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MARCH 2020 – FIRE & EMS LAW Newsletter

[NEWSLETTER IS NOT PROVIDING LEGAL ADVICE.]
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EMS REPORT WRITING / LEGAL LESSONS LEARNED: Prof. Bennett is doing two seminars, March 12, 2020, with Randy Johann, EMS Coordinator, TriHealth at the Ohio BWC Safety Congress, Columbus, OH. Send me e-mail if wish copy of the handout.

Table of Content

Chap. 1, American Legal System

TX: GRANDMOTHER'S 911 CALLS DID NOT GO THROUGH – BABY DIED – T-MOBILE HAS IMMUNITY UNDER STATE LAW

On Feb. 27, 2020, in Bridget Alex v. T-Mobile USA, the U.S. Court of Appeals for 5th Circuit (New Orleans) held (3 to 0) that T-Mobile enjoys immunity under State statute.

> "Seven-month-old Brandon Alex was injured after falling from a daybed. His babysitter dialed 9-1-1 three separate times, and stayed on an unconnected line for over thirty minutes. Unable to connect to a dispatcher, Brandon's grandmother drove him to an emergency room over an hour after the first 9-1-1 call. Brandon was pronounced dead shortly after arriving at the hospital.
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> This court has already held that, under the Supreme Court of Texas's decision in City of Dallas v. Sanchez, 494 S.W.3d 722 (Tex. 2016), Plaintiffs failed to allege proximate cause sufficient to overcome T-Mobile's immunity…. Because T-Mobile and T-Systems are immune under Texas law, the district court did not err in dismissing Plaintiffs' claims against them—we affirm.

Facts:

> "This case comes before us a second time after remand to the district court. See Alex v. T-Mobile USA, Inc., 776 F. App'x 205 (5th Cir. 2019). Brandon Alex's family members sued T-Mobile USA, Inc., T-Mobile US, Inc. (collectively, 'T-Mobile'), Deutsche Telkom North America, Inc., and T-Systems North America, Inc. (collectively, 'T-Systems'), alleging that a defect in their 9- 1-1 technology prevented first responders from arriving in time to save Brandon's life. Because, as we previously concluded, T-Mobile and T-Systems are immune under Texas law, we AFFIRM the district court's dismissal."

Holding:

> "Because T-Mobile and T-Systems are immune under Texas law, the district court did not err in dismissing Plaintiffs' claims against them—we affirm."

Legal Lessons Learned: State statutes often provide immunity to 911 equipment suppliers; this helps avoid suppliers charging municipal governments will large insurance costs.

File: Chap. 1, American Legal System

MI: ARSON CASE TO BE RE-TRIED – ARSON INVESTIGATORS CHANGED OPINION – 2 POINTS OF ORIGIN TO 1 LOCATION

On Feb. 25, 2020, in People of the State of Michigan v. Joshua Mark Burger, the Michigan Court of Appeals held (3 to 0) that the defendant must re-tried. Two arson investigators also changed their opinion from two points or origin to one, but not disclosed to defense until first day of trial. Also, defendant owned a successful pawn shop, and the trial court improperly prohibited him from calling two witnesses who would testify his pawn shop was financially doing well – insurance adjustor, and the landlord.

> "Defendant's primary theory of the case was spontaneous combustion of the rag soaked with linseed oil that he had been using to finish a guitar in the days leading up to the fire, as he argued in closing. ***
> It is undisputed in this case that defendant learned for the first time at trial that the fire chiefs had changed their opinion regarding the fire's point of origin. In their original reports, which were disclosed to defendant, both chiefs opined that the fire had two points of origin. However, the chiefs later altered their conclusions,

indicating that indeed, the fire had a single point of origin. We conclude that this information was suppressed, as it was not disclosed until the beginning of trial, and that it was material to defendant's case."

Facts:

"This case arises out of a fire that occurred on April12, 2017, at defendant's pawn shop, for which defendant made an insurance claim. Defendant, together with his father, Christian Whitt, co-owned the pawn shop called Pawn Max, or Southgate Exchange Incorporated. The pawn shop was purchased in 2012 for $125,000 on a five-year-land contract, and was paid off within six months.

