College of Engineering & Applied Science

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

Phone (513) 556-6583

March 2019 – FIRE & EMS LAW Newsletter

[NEWSLETTER IS NOT PROVIDING LEGAL ADVICE.]
If you would like to receive free newsletter, just send me an e-mail.

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

COMMUNITY PARAMEDICINE / HOSPITAL PARTNERSHIPS: March 20, 2019, free seminar, FDs, elected officials and hospital representatives sharing best practices; will be videotaped and posted on our web page.

DRONES FOR HAZMAT: Fall, 2019 two-day class, UAVs For Emergency Responders, FST 3055 will include presentations for Incident Commanders [Nov. 8, 2019 at UC Flight Lab] and multi-agency HAZMAT drill [Nov. 9, 2019 at a FD training center]. UC Fire Science Adjunct Professor / Fire Chief (retired) BJ Jetter, PhD will be coordinating the drill.

Contents

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

CO: ARSON - $3M LOSS TO HOTEL BEING BUILT– INSURANCE CO. NOT REQ. TO PAY – NO SECURITY FENCE

On March 1, 2019, in Praetorian Insurance Company v. Axia Contracting, LLC and 255 Blackhawk Hospitality, LLP, U.S. District Court Judge William J. Martinez, District of Colorado, granted summary judgment to the insurance company. "On summary judgment, the parties seek clarity from this Court on whether, under the Policy, Defendants' failure to maintain a protective device, a six-foot fence enclosing the entire job site, which was listed in an endorsement and schedule attached to the contract, relieves Praetorian of its obligation to pay for Defendants' losses due to fire…. For the reasons discussed below, the Court will grant Praetorian's Motion for Summary Judgment ('the Motion'), direct entry of judgment, and terminate this case."

Facts:

> "On June 19, 2017, Defendants were in the process of constructing a hotel (the 'Project') at 255 Blackhawk Street, Aurora, Colorado (the 'Property'). Blackhawk owned the Property and Axia was the general contractor for the Project. Early in the morning on June 19, 2017, a fire occurred at the Property damaging the unfinished hotel structure.
>
> The City of Aurora Fire Department investigated the fire and a fire investigator concluded that it was 'the result of an intentional and direct human act' and classified the fire as 'incendiary . . . that is deliberately set with the intent to cause the fire.' (ECFNo. 50-1 at 10 (emphasis in original).) Based on information provided

by Axia, the City of Aurora Fire Department estimated the property and structural damage to be approximately $3,000,000.

***

The [insurance] Policy includes a 'Protective Devices Schedule' and a 'Protective Devices Endorsement' ('PDE'). (ECF No. 50-2 at 50–51.) The Protective Devices Schedule lists the following protective devices or services (together, 'Protective Safeguards'):

> Site will be protected with chain link fencing, or other similar security fencing, at least 6 ft. in height completely enclosing the jobsite. All entrance and access gates shall remain securely locked during non-working hours. Jobsite will be fully illuminated each night with lights continuously from sunset to sunrise

****

Praetorian contends, and Defendants admit for purposes of the Motion, that Defendants received a 10%credit due to the inclusion of the PDE and Protective Devices Schedule, thereby reducing the premium for the Policy by 10%."

Holding:

"The present dispute is, at heart, one of contract interpretation. Under Colorado law, courts construe insurance policies using general principles of contract interpretation.

***

On this record, the Court concludes that there is no genuine dispute of material fact that the requirement to maintain a security fence was a material term of the insurance contract. Defendants' failure to adhere to the Policy terms as written deprived Praetorian of the central benefit of its bargain with Defendants: Praetorian agreed to assume a known level of risk of liability for losses not otherwise excluded and issued the Policy in exchange for Defendants' payment of insurance premiums."

Legal Lessons Learned: FDs should encourage owners of large construction sites to enclose the site with fencing and nighttime lights.

File – Chap. 1, American Legal System

MD: GOVT IMMUNITY – COUNTY 911 DOWN 3 HOURS, LOSS OF AIR CONDITIONING - CHRONIC KIDNEY PATIENT DIED

On Feb. 22, 2019, in Raul T. Aristorenas, et al. v. Montgomery County, Maryland**,** the Court of Appeals Appeals of Maryland, held (3 to 0) in unreported decision upheld the dismissal of the lawsuit by Circuit Court trial judge:

"The [trial] court concluded that the allegations did not state a claim for negligence—which underlies both the wrongful death and the survival claims—because the County is immune from suit and the individual defendants did not owe a duty to Mr. Somarriba or Marlon. We agree and affirm."

Facts:

"On the night of July 10, 2016 by 11:00 pm, 911 Emergency Call Centers in Montgomery County experienced a complete service outage, causing all callers who dialed 911 for emergency assistance to hear a busy tone. Callers were unable to communicate with all operators. The outage continued until July 11, 2016, when service was restored around 1:00am.

***

This 911 outage was caused by certain electrical, mechanical, and computer failures at Montgomery County owned, operated, and maintained 911 phone facilities. The systems were negligently designed and maintained by Montgomery County, its agencies, and employees including the three named defendants. In particular, the HVAC unit that failed on the night of the outage was maintained in a grossly negligent manner. The duty owed to maintain that critical unit was very high as it was the only unit that cooled the critical severs necessary to keep the 911 center running and its failure to function would crash the entire 911 system. It was not filled with coolant, which was grossly negligent under the circumstances. The level of coolant was also not checked, which is grossly negligent under the circumstances.

***

Decedent Marlon Somarriba was under care for chronic kidney ailments. The conditions were not life threatening as long as Mr. Somarriba had reasonable access to 911 services in case of an emergency. Based on Defendant's media representation, he believed 911 was always operational.
***

On July 10 and 11, 2016, during the 911 phone call center outage, Marlon Somarriba had a medical emergency. Mr. Somarriba was having trouble breathing, and after applying a blood pressure monitor on himself, realized that he had extremely low and dangerous blood pressure. His father, Eduardo Somarriba, called 911 repeatedly to attempt to contact emergency services to dispatch an ambulance for Marlon Somarriba. Because the emergency communication center in Montgomery County was having a call outage due to mechanical, electrical, and computer malfunctions caused by its negligence and gross negligence, fire and rescue was unable to respond to any 911 calls placed for the purposes of bringing assistance to Marlon Somarriba.

