

April 2022 – FIRE & EMS LAW NEWSLETER

[NEWSLETTER IS NOT PROVIDING LEGAL ADVICE.]



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- **2022: FIRE & EMS LAW – RECENT CASE SUMMARIES / LEGAL LESSONS LEARNED:** [Case summaries since 2018 from monthly newsletters](#)
- **2022: FIRE & EMS OFFICER DEVELOPMENT / LEGAL LESSONS LEARNED / AMERICAN HISTORY**
- **Pet Therapy:** [Cincinnati Channel 5 TV Youtube Video](#)
IAFC: [Pet Therapy Response Team; From 9-1-1 Dispatch to FD “Stress Relief” Visits](#)



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CHAP. 1: AMERICAN LEGAL SYSTYEM, INCL. FIRE CODES, INVESTIGATIONS, ARSON

File: Chap. 1

IL: SPRINKLERS FOR COMMERCIAL BLDGS, BUT NOT MULTI-FAMILY DWELLINGS – LAWFUL VILLAGE ORDINANCE

On March 17, 2022, in [2095 Stonington, LLC v. Village of Hoffman Estates](#), the Court of Appeals of Illinois, First District (Fourth Division) held (3 to 0) that the trial court properly found that the ordinance is neither arbitrary or discriminatory, and the Plaintiff when acquiring the commercial property in 2016 (13 rental units, including manufacturing operations) had an obligation to comply with the 2002 Village ordinance, at cost of about \$573,000 in a building worth \$1.5 million. The trial court concluded that plaintiff failed to prove that residential properties and commercial properties are similarly situated for purposes of fire protection of the occupants and, therefore, plaintiff’s equal protection claim failed.

“Plaintiff contends that it is both arbitrary and discriminatory as the ordinance makes irrational distinctions between commercial properties and multi-family dwellings. Specifically, plaintiff observes that while defendant amended the ordinance in 2002 to exclude multi-family dwellings based on cost, such an amendment was not considered for

older commercial buildings. Furthermore, plaintiff argues that its particular property did not warrant the installation of an automatic sprinkler system because it is equipped with alternative fire prevention measures and his fire expert, Glenn, testified the construction and layout of the property made the property safer than most.

While the property at issue is fitted with smoke detectors, a fire alarm system, manual pull stations, and a direct connection to the Hoffman Estates Fire Department, the evidence presented established that more can be done to protect the life and property of the occupants at the property; namely, retrofitting the property with an automatic sprinkler system. There was no dispute that were such a system installed it would benefit the public and offer more protection to the occupants than what is currently installed. The ordinance, as applied to plaintiff's property, is neither arbitrary nor discriminatory. Accordingly, we find that while the trial court did err in not applying the rational basis test, its ultimate finding was correct-the ordinance is not unconstitutional as applied to plaintiff.”

Additional facts:

“After a multi-day bench trial, the trial court entered judgment in favor of defendant on all counts. The trial court found that the ordinance advanced a legitimate state interest for the welfare of the public by providing additional safety for the occupants of the property. The trial court further found that plaintiff failed to meet its heavy burden of proof that the ordinance was arbitrary, capricious, or unreasonable.

Regarding the cost to retrofit the property with a sprinkler system, the trial court found that plaintiff ‘failed to prove that requiring it to comply results in an unreasonable exaction as to the cost of installing the sprinkler system as compared to the additional benefit to the public.’ The trial court further found significant the fact that plaintiff presented no evidence that the unencumbered property was ever offered as security for a loan to finance the installation of the sprinkler system. The trial court thus found that plaintiff failed to prove it could not afford the installation.

As this controversy involves a decades-old ordinance, we will begin there. In 1996, the Village of Hoffman Estates adopted the Building Officials Code Administrators (BOCA), a national building code, which required automatic sprinkler systems in new buildings. As BOCA did not have a retrofit requirement, defendant amended the ordinance to require certain preexisting buildings to be retrofitted with sprinkler systems. The ordinance required compliance by December 31, 2010. James Norris, the Hoffman Estates village manager, testified at trial that the purpose of the ordinance was to protect public safety and to reduce the costs associated with fighting fires. Specifically, Norris testified that having sprinkler systems installed throughout the community improves the fire department's effectiveness and ability to respond to emergencies.

In May 2002, the village board was presented with a request to amend the ordinance. The Public Health & Safety Committee conducted a series of meetings with individuals representing multi-family complexes within the Village of Hoffman Estates affected by the retrofit requirement. The Committee also held a three-hour meeting with approximately 420 condominium unit owners. The ordinance was amended to exempt multiple family dwellings and churches from having to retrofit with a sprinkler system. This decision was based, in part, upon the cost to residential owners who, unlike commercial property owners, did not receive revenue from the use of their properties. The decision was also based in part on practical issues, such as whether a condominium association could require its owners to install sprinklers within their private residences. In omitting existing residential properties from the retrofit requirement, the village board also considered statistics which demonstrated that fires in commercial buildings could, in fact, be more dangerous than residential fires. The village board enacted the amendment despite the fire department's recommendation against it.

The property at issue is located at 2095-2119 North Stonington in the Village of Hoffman Estates. Donald S. Craig, plaintiff's property manager, testified regarding the makeup of the property. The property, built in 1971, consists of two multi-unit, single-story commercial buildings and the building space is just under 32, 000 square feet. The property was constructed using noncombustible materials with a brick masonry exterior and aluminum framing, windows, and doors. It has a total of 13 rental units, nine of which (at the time of the trial) were rented to tenants. Each unit is separated with a three-hour rated firewall. Two of these firewalls had door-sized holes so as to connect the units. Fire-rated doors were installed to cover these holes. Each unit has three exits: a front exit, a rear exit, and a rear drive-in dock. Two tenants in particular were discussed during the bench trial. The first tenant is a carpet restoration company that stores cleaning chemicals and a truck inside its unit. The second tenant is a manufacturing shop that takes up five of the units of the property. The manufacturing shop operates a propane-powered forklift inside its units.

Donald S. Craig [who purchased the property in 2016, and is sole member of the LLC] further testified regarding the fire safety measures at the property. The property is equipped with a smoke detector system and a fire alarm system linked to the Hoffman Estates Fire Department. Donald S. Craig explained that once a smoke detector activates inside a unit, the alarm system begins emitting a loud noise and strobe lighting to alert all the occupants to the existence of a fire. The fire alarm can only be deactivated by the fire department. There are also manual pull stations which an individual can activate in case of fire. When this occurs, the Hoffman Estates Fire Department is also directly contacted. These fire safety devices were installed in March 2019, just prior to trial in April 2019. Craig also testified that during plaintiff's ownership, the Hoffman Estates Fire Department inspected the property annually and never identified the property as being at risk of a fire. There has never been a fire at the property.

Plaintiff's witness Scott DiGilio, an expert engineering consultant, testified his company provided plaintiff with two estimates for installing an automatic sprinkler system at the property. The first estimate was delivered in August 2016 and indicated it would cost \$434, 615. This estimate was, in part, based on the price per square foot being \$3.50. This estimate also included the construction of two water rooms and the installation of a new water main to the property. The second estimate was delivered in March 2019 for \$573, 563. DiGilio testified that the second cost estimate increased in part because of issues he did not identify during his 2016 site visit. For example, he changed the location of the water rooms to a location further away from the parking lot which required him to use a longer water service line. DiGilio also added \$30, 000 in costs to relocate and protect the contents of the units. In addition, the cost per square foot had increased to \$5.50 for unoccupied units and \$6.50 for occupied units.

We find the ordinance is neither arbitrary nor discriminatory. As explained in further detail below, the differences between commercial properties and multi-family dwellings are easily perceived... As demonstrated by the evidence at trial, when a firefighter comes upon a fire at a commercial property there are many unknowns. The firefighter will not know the occupancy of the building, the lay out of the interior of the units, and the potential fire loads within each unit of the property. It is therefore reasonable for defendant to have made a distinction between commercial and multi-family dwellings when enacting the amendment to the ordinance.

Regarding plaintiff's cost argument, we find that plaintiff did not meet its burden to prove that defendant made an arbitrary distinction when it considered the cost of retrofitting multi-family dwellings and not the cost of retrofitting its commercial property when enacting the 2002 amendment.”

Legal Lesson Learned: Excellent decision, balancing the benefits of sprinklers versus costs.

Chap. 2 – Line Of Duty Death / Safety

CHAP. 3: HOMELAND SECURITY, INCL. ACTIVE SHOOTER, CYBERSECURITY, IMMIGRATION

File: Chap. 3

LA: CIVIL UNREST – OFFICER HIT HEAD WITH CONCRETE - CAN SUE “BLM” PROTEST ORGANIZER UNDER STATE LAW

On March 25, 2022, in [Officer John Doe v. DeRay Mckesson, et al.](#), the Louisiana Supreme Court issued an opinion (6 to 1) answering two “Certified Questions” from the U.S. Court of Appeals for the 5th Circuit [New Orleans]. First, under state law a City of Baton Rouge police officer who was struck in the head in July, 2016 by a piece of concrete, lost teeth and suffered

brain trauma, may sue DeRay Mckesson, co-founder of Black Lives Matter [BLM] who organized the protest, even though the concrete thrower was never identified. Second, the “Professional Rescuer’s Doctrine” [also known as the “Fireman’s Rule”] prohibiting emergency responders from suing for injuries on the job, was set aside by LA Legislature in 1996 and subsequent court decisions. The 5th Circuit must now decide if lawsuit in Federal court may be reinstated and pre-trial discovery commenced.

“Accordingly, we answer the Fifth Circuit Court of Appeals' second certified question: In view of the current directive of La. C.C. art. 2323 that ‘[i]n *any* action for damages where a person suffers injury, death, or loss, the degree or percentage of fault of *all* persons *causing or contributing* to the injury, death, or loss *shall* be determined...’ (emphasis added) and this court's holding in [Murray v. Ramada Inns, Inc., 521 So.2d 1123, 1132 \(La. 1988\)](#), abrogating assumption of risk, we conclude that the Professional Rescuer's Doctrine has likewise been abrogated in Louisiana both legislatively and jurisprudentially.”

Additional Facts:

“The plaintiff alleges that he was a duly commissioned police officer for the City of Baton Rouge on July 9, 2016, when he was ordered to respond to a protest "staged and organized by" BLM and DeRay Mckesson, which was in response to the July 5, 2016 death of Alton Sterling, who was shot by a Baton Rouge police officer when Mr. Sterling resisted arrest.

Under the allegations of fact set forth in the plaintiff's federal district court petition, it could be found that Mr. Mckesson's actions, in provoking a confrontation with Baton Rouge police officers through the commission of a crime (the blocking of a heavily traveled highway, thereby posing a hazard to public safety), directly in front of police headquarters, with full knowledge that the result of similar actions taken by BLM in other parts of the country resulted in violence and injury not only to citizens but to police, would render Mr. Mckesson liable for damages for injuries, resulting from these activities, to a police officer compelled to attempt to clear the highway of the obstruction.”

Legal Lesson Learned: Hopefully the 5th Circuit will now remand the case to the U.S.

District Court judge and allow pre-trial discovery to be held.

Note: Lots of judges have now reviewed this case; unclear if it will ever be tried. The lawsuit was originally dismissed by a U.S. District Court judge prior to any discovery based on the First Amendment right to organize protests; the 5th Circuit (2 to 1) reversed, *Doe v. Mckesson*, 945 F.3d 818 (5th Cir. 2019) holding that a jury could plausibly find that Mckesson breached his “duty not to negligently precipitate the crime of a third party” because “a violent confrontation with a police officer was a foreseeable effect of negligently directing a protest” onto the highway. 945 F. 3d, at 82. The Fifth Circuit subsequently deadlocked 8 to 8 on Mckesson’s petition for rehearing en banc [all the active judges on the 5th Circuit]. 947 F. 3d 874, 875 (2020) (per curiam). The U.S. Supreme Court agreed to review the case, and in 2020 in a Per Curiam order [not a

decision issued by a particular Justice) and vacated [5th Circuit \(3-judge panel\) decision, remanded case back to 5th Circuit.](#)

“We think that the Fifth Circuit’s interpretation of state law is too uncertain a premise on which to address the question presented. The constitutional issue, though undeniably important, is implicated only if Louisiana law permits recovery under these circumstances in the first place. The dispute thus could be ‘greatly simplifie[d]’ by guidance from the Louisiana Supreme Court on the meaning of Louisiana law.”

File: Chap. 3

U.S. SUP. COURT: NAVY SEALS MUST GET COVID VACCINATED – MILITARY OPERATIONAL DECISION

On March 25, 2022, in [Lloyd J. Austin, II, Secretary of Defense v. U.S. Navy Seals, et al.](#), the U.S. Supreme Court issued order (6 to 3) granting the U.S. Government’s motion for a partial stay of the decisions by both the 5th Circuit and a U.S. District Court judge in Texas regarding 35 Navy seals.

“The district court’s January 3, 2022 order, insofar as it precludes the Navy from considering respondents’ vaccination status in making deployment, assignment, and other operational decisions, is stayed pending disposition of the appeal in the United States Court of Appeals for the Fifth Circuit and disposition of the petition for a writ of certiorari, if such writ is timely sought.”

Concurring Opinion:

Justice Kavanaugh in a concurring decision wrote:

“As the Court has long emphasized, moreover, the ‘complex, subtle, and professional decisions as to the composition, training, equipping, and control of a military force are essentially professional military judgments.’ *Gilligan v. Morgan*, 413 U. S. 1, 10 (1973). Therefore, it is ‘difficult to conceive of an area of governmental activity in which the courts have less competence.’

As Admiral William Lescher, Vice Chief of Naval Operations, explained: ‘Sending ships into combat without maximizing the crew’s odds of success, such as would be the case with ship deficiencies in ordnance, radar, working weapons or the means to reliably accomplish the mission, is dereliction of duty. The same applies to ordering unvaccinated personnel into an environment in which they endanger their lives, the lives of others and compromise accomplishment of essential missions.’

Legal Lesson Learned: The U.S. Supreme Court majority clearly decided to not interfere with U.S. military command decisions regarding deployment eligibility of personnel.

Note: [On Feb. 26, 2022, the 5th Circuit \(New Orleans\) upheld the District Court judge, holding \(3 to 0\):](#)

“The Navy has granted hundreds of medical exemptions from vaccination requirements, allowing those service members to seek medical waivers and become deployable. But it has not accommodated any religious objection to any vaccine in seven years, preventing those seeking such accommodations from even being considered for medical waivers. We DENY Defendants’ motion.”

Chap. 4 – Incident Command, incl. Training, Drones, Communications

CHAP. 5: EMERGENCY VEHICLE OPERATIONS

File: Chap. 5

TX: MEDIC USED LIGHTS / BUT NO SIREN – INTERSECTION RED LIGHT - TRUCK KILLED PATIENT – NO IMMUNITY

On March 17, 2022, in [Blue Bird Medical Enterprises, LLC, d/b/a Allegiance Mobile Health and Nicole Marina Mirza v. Russell Lynn Willis, et al.](#), the Court of Appeals of Texas, Fourteenth District, held (3 to 0) that trial court properly denied the defendants’ motion to dismiss, since the plaintiffs’ expert (a very experienced medic) testified the medic on a hospital to hospital transfer “breached the standard of care” when entering intersection against a red light without a siren activated. The lawsuit may now proceed under the Texas health care liability claim.

“Nicole Mirza was driving the ambulance, with Willis as a passenger on the rear stretcher, on FM 2004 in Brazoria County. Mirza approached a red light at the intersection of FM 2004 and State Highway 288B. Mirza entered the left-hand turn lane to pass other vehicles waiting at the red light, and she pulled into the intersection using only emergency lights with no audible siren. A pickup truck struck the ambulance, causing it to overturn. Shortly thereafter, Willis collapsed and could not be resuscitated. In the crash, Willis sustained blunt force injuries with laceration of the spleen and massive internal injuries, and the blunt force trauma caused his death.