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On the day of the fire, defendant had been staining a guitar with linseed oil on a rag. Defendant was storing the project on a plywood shelf in the pawn shop's storage room. At 7:23 p.m., security cameras showed defendant leaving the storage room for 10 seconds, then returning. Defendant stayed in the storage room until 7:27:39 p.m. before walking out of the room alone and locking the door. At 7:27:55 p.m., a fire could be seen in the storage room. Defendant turned off the lights in the pawn shop office, set the alarm, and left the building at 7:28:13 p.m.

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The fire was investigated by Southgate Fire Chief Michael Sypula, Wyandotte Fire Chief Jeffrey Carley, and Richard Kobarsky, a forensic engineer and owner of a forensic engineering firm called Pyrotechnical Investigations who was called by the defense and qualified as an expert in the field of fire investigation, testified that he investigated the fire on May 31, 2017.

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Chief Sypula testified that in addition to ruling-out electrical, mechanical, and natural causes of the fire, he relied on the firefighters' statements that there were two separate fires and the security camera footage showing defendant in the storage area 60 to 90 seconds before the fire started to conclude that the fire was incendiary. Chief Sypula also relied on video footage showing defendant 'repositioning a camera' inside the storage room earlier that day and defendant putting rubber gloves on at 7:20 p.m. Chief Sypula did not find what actually started the fire.

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Moreover, defendant's primary theory of the case was spontaneous combustion of the rag soaked with linseed oil that he had been using to finish a guitar in the days leading up to the fire, as he argued in closing. One of defendant's employees testified about defendant using linseed oil on a rag to finish a guitar the day of the fire and for about five days preceding the fire. Kovarsky testified about rags and a metal paint container found on a shelf in the storage area believed to be the point of origin and his belief that the fire started as a result of spontaneous combustion. Indeed, defendant's spontaneous combustion theory was consistent with the fire chiefs' amended opinion that the single point of origin was a shelf in the storage room. Regardless, defendant has not shown that the prosecution's late disclosure of the fire chiefs' change of opinion would have likely affected the outcome of the trial."

Holding:

"Where financial motive may be relevant of arson, id., it logically follows that a lack of financial motive is also relevant to whether a defendant committed arson. Thus, Desantis' testimony was relevant, and should have been admitted. Defendant should have the opportunity to fully pursue his defense on remand.

***

Although the prosecution elicited testimony about this change of opinion first, defendant emphasized on cross-examination that Chief Sypula and Chief Carley changed their opinions about the number of points of

origin before trial without notifying defendant, and this change of opinion before trial was favorable to defendant because it allowed him to undermine the reliability of their testimony. *** Regardless, defendant has not shown that the prosecution's late disclosure of the fire chiefs' change of opinion would have likely affected the outcome of the trial."

Legal Lessons Learned: Prosecutors must disclose, prior to trial, when arson investigators change their findings from two points of origin to one point.

File: Chap. 2, LODD & Safety

OH: FF INJURED KNEE STEPPING DOWN FROM ENGINE — STEP WAS MORE 24 INCHES OFF GROUND - VSSR PENALTY

On Feb. 11, 2020, in The State ex rel. Madison Fire District v. Industrial Commission of Ohio, 2020 Ohio 463, the Ohio Court of Appeals for Tenth Appellate District, held (3 to 0) that firefighter Joseph P. Purcell, who injured his right knee stepping out of the cab of a 1995 Spartan Darley, was properly awarded his VSSR [violation of specific safety regulation] claim; 15% to 50% of workers comp. award.

"In 2009, the department commissioned a master plan evaluation by an independent third party to do a study of every aspect of the fire department. As a part of that study, the fire engines in use by the department at that time were evaluated. Engine 2124 was a part of that evaluation. The evaluation report states that the department should consider installing steps into cab for safety to engine 2124 [1995 Spartan Darley]."

Facts:

"The Staff Hearing Officer finds that there was a VSSR violation of 4123:1-21-04(H)(c) in that the step to ground level on engine 2124 exceeded the maximum height requirement of 24 inches. The SVIU [Special Violations Investigations Unit] report dated 12/06/2017 shows that the step to the ground on engine 2124 measured 25-1/8 inches at the time of this industrial injury. It is further found that the Employer, subsequent to this industrial injury, sent engine 2124 for a modification to have an additional step added below the original step on engine 2124 to reduce the height of the step to ground level to less than 24 inches and remediate the violation. Chief [Tod] Baker testified at hearing that it was his belief that the modification to the step was in response to this injury and to avoid anyone else from being injured."