***

Marlon's friends and family repeatedly called 911, and repeatedly got a busy tone. They called in vain for over an hour. No emergency vehicles arrived to render assistance to Marlon Somarriba during that one hour time span.

***

Fire rescue and police were eventually dispatched over at least one hour later. When they arrived at Marlon Somarriba's location, they were unsuccessful in getting Marlon Somarriba to respond. They rendered first aid and other medical assistance to him on the scene for 15 minutes. Mr. Somarriba was pronounced dead by [an EMS Medic] at 0028 hours."

Holding:

> "In this case, the question is whether maintenance of the 911 system—including the maintenance of an air conditioning unit that is alleged to be necessary to its proper functioning—is a governmental or proprietary activity. We have no difficulty finding this function governmental. First, the operation of the 911 system is 'sanctioned by legislative authority'—state law requires each county to operate a 911 system and requires the County to provide public access to police, fire, and ambulance services through that system.
>
> ***
>
> The functions the County performs in connection with its 911 system, including maintenance of the buildings and equipment that allow itt o operate, are governmental functions, and the County is immune from tort liability for Messrs. Somarriba and Aristorenas's wrongful death and survival action claims.
>
> ***
>
> When a public entity or employee has a duty to protect the general public, and injury results from breach of that duty, the entity or individual may not be held liable. Id. The doctrine does not apply, though, where an individual has a special relationship with the plaintiff, i.e., when that the individual 'affirmatively acted to protect or assist the specific individual, or a specific group of individuals like the individual, in need of assistance, thereby often inducing the specific reliance of the individual on the employee.' Id.at 496 (citing Ashburn v. Anne Arundel Cnty., 306 Md. 617, 631 (1986)).
>
> [Footnote 9]:
>
> > Even if the public duty doctrine were satisfied here, Messrs. Somarriba and Aristorenas's claims would fail anyway because the facts as pled do not support the existence of a special relationship. Indeed, they don't even argue that Mr. Dise and Ms. Feinberg had a special relationship with plaintiffs. Instead, they argue that that a special relationship exists between '911' and the public: 'there is actually a sufficient promise made by 911 to any citizen that it will be operational to find that[sic] special relationship exists.' But of course, '911' is not an entity that can make a promise or owe a duty, let alone be sued in tort for breaching a duty. And even assuming that Messrs. Somarriba and Aristorenas intended to argue that it was not '911' but rather Mr. Dise and Ms. Feinberg who made and broke a 'promise,' the amended complaint is devoid of allegations supporting the existence of a special relationship between them and these plaintiffs."

Legal Lessons Learned: This is a tragic case – amazing there was no back up system, or ability to have another 911 Center pick up the calls.

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

MA: SPRINKLERS - DRUG REHAB HOUSE WITH 8 PATIENTS – COURT UPHOLDD FD ORDER TO INSTALL - $55,000 COST

On Jan. 29, 2019, in Crossing Over, Inc, et al. v. City of Fitchberg, Justice Rosemary Connelly, MA Superior Court upheld the July 14, 2017 decision of the "Automatic Sprinkler Appeals Board" which held:

> Based upon the aforementioned findings and reasoning, the Board hereby upholds the Order of the Fitchburg Fire Department and requires the installation of an adequate system of sprinklers throughout all portions of the subject building used and/or occupied for boarding or lodging purposes…."

Justice Connelly denied the property owner's motion to reverse the Board, holding that the Board's decision is legal, supported by the record, and the Board has not exceeded it authority. The court will give deference to the Board's reasonable interpretation of its own statute."

Facts [from the Board's decision]:

> "This administrative appeal is held in accordance with Massachusetts General Law, Chapter 30A; Chapter 148, section 26H and Chapter 6, section 201, to determine whether to affirm, reverse or modify the decision of the Fitchburg Fire Department requiring Mr. Theodore Bronson to install automatic sprinklers in a house owned by him located at 44 Mt. Vernon Street, Fitchburg, MA. Said owner leases the house to Crossing Over, Inc.
>
> ***
>
> By written decision dated March 8, 2017 and received by Mr. Bronson on or about March 8, 2017, the Fitchburg Fire Department issued a determination to him, requiring automatic sprinklers to be installed throughout a building owned by him located at 44 Mt. Vernon Street, Fitchburg, MA. The determination was issued pursuant to the provisions of M.G.L. c. 148, section 26H. On April 20, 2017, Mr. Bronson and the tenant, Crossing Over, Inc., (hereinafter referred to as "the Appellants") filed an appeal of the decision with the Automatic Sprinkler Appeals Board. The Board held a hearing on June 14, 2017, at the Department of Fire Services, Stow, Massachusetts.
>
> ***
>
> According to testimony and documentation provided by the Fitchburg Fire Department, the City of Fitchburg, accepted the provisions of M.G.L. c. 148, section 26H on or about September 3, 2002. The Appellants do not challenge the legality of the City's acceptance of the statute. The provisions of M.G.L. c. 148, section 26H provide for enhanced fire protection requirements for certain buildings that are considered lodging or boarding houses. Section 26H states, in pertinent part:
>
> > For the purposes of this section "lodging house" or "boarding house" shall mean a house where lodgings are let to six or more persons not within the second degree of kindred to the person conducting it, but shall not include fraternity houses or dormitories, rest homes or group residences licensed or regulated by agencies of the commonwealth.
> >
> > According to the third paragraph of the statute, any lodging house subject to the law shall be equipped with automatic sprinklers within five years of the statute's acceptance by a city or town.
>
> ***
>
> According to the representative of the Appellants, the house is owned by the Appellant, Mr. Bronson, who rents the house to Crossing Over, Inc., a non-profit organization, for $1,400.00 per month. Crossing Over, Inc. provides congregate living arrangements to eight individuals. One individual is considered the house manager who provides general oversight in lieu of rent payment. The organization charges $130.00 per week to the seven other individuals. The Program Director testified that the amounts charged pay for heat, hot water, gas/electric, internet, the on-site Program Manager and for drug testing several times a week. It includes daily continental breakfast and lunch. Each guest is expected to also conduct 10 hours of house or community related work per week.

