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Jan. 2020 – FIRE & EMS LAW Newsletter

[NEWSLETTER IS NOT PROVIDING LEGAL ADVICE.]
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TERRORISM & HOMELAND SECURITY FOR EMERGENCY RESPONDERS – new online course starts Jan. 13, 2020:

- **17 Subject Matter Experts** – videos; including Fire Chiefs from IAFC Terrorism & Metro Chiefs.
- **Las Vegas Mass Shootings:** Greg Cassell, Fire Chief, Clark County, NV – watch his "eye opening video" [shared with Chief Cassell's permission].
- **Syllabus for course**

CASES IN NEWSLETTER

File: Chap. 1, American Legal System

FL: FIRE CHIEF – CODE ENFORCEMENT / 100-YR OLD LODGE WAS CONDEMNED – FIRED – 1st AMENDMENT CASE DISMISSED

On Dec. 12, 2019, in Bradley Batz v. City of Sebring, the U.S. Court of Appeals for the 11th Circuit (Atlanta) held (3 to 0) that the U.S. District Court judge had properly dismissed his First Amendment lawsuit, despite his claims of retaliation for his lawful efforts to condemn a 100-year old Lodge, partially owned by a member of City Council.

"In other words, one of Batz's core responsibilities as the City employee responsible for enforcing the Safety Code was ensuring public safety. Thus, his continued assertion that his speech was motivated by a concern for public safety does not remove it from the realm of employment-related speech…. At the very least, he made no effort to communicate his safety concerns to the public or otherwise communicate with anyone outside other government officials…. Accordingly, we conclude Batz spoke in his role as a City employee when he expressed concerns about efforts to undermine and delay his enforcement efforts against the Lodge. His speech therefore was not protected by the First Amendment.

Facts:

"Batz, who served as the City's Fire Chief from May 2006 to December 2016, alleged the City illegally retaliated against him when it discharged him following his complaints about attempts by various City officials to undermine his efforts to enforce fire safety rules at the Kenilworth Lodge (the Lodge), a historic building owned by certain persons with connections to the City Council and City Administration. Following his discharge, Batz initiated a civil suit against the City in Florida state court, and the City removed the action to federal court.

***

On May 10, 2016, a fire broke out at the Kenilworth Lodge. The Lodge is a hotel located in the City, the main building of which is a 100-year-old four-story wood-frame structure. The Lodge is co-owned by City council member Mark Stewart, and two other men not directly connected to the City government, Monir Rahal and Robert Mueller. Stewart and his wife are 49% owners, with Rahal and Mueller collectively controlling the majority interest.

***

When the fire broke out in May 2016, Batz, Assistant Chief Robert Border, and other firefighters responded and put out the fire. Batz determined the cause of the fire was two mattresses that had been pushed against an air conditioning unit in a mechanical room. Batz informed the Lodge's "maintenance man" that it violated the Florida Fire Prevention Code (the Safety Code) to use an electrical room for storage.

***

On May 12, 2016, two days after the fire, Batz and Assistant Chief Border returned to the Lodge to conduct a follow-up inspection, during which Batz and Border documented several additional violations of the Safety Code, chief among them issues with the Lodge's sprinkler system.1

> Footnote 1: Batz also identified exposed wiring, malfunctioning emergency lights, exit doors that would not open, excessive extension cords, issues with breaker boxes, multiple penetrations in walls, and improper storage.

After this follow-up inspection, Batz and Border met with Mueller and members of the Lodge's maintenance crew to discuss the various code violations, which were documented in a report provided to Mueller.

***

[After repeated efforts to get Lodge to fix code violations] Batz came to believe that Noethlich [City Administrator] had been telling the Lodge's owners that they did not have to comply with Batz's directives because the Lodge qualified as a historic building. Batz believed this explained the Lodge's pattern of hiring and dropping contractors. He inferred that, after hiring a contractor in response to Batz's instructions, the Lodge owners would be told they did not have to comply and then cancel the contract.

***

On or around August 12, 2016, Batz, Mayor Shoop, Councilman Lowrance, Noethlich, and City Attorney Swaine met and agreed that if the Lodge failed to meet the deadline set out in the August 5 letter, the City would proceed with condemnation.

***

As of close of business on August 15, the Lodge had not submitted any documentation regarding the status of the fire sprinkler system. The Lodge was formally condemned for occupancy on August 16, 2016 by Batz and Assistant Chief Border by serving appropriate notice and posting notices on the building. The Lodge remains closed.

***

Following the condemnation, Batz had several additional interactions and meetings with City Officials regarding the condemnation of the Lodge and what Batz believed to be inappropriate interference with that process by Noethlich and others.

The first such meeting occurred on August 23, 2016, when Noethlich called Batz into a meeting with Assistant Chief Border, City Attorney Swaine, and Councilman Stewart.2 During this meeting, Stewart "was very agitated with [Batz]" and "went off on [him]," insisting the condemnation was Batz's fault and claiming that the property had not been cited for 20 years and suddenly his property was being condemned. Batz explained that the repairs were being required now because the dangerous conditions had been discovered following the May 2016 fire.

Shortly thereafter, Batz attended the Sebring Thunder car show, where he had a heated discussion with City Councilman Lenard Carlisle.

***

When Batz asked why everyone was so angry with him, Mayor Shoop responded that "nobody thought you would really do it," presumably referring to the condemnation of the Lodge. According to Mayor Shoop, "[t]he incident with Lenard Carlisle was the final indication . . . that the City should not continue to tolerate Batz's attitude and treatment towards others."

***

Unrelated to the condemnation of the Lodge, the City had, over time, received complaints and concerns from six owners and operators of properties subject to Batz's fire inspections who had been required to take actions to bring their properties into compliance with the Safety Code. Specifically, various business owners complained about Batz's demeanor, rudeness, and overall attitude during fire inspections. There were no written reports or other records documenting any of these complaints.

On November 7, 2016, Batz attended a meeting with Mayor Shoop, Noethlich, and Councilman Lowrance, during which he was told he needed to resign or retire because "people are complaining about you and the fire codes."When he refused, he was placed on administrative leave with the City.

***

Of the four councilmen who ultimately voted to discharge Batz, three submitted affidavits in the instant case explaining their decisions. Councilman Lowrance, the Fire Department Liaison, explained that he did not think Batz was n effective Chief, and he denied his decision had anything to do with the Lodge. He further explained that "Batz was rude to members of the community and a bully to his own firefighters and it was causing problems for the Department." Councilman Lowrance also attributed what he viewed as the 'excessively high' turnover rate in the Fire Department to Batz's leadership."

Holding:

"[It] is well established that 'public employees do not surrender all their First Amendment rights by reason of their employment,' and a public employer generally may not retaliate against a public employee for speech that is protected by the First Amendment. Garcetti v. Ceballos, 547 U.S. 410, 417 (2006). However, the Court also recognized the need to strike 'a balance between the interests of the [employee], as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees.' Id. (quotation marks omitted) (quoting Pickering v. Bd. of Educ. of Twp. High Sch. Dist. 205, 391 U.S. 563, 568 (1968)).

***

Indeed, each of the three instances of purportedly protected speech Batz has identified was made in furtherance of his attempt to fulfill his professional duty to ensure compliance with the Safety Code. The fact that 'the starting point' of Batz's speech was his "official duties" suggests he was not speaking as a private citizen.

***

His repeated expressions of concern and frustration regarding what he considered to be a concerted effort to undermine and delay enforcement of the Safety Code were made 'in furtherance of' his responsibility to ensure such enforcement.

***

Accordingly, we conclude Batz spoke in his role as a City employee when he expressed concerns about efforts to undermine and delay his enforcement efforts against the Lodge. His speech therefore was not protected by the First Amendment."

Legal Lessons Learned: Fire Chiefs are other public employees have only limited First Amendment rights under the "balancing test." The Court also dismissed his Florida Whistleblower claims because he did not submit a "written and signed complaint."

File: Chap. 1, American Legal System

VA: HYDRANT NEAR HOUSE OUT OF SERVICE – 1000 FOOT LAY – PERSON DIED - GOVERNMENTAL IMMUNITY, CASE DISMISSED

On Dec. 12, 2019, in Sam Massenburg, Administrator of the Estate of Corey Demetrius Massenburg, Deceased v. City of Petersburg, the Supreme Court of Appeals of Virginia, held that the Circuit Court judge properly granted summary judgment to the City.

"A fire hydrant, as the name suggests, exists to facilitate the firefighting function of the municipality that installed it. That function is quintessentially governmental. That fire hydrants can be put to other uses is inconsequential because the sole reason municipalities undertake the expense of installing fire hydrants is to promote their ability to respond to fire emergencies. *** The City's provision and maintenance of fire hydrants is therefore an immune governmental function.

Facts:

"Corey Demetrius Massenburg died during a fire at his Petersburg residence. His father, Sam Massenburg, qualified as the administrator of his estate and in that capacity filed a wrongful-death action against the City of Petersburg. The complaint alleged that a fire began at Corey's residence while he was inside. Although firefighters arrived promptly, the closest fire hydrant 'was effectively inoperable' because it 'was not receiving an adequate or sufficient sustained flow of water.'

***

Firefighters had to resort to the next closest hydrant 'some 1,000 feet away,' and as a result, Corey 'died from smoke inhalation and thermal injuries before firefighters could establish a sufficient water supply and remove him from the burning residence.'

***

[Complaint also alleged] that the lack of water pressure was a systemic problem affecting the area in which the house was situated. It faulted the City for failing to notify area residents that the infrastructure was 'not adequate or sufficient to provide the required safe flow of water to fire hydrants in the area.'

[But on appeal this was no longer alleged.] At oral argument, however, counsel for Massenburg declined to argue this position, conceding that he did not possess information that there was insufficient pressure generally or that the water supply was otherwise inhibited in a systemic manner. When asked whether a systemic lack of water pressure caused the harm, counsel argued that the cause was instead 'defective equipment that the City was supposed to take care of. I'm assuming the water pressure was fine. There's not a concern about a lack of supply of water. The fire department just couldn't get to it because the public works department didn't take care of the things they were supposed to take care of.'

