JAN. 2025 – FIRE & EMS LAW NEWSLETTER

[NEWSLETTER IS NOT PROVIDING LEGAL ADVICE.]


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

24 RECENT CASES

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

Chap. 1 – American Legal System, incl. Fire Codes, Investigations, Arson

Chap. 2 – Line Of Duty Death / Safety

Chap. 3 – Homeland Security, incl. Active Shooter, Cybersecurity
Chap. 4 – Incident Command, incl. Training, Drones, Communications
Chap. 5 – Emergency Vehicle Operations
Chap. 6 – Employment Litigation, incl. Work Comp., Age, Vet Right
Chap. 7 – Sexual Harassment, incl. Preg. Discrimination, Gay Rights

Chap. 8 – Race / National Origin Discrimination

Chap. 9 – Americans With Disabilities Act

Chap. 10 – Family Medical Leave Act, incl. Military Leave
Chap. 11 – Fair Labor Standards Act
Chap. 12 – Drug-Free Workplace, inc. Recovery
Chap. 13 – EMS, incl. Comm. Param., Corona Virus

Chap. 14 – Physical Fitness, incl. Heart Health
Chap. 15 – Mental Health, incl. CISM, Peer Support

PA: Admin. Search Warrant – Sewer Gas Home
WA: Removal Homeless – Personal Property
KY: Vol. FFs Arson - Church – Not Fed. Case
PA: Fleeing Driver Almost Hit EMS – 5-10 Yrs
PA: 2 LODD – Condemned Bldg - City Dismissed
CA: Started Fires – CA Emergency – 200 Bldgs
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PA: Lung Cancer – City Pay Wife 10% Penalty
MD: Fired – Vote 2-2, New Hearing - No Pension
US Sup Ct: –"Straight" Clams Disc By Gay Mgr
LA: Two Capts Discip. - Claim Disparate Treat
MO: Chief Fired – Secret Camera – Bd Animus
TX: Hostile Work Claim – Age, Weight, PTSD
NJ: Broke Foot - Promotion To Capt. Delayed
TN: No FMLA Viol. - Alcohol - Resigned
MA: Settled – Drop Claim DCs Non-Exempt
MT: New Random Policy – Must Bargain
CA: COVID-19 – BC - Due Process Given
U.S.: VA Ambul. Lower Travel Rate Set Aide
AR: Working Out – Lumbar - Work Comp
TX: Suicide Att. – Dorm Fire – AirForce Dischar

Chap. 16 – Discipline, incl. Code of Ethics, Social Media, Hazing

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

PA: Dispatchers Fired – New Year Alcohol Toast
MI: Whistleblower, Ropt Bad Tires – Later Fired
OH: Fire Engine Mfg – Delay – Arbitration
NM: Forest Fire Act – Prop. & Emotional Dam.

ONLINE RESOURCES – EDUCATION / TRAINING

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

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

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

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

File: Chap. 1, American Legal System; Code Enforcement

PA: ADMIN. SEARCH WARRANT – SEWER GAS HOME

On Dec. 17. 2024, in Karimu Hamilton v. Christopher B. Flannigan; Bryan Mawr Fire Company, et al., the United States Court of Appeals for the 3rd Circuit (Philadelphia) held 3 to 0 (not precedential decision) that U.S. District Court judge for Eastern District of Pennsylvania properly dismissed the lawsuit against the firefighters and police officers who entered her home with her consent. https://cases.justia.com/federal/appellate-courts/ca3/24-1567/24-1567-2024-12-17.pdf?ts=1734458412

The 3rd Circuit wrote:

> "She also has no Fourth Amendment claim against the firefighters or police officers. The firefighters entered Hamilton's home only once, when she consented to their search. See Schneckloth v. Bustamonte, 412 U.S. 218, 219 (1973). When they asked to enter again another time, she refused entry, so they never searched her house. Officer Patterson entered Hamilton's house in response to the reported smell of gas. The District Court correctly held that qualified immunity shields Patterson because existing precedent does not "squarely govern[ ]."

Legal Lesson Learned: The 3rd Circuit decision started with following: "Like good fences, good sewage systems make good neighbors."

File: Chap. 1, American Legal System

WA: REMOVAL HOMELESS – PERSONAL PROPERTY

On Dec. 9, 2024, in Bobby Kitcheon, Candance Ream, et al. v. City of Seattle, the Court of Appeals, Division 1, State of Washington, held (3 to 0) that the city ordinance allowing destruction of property of homeless on city property, without prior notice, must be revised. https://www.courts.wa.gov/opinions/pdf/855832.pdf

The Court wrote:

> "Applying a rational basis review, we hold that the City's in-a-park category within FAS 17-01, section 3.4 allows the indiscriminate and standardless removal of such obstructions and is not carefully tailored to meet a legitimate governmental goal. Accordingly, section 3.4 is facially unconstitutional under article I, section 7 of the Washington State Constitution.
>
> ***
>
> On its face, the rules do not bind the in-a-park category with minimum requirements or standards that connect those obstructions to health and safety concerns. To restate the challenged provision, the in-a-park category allows the City to immediately remove 'people, tents, personal property, garbage, debris or other objects related to an encampment' merely because the encampment exists 'in a City park or on a public sidewalk."

Legal Lesson Learned: When drafting homeless removal ordinance, consider including a pro vision requiring notice be provided at least one day prior to removal of personal property.

File: Chap. 1, Amer. Legal System, Arson

KY: VOL. FFs ARSON – CHURCH – NOT FEDERAL CASE

On Dec. 3, 2024, in United States of America v. Brendan J. Gibson and Robert J. Hughes, United States District Court Judge David L. Bunning, U.S. District Court for the Eastern District of Kentucky, granted the defendant's motion to dismiss the federal indictment because the church building located at 10950 Dixie Highway, Corinth, KY is not used in interstate commerce, nor used in any activity affecting interstate commerce. https://casetext.com/case/united-states-v-gibson-453

The Court wrote:

> "Based on the Government's proffer of the evidence, the arguments presented, and the authorities cited, the Court concludes that the United States cannot, as a matter of law, prove the required interstate commerce element of the offense charged."