***

According to testimony and documentation, Crossing Over, Inc., is a 'spiritual based' program, to provide a supportive environment for those recovering from issues with drugs or alcohol. The program does not provide on-site treatment, but does assist the occupants in coordinating outside treatment/counseling activities. The program requires guests to on form to 'House Rules' that include: abstinence from use of drugs and/or alcohol in the house, no smoking within the premises, no overnight guests and active participation in alcohol and/or substance abuse counseling. Failure to comply with the rules may result in release from the house/program.

***

The house owner and landlord testified that he contacted one sprinkler installation company and, after providing a description of the property, was given a verbal cost estimate that sprinklers could cost approximately $55,000.00. He indicated that he could not afford to pay this cost. When questioned by the Board about the unusually high estimate based upon the size of the house, the owner provided no additional details to explain the high estimate.

***

In his request for reasonable accommodations, the Appellant's Counsel requested that the City of Fitchburg treat this property and its residents like a regular family and that the sprinkler requirements should be waived completely.

***

Counsel for the City of Fitchburg further argues that the Appellant's contention that this is a case of discrimination, is not accurate, as every house that is conducted as a lodging house with groups of 6 or more unrelated individuals in the City i s required to install sprinklers equally without regard to whether or not the occupants are disabled. Furthermore she argues that sprinklers are a benefit to these residents, providing an enhanced level of life protection that they deserve. Counsel cited a Massachusetts Appeals Court decision which upheld a decision of the Chelsea Fire Department to require automatic sprinklers in a house involving circumstances similar to this case."

Holding [by the Board]:

"The purpose of the automatic sprinkler requirement is to protect public safety in the event of a fire. The statute applies to all such buildings, in a neutral manner, without regard to the actual or perceived disability status of the building occupants. Although the statute requires a monetary expenditure related to the installation of a fire sprinkler system, it clearly does not prohibit the intended use of the house by the Appellants."

Legal Lessons Learned: Sprinkler ordinances save lives.

File: Chap. 5, Emergency Vehicle Operations

LA: CHILD NOT BREATHING RUN – EMER. LIGHTS USED, BUT NO SIREN (PER 3 WITNESSES) - NO STATUTORY IMMUNITY

On Feb. 22, 2019, in Nunzio Inzina & Emily Inzina v. Troy Guitreau, et al., the State of Louisiana, Court of Appeal, First District (3 to 0) held that "because the trialcourt's finding that Mr. Guitreau's emergency lights were insufficient to warn motorists of his approach was not manifestly erroneous, the trial court properly determined that the 'reckless disregard' (or 'gross negligence') standard does not apply. Mr. Guitreau does not meet the requirements of 32:24(C) and therefore his actions must be assessed under an ordinary negligence standard."

Facts:

> "At approximately noon on January27, 2013, Nunzio Inzinna was driving a 2007Honda Accord on Highway22 near Killian, Louisiana. At the same time, Troy Odem Guitreau, who was responding to an emergency call [child not breathing] dispatched by Livingston Parish Fire Protection District Two Volunteer Fire Department Incorporated ('District2'), was driving a 2007 Ford Crown Victoria on the same highway. Mr. Guitreau was driving at least 60 miles per hour, but may have been driving as fast as 90miles per hour.
>
> ***
>
> As Mr. Guitreau was driving down Highway22, he approached a pick-up truck, driven by Robert Watkins, which was traveling in the same lane in the same direction. Mr. Watkins was driving behind Mr. Inzinna. At this point, Mr. Inzinna activated his left blinker to attempt a left turn into a driveway. As Mr. Inzinna was preparing to turn, Mr. Guitreau (who was behind Mr. Watkins), accelerated to pass Mr. Watkins. Mr. Guitreau then went around the left side of Mr. Watkins' truck. Mr. Inzinna, who did not see Mr. Guitreau attempting to pass Mr. Watkins, began his left turn into the driveway. When Mr. Guitreau saw Mr. Inzinna making the left turn, Mr. Guitreau slammed on his brakes and steered towards the ditch on the left side of the road. However, Mr. Guitreau was unable to avoid a collision and crashed into Mr. Inzinna's vehicle.
>
> ***
>
> Mr. Guitreau testified that the speed limit on Highway22 was 55miles per hour, but that he was driving approximately 65to70 miles per hour when responding to the call [and had both emergency lights and siren on]. There was a no -passing area on Highway22, but Mr. Guitreau believed he could ignore the no -passing line when responding to an emergency.
>
> ***
>
> Mr. Inzinna testified that he had not seen Mr. Guitreau's vehicle coming, nor had he seen any emergency lights. He further testified that he did not hear any sirens prior to or after the accident.
>
> ***
>
> Mr. Watkins testified that Mr. Guitreau's vehicle had flashing lights, but nosiren. He stated that the portion of the highway where the accident occurred has stripes for no passing, because of the curves in the road. He further stated that he believed that the no passing stripe applied to the lane that he (and Mr. Inzinna and Mr. Guitreau) were driving in.

***

Mrs. Inzinna [observed the accident from her front yard] testified that she did not hear any sirens, nor did she see any emergency lights."

Holding:

"After a bench trial, the trial court signed a judgment on January 22, 2018, assessing the fault of the remaining defendants, Mr. Guitreau, District 9, and American Alternative at75%. The trial court assessed the remaining 25% of fault to Mr. Inzinna. In its reasons for judgment, the trial court stated that it had found La. R.S. 32:24 to be inapplicable. The trial court noted the disputed facts as to whether Mr. Guitreau had emergency lights on, his siren on, or both, and found Mr. Watkins's testimony that he observed the lights but no siren to be the most credible.