Because responding to emergency calls for fires is an immune governmental function, the trial court concluded that sovereign immunity barred Massenburg's suit. It accordingly granted the City's demurrer and plea in bar and dismissed the complaint with prejudice."

Holding:

"The trial court therefore did not err in deciding the case on the pleadings despite Massenburg's jury demand.

***

The central issue in this appeal is whether sovereign immunity bars Massenburg's suit. Virginia has long recognized that local governments share in the Commonwealth's sovereign immunity.

***

Under longstanding principles, sovereign immunity protects municipalities from tort liability arising from governmental functions, but not proprietary functions.

***

In determining whether a municipality is engaged in a governmental or proprietary function, this Court has rejected a simple inquiry into whether private entities also perform the same service. Edwards v. City of Portsmouth, 237 Va. 167, 172 (1989).

***

The City's provision and maintenance of fire hydrants is therefore an immune governmental function."

Legal Lessons Learned: Governmental immunity is recognized in Virginia, and protects the city when performing services that are not provided by private companies.

File: Chap. 1, American Legal System

OH: ARSON CONVICTION UPHELD – FIRE IN 3 LOCATIONS – FESH GASOLINE – DIRECT & CIRCUMSTANTIAL EVIDENCE

On Dec. 12, 2019, in State of Ohio v. Gina M. Huler, the Ohio Court of Appeals for the 8th District (Cuyahoga County), held (3 to 0) that there was sufficient direct and circumstantial evidence for the trial judge to find her guilty of aggravated arson.

> "[Jeff] Koehn [Ohio Fire Marshal investigator] also determined that three separate fires were set in three separate locations in the house and a fourth was attempted, but failed to erupt. In support of his determination, Koehn discussed in detail three distinct fire patterns, which had no connection to each other and did not spread across the ceiling as a normal house fire would spread. A determination that there were three separate and distinct fires, with no connecting patterns, serves to eliminate the notion that sparks from the masonry work completed earlier that day could have gone down the chimney, into the house, and started the fire. *** The debris from the trash can on the stairs tested positive for acetone; debris from the attic tested positive for gasoline, and the plastic water bottle tested positive for gasoline. The forensic lab report also indicated the gasoline was fresh, not weathered or aged gasoline. *** Further, although the fire investigation determined that the cause of the fire was classified as incendiary and was intentionally set by Huler, we could arrive at the same conclusion using only circumstantial evidence. 'Circumstantial evidence and direct evidence inherently possess the same probative value.' Jenks, 61 Ohio St.3d 259, 574 N.E.2d 492, at paragraph one of the syllabus."

Facts:

> "In May 2018, Huler was charged with one count of aggravated arson, in connection with a fire that occurred at the Parma, Ohio residence she shared with her boyfriend and two of their three children, as well as with their two dogs. In December 2018, the matter proceeded to a bench trial.
> ***
> On April 13, 2018, the day of the fire … [at] approximately 1:00 p.m., after leaving the house twice and returning for the second time around 12:30 p.m., Huler came out of the house yelling and screaming that there was a fire inside and her dogs were trapped inside the house. Two neighbors assisted Huler by calling 911, and one of the masons rescued one of the dogs. The second dog was rescued after the fire department, police, and dog warden arrived on the scene.
> ***
> The fire department extinguished three distinct fires in the home; one on the landing between the first floor and the basement; one on a hanging mail and key holder; and one at the entrance to the kitchen. There was evidence to suggest here would have been a fourth fire, but it failed to erupt. The fire caused approximately $4,200 worth of damage.
> ***
> Mollie Jordan ("Jordan"), of the State Fire Marshal's Forensic Lab, testified that she analyzes evidence for possible ignitable liquids, possible latent fingerprints, and also swabs for DNA. Jordan testified that she tested the debris from the fire. Specifically, Item Number 1, debris from the kitchen and hallway floor, tested negative for ignitable liquids; Item Number 2, debris from the kitchen table, tested negative for ignitable liquids; Item Number 3, debris from the trash can on the stairs, tested positive for acetone; Item Number 4, debris from the attic, tested positive for gasoline; and Item Number 5, plastic bottle from the attic, tested positive for gasoline.
> ***
> Jeff Koehn ('Koehn'), a fire investigator for the Ohio Division of State Fire Marshal, whom the defense stipulated was an expert witness, testified that the Parma Fire Department asked him to investigate the fire.
> ***

Koehn testified that the fires in the separate locations in the house did not communicate with each other. Koehn explained the first fire, on the countertop, was fuel limited, so it burned out before spreading up the wall or beyond the wall corner of tabletop. The second fire, in the kitchen, Koehn explained, spread up the wall and about three feet across the ceiling. Koehn testified that these two fires did not communicate across the ceiling as one would expect in a house fire when something burns. Koehn explained the third fire, on the landing, did not communicate beyond its limited area of origin.

Koehn testified that after conducting his examination and investigation, he determined to a reasonable degree of scientific certainty that the cause of the fires were incendiary. Koehn further determined that Huler lit the fires.

***

The trial court found Huler guilty as charged. The trial court imposed a two-year suspended sentence and placed her on probation for two years. The trial court ordered restitution in the amount of $4,264.47, and notified Huler that she will have to register her address as an arson offender for a period of ten years."

Holding:

"In the instant case, it is undisputed that the house was an occupied structure, there is no question that the fire occurred, and it was uncontroverted that the fire resulted in approximately $4,200 worth of damage. The remaining element is whether Huler was responsible for the fire.

At trial, Koehn, whom the defense stipulated was an expert fire investigator, laid out the four classifications for causes of a fire as accidental, natural, incendiary, and undetermined. Koehn meticulously eliminated any possibility that the fire was accidental. There was no evidence of an electrical short and no evidence of the failure of an equipment or tool. The possibility that the fire resulted from natural causes, such as lightning strike, flood, or high winds, was also eliminated."

Legal Lessons Learned: Expert testimony by State Fire Marshal investigator who "meticulously" eliminated other causes, and laboratory tests confirming gasoline, led to this conviction.

File: Chap. 3, Homeland Security

NY: TERRORIST – ATTACKED FBI AGENT, 8-INCH KNIFE – PLED GUITY – 2nd Cir: 17 YRS IN PRISON NOT ENOUGH

On Dec. 27, 2019, in United States of America v. Fareed Mumuni, the U.S. Court of Appeals for Second Circuit (NYC), held 2 to 1 that U.S. District Court judge must re-sentence the convicted terrorist.

"In this terrorism case, the Government appeals the substantive reasonableness of the sentence imposed on Defendant-Appellee Fareed Mumuni ('Mumuni'). He was convicted of, inter alia, conspiring to provide material support to the Islamic State of Iraq and al-Sham ('ISIS') and attempting to murder a federal agent in the name of ISIS. His advisory sentence under the United States Sentencing Guidelines ('Guidelines' or 'U.S.S.G.') was 85 years' imprisonment. The sole question on appeal is whether the United States District Court for the Eastern District of New York (Margo K. Brodie, Judge) erred—or 'abused its discretion'—by imposing a17-year sentence, which constitutes an 80% downward variance from Mumuni's advisory Guidelines range. We conclude that it did. Accordingly, we REMAND the cause for resentencing consistent with this opinion."

Facts:

> "Mumuni is an American-born citizen who pledged allegiance to ISIS and pleaded guilty, without a plea agreement, to:(1) conspiring to provide material support—including services and himself—to a foreign terrorist organization, to wit ISIS, in violation of18U.S.C.§2339B….
> ***
> Beyond his efforts to facilitate travel to Syria, Mumuni also conspired with Saleh and others to conduct a domestic terrorist attack against law enforcement officers. Indeed, in a post-arrest statement to agents from the Federal Bureau of Investigation ('FBI'), Mumuni confirmed no less than four times that he planned to attack law enforcement were they to ever approach him or prevent him from traveling to Syria.
> ***
> Two days after Saleh's attack [on an FBI agent in surveillance car in NYC], the Government obtained a search warrant for Mumuni's cellular phone and residence on Staten Island. On June17, 2015, FBI agents went to Mumuni's residence to execute the search warrant. The agents knocked on the front door and announced themselves as members of law enforcement. Mumuni's mother and sister opened the door and granted the officers permission to enter the premises.
> Mumuni, aware that law enforcement officers had entered his home, retrieved an eight-inch kitchen knife from his bedroom and descended the stairs. With the knife concealed behind his back, Mumuni—pursuant to the agents' instructions—entered the living room and walked toward the couch. Suddenly, he began charging toward FBI Special Agent Kevin Coughlin ('Agent Coughlin'). It wasn't until he was within 'arm's length' that Mumuni revealed his knife and began stabbing the unarmed Agent Coughlin. During the ensuing tussle, as other agents rushed to Agent Coughlin's aid, Mumuni attempted to reach for the trigger of another agent's M4 carbine assault rifle.
> Fortunately, prior to entering Mumuni's home, Agent Coughlin made a 'last-minute decision' to wear an armored SWAT vest…. What ultimately shielded Agent Coughlin from Mumuni's repeated stabs was the metal magazine carrier inside his vest. Indeed, photographs taken after the attack show Agent Coughlin's metal magazine carrier with three distinct indentations and an eight-inch kitchen knife with a missing tip."

Holding:

> "Specifically, [Federal sentence judge] impermissibly second-guessed—after accepting Mumuni's guilty plea—whether Mumuni actually intended to kill his victim and whether the eight-inch kitchen knife he wielded during his attack on law enforcement constituted a deadly or dangerous weapon.
> ***
> While district courts have broad discretion at sentencing, this discretion is not unlimited. Not only must district courts abide by specific procedural requirements, but they must faithfully evaluate the record to ensure that the sentence imposed accurately and adequately reflects the seriousness of the offense conduct.
> ***
>
> We conclude by underscoring that the Guidelines, while only advisory, appropriately reflect Congress's considered judgment that terrorism is different from other crimes."