Legal Lesson Learned: The firefighters can now be tried in state court.

File: Chap. 2, Safety

PA: FLEEING DRIVER ALMOST HIT EMS – 5-10 YRS

On Dec. 23, 2024, in Commonwealth of Pennsylvania v. Marisa Nicole Liddington, the Superior Court of Pennsylvania held (3 to 0; non-precedential decision) that the sentence of 5 – 10 years in prison was appropriate for aggravate assault on two EMS and for DUI. https://www.pacourts.us/assets/opinions/Superior/out/J-A11020-24m%20-%20106209941292398313.pdf?cb=1

The Court wrote:

> ""Marisa Nicole Liddington appeals from the judgment of sentence of five to twelve years of imprisonment imposed upon her convictions for driving under the influence ("DUI") and four counts of aggravated assault. We affirm.
>
> ***
> We first assess whether the evidence demonstrated that Appellant attempted to cause serious bodily injury to [EMS] Messrs. Ebersole and Eppley and attempted by physical menace to put them in fear of serious bodily injury…. Appellant argues that, even when viewed in the light most favorable to the Commonwealth, the evidence in this case does not prove that she acted with the specific intent to harm or menace anyone. She posits that Mr. Ebersole placed himself in harm's way by attempting to detain her, and that Mr. Eppley was hit by the car door when she backed up only because he reached to grab Mr. Ebersole…. Here, it appears that neither Appellant's motivation nor her ultimate

> goal was to injure the first responders on scene in the Walmart parking lot. Rather, it seems plain that what she wanted was to get away before the police arrived. However, under the totality of the circumstances, the jury was within its rights to conclude that Appellant made the conscious decision to achieve her goal by any means necessary, including causing serious bodily injury to any of the first responders who were in her way."

Legal Lesson Learned: The sentence reflects the seriousness of the defendant's conduct; she could have killed or serious injured the two EMS.

File: Chap. 2, Firefighter Safety

PA: 2 LODD – CONDEMNED BLDG – CITY DISMISSED

On Dec. 9, 2024, in Rachel Butrim, et al. v. Maor and City Council of Baltimore, United States District Court Judge Matthew J. Maddox, U.S. District Court for the District of Maryland, granted the city's motion to dismiss. Even though the building was condemned, and not marked to warn firefighters, there was no proof the city intended to harm the firefighters. https://storage.courtlistener.com/recap/gov.uscourts.mdd.559142/gov.uscourts.mdd.559142.21.0.pdf

The Court wrote:

> "The Motion is fully briefed and ripe for disposition. No hearing is necessary.
>
> ***
>
> Although Plaintiffs allege that the City acted 'deliberately' and 'intended to harm . . . through its egregious affirmative acts,' … they fail to allege sufficient facts to support these conclusory and formulaic allegations. Plainly, Plaintiffs do not allege that the City sent Plaintiff Firefighters into the Property on January 24, 2022, with the intent to injure them. The only plausible purpose for sending Plaintiff Firefighters into the Property supported by the facts in the Complaint was to fight the fire that engulfed the building. The only facts offered that speak to the City's motivations in failing to mark the Property as structurally compromised concern the City's agreement with the Southwest Partnership, a nonprofit community organization. See Compl. ¶¶ 63–68. Plaintiffs allege on information and belief that this agreement caused the City to avoid marking certain compromised properties because the markings would make them unattractive to potential investors. See id. ¶¶ 64–65, 68. Accepting these allegations as true—and accepting that

> they may describe wrongful or even egregious conduct by Defendant—the Court does not find that the allegations support a reasonable inference that Defendant acted with the purpose of causing harm to Plaintiff Firefighters."

Legal Lesson Learned: Tragic set of facts, but no city intent to injure was alleged. Plaintiffs are expected to appeal to the 4th Circuit.

> See Dec. 27, 2024 article: "Judge tosses out lawsuit from families of Baltimore firefighters killed in blaze."
> **https://www.firerescue1.com/legal/judge-tosses-out-lawsuit-from-families-of-baltimore-firefighters-killed-in-2022-blaze?utm_source=delivra&utm_medium=email&utm_campaign=FR1-Daily-12-27-24&utm_id=8279434&dlv-emuid=fed355b8-46a2-4fa4-b55c-4d602dde33c4&dlv-mlid=8279434**

File: Chap. 3, Homeland Security

CA: STARTED FIRES DURING STATE EMERGENCY

On Dec. 9, 2024, in Alexandria A. Souverneva v. The Superior Court of California, the California Court of Appeals, Third Circuit, Shasta, held (3 to 0; unpublished decision) that the trial court, upon being informed she was competent to stand trial, revoked her bond (after two years being out on bond) given risk of further fires. She started six fires in rural area on September 22, 2021, burning 200 structures and nearly 9,000 acres; she told a CAL FIRE Captain that she had bombs – they were actually CO2 cartridges. The Court of Appeals reviewed her history of drug abuse and mental illness, and upheld the trial court. https://casetext.com/case/souverneva-v-the-superior-court

The Court wrote:

> "Souverneva was charged with arson of forest land, and it was alleged the arson was committed during a state of emergency…. The record indicates that at the time of the hearing, Souverneva had been out of custody on bond for over two years, apparently without incident, and had sought treatment for her bipolar disorder. Nevertheless, substantial evidence supports the trial court's finding of an unreasonable risk to public safety."

Legal Lesson Learned: The trial court properly found that during a fire risk emergency, a defendant who starting six fires with mental health and drug abuse, is a risk to the public.

