the trust fund taxes he had already collected from STAT EMS employees. He redirected the funds elsewhere.

In sum, Mr. Smyth shorted the Sovereign and the tax-paying public. Under such circumstances, a downward departure is inappropriate. A ruling on the variance request awaits further development by counsel at sentencing."

Legal Lesson Learned: Failure to pay taxes can result in jail time.

Note: See May 3, 2024, U.S. Department of Justice press release, "West Virginia Ambulance Services Business Owner Convicted of Tax Crimes."

"A federal jury in Beckley, West Virginia, convicted a man yesterday for failing to pay the taxes withheld from employees' wages at an ambulance service he operated and for obstructing the IRS. According to evidence presented at trial, from 2012 through part of 2017, Christopher Jason Smyth operated Stat EMS LLC, an ambulance service located in Pineville, West Virginia. Smyth created Stat EMS after a previous ambulance business Smyth operated accrued millions of dollars of employment tax liabilities and filed for bankruptcy. Smyth caused Stat EMS to be founded in the name of a nominee owner but continued operating the business in the same manner as before.

At Stat EMS, Smyth was responsible for withholding Social Security, Medicare and income taxes from employees' wages and paying them to the IRS. For two quarters in 2016, Smyth, however, did not fully pay the taxes to the IRS. Instead, he paid various personal expenses and transferred funds to businesses held by his friends and family. The IRS determined that Stat EMS accrued approximately $3.3 million in unpaid taxes."

File: Chap. 17, Arbitration

IL: CBA - INJURED FF – WORK COMP AT PART-TIME RATE

On Jan. 17, 2025, in Village of Roselle v. The Illinois Worker's Compensation Commission, et al. (Glen Thomas, Appellee), the Court of Appeals of Illinois, Third District held (5 to 0) reversed an Arbitrator and the Commission on the calculation of the "wage-differential" award to Village part-time firefighter Glen Thomas. He suffered a permanent partial disability (shoulder injury at fire on Feb. 17, 2015) but was able to return to work full time as a public service employee with the Village until retiring on April 29, 2022. He is entitled under state law to a "wage-differential award" but the Court held it is to be calculated only based on normal firefighter pay of $19.15 per hour, not the CBA rate of 1.5 times his public works pay rate ($32.55, using 1.5 multiplier times $21.70). He will therefore receive $374.19 per week until social security and not $636.03 per week that the Arbitrator and Commission awarded him. https://ilcourtsaudio.blob.core.windows.net/antilles-resources/resources/7509d61b-3a3a-4986-bb3a-7cce5964f936/Village%20of%20Roselle%20v.%20Illinois%20Workers'%20Compensation%20Comm'n,%202025%20IL%20App%20(3rd)%20240306WC-U.pdf

The Court held:

> "On February 17, 2015, he was 48 years old and had been working for the Village for 15 years as a full-time public works employee and as a part-time firefighter paramedic. On that date, claimant was injured while fighting a fire. Although he was unable to ever resume work as a firefighter after the accident, he returned to his full-time duties as a public works employee on September 22, 2016. On September 28, 2021, claimant was involved in a non-work-related motorcycle accident. He was completely off work, using medical leave and all of his accrued vacation and sick time, until he retired from the Village on April 29, 2022.
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> ***
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> The calculation of wage-differential benefits should be based on claimant's hourly rate as a part-time firefighter/paramedic. It is claimant's earning capacity as a firefighter that was affected due to the accident. Applying claimant's public works employee hourly rate and the 1.5 multiplier to a wage-differential calculation would not accurately reflect the reduced earning capacity of a retired full-time village employee who was prevented from ever working as a firefighter due to his work-related injury. In other words, after retiring, claimant is not missing out on his public works full-time position pay due to the accident. Instead, he is missing out on his hourly rate as a firefighter only.
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> The Village is correct that the multiplier does not apply upon claimant's retirement. However, the Village is incorrect that the calculation of benefits should be based on

claimant's public works employee hourly rate. The calculation of wage-differential benefits should be based on claimant's hourly rate as a part-time firefighter/paramedic."

Legal Lesson Learned: When drafting CBA for part-time firefighters who are also full time Village employee, include a provision on calculation of a wage-differential award.