Concur in Part / Dissent in Part – Judge Peter W. Hall:

> [Judge Hall concurs in re-sentencing, but dissents as follows.]
> "I respectfully disagree with the majority's suggestion that the District Courts should weigh mitigating factors differently in cases involving terrorism and serious offense conduct."

Legal Lessons Learned: Very important decision that will hopefully influence other Federal sentencing judges nationwide. Lots of Press Coverage on the decision [resentencing not yet occurred].

TN: GREAT SMOKEY MOUNTAIN FIRE – GATLINBURG NOT WARNED - KILLED 14 – LAWSUIT MAY PROCEED

On Dec. 9, 2019, in Michael Reed v. United States, Senior U.S. District Court Judge Thomas W. Phillips, Eastern District of Tennessee (Knoxville Division), denied the U.S. Government's motion to dismiss, since Federal Tort Claims Act allows lawsuit since the National Park Services' "Fire Management Plan has mandatory mitigation actions to protect life and property (duty to warn).

> "Section 3.3.2(C) of the FMP [Fire Management Plan] states that '[f]irefighter and public safety is the first priority in all fire management activities[,]' and specifies that 'Park neighbors, Park visitors and local residents *will be* notified of *all* planned and unplanned fire management activities that have the potential to impact them.' [*Id*. at 28 (emphasis added)]. Additionally, Section 4.4.2 of the FMP addresses the issue of public safety, and subsection (F) 'outline[s] mitigation actions *required* to protect values at risk and to ensure the safety of park staff and visitors as well as the neighboring public.' [*Id*. at 54-55 (emphasis added)]. Table 13, titled 'Mitigations for Public Safety Issues,' then addresses various actions to be taken to protect various groups and resources. [*Id*. at 55]. *** Plaintiffs have cited mandatory directives to support jurisdiction over their claims based on the failure to warn about the Chimney Tops 2 fire, the Court finds that it has jurisdiction over this matter, and Defendant's motion to dismiss for lack of jurisdiction … will be denied.

Facts:

> "This case stems from the Chimney Tops 2 fire that began in the Great Smoky Mountains National Park, and ravaged the City of Gatlinburg, in November 2016. Plaintiffs have now sued the United States under the Federal Tort Claims Act ('FTCA'), seeking redress for their losses, which include property losses and losses of life…. Plaintiff Reed has also raised claims of wrongful death and loss of society and consortium relating to the deaths of his wife, Constance Reed, and two young daughters, Chloe and Lily Reed.
> ***
> The government has filed a motion to dismiss for lack of subject matter jurisdiction, asserting that the claims all fall within the discretionary function exception to the government's waiver of sovereign immunity under the FTCA.
> ***
> As an initial matter, although the parties briefed the issue of the application of the discretionary function exception to each of the claims raised in the complaint, at a hearing on this matter, Plaintiffs limited their arguments to the failure to warn claim. Specifically, Plaintiffs stated 'make no mistake, we're not challenging how they fought the fire. We are challenging the warning decision, not how they fought the fire. They have the right to decide to let it burn. They have the right to decide to put it out.'"

Holding:

> "Plaintiffs allege jurisdiction over the United States pursuant to the FTCA. The FTCA provides a limited waiver of sovereign immunity, that is, a waiver that only applies to certain tort claims for:
>
> > injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred. 28 U.S.C. § 1346(b)(1).
>
> This limited waiver of the government's sovereign immunity is further narrowed by certain enumerated exceptions. *See* 28 U.S.C. 2680. Among these is the discretionary function exception, which excludes from the waiver of sovereign immunity the following:

> [a]ny claim . . . based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused. 28 U.S.C. § 2680(a).
>
> 'The exception covers only acts that are discretionary in nature, acts that "involv[e] an element or judgment or choice.'" *United States v. Gaubert*, 499 U.S. 315, 322 (1991) (quoting *Berkovitz v. United States*, 486 U.S. 531, 536 (1988)). The purpose of this exception is 'to prevent judicial 'second-guessing' of legislative and administrative decisions.'
>
> ***
>
> [FAILURE TO WARN.] In determining whether the NPS's failure to warn of the fire danger falls within the discretionary function exception, the critical first step is to determine precisely the conduct at issue. Plaintiffs define the conduct at issue as the NPS 'neglecting to provide timely and accurate notice and warning to Park neighbors, local government officials, local fire departments, local residents, and visitors about the status of an imminent danger presented by the Chimney Tops 2 Fire….
>
> ***
>
> Plaintiffs also cite to Section 4.4.2 of the FMP, which requires the Park Service to 'protect values at risk and to ensure the safety of park staff and visitors as well as the neighboring public.' … That same section of the FMP continues on to list actions that the Park Service should take with regard to 'Park neighbors,' including:
>
> • Post current fire information on websites as available
> • Inform park neighbors of wildland fires, and
> • Suppress those fires or parts there of [sic] that threaten to burn off of park property or that adversely impact public health and safety.
>
> ***
>
> The Court finds that this language is insufficient to label the entirety of the FMP as mere 'guidelines,' that cannot provide any mandatory directives. The Court has carefully reviewed the entirety of both DO 18 [Director's Orders] and the FMP, and, although the Court concludes that DO 18 merely contains guidelines for the NPS, the Court concludes that the FMP appears to set forth more specific requirements, to implement the goals and guidelines set forth in DO 18. Accordingly, the Court cannot conclude, based on the language in the introduction to the FMP, that everything contained therein is merely a guideline.
>
> ***
>
> The Court finds that this language is insufficient to label the entirety of the FMP as mere 'guidelines,' that cannot provide any mandatory directives. The Court has carefully reviewed the entirety of both DO 18 and the FMP, and, although the Court concludes that DO 18 merely contains guidelines for the NPS, the Court concludes that the FMP appears to set forth more specific requirements, to implement the goals and guidelines set forth in DO 18. Accordingly, the Court cannot conclude, based on the language in the introduction to the FMP, that everything contained therein is merely a guideline.
>
> ***
>
> Accordingly, for the reasons stated herein, Defendant's motion to dismiss for lack of jurisdiction … will be denied.

Legal Lessons Learned: "Failure to warn" establishes a cause of action under Federal Tort Claims Act. See also the After Action Report (Dec. 19, 2017): "An After Action Review has been released for the Chimney Tops 2 Fire that spread from Great Smoky Mountains National Park into the city of Gatlinburg, Tennessee a little over a year ago killing 14 people, forcing 14,000 to evacuate, destroying or damaging 2,500 structures, and burning 17,000 acres. The AAR, completed by ABS Group, was commissioned by Gatlinburg and Sevier County."

File: Chap. 6, Employment Litigation [also Chap. 18, Legislation]

PA: PHILADEPHIA FF WITH LUNG CANCER – SMOKER – WILL RECEIVE WORKERS COMP BENEFITS – 2011 STATUTORY PRESUMPTION LAW

On Jan. 3, 2020, in Wayne Deloatch v. Workers' Compensation Appeal Board (City of Philadelphia), the Commonwealth Court of Pennsylvania held (3 to 0) that the firefighter is entitled to benefits.

> "During Claimant's firefighting career (20 years), he fought approximately 200-300 fires, including building, house, car, dumpster, trash, grass, and field fires, which exposed him to smoke. *** Claimant did not use the SCBA during exterior firefighting—*i.e.*, outdoor firefighting—or overhaul, which entailed 'ripping of walls, ceilings, searching for any hidden fire and extinguishing that if it's visible.'… After exposure to each fire incident, Claimant's body would be coated in soot, and Claimant would often find soot in his nasal secretions up to a week after exposure…. Claimant further testified that he stopped smoking cigarettes in 2011, but had a 30 to 35-year-long smoking history… During that period, Claimant recalled smoking only one pack of cigarettes per week…. Firefighters were permitted to smoke in the fire stations, and Claimant worked with smokers during his career as a firefighter. *** For the reasons set forth above, Claimant established that he was entitled to the statutory presumption under Section 301(f) of the Act, being that his lung cancer was caused by the occupation of firefighting. Employer failed to rebut the statutory presumption with substantial competent evidence that Claimant's cancer was caused by something other than his workplace exposure to IARC Group 1 carcinogens linked to lung cancer.

Facts:

> Claimant worked as a firefighter for the City of Philadelphia (Employer) from December 12, 1988, until he retired on November 1, 2008…. In 2011, Daniel Stermand, M.D., diagnosed Claimant with lung cancer, for which Claimant later received treatment.
> ***
> On December 12, 2012, Claimant filed a claim petition alleging that he suffered from non-small cell lung cancer resulting from direct exposure to IARC Group 1 carcinogens while working as a firefighter with Employer…. Claimant sought payment of medical bills related to treatment of his non-small cell lung cancer….
> Employer, thereafter, filed an answer denying all allegations in the claim petition…. In support of his claim petition, Claimant provided his own deposition testimony, a medical report from Virginia Weaver, M.D., as well as a medical report from and deposition testimony of Barry L. Singer, M.D. In opposition to Claimant's claim petition, Employer presented the deposition testimony of Tee Guidotti, M.D., M.P.H., as well as a medical report from Howard Sandler, M.D.
> ***
> According to Claimant, he worked for Employer as a firefighter for approximately twenty years…. Employer gave Claimant a physical examination prior to hiring him. As a result of the examination, Employer did not place any restrictions on Claimant's ability to work…. Further, Claimant was never diagnosed with cancer at any point during his employment….
> Over the course of his career, Claimant worked at three different fire stations. None of these stations contained a diesel fuel emissions capture system…. At the beginning and end of each shift, firefighters were required to start the fire engine trucks and leave them running for approximately 15-20 minutes…. Claimant, therefore, saw and smelled diesel fuel emissions at each shift during the twenty years of his employment…. The ceilings and walls in each fire station were covered with soot and grime….
> During Claimant's firefighting career, he fought approximately 200-300 fires, including building, house, car, dumpster, trash, grass, and field fires, which exposed him to smoke…. Claimant sometimes wore a self-contained breathing apparatus (SCBA) when responding to a fire…. SCBAs provide the wearer with clean air for approximately 20-30 minutes depending on the individual and the amount of work involved….
> According to Claimant, Employer did not fit-test the SCBAs…. Claimant did not use the SCBA during

exterior firefighting—*i.e.*, outdoor firefighting—or overhaul, which entailed 'ripping of walls, ceilings, searching for any hidden fire and extinguishing that if it's visible.'…. After exposure to each fire incident, Claimant's body would be coated in soot, and Claimant would often find soot in his nasal secretions up to a week after exposure. Claimant further testified that he stopped smoking cigarettes in 2011, but had a 30 to 35-year-long smoking history…. During that period, Claimant recalled smoking only one pack of cigarettes per week…. Firefighters were permitted to smoke in the fire stations, and Claimant worked with smokers during his career as a firefighter.