***

[The Louisiana emergency responses statute, La. R.S. 32:24] provides:

> C. The exceptions herein granted to an authorized emergency vehicle shall apply only when such vehicle or bicycle is making use of audible or visual signals, including the use of a peace officer cycle rider's whistle, **sufficient to warn motorists of their approach,** except that a police vehicle need not be equipped with or display a red light visible from in front of the vehicle.

***

We find that the trial court's findings in the present case were not manifestly erroneous. It is reasonable to conclude that Mr. Guitreau's use of his emergency lights at noon on a clear day was not sufficient to warn motorists of his approach, especially considering that there was a vehicle between Mr. Guitreau and Mr. Inzinna prior to Mr. Guitreau's attempt to pass Mr. Watkins's pick-up truck."

Legal Lessons Learned: If you are in an accident responding to an emergency, and your siren was on, keep it on when calling dispatch to report the accident – the 911 Dispatch recording will help avoid litigation and liability.

File: Chap. 6, Employment Litigation

MI: FIRE CHIEF RESIGNED – CHECKS FOR FD VENDORS TO HIS HOME – TWP PRESS RELEASE WAS NOT DEFAMATION OR "FALSE LIGHT"

On Feb. 26, 2019, in Richard Marinucci v. Charter Township of Northville, et al., State of Michigan Court of Appeals, held (3 to 0) in an unpublished decision, "Further, plaintiff offers no evidence to show that informing the public that he had resigned was unreasonable or highly objectionable. Although plaintiff contends that the statements made to the media placed him in a false light, plaintiff does not explain how the statements negatively affected him."

Facts:

> "Plaintiff served as chief of the Northville Township Fire Department from 2008 until 2016, first as an independent contractor and then as an employee. On March 15, 2016, he was asked to resign following an administrative meeting held to discuss the results of a 'surprise' audit of the township's finances. The audit revealed that vendor payments issued by the township were being sent to plaintiff's home address, and the payments were not related to the employee payroll. The township paid for specialized firefighter training from various organizations.
>
> Plaintiff was active in many of these organizations, including some to which he sent firefighters for training. Plaintiff's wife handled administrative functions for some of these entities, including receiving checks for the training provided. 1
>
> > [Footnote 1: Plaintiff testified that his wife worked in the capacity of executive secretary for the associations, earning around $100,000 per year.]
>
> The checks were being sent to plaintiff's and his wife's home address. The auditors noted that plaintiff's act of receiving the checks at his home address constituted a 'related party transaction' that could negatively affect future audits.
>
> Defendant John E. Werth, the director of public safety, was aware of these transactions, but defendant Marvin Snider, the township supervisor, was not. When Snider attempted to come to an agreement with plaintiff regarding the related party transactions, plaintiff suggested that Northville Township cease participation in the fire safety organizations. Snider felt this would detrimentally affect the Northville Township Fire Department, simply to allow plaintiff and his wife to remain involved in those organizations and receive checks at home. Defendant Snider concluded that plaintiff did not have the fire department's best interests in mind, and asked him, through Werth, to resign, in order to give him an opportunity to avoid being fired. For purposes of this appeal, defendants do not dispute that plaintiff's ultimate departure was not voluntary.
>
> Plaintiff filed the instant lawsuit on May 19, 2016. He alleged a breach of a legitimate expectation of employment absent just cause for termination(Count I), termination in violation of public policy (Count II), violation of his right to due process when depriving him of a property interest in continued employment(Count III), age discrimination in violation of the Elliot Larson Civil Rights Act (Count IV), violation of the Open Meetings Act (Count V)2, defamation (Count VI), and false light (Count VII). On January 25, 2017, defendants moved for summary disposition of all of plaintiff's claims. Following briefing and oral argument, the trial court granted the motion in an August 16, 2017 opinion and order."

Holding:

> Finally, plaintiff argues that the trial court erred by granting defendants' motion for summary disposition with respect to his false light claim. We disagree…
>
> Plaintiff argues that reporting to several media outlets that he had resigned was 'unreasonable and highly objectionable' because it was a false statement that implied to the public that he had done something wrong. However, before making any statements to the media, defendants were under the impression that plaintiff had agreed to resign because after being asked to resign, plaintiff packed up the belongings he kept in his office and left his badge behind. Thus, the statement to the media that plaintiff had resigned was not patently false; rather, it was based on defendants' belief that plaintiff had, in fact, resigned. Further, plaintiff offers no evidence to show that informing the public that he had resigned was unreasonable or highly objectionable. Although plaintiff contends that the statements made to the media placed him in a false light, plaintiff does not explain how the statements negatively affected him. Plaintiff contends that the news of his resignation implied wrong doing, but offers no proof that he actually suffered any harm as a result. Since there is no evidence that defendants' actions detrimentally impacted plaintiff, his contention that he was placed in a false light is mere speculation. Without further proof, the trial court did not err by granting defendants' motion for summary disposition."

Legal Lessons Learned: When a Fire Chief resigns, the employer may report this fact to the press. Avoid financial situations where there may be an "appearance of impropriety."

File: Chap. 7, Sexual Harassment; Pregnancy Discrimination

AL: PREGNANT EMT– NO LIGHT DUTY UNLESS INJURED ON JOB – EEOC SUPPORTING HER APPEAL TO 11TH CIRCUIT

On Feb. 11, 2019, in Kimberly Michell Durham v. Rural / Metro Corporation, the Equal Employment Opportunity Commission has filed an amicus brief with the 11th Circuit (Atlanta), arguing:

> "The PDA [Pregnancy Discrimination Act] does not categorically bar employers from maintaining a policy of accommodating only a subset of employees, including those employees with on-the-job injuries. See [U.S. Supreme Court's 2015 decision in *Young v. UPS*] 135 S. Ct. at 1349-51. However, *Young* allows that a jury may find that an employer's policy of accommodating only some employees is a pretext for pregnancy discrimination."