The driver of the pickup truck had a green light and did not hear any siren activated on the ambulance. Three eyewitnesses at the scene confirmed that Mirza had not activated the ambulance siren by the time of the collision. The investigating police officer cited Mirza's failure to activate the siren as the only contributing factor in the crash. Plaintiff's expert [Robert Krause, Ed.D., has been a practicing paramedic for nearly four decades] then identified the different standards of care applicable to ‘routine’ transports and to ‘true emergencies,’ and although he asserted that Willis's transport ‘was not an emergency,’ he opined that Mirza breached both standards of care.”

Additional Facts:

“When Donald Willis presented to Matagorda Regional Medical Center complaining of chest pain, left arm numbness, shortness of breath, dizziness, and nausea, his medical history included three prior myocardial infarctions and seven cardiac stents. He was diagnosed with ‘unstable angina,’ and a few hours after he was admitted to the hospital,

his physician determined that Willis would have an 'improved possibility of retaining life or limb' if he were transferred to the University of Texas Medical Branch at Galveston for specialized treatment and for invasive or radiologic procedures and tests that were not available at the Matagorda facility. Willis's physician stated in the 'memorandum of transfer' that Willis was stable at the time of transfer and that emergency medical services (EMS) personnel were needed for the transport.

In the ambulance, Willis remained connected to a cardiac monitor and he received heparin intravenously through a transport pump. While paramedic Robert Smith cared for Willis in the patient compartment, emergency medical technician (EMT) Nicole Marina Mirza drove the ambulance. Mirza activated the ambulance's emergency lights, but not its siren.

On approaching an intersection where the vehicles in front of her were stopped for a red light, Mirza avoided the waiting traffic by steering the ambulance into the left-turn lane, then proceeding forward through the intersection. While at this intersection, Smith assessed Willis's vitals. Smith leaned forward to push the 'acquire BP' (presumably, blood pressure) button on the monitor, and as he sat back, he saw through a side window that the ambulance was traversing the first lane of the cross-traffic, and a truck approaching the intersection in the next lane was not slowing down.

The truck—a Ford F250 driven by Dexter Buchanan Fernil—struck the passenger side of the ambulance, knocking it onto its left side. The resulting blunt-force trauma lacerated Willis's spleen, and he lost nearly two liters of blood into his abdomen. He died from his injuries.

Marc Krouse, M.D.'s Report on Causation.

After reviewing the hospital records, the crash report, the report of the police investigation of the crash, and the autopsy report, Krouse concluded that Willis did not die from his pre-existing heart condition but from "blunt force trauma in the ambulance crash, with large splenic laceration and loss of nearly two liters of blood in his abdominal cavity."

Assuming, without deciding, that the Willis Parties' claims are HCLCs [health care liability claim] their expert reports satisfy the requirements of the Texas Medical Liability Act. We accordingly affirm the trial court's orders denying the Ambulance Parties' motions to dismiss."

Legal Lesson Learned: When driving an ambulance, or other emergency apparatus, do not enter an intersection against a red light without both siren and lights activated. A best practice, while not required by some state laws, is to have a SOG requiring full stops at controlled intersections.

File: Chap. 5

TX: VOL. FF DRIVING HOME AFTER FIRE – STRUCK TWO FF CHECKING TIRE ON TANKER – ONE DIED - NO IMMUNITY

On March 17, 2022, in [John Weston Roades v. Lisa Henderson, as Administratrix of the estate of Steven Henderson, Kinsley Henderson, Koale Jaks and Robert Popp](#), the Court of Appeals of Texas, Thirteenth District (Corpus Christi – Edinburg), held (3 to 0) that the trial court properly denied the motion to dismiss by the volunteer firefighter with the Louise Volunteer Fire Department (LVFD), Wharton County, Texas, since the Texas Tort Claims Act protects governmental “employees” (defined as “in the paid service of a governmental unit) and another provision only protects volunteer firefighters “*while involved in or providing an emergency response* as a member of a volunteer fire department.”

“Here, by Roades's own account, ‘the fire was under control’ and he was travelling home in his personal vehicle when the accident occurred. Thus, it is undisputed that Roades was not involved in or providing an emergency response during or at the time of the accident. Accordingly, Roades is not entitled to the ‘exclusions, exceptions, immunities, and defenses’ applicable to an employee under the TTCA. *See* Tex. Civ. Prac. & Rem. Code Ann. §§ 78.101(1), 78.102, 78.104.”

[Here’s an article on this tragic accident.](#)

On Monday, October 7, 2019, Firefighter Steven Henderson with the Louise (TX) Volunteer Fire Department and another firefighter were returning from a fire call in a tanker truck when they stopped alongside the road to inspect the front tires. While outside the vehicle, another firefighter from the same fire department driving his personal pick-up truck, who was also at the scene of the fire call and left shortly after Henderson, did not see the truck parked in the roadway or the two firefighters standing outside of it. He subsequently hit both Henderson and the other firefighter.”

Additional Facts:

“Steven, Popp, and Roades were volunteer firefighters for the Louise Volunteer Fire Department (LVFD), located in Wharton County, Texas. In their petition, appellees allege that on October 7, 2019, Steven and Popp ‘were returning back to the fire station in an [LVFD] vehicle when they stopped on FM 647.’ According to the petition, Roades, who was traveling in his personal vehicle, struck the two, killing Steven and severely injuring Popp. Appellees sued Roades for negligence.

In his affidavit, Roades testified that he was a volunteer firefighter with LVFD. He stated that on October 7, 2019, he responded to the scene of a fire located near FM 647. Roades asserted that ‘once the fire was under control, [he] departed the scene of the fire and traveled . . . toward [his] home in [his] personal vehicle.’ Roades stated that while ‘traveling southbound on FM 647, [he] unintentionally struck [Popp] and [Steven] with [his] vehicle.’

The Court of Appeals reviewed the Texas Tort Claims Act [TTCA]:

The TTCA defines an "employee" as:

a person, including an officer or agent, who is in the paid service of a governmental unit by competent authority, but does not include an independent contractor, an agent or employee of an independent contractor, or a person who performs tasks the details of which the governmental unit does not have the legal right to control.

However, Chapter 78 of the civil practice and remedies code affords certain protections for volunteer fire departments and firefighters. *See* Tex. Civ. Prac. & Rem. Code Ann. §§ 78.001-.151. In particular, '[a] volunteer fire fighter is . . . liable for damages . . . only to the extent that an employee providing the same or similar services for a county would be liable' and is 'entitled to the exclusions, exceptions, immunities, and defenses applicable to an employee of a county under [the TTCA] and other statutory or common law.' *Id.* § 78.104. But these protections apply only to 'damages for personal injury, death, or property damage . . . arising from an error or omission of . . . a volunteer fire fighter while involved in or providing an emergency response as a member of a volunteer fire department.' *Id.* § 78.102 (emphasis added). An "emergency response" is defined as "a response involving fire protection or prevention, rescue, emergency medical, or hazardous material response services." *Id.* § 78.101(1). Thus, a volunteer firefighter is considered an employee under the TTCA "while involved in or providing" a "response involving fire protection or prevention, rescue, emergency medical, or hazardous material response services." *Id.* §§ 78.101(1), 78.102, 78.104.

For the foregoing reasons, we conclude that Roades has not established that he can be considered an employee of a governmental unit as required to invoke dismissal under § 101.106(f). *See Franka*, 332 S.W.3d at 381. Therefore, the trial court did not err in denying his motion to dismiss. *See Michaelski*, 541 S.W.3d at 348.^[2] We overrule Roades's sole issue."

Legal Lesson Learned: Volunteer emergency responders should carefully check the law in their state; it is a wise practice to confirm with your automobile insurance carrier that you have coverage when serving as a volunteer.

CHAP. 6: EMPLOYMENT LITIGATION, INCL. WORK. COMP, DISABILITY, VET. RIGHTS

File: Chap. 6

CA: FF PAY - CITY COUNCIL DOES NOT HAVE TO COMPARE PAY FF IN 5 CITIES – "MEASURE F" UNENFORCEABLE

On March 24, 2022, in [Pacifica Firefighters Association v. City of Pacifica](#), the California Court of Appeals, First District (Second Division) held (3 to 0) that the trial court judge properly denied the FF Association’s petition requiring the City to follow “Measure F” after an impasse in negotiations in 2019.

“Measure F addresses the compensation of employees in a single city department; the voters sought to ensure that if negotiations failed, firefighters in Pacifica would receive compensation commensurate with that of firefighters in neighboring cities. Laudable as their purpose may have been, the voters were considering one part of a complicated puzzle in isolation. Voters do not have access to the detailed financial information necessary to see the puzzle as a whole and weigh competing demands on a finite city treasury. In specifically directing the ‘city council’ to ‘fix the compensation of all appointive officers and employees’ (§ 36506), the Legislature must have intended to avoid the disruption to city operations that could result if the electorate could require a general law city to pay its firefighters higher salaries than the city council deemed appropriate by requiring salaries no less than those in another jurisdiction. We therefore agree with the trial court that Measure F is unenforceable as a usurpation of authority the Legislature granted exclusively to the city council.”

Additional Facts:

“In 1988, the voters in the City of Pacifica (City) approved Measure F, which prescribes procedures to be followed in the event of an impasse in labor disputes with the City’s firefighters. Under this measure, absent other agreement, the top step salaries of fire captains in the city are to be set at an amount not less than the average for top step salaries of fire captains in five neighboring cities.

Measure F, an ordinance entitled ‘Firefighter Dispute Resolution Process Impasse Resolution Procedures: Minimum Wages and Benefits For Firefighters,’ was adopted by the City’s voters in 1988. The stated purpose of the ordinance is ‘to resolve an impasse in wage and benefit negotiations should they occur between representatives of the City and of the recognized firefighter organization’ and to thereafter adopt minimum salary and benefits for firefighters.’

Pursuant to section 3(a) of Measure F, ‘Unless otherwise agreed by City and firefighter representatives following the adoption of this ordinance, the top step salaries of Fire Captains in the City of Pacifica shall be fixed retroactively to July 1 of each fiscal year at an amount which is not less than the average for top step salaries for Fire Captains in the Cities of South San Francisco, Daly City, San Mateo, San Bruno and Redwood City. Salaries for top step Firefighter-Engineers shall be adjusted to a rate of 15.3% below the salary for top step Fire Captains. The percentage rated step increases below the top step Fire Captain and the top step Firefighter-Engineer shall be increased proportionately to the increases in the top steps for said classifications.’

‘In general, labor relations between local government employers and employees are regulated by the Meyers-Milias-Brown Act (MMBA), Government Code section 3500 et seq.’ (*Service Employees Internat. Union v. Superior Court* (2001) 89 Cal.App.4th 1390, 1394.) “[T]he MMBA has two purposes: (1) to promote full communication between public employers and employees; (2) to improve personnel management and employer-employee relations within the various public agencies. Those purposes are to be achieved by establishing methods for resolving disputes over employment conditions and for recognizing the right of public employees to organize and be represented by employee organizations.

As a general law city, Pacifica is subject to section 36506, which provides, "By resolution or ordinance, the *city council* shall fix the compensation of all appointive officers and employees." (§ 36506, italics added.)

Legal Lesson Learned: The California legislature has enacted procedures when the parties are at an impasse in negotiations, and city voters cannot overturn those provisions.

Note: “[The Meyers-Milias-Brown Act \(1968\)](#) governs the labor-management relations in California local government, including cities, counties, and most special districts.”

CHAP. 7: SEXUAL HARASSMENT, INCL. PREGNANCY DISCRIM., GAY RIGHTS

File: Chap. 7

VA: FEMALE FIRE INSPECTOR – MADE COMPLAINT PASSED OVER PROMOTIONS – RETALIATION – CASE TO PROCEED

On March 11, 2022, in [Karen Baka v. City of Norfolk, Virginia](#), U.S. District Court Judge Raymond A. Jackson, U.S. District Court for Eastern District of Virginia (Norfolk Division) denied the City’s motion to dismiss this lawsuit by the plaintiff, who is a Fire Investigator in the Norfolk Fire Marshal’s Office and complained about being passed over for several promotions in retaliation for filing internal complaints with the City. Another female Fire Investigator, who retired after 30 years, has filed a similar lawsuit. The Court referenced in Footnote 1 a TV story about the alleged hostile workplace experience by the two Investigators.

“Defendant also claims that it is "immune from tort liability for governmental functions, absent an express waiver of such immunity." Def.'s Mem. Supp. at 4. Yet, the Supreme Court of Virginia in *Massenburg* - a case upon which Defendant relies - explicitly stated: ‘Unlike counties, which share fully in the sovereign's immunity from tort, whether a municipal corporation is entitled to sovereign immunity protection depends on the type of function it exercises when liability arises.’ 298 Va. at 218 (2019). Indeed, Defendant's

reliance on *Ligon* is misplaced because that case dealt specifically with a county employee who brought suit against the county for which he worked. *See Ligon v. Cnty. of Goochland*, 279 Va. 312, 314 (2010). The *Massenburg* court made clear that counties enjoy immunity protections distinct from those enjoyed by municipalities. Defendant is a municipality, not the Commonwealth or one of its counties.’

Footnote 1: *See* Jason Marks, *Special Report: Norfolk Under Fire for Treatment of Female Employees*, *WAVY.com* (Oct. 24, 2019, 4:11 PM). [[Watch the video and read the article.](#)]

NORFOLK, Va. (WAVY) – Humiliation and hostility. That’s what two women claim happened to them in the Norfolk Fire Marshal’s Office. The women feel they are treated differently than their male co-workers and are taking the city to court.

“Changes tend to happen when people pay attention to the problems,” said attorney Barry Montgomery. Montgomery is the attorney for the two women: Karen Baka, a current Norfolk Fire Marshal, and Karen Barnes, who retired from the Fire Marshal’s Office after 30 years of service. Baka, who has been with Norfolk Fire since 1985, says she has been overlooked on purpose for promotions. ‘One of her major complaints is failure to not get promoted,’ Montgomery said. “She filed for promotion three separate times for lieutenant and was denied each time. The job went to male firefighters who did not have as much experience as she did. She noticed that happened after she made her complaints.” Barnes, who retired as a lieutenant, says she felt threatened, humiliated and picked on by her boss. She was told at times that if she went behind his back she would feel his wrath.”

Additional Facts:

“Plaintiff is a female who, at all times relevant to the Complaint, was an individual and resident of Virginia Beach, Virginia, and an employee of the City of Norfolk. Compl. at ¶¶ 1, 11. Defendant is a municipal corporation employing more than 500 individuals in the Norfolk, Virginia area. *Id.* at ¶ 2. Plaintiff began working for Norfolk as a firefighter and paramedic in July of 2005. *Id.* at ¶ 9. In 2012, Plaintiff accepted a position in the Norfolk Fire Marshall's Office as a fire inspector. *Id.* at ¶ 10. That same year, Plaintiff achieved the rank of Fire Investigator with the Norfolk Fire Marshall's Office. *Id.*

Plaintiff alleges that the Norfolk Fire Marshall's Office has historically been dominated by men, including at leadership and management levels. *Id.* at ¶ 12. At all times relevant to the Complaint, Chief Roger Burris, Chief Jeffrey Wise, Chief Michael Brooks, and Captain Michael Rose were all male employees of Norfolk and Plaintiffs direct supervisors. *Id.* at ¶ 13. Plaintiff alleges that male supervisors in the Norfolk Fire Marshall's Office, including the four named supervisors, routinely acted with hostility toward the few female fire investigators working in the office, including Plaintiff.