***

Employer submitted a medical report of Dr. Sandler, a licensed physician specializing in occupational and environmental medicine…. With respect to Claimant's specific case, Dr. Sandler opined that epidemiologic evidence does not support the conclusion that exposure to arsenic, asbestos, benzene, and other IARC Group 1 carcinogens was a substantial factor in causing Claimant's lung cancer…. Accordingly, Dr. Sandler opined that Claimant's lung cancer was not caused by occupational exposure to carcinogens, but most likely by Claimant's personal risk factors—specifically, his smoking history."

Holding:

"[In 2011, PA enacted statutory presumption law.] Section 301(f) of the Act establishes a special evidentiary presumption that applies when the employee is a firefighter who suffers from an occupational disease in the form of cancer. Section 301(f) provides, in relevant part:

> *Compensation pursuant to cancer suffered by a firefighter shall only be to those firefighters who have served four or more years in continuous firefighting duties, who can establish direct exposure to a carcinogen referred to in* [*S*]*ection 108(r)* [*of the Act*] relating to cancer by a firefighter and have successfully *passed a physical examination prior to asserting a claim under this subsection or prior to engaging in firefighting duties and the examination failed to reveal any evidence of the condition of cancer. The presumption of this subsection may be rebutted by substantial competent evidence that shows that the firefighter's cancer was not caused by the occupation of firefighting*. . . .

***

Dr. Sandler's opinion also rejected the notion that Claimant's cancer was caused by exposures to carcinogens during firefighting, concluding, instead, that '[Claimant's] diagnosed lung cancer is *most likely* caused by his significant personal risk factors, the most important being his personal smoking history.' (R.R. at 894 (emphasis added).) Dr. Sandler's opinion lacks the level of certainty required by law to establish a causal connection between Claimant's nonemployment-related risk factors and his cancer…. Consequently, Dr. Sandler's opinion is also insufficient to rebut the evidentiary presumption.

***

For the reasons set forth above, Claimant established that he was entitled to the statutory presumption under Section 301(f) of the Act, being that his lung cancer was caused by the occupation of firefighting. Employer failed to rebut the statutory presumption with substantial competent evidence that Claimant's cancer was caused by something other than his workplace exposure to IARC Group 1 carcinogens linked to lung cancer. Accordingly, Claimant is entitled to benefits under the Act, and we reverse the Board's December 11, 2018 order to the contrary."

Legal Lessons Learned: The Pennsylvania Firefighter Cancer Presumption Act of 2011, established that cancer is *presumed* to have been caused by work-related exposure, if the firefighter establishes four years of firefighting service and direct exposure to a listed carcinogen.

File: Chap. 6, Employment Litigation [also Chap. 18, Legislation]

RI: CRANSTON FF – 20 YRS ON FD - DIED COLON CANCER 2017 – RI SUPREME COURT DENIES WIDOW ACCIDENTAL DISABILITY PENSION

On Dec. 18, 2019 in Corrine A. Lang as Executrix of Estate of Kevin Land v. Municipal Employees' Retirement System of Rhode Island, the Supreme Court of Rode Island ruled (4 to 1) that the widow was not entitled to an award of accidental disability benefits, reversing the Appellate Division of the Workers' Compensation Court.

> "To conclude that the language in § 45-19.1-1 creates a conclusive presumption would not only render the statutory definition of occupational cancer in § 45-19.1-2(d) meaningless and create a right not found within the statute, but would also construe the statute to reach an absurd result. For example, a conclusive presumption that all cancers in firefighters are occupational cancers would mean that a firefighter who smoked four packs of cigarettes a day for decades would receive an occupational cancer disability benefit despite not having proved that his cancer was related to exposure on the job. Similarly, a conclusive presumption would provide occupational cancer benefits to a firefighter who contracted cancer as a result of exposure to pesticides while landscaping in his or her yard. We do not believe the General Assembly would have extended such broad benefits to all firefighters without expressly providing for such in clear and unambiguous language."

Facts:

> "Lang served as a firefighter for the City of Cranston from 1996 until September 2012, when his career was abruptly cut short after he was diagnosed with colon cancer. The city placed Lang on injured-on-duty status, pursuant to G.L.1956§ 45-19-1, and he began receiving salary benefits while incapacitated from work. In January 2014, he applied for accidental disability benefits under G.L. 1956 § 45-21.2-9, based upon his cancer diagnosis.
>
> In July 2015, the Retirement Board of the Municipal Employees' Retirement System of Rhode Island (the board) found that he did not prove that his cancer arose out of and in the course of his employment as a firefighter, and it therefore denied his application.
> ***
> The record reflects that Kevin Lang passed away in June 2017. On December 3, 2018, this Court ordered that Corrine A. Lang, as Executrix of the Estate of Kevin Lang, be substituted as petitioner.
> ***
> [On appeal to Superior Court the] petitioner submitted three affidavits: one from Lang; one from Raymond Chaquette, M.D., Lang's oncologist; and one from William McKenna, the chief of the Cranston Fire Department. The affidavits established that Lang had been employed as a firefighter since 1996, was diagnosed with colon cancer in September 2012, and was immediately placed on injured-on-duty status because he was unable to work as a firefighter. Lang also submitted the record of proceedings before the board, along with its decision. Included in the record of proceedings were the reports from five physicians, including Dr. Chaquette. Although all five physicians agreed that Lang was permanently disabled, none could state that Lang's colon cancer resulted from exposures that occurred while he was employed as a firefighter.
>
> The trial judge issued a written decision in which she reversed the board, finding that §45-19.1-1(b) creates a conclusive presumption that all cancer in firefighters under §45-19.1-1(a) arises out of and in the course of their employment; she therefore granted Lang accidental disability retirement benefits based upon his claim of occupational cancer.
>
> The respondent appealed to the Appellate Division, which, in a written decision, denied and dismissed the appeal and affirmed the decision and decree of the trial judge. A final decree was entered that affirmed the

findings of fact and orders contained in the decree entered by the trial judge. The respondent filed a timely petition for writ of certiorari, which this Court granted."

Holding:

"Additionally, we conclude that the legislative findings contained in § 45-19.1-1 do not establish a conclusive presumption that every firefighter's cancer is due to injury from exposures while in the performance of his or her duties. The legislative findings in § 45-19.1-1(a) are general statements regarding the harsh conditions that firefighters can face or often face. Specifically, § 45-19.1-1(a)(4) states that firefighters 'are often exposed' to carcinogens and that the rise in occupational cancer 'can be related' to toxic substances being in the environment, while § 45-19.1-1(a)(5) adds that cancer among firefighters 'can develop very slowly[.]' (Emphasis added.)

***

Significantly, however, § 45-19.1-1(b)does not declare that each and every individual firefighter has necessarily faced those harsh conditions and been harmed by them, or that every cancer in a firefighter is 'a cancer arising out of his or her employment as a fire fighter, due to injury from exposures * * * while in the performance of active duty in the fire department.' Section45-19.1-2(d)(emphasis added).

Concurring in Part / Dissenting in part [Justice Francis Flaherty]:

"[Concur that Workers Comp Court had jurisdiction.] I dissent because the General Assembly determined as a matter of declarative fact that cancer in firefighters is caused by their dangerous working conditions and because I cannot fathom how the statute at issue can be read in any other way."

Legal Lessons Learned: Hopefully the Rhode Island legislature will promptly amend the statutory presumption statute to clarify the burden of proof when firefighters have cancer. See article on the decision:. See Editorial in support of the decision.

File: Chap. 11, FLSA

NY: FDNY - BACK PAY FOR EMS – HRS WORKED BEFORE / AFTER SHIFT – WILFULL VIOLATION – 3-YRS BACK PAY, DOUBLED - $14.4 MILLION

On Dec. 23, 2019, in Chaz Perry, et al. v. City of New York, U.S. District Court Judge Vernon S. Broderick, Southern District of New York, granted plaintiff's motion for final judgment on behalf of 2,519 current and former EMS, and also Fire Safety Inspectors below the rank of lieutenant. A jury found the FDNY willfully violated FLSA by allowing EMS and Inspector to work early or after shift while not "on the clock." Federal judge awarded backpay for three years for willful violation (not just two years) of $7,238,513.00, as well as an equal amount of $7,238,513.00 in liquidated damages.

"Because the jury in this case has already determined that Defendants committed a willful violation of the FLSA, I reject Defendants' request to deny liquidated damages in this case."

Facts:

"Plaintiffs are 2,519current or former Emergency Medical Technicians ('EMTs'), Paramedics, and Fire Safety Inspectors below the rank of lieutenant in the New York City Fire Department (the 'FDNY'), and brough tthis action against Defendants the City of New York and the FDNY … to recover unpaid compensation under the Fair Labor Standards Act (the 'FLSA'), 29 U.S.C. § 201 et seq.

***

On October 24, 2019, after a three-week trial, an eight-member jury returned a unanimous verdict in Plaintiffs' favor, finding that Defendants violated the FLSA by failing to compensate Plaintiffs for work done before and after their compensated shifts…. The special verdict form used by the jury to render its verdict included a question that asked whether 'Plaintiffs prove[d]by a preponderance of the evidence that the Defendants willfully violated the Fair Labor Standards Act,' to which the jury answered 'YES.'… In light of the verdict, and in accordance with the August 26, 2019 stipulation, the parties conferred and came to an agreement that the total amount of backpay damages owed to Plaintiffs under the FLSA equaled $7,238,513.00."