Facts [from EEOC's amicus brief]:

> "Defendant Rural/Metro provides ambulance and fire protection services. R.43-5. Durham worked for Rural/Metro as an emergency medical technician (EMT) beginning in March 2015. R.42-1 at 16-17 (Durham Dep.). The job duties were primarily 'lifting and moving patients from Point A to Point B.' R.43-4 at 11 (Watkins Dep.). The job description required that EMTs 'frequently lift and/or move up to 20 pounds and occasionally lift and/or move, with help, up to 100 pounds.' R.42-2 at 115. Durham described her job as "to drive the ambulance and maintain it . . . and assist my medic with anything needed in patient care." R.42-1 at 17 (Durham Dep.). She had to lift 'the stretcher, [t]he patient from their bed to the stretcher or any location they might be,' as well as 'equipment that we would move between trucks.' Id
>
> Six months after starting work, Durham disclosed to her manager, Mike Crowell, that she was pregnant and that her doctor had given her a fifty-pound lifting restriction. R.42-1 at 18-20 (Durham Dep.). Both Durham and Crowell agreed she could not work her regular job 'on the truck.' R.42-1 at 21 (Durham Dep.); R.42-3 at

31-32 (Crowell Dep.). Durham had checked the job board at work and noted that there were several ambulance dispatch positions open. R.43-2 ¶3 (Durham Decl.). She asked Crowell to move her to light duty or dispatch. R.42-1 at 21 (Durham Dep.); R.43-3 ¶3 (Durham Decl.). Crowell told her the company's policy was to provide light duty only for those employees who suffered on-the-job injuries and were on workers' compensation. R.42-1 at 22-23 (Durham Dep.); see also R.42-6 at III.A (Transitional Work Program policy).

Rural/Metro would not create new positions for these employees, but it would find work they could do within their medical restrictions, such as stocking the bins for the ambulance or doing clerical work. R.42-3 at 38-39 (Crowell Dep.); R.42-2 at 48-49 (Morris Dep.). Rural/Metro did not offer a reason that light duty was reserved for on-the-job injuries. R.42-2 at 53-54(Morris Dep.) ('I don't think I can answer why the company would have made that decision.')

***

Because Durham had worked only six months, she was ineligible for FMLA leave. R.42-1 at 23 (Durham Dep.). Rural/Metro offered her a ninety-day unpaid leave of absence. R.42-1 at 26-27 (Durham Dep.26-27). Human resources manager Jennifer Harmon mailed the policy to Durham with an unpaid personal leave request form for her to complete. R.42-1 at 35-3 6. The policy states: 'Unpaid personal leave will not be granted for more than 90 days or for the purpose of pursuing another position, temporarily trying out new work or venturing into business.' R.42-1 at 35. Durham testified that she understood the terms of the policy to preclude her from seeking employment elsewhere, which, she testified, she could not afford. 'I was not allowed to find another job. I was not allowed to file for unemployment, and I would effectively have no income for those months.' R.42-1 at 24 (Durham Dep.). Durham therefore did not submit the personal leave request form. R.42-1 at 26-27 (Durham Dep.).

***

Durham called Harmon to ask if there were any other options because she could not take unpaid leave. R.42-1 at 27 (Durham Dep.). Harmon responded that unpaid leave was her only option. Id. Durham also called Crowell repeatedly about her options, but the calls 'went unanswered.' R.43-2 ¶11 (Durham Decl.).

Durham consulted with an attorney, who informed Rural/Metro by letter that Durham considered herself constructively discharged and was preparing to file a charge of pregnancy discrimination with the EEOC.

****

Meanwhile, the record reflects, at least three employees working under Crowell during the same year as Durham experienced on-the-job injuries—all of whom received accommodation of their lifting restrictions: Chris Doubek, Daniel Trussell, and Billy McKiven. R.43-15 (Employee Transitional Work Assignment Offer Agreements); 42-3 at 29 (Crowell Dep.). Crowell testified that, in addition to these three, '[t]here may have been more.' Id. The record also shows that Rural/Metro accommodated employees who were disabled under the ADA, as reflected in its employee handbook and the testimony of its senior human resources manager. R.43-7 at 8 (Accommodations for Qualified Individuals with Disabilities); R.42-4 at 42 (Reaves Dep.).

***

After requesting and receiving a right-to-sue notice, Durham filed suit alleging pregnancy discrimination under Title VII. R.1 (Complaint). Rural/Metro filed a motion for summary judgment. R.40-41."

Holding [of U.S. District Court]:

> "The district court held that Durham failed to establish the fourth prong of her prima facie case and granted summary judgment. R.55 at 8-11. According to the court, Durham did not 'provide substantial evidence that Rural/Metro intentionally treated Ms. Durham less favorably than other persons not so affected but similar in their ability or inability to work.' Id.at 8 (citing Young, 135 S. Ct. at 1345)."

Legal Lessons Learned: This is an important case for the fire service, and may eventually reach the U.S. Supreme Court.

> Note: Numerous civil rights groups, including a Better Balance, The National Women's Law Center and the National Employment Law Project, have filed amicus briefs urging the 11th Circuit to reverse the Federal District court's decision.
> See also Feb. 22, 2019 article, "11th Circuit Pregnancy Bias Case Tests 2015 Supreme Court Ruling,"

FL: MEDICAL CLEARANCE DOCTOR – COMPLAINED ABOUT FF –CONTRACT NOT RENEWED – NO "REVERSE DISCRIM" / 1st AMEND.

On March 1, 2019, in Nancy King v. Board of County Commissioners, Polk County, the U.S. Court of Appeals for the 11th Circuit (Atlanta) held (3 to 0) that U.S. District Court judge properly granted summary judgment to Polk County. "She did not engage in speech protected by the First Amendment, however, because she spoke as an employee and not as a private citizen."