On August 30, 2019, Plaintiff filed a complaint for gender discrimination in employment against Defendant in this Court. *Id.* at ¶ 35. On October 24, 2019, a local television

station published a news story about gender discrimination in the Norfolk Fire Marshall's Office, which provided details about Plaintiffs lawsuit and another lawsuit Barnes filed alleging gender discrimination. [Footnote 1.] *Id.* At ¶ 36. A few weeks later, on November 15, 2018, and on November 22, 2019, Defendant required Plaintiff to take multiple drug tests. *Id.* at ¶ 37. Rose accompanied Plaintiff to one of the drug tests. *Id.* Defendant had never required Plaintiff to take a drug test since hiring her in 2005. *Id.* Defendant also required Criswell to submit to a "random" drug test soon after she complained of gender discrimination in 2018. *Id.*

Moreover, Plaintiff alleges Norfolk would routinely assign less desirable job duties to female fire inspectors, such as bed bug complaints and suspected hoarders. *Id.* at ¶ 21. Conversely, Defendant would assign more desirable jobs to similarly situated male coworkers, such as hood inspections, school inspections, and training opportunities. *Id.* Plaintiff alleges that, as a result, her male coworkers obtained more inspection credits, which are necessary for career advancement. *Id.*

Legal Lesson Learned: Claims of retaliation, particularly after an internal complaint of hostile workplace has been submitted to the employer, can be difficult to defend before a jury.

Note: Reportedly, plaintiff settled a prior lawsuit against the City for \$87,000.

[See March 13, 2022 article. "Court Refuses to Dismiss State Law Claims in Norfolk Retaliation Suit."](#)

The US District Court for the Eastern District of Virginia has refused to dismiss the state law claims of a fire investigator with Norfolk Fire-Rescue who alleges sexual harassment, discrimination, retaliation, and violation of Virginia's Whistleblower Protection Act.

Karen Baka filed the suit last year. It was her second suit against the city. Baka had previously filed a gender discrimination suit in 2019. That suit ultimately settled for \$87,000.

File: Chap. 7 [also Chap. 15]

**TX: PTSD - FEMALE FF NUDE VIDEO FOR HER HUSBAND (FF)
– LEARNED 9 YRS LATER FF WATCHED IT – MAY SUE FD**

On March 11, 2022, in [Melinda Abbt v. City of Houston, John Chris Barrientes](#), the U.S. Court of Appeals for 5th Circuit (New Orleans) held (3 to 0) that the lawsuit against the City of Houston and Captain Barrientes should be reinstated. "Abbt has presented sufficient evidence to create a genuine dispute as to whether the City knew or should have known about the harassment, and thus can be held liable."

In a Concurring Opinion, Justice James C. Ho wrote:

"Melinda Abbt is a firefighter. But at least two of her male superiors at the Houston Fire Department-Chris Barrientes and David Elliott-and perhaps countless others treated her

as nothing more than a sexual object. They accessed a private, intimate, nude video that Abbt had obviously made exclusively for her husband. They did so without her knowledge or permission. And they watched it repeatedly, both on and off-duty, alone and in front of co-workers, *for over nine years*. The only reason Abbt ever discovered this most invasive violation of privacy was because Elliott finally confessed to her husband. Even to this day, Abbt cannot be sure whether anyone else at the Department has already seen the video-or may watch it in the future.”

Additional Facts:

“Beginning in 2003, Melinda Abbt worked for the City of Houston as a firefighter in the Houston Fire Department. From 2006 until 2009, she was assigned to Station 18. During that time, she served under Chris Barrientes, who was a Junior Captain at Station 18. Station 18 was overseen by District Chief David Elliott, who also had purview over three to four other stations.

According to Barrientes's deposition testimony, the actions which led to this case began around 2008, when Barrientes received an anonymous email. That e-mail contained an intimate, nude video of Abbt that she had made privately for her husband and had saved on her personal laptop, which she had brought to the fire station. Barrientes first watched the video in the captain's office of Station 18. He kept the video's existence hidden for several days, and then brought it to the attention of District Chief Elliott.

When Barrientes told Elliott about Abbt's nude video, Elliott asked to see it. Barrientes then played the video for Elliott; another firefighter, Jonathan Sciortino, testified that he was also in the room and viewed the video. Barrientes testified that, when he asked Elliott what to do, Elliott first asked ‘if [Barrientes] had told anybody’ about the video. When Barrientes said he had not, Elliott responded that was ‘good,’ that Barrientes should not discuss the video with anyone else, and that Elliott would ‘get back to [Barrientes]’ about what to do.

Elliott did not report the video to human resources or to a supervisor. Instead, Elliott ‘asked [Barrientes] to forward [the video] to him’ because Elliott ‘wanted to see it again.’ Barrientes did not forward the e-mail at that time, but provided his e-mail password to Elliott so that Elliott would have access to the video. A year or so later, Elliott called Barrientes because the password to Barrientes's account no longer worked and Elliott needed the new one to continue watching the video. According to Barrientes, Elliott said he was ‘going to keep hounding [Barrientes] till [he gave Elliott] the password or let [him] see the video again.’ Barrientes then forwarded the video to Elliott. Barrientes also continued to watch the nude video of Abbt multiple times over the next several years.

Abbt learned of these events on May 18, 2017, when Elliott confessed to Abbt's husband (also a member of the Fire Department) that Elliott had seen a nude video of Melinda Abbt. Upon learning that her personal, intimate video had been seen by other firefighters, Abbt was ‘completely distraught’ and ‘disgusted.’ She called in sick the next day and continued to call in sick in the weeks that followed. On June 6, 2017, Abbt was diagnosed with post-traumatic stress disorder (PTSD) by Dr. Jana Tran, a therapist with

the City. After the incident, Abbt received six months of unpaid leave under the Family and Medical Leave Act (FMLA); however, she was initially denied paid leave. Abbt filed a worker's compensation claim on February 16, 2018, which was opposed by the City; an Administrative Law Judge found that Abbt had suffered 'a compensable mental trauma injury' and she was granted worker's compensation pay. She was medically separated from the City and her employment ended on February 12, 2019.

Abbt also reported the incident to the City of Houston's Staff Services Department and, on May 26, 2017, she filed a complaint with the Houston Office of Inspector General (OIG). When he learned of the investigation, Barrientes deleted the original e-mail from his e-mail account; it is unclear whether he additionally deleted the e-mail he sent to Elliott or whether he retained that copy of the video. The OIG eventually sustained Abbt's allegations. Barrientes, Elliott, and Sciortino each received suspensions of varying length; Barrientes also received a two-rank demotion. However, Abbt asserts that, after the investigation, (1) she was not told how widely the video had been distributed throughout the Fire Department, (2) she did not know whether any copies of the video continued to exist and were still in the possession of others, and (3) there were no assurances that Abbt would not be required to work in the future with Barrientes or Sciortino (both of whom she knew had seen the video and were still working for the Fire Department).

The district court then granted summary judgment to the City on both Abbt's sexual harassment claim and her retaliation claim. It first found that Abbt's sexual harassment claim failed because no hostile work environment was created as (1) neither Barrientes nor Elliott were Abbt's supervisors, and so the City could not be held vicariously liable for their actions; (2) 'it was [Abbt's] knowledge of what had happened that led to her purported PTSD, not the actual conduct of her coworkers viewing the video;' (3) Abbt was unable to prove that the theft of the video occurred at work; and (4) the City took sufficient remedial action once Abbt filed a complaint with the OIG. The court ultimately stated that '[b]ecause Abbt cannot show that she was subjected to a hostile work environment - just that she is angry and embarrassed - her sexual harassment claim fails.'

There is a genuine dispute of material fact for every element of Abbt's sexual harassment/hostile work environment claim. Summary judgment was therefore improper, and we reverse the grant of summary judgment to the City of Houston."

Legal Lesson Learned: Terrible facts; City would be wise to quickly settle this case.

File: Chap. 7 [also Chap. 18]

DC: SEXUAL HARASSMENT OR ASSAULT – NEW FEDERAL LAW - INVALID EMPLOYEE MANDATORY ARBITRATIONS

On March 3, 2022, President Biden signed into law the [“Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act.”](#) The law amends the Federal Arbitration Act to prohibit mandatory arbitration of sexual harassment and sexual assault claims in arbitration agreements.

- (a) “In General - Notwithstanding any other provision of this title, at the election of the person alleging conduct constituting a sexual harassment dispute or sexual assault dispute, or the named representative of a class or in a collective action alleging such conduct, no predispute arbitration agreement or predispute joint-action waiver shall be valid or enforceable with respect to a case which is filed under Federal, Tribal, or State law and relates to the sexual assault dispute or the sexual harassment dispute.
- (b) [Determination of Applicability.](#) An issue as to whether this chapter applies with respect to a dispute shall be determined under Federal law. The applicability of this chapter to an agreement to arbitrate and the validity and enforceability of an agreement to which this chapter applies shall be determined by a court, rather than an arbitrator, irrespective of whether the party resisting arbitration challenges the arbitration agreement specifically or in conjunction with other terms of the contract containing such agreement, and irrespective of whether the agreement purports to delegate such determinations to an arbitrator.”

Legal Lesson Learned: Fire & EMS departments should review their Employee Handbooks and other documents and remove any provision requiring arbitration for claims of sexual harassment or sexual assault.

Note:

March 28, 2022: [“Moving Away from Mandatory Arbitration Over Sexual Assault and Harassment Claims.”](#)

“Given these changes to the FAA, it is critical for employers to review their arbitration agreements and remove any language indicating sexual assault or harassment claims must be arbitrated. The existence of such provisions could invalidate the agreement in whole or in part. In addition to revising the arbitration agreement provisions in the employee handbook or collective bargaining agreement, employers should also tighten their procedures and requirements for investigating and reporting sexual harassment and assault to avoid liability. In terms of reporting procedures, employers should have clearly defined persons of contact for reporting.”

March 3, 2022: [“Biden signs bill to end forced arbitration in sexual harassment, assault cases.”](#)

The law is retroactive, freeing individuals who have been bound by arbitration language to pursue legal action against their harassers.

March 1, 2022: [“Congress Votes To End Mandatory Arbitration Of Sexual Assault And Sexual Harassment Claims.](#)

CHAP. 8: RACE, NATIONAL ORIGIN DISCRIMINATION

File: Chap. 8

CA: AFRICAN AMERICAN FF FIRED - MEDICAL INFO IN HIS PERSONNEL FILE ON PUBLIC LINK - LAWSUIT PROCEED

On March 17, 2022, in [Vernon Franklin v. City of Kingsburg, et al.](#), U.S. District Court Judge Anthony W. Ishii, U.S. District Court for Eastern District of California, in a lawsuit a firefighter / medic alleging his was fired because of his race (African American), denied in part defense motion for summary judgment, holding that his claim of “invasion of privacy” will not be dismissed, since disclosure of the firefighter’s psychiatric and other medical records in his personnel file alleges a viable cause of action under CA law. His claim of “retaliation” will also not be dismissed.

“Additionally, Franklin argues that release of his medical information is a violation of the California Confidentiality of Medical Information Act. Doc. 45, 18:14-21. That law states in relevant part:

No employer shall use, disclose, or knowingly permit its employees or agents to use or disclose medical information which the employer possesses pertaining to its employees without the patient having first signed an authorization under Section 56.11 or Section 56.21 permitting such use or disclosure, except as follows:

- (1) The information may be disclosed if the disclosure is compelled by judicial or administrative process or by any other specific provision of law.
- (2) That part of the information which is relevant in a lawsuit, arbitration, grievance, or other claim or challenge to which the employer and employee are parties and in which the patient has placed in issue his or her medical history, mental or physical condition, or treatment may be used or disclosed in connection with that proceeding.

Cal. Civ. Code § 56.20(c). Monetary damages are available for violations of Section 56.20. Cal. Civ. Code § 56.35. This law also appears to apply to public entities. [See *Loder v. City of Glendale*, 14 Cal.4th 846, 859-62 \(Cal. 1997\)](#) (analyzed the claim without directly addressing whether suit could be brought against public entity City of Glendale).”

Additional Facts:

“Plaintiff Vernon Franklin was a firefighter/EMT with the Kingsburg City Fire Department between 2006 and 2017. Franklin was the first and only African American member of the Fire Department.

In 2014, Franklin got into an altercation with a white co-worker. Franklin was written up while the co-worker was not. At an unspecified time in the past, Franklin had also been written up for unsafe driving and put on six-month paid leave while the incident was investigated. Franklin was responsible in part for maintaining self-contained breathing apparatus ('SCBA') equipment used by the Fire Department. In September 2015, Franklin asked Chief Ray if he could take a course on SCBA maintenance he thought was necessary for ensuring their safe use. Chief Ray denied the request. Franklin then e-mailed his request to Chief Ray, City Manager Alex Henderson, and the City of Kingsburg Safety Council. Franklin's supervisor, Captain Bob McGee, told Franklin in October that Chief Ray and the City Manager were upset with his e-mail and that he would consequently be punished. With reference to his prior write ups, Franklin was given two 48-hour shift suspension and required to comply with a Performance Improvement Plan ('PIP').

Franklin then filed a complaint with the Equal Employment Opportunity Commission ('EEOC'). After mediation, Franklin and the Fire Department came to a formal settlement agreement. Franklin agreed to comply with two 6-month PIPs in return for pay withheld due to his suspension and a release of all prior other claims up to that point. In October 2016, Franklin and Chief Ray argued about Franklin's PIP.

In early 2017, Franklin's EMT accreditation with the Central California Emergency Medical Services Agency lapsed. Paramedics with the Fire Department are required to maintain that accreditation. Franklin corrected the problem; he was without accreditation for two weeks. The Fire Department then started proceedings to end Franklin's employment. He was formally dismissed on May 12, 2017. Franklin challenged his dismissal through a civil service administrative process ('Administrative Process'). Though the administrative law judge ('ALJ') found in favor of Franklin, issuing a proposed decision that he not be fired, the Kingsburg City Council ('City Council') rejected that conclusion and affirmed Franklin's dismissal ('Administrative Decision'). Additionally, Franklin filed a new EEOC complaint in August 2017; Franklin thereafter received a right to sue letter.

B. Title VII Retaliation

The sixth cause of action alleges retaliation in violation of Title VII. As Franklin points out, Defendants have not made any argument to dismiss this claim. Doc. 45, 1:2-8. This claim remains.

D. Invasion of Privacy

The tenth cause of action is for invasion of privacy based on allegations that 'prior to March of 2018, Defendants, and each of them, enabled the general public to have access to his personnel file and to other private documents pertaining to his employment relationship with the City of Kingsburg, including write-ups, psychiatric evaluation, contents of investigative reports, and other documents. This access was provided through a link on the

City of Kingsburg's City Council meeting agenda. A request was made by or behalf of Plaintiff to remove all links to this information, but that request was substantially ignored.'

While this point is contested, the weight of the case law appears to establish that only injunctive relief is available.

Additionally, Franklin argues that release of his medical information is a violation of the California Confidentiality of Medical Information Act.
Franklin's invasion of privacy claim is construed as a claim under Section 56.20.”

Legal Lesson Learned: While in many states a firefighter’s personnel records are “public records,” personnel files should not include confidential medical documents.

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. Recover

CHAP. 13: EMS, INCL. COMMUNITY PARAMEDICINE, CORONA VIRUS

File: Chap. 13

NC: QUADRIPEdic – DAUGHTER POWER-OF-ATTORNEY – MEDICS / DEPUTY REFUSED TRANSPORT – NO IMMUNITY

On March 30, 2022, in [Justin L. Sutton, personal representative of the Estate of Hartwell Lanier King, Sr., et al. v. Rockingham County, et al.](#), U.S. District Court Judge Loretta C. Briggs, U.S. District Court for Middle District of North Carolina, held that while the County has governmental immunity and is dismissed from the case, the three paramedics and Deputy Sheriff remain defendants in the wrongful death claims for not transporting the elderly patient with severe respiratory distress and abnormal breathing, elevated heart rate, high grade fever, severe dehydration, and inability to consume solid foods and liquids. He died the next morning. The medics, despite the daughter’s Power-Of-Attorney, allegedly “deemed Mr. King's transportation to the emergency room facility that day as tantamount to ‘kidnapping,’ and thus refused to transfer Mr. King out of fear and reprisal that such action would result in the termination of their employment with Rockingham County.”