> See Feb. 27, 2024, article [TV VIDEO], "Fawn fire trial delayed again, Shasta County DA responds." REDDING, Calif. — The Fawn Fire trial has been postponed again. Alleged arsonist Alexandra Souverneva will no longer be starting trial on March 1. Shasta County District Attorney Stephanie Bridgett says this was discussed in court Monday, where her attorney once again filed for a mental health diversion. It's been 2.5 years since the fire took place, burning homes and land in north Redding for 10 days, destroying nearly 200 structures and burning nearly 9,000 acres. Bridgett says that trials can be a lengthy process, especially when they involve felonies.

File: Chap. 6, Employment Litigation

PA: LUNG CANCER – CITY PAY WIFE 10% PENALTY

On Dec. 24, 2024, in City of Philadelphia v. Wayne Deloatch and Independence Blue Cross (Workers' Compensation Appeal Board), the Commonwealth Court of Pennsylvania held (3 to 0) that City must reimburse the firefighter's insurance company $124,680.22 for medical benefits paid to the firefighter, plus interest back to 2014, and also pay a 10% penalty to the wife of the deceased firefighter. The Court referenced the PA statutory presumption law (July 7, 2011) in holding that the firefighter's wife will receive 51% of Deloatch's average weekly wage as of his death on September 26, 2019.

The Court wrote:

> "Accordingly, because Insurer is entitled to interest on its subrogation lien, and the subrogation lien was established as of October 21, 2014, when Insurer introduced it before WCJ [Worker's Comp Judge] Timm, WCJ Lawrence did not err by ordering Employer to pay interest on the subrogation lien from October 21, 2014." https://cases.justia.com/pennsylvania/commonwealth-court/2024-541-and-589-c-d-2022.pdf?ts=1735057731

Legal Lesson Learned: Employers continue to litigate firefighter cancer claims despite a statutory presumption.

File: Chap. 7, Sexual Harassment

MD: FIRED – VOTE 2-2, NEW HEARING – NO PENSION

On Dec. 17, 2024, in Baltimore County, Maryland v. Theodore C. Priester, Jr., the Appellate Court of Maryland held (3 to 0; unreported decision) that the now retired Captain is entitled to a new decision (instead of a tie vote of 2 to 2) before the Baltimore County Personnel and Salary Advisory Board ("PSAB"). While he is no longer entitled to reinstatement, the Board could decide to award him back pay for time from his termination (May 16, 2013) until he applied for retirement (July 31, 2014). The case has been through numerous appeals and remands, including prior decision denying him a pension. https://www.mdcourts.gov/sites/default/files/unreported-opinions/1316s22.pdf

The Court wrote:

> "Returning to the appeal before us, we conclude that the circuit court correctly determined that the PSAB erred in denying Priester's grievance appeal as moot. Priester's resignation from employment does not preclude him from pursuing a grievance that was properly filed while he was still employed. Neither the plain language of the County Code nor the MOU supports the County's claim that an employee's resignation automatically terminates an ongoing grievance process. *** Therefore, even if PSAB could no longer "reinstate" Priester back to his original position under the MOU should it determine that the termination was not justified, it could still award Priester backpay for the period of time between May 16, 2013 (the date of his effective termination) and July 31, 2014 (when Priester filed for retirement)…. On remand, the PSAB may give the parties an opportunity to submit additional evidence for its consideration. Whether this requires a full evidentiary rehearing is left to the PSAB's discretion.
>
> ***
> In Priester II, we reviewed and affirmed the Board's decision to deny Priester's entire claim for pension benefits. In reaching that conclusion, we recounted the extensive testimony offered by Priester's former colleagues and subordinates regarding his pattern of sexually harassing behaviors. Rather, we agreed with the Board that any 'average adult citizen' would have known the potential sanctions that might follow from Priester's behavior, noting that Captain Priester abused his status as a captain by creating a hostile and predatory environment, in which he exhibited a pattern of sexually harassing women for his amusement and the amusement of his minions. . . . He was responsible, as captain, for enforcing the very rules that he flagrantly violated."

Legal Lesson Learned: This case illustrates the importance of Civil Service Boards making final decisions, supported by findings of fact. In the event of a tie vote, rehear the case.

File: Chap. 7, Sexual Harassment

US SUP CT: "STRAIGHT" CLAIMS DISC BY GAY MGR

On Dec. 16, 2024, in Marlean A. Ames, Petitioner v. Ohio Department of Youth Services, the U.S. Department of Justice, Solicitor General, filed an amicus brief with the U.S. Supreme Court that Title VII prohibits racial discrimination against both minorities and those who are in majority (including white and heterosexual plaintiffs), with same standards of proof. The 6th Circuit had upheld the dismissal of the lawsuit by Ms. Ames (heterosexual) since she did show "background circumstances" to support her claim; such as statistical evidence showing a pattern of discrimination at her workplace in favor of gays. The U.S. Supreme Court on Oct. 4, 2024 agreed to hear Ms. Ames' appeal; a decision in this case could have significant impact on "reverse discrimination" cases, including fire & EMS.
https://www.supremecourt.gov/DocketPDF/23/23-1039/335322/20241216192608136_23-1039_Ames_Amicus_Brief_iso_Vacatur.pdf

The Solicitor General brief included:

> "She [Ms. Ames] alleged, as relevant here, that the denial of a promotion to Bureau Chief in favor of Frierson, a gay woman, was discrimination based on sexual orientation and that her demotion in favor of Stojsavljevic, a gay man, was discrimination based on sexual orientation and sex. *** The requirements of a prima facie case do not vary depending on the plaintiff 's protected characteristics. To the contrary, this Court has squarely held that Title VII 'prohibits racial discrimination against * * * white [plaintiffs] upon the same standards as would be applicable' if they were Black. McDonald, 427 U.S. at 280. The EEOC, too, has long understood Title VII to require that the claims of minority- and majority-group plaintiffs be assessed in the same fashion." https://www.supremecourt.gov/DocketPDF/23/23-1039/335322/20241216192608136_23-1039_Ames_Amicus_Brief_iso_Vacatur.pdf