Facts:

> "Dr. Nancy King worked under contract for Polk County, Florida and for fifteen years was the primary person responsible for determining whether firefighter applicants were medically qualified. In 2014, the medical clearance process for one applicant was mishandled, and King had strong feelings about how the process should have gone and who should have been making clearance decisions. She aired these feelings to her colleagues and, in two private meetings, with a deputy county manager and with the county manager. Subsequently, her contract with the county was put out for bids, and her bid was not selected.
>
> King then sued the county and others, alleging that they violated her First Amendment rights by retaliating against her for engaging in protected speech. She did not engage in speech protected by the First Amendment, however, because she spoke as an employee and not as a private citizen.
>
> ***
>
> According to King, her responsibilities to the county had always been to ensure personnel were medically fit to perform their essential job duties.' Ordinarily, King would rely on a national standard known as NFPA 1582 to determine whether the candidate was capable of performing the tasks of a firefighter, and she would then make a recommendation to the County.
>
> This case revolves around one applicant, 'J,' who is African-American, and who applied for a position with the Polk County Fire Department under a diversity initiative. Under this initiative, six promising candidates from socially-disadvantaged backgrounds are provided financial assistance and training to help them apply to be, and ideally become, Polk County firefighters. Unlike other firefighter applicants who go through fire school and then apply for a position, those hired through the diversity initiative get on the county payroll prior to completing their training.
>
> King did not perform J's initial preemployment screening. Rather, a physician assistant employed by King performed the exam and found several medical problems related to J's lungs, even though J had earlier stated that he did not have any lung problems. The assistant recommended that J see a personal physician to get these issues looked at. This resulted in a misunderstanding: as the physician assistant saw it, J was not medically qualified to become a firefighter; as J saw it, he just needed to get cleared to work by a personal physician. In addition to this misunderstanding, there was a mix-up: even though neither the physician assistant nor King had signed off on J's fitness, J was permitted to begin classroom instruction, which,

because he was part of the diversity initiative, meant that he was placed on the county payroll in January 2014.

In the following months, several medical professionals gave conflicting statements about J's medical fitness. Some of these professionals opined that J was medically fit to perform at least some tasks, while those associated with King's office maintained that J was not fit to work as a firefighter. The professionals who cleared J did not use, or were not even aware of, the NFPA standard. King, who ordinarily was the person tasked with making medical fitness recommendations, was not consulted on J's case until late 2014.

King became involved when the then-director of risk management for the county, Mike Kushner, noticed J's case and asked King to review what was going on. In an email that Kushner sent to King, he stressed that King's clinic, Employee Health Services or 'EHS,' should 'never relinquish control of the process' of clearing candidates. In November 2014, Kushner also asked King to render a medical opinion regarding J's fitness for duty.

Following Director Kushner's request, King called Kandis Baker-Buford, the equal opportunity administrator who oversaw the diversity initiative, to notify her that King would be examining J. According to King's notes, Baker-Buford responded that it would be 'inappropriate' for King to examine J because J had 'already received medical clearance from his treating physician.' King was 'dumbfounded' because in the fifteen years she had served in this role she had never been refused the opportunity to examine an applicant.

Despite Baker-Buford's request that King not physically examine J, Kushner asked King to review J's medical records and render an opinion. In his request, Kushner asked King for her 'medical opinion as to whether Mr. J completed his physical intake questionnaire accurately.' King was surprised because she had never been 'asked to review an applicant's medical records for potentially false information.' King completed her review of J's records in December 2014 and recommended getting a second opinion 'given the contentious nature of this case.' In her review, King had found multiple inconsistencies and 'false information' provided by J in his medical records. King recommended that J 'be evaluated by another Occupational Health physician with an expertise in pulmonary conditions,' and Kushner set up an appointment for J to meet with a Dr. McCluskey. [King Aff. 6 ¶ 26.] Baker-Buford was 'fine' with the appointment, but was concerned about making J, an African-American diversity initiative applicant, go through more examination than other employees.

***

After this meeting [with County's Deputy Manager], King sent a letter to J's personal physician, who then wrote that J was not medically qualified for firefighter training. King then sent this letter to Diane Mulloney—who worked for Director Kushner—and Mulloney sent it to the fire school. J was then dismissed from fire school in April.

***

King sent Kushner and Mulloney a final written determination advising that J 'remained medically unqualified for the EMT position' but recommended further testing. After sending this letter, Deputy County Manager Gary Hester contacted King and told her 'that under no circumstances' would J be required to undergo more testing. Hester's apparent concern was that more was being required of J than of other

applicants. King thought that Hester was 'hostile and belligerent.' In the end, County Manager Freeman decided to place J in a non-firefighter EMT position.

***

Later that month, in September 2015, Kushner informed King that the county was going to put King's contract out for bids through a Request for Proposals, or "RFP" process. King had served in her role pursuant to three-year contracts which had been renewed without incident since she began working for the county in 2000.

***

Although King received the highest score out of the submitted bids, the selection committee did not make an official recommendation to the county board to renew King's contract… After King informed Freeman that she would stop providing services, the county's procurement director, Fran McAskill, rejected both RFP proposals. According to McAskill and Freeman, the proposals were officially rejected because after King's abrupt decision to stop providing these services, the county had to move fast and decided to enter into an agreement with a different provider.

J ultimately re-enrolled in the firefighter academy, got his medical clearance, and has been working a firefighter since November 2016."

Holding:

"The district court properly granted summary judgment because King spoke in her role as an employee when she expressed concerns with county employees about J's hiring. Her speech was therefore not protected by the First Amendment. King spoke pursuant to her official job duties, the purpose of her speech was work-related, 13 and she never spoke publicly. When viewed together, these factors paint a clear picture of a person speaking as an employee and not as a private citizen.

***

It is not entirely clear what speech King asserts to be protected by the First Amendment in her case. Her briefing appears to focus on the two meetings she had with Deputy Manager Thomas and County Manager Freeman. As will be explained below, King stresses the importance of her comments about 'reverse discrimination' and these meetings appear to be the only times King raised the issue.

***

The Supreme Court's decision in *Garcetti* supports this. In *Garcetti*, a district attorney alleged that he was retaliated against for speaking out about an allegedly faulty warrant, but the Court determined that the district attorney's speech was not protected. 'The controlling factor [was] that his expressions were made pursuant to his duties as a calendar deputy.' *Garcetti*, 547 U.S. at 421. That is, he only spoke about this issue because his job required him to speak about it. Like the plaintiff in *Garcetti*, the impetus for King's speech was her job-related responsibilities."

Legal Lessons Learned: Public employees have limited First Amendment rights; reverse discrimination not proven.