“Here, Plaintiffs do not allege medical malpractice [which would require affidavit from MD that medical standard of care were breached]. Taking all alleged facts in the light most favorable to Plaintiffs, Defendants' refusal to transport King to the hospital was not a medical decision based on the severity of his condition, but rather a legal decision based on their fear that transporting King would constitute ‘kidnapping’ and would cause them to lose their employment.... Moreover, Plaintiffs allege Defendants refused to recognize Becky Sutton's power of attorney-another administrative decision that required no medical expertise. These decisions are akin to the hospital's administrative policy in *Muse* of discharging patients based on the expiration of their insurance rather than their medical needs. [Muse, 452 S.E.2d at 593](#). In both cases, the allegations that health care providers refused medical treatment based on an administrative, not medical, decision.”

Additional facts.

“On October 3, 2020, King suffered severe respiratory distress and abnormal breathing, elevated heart rate, high grade fever, severe dehydration, and inability to consume solid foods and liquids.... King was elderly and suffered from quadriplegia which had confined him to an adjustable lift bed for seventeen years.... His home health aide summoned a Rockingham County Emergency Medical Services (‘EMS’) unit to King's home....

Three paramedics-Taylor Carter, Paul Higgins, and Chasity Wall-and Deputy Sheriff Terry Gautier (collectively, ‘Individual Defendants’) arrived on the scene.... King's daughter, Plaintiff Becky Sutton ‘pleaded’ with the Individual Defendants ‘to take swift and responsive medical action by transporting Mr. King to the nearest emergency room facility....’ Becky Sutton was King's attorney-in-fact under a valid power of attorney instrument on file with the Rockingham County Register of Deeds Office which authorized her to make medical decisions for her father.... Individual Defendants ‘disregarded the effect and enforceability’ of Becky Sutton's power of attorney, however, and refused to transport King to the hospital.... Plaintiffs allege that the Individual Defendants ‘deemed Mr. King's transportation to the emergency room facility that day as tantamount to “kidnapping,” and thus refused to transfer Mr. King out of fear and reprisal that such action would result in the termination of their employment with Rockingham County.... King then ‘suffered through the evening . . . with rapidly declining vitals and an elevated fever....’ Becky Sutton summoned an ambulance again at approximately 10:30 a.m. the next morning after finding her father unresponsive with faint to little pulse, but the new EMS unit was unable to resuscitate him, and he was pronounced dead at the hospital one hour later.”

Legal Lesson Learned: If in doubt about Power-Of-Attorney, call Medical Control and discuss the patient’s vitals and get authorization to transport.

File: Chap. 13

IL: PHOTO TAKEN OF PATIENT SHOT IN HEAD – LT. PUT ON FACEBOOK - PUBLIC LOCATION - NOT CONSTIT. VIOL.

On March 24, 2022, in [Adrian Cazares, Administrator of estate of Victor M. Cazares, Jr. and Michelle Cazares v. Frank R. Rand, Justin Zheng, Gene Lacano and Town of Cicero, Illinois](#), U.S. District Court Judge Robert M. Dow, Jr., Northern District of Illinois [Eastern District] granted the motion of two medics and the Town to dismiss the federal lawsuit. “In this case, the Court agrees with Defendants that the Complaint does not allege a violation of Plaintiffs’ fundamental rights or liberties because Defendants did not publicly disclose *private* medical information. The photo neither captured a private scene, nor medical information that was not already readily accessible to the naked eye.” The lawsuit, however, may be refiled in state court, where a jury may find the comments on Facebook by to be particularly offensive.

“Another individual, Defendant [Lieutenant] Frank R. Rand, posted that photograph of Mr. Cazares to an 8, 000-member Facebook group ‘for people who grew up in Cicero, Illinois’ at 6:25 p.m., *i.e.*, within two minutes of the paramedics’ arrival on the scene.... Accompanying the photo is the message, ‘[c]ome to Cicero to loot and break shit! Get a free body bag!! Nice head shot!!’”

Additional Facts:

“During the summer of 2020, millions of individuals gathered across the country to engage in protest activity, including in the town of Cicero, Illinois.... Among other things, the protesters called for an end to racial injustice and excessive use of force by members of law enforcement.... On June 1, 2020, while protests were ongoing in Cicero, police reported that looting and vandalism had also broken out.... Victor M. Cazares, Jr. (‘Mr. Cazares’) gathered with several neighbors in front of a local grocery to discourage looting.... At around 6 p.m., shots fired by an unknown person hit Mr. Cazares in the head.

The Town of Cicero dispatched two Cicero Fire Department EMT paramedics, Justin Zheng and Gene Lazcano, to administer emergency medical care.... When Zheng and Lazcano reached Mr. Cazares at 6:23 pm, he was still breathing and had a pulse. Paramedics Zheng and Lazcano dispensed medical aid to him.... Nevertheless, Mr. Cazares died later that evening.

Central to this Complaint, a photo of Mr. Cazares, wounded and on a stretcher, was disseminated on social media. According to the Complaint, while administering aid, ‘Zheng and Lazcano, took or caused another to take, one or more photograph[s] of Mr. Cazares without his consent....’ According to the Complaint, the photograph depicts ‘Mr. Cazares on the ambulance stretcher, his head having been bandaged and dying’ with the stretcher ‘covered in blood and the bandage roll on Mr. Cazares’ head * * * red and wet....’ Another individual, Defendant [Lieutenant] Frank R. Rand, posted that photograph of Mr. Cazares to an 8, 000-member Facebook group ‘for people who grew up in Cicero, Illinois’ at 6:25 p.m., *i.e.*, within two minutes of the paramedics’ arrival on the scene.... Accompanying the photo is the message, ‘[c]ome to Cicero to loot and break shit! Get a free body bag!! Nice head shot!!’

The purported liberty interest asserted by Plaintiffs is the disclosure of private medical information. Although the Supreme Court ‘has never held that the disclosure of private information denies due process,’ the Seventh Circuit has read the High Court’s Fourteenth Amendment jurisprudence to ‘suggest that there might be a due process right to the nondisclosure of certain private information.’

In this case, the Court agrees with Defendants that the Complaint does not allege a violation of Plaintiffs’ fundamental rights or liberties because Defendants did not publicly disclose *private* medical information. The photo neither captured a private scene, nor medical information that was not already readily accessible to the naked eye. Rather, the photograph at the center of this litigation captured an image of a tragic scene that occurred in a public forum (on the street, in front of a grocery store), visible in plain sight, surrounded by other people (*e.g.*, at a *minimum* the community members with whom Mr. Cazares gathered), during a protest on a matter of wide public interest and of great public concern. Simply put, the Complaint does not allege that the photo uploaded by Mr. Rand revealed or exposed *private* medical information.”

Legal Lesson Learned: Do not take photos of patients; don’t post them on Facebook or other social media.

File: Chap. 13

SC: EMS FAILURE TO TRANSPORT NAKED, MENTAL PATIENT HOSPITAL – KILLED I-95 – LAWSUIT TO PROCEED

On March 23, 2022, in [Paul Tarashuk v. Orangeburg County, Orangeburg County Emergency Medical Services, et al.](#), U.S. District Court judge J. Michelle Childs, U.S. District Court of South Carolina (Orangeburg Division) denied the defendants’ motion for summary judgment. A truck driver called 911 to report that the man, later identified as Paul Tarashuk, was naked and climbed on the tractor trailer at an on-ramp for I-95, rode on the catwalk and detached air lines to the breaks. Police from three agencies responded and requested EMS. He sat in ambulance for 12 minutes, head down, not responding to questions. A medic “pushed an ammonia inhalant up his nose” and took his vitals: blood pressure of 160/82 and pulse of 124. Law enforcement and EMS were unaware of Plaintiff’s identity throughout their interactions as he refused or was unable to state his full name and carried no identification. A Deputy Sheriff, recording the event, then decided to drop him off at a closed gas station, telling him:

“You are not under arrest. I’m gonna give you a ride You’re not going to jail, you’re not under arrest, I’m going to give you a ride I’ll figure out where you live. I’ll give you a ride to a safe environment. That’s all I want. . . .” [Deputy] Doroski then told the other on-scene OCSO deputy that he was taking Tarashuk to Santee and ultimately dropped Tarashuk off at a closed gas station.”

After being dopped off at the gas station, Mr. Tarashuk walked back to I-95 and was struck and killed a few hours later. Under these unfortunate facts, Judge Childs held that while the

deceased's family cannot sue the County for "failure to train" the Deputy and the medics, they can sue under the ADA [Americans with Disabilities Act] for failure to accommodate the patient by not taking him to the hospital.

"Plaintiff has alleged sufficient facts to indicate that two trained paramedics should have been able to gauge the specific accommodation required here and taken Tarashuk to the hospital. Ultimately, whether the circumstances alleged here are such that responding paramedics knew or should have known Tarashuk was obviously disabled presents a genuine question of material fact and precludes summary judgment."

Additional Facts:

"Plaintiff has demonstrated that there is a genuine question of material fact as to whether Harmon and Givens, as employees of Orangeburg County and OCEMS, were aware of Tarashuk's mental disability, which would, in turn, trigger their obligation to provide reasonable ADA accommodations. It is evident from video and testimonial evidence that Tarashuk was confused, disorganized, and nonverbal throughout his encounter with police officers and EMS. It is certainly possible that his symptoms were caused by an ADA-qualifying disability. 42 U.S.C. § 12210(a). Given the circumstances surrounding the initial 911 call and Tarashuk's inability to answer any questions he was asked, it is also possible that Tarashuk's behavior could have been triggered by circumstances which are explicitly outside the purview of the ADA, such as the illegal use of drugs. *See* 42 U.S.C. § 12210(a) (The ADA does not reach individuals who are 'currently engaging in the illegal use of drugs.')

But Plaintiff has identified sufficient facts under which Harmon and Givens, especially in light of their medical training, could properly have concluded that Tarashuk "was in the midst of an acute psychotic break...." Defendants' attempt to narrow the knowledge requirement to their knowledge of Tarashuk's specific mental health diagnosis of schizoaffective disorder is unavailing. *See Smith v. City of Greensboro*, No. 1:19-cv-386, 2020 WL 1452114, at *13 (M.D. N.C. Mar. 25, 2020), *reconsideration denied*, No. 1:19-cv-386, 2021 WL 5771544 (M.D. N.C. Dec. 6, 2021) (concluding that the allegations in the complaint made it 'at least plausible that the Officers recognized Smith as mentally disabled, even if the precise nature of his disability was uncertain.'). Individuals suffering from acute mental crises as a result of documented disabilities cannot, by definition, communicate their diagnoses or request accommodations. Instead, where the circumstances indicate that an individual has an obvious need for accommodations, the ADA shifts the burden of compliance on public bodies and their employees."

Legal Lesson Learned: EMS should know the law in their state, and local protocols, on when a patient should be taken to hospital for psychiatric evaluation.

Note: One of the medics on this run had a long history of drug addictions, and license suspension, prior to being hired by the County EMS. The trial judge dismissed the claim of negligent hiring.

"Here, Plaintiff concedes Rivers contacted [the medic's] longest-term employer who affirmed her competence as a paramedic. Rivers knew of [the medic's] license suspension and contacted DHEC, the regulatory body in charge of her reinstatement, to

ensure she had complied with its requirements. While certain red flags on [the medic's] application, such as her relatively short tenure with subsequent employers and publicly available facts regarding her license suspension due to opioid addiction may have warranted further scrutiny, Rivers' failure to follow each thread in his investigation constitutes negligence at best. And in this context, negligence-based *respondeat superior* liability does not reach the substantial 'deliberate indifference' threshold."

File: Chap. 13

GA: PATIENT'S PUSH BUTTON DEVICE - ANSWERING SERVICE DIDN'T ASK DOORS LOCKED – FAMILY SUE CO.

On March 17, 2022, in [Eric Brown, Administrator of the Estate of Loretta Lewis v. Medscope America Corporation and AvantGuard Monitoring Centers, LLC](#), U.S. District Court Judge Clay D. Land, U.S. District Court for the Middle District of Georgia (Columbus Division), denied the defendants' motion to dismiss in a lawsuit brought under Georgia's Fair Business Practices Act and under general tort law. The COPD patient activated the push button medallion device she wore around her neck. The answering service notified 911, but never asked her if the doors were locked. When EMS arrived at the patient's home, the doors were locked and they needed to wait for a fire engine to breach the door; patient suffered an extended hypoxic event leading to serious brain injury that led to her death three days later while in the hospital.

"Specifically, Plaintiff alleges that, if Lewis had called 9-1-1 directly, 9-1-1 would have asked her if her doors were locked and would have sent a fire crew to Lewis's house upon learning that Lewis 'couldn't breathe.' Plaintiff thus adequately alleges that Defendants owed a duty of care to Lewis by assuming responsibility for providing Lewis with necessary emergency services, Lewis relied on Defendants' assumption of that duty, and that Defendants breached that duty and harmed Lewis by negligently failing to act as a reasonable 9-1-1 operator would if Lewis called 9-1-1 directly. Defendants' motions to dismiss Plaintiff's negligence claim are denied."

Additional Facts:

"Loretta Lewis suffered from chronic obstructive pulmonary disease ('COPD'), a condition which substantially limited her major life activities. Because of this disability, she needed a reliable way to summon emergency medical personnel if she encountered a medical emergency while alone at home. Due to her medical condition and associated disability, she and her family were concerned that she would not be able to reach a telephone to call the public 9-1-1 service if she needed an ambulance. Having seen advertisements touting push button medallion-type devices worn around one's neck which would be on her person at all times and could-with the click of a button-promptly alert a service in case of an emergency, Lewis and her family thought this was just what she needed. The promotional information for the device led Lewis and her family to believe that the service would provide, at a minimum, service that was at least substantially similar to what Lewis would receive from a standard 9-1-1 telephone call service. They understood that all the relevant information needed to assure that Lewis would receive a prompt and reasonable emergency response would be provided by the

vendor to the emergency personnel. So, Lewis purchased a device from MedScope America Corporation.

While at home alone one day, Lewis felt that she could not breathe. She pressed the MedScope medallion, and a 9-1-1 certified operator employed by MedScope's partner, AvantGuard Monitoring Centers, LLC, answered Lewis's call. The operator notified the local 9-1-1 services agency of the call, who dispatched an ambulance to Lewis's home. But the operator did not discover that Lewis's home was locked, and the dispatched paramedics could not access the home until a firetruck arrived. According to the complaint, this delay caused Lewis to suffer an extended hypoxic event leading to serious brain injury that hastened her death three days later while in the hospital.

Prior to purchasing the system, Lewis and her son, Eric Brown, studied MedScope's website and viewed informational videos and tutorials about MedScope's devices.... One of these videos stated that MedScope would 'send someone immediately' and 'contact [the customer's] physician' if alerted by a customer.... The videos also represented that 'MedScope monitoring personnel are highly skilled representatives and are on call 24 hours a day 7 days a week.' MedScope's website claimed that calls would be answered by MedScope's 9-1-1 certified response operators, though these calls were actually answered by 9-1-1 certified response operators employed by AvantGuard.

Lewis activated her MedScope device on December 11, 2019, and told the operator that she could not breathe.... The operator stated that they worked with the 'MedScope Monitoring Center' despite actually working for AvantGuard.... The operator relayed the emergency call to the public 9-1-1 service. But the AvantGuard/MedScope operator allegedly omitted several important pieces of information. Regarding Lewis's condition, the operator informed the 9-1-1 dispatcher that Lewis simply was 'having trouble breathing' instead of accurately reporting that she 'cannot breathe....' And the operator did not mention her underlying medical condition of COPD.... The Avant Guard/MedScope operator also did not inform the 9-1-1 dispatcher of any obstacles that the paramedics may encounter in trying to enter Lewis's home so that they would be fully prepared to reach Lewis immediately upon their arrival. Specifically, the operator did not inform the dispatcher that Lewis was home alone.... The operator also did not notify the dispatcher that the doors to her home were locked, having failed to even ask Lewis that question.... Plaintiff alleges that had a call been made directly to the official 9-1-1 dispatch service, the dispatcher would have made those inquiries of the caller."