Holding:

"District courts in the Second Circuit have applied *Pollis* [Pollis v. New Schoolfor Social Research,132 F.3d 115(2d Cir.1997)], and found that the court's discretion to deny liquidates damages is negated by a jury's finding of willfulness.

***

I do not find any of the arguments articulated by Defendants sufficiently persuasive to convince me that it is necessary or prudent to reexamine a conclusion unanimously reached by the eight jurors who already decided the question of willfulness."

The U.S. District Court judge in March 26, 2018 Opinion and Order described the plaintiff's case:

"Specifically, Plaintiffs (1) cite to evidence supporting that supervisors observed EMTs and Paramedics performing uncompensated work …; (2) note that the CityTime system tracks the amount of uncompensated work on a minute-by-minute basis …; (3) explain that they cannot comply with certain FDNY mandates—including being prepared at the start of their shift and maintaining all equipment—unless they engage in pre- and post-shift work …; (4) note that the City provides cash incentives in favor of starting early and that Lieutenants and Captains praise EMTs and Paramedics in their performance evaluations for arriving early …; and (5) state that Plaintiffs understood that they would not be compensated for this type of work, with a few Plaintiffs testifying that they were told they would not be paid or should 'eat the time' …."

***

The Judge then referenced: "As further explained in the Department of Labor's regulations:

> Work not requested but suffered or permitted is work time. For example, an employee may voluntarily continue to work at the end of the shift. He may be a pieceworker, he may desire to finish an assigned task or he may wish to correct errors, paste work tickets, and prepare time reports or other records. The reason is immaterial. The employer knows or has reason to believe he is continuing to work and the time is working time. 29 C.F.R. § 785.11."

Legal Lessons Learned: Fire & EMS departments, like all employers, must pay hourly employees for all hours worked; allowing personnel to work early or stay late without being "on the clock" can result in willful violations (3 years back pay), an additional equal amount as liquidated damages, and attorney fees and costs. 29 USC 216(b).

File: Chap. 13, EMS

GA: EMT – OBJECTED WHEN TOLD TO FALSIFY PATIENTS CAN'T WALK – LATER FIRED, DIDN'T INFORM DIR. 2nd EMS JOB – NO RETALIATION

On Jan. 3, 2020, in Jamie Nesbitt v. Chandler County, GA, d.b.a. Chandler County Ambulance Service, the U.S. Court of Appeals for the 11th Circuit (Atlanta) held 3 to 0 that the U.S. District Court judge properly dismissed the EMT's False Claims Act lawsuit claiming retaliation. He was fired for having an undisclosed second job working for a private ambulance company; no proof that "but for" his being a whistleblower he would have been fired.

"According to Nesbitt, when Greer became the deputy director he started pressuring the EMTs to write in their report narratives that patients were unable to walk, even if they could. That way Medicare would pay for more trips. Nesbitt believed that Greer was asking him to commit fraud, so he began complaining to Greer himself and other County officials. *** The County had a policy prohibiting EMTs from working side jobs without the approval of the ambulance service director. Greer was not the director, David Moore was. Nesbitt assumed that Moore somehow knew about his other job, but there's no evidence that Moore did know about it, much less that he approved it."

Facts:

"The plaintiff, Jamie Nesbitt, started working as an emergency medical technician for Candler County's ambulance service in 2006. Several years later one of his coworkers, Donald Greer, was promoted to be the new deputy director of the ambulance service. That was when Nesbitt's problems began. Nesbitt grew concerned about how Greer was instructing him and other staff members to fill out certain paperwork. Part of his job as an EMT was to complete a 'trip report' after each ambulance ride to document the condition of the patient and the medical necessity of the ambulance service. Medicare relies on those reports when deciding whether to pay for the service. The narrative section of a trip report is especially important for billing purposes.

According to Nesbitt, when Greer became the deputy director he started pressuring the EMTs to write in their report narratives that patients were unable to walk, even if they could. That way Medicare would pay for more trips. Nesbitt believed that Greer was asking him to commit fraud, so he began complaining to Greer himself and other County officials. After Nesbitt started complaining, Greer changed his schedule. Ordinarily the County EMTs worked two 24-hour shifts per week and were on call for two additional 24-hour days. The on-call days gave the EMTs a chance to pick up more overtime hours. Greer started putting Nesbitt on call for only the first half of a day instead of for the full 4 hours, which meant less overtime pay.

With Greer's approval, Nesbitt began working another job at a private ambulance company called Meddixx. The County had a policy prohibiting EMTs from working side jobs without the approval of the ambulance service director. Greer was not the director, David Moore was. Nesbitt assumed that Moore somehow knew about his other job, but there's no evidence that Moore did know about it, much less that he approved it.

The County fired Nesbitt in 2014. The five-member Board of Commissioners had the sole authority to hire and fire County employees. Usually when an employee was fired, the County Administrator or a department head would make the termination recommendation to an individual Board member, who Greer and Moore started th e process to terminate Nesbitt. They met with the County Administrator, William Lindsey, and told him that they wanted to fire Nesbitt because he would not follow orders and had violated the County's policy on side jobs. The Board voted to terminate Nesbitt's employment, and after that, Moore and Greer called him into Greer's office and told him that he no longer worked for the County. They gave him a letter stating that he had been fired for two reasons: his unauthorized job with Meddixx and his refusal to fill out trip reports in 'the proper way.'
***
In August 2014 Nesbitt filed suit under the False Claims Act, 31 U.S.C. §§ 3729–3731, and the Georgia False Medicaid Claims Act, Ga. Code Ann. §§ 49-4-168–168.6, alleging that the County had engaged in a fraudulent scheme related to billing for ambulance services and had fired him in retaliation for his whistleblowing. In June 2016 the United States intervened and reached a settlement with the County and Nesbitt. As part of the settlement, Nesbitt and the government voluntarily dismissed the fraud claims, but Nesbitt's False Claims Act retaliation claim moved forward."

Holding:

> "The result in this case, as we have said, depends on the standard of causation that applies to retaliation claims under the False Claims Act. Nesbitt conceded at oral argument that if a but-for standard instead of a motivating factor standard applies, he loses.
> ***
> We accept his concession about the result of applying that standard to the facts of this case. Nesbitt loses under the but-for standard because it requires him to do what he cannot, which is to 'show that the harm would not have occurred in the absence of[,] that is, but for' his protected conduct. Univ. of Tex. Sw. Med. Ctr. v. Nassar, 570 U.S. 338, 346–47 (2013) (quotation marks and dash omitted)."

Legal Lessons Learned: Some Federal circuit courts have used the "motivating factor" standard in deciding is a retaliation lawsuit may proceed, instead of the much tougher "but-for" standard. Employees who come forward as whistleblowers need to avoid breaching any employer policies in order to enjoy retaliation protection in "but for" jurisdictions.

File: Chap. 13, EMS

FL: HIGH SCHOOL FOOTBALL – HEAT EXHAUSTION / DIED - COACH DELAYED CALLING 911 – NO LIABILITY, LACK REQUISITE CONTROL

On Jan. 2, 2019, in Laurie Alice Giordano v. The School Board of Lee County, Florida and James Delgado, U.S. District Court Judge John E. Steele, U.S. District Court, Middle District of Florida (Fort Myers Division), granted defendants motion to dismiss.

> "Mere compulsory attendance at a public school does not give rise to a constitutional duty of protection under the Due Process Clause because public schools generally lack the requisite control over children to impose such a duty of care upon these institutions."

Facts:

> "Showing obvious signs of heat exhaustion, at the end of the sprints, Zachary had to be helped by other players to the huddle. Just after 10:30 a.m., Zachary collapsed and began convulsing, vomiting, and became incoherent, all obvious signs of heat exhaustion, heat stroke, and dehydration that were ignored. Even after Zachary collapsed, Coach Delgado continued to hold his other huddle meeting with other players and failed and refused to call 911 and provided no proper medical attention to Zachary. There was no trainer or other health care professional present on the practice fields at the time Zachary collapsed.
> A player came from the field to inform Zachary's mother (plaintiff) that her son 'was down' and plaintiff made her way to the field with no indication of the crisis. When she saw Zachary collapsed, she demanded Coach Delgado call 911. When Coach Delgado called 911 he intentionally downplayed the severity of the situation, told the 911 operator that Zachary was fine, substantially increasing the time it took for EMS to arrive. While waiting for EMS to arrive, the School Board and Coach Delgado failed to provide ice packs, immersion tubs, or other equipment to treat Zachary.
> First Responders arrived at 10:52 a.m., and because they were led to believe there was no emergency, they arrived with no means to transport Zachary to the hospital. First Responders did not provide any lifesaving measures such as the "cool first, transport second" method wherein they would move a person out of the sun and into air conditioning and apply ice packs or immerse a person in a cold-water immersion tub. Eight minutes later, EMS arrived and walked to the field without a stretcher or any type of equipment to provide medical attention to Zachary.

Zachary's temperature had risen to 107 degrees and he fell into a heat-induced coma on the way to the hospital, from which he never regained consciousness. Zachary died on July 10, 2017 due to complications related to heat exhaustion/stroke suffered on June 29, 2017."

Holding:

"As for the federal claims under 42 U.S.C. § 1983 for 'unconstitutional deprivation of life', plaintiff alleges that Coach Delgado violated Zachary's clearly established and statutory rights to a safe environment while at summer football practice and not to be denied basic, known rights, such as hydration while exercising in the intense Southwest Florida heat in June.

***

Plaintiff has failed to plausibly allege that Zachary had a custodial relationship with defendants at a voluntary summer football practice.

***

Here, Coach Delgado is alleged to have made conscious decisions and intentional acts to deprive Zachary of water and subjected Zachary to continued rigorous practice to punish him. Even so, such a motive does not create a constitutional violation.