See the 6th Circuit decision, Dec. 4, 2023:

> "In January 2019, Ohio's governor appointed Ryan Gies to be the Department's Director. Walburn [Assistant Director Julie Walburn] and Gies are both heterosexual. *** First, Ames was terminated as PREA Administrator by Walburn and Gies, who are both heterosexual. *** Second, Ames's only evidence of a pattern of discrimination against heterosexuals is her own demotion and the denial of the Bureau Chief position. Under our caselaw, however, a plaintiff cannot point to her own experience to establish a pattern of discrimination. *** Ames therefore has not made the necessary showing of "background circumstances." For that reason her claim of sexual-orientation discrimination fails."
> https://www.opn.ca6.uscourts.gov/opinions.pdf/23a0264p-06.pdf

Legal Lesson Learned: Important case to clarify that Title VII rights are not just for minority employees.

LA: TWO CAPTS DISCIP. – CLAIM DISPARATE TREAT

On Dec. 20, 2024 in Varrick Dyer v. City of New Orleans, et al., United States Magistrate Judge Janis Van Meerveld, U.S. District Court for Eastern District of Louisiana, held that city's motion for summary judgment will be denied in part. Black Captain was on the 4th engine to fire – later had verbal dispute with white Captain who criticized him for not getting off engine with his crew. The lawsuit will continue on two claims - "disparate treatment" (white charged with "hazing" – letter of reprimand; black charged with "threats" – possible suspension or termination) and subsequent failure to be promoted. https://casetext.com/case/dyer-v-city-of-new-orleans-2

The Magistrate wrote:

> "The Court finds that Dyer has stated a plausible claim for race-based disparate treatment as to two incidents. He alleges that he was charged with a more severe rule violation than Martin arising out of the February 2022 incident they were both involved in. Of course there may be legitimate explanations for this difference in treatment. But at this stage, the Court finds Dyer has plausibly alleged that this difference was race based because their conduct appears to have been similar but the black firefighter was charged with a more severe rule violation than the white firefighter. Additionally, Dyer has stated a plausible claim arising out of the denied promotion that was allegedly given to a less qualified white male."

Legal Lesson Learned: When imposing discipline involving a white FF and a black FF, management must document specific reasons for different discipline.

> Note: See also City's Civil Service Commission (vote 2 to 1) on Dec. 14, 2023, reversing 36-hour suspension for bringing a "gate valve" from a fire engine to a Rock of Ages
> Church event provided showers and laundry facilities to homeless and mentally ill individuals.
> **https://nola.gov/getattachment/e3454bbc-a629-43a1-b296-8d99f21a3e04/Dyer,-Varrick-9485/**

MO: CHIEF FIRED – SECRET CAMERA – BD ANIMUS

On Dec. 18, 2024, in Ankeneth Corbin v. Black Jack Fire Protection District, et al., United States District Court Judge John A. Ross, U.S. District Court for Eastern District of Missouri, held that the former Fire Chief (African American), who was fired on Jan. 17, 2023 for secretly installing a camera and a sound recording device in his office, may proceed with his lawsuit for retaliation. https://casetext.com/case/corbin-v-black-jack-fire-prot-dist

The Court wrote:

> "The District argues that the EEOC charges were too remote in time to show causation, and the actual reason for Corbin's termination was his use of the hidden camera and failure to return all electronic devices. In response, Corbin contends that the evidence gives rise to jury questions. The Court agrees [with Corbin].
>
> [Board Chairman David] Calhoun admitted he said to Corbin in March 2022, 'You can't do nothing to me' and '[g]o write your letter' as he thought Corbin 'was trying to get me ran out of the place."' Corbin filed EEOC charges in July and late August 2022, claiming retaliation for reporting alleged 'conflicts of interest, fiscal irregularities and wasteful spending' by the Board and other specific retaliatory actions by Calhoun. Calhoun admitted stating that Corbin was going to 'destroy the department' because of 'harassment like the charges.' Calhoun further admitted that he believed Corbin was going to alert the media about allegations against the Board. Tensions escalated into the fall of 2022 and Corbin recorded Calhoun in his office via video and their arguments via audio. Corbin was suspended that December and terminated the following month. This timeline is not so remote as to remove the question of causation from the province of the jury. Rather, the timeline and conflicting evidence give rise to a genuine material dispute as to whether the Board cited Corbin's recordings and alleged failure to return devices as a pretext to fire a troublesome whistleblower. These are fact questions for a jury to resolve. Accordingly, the Court will deny the District's motion for summary judgment as to Count I."

Legal Lessons Learned: Court found direct evidence of "discriminatory animus" behind the Board's decision to suspend and then terminate.

File: Chap. 9, Americans With Disabilities Act

TX: HOSTILE WORK CLAIM - AGE, WEIGHT, PTSD

On Dec. 17, 2024, in Timothy B. Hauptrief v. Denver Teleford, Fire Lieutenant, City of Converse, Texas, United States District Court Judge Fred Biery, U.S. District Court for Western District, San Antonio Division, held that lawsuit should proceed by the firefighter / paramedic's claims under ADA and ADEA [Age Discrimination in Employment]. Plaintiff alleges that he suffered a hostile work environment due to his age, weight, and PTSD, and also retaliation for complaining about lack of training. https://casetext.com/case/hauptrief-v-telford-1

Judge Fred Biery wrote:

> "Because no party has objected to the Magistrate Judge's Report and Recommendation, the Court need not conduct a de novo review…. The motion to dismiss the ADA and ADEA claims against the City of Converse, however, shall be denied."
>
> ***
>
> [Magistrate Judge wrote: "Defendants' briefing discusses why Plaintiff's ADA and ADEA claims should be denied as to the individual defendants, the briefing fails to make *any* argument as to why the ADA and ADEA claims against the City should be dismissed."]