Legal Lesson Learned: Answering services have an obligation to inform 911 of critical facts, including whether patient is alone in her home with the doors locked.

CA: ASPHYXIATION - PD MAN FACE DOWN – EMS USED BACKBOARD 4 MIN. PRONE – NOT UNCONSTIT. IN 2017

On March 17, 2022, in [Anthony Perez, et al, v. City of Fresno, et al.](#), U.S. Senior District Court Judge Anthony W. Ishii, U.S. District Court for Eastern District of California, granted summary judgment for all the defendants, including the two medics, and the police officers, the City, and the County. Based on case law in 2017, a “reasonable paramedic would have known that [paramedic] Anderson's conduct was unconstitutional” under 14 Amendment due process clause.

“After the backboard was attached to Perez, Perez was turned over.... [Officer] Martinez estimated that Perez had been under the backboard for about four minutes before being turned over.... Paramedic Dines observed that Perez was unconscious and blueish in the face.... [Paramedic] Anderson stated that it did not appear that Perez was breathing.... [O]nce Anderson and Dines saw that Perez was unconscious, they both testified that Anderson checked Perez's pulse and was unable to detect one.... Because Perez was blueish in the face and had no pulse, the paramedics initiated a cardiac arrest protocol.... Perez was placed on a gurney, moved inside the ambulance, and CPR was initiated.... Ortiz hooked Perez up to a heart monitor in the ambulance and he was asystole, i.e. without a heartbeat.

With respect to Plaintiffs' claims that Anderson's conduct was obviously unconstitutional, the Court cannot agree. It is true, as Plaintiffs point out, that none of the AA [American Ambulance] personnel, County Deputies, or City Officers had ever seen a backboard placed on the back of a prone person. It is also true that Anderson himself recognized that placing a backboard on a prone individual is generally not a good idea because one of the possible dangers of that practice appears to have manifested in this case - asphyxiation. Nevertheless, Anderson was confronted with a § 5150 situation in which the call had been elevated from a Code Two (straight § 5150 situation) to a Code Three with combative behavior reported.

In sum, particularly in light of [prior court decisions], the law as it existed in May 2017 was not so clear that a reasonable paramedic would have known that Anderson's conduct was unconstitutional, and this is not a rare case in which the Anderson's behavior was obviously unconstitutional.... Therefore, the Court holds that Anderson is entitled to qualified immunity.”

Additional Facts:

“On May 17, 2017, City police officers Rosetti, Calvert and Martinez encountered Perez at 10:30 a.m.... The City Officers had not been dispatched regarding Perez.... When the City Officers first encountered Perez, he was standing in the right lane of Palm Ave. in Fresno, but was walking in and out of the roadway waiving his arms and yelling what sounded like ‘help’ in the direction of the officers.... Perez was a little over 6' tall and weighed 241 lbs.... The City Officers had no information that Perez had committed a crime.... Martinez spoke to Perez, but what Perez ‘was saying wasn't really making any sense....” Perez was talking to himself and believed that people were chasing and hitting

him.... Nevertheless, Perez was cooperative with the City Officers.... Perez was asked to sit down, and he sat down on the curb.... After three to five minutes, Martinez handcuffed Perez while Perez was sitting on the curb.... Martinez testified that he decided to handcuff Perez because Perez was kicking his feet out and rocking back and forth and looked like he was trying to get up, there was traffic in the area, and Rosetti was standing in front of Perez and Rosetti could have been in danger from the traffic if Perez got up suddenly.... Perez was cooperative during the handcuffing process.... Martinez patted Perez down after the handcuffing and no weapons were found.

Approximately five minutes after the City officers made contact with Perez, Rosetti made his first of two calls for EMS assistance.... Rosetti requested a 'Code Two' because he believed that Perez was a danger to himself and others, i.e. a '5150....'. Rosetti made this call while Perez was seated on the curb in handcuffs.

While on the ground, Perez was kicking, attempting to roll, and scraping and banging his head on the cement.... Martinez was attempting to control Perez's legs by applying pressure across Perez's thighs.... Calvert put his hand between Perez's shoulder blades and applied 'positive pressure....' McEwen was applying pressure to Perez's back.... McEwen and Calvert applied pressure on Perez's back to prevent Perez from getting up.

McEwen believed that Perez was trying to get up, and the officers and deputies 'just continued to hold him down to the ground so that he would not get up....' McEwen testified that Perez was attempting to turn or get up and that, in order to gain compliance, McEwen applied three knee strikes to Perez's left side, but the strikes were completely ineffective.... McEwen also applied a wrist lock on Perez.... Rosetti observed Calvert strike Perez twice in the lower right side of the body with his knees.... McEwen testified that Perez was not complying with requests to stop thrashing about and to remain calm.

AA had received a call for assistance at 10:39 a.m. and made contact with Perez at approximately 10:52 a.m.... Three AA personnel were on scene, paramedic Anderson, EMT Joel Dines ('Dines'), and trainee Jennifer Ortiz ('Ortiz'). AA personnel noticed that officers were holding Perez's face up with a white towel and Perez was 'actively resisting' the officers.... Perez was screaming and there appeared to be a 'big struggle.'

When he arrived, Anderson saw numerous law enforcement officers around a prone individual who was hobbled, had a towel around his face, was yelling, and was moving/thrashing/flailing, and behaving in a resistive manner (be it from attempting to get air, reacting to hallucinations, or making a conscious choice to disobey). Anderson gave instructions to move the towel, was unable to treat or assess Perez, but determined that applying a backboard on Perez was needed to accomplish adequate restraint for purposes of medical transportation and care. Anderson of necessity would have had to

balance the possible benefits and dangers of applying the backboard in the way he instructed in light of the purpose of a § 5150 detention and the situation that he observed. In a circumstance such as this ... the Court agrees with the observations of the Sixth and Seventh Circuits. At their essence, Plaintiffs' claims are based on a paramedic improperly using and attempting to place a piece of emergency medical equipment on Perez. Thus, Plaintiffs' claims against Anderson are based on botched medical care and involve state law medical duties or medical malpractice claims, they are not constitutional torts. See Thompson, 900 F.3d at 422-23; *Herring*, 712 F.3d at 281; *Peete*, 463 F.3d at 222-23. The Court cannot hold that this is such a case where the actions of Anderson were obviously unconstitutional.”

Legal Lesson Learned: Asphyxiation from person being held by police face down on the ground is well known concern. EMS protocol should address avoiding leaving patient prone on a backboard; similar conduct in 2022 may not lead to dismissal of Federal constitutional rights lawsuit.

File: Chap. 13

NJ: EMT FIRED AFTER COMPLAINED ABOUT PD FORCING PATIENT AMBULANCE – RETALIATION CASE REINSTATED

On March 14, 2022, in [Amara Sepulveda and Louis Deleon v, Township of North Bergen and Deputy Chief Prina](#), the Superior Court of New Jersey, Appellate Division, held (3 to 0) in an unpublished decision that EMT Deleon’s complaint that he was fired in retaliation for reporting police misconduct in violation of the Conscientious Employee Protection Act (CEPA) is reinstated. EMT Sepulveda is dismissed from the lawsuit since she didn’t make report of police misconduct and then resigned from the Township EMS Department. On remand, the trial court must provide EMT Deleon with a hearing.

“The [trial] court granted defendants' motion without oral argument, despite plaintiffs' request. In a nine-page written opinion, the court explained that the motion record failed to create a genuine issue of material fact as to whether plaintiffs engaged in CEPA protected conduct. The court reasoned that the ‘broad stroke claims’ of illegal conduct amounted to mere ‘disagreements’ between the police and the EMTs ‘about whether F.A. required medical assistance,’ which "is not protected activity within the meaning of CEPA.’

For the reasons that follow, we are satisfied that the motion record contains disputed issues of material fact sufficient to establish a prima facie case of retaliation under CEPA as it related to DeLeon. We reach a contrary conclusion as to Sepulveda. As to her claim, it was undisputed that she never reported the incident to her superiors. We also note she resigned voluntarily, based upon speculative future conduct by the Township's police department.

Both plaintiffs testified at their depositions that they had learned in the course of their formal training that transporting a patient against his or her will is illegal and tantamount

to kidnapping and or assault under New Jersey law. When the North Bergen police forced plaintiffs to ferry F.A. to the hospital against his wishes, plaintiffs allege they had a reasonable belief that such actions violated the false imprisonment statute as well as New Jersey's public policy protecting a competent patient's right to refuse medical treatment.”

Additional Facts:

“On the evening of July 31, 2017, Sepulveda and DeLeon responded to a domestic dispute involving an alleged intoxicated individual, F.A. At that time, plaintiffs were employed as EMTs with the Township's Emergency Management Services (EMS). Police had been dispatched to the scene after receiving a call from F.A.'s wife, who indicated that she was concerned regarding her husband's behavior.

Officers at the scene, Sergeant Edward Moyano and patrolmen Michael Whalen and Javier Perez, reported that F.A. admitted to consuming alcoholic beverages. They observed that his speech was slurred, and his temperament quickly alternated between ‘extremely angry’ and ‘mild.’ Once plaintiffs arrived, Sergeant Moyano indicated that F.A. stood up, put his shoes on, began walking towards the front door to exit, and proceeded toward the ambulance. The officers informed plaintiffs that F.A. was intoxicated and needed to be brought to the hospital. The officers stated that they observed F.A. sweating, red-faced and ‘repeatedly clench[ing] his jaw [with] what appeared to be muscle spasms.’ In his report, Officer Whalen noted that F.A. had admitted to drinking a bottle of alcohol, but had ‘no scent of that beverage on his breath.’

In their depositions, plaintiffs materially disputed the police officers' version of events that night. They stated F.A. told them that he did not want to ‘be checked out by an ambulance.’ Most importantly, based on their visual observations, plaintiffs testified they did not believe F.A. needed to be transported, as he was ‘alert and oriented,’ with a steady gait, normal pupil dilation, and was not slurring his speech. Neither DeLeon nor Sepulveda measured F.A.'s vitals, however, because, as Sepulveda testified, ‘the patient didn't want to be touched.’

At this point, plaintiff DeLeon called his supervisor, Deputy Chief David Prina, to discuss the matter, who purportedly advised him not to transport F.A. against his will. DeLeon testified that he then explained to Sergeant Moyano that EMTs cannot transport a patient without his or her permission, as his training taught him that doing so would be considered kidnapping. In the police reports prepared after the incident, officers reported that DeLeon began to curse loudly and threaten to resign as an EMT, and informed the officers that he planned to file a formal complaint.

Plaintiffs further testified that the officers ostensibly forced F.A. into the ambulance, stating, ‘you're going to the hospital or you're going to jail.’ They also allegedly physically blocked F.A. from going back into his home and pushed him towards the ambulance. Based on their statements contained in the police reports, the officers disputed that version of events and reported F.A. voluntarily agreed to go to the hospital before the EMTs arrived.

Plaintiffs testified that they continued to refuse to transport F.A. to the hospital or provide medical care against his wishes. F.A. nevertheless eventually entered the ambulance. While in the vehicle, however, plaintiffs stated that F.A. continued to resist and stated that he 'didn't want to go to the hospital, and that he was being forced to [do so].'"When they arrived at the hospital, Sepulveda stated that F.A. 'was still agitated' and 'still screaming that he didn't want to be there.'

Both plaintiffs testified that after the incident, they were 'pulled off the [work] schedule[s].'

The Township thereafter issued a notice of preliminary disciplinary action (PNDA) to DeLeon only, charging him with: (1) incompetency, inefficiency, failure to perform duties; (2) inability to perform duties; (3) conduct unbecoming a public employee; (4) neglect of duty; and (5) violation of North Bergen EMS Standard Operating Procedures based upon his failure to complete a medical assessment of F.A., as well as his inappropriate outbursts and use of vituperative epithets in front of the patient. Despite the Township's request that he be removed as an EMT, DeLeon did not request a hearing to challenge the charges. He testified that he did not recall ever receiving a copy of the PNDA.

The Township issued a final notice of disciplinary action, sustaining the charges set forth in the PNDA, and DeLeon was later removed from his position. Sepulveda, however, did not report the incident to any superior and elected to resign voluntarily, claiming the environment at the Township's EMS department was 'hostile and uncomfortable,' and she believed she faced possible "chances of retaliation from [the] North Bergen [police department] when [EMTs] do not comply with their wishes on patient care.'

Additionally, the circumstances surrounding F.A.'s voluntary transport were critical to determining whether the officers' conduct, and defendants' apparent acceptance of their actions, was a violation of this well-settled public policy. In this regard, we are satisfied that the motion record, specifically plaintiffs' deposition testimony as compared to the police reports, and other proofs, contain genuine and material questions of fact as to whether F.A. was in need of medical care and was transported to the hospital voluntarily.

Under prong two, a plaintiff must establish that "he or she performed a 'whistle-blowing' activity described in N.J.S.A. 34:19-3(c)." *Lippman*, 222 N.J. at 380. A "whistle-blowing" activity "refers to notification, or threatened notification, to an outside agency or supervisor . . . and also permits a claim to be supported by evidence that the employee objected to or refused to participate in the employer's conduct." *Tartaglia v. UBS PaineWebber, Inc.*, 197 N.J. 81, 106 (2008). The whistle-blowing activity must reflect a "threat of public harm, not merely a private harm or harm only to the aggrieved employee."

Here, the motion judge found that Sepulveda did not satisfy this requirement. We agree. Plaintiffs allege only that Sepulveda documented the incident in her patient care report from the night of July 31, 2017. The record on appeal does not contain this report, however, and there is no indication that Sepulveda's supervisor, or the Township EMS department, received that report.”

Legal Lesson Learned: Unfortunate dispute at the scene between police and EMS; time for PD and EMS management to jointly review patient transport protocols.

Note: See the article when lawsuit was filed. Aug. 22, 2018, [“2 ex-North Bergen EMS workers file wrongful termination suit against township, deputy EMS chief.”](#)

Chap. 14 – Physical Fitness, incl. Heart Health

CHAP. 15: CISM, INCL. PEER SUPPORT, EMPLOYEE ASSISTANCE, SUICIDE

File: Chap. 15

NJ: PTSD - OFFICER CALLED TO FF'S SUICIDE WITH SHOTGUN – NOT CLOSE FRIENDS - NO ACCIDENTAL DISAB.

On March 30, 2022, in [Barry Mesmer v. Board of Trustee, Police And Firemen's Retirement System](#), the Superior Court of New Jersey, Appellate Division, held (3 to 0), unpublished decision, the Board properly denied the application for accidental disability retirement; the deceased firefighter was someone he casually knew, but not close friends; under New Jersey case law the traumatic event must be “undesigned and unexpected” in job duties of a police officer.

“Mesmer received training, both at the police academy and through the course of his career in law enforcement, in responding to situations involving graphic and gruesome deaths. Mesmer was not a rookie officer and, during his career in law enforcement, he responded to at least ten calls involving gruesome and disfigured dead bodies or serious injuries. Mesmer conceded he did not experience any disabling mental injury after responding to those deaths and he returned to work without incident after each of those events.

Additionally, while Mesmer knew M.H., the two men were not even casual friends. Mesmer provided no evidence of any close, personal relationship with the deceased that might have satisfied the undesigned and unexpected requirement under *Richardson*. Mesmer knew he was responding to a suicide at an address where he knew the homeowner. On this record, nothing about the events of February 14, 2016, fell outside the scope of Mesmer's general duties as a police officer. Given the totality of the circumstances, it was not unreasonable for Mesmer to anticipate the aftermath of M.H.'s suicide.