***

Plaintiff does not allege that Coach Delgado made physical conduct with Zachary or engaged in corporal punishment or acted with an intent to punish or injure the minor child. While the alleged conduct might be mistaken or negligent, the Court follows Eleventh Circuit precedent and finds that these allegations do not rise to the conscience-shocking level."

Legal Lesson Learned: Football and other athletic coaches need training in signs of serious illness, and need to promptly call 911.

Chap. 13, EMS

TX: POTHOLE - MOTORCYCLIST INJURED – DIDN'T INFORM CITY OF POTHOLE - EMS RUN RPT. NOT "ACTUAL NOTICE" – CASE DISMISSED

On Dec. 31, 2019, in City of Houston v. Elvin D. Miller, the Court of Appeals for the First District of Texas, held (3 to 0) that the trial judge should have dismissed this lawsuit.

"Accordingly, we hold that Miller has not demonstrated that the City was subjectively aware of its fault in producing or causing his injuries such that it had actual notice of his claims prior to the jurisdictional deadline for giving notice of his claims."

Facts:

"[O]n November 9, 2015, Miller was traveling on Scott Street in Houston, Texas, when he struck a pothole and lost control of his motorcycle, causing him to be 'thrown into the air before colliding violently onto the street.' Emergency medical personnel arrived on the scene and drove Miller to the hospital, where he was treated for a broken leg, a shattered ankle, lacerations, avulsions, and road rash to his arms, legs, and torso. Miller's injuries required multiple surgeries and skin grafts.

***

On March 3, 2016, Miller sent the City a 'pre-suit notice of claim' letter apprising it of his negligence claims against it, and, on April 10, 2017, he filed suit against the City, alleging that an improperly repaired, unbarricaded pothole caused his accident and injuries.

***

The City attached an affidavit stating that it received Miller's notice of claim letter on March 8, 2016, which was outside the 90-daynotice deadline for personal injury claims established by the City Charter.
***
In support of his argument, Miller attached an EMS Patient Care Report from his accident. The report identified the 'cause of injury' as a motorcycle accident, and stated a time and date of 3:26 p.m., November 9, 2015. It also noted that Miller stated that he was travelling at approximately30 miles per hour when he 'hit a pothole and lost control of the bike and was thrown from it.'
Miller also attached work orders for repairs to a water main in the area of the street where he was injured, indicating that work was being done on the road between October 28, 2015 and November 12, 2015.
Miller also argued that a local television news report about his accident, entitled 'Poorly repaired pothole sends motorcyclist to the hospital,' which aired several days after his accident, established that the City had actual notice of his claims.
***
The trial court signed an order denying the City's plea to the jurisdiction and motion to dismiss, and the City appeals that order."

Holding:

"Under the common law, municipalities like the City of Houston are immune from suit and liability for money damages unless the legislature has clearly and unambiguously waived immunity. Worsdale v. City of Killeen, 578 S.W.3d 57, 62 (Tex. 2019).Absent a valid statutory waiver of immunity, atrial court may not assume subject-matter jurisdiction over a suit against a governmental unit.
***
The Texas Tort Claims Act waives the City's governmental immunity in certain limited circumstances, including for personal injury caused by a condition or use of personal or real property. TEX.CIV.PRAC.&REM.CODE ANN.§101.021(2)(providing for waiver of immunity for personal injury or death caused by condition or use of tangible personal or real property).To take advantage of the Act's limited waivers of immunity, a claimant must comply with the notice requirements set forththerein.Seeid.§101.101(a)(requiring notice to be given to governmental entity within six months of injury in order to bring claim against governmental entity).
***
Although the Act states that a claimant must provide written notice within six months of his injury, it also provides that a city can establish a different notice deadline in its charter.Id.§101.101(b)('A City's charter and ordinance provisions requiring notice within a charter period permitted by law are ratified and approved.').The City of Houston's charter establishes a 90-day deadline to provide it with notice of a claim for damages for personal injuries.
***
The written notice requirements in subsections (a) and (b) do not apply if a governmental unit has actual notice.
***
To have actual notice, a governmental unit must have the same knowledge it is entitled to receive under the written notice provisions of the Act. Id. Thus, the actual notice provision requires that a governmental unit have subjective awareness that its fault, as ultimately alleged by the claimant, produced or contributed to the claimed injuries.
***
Neither the EMS report nor the work orders that Miller attached as evidence to his response indicate that the City bore possible responsibility for causing Miller's injuries…. The emergency medical technician's notation that Miller stated that he lost control of his motorcycle after hitting a pothole says nothing about fault.

The same is true of the work orders, which show only that, at the time of Miller's accident, a water main near the area of the road where he was injured was under repair. The work orders do not mention the pothole, Miller, or anyone having been injured."

Legal Lessons Learned: If EMS respond to serious accident and patient advises it was caused by pothole, notify the city immediately of the pothole so it can be filled and similar injuries avoided.

File: Chap. 13, EMS

LA: PARAMEDIC LETTER TO BOARD – NEED POLICY CHANGES – FIRED 19 MOS. LATER – FALSIFYING TRAINING RECORDS – NO RETALIATION

On Dec. 17, 2019, in Patrick A. Benefield; Brian Scott Warren v. Joe D. Magee, the U.S. Court of Appeals for the 5th Circuit (New Orleans) held (3 to 0) that Benefield's "Free Speech" claim may proceed in U.S. District Court in Louisiana.

"The issues, therefore, are (1) whether Warren's speech was on a matter of public concern and (2) whether his June 2015 letter was a substantial or motivating factor for his firing. We agree with Magee [EMS Manager] that Warren failed to allege a sufficient causal connection between his letter and his firing…. Warren sent his letter in June 2015 and was fired in January 2017—a 19-month gap…. Thus, the timing, by itself, between Warren's speech and his firing is not close enough to permit a plausible inference that Warren's firing was causally connected to his speech."

Facts:

"Plaintiffs Brian Warren and Patrick Benfield sued their boss, Joe Magee, claiming that he fired them for exercising their First Amendment free-speech and free-association rights. Magee moved to dismiss their claims based on qualified immunity. The district court held that Magee was entitled to qualified immunity for Benfield's free-association claim but not for Warren's or Benfield's free-speech claims. Magee, on interlocutory appeal, challenges this denial of qualified immunity. We affirm in part, reverse in part, and remand for further proceedings.

***

Warren and Benfield worked in Louisiana as paramedics for the Desoto Parish Emergency Medical Services. Louisiana paramedics must complete annual recertification training and submit reports of this training to a certification organization. The Desoto Parish EMS Medical Director had to sign these annual reports before submission. Joe Magee, the Desoto Parish EMS Administrator, would allegedly sign these reports on behalf of the Medical Director. When the reports were computerized in 2007, Magee allegedly instructed Warren to 'check off the box for [the Medical Director's] approval of the training hours,' which he did. This box was apparently used in lieu of a physical signature.

In June 2015, Warren sent a letter to a member of the Desoto Parish Police Jury [similar to County Commissioners or to a County Council] suggesting changes to Desoto Parish EMS personnel, procedures, and policy. After submitting this letter, Warren claims that 'Magee and some of his underlings' harassed him. This harassment included criticizing Warren's religious beliefs, harassing him about going back to school, telling him to go to counseling or be fired, denying him a promotion, accusing him of acts of terrorism for hiring an attorney to sue the Desoto Parish EMS, accusing him of having women at the station for sexual purposes, and encouraging him to quit.

In December 2016, the new co-Medical Director asked Warren how he and Benfield had been recertified. Warren told him about the practice of checking the box for the Medical Director's approval. Shortly

thereafter, '[Magee] told [Warren] that he needed to quit 'before something bad happened.' Warren does not explain what 'something bad' might mean.

Later that month, Magee allegedly asked Benfield to provide a statement that Warren was not authorized to check the box for the Medical Director and that Magee had not authorized Warren to do so. Benfield refused because, according to him, the statement would have been false. Magee then suspended Warren and Benfield in early January 2017 for falsifying documents and training records. On January 26, 2017, Magee fired them.
***
Warren and Benfield sued Magee under 42 U.S.C. § 1983, alleging (1) that Magee 'retaliated against [Warren] for expressing, in his capacity as a private citizen, matters of public concern' in his June 2015 letter to the Desoto Parish Police Jury; and (2) that Magee 'retaliated against [Benfield] due to [Magee's] perception that [Benfield] was allied with [Warren] and because [Benfield] would not provide false statements to the authorities or to [Magee] concerning [Warren].'
***
Magee moved to dismiss under Federal Rule of Civil Procedure 12(b)(6), arguing that he was entitled to qualified immunity because neither Warren nor Benfield adequately pleaded a constitutional violation and any alleged constitutional right was not clearly established. The district court granted the motion in part and denied it in part. The court held that Warren stated a free-speech claim and that clearly established law prohibited Magee from firing Warren for sending his June 2015 letter. But the court declined to consider whether to dismiss Benfield's free-speech claim because Magee had challenged only Benfield's free-association claim.
***
Magee appealed. He seeks interlocutory review of the district court's denial of qualified immunity for both free-speech claims."

Holding:

"We agree with Magee that Warren failed to allege a sufficient causal connection between his letter and his firing. Thus, whether Warren's letter was speech on a matter of public concern or not, Warren has not stated a First Amendment retaliatory-discharge claim.

Warren sent his letter in June 2015 and was fired in January 2017—a 19-month gap. 'Close timing between an employee's protected activity and an adverse action against him may provide the 'causal connection' required' to make out a prima facie retaliation case. Swanson v. Gen. Servs. Admin., 110 F.3d 1180, 1188 (5th Cir. 1997) (citing Armstrong v. City of Dallas, 997 F.2d 62, 67 (5th Cir. 1993). But a 19-month gap is too long to show causation by itself.
***
If the harassment did not begin soon enough after he sent the June 2015 letter, the chronology of this harassment would fail to permit the necessary inference for the same reason that his firing 19 months later fails to permit the inference: it is too remote from the protected activity to imply acausal connection. And if the harassment did not continue periodically throughout the 19-month gap, we would be unable to plausibly infer that the harassment and Warren's firing are part of a causally connected string of events stemming from Warren's June 2015 letter.
***
Because Magee made no substantive argument for dismissing Benfield's free-speech claim, the district court did not err in refusing to address the issue sua sponte…. For the foregoing reasons, we REVERSE the district court's denial of qualified immunity for Warren's free-speech claim; RENDER judgment for Magee on that claim; AFFIRM the court's judgment to not dismiss Benfield's free-speech claim; and REMAND this case for further proceedings.