Legal Lesson Learned: Internal complaints of hazing, training or otherwise should be promptly and thoroughly investigated, with a written report; the report can then be filed with court if there is subsequent litigation.

File: Chap. 9, ADA

NJ: BROKE FOOT – PROMOTION TO CAPT. DELAYED

On Dec. 10, 2024, in Jersey City IAFF Local 1066 v. City of Jersey City, the Superior Court of New Jersey, Appellate Division, held (3 to 0; unpublished decision) that trial court improperly dismissed lawsuit. Lawsuit to proceed; promotion to Captain was delayed until he could return to work.

The Court wrote:

> **"**Plaintiff [IAFF Local 1066] became aware of the previously undisclosed promotion policy when firefighter Richard Mulligan was denied a promotion to captain while he was on injury leave. Mulligan broke his foot while on duty in June 2022. He was expecting a promotion to captain on July 1. However, when he arrived at the promotion ceremony with his family, he learned he would not be promoted because he was on injury leave…. Although he was eventually promoted, the delay affected his seniority status.
>
> ***

> Plaintiff alleges the promotion policy is facially discriminatory, and it has presented sufficient evidence of direct discrimination and retaliation to survive the dismissal motion regarding the promotion policy 11 A-0448-23. In giving plaintiff every reasonable inference of fact, as we must, we are satisfied plaintiff has presented sufficient facts to support its cause of action. Therefore, we vacate the order of dismissal." https://www.njcourts.gov/system/files/court-opinions/2024/a0448-23.pdf

Legal Lesson Learned: Delaying a promotion while firefighter heals from a broken foot seems unfair and illogical; pre-trial discovery will proceed.

File: Chap. 10, FMLA

TN: NO FMLA VIOL – ALCOHOL - RESIGNED

On Nov. 18, 2024, in Brian Bergeron, et al. v. Town of Brookline and Brookline Fire Department, Unites States District Court for the District of Massachusetts, the City filed settlement agreement. The lawsuit was filed December 1, 2023 by two Lieutenants on behalf of a class of 119 current and former firefighters and officers. The original complaint included a claim that Deputy Chiefs were improperly classified as exempt. That claim was dropped in the settlement. https://brookline.news/wp-content/uploads/2024/12/jointsettlementfiling.pdf

The Court wrote:

> "Neither of plaintiff's FMLA theories survive summary judgment. Assuming without deciding that plaintiff could prove that he was constructively discharged (*see supra* Section III(a)(1)), plaintiff's FMLA interference claim fails for the same reason as his ADA accommodation claim: the leave at issue was requested on September 14, 2021, after his terminable conduct. Therefore, defendant was not obligated to provide leave to an employee who was no longer deemed eligible for his position."

Legal Lesson Learned: Employer has no obligation to offer additional FMLA to an employee facing termination.

File: Chap. 11, FLSA

MA: SETTLED – DROP CLAIM DCs NON-EXEMPT

On Nov. 18, 2024, in Brian Bergeron, et al. v. Town of Brookline and Brookline Fire Department, Unites States District Court for the District of Massachusetts, the City filed settlement agreement. Lawsuit was filed December 1, 2023 by two Lieutenants on behalf of a

class of 119 current and former firefighters and officers. The original complaint included a claim that Deputy Chiefs was improperly classified as exempt.

The Settlement includes following.

> "The Town will pay the Plaintiffs the amount of $101,604.22 to resolve all claims as allocated in an attachment to the Settlement Agreement. *** By April 2024, the parties had reached an agreement in principle with the following elements:
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> (a) The Town would include the ASHER [Active Shooter / Hostile Event Response]] stipend in the FLSA regular rate;
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> (b) The Town would count each shift as 24 hours instead of 21 hours as FLSA hours worked;
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> (c) The Town would properly count the hours of employees who swap shifts;
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> (d) The Town would include all types of overtime as FLSA hours worked;
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> (e) The Town would include 'out of class' hours as FLSA hours worked;
>
> (f) The Town would count the hours for all days worked, including those days they failed to previously certify;
>
> (g) The Town would not count deputy fire chiefs as FLSA non-exempt employees but they would count all fire lieutenants and fire captains as FLSA non-exempt employees;
>
> (h) The Plaintiffs would waive liquidated/double damages;
>
> (i) The Plaintiffs would waive attorney's fees. "

https://brookline.news/wp-content/uploads/2024/12/jointsettlementfiling.pdf

Legal Lesson Learned: Lieutenants and Captains are non-exempt. For higher ranks, FDs should consult with knowledgeable legal counsel and read opinion letters from the U.S. Department of Labor, Wage & Hour Division.

> Note: See Nov. 24, 2024 article, "Settlement Proposed for MA Firefighters Following 2023 FLSA Lawsuit." https://www.firefighterovertime.org/2024/11/24/settlement-proposed-for-ma-firefighters-following-2023-flsa-lawsuit/

MT
File: Chap. 12, Drug Free Workplace

MT: NEW RANDOM POLICY – MUST BARGAIN

On Dec. 10, 2024, in City of Great Falls v. Int'l Ass'n of Fire Fighters, Local #8, the Supreme Court of Montana held (5 to 0) that the city failed to collectively bargain the new policy and failed to exhaust its administrative remedies. The pre-2019 collectively bargained random drug testing policy applied only to employees with CDLs [commercial driver licenses] and specific "safety-sensitive positions." The new policy included all city drivers of city vehicles, including firefighters. Multiple city unions filed unfair labor practice charges with the Montana Board of Personnel Appeals (MBPA), and on October 22, 2020 the hearing officer found for the unions. The city did not appeal to the MBPA, but instead on November 20, 2020, petitioned for district court judicial review. The District Court judge denied the petition since the city failed to exhaust administrative rights. https://casetext.com/case/city-of-great-falls-v-intl-assn-of-fire-fighters-loca

The Montana Supreme Court wrote:

> "We must thus consider whether the District Court correctly concluded that the October 2020 hearing examiner's decision and order was not eligible for judicial review under § 2-4-702(1)(a), MCA, due to the City's failure to exhaust the administrative 'exceptions' and final agency review remedy provided by §§ 39-31-406(6), 2-4-621(1)-(3), and -623(1)(a), MCA. *** We hold that the District Court correctly concluded that the hearing examiner's October 2020 proposed agency/MBPA decision and order was not eligible for judicial review as a preliminary order under § 2-4-701, MCA. We hold further that the District Court also correctly concluded that the resulting October 2020 final agency/MBPA decision and order was not eligible for judicial review under § 2-4-702(1)(a), MCA, due to the City's failure to exhaust the 'exceptions' and final agency review remedy available under §§ 39-31-406(6), 2-4-621(1)-(3), and -623(1)(a), MCA. The District Court's 2022 order and judgment denying the City's petition for judicial review of the October 2020 MBPA hearing examiner decision and order is therefore AFFIRMED."

Legal Lesson Learned: A collectively bargained random drug testing policy can be modified through additional collective bargaining.

File: Chap. 13

CA: COVID-19 – BC – DUE PROCESS GIVEN

On Dec. 10, 2024, in Robert L. Kilpatrick v. City of Los Angeles, the Court of Appeals, Second District, Third Division, held that the Battalion Chief with 34 years of service was not entitled to a pre-disciplinary hearing prior to suspension, thereby overturning a Superior Court judge that held the City Charter required a hearing and decision by the City Board of Rights. On Nov. 9, 2021 he was given Notice of Charges for not getting a COVID vaccination; the Notice provided

Kilpatrick at least 48 hours to either confirm he had complied with the vaccine mandate, or agreed that he would comply by December 18, 2021, and signing an agreement. Kilpatrick did not sign. On November 12, 2021, the City placed him off duty without pay . A virtual hearing took place on December 21, 2021, and Kilpatrick left the hearing after the City refused to produce materials he requested. https://casetext.com/case/kilpatrick-v-city-of-l-a

The Court wrote:

> "Kilpatrick received notice of the charges against him and had a short period to respond prior to being temporarily removed from duty. He received further post-suspension notice and the opportunity to be heard and respond in real time less than six weeks later. Under the circumstances of this case, and considering the three distinct factors necessary to determine what process was constitutionally due, we conclude the City's procedure was constitutionally sufficient. Kilpatrick received the 'predisciplinary procedures otherwise required by law'…."

Legal Lesson Learned: COVID-19 concerns required prompt decision making; a virtual hearing after suspension was adequate due process.

File: Chap. 13, EMS

US: VA AMBUL. LOWER TRAVEL RATE SET ASIDE

On Dec. 9, 2024, in Metropolitan Area EMS Authority, et al. v. Secretary of Veteran Affairs, the United States Court of Appeals for the Federal Circuit (D.C.) held (3 to 0) that Congress did not authorize VA to implement reduced ambulance travel reimbursement using Medicare rate for transports that are to "other places" instead of to or from a VA facility (for example, to a nursing home). The Court relied on U.S. Supreme Court's landmark June 28, 2024 decision, setting aside the "Chevron doctrine" where federal courts normally followed Agency interpretation of Congressional statutes. https://cafc.uscourts.gov/opinions-orders/24-1104.OPINION.12-9-2024_2432337.pdf

The Court of Appeals wrote:

> "In 2018, the VA Office of Inspector General (OIG) faulted the VA for failing to realize $11 million in savings for ambulance services between October 2012 and December 2015 due to the VA's failure to exercise its discretionary authority under § 111(b)(3)(C) to pay 'the lesser of the actual charge for the transportation or the [Medicare fee schedule (MFS)] amount" for noncontract ambulance services.
>
> ***

> Thus, while in § 111(a) Congress authorized the Secretary to 'pay the actual necessary expense' for travel 'to or from a Department facility or other place,' Congress only authorized the Secretary in § 111(b)(3)(C) to apply the 'lessor of' payment methodology for transports 'to or from a Department facility by ambulance.' Conspicuously missing from § 111(b)(3)(C) is the 'or other place' language that Congress expressly stated in the earlier subsection."

Legal Lesson Learned: EMS transport companies nationwide will benefit from this decision. It is one of the first cases overturning a federal agency regulation since the U.S. Supreme Court set aside the "Chevron doctrine."

> Note: See Dec. 9, 2024 article, "Federal court vacates VA rule reducing ambulance payments." The regulation aimed to tie reimbursement rates for ambulance services to the lesser of a provider's actual charges or the Medicare Fee Schedule rate, even for transports unrelated to VA facilities.
> https://www.ems1.com/legal/federal-court-overturns-va-rule-reducing-ambulance-payments

File: Chap. 14, Physical Fitness

AR: WORKING OUT – LUMBAR - WORK COMP

On Dec. 13, 2024, in City of Tucson v. The Indus. Comm'n of Ariz., Court of Appeals of Arizona, Second Division held (3 to 0) that ALJ properly found Spitzer's lumbar surgery claim compensable. The Court held: "The City contends Dr. Jeong's testimony was 'foundationally deficient' and should not have been used as competent medical evidence to support the ALJ's award of a compensable claim. We conclude otherwise. Jeong, Spitzer's surgeon, testified that the 'deadlift episode' was 'more likely than not' the cause of Spitzer's lumbar disk herniation. Dr. Eskay-Auerbach, the City's expert, opined that Spitzer's workout resulted in a 'lumbar sprain' and noted that deadlifting is 'not an activity that causes disk herniations.' Eskay-Auerbach attributed Spitzer's disk herniation to 'age related degenerative changes.'" https://casetext.com/case/city-of-tucson-v-the-indus-commn-of-ariz

The Court wrote:

> "The City contends Dr. Jeong's testimony was 'foundationally deficient' and should not have been used as competent medical evidence to support the ALJ's award of a compensable claim. We conclude otherwise. Jeong, Spitzer's surgeon, testified that the 'deadlift episode' was 'more likely than not' the cause of Spitzer's lumbar disk herniation. Dr. Eskay-Auerbach, the City's expert, opined that Spitzer's workout resulted in a 'lumbar sprain' and noted that deadlifting is 'not an activity that causes disk herniations.' Eskay-Auerbach attributed Spitzer's disk herniation to 'age related degenerative changes.'"