On this record, we are satisfied there is ample credible evidence supporting the denial of Mesmer's application for ADR benefits and the Board's decision was not arbitrary, capricious, or unreasonable.”

Additional Facts:

“We summarize the relevant facts. Mesmer began working for the Evesham Police Department in November 2006. On February 14, 2016, Mesmer was dispatched in response to a call regarding a potential suicide. Based on the address, Mesmer knew he was driving to the home of M.H., an Evesham Township firefighter. Mesmer described his relationship with M.H. as professional, but stated they were not close friends.

When Mesmer arrived at M.H.'s house, a woman and her son ran out, screaming ‘[h]e's inside, he shot himself.’ Inside the house, Mesmer saw a white dog splattered with blood and M.H. propped against the fireplace with a shotgun under his leg and his head blown off. He also saw brain matter everywhere and smelled the strong odor of gunpowder and blood.

Mesmer's supervisor instructed Mesmer to stay with the body to prevent the scene from contamination. Mesmer did not touch the body, nor did he see the body being removed from the house. After the body was removed, Mesmer was assigned to comfort M.H.'s wife and son. He also transported M.H.'s daughter to the police station.

After completing his shift on February 14, Mesmer felt depressed and had trouble disassociating from the incident. When he returned to work two days later, Mesmer attended a debriefing to discuss the incident. Mesmer did not speak during the debriefing because he felt uncomfortable discussing his feelings in the aftermath of M.H.'s suicide. Mesmer told his supervisor he was sleeping poorly, experiencing flashbacks, and reliving the incident. A chaplain sent Mesmer home and recommended he take time off from work.

After the incident, Mesmer saw a psychiatrist. When Mesmer returned to work, he performed clerical jobs and used headphones to help him focus on work tasks. Although he attempted to return to his normal work routine, Mesmer concluded he was unable to continue working as a police officer.

In June 2017, more than one year after M.H.'s suicide, Mesmer filed for ADR benefits, alleging a mental disability. On January 9, 2018, the Board denied Mesmer's application for ADR benefits, finding the traumatic event was not undesigned and unexpected.

Mesmer also offered the testimony of Dr. Garry Glass, a psychiatric expert, who addressed causes associated with post-traumatic stress disorder (PTSD). At the Board's request, Dr. Glass began treating Mesmer in June 2016. Dr. Glass diagnosed Mesmer as suffering from PTSD attributable to the February 14, 2016 incident. The doctor explained Mesmer was unprepared, either by his training or work experience, for the events at M.H.'s home on February 14, 2016. In an April 28, 2017 written report to the Board, Dr. Glass opined Mesmer could not return to police work due to his PTSD.

[T]he Administrative Law Judge] determined the event was not "undesigned and unexpected" under *Richardson v. Board of Trustees, Police and Firemen's Retirement System*, 192 N.J. 189 (2007).

On this record, we are satisfied there is ample credible evidence supporting the denial of Mesmer's application for ADR benefits and the Board's decision was not arbitrary, capricious, or unreasonable.”

Legal Lesson Learned: Under N.J. case law, this single traumatic event leading to PTSD did not qualify for added retirement benefits.

File: Chap. 15

MD: PTSD - MEDICAL LEAVE 1-YR – OFFERED TAKE DEMOTION TO FF - CAN'T PERFORM DUTIES - NO FED. VIOL.

On March 18, 2022, in [Stanley Abler v. Mayor and City Council of Baltimore](#), Beth P. Gesner, Chief U.S. Magistrate Judge, U.S. District Court for District of Maryland, granted the defense motion for summary judgment, finding no violation of the federal Rehabilitation Act since he could no longer perform the duties of a medic or a firefighter. Paramedic Abler suffered from PTSD stemming from an incident in April 2015 [no details about the incident in Court's opinion]. “After reporting to the Baltimore City Public Safety Infirmery (‘PSI’) for a medical evaluation, plaintiff was placed on medical leave effective June 7, 2015.... Plaintiff remained on medical leave for a year, and his clinician noted he was “disabled from all work.” He requested a reduction in rank to return to work as a firefighter, but this was not granted and was forced to retire on November 22, 2016.

“Here, plaintiff argues that he and his clinician believed he could perform the essential functions of a firefighter.... Plaintiff, however, provides no evidence to support his claim. Instead, plaintiff references documents indicating that the BCFD engaged in the interactive process with other disabled employees, but these documents do not provide evidence of *plaintiff's* ability to perform the essential functions of a firefighter or some other position within the BCFD.... Further, plaintiff contends that while his medical providers noted that he was not able to work as a paramedic, they did not otherwise indicate that he was unable to perform as a firefighter or in a variety of other positions.... Plaintiff's argument, however, is not supported by the record. For example, while plaintiff's clinician opined that plaintiff was ‘permanently disabled from returning to the BCFD as a Paramedic,’ she also noted, two days before plaintiff retired, that plaintiff was ‘disabled from *all work* at this time’ and that she would ‘re-evaluate his condition in two months to see if he is prepared to try to enter the job force in a different position.’ (emphasis added).

In addition, plaintiff admits that he “was not able to do any job functions, for the entire year [he] was off injured....” Further, plaintiff indicated in his answers to defendant's interrogatories that he suffered from PTSD stemming from an incident in April 2015, and

he struggled with ‘depression, anxiety, insomnia, flashback [sic], [and] cognitive issues that make it hard to focus, at times it is extremely debilitating where daily activities of living are difficult....’ Plaintiff, however, fails to provide any evidence of how, despite his PTSD and ‘extremely debilitating’ medical conditions, he was able to perform the essential functions of a firefighter, such as extinguishing fires and rescuing emergency victims.... The court, therefore, concludes that plaintiff has failed to offer evidence that he was able to perform the essential functions of a firefighter or some other position within the BCFD.... Accordingly, plaintiff fails to satisfy the third element of his prima facie claim of failure to accommodate under the Rehabilitation Act.”

Additional Facts:

“Plaintiff was employed by the Baltimore City Fire Department (“BCFD”) from March 20, 2006 to November 17, 2016.... During the course of his employment with the BCFD, plaintiff worked as a Firefighter-Paramedic Apprentice, Firefighter-Paramedic, and Paramedic/Cardiac Rescue Technician, although the parties dispute the timing of plaintiff’s various positions.... Plaintiff alleges that he suffered post-traumatic stress disorder (‘PTSD’) with severe depression and anxiety stemming from an April 2015 incident while on duty, causing him to become disabled.... After reporting to the Baltimore City Public Safety Infirmery (‘PSI’) for a medical evaluation, plaintiff was placed on medical leave effective June 7, 2015.... Plaintiff remained on medical leave through August 19, 2016, although he returned briefly to regular duty on August 10, 2015 through October 13, 2015, and again on December 1, 2015 through December 9, 2015.... Following the expiration of medical leave on August 19, 2016, plaintiff exhausted his 90 days of retirement leave on November 17, 2016. (*Id.*) Pursuant to a Memorandum of Understanding (‘MOU’) between defendants and plaintiff’s former bargaining union, plaintiff was entitled to 12 months of medical leave and an additional 90 days of retirement leave.

On September 11, 2015, plaintiff sent a letter to the BCFD requesting ‘a voluntary reduction in rank to [his] previously held position of Firefighter ALS.... Subsequent notations on plaintiff’s letter by BCFD officials indicate a recommendation of approval of plaintiff’s request if a vacancy became available.... On April 6, 2016, however, plaintiff received his first Retirement Process Notification, indicating that plaintiff’s medical and retirement leave was set to expire on May 16, 2016.... On May 4, 2016, plaintiff received a second Retirement Process Notification, this time indicating that plaintiff’s medical and retirement leave would expire on November 17, 2016.... In the ensuing months, plaintiff made approximately 70 phone calls to BCFD’s human resources (‘HR’) department and other BCFD and city officials regarding his request for a voluntary reduction in rank ... and on November 13, 2016, plaintiff sent a follow up letter to HR, in which he noted his request for a reduction in rank to firefighter was for ‘medical reasons....’ On November 22, 2016, plaintiff appeared for an examination at the PSI, and doctor notes from that date indicate that plaintiff was ‘no longer with the [BCFD]....’ Plaintiff also appeared for an employee exit interview on the same day.”

Legal Lesson Learned: The clinician’s determination that he was disabled “from all work” meant FD did not need to try find an accommodation.

File: Chap. 15 [also Chap. 7]

TX: PTSD - FEMALE FF NUDE VIDEO FOR HER HUSBAND (FF) – LEARNED 9 YRS LATER FF WATCHED IT – MAY SUE FD

On March 11, 2022, in [Melinda Abbt v. City of Houston, John Chris Barrientes](#), the U.S. Court of Appeals for 5th Circuit (New Orleans) held (3 to 0) that the lawsuit against the City of Houston and Captain Barrientes should be reinstated. “Abbt has presented sufficient evidence to create a genuine dispute as to whether the City knew or should have known about the harassment, and thus can be held liable.”

In a Concurring Opinion, Justice James C. Ho wrote:

“Melinda Abbt is a firefighter. But at least two of her male superiors at the Houston Fire Department—Chris Barrientes and David Elliott—and perhaps countless others treated her as nothing more than a sexual object. They accessed a private, intimate, nude video that Abbt had obviously made exclusively for her husband. They did so without her knowledge or permission. And they watched it repeatedly, both on and off-duty, alone and in front of co-workers, *for over nine years*. The only reason Abbt ever discovered this most invasive violation of privacy was because Elliott finally confessed to her husband. Even to this day, Abbt cannot be sure whether anyone else at the Department has already seen the video—or may watch it in the future.”

Additional Facts:

“Beginning in 2003, Melinda Abbt worked for the City of Houston as a firefighter in the Houston Fire Department. From 2006 until 2009, she was assigned to Station 18. During that time, she served under Chris Barrientes, who was a Junior Captain at Station 18. Station 18 was overseen by District Chief David Elliott, who also had purview over three to four other stations.

According to Barrientes's deposition testimony, the actions which led to this case began around 2008, when Barrientes received an anonymous email. That e-mail contained an intimate, nude video of Abbt that she had made privately for her husband and had saved on her personal laptop, which she had brought to the fire station. Barrientes first watched the video in the captain's office of Station 18. He kept the video's existence hidden for several days, and then brought it to the attention of District Chief Elliott.

When Barrientes told Elliott about Abbt's nude video, Elliott asked to see it. Barrientes then played the video for Elliott; another firefighter, Jonathan Sciortino, testified that he was also in the room and viewed the video. Barrientes testified that, when he asked Elliott what to do, Elliott first asked ‘if [Barrientes] had told anybody’ about the video. When Barrientes said he had not, Elliott responded that was ‘good,’ that Barrientes should not discuss the video with anyone else, and that Elliott would ‘get back to [Barrientes]’ about what to do.

Elliott did not report the video to human resources or to a supervisor. Instead, Elliott ‘asked [Barrientes] to forward [the video] to him’ because Elliott ‘wanted to see it again.’

Barrientes did not forward the e-mail at that time, but provided his e-mail password to Elliott so that Elliott would have access to the video. A year or so later, Elliott called Barrientes because the password to Barrientes's account no longer worked and Elliott needed the new one to continue watching the video. According to Barrientes, Elliott said he was 'going to keep hounding [Barrientes] till [he gave Elliott] the password or let [him] see the video again.' Barrientes then forwarded the video to Elliott. Barrientes also continued to watch the nude video of Abbt multiple times over the next several years.

Abbt learned of these events on May 18, 2017, when Elliott confessed to Abbt's husband (also a member of the Fire Department) that Elliott had seen a nude video of Melinda Abbt. Upon learning that her personal, intimate video had been seen by other firefighters, Abbt was 'completely distraught' and 'disgusted.' She called in sick the next day and continued to call in sick in the weeks that followed. On June 6, 2017, Abbt was diagnosed with post-traumatic stress disorder (PTSD) by Dr. Jana Tran, a therapist with the City. After the incident, Abbt received six months of unpaid leave under the Family and Medical Leave Act (FMLA); however, she was initially denied paid leave. Abbt filed a worker's compensation claim on February 16, 2018, which was opposed by the City; an Administrative Law Judge found that Abbt had suffered 'a compensable mental trauma injury' and she was granted worker's compensation pay. She was medically separated from the City and her employment ended on February 12, 2019.

Abbt also reported the incident to the City of Houston's Staff Services Department and, on May 26, 2017, she filed a complaint with the Houston Office of Inspector General (OIG). When he learned of the investigation, Barrientes deleted the original e-mail from his e-mail account; it is unclear whether he additionally deleted the e-mail he sent to Elliott or whether he retained that copy of the video. The OIG eventually sustained Abbt's allegations. Barrientes, Elliott, and Sciortino each received suspensions of varying length; Barrientes also received a two-rank demotion. However, Abbt asserts that, after the investigation, (1) she was not told how widely the video had been distributed throughout the Fire Department, (2) she did not know whether any copies of the video continued to exist and were still in the possession of others, and (3) there were no assurances that Abbt would not be required to work in the future with Barrientes or Sciortino (both of whom she knew had seen the video and were still working for the Fire Department).

The district court then granted summary judgment to the City on both Abbt's sexual harassment claim and her retaliation claim. It first found that Abbt's sexual harassment claim failed because no hostile work environment was created as (1) neither Barrientes nor Elliott were Abbt's supervisors, and so the City could not be held vicariously liable for their actions; (2) 'it was [Abbt's] knowledge of what had happened that led to her purported PTSD, not the actual conduct of her coworkers viewing the video;' (3) Abbt was unable to prove that the theft of the video occurred at work; and (4) the City took sufficient remedial action once Abbt filed a complaint with the OIG. The court ultimately stated that '[b]ecause Abbt cannot show that she was subjected to a hostile work environment - just that she is angry and embarrassed - her sexual harassment claim fails.'

There is a genuine dispute of material fact for every element of Abbt's sexual harassment/hostile work environment claim. Summary judgment was therefore improper, and we reverse the grant of summary judgment to the City of Houston.”

Legal Lesson Learned: Terrible facts; City would be wise to quickly settle this case.

File: Chap. 15

CA: PTSD – CHP TROOPER – FIREARM RETURNED – KILLED WIFE – SHOT HER BOYFRIEND, SUICIDE – NO IMMUNITY

On Feb. 25, 2022, in [Phil Debeaubien v. State of California, California Highway Patrol, Todd Brown, et al.](#), U.S. District Court Judge William B. Shubb, U.S. District Court for Eastern District of California, in a lawsuit filed by estranged wife’s boyfriend who was shot in arm, denied the State of California and the CHP supervisors’ motion for summary judgment. The service weapon had been returned after EAP counselors advised CHP he could return to work.

“Plaintiff Philip Debeaubien (‘plaintiff’) brought this section 1983 action against the State of California; the California Highway Patrol (‘CHP’); CHP officers Todd Brown, Reggie Whitehead, Ryan Stonebraker, Brent Newman, and Jeremy Dobler (collectively the ‘CHP defendants’); Joy Graf; and Sabrena Swain; for various alleged constitutional and state tort offenses... The case arises out of events on September 3, 2018, wherein CHP officer Brad Wheat (‘Wheat’) shot plaintiff before fatally shooting Wheat's wife and himself.

[Motion to dismiss is] DENIED as to defendants Dobler, Brown, Stonebraker, State of California, and California Highway Patrol on the issue of whether these defendants owed plaintiff a duty not to entrust Wheat with a firearm.”

[Watch the Jan. 26, 2022 TV interview with Plaintiff](#) - includes bystander video of scene on Sept, 3, 2018 where you can hear shots being fired.