Holding:

"The magistrate finds the commission did not abuse its discretion when it determined the information contained in the 2009 evaluation was sufficient to put relator on notice that the step should have been inspected. Had the step been inspected, relator would have known it exceeded the 24 inch requirement. The commission cited the evidence on which it relied and provided a brief explanation for its decision and this magistrate finds relator has not demonstrated the commission abused its discretion."

Legal Lessons Learned: FDs should review the Ohio Administrative Code regulation on fire apparatus, including the height of steps. VSSR penalties can range from 15 to 50% of the maximum allowable weekly compensation rate granted the injured worker.

File: Chap. 2, LODD / Safety

DE: ROLLING BLACKOUTS – THREE FF KILLED, THREE INJURED – NOT VIOLATION OF FED CONSTIT. RIGHTS

On Jan. 9, 2020, in Firefighter Brad Speakman, et al. v. Dennis P. Williams, City of Wilmington, et al, U.S. District Court Judge Maryellen Noreika dismissed the lawsuit by the families of the firefighters killed on Sept. 24, 2016. The Court held that the "rolling bypass" practices may be a basis for a tort lawsuit in state court, the practice is not a violation of the substantive rights guaranteed by the Fourteenth Amendment to the U.S. Constitution.

> "This case, like *Estate of Phillips*, Estate of Phillips, [Washington, D.C. line of duty deaths in] Estate of Phillips v. D.C., 455 F.3d 397 (D.C. Cir. 2006)], involves a tragedy. Lieutenant Christopher Leach, Senior Firefighter Jerry Fickes, and Senior Firefighter Ardythe Hope died, and Firefighter Brad Speakman, Senior Firefighter Terrance Tate, and Lieutenant John Cawthray suffered severe injuries. But as the *Estate of Phillips* court recognized, the Constitution does not provide a basis to address all injuries…. The Court has no doubt that, as Plaintiffs argue … a relationship exists between shift staffing and firefighter safety. For the reasons articulated, however, that relationship alone does not transform Present Defendants' conduct into substantive due process violations [of the 14Th Amendment of U.S. Constitution]…. In other words, like the firefighters in *Estate of Phillips*, Plaintiffs allege that Present Defendants (along with others) exposed Firefighter Plaintiffs to 'additional risks of injury unknown to [them] when they joined' the WFD. 455 F.3d at 407. Yet, as explained, such increased risk is not enough to establish a substantive due process violation where the underlying risk is inherent in the injured parties' profession and is not so extremely elevated that employees will almost certainly and immediately be injured if they carry out their work."

Facts:

> "The [U.S. Magistrate's] Report finds that Plaintiffs do not satisfy the 'foreseeable and fairly direct' requirement of a state-created danger claim…
> In regard to the 'fairly direct' requirement, the Report finds that the facts alleged by Plaintiffs are insufficient as to all defendants because '[t]he rolling bypass policy and/or inadequate staffing were not the direct catalyst for the harm. This fire was the result of arson committed by a third party.' (D.I. 57 at 18).
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> ***
> Patrick left his position as Fire Chief in January 2013, more than three and one-half years before the September 24, 2016 fire. (D.I. 57 at 2). During that period, as Plaintiffs' Complaint details, various intervening events occurred. For example:
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> •A new mayor, Dennis P. Williams ('Williams'), was elected and a new fire chief, Anthony S. Goode was appointed;
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> •Williams and Goode enacted a similar, but 'new policy of 'conditional company closures';
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> •Williams and Goode further understaffed the WFD by delaying the filling of vacancies and transferring numerous firefighters from fire suppression to administrative roles;
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> •The Wilmington City Council passed legislation to mandate the hiring of more firefighters and address other issues of fire safety;
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> •Williams and Goode refused to comply with the new legislative requirements;
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> •[T]he City [began] to experience rolling bypass more often than not.'(D.I. 1 ¶¶ 26, 28, 197-99, 204, 226-58).

According to Plaintiffs, these changes 'continued to make, and by themselves independently made, the WFD an unmanageably dangerous place, and an even more dangerous place than it previously had been under defendant[]' Patrick.7 (D.I. 1 ¶ 180). In addition to all of these intervening events related to the WFD, the fire that ultimately harmed Plaintiffs was the result of arson by a third party. (D.I. 57 at 8)."