Legal Lessons Learned: While the EMS Manager won his appeal and he is now dismissed from the lawsuit by Warren, the lawsuit by Benefield may now proceed.

File: Chap. 13, EMS

WV: DRAG RACING / SON EJECTED – MOTHER RN / FLIGHT NURSE - PD STOPS HER CARE SON; MEDICS DIDN'T TAKE PULSE – CASE PROCEED

On Dec. 5, 2019, in Amy Brown, individually and Administratrix of the Estate of James Brady Leonard v. Mason County Commission, Gallia County Board of Commissioners, et al., U.S. District Court Judge Robert Chambers, Southern District of West Virginia (Huntington Division), the lawsuit against the Deputy Sheriff may proceed.

> "Taken as true, the conduct [by County Deputy Sheriff] alleged here is certainly more than 'merely annoying' or 'uncivil.' A jury could very well determine that physically restraining a mother attempting to provide medical assistance to her son is utterly intolerable in a civilized community. *See Travis*, 504 S.E.2d at 425. It would be similarly reasonable for a jury to determine that Bryant acted recklessly, that his actions caused Plaintiff to suffer emotional distress, and that her distress was so severe that no reasonable person could be expected to endure it. It follows that Plaintiff has pleaded sufficient facts to state a claim for relief under an [Intentional Infliction of Emotional Distress] theory.
> ***
> Gallia County EMS is not entitled to dismissal. As discussed in the preceding section, Plaintiff alleges that Elliott and Turner—both Gallia County EMS responders—did not check Leonard's pulse, his breathing, or his body for injuries, and that they pronounced him dead without following proper procedures."

Facts:

> "This case arises out of a tragic set of facts. On December 7, 2016, James Brady Leonard was a passenger in a vehicle participating in a drag race along a stretch of road running parallel to the Kanawha River in Mason County, West Virginia…. At some point during the race, the driver lost control of the vehicle and struck a telephone pole…. The collision sent the car flying off the road and down a steep embankment, eventually landing in the river below…. The force of the impact ejected Leonard from the car and launched him into the river…. A friend, Jeffrey Woodall, pulled Leonard to shore and called 911…. Though Woodall attempted to carry Leonard back up to the road, the embankment leading to the river was too steep and slippery for Woodall to make the trip with him. *Id*. Instead, Woodall left Leonard on the riverbank and returned to the road in an attempt to find something to warm his friend…. Sometime after this point, Leonard—bleeding badly—succumbed to his injuries….
> ***
> Plaintiff [mother of deceased] apparently learned of the accident after receiving a call from Woodall, and was able to arrive 'shortly after the crash.'… A Certified Flight Mobile Critical Care Nurse ('CFRN'), Plaintiff had access to her medical flight bag containing 'items such as tourniquets, IV[s], IV supplies, dressings, and saline fluid bags.'… Nevertheless, Plaintiff alleges that Bryant prevented her from reaching her son. *Id*. She claims Bryant [Adam Bryant, Mason County Sheriff's Department – process server] threatened her and her son's friends on the scene, telling them that 'if they went to him, he would arrest them…. Not immediately dissuaded, Plaintiff recalls Bryant physically restraining her when she again attempted to reach her son.
> ***
> As Gallia County, Ohio borders Mason County, the counties maintain a shared services agreement through which their respective EMS departments may respond to emergency calls when necessary…. After receiving a request from the Mason County EMS department for assistance in responding to Woodall's call, a Gallia County EMS team reported to the scene…. Plaintiff alleges that 'when they did arrive, no one from Gallia

County EMS, including but not limited to Nanette Elliott and Lisa Turner, checked on Mr. Leonard's pulse, breathing, or examined his body for injuries.'… Instead, Plaintiff alleges 'they pronounced him deceased, placed him on a backboard, and carried him up the riverbank to the roadway, where he lay until Mason County EMS arrived.'

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The gravamen of Plaintiff's due process allegations against [Deputy Sheriff] Bryant is that he 'deprived plaintiff[] of [her] due process rights, under color of state law, by his affirmative act of restraining [Plaintiff] and preventing her from rendering medical care to her critically injured son.'

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Plaintiff's final claim is based on a theory of medical negligence, and is raised against Gallia County, Mason County, Nanette Elliot, and Lisa Turner."

Holding:

"In any event, Plaintiff has alleged more than enough facts to state a claim against Bryant. Taken as true, Plaintiff has alleged that Bryant physically restrained her from assisting her son and thereby prevented her from saving his life…. As noted above, Plaintiff bases her claim on federal and state due process provisions. While it is never explicitly stated, the Court construes Plaintiff's federal constitutional claim as a § 1983 action.

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While this is undoubtedly a high bar, Plaintiff's allegations concerning Bryant—taken as true—meet this threshold. Plaintiff claims that Bryant stopped her from providing assistance to her son despite being aware of her role as a critical care nurse…. At one point, she claims that he physically restrained her and threatened her with arrest as she attempted to move past him…. It is worth noting that discovery may shed more light on the factual circumstances surrounding Plaintiff's interaction with Bryant at the crash scene, and that her factual assertions will no longer be accepted as true at future stages of this action. Yet it bears repeating that, for the purposes of a motion to dismiss, Plaintiff's allegations are sufficient to state a claim upon which relief may be granted.

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In the instant case, Bryant quotes extensively from Supreme Court precedent to make the case that Plaintiff has not cited a body of law that would put him on notice that he was violating a clearly established right. *See Bryant Mem. of Law*, at 5. He spends no time, however, responding to Plaintiff's allegations that he is employed as a process server for the Mason County Sheriff's Department and therefore "not qualified to be on [sic] emergency scenes." *Am. Compl.*, at ¶ 19. Assuming control of emergency scenes and physically restraining others is hardly within the scope of a process server's employment, and Bryant has made no effort to demonstrate that his alleged conduct 'falls within the scope of [his] duties.' *Henry*, 501 F.3d at 377 n. 2. Plaintiff's factual allegations regarding Bryant's employment and its attendant scope are therefore undisputed; as such, the Court cannot conclude that qualified immunity shields him from Plaintiff's § 1983 claim.

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Plaintiff's final claim against Bryant alleges intentional infliction of emotional distress ('IIED'). She claims that 'Bryant knew of [Plaintiff's] qualifications as a Certified Flight Mobile Critical Care Nurse . . . as he had worked with her in the past,' but that '[d]espite his knowledge, he physically restrained [Plaintiff] and kept her from going to her son and providing medical assistance to him.' *Am. Compl.*, at ¶¶ 53-54.

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To state a claim for IIED under West Virginia law, a plaintiff must establish: (1) conduct by the defendant which is atrocious, utterly intolerable in a civilized community, and so extreme and outrageous as to exceed all possible bounds of decency; (2) the defendant acted with intent to inflict emotional distress or acted recklessly when it was certain or substantially certain such distress would result from his conduct; (3) the actions of the defendant caused the plaintiff to suffer emotional distress; and (4) the emotional distress suffered by the plaintiff was so severe that no reasonable person could be expected to endure it.

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Taken as true, the conduct alleged here is certainly more than "merely annoying" or "uncivil." A jury could very well determine that physically restraining a mother attempting to provide medical assistance to her son is utterly intolerable in a civilized community. *See Travis*, 504 S.E.2d at 425. It would be similarly reasonable for a jury to determine that Bryant acted recklessly, that his actions caused Plaintiff to suffer emotional distress, and that her distress was so severe that no reasonable person could be expected to endure it. It follows that Plaintiff has pleaded sufficient facts to state a claim for relief under an IIED theory.

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For the foregoing reasons, the Court **DENIES** Adam Bryant's Motion to Dismiss, ECF No. 27, in its entirety. The Court **GRANTS IN PART** Mason County's Motion to Dismiss, ECF No. 30, with respect to Count Five and the state due process claims contained in Count One, but **DENIES IN PART** its motion with respect to Counts Two, Three, and the federal due process claims contained in Count One. Finally, the Court **GRANTS IN PART** Gallia County's Motion to Dismiss, ECF No. 38, with respect to Count Two in its entirety and Count Five as raised against Defendants Elliott and Turner, but **DENIES IN PART** its motion with respect to Count Three in its entirety and Count Five as raised against the Gallia County Board of Commissioners."

Legal Lessons Learned: The lawsuit will now proceed; hopefully the EMS run report by the two Gallia County EMS reflects they followed their protocol prior to deciding the victim was dead at the scene.

File: Chap. 16, Discipline

TN: SOCIAL MEDIA – NASHVILLE PD OFFICER'S FACEBOOK POSTS - PD KILLING DRIVER MN - "GROSSLY UNPROFESSIONAL" - FIRING UPHELD

On Dec. 20, 2019, in Anthony Venable v. Metropolitan Government of Nashville and Davidson County, Chief Judge Waverly D. Crenshaw, Jr., U.S. District Court, Middle District of Tennessee (Nashville Division) granted Nashville's motion for summary judgment and dismissed the lawsuit by the former police officer, finding his Facebook comments "grossly unprofessional."

"In addition to the "not bring discredit" language, the MNPD policy contains an explanation of why police officers are held to a higher standard, and why inappropriate conduct can be detrimental to the department. An ordinary person, exercising ordinary common sense, could understand that Venable's inflammatory Facebook comments, where he drew upon his law enforcement background, would reflect negatively on the MNPD and constitute a violation of the Conduct Unbecoming policy. Any doubt about this is eliminated by warning statements of other participants that his comments were 'grossly unprofessional,' and could get him 'in serious trouble.'

Facts:

[Protests in Nashville and elsewhere on videotaped MN police shooting.]