File: Chap. 9, Americans With Disabilities Act

WI: LIGHT DUTY WITH INJURED ANKLE – BUT TENNIS SHOES NOT ALLOWED – LAWSUIT MAY PROCEED / WORKERS COMP

On Feb. 27, 2019, in Keith Daniel v. City of Minneapolis, the Supreme Court of MN held (5 to 2), "To give effect to the plain language of the workers' compensation act and the human rights act, we hold that an employee can pursue claims under each act because each act provides a distinct cause of action that redresses a discrete type of injury to an employee."

Facts:

> "Daniel worked as a firefighter for the Minneapolis Fire Department for 14 years. While employed, Daniel suffered numerous work-related injuries, including many injuries to his right ankle and to his shoulders. His complaint focuses on the Department's response to his request for a footwear accommodation.
>
> While performing rescue duties in August 2014, Daniel injured his right ankle. After this injury, Daniel's doctor gave him a prescription for supportive 'tennis shoes with arch support + high rescue boot high ankle' to reduce pain and improve ankle stability.
>
> Daniel filed a claim petition for workers' compensation benefits to pay for the cost of the shoes and inserts prescribed by his doctor, as well as for lost wages. As part of the claim process, a doctor conducted an independent medical examination for the City. The doctor concluded that Daniel's ankle issues were 'aggravated by his ... need to walk on uneven surfaces wearing heeled shoes at work.' He recommended that Daniel wear flat shoes but opined that Daniel could work full time without restrictions. The City accepted liability for Daniel's workers' compensation claim in January 2015.
>
> After a captain told Daniel that he could wear black tennis shoes in the station house, Daniel purchased black tennis shoes and fitted them with special inserts. The City compensated Daniel for the black tennis shoes, orthotic inserts, supportive rescue boots, and lost wages. Daniel then wore the tennis shoes at the station house for about 6 to 8 weeks, until May 2015, when the Deputy Chief told him that he could no longer wear them because they did not comply with the Department's policy for station shoes.
>
> ***
>
> Daniel asserts that wearing the tennis shoes 'did not re-aggravate his ankle injury,' but after he reverted to wearing station shoes, his ankle started to 'swell' again and 'exacerbated his pain.' Two months after being told that he could not wear his prescribed tennis shoes, Daniel reinjured his ankle and soon thereafter seriously injured his shoulder when he lost his footing climbing down from a fire truck.
>
> The Department placed Daniel on light-duty status after the shoulder injury. While working on light-duty status, the Department did not allow Daniel to wear his prescribed tennis shoes. Because Daniel claimed that not being able to wear the prescribed shoes made the light-duty job fall outside of his physical restrictions, the Department placed him on leave. The Department told him that he could return to work if his work restrictions allowed him to wear shoes that complied with the Department's footwear policy.

While on injury leave, Daniel and the Department engaged in 'numerous' meetings to discuss a shoe that would comply with the Department's uniform policy and Daniel's footwear prescription; they never agreed on an acceptable shoe. The Department informed Daniel that if he wished to receive workers' compensation benefits for his injury and continue his employment, he would have to comply with the Department's uniform guidelines. Daniel then sued the City in December 2015, asserting claims under the Minnesota Human Rights Act, Minn. Stat. §§ 363A.01–.44 (2018), and the Minnesota Workers' Compensation Act, Minn. Stat.§§ 176.001–.862 (2018). He claims that the City violated the human rights act by not allowing him to wear doctor-prescribed tennis shoes inside the station house, which, he alleges, was a reasonable accommodation. He also maintains that the City retaliated against him for seeking an accommodation.

***

Daniel accepted the early retirement benefits in March 2016, ending his employment with the City.

***

In June 2016, Daniel settled his workers' compensation claims for about $125,000. The settlement agreement identified and covered specific work-related, physical injuries that Daniel sustained between 2001 and 2015, including his ankle injuries."

Holding:

"Employer liability under the workers' compensation act turns on the exact nature and cause of the injury because the workers' compensation scheme was meant to replace the tort system of fault-based adjudication for workplace injury claims, with a system of strict liability that ensured that injured workers would receive expedient relief.

***

Here, the workers' compensation act functioned as the Legislature intended. Regardless of the City's fault for Daniel's ankle injury, the City accepted liability under the workers' compensation act and compensated him because his ankle injury was a 'physical injury' that arose out of and during the course of his employment with the Department. See Minn. Stat. §§176.011, subd. 16, .021, subd.1. Specifically, Daniel received financial compensation for the cost of medical expenses and for the wages that he could not earn while recovering from his ankle injury. He was also reimbursed for the price of the prescribed tennis shoes and the orthotic inserts that he purchased to comply with his doctor's prescription.

Daniel's claimed injury under the human rights act, on the other hand, is different from the physical injury that he sustained at work. He claims a distinct injury arising from the City's later response to his disability, an alleged deliberate failure to accommodate his disability by refusing to allow him to wear his doctor-prescribed tennis shoes. His claims arise under the human rights act's disability-accommodation requirement, which makes it unlawful for an employer to fail 'to make reasonable accommodation to the known disability of a qualified disabled person' unless the employer can demonstrate that the accommodation would impose an 'undue hardship' on the employer. Minn. Stat. §363A.08, subd. 6(a).

***

Just as an employer cannot discriminate on the basis of race or gender, an employer cannot refuse to make reasonable accommodations 'to the known disability of a qualified disabled person,' unless doing so would be an undue hardship to that employer. Id., subd. 6(a). If an employer commits an unfair employment practice against a disabled employee, that employer has, by law, discriminated against that employee in violation of the act, and the employee can sue the employer for that discrimination.

***

Accordingly, reading the plain language of each statute, we conclude that the Legislature intended claims under the two exclusive acts to coexist. The human rights act exists to protect an employee's civil rights; it provides the exclusive remedy for discrimination injuries caused by any employer conduct that the statute defines as 'unfair.'Minn.Stat. §363A.04. The workers' compensation act, by contrast, provides the exclusive remedy for financial and medical losses arising from a work-related 'personal injury.' Minn. Stat. §176.011, subd. 16."