Legal Lesson Learned: The firefighter presented expert testimony that persuaded the Administrative Law Judge.

File: Chap. 15 – Mental Health

TX: SUICIDE ATT. –DORM FIRE – AIR FORCE DISCHARGE

On Dec. 23, 2024, in United States v. Randy B. Giles, Jr., Airman Basic (E-1), U.S. Air Force, the United States Air Force Court of Criminal Appeals, held (3 to 0) that the bad-conduct discharge, confinement for 30 days, and forfeiture of $1,917.00 pay for one month was appropriate penalty, given the attempted suicide by starting a fire on Aug. 16, 2022 in his dormitory room at Sheppard Air Force Base (AFB), Wichita Falls, Texas. Instructors had sent him to be evaluated by Air Force mental, which allowed him to return to his dorm. https://afcca.law.af.mil/afcca_opinions/cp/giles_-_40482_u_2091447.pdf

The Court wrote:

> "We are not persuaded Appellant's bad-conduct discharge is inappropriately severe. Contrary to Appellant's argument, he was not prosecuted for attempting suicide; he was prosecuted for the serious offense of aggravated arson and related offenses, which created a risk to the health and safety to many of his fellow Airmen as well as himself. Appellant pleaded guilty to the charges, unconditionally admitting his criminal responsibility. Based on his guilty pleas, Appellant faced a maximum punishment that included a dishonorable discharge and confinement for 25 years, among other penalties. Through the admitted evidence and Appellant's unsworn statements, the court members were well-informed of the nature of his mental health problems and the progress of his inpatient treatment. The court members likely took these factors into account when they adjudged a relatively lenient sentence including only 30 days of confinement and one month of forfeitures—entirely nullified by the sentence credit the military judge awarded—in addition to the bad-conduct discharge. Having given individualized consideration to Appellant, the nature and seriousness of the offenses, Appellant's record of service, and all other matters contained in the record of trial, we conclude Appellant's sentence is not inappropriately severe." **https://afcca.law.af.mil/afcca_opinions/cp/giles_-_40482_u_2091447.pdf**

Legal Lesson Learned: A fellow airman properly reported the arson threat to Instructors, who promptly referred him for mental evaluation. It is unfortunate that the evaluation did not immediately lead to inpatient treatment.

File: Chap. 16, Discipline

PA: DISPATCHERS FIRED – NEW YEAR'S ALCOHOL TOAST

On Dec. 27, 2024, in Justin K. Zucak, et al. v. County of Lehigh, United States District Court Judge John M. Gallagher, U.S. District Court, Eastern District of Pennsylvania, granted summary judgment to the County. The dispatchers, including two Supervisors, were fired after participating in a New Year's Eve toast on December 31, 2019 of "Coquito"- a mixed drink which according to plaintiffs only "contained a negligible amount of alcohol" served in a "mouthwash size cup." https://casetext.com/case/zucal-v-cnty-of-lehigh-5

The Court wrote:

> "Plaintiffs next raise a 14th Amendment due process claim against Defendants Molchany and Armstrong for 'creat[ing] a false image to the public of the Plaintiffs partying and drunk on the job' as part of a group of individuals who were either terminated or forced to resign for their participation in a New Year's Eve toast…Defendants Armstrong and Molchany were quoted in a WFMZ News 11 article titled '10 Lehigh County 911 Workers Lose Jobs After Alleged New Year's Eve Drinking Incident.' Although the article did not name any specific individuals who participated in the toast, Plaintiffs claim individuals who regularly dealt with the 911 Call Center could identify some of them based on the descriptions provided…. (alleging that Plaintiff Kirchner was the only former County supervisor terminated with 35 years' experience). Defendant Molchany is quoted in the article as saying 'we believe there was a violation of a long-standing County policy. Due to that violation, we needed to take swift action, . . .'. Mr. Armstrong described the decision to terminate Plaintiffs as 'a black and white issue . . . not gray,' because '[i]f something like that would happen later, and [Defendant County] said well this time we only did a suspension, well then [Defendant County] didn't really say this is not allowed and this is not policy.
>
> ***
>
> The Court finds no reasonable fact finder could reach a judgment for the Plaintiffs, even drawing all inferences in their favor. As the non-moving party, Plaintiffs were required to put forth evidence to generate a genuine dispute of material fact, and they have not done so. Therefore, Defendants' Motion for Summary Judgment … is granted, and all claims are dismissed."

Legal Lesson Learned: Consumption of alcohol on duty, no matter how much was consumed, can lead to termination, and also very negative press.

File: Chap. 16, Discipline

MI: WHISTLEBLOWER, REPT BAD TIRES – LATER FIRED

On Dec. 19, 2024, in Dale Gorm v. Northern Bay Ambulance & Rescue, the Michigan Court of Appeals held (3 to 0; unpublished decision) that the trial court improperly granted summary judgment to the ambulance company. In 2022, Paramedic Gorm complained twice to Chairman of Board about poor tires on the ambulances and also complained that the Operations Manager, Ms. Jones, was doing poor job and should be fired. The complaint was about two months prior to being fired. On July 1, 2022, he inadvertently found on the common-use copier a document with EMS salary info and social security numbers, and he showed it two other EMS on duty. He was fired July 14 for "privacy breach." https://cases.justia.com/michigan/court-of-appeals-unpublished/2024-368783.pdf?ts=1734703212

The Court held:

> "In sum, plaintiff presented sufficient circumstantial evidence to allow a reasonable fact-finder to infer that plaintiff's protected activity, i.e., reporting Jones's failures to the Chairman, was a motivating factor in the decision to terminate him. A reasonable fact-finder could also infer that the proposed legitimate business reason—the privacy breach—was just a pretext. Therefore, there is an issue of fact as to why plaintiff was fired 'upon which reasonable minds might differ.' West, 469 Mich at 183."