"On July 6, 2016, Philando Castile, his girlfriend Diamond Reynolds, and their daughter were riding in a car in Falcon Heights, Minnesota, when they were pulled over by Jeronimo Yanez, a St. Anthony, Minnesota police officer. During the course of the traffic stop, Castile was shot four times, the aftermath of which Reynolds live-streamed on Facebook. The shooting captured the attention of individuals nationwide, and followed officer-involved shootings in Ferguson, Missouri (that led to protest and marches around the country, including in Nashville); Baton Rouge, Louisiana; and Dallas, Texas.

The day after the Falcon Heights shooting, Anthony Venable, who had been an officer with the Metropolitan Nashville and Davidson County Police Department ('MNPD') since December 2007, engaged in a Facebook conversation regarding that shooting. At the time, Venable was off-duty.

During the course of the conversation, Venable posted a number of comments, including:

• "Yeah, I would have done 5," in response to a comment that Castile was shot 4 times.
• "You don't shoot just one. If I use my weapon, I shoot to kill and stop the threat."
• "It's real and it's what every cop is trained to do. Move to Mexico."
• "There ARE bad cops!!! NO one is sitting here saying every cop is a good one. Ha. Why are you not talking about how many white people are killed by cops everyday !?!?!?!? You are given statistics that more whites are killed by cops than blacks yet you still stay on the issue of feeling sorry for blacks or only post if a black is involved. You're blind"
• "Obviously he would smell it [the odor of marijuana]. Watch the video. The woman even says oh and we have weed in the car. Lol you don't know facts and you don't know police work You sit on the outside and judge what you only see not what you KNOW. If you want to see how it is you get your ASS up and strap on a vest and 25lbs of gear and you go out and put your pretty little life on the line every f***king day."
• "Stop bitching about the people who protect you."

In posting his comments, Venable never stated he was an MNPD officer. Nevertheless, within minutes of the postings, Sergeant James Capps of MNPD's Office of Professional Accountability received a complaint about Venable from Alena Chandler of Madison, Alabama who was one of the participants in the conversation. An hour later, David McMurray, a Madison Chamber of Commerce board member, sent a complaint to a Community Precinct Coordinator at MNPD after being notified of Venable's comments by David Luciana of Akron, Ohio, who had seen the posts. Venable was immediately decommissioned, meaning that his policing authority was temporarily suspended pending an investigation. Venable's squad car and police equipment were confiscated that same afternoon.

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The same day as Venable's postings, MNPD Chief Steve Anderson issued a press release regarding the Baton Rouge and Falcon Heights shootings. Chief Anderson asked Nashville not to judge MNPD officers based on the actions of other police departments, and to believe in the MNPD. Chief Anderson also noted that MNPD officers are trained to de-escalate situations and not to use deadly force unless absolutely necessary, and only as a last option.

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Venable was charged with conduct unbecoming an officer. He was dismissed effective February 15, 2017…."

Holding:

"In Pickering v. Board of Education, 391 U.S. 563, 568 (1968), the Supreme Court held that the First Amendment provides protection to public employees to exercise the right of free speech without risk of retaliation by their employer if the speech in question is 'on matters of public interest.' That protection, however, is not absolute because 'the State has interests as an employer in regulating the speech of its employees that differ significantly from those it possesses in connection with regulation of the speech of the citizenry in general.'

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It may well be that Venable did not intend that his posts be taken seriously, but they were. Not only did one participant in the discussion warn him about the tenor of his remarks, another expressed the hopes that the remarks would not spread.

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Applying this standard, the Court has no hesitation in concluding that the MNPD could reasonably predict that Venable's comments would be disruptive to its mission and affect officer morale. The comments were made directly in response to a police shooting at a time when polices shootings were a hot topic of debate among members of the public and the subject of nationwide protests. Making matters worse, the comments came on the very day that Police Chief Anderson issued a press release regarding the Baton Rouge and Falcon Heights shootings, in which he asked that the citizens of Nashville not judge its police officers by

actions of police in other departments, and pointed out that officers shoot to kill only as a matter of last resort.
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At a minimum, Venable's postings could be viewed as undercutting or contradicting Chief Anderson. Moreover, as Venable's statements gained traction on the internet, MNPD learned of a call for a vigil or protest and to counteract that it felt it best to host a prayer service. Summary judgment is therefore warranted on Venable's First Amendment claim."

Legal Lessons Learned: Fire & EMS Departments should have a policy that warns personnel that Social Media posts that adversely reflect on the Department can lead to discipline, including termination. See Phoenix FD's Social Media policy.

File: Chap. 16, Discipline

OH: LT. DEMOTED / SUSPENDED – UPHELD BUT TOWNSHIP MINUTES ON REASON FOR GOING INTO EXEC. SESSION NEED CLARIFICATION

On Dec. 9, 2019, in Douglas Bode v. Concord Township, the Ohio Court of Appeals for the Eleventh District (Lake County) upheld the demotion of part-time Lieutenant to part-time firefighter / paramedic, and his suspension for six months, but found technical violation of Open Meeting Act since minutes of the Township public meeting did not reflect the reason for going into executive session.

"We determine the Board committed a technical violation of Ohio's Open Meetings Act (the 'OMA') so that an injunction ordering the Board to comply with the OMA is appropriate, but we do not invalidate Mr. Bode's suspension and demotion approved by the Board. *** Here, it is undisputed that the meeting minutes were deficient in identifying the purpose of the executive session with regard to Mr. Bode. No reason for entering executive session was stated; therefore, the Board has failed to comply with R.C. 121.22(G)(1).

Facts:

"Mr. Bode previously filed a notice of appeal of an administrative decision in a separate complaint in the Lake County Court of Common Pleas, citing a litany of failures by the Department and the Board to comply with mandated procedures for imposing removal. The Board filed a motion to dismiss the appeal as time-barred under R.C. 505.38(A), and the appeal was dismissed by the trial court for want of jurisdiction. That decision was upheld by this court in Bode v. Concord Twp. Bd. of Trustees, 11th Dist. Lake No. 2018-L-043, 2019-Ohio-2666.

[July 1, 2019 decision held: "The facts in the matter are not in dispute. Mr. Bode was suspended for six months and demoted from a part-time lieutenant to a part-time firefighter/paramedic with the Concord Township Fire Department following a series of incidents alleging unacceptable conduct. *** Here, there is no question that Mr. Bode was aware of the Board's decision. Regardless, there is no requirement in the law that meeting minutes be served upon anyone in this situation. This is not a situation where Mr. Bode is professing no knowledge of the Board's decision. To the contrary, he was served with written notice of his suspension and reduction in rank from the Fire Chief directly. He enumerated in his merit brief the reasons given for the demotion and suspension. He signed the notice acknowledging receipt on March 27, 2017. Mr. Bode was required to file his notice of appeal within 10 days of the Board's approval of the meeting minutes on April 19, 2017. Mr. Bode filed his notice of appeal on May 8, 2017. Therefore, the trial court did not err in determining that it lacked jurisdiction to hear the merits.]
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Mr. Bode brought the underlying action as a procedural challenge under R.C. 121.22, the OMA. He sought, inter alia, to invalidate the suspension and demotion approved by the Board and an injunction ordering the Board to comply with the OMA. A substantive challenge regarding the alleged incidents of unacceptable conduct supporting Mr. Bode's suspension and demotion are not subject to the current appeal.

That being said, the Board originally discussed the potential suspension and demotion of Mr. Bode at a March 27, 2017 special meeting during an executive session to which Fire Chief Matthew Sabo ("Chief Sabo") was invited to attend.

[Trial Court hearing.]

> [MR. GALLOWAY]: Your honor, the motion that I made was in two parts, for the purposes of potential employee discipline, as well as a potential new hire
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> [JUDGE LUCCI]: All right; so, it wasn't just a blanket personnel; it was specific as to discipline and hiring two separate employees.
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> [MR. GALLOWAY]: That is correct, and I believe that the notice that was made was done as personnel matters, which is probably just an attempt by our administrator at the time to sort of sew those together, if you will, in terms of the notification. But the actual motion that I made to go into executive session was explicit as to the two matters. Our legal counsel is extremely detailed in those matters and always insisted –
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> [JUDGE LUCCI]: It wouldn't be Mr. Lucas, would it?
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> [MR. GALLOWAY]: It is Mr. Lucas, yes.
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> ***
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> [ATTORNEY LUCAS]: Okay. During the course of that executive session, at any point in time, was there any deliberation made as to any of those issues [regarding Bode]?
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> [MR. GALLOWAY]: No.

Following the special meeting and executive session, no action was authorized by vote or taken by the Board. That same day, however, Chief Sabo drafted a two-page letter to Mr. Bode—following the suggestion of the Board that he follow his best judgment in crafting an appropriate disciplinary action consistent with the employee handbook—informing him that he would be suspended and demoted, outlining the unacceptable conduct, citing the Standard Operating Guidelines that were violated, and stating that the suspension and demotion was 'effective immediately.' Mr. Bode signed the letter where prompted, acknowledging receipt.

Thereafter, the Board moved for, voted on, and approved Mr. Bode's suspension and demotion at its regularly scheduled April 5, 2017 meeting. The suspension was made retroactive to March 27, 2017. The minutes of that meeting, which contained the vote in favor of Mr. Bode's suspension and demotion, were approved by the Board on April 19, 2017."

Holding:

> "The violations represented by the Board's deficient meeting minutes are technical in nature. See Weisbarth v. Geauga Park Dist., 11th Dist. Geauga No. 2007-G-2780, 2007-Ohio-6728, ¶27. We therefore remand this matter to the trial court (1) to issue an injunction pursuant to R.C. 121.22(I)(1) to compel the members of the Board to comply with the OMA and (2) to order the Board to pay a civil forfeiture, all court costs, and reasonable attorney's fees, in an amount deemed appropriate, pursuant to R.C. 121.22(I)(2)(a) and Weisbarth.

Legal Lessons Learned: Minutes of public meetings, prior to going into Executive Session, should careful be prepared to avoid costly litigation.