Legal Lessons Learned: FD dress policies, including policies on "station shoes" may need to be modified to "reasonably accommodate" a fire fighter on light duty for an ankle injury. This case will now go to a jury trial, unless settled. See also article about case regarding the "station shoes".

File: Chap. 13, EMS

PA: ATTEMPTED MURDER – CONV. UPHELD - EMT DIDN'T DOCUMENT VICTIM'S WORDS ABOUT WHO SHOT HIM – VICTIM TESTIFIED

On Feb. 22, 2019, in Commonwealth of Pennsylvania v. Gregory Mack, the Superior Court of PA held (3 to 0) that the jury conviction is affirmed. On of the issues on appeal was veracity of the EMT who testified at the criminal trial:

"Moreover, at trial, the emergency medical technician (EMT) who transported the victim to the hospital testified that the victim told him that his friend shot him; on appeal, Appellant claims the testimony was invalid and lacked veracity because the EMT did not make a record of the conversation or subsequently inform the police of it."

Facts:

"Appellant, Gregory Mack, appeals from the judgment of sentence entered on January 27, 2017, following his jury trial convictions for attempted murder, aggravated assault, persons not to possess a firearm, carrying a firearm without a license, carrying a firearm on public streets in Philadelphia, and possession of an instrument of crime. We affirm.

We briefly summarize the facts and procedural history of this case as follows. The aforementioned charges stemmed from an incident that occurred on December 22, 2013, wherein Dajohn Comer was shot numerous times and sustained serious injuries. Appellant proceeded to a jury trial in January 2016 that ended in a deadlock and subsequent mistrial. Following a second trial in October 2016, a jury convicted Appellant of all charges. On January 27, 2017, the trial court imposed an aggregate sentence of 26 to 52 years of incarceration.

***

Appellant claims that his convictions were against the weight of the evidence for several reasons. First, Appellant argues, 'the evidence showed that the [victim] could not and did not identify [A]ppellant during trial [as the perpetrator of the crimes].' Appellant's Brief at 17. Appellant argues that the victim also 'averred

that no one asked him directly who []shot him because he indicated to those to whom he spoke that he did not know who shot him.' Id. Appellant maintains that the victim's statements to police that Appellant shot him were made under the influence of pain pills and unreliable. Id.at 19.

Moreover, at trial, the emergency medical technician (EMT) who transported the victim to the hospital testified that the victim told him that his friend shot him; on appeal, Appellant claims the testimony was invalid and lacked veracity because the EMT did not make a record of the conversation or subsequently inform the police of it. Id.at 18. Appellant additionally claims that the victim's mother, who was also riding in the ambulance, testified that her son was unintelligible, further undermining the EMT's testimony.

***

The EMT testified that although the victim's mother rode to the hospital in the ambulance, she was seated in the front of the vehicle next to the driver. N.T., 10/5/2016, at 106 and 108. The EMT testified that he asks patients multiple questions to keep them alert and to obtain as much information as possible to assist in their medical intervention. Id.at 109-110. When asked who shot him, the victim stated it was a friend. Id.at 113. On cross-examination, the EMT clarified that the victim '[c]ould have said his homie, but he referred to somebody who he knew personally.' Id.at 12.

The EMT also explained that he did not document the statement on his subsequent medical report because 'only medical information [is] supposed to be documented.' Id.at 115.The emergency surgeon testified that the victim 'had two gunshot wounds to his face and four to his torso.' N.T., 10/7/2016, at 52. The surgeon did not know if there were bullets removed from the victim's abdomen, but several bullet fragments were recovered from the victim's head. Id.at 55-56.

***

At trial, the Commonwealth presented the testimony of the victim. Although he testified he could not recall what happened on the night of the shooting or his subsequent statements to police, the Commonwealth presented the victim with his written statement to police, taken soon after his release from the hospital. N.T., 10/5/2016, at 26-40. In that statement, the victim claimed that he was outside of his house with Appellant at 1:30 a.m. on the night in question. Id.at 35. There were no other people present. Id.at 37. Appellant went into the house across the street to retrieve a jacket because he was cold. Id.at 35. When Appellant returned, he stood on the left side of the victim. Id. The victim heard a loud bang in his left ear and fell to the ground. Id. The victim identified Appellant by a photograph to which he attested by signature. Id.at 37-41. The victim also told police that he had been inside the residence where Appellant retrieved his jacket, on three prior occasions, and that Appellant showed him a .25 caliber semi-automatic firearm. Id.at 36-37. The victim testified that he did not want to appear in court, because he now has a son and no longer wants 'to bring the situation up.' Id.at 46.

The Commonwealth also presented the victim's grand jury testimony, which largely mirrored his statement to police. Id.at 53-64. Moreover, the victim additionally testified before the grand jury that when he awoke in the hospital, he told his mother that Appellant shot him. Id.at 65."

Holding:

Based upon our review of the record, we conclude that Appellant's weight of the evidence [argument] is without merit. The Commonwealth presented evidence that Appellant was the sole person present when the victim was shot. The victim told his mother, police officers, and a grand jury that Appellant was the

perpetrator. Further, the EMT who rendered emergency aid immediately after the shooting testified that the victim told him that his friend shot him. While no ballistics evidence was recovered from the scene, the Commonwealth presented evidence that Appellant possessed a .25 caliber firearm that he kept inside the residence he exited immediately prior to the shooting and police witnessed Appellant frequenting another residence wherein they recovered .25-caliber ammunition and a magazine from an area where Appellant spent time. The jury also heard evidence that once detained, Appellant gave false names to police and then fled. Appellant's current claim largely centers on inconsistencies in the witnesses' trial testimony. However, conflicts in testimony are not cause for a new trial. The jury was free to believe all, part, or none of the evidence presented and we may not usurp their findings. Finally, we conclude the jury's verdict was simply not so contrary to the evidence as to shock one's sense of justice.

Accordingly, Appellant is not entitled to relief. Judgment of sentence affirmed."

Legal Lessons Learned: EMS should document a victim's statement concerning who shot him, either on the EMS run report or on a supplemental report. This helps avoid issues on appeal.