Legal Lesson Learned: Employees, including "at will" employees, are covererd under the state's Whistleblower's Protection Act.

File: Chap. 17, Arbitration

OH: FIRE ENGINE MFG – DELAY – ARBITRATION

On Dec. 23, 2024, in Dorset Township Board of Trustees v. T-Line EV, LLC, the Ohio Court o Appeals for 11th Appellate District (Ashtabula County), held (3 to 0) that trial court improperly set aside the arbitrator's decision that found in favor of the Township. The arbitrator awarded a "Delay Penalty" under the contract 0.5% per week (80 weeks; $7,500 based on $150,000 contract) and ordered T-Line to return their down payment ($75,000), pay for the 2007 Ferrar chassis supplied by the Township ($35000), and reimburse the Township $1,925 filing fee for the American Arbitration Association. T-Line on Feb. 5, 2024 returned the 2007 Ferrara chassis to the Township, and claimed $76,394.78 worth of materials into the partially built engine. On March 15, 2024, the Township filed lawsuit to enforce the arbitration award; the trial court judge however set aside that portion of award requiring T-Line to pay back $75,000 down payment. On July 18, 2024, T-Line deposited with the Clerk funds satisfying the Delay Penalty ($7,500) and the AAA filing fee ($1,925). The Court of Appeals wrote:

> "T-Line argued that the arbitration award should be vacated because Dorset Township was in possession of the Pumper with the improvements and that it would be inequitable to allow Dorset Township to both have the Pumper and the arbitration award.
>
> ***
> The arbitration award was issued on November 22, 2022. Dorset Township filed its complaint seeking confirmation of the award on March 15, 2023. Pursuant to this provision, R.C. 2711.09, Dorset Township's application for confirmation of the award was timely filed.
>
> ***
> Ohio case law interpreting R.C. 2711.13 confirms the plain language of the statute. 'A party seeking to modify or vacate an arbitration award has up to three months from the date of the award to file its motion.' … Here, T-Line's application to vacate the arbitration award was filed on June 27, 2023, while the arbitration award was issued on November 21, 2022. It is apparent that T-Line's motion was out of rule.
>
> ***
> Proceeding on the timely application of Dorset Township to confirm the award, the trial court was required to confirm the award as no timely application to modify or vacate was made. The record shows that the trial court exceeded its authority in not doing so."
> https://www.supremecourt.ohio.gov/rod/docs/pdf/11/2024/2024-Ohio-6002.pdf

Legal Lesson Learned: An arbitration provision in a contract to purchase or refurbish an engine is an effective way to resolve a dispute.

File: Chap. 18, Legislation

NM: FOREST FIRE ACT – PROP. & EMOTIONAL DAM.

On Dec. 17, 2024, in Tobin Dolan, et al. v. FEMA, United States District Court Judge James O. Browning, U.S. District Court for District of New Mexico, held that when Congress in 2022 passed the Hermit's Peak Fire Assistance Act, and directed FEMA to disburse $3.95 billion in compensation for property owners damaged by the Hermit's Peak/Calf Canyon Fire, that compensation can include noneconomic damages, including damages for emotional distress. https://casetext.com/case/dolan-v-fed-emergency-mgmt-agency

The Court wrote:

> "The Court held a hearing on October 15, 2024…. The primary issues are: (i) whether the Hermit's Peak Fire Assistance Act, Pub. L. No. 117-180, § 104, 136 Stat. 2114, 2168 (2022)('Hermit's Peak Act') allows victims of the Hermit's Peak/Calf Canyon Fire to recover noneconomic damages for discomfort, annoyance, inconvenience, and emotional

distress under New Mexico State law; and (ii) whether the Defendant Federal Emergency Management Agency's ('FEMA's') refusal to compensate noneconomic damages under the Hermit's Peak Act is arbitrary or capricious in violation of the Administrative Procedure Act, 5 U.S.C. § 706(2)(A). The Court concludes that: (i) the Hermit's Peak Act waives FEMA's sovereign immunity for claims pursuing damages resulting from the Hermit's Peak/Calf Canyon Fire that are available under New Mexico State law; (ii) New Mexico State law allows victims of the Hermit's Peak/Calf Canyon Fire to recover noneconomic damages for nuisance, trespass, and personal injury, such as damages for emotional distress, discomfort, annoyance, and inconvenience; (iii) the correct interpretation of the 'actual compensatory damages' recoverable in the Hermit's Peak Act's includes noneconomic damages; and (iv) FEMA's refusal to award noneconomic c damages under the Hermit's Peak Act is arbitrary and capricious in violation of the APA; and (v) the Court compels FEMA to award noneconomic damages under the APA."

Legal Lesson Learned: Another example where courts, per U.S. Supreme Court's June 28, 2024 decision in *Loper Bright*, are no longer routinely following federal regulations under the former "Chevron doctrine."

Note: If Congress had not enacted this statute, the property owners could not sue the Forest Service for "discretionary" decisions under the Federal Tort Claims Act. See, for example, *Freres Timber, Inc. v. The United States*, Oregon; Dec. 6, 2024. "Plaintiffs Freres Timber and Freres Lumber, sister lumber companies, filed this action against the United States Forest Service, seeking over $30 million in damages under the Federal Tort Claims Act ('FTCA') for lumber and profits lost in the Beachie Creek fire. *** Because the challenged decisions [by Incident Commanders] fall within the discretionary function exception, this Court lacks jurisdiction, and Plaintiffs' FTCA claims must be dismissed." https://casetext.com/case/freres-timber-inc-v-the-united-states