“He’s suing the CHP after an off-duty officer shot him. Here’s what he hopes to change. Bystander video shows part of the 2018 murder-suicide incident involving CHP Lt. Brad Wheat and his estranged wife, Mary. Trae deBeaubien, who was dating Mary, was also shot and is suing the agency for returning Wheat's gun after he made threats.”

Feb. 25, 2022: [“An Off-Duty Cop Murdered His Ex-Girlfriend. The California Highway Patrol Ignored the Red Flags.”](#)

Additional Facts:

“In 2018, Wheat was a CHP officer in CHP's Amador Area Office and was married to Mary Wheat....

Plaintiff operated a fitness business next to a gym Mary owned and operated, and in 2018 he and Mary began an extramarital affair.... Although Brad and Mary Wheat were married, they were not living together; Brad Wheat was living with Mary's brother, Matthew Hooper, and two of the Wheats' children....

By July of 2018, Wheat became aware of the affair, and he called plaintiff about it on July 8.... On the evening of August 2 or after midnight on August 3, Wheat drove to a house where plaintiff and Mary were staying, which Wheat had identified by tracking Mary's location through her phone and by speaking with Hooper.... The Wheats' son, Warren, told Hooper that Wheat was driving toward the house and was armed, and that Warren was afraid about what Wheat might do because of Wheat's angry demeanor.... Because of these concerns, and after unsuccessfully attempting to contact Wheat, Hooper called 911 and told the dispatcher that Wheat was driving to Mary's location and was armed with a gun, though he denied that Wheat said he intended to use the gun once there.... Hooper also called his niece, Madison, who lived near where plaintiff and Mary were staying and warned them Wheat was coming.... Hooper's brother, Monty, also called Mary to tell her that plaintiff should leave, and plaintiff left to avoid a confrontation with Wheat.... Wheat arrived at the house and, after finding Mary there alone, verbally assaulted her, took her phone charger, and left....

On August 3, 2018, the following day, Wheat spoke to Hooper about the incident and told Hooper that he had intended to confront plaintiff and Mary and that the confrontation could have become violent or lethal.... Wheat also spoke with CHP officer David Ward that day and told Ward that, the night before, he had taken his duty weapon and gone looking for Mary and plaintiff to kill them but did not find them.... At Ward's request, Wheat agreed to store his duty weapon in his locker and gave Ward the combination, and after Wheat left Ward moved the gun into his own locker....

Ward notified defendant Dobler, a sergeant at the CHP Amador office, what had happened, and Dobler notified defendant Brown, a CHP lieutenant and commander of the Amador office.... Brown then notified Frank Newman of CHP's Office of Employee Safety and Assistance, with the expectation that Newman would arrange for a mental health professional to go to Wheat's house and evaluate him.... The CHP contracts with Magellan Health Services of California, which employs mental health counselors who respond to incidents on an urgent basis, and which sent defendant Swain to Wheat's house to speak with him and to determine how the CHP should proceed....

Dobler and Ward drove to Wheat's house, where they spoke to Wheat and where Wheat surrendered all of the firearms in the house -- three rifles -- and they waited for Swain to arrive.... Swain arrived early in the morning on August 4, 2018, and spoke with Wheat for two hours.... Based on this conversation, Swain told Brown that she did not believe Wheat posed a threat to plaintiff, Mary, or himself.... Brown then advised defendant Stonebraker, who was Assistant Chief in CHP's Valley Division and responsible for the Amador office, of what Wheat had told Ward about the evening of August 2, of the fact that CHP personnel had possession of Wheat's duty weapon and other firearms, and about

Swain's evaluation.... Through communications with Stonebraker, Brown, and other CHP officials, defendant Newman, who was Chief of the CHP's Valley Division, received this information as well....

Following Swain's evaluation, Dobler and Ward returned to the CHP office, retrieved Wheat's duty weapon from Ward's locker, and stored it and Wheat's rifles in a locked closet in the sergeants' office.... Wheat requested and was granted time off from work and did not return to duty until August 20, 2018....

By August 4, 2018, plaintiff had heard that Wheat had told a colleague that Wheat had gone to confront plaintiff and that CHP personnel and a counselor had gone to Wheat's house to talk to Wheat about it.... However, plaintiff did not learn until Brown's deposition on September 20, 2020 that on August 2, 2018, Wheat had driven with his duty weapon to the house where plaintiff and Mary were staying with the intent to kill plaintiff before killing himself....

On August 15, 2018, Wheat went to the office for a critical incident stress debrief session made available to staff following the arrest of a colleague, which was facilitated by defendant Graf, another Magellan Health Services therapist.... After the debrief session, Graf spoke with Wheat privately, discussed plaintiff's and Mary's affair, and learned that Wheat had attempted to confront them....

However, during a ten-minute conversation Graf had with Brown about Wheat either before or immediately after she and Wheat spoke, Brown did not inform her that Wheat had sought to kill plaintiff and himself on August 2 or that the CHP was in possession of Wheat's guns.... Based on her conversation with Brown, Graf believed she was speaking with Wheat because he had recently been in three car accidents while on duty.... Following her conversation with Wheat, Graf did not believe he posed a threat to plaintiff or Mary and shared this opinion with Brown, who shared it with Stonebraker and Newman....

Wheat returned to work on limited duty as the front desk officer on August 20, 2018, and Dobler gave Wheat the duty weapon Ward had taken after advising Brown he would do so.... Brown understood that Wheat would receive his duty weapon when he returned.... Stonebraker also learned at some point in August of 2018 that Wheat had returned to duty and that his duty weapon had been returned to him....However, Dobler retained custody of the three rifles Wheat had surrendered....

On August 21, 2018, Graf spoke to Wheat again, by telephone, for ten to twelve minutes.... Based on this call, Graf believed Wheat seemed to be doing well and told this to Brown....

However, around this time, Dobler was also aware that Wheat was frequently distracted at work by personal issues (and discussed this with Brown); that Wheat had been assigned to work at the front desk after being in two car crashes while on duty, because of this distraction; and that Wheat had begun to frequently write in a personal journal while on duty. (*See Depo. of Jeremy Dobler* Additionally, when speaking with Graf about Wheat

on August 15, Brown noted that Wheat had been in three car accidents and that this conduct was ‘unusual for him....’ At some point in August after the August 2 incident, Brown also became aware that Wheat had sent Mary ‘unprofessional or inappropriate texts’ that ‘weren't nice’; that during a ride-along Wheat had asked another officer to drive by plaintiff's gym, of which the officer informed Dobler; and that Wheat continued to be able to track Mary's location via her phone....

On the evening of September 3, 2018, Wheat went to plaintiff's gym, where plaintiff and Mary were staying at the time.... Using his duty weapon, Wheat shot plaintiff in the shoulder before fatally shooting Mary and then himself.’

Viewing the facts in the light most favorable to plaintiff, a factfinder could find it clear that plaintiff was in greater danger after Wheat received his service weapon on August 20 than when Wheat had no service weapon based on the basic fact that Wheat used that weapon to shoot plaintiff on September 3. *See Kennedy*, 439 F.3d at 1063. Thus, a reasonable jury could conclude that, by giving Wheat the gun at a time when he possessed no service weapon -- indeed, no guns of any kind, (*see* Pl.'s Resp. at ¶ 69)^[12] -- Dobler and Brown “created ‘an opportunity for [Wheat] to assault [plaintiff]’” with a firearm “that otherwise would not have existed.” *Kennedy*, 439 F.3d at 1063 (quoting *L.W. v. Grubbs*, 974 F.2d 119, 121 (9th Cir. 1992)).”

Legal Lesson Learned: Returning a service weapon to a police officer suffering from PTSD or other serious mental should only be done after a Fitness for Duty (FFDE) psychological evaluation (FFDE) by an appropriately trained and competent licensed mental health professional.

Note: Dr. Eric Birkley, Psychologist, has kindly provided this info on Fitness For Duty Evaluations [posted with her permission]. On May 26, 2022, Dr. Birley and the author of this newsletter, will both be on a panel for [First Responder Mental Health Symposium](#).

3/25/2022

Hi Larry,

I would specify that when an employed officer makes specific threats of violence that the criterion standard is (under all circumstances I can think of) met to order a Fitness for Duty psychological evaluation (FFDE) by an appropriately trained and competent licensed mental health professional. Part of that professional's job is to provide feedback to the first responder agency on whether the criterion standard for a FFDE is met given the facts of the case. As mental health professionals, we expect that if a person is referred for a Fitness for Duty evaluation that they will most likely be placed on administrative leave, and/or other actions have been taken by the agency to limit their duties appropriately.

This is the criterion standard for a fitness for duty evaluation: “According to the Americans with Disabilities Act (ADA), when an employer has a reasonable belief, based

on objective evidence, that a police officer may have a psychological condition that impairs his or her ability to perform essential job functions or poses a direct threat, an FFDE is “job-related and consistent with business necessity” (42 U.S.C. §12112[d][4][A]; 29 C.F.R. §1630.14[c]). Case law has established that an employer need not wait for objective evidence of impaired performance before justifying an FFDE when the employee is engaged in dangerous work.”

I perform FFDE for LEOs and most often agencies aren't abreast of the criterion standard for ordering an FFDE and order one too prematurely (when someone is an “asshole” but does not have an identifiable mental health impairment) or wait too long as in this case as they may be unaware of their options. FFDEs are designed to safeguard the public and the agency and save departments/taxpayers millions – they cost around \$3500 for a psychologist to perform and some departments don't consider the alternative cost of a lawsuit.

Hope this is helpful! I attached a key article written by two leading police psychologists who literally wrote the book on FFDEs for LEO with several case law examples included.

Current Issues in Psychological Fitness-for-Duty Evaluations of Law Enforcement Officers: Legal and Practice Implications (2016): [Mayer ^0 Corey 2016 Current Issues in FFD evaluations of LEOs.pdf](#)

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CHAP. 16: DISCIPLINE, INCL. CODE OF ETHICS, SOCIAL MEDIA, HAZING

File: Chap. 16 [also Chap. 17]

OH: ARBITRATOR MAY REDUCE PENALTY – NEW SHIFT RELIEF - ASSISTANT CHIEF'S LOSS PAY OVERTURNED

On March 17, 2022, in [Association of Cleveland Fire Fighters, Local 93 v. City of Cleveland](#), the Court of Appeals of Ohio, 8th District (Cuyahoga County), held (3 to 0) that a Common Pleas judge improperly set aside the arbitrator's award which found the charge of "gross insubordination" by Assistant Fire Chief was not proven, but the facts supported a "conduct unbecoming" charge. The Assistant Fire Chief was charged with 16 charges for trying to get the vacationing Fire Chief to overturn Acting Fire Chiefs order to follow the new shift relief procedure (to save overtime money, when the incoming Assistant Chief called off, he can only be replaced by on duty officer of lesser rank). The arbitrator had authority to vacate the most serious charge of "gross insubordination" and the 24-hour suspension, and to direct the FD to change in his personnel file with an official reprimand for one of the lesser charges, "conduct unbecoming an employee in the public service," with no loss of wages.

"In focusing solely on the question of gross insubordination, the Union disregards the fact that the parties stipulated to *two* questions before submitting the matter to arbitration. The first question was whether the city had just cause to suspend Viancourt for a day and issue him an official reprimand. The question of just cause was not confined to "gross insubordination." Rather, the question concerned whether the city had just cause discipline Viancourt for his conduct.

The Union nevertheless maintains that the arbitrator exceeded his powers by creating a new charge not submitted to arbitration and issuing a penalty based on that charge. The charge of conduct unbecoming was not expressly submitted to arbitration in the parties' stipulated questions, but neither were the charges of gross insubordination or insubordination expressly submitted to arbitration. The questions to which the parties stipulated focused on remedies: the penalties Viancourt had received for his conduct and, if these penalties were unjustified, the penalty the arbitrator determined that Viancourt should receive for his conduct. The Union's claim that the arbitrator created a new charge by finding that Viancourt engaged in conduct unbecoming is not supported by the record. Viancourt was charged with 16 violations, which included the charge of conduct unbecoming. The Union's claim that any penalty based on that charge was improper is also not supported by the record because conduct unbecoming is punishable by official reprimand. The arbitrator's leaving this penalty intact is consistent with the discipline guide."

Additional Facts:

"On August 10, 2018, former Assistant Fire Chief David Viancourt ('Viancourt') was reaching the end of a double shift at 8:00 a.m. Viancourt was to be relieved by Assistant Chief Michael Zedella, who had called off work the night before. According to division procedure, one of the assistant chiefs responsibilities is filling officer vacancies throughout the division. In the event of a call-off, division procedure required Viancourt to find his own replacement.

Two months prior, on June 4, 2018, Fire Chief Angelo Calvillo ('Chief') had issued a directive changing division procedure from finding a replacement from among off-duty individuals of the same rank to on-duty individuals of a lower rank. This directive was

intended to limit payment of overtime. According to the directive, Viancourt had to find his replacement from among on-duty battalion chiefs according to their seniority. A battalion chief is one rank below an assistant chief.

Viancourt reviewed the schedule and believed the on-duty battalion chiefs were either ineligible or inexperienced to act as assistant chief. Of the four battalion chiefs scheduled that day, two had less than the required six months as battalion chief needed to serve as acting assistant chief, and Viancourt believed the remaining two would not perform well in the position. Viancourt believed that the senior battalion chief had very little experience as a command officer and the other eligible battalion officer was struggling with personal problems that rendered him ill-equipped to serve as acting assistant chief.

At 8:13 a.m., Viancourt texted the Chief to apprise him of the battalion chief who would be replacing him under the directive and ask whether that was who the Chief wanted. The Chief was on vacation and did not immediately reply. At approximately 8:25 a.m., Viancourt realized the Chief was on vacation and called Acting Fire Chief Michael Odum ("Acting Chief) to share his concerns, requesting permission to deviate from the procedure and bolster the officer corps on duty that day. The Acting Chief ordered Viancourt to follow the directive as written.

After this call, Viancourt began to execute the directive, calling the senior battalion chief, who declined to serve as acting assistant chief. Viancourt continued down the seniority list to the only other eligible battalion chief, who initially refused. With no other options, Viancourt ordered this second battalion chief to act as assistant chief. The battalion chief reluctantly agreed, adding that he was accepting the assignment under duress. Viancourt then ordered a less experienced officer to cover the battalion chiefs vacancy while the battalion chief traveled to relieve Viancourt.

At 9:00 a.m., the Chief replied to Viancourt's initial text message, stating that he approved of the senior on-duty battalion chiefs acting as assistant chief if she agreed to be assigned that detail. The Chief also stated that he was out of town and that the Acting Chief was in charge. At 9:05 a.m., Viancourt texted to inform the Chief that the Acting Chief did not permit a deviation from the replacement procedure and asked if the Chief would grant this permission. At 9:09 a.m., the Chief texted his reply, declining the request and directing Viancourt to follow the Acting Chiefs order. At 9:42 a.m., Viancourt texted that he understood, but added, 'I want to go on record that it is my professional opinion that this is an unsafe situation due to the gross lack of experience at the BC/AC [battalion chief and assistant chief] ranks.'

The battalion chief arrived to relieve Viancourt shortly after 10:00 a.m. While they were transferring command, the Acting Chiefs administrative assistant informed Viancourt that the Acting Chief wanted to meet with Viancourt. During their meeting, Viancourt again shared his concerns with the Acting Chief. The Acting Chief stated that he would provide support for the battalion chief who had relieved Viancourt. After this meeting, Viancourt clocked out at 11:00 a.m.

Ten days later, on August 20, 2018, the Acting Chief filed 16 disciplinary charges against Viancourt.

On September 19, 2018, a predisciplinary hearing was held before the Chief. The Chief found Viancourt guilty of all 16 charges as written by the Acting Chief in the August 20, 2018 charging document. The Chief issued an official reprimand that would remain in Viancourt's personnel record for a three-year period from the date of the hearing and suspended Viancourt from duty for 24 hours without pay. Although finding Viancourt guilty of gross insubordination (a group 4 offense), the Chief issued a penalty commensurate with insubordination (a group 3 offense) or conduct unbecoming (a group 2 offense), determining that Viancourt's many years of exemplary service, all without discipline, was a mitigating factor.

On July 1, 2021, the common pleas court issued a written opinion sustaining the Union's grievance in its entirety and vacating the portion of the award that concluded that Viancourt had engaged in conduct unbecoming.”

Legal Lesson Learned: When submitting a disciplinary matter to arbitration, be very careful in the questions being submitted to the arbitrator.

CHAP. 17: ARBITRATION, INCL. MEDIATION, LABOR RELATIONS

File: Chap. 17

IN: IAFF LOCAL GETS INJUNCTION – SHIFTS CHANGED 8/24 - RETALIATION BY MAYOR – UNION SUPPORTED OPPONENT

On March 24, 2022, in [IAFF Local 365, et al. v. City of East Chicago](#), U.S. District Court Judge Philip P. Simon, U.S. District Court for Northern District of Indiana (Hammond Division) issued a preliminary injunction against the City, finding the Mayor (a retired firefighter) changed the 24 / 48 shift in retaliation for the Local (which does not have a CBA) supporting an opponent in 2019. The judge held a hearing in Oct. 2021, and held the city offered little financial proof the Mayor’s swing shift saves money. In his Preliminary Injunction, the judge ordered the City to “immediately begin the process of reinstating the 24/48 schedule for its firefighters. Because it may take a few weeks to fully implement the new schedule, East Chicago will have until April 18, 2022, to have the schedule in place.”

“Firefighters across the nation generally work a 24/48-hour shift, that is, they are on duty for 24 hours and then off for 48 hours. Most fire departments in the country adhere to this schedule. The City of East Chicago does not. Instead, East Chicago requires its firefighters to work 8 hours on, then 24 hours off. This leads to a perpetually rotating

schedule which can wreak havoc on the lives of firefighters. It effects their personal lives and health, prevents a consistent sleep schedule, and makes it difficult to obtain reliable childcare. No. other department in the country imposes this schedule.

Why is East Chicago an outlier? The firefighters say it is retaliation from Mayor Anthony Copeland because they exercised their First Amendment rights in their backing of a rival mayoral candidate and in their lobbying efforts with East Chicago's legislative body, the Common Council. The firefighters seek a preliminary injunction ordering the City to revert back to the 24/48 schedule. East Chicago says it is a cost saving measure. I held a two-day hearing to get to the bottom of the issue. Because the firefighters have established a likelihood of succeeding on their First Amendment political retaliation claim, and they will suffer irreparable harm if the schedule remains intact, a preliminary injunction will be issued.”

Additional Facts:

“On December 4, 2019, East Chicago Fire Chief Anthony Serna (who has since retired), acting at the direction of Mayor Copeland, issued a memorandum to his firefighters that a new schedule would be instituted. The old schedule was the standard 24 hours on, 48 hours off schedule employed by most fire departments in the country. Chief Serna did not give the East Chicago firefighters much time to prepare for the new schedule: it was set to begin within three days. And the change was dramatic. The new plan called for an 8/24 schedule, whereby a firefighter would work an 8-hour shift followed by 24 hours off-shift. I have set out a typical 8/24 schedule below, and as can be seen, under the new schedule, firefighters must be at the firehouse literally every day of the week.

Monday - 7:30 am - 3:30 pm

Tuesday - 3:30 pm - 11:30 pm

Wednesday - 11:30 pm - 7:30 am (Thursday)

Friday - 7:30 am - 3:30 pm

Saturday - 3:30 pm - 11:30 pm

Sunday - 11:30 pm - 7:30 am (Monday)

While the firefighters have a union, they do not have a collective bargaining agreement with the City of East Chicago. After attempting to negotiate out of this schedule with East Chicago, the firefighters brought this cause of action claiming the schedule was thrust on them in retaliation for the exercise of their First Amendment rights-the union supported Mayor Anthony Copeland's opponent in an election and engaged in extensive lobbying of the Common Council. Although the case has a much larger breadth, the only thing presently before me is the firefighters' request for a preliminary injunction. And the request is a narrow one: they want their old schedule back while this case is being litigated.

Prior to running for mayor, Copeland worked as a firefighter for 26 years for the City of East Chicago.... During that time, Copeland himself worked the 24/48 schedule. In 2010, Copeland decided to run for mayor. He campaigned to reduce corruption, obtain financial

accountability, transparency, and increase the quality of life in East Chicago.... Copeland won the mayor's race, and after being elected he froze salaries and benefits for various city employees in an effort to get East Chicago's fiscal house in order. His efforts included freezing the firefighters' salaries and benefits such as longevity pay, grade pay, abolishing terminal leave, and eliminating the payout of leave banks for any firefighter hired after 2010....

Mayor Copeland was re-elected a couple of times, and in 2019 he faced yet another election. During the spring election season that year, the firefighters' Political Action Committee actively endorsed candidates opposing incumbent mayor Anthony Copeland.... Around this time the firefighters' union president, David Mata, spoke with then-Fire Chief Anthony Serna, and Chief Serna warned Mata not to go against Mayor Copeland: 'If you go against the mayor and he wins, I don't know what he's going to do' and to not 'go against the hand that feeds you....' Mayor Copeland defeated his opponent; but six of the Common Council members that the firefighters supported won their election.... Several firefighters protested at Mayor Copeland's inauguration, and Copeland found that to be 'disrespectful.' After the election, Chief Serna instituted several new policies that transferred union personnel and prohibited firefighters from parking or washing their personal cars at the station.

Unsurprisingly, this perpetually rotating schedule has wreaked havoc on the lives of the East Chicago firefighters. The new schedule has been deleterious to their health and well-being. Because the schedule changes each day, firefighters cannot get on a normal sleep schedule. Several firefighters credibly testified that the schedule has caused them to gain weight, has led to a lack of sleep, irritability, trouble concentrating, and prevents a consistent exercise regime.... There are practical problems as well. It is nearly impossible to get dependable childcare for firefighters who are parents. One firefighter testified credibly about the 'logistical nightmare' the rotating schedule poses to her.... Ever since the new schedule has been implemented, the Assistant Fire Chief has heard a number of serious complaints about how the schedule is making caring for kids, elderly parents and meeting other family responsibilities nearly impossible.

In sum, considering all the evidence presented during the preliminary injunction and post-hearing briefs, I find that the firefighters have made a strong showing of likelihood of success on the merits. They engaged in protected First Amendment activity, that activity was a motivating factor in East Chicago's imposition of the 8/24 work schedule, and they suffered a deprivation likely to deter free speech."

Legal Lesson Learned: An IAFF Local's support of a Mayor's opponent in an election is protected under the First Amendment. The city will likely appeal this Preliminary Injunction.

Note: See March 29, 2022 article about the case: "[Judge orders East Chicago to give firefighters back their old work shifts.](#)"

File: Chap. 17 [also Chap. 16]

OH: ARBITRATOR MAY REDUCE PENALTY – NEW SHIFT RELIEF - ASSISTANT CHIEF’S LOSS PAY OVERTURNED

On March 17, 2022, in [Association of Cleveland Fire Fighters, Local 93 v. City of Cleveland](#), the Court of Appeals of Ohio, 8th District (Cuyahoga County), held (3 to 0) that a Common Pleas judge improperly set aside the arbitrator’s award which found the charge of “gross insubordination” by Assistant Fire Chief was not proven, but the facts supported a “conduct unbecoming” charge. The Assistant Fire Chief was charged with 16 charges for trying to get the vacationing Fire Chief to overturn Acting Fire Chiefs order to follow the new shift relief procedure (to save overtime money, when the incoming Assistant Chief called off, he can only be replaced by on duty officer of lesser rank). The arbitrator had authority to vacate the most serious charge of “gross insubordination” and the 24-hour suspension, and to direct the FD to change in his personnel file with an official reprimand for one of the lesser charges, “conduct unbecoming an employee in the public service,” with no loss of wages.

“In focusing solely on the question of gross insubordination, the Union disregards the fact that the parties stipulated to *two* questions before submitting the matter to arbitration. The first question was whether the city had just cause to suspend Viancourt for a day and issue him an official reprimand. The question of just cause was not confined to "gross insubordination." Rather, the question concerned whether the city had just cause discipline Viancourt for his conduct.

The Union nevertheless maintains that the arbitrator exceeded his powers by creating a new charge not submitted to arbitration and issuing a penalty based on that charge. The charge of conduct unbecoming was not expressly submitted to arbitration in the parties' stipulated questions, but neither were the charges of gross insubordination or insubordination expressly submitted to arbitration. The questions to which the parties stipulated focused on remedies: the penalties Viancourt had received for his conduct and, if these penalties were unjustified, the penalty the arbitrator determined that Viancourt should receive for his conduct. The Union's claim that the arbitrator created a new charge by finding that Viancourt engaged in conduct unbecoming is not supported by the record. Viancourt was charged with 16 violations, which included the charge of conduct unbecoming. The Union's claim that any penalty based on that charge was improper is also not supported by the record because conduct unbecoming is punishable by official reprimand. The arbitrator's leaving this penalty intact is consistent with the discipline guide.”

Additional Facts:

“On August 10, 2018, former Assistant Fire Chief David Viancourt (‘Viancourt’) was reaching the end of a double shift at 8:00 a.m. Viancourt was to be relieved by Assistant Chief Michael Zedella, who had called off work the night before. According to division procedure, one of the assistant chiefs responsibilities is filling officer vacancies

throughout the division. In the event of a call-off, division procedure required Viancourt to find his own replacement.

Two months prior, on June 4, 2018, Fire Chief Angelo Calvillo ('Chief') had issued a directive changing division procedure from finding a replacement from among off-duty individuals of the same rank to on-duty individuals of a lower rank. This directive was intended to limit payment of overtime. According to the directive, Viancourt had to find his replacement from among on-duty battalion chiefs according to their seniority. A battalion chief is one rank below an assistant chief.

Viancourt reviewed the schedule and believed the on-duty battalion chiefs were either ineligible or inexperienced to act as assistant chief. Of the four battalion chiefs scheduled that day, two had less than the required six months as battalion chief needed to serve as acting assistant chief, and Viancourt believed the remaining two would not perform well in the position. Viancourt believed that the senior battalion chief had very little experience as a command officer and the other eligible battalion officer was struggling with personal problems that rendered him ill-equipped to serve as acting assistant chief. At 8:13 a.m., Viancourt texted the Chief to apprise him of the battalion chief who would be replacing him under the directive and ask whether that was who the Chief wanted. The Chief was on vacation and did not immediately reply. At approximately 8:25 a.m., Viancourt realized the Chief was on vacation and called Acting Fire Chief Michael Odum ("Acting Chief) to share his concerns, requesting permission to deviate from the procedure and bolster the officer corps on duty that day. The Acting Chief ordered Viancourt to follow the directive as written.

After this call, Viancourt began to execute the directive, calling the senior battalion chief, who declined to serve as acting assistant chief. Viancourt continued down the seniority list to the only other eligible battalion chief, who initially refused. With no other options, Viancourt ordered this second battalion chief to act as assistant chief. The battalion chief reluctantly agreed, adding that he was accepting the assignment under duress. Viancourt then ordered a less experienced officer to cover the battalion chiefs vacancy while the battalion chief traveled to relieve Viancourt.

At 9:00 a.m., the Chief replied to Viancourt's initial text message, stating that he approved of the senior on-duty battalion chiefs acting as assistant chief if she agreed to be assigned that detail. The Chief also stated that he was out of town and that the Acting Chief was in charge. At 9:05 a.m., Viancourt texted to inform the Chief that the Acting Chief did not permit a deviation from the replacement procedure and asked if the Chief would grant this permission. At 9:09 a.m., the Chief texted his reply, declining the request and directing Viancourt to follow the Acting Chiefs order. At 9:42 a.m., Viancourt texted that he understood, but added, 'I want to go on record that it is my professional opinion that this is an unsafe situation due to the gross lack of experience at the BC/AC [battalion chief and assistant chief] ranks.'

The battalion chief arrived to relieve Viancourt shortly after 10:00 a.m. While they were transferring command, the Acting Chiefs administrative assistant informed Viancourt that

the Acting Chief wanted to meet with Viancourt. During their meeting, Viancourt again shared his concerns with the Acting Chief. The Acting Chief stated that he would provide support for the battalion chief who had relieved Viancourt. After this meeting, Viancourt clocked out at 11:00 a.m.

Ten days later, on August 20, 2018, the Acting Chief filed 16 disciplinary charges against Viancourt.

On September 19, 2018, a predisciplinary hearing was held before the Chief. The Chief found Viancourt guilty of all 16 charges as written by the Acting Chief in the August 20, 2018 charging document. The Chief issued an official reprimand that would remain in Viancourt's personnel record for a three-year period from the date of the hearing and suspended Viancourt from duty for 24 hours without pay. Although finding Viancourt guilty of gross insubordination (a group 4 offense), the Chief issued a penalty commensurate with insubordination (a group 3 offense) or conduct unbecoming (a group 2 offense), determining that Viancourt's many years of exemplary service, all without discipline, was a mitigating factor.

On July 1, 2021, the common pleas court issued a written opinion sustaining the Union's grievance in its entirety and vacating the portion of the award that concluded that Viancourt had engaged in conduct unbecoming.”

Legal Lesson Learned: When submitting a disciplinary matter to arbitration, be very careful in the questions being submitted to the arbitrator.

CHAP. 18: LEGISLATION

File: Chap. 18 [also Chap. 7]

DC: SEXUAL HARASSMENT OR ASSAULT – NEW FEDERAL LAW - INVALID EMPLOYEE MANDATORY ARBITRATIONS

On March 3, 2022, President Biden signed into law the [“Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act.”](#) The law amends the Federal Arbitration Act to prohibit mandatory arbitration of sexual harassment and sexual assault claims in arbitration agreements.

- (a) “In General - Notwithstanding any other provision of this title, at the election of the person alleging conduct constituting a sexual harassment dispute or sexual assault dispute, or the named representative of a class or in a collective action alleging such conduct, no predispute arbitration agreement or predispute joint-action waiver shall be valid or enforceable with respect to a case which is filed under Federal, Tribal, or State law and relates to the sexual assault dispute or the sexual harassment dispute.

- (b) Determination of Applicability. An issue as to whether this chapter applies with respect to a dispute shall be determined under Federal law. The applicability of this chapter to an agreement to arbitrate and the validity and enforceability of an agreement to which this chapter applies shall be determined by a court, rather than an arbitrator, irrespective of whether the party resisting arbitration challenges the arbitration agreement specifically or in conjunction with other terms of the contract containing such agreement, and irrespective of whether the agreement purports to delegate such determinations to an arbitrator."

Legal Lesson Learned: Fire & EMS departments should review their Employee Handbooks and other documents and remove any provision requiring arbitration for claims of sexual harassment or sexual assault.

Note:

March 28, 2022: "[Moving Away from Mandatory Arbitration Over Sexual Assault and Harassment Claims.](#)"

"Given these changes to the FAA, it is critical for employers to review their arbitration agreements and remove any language indicating sexual assault or harassment claims must be arbitrated. The existence of such provisions could invalidate the agreement in whole or in part. In addition to revising the arbitration agreement provisions in the employee handbook or collective bargaining agreement, employers should also tighten their procedures and requirements for investigating and reporting sexual harassment and assault to avoid liability. In terms of reporting procedures, employers should have clearly defined persons of contact for reporting."

March 3, 2022: "[Biden signs bill to end forced arbitration in sexual harassment, assault cases.](#)"

The law is retroactive, freeing individuals who have been bound by arbitration language to pursue legal action against their harassers.

March 1, 2022: "[Congress Votes To End Mandatory Arbitration Of Sexual Assault And Sexual Harassment Claims.](#)"