Holding:

"In other words, like the firefighters in *Estate of Phillips*, Plaintiffs allege that Present Defendants (along with others) exposed Firefighter Plaintiffs to 'additional risks of injury unknown to [them] when they joined' the WFD. 455 F.3d at 407. Yet, as explained, such increased risk is not enough to establish a substantive due process violation where the underlying risk is inherent in the injured parties' profession and is not so extremely elevated that employees will almost certainly and immediately be injured if they carry out their work."

Legal Lessons Learned: Similar to the Washington, D.C. line-of-duty-death case in Estate of Phillips, this lawsuit in Federal court has been dismissed prior to trial.
Note: "Woman gets 30 year sentence in arson that killed 3 Wilmington firefighters," (Dec. 13, 2019).

File: Chap. 3, Homeland Security

CA: ILLEGAL IMMIGRANTS CROSSING US BORDER - SENT BACK TO MEXICO – INJUNCTION AGAINST FED. PROGRAM UPHELD BY 9th CIR.

On Feb. 28, 2020, in Innovation Law Lab v. Chad Wolf, Acting Secretary of Homeland Security, the U.S. Court of Appeals for the 9th Circuit (San Francisco) held (2 to 1) that the nationwide preliminary injunction issued by a U.S. District Court judge, against the Federal Government's new Migrant Protection Protocols ("MPP"), will remain in place.

"The MPP has had serious adverse consequences for the individual plaintiffs. Plaintiffs presented evidence in the district court that they, as well as others returned to Mexico under the MPP, face targeted discrimination, physical violence, sexual assault, overwhelmed and corrupt law enforcement, lack of food and shelter, and practical obstacles to participation in court proceedings in the United States. The hardship and danger to individuals returned to Mexico under the MPP have been repeatedly confirmed by reliable news reports."

Facts:

"Plaintiffs brought suit in district court seeking an injunction against the Government's recently promulgated Migrant Protection Protocols ('MPP'), under which non-Mexican asylum seekers who present themselves at our southern border are required to wait in Mexico while their asylum applications are adjudicated. The district court entered a preliminary injunction setting aside the MPP, and the Government appealed. We affirm.

In January 2019, the Department of Homeland Security('DHS') promulgated the MPP without going through notice-and-comment rulemaking."

Holding:

"Because plaintiffs have successfully challenged the MPP under §706(2)(A) of the APA, and because the MPP directly affects immigration into this country along our southern border, the issuance of a temporary injunction setting aside the MPP was not an abuse of discretion."

Legal Lessons Learned: The Federal Government may now ask for all the judges on the 9th Circuit ("en banc") their appeal, or seek an appeal to the U.S. Supreme Court (requires vote of 4 of 9 Justices to take the case).

File: Chap. 3, Homeland Security

NY: SANCTUARY CITIES –- 2nd CIRCUIT UPHOLDS FED. GOV'T RIGHT TO DENY GRANTS TO STATES / CITIES

On Feb. 26, 2020, in The State of New York, Connecticut, New Jersey, Washington, Massachusetts, Virginia, Rhode Island, and City of New York v. United States Department of Justice, the U.S. Court of Appeals for the Second Circuit (New York), held (3 to 0) that the Federal Government has the statutory right to withhold Edward Byrne Memorial Program* Criminal Justice Assistance grants from sanctuary states and municipalities, setting aside an injunction issued in 2018 by a U.S. District Court judge. [*Court in its decision, Footnote 2: "The Byrne Program is named for New York City Police Officer Edward Byrne who, at age 22, was shot to death [Feb. 26, 1988] while guarding the home of a Guyanese immigrant cooperating with authorities investigating drug trafficking. The case is well known in this circuit, where five persons were convicted in the Eastern District of New York for their roles in Byrne's murder. Among these was Howard 'Pappy' Mason, a drug dealer who, from his New York State prison cell, ordered subordinates to kill a police officer in retaliation for Mason's own incarceration."]

> "The principal legal question presented in this appeal is whether the federal government may deny grants of money to State and local governments that would be eligible for such awards but for their refusal to comply with three immigration-related conditions imposed by the Attorney General of the United States. Those conditions require grant applicants to certify that they will (1) comply with federal law prohibiting any restrictions on the communication of citizenship and alien status information with federal immigration authorities, see 8U.S.C.§1373; (2) provide federal authorities, upon request, with the release dates of incarcerated illegal aliens; and (3) afford federal immigration officers access to incarcerated illegal aliens. *** For reasons explained in this opinion, we conclude that the plain language of the relevant statutes authorizes the Attorney General to impose the challenged conditions.

Facts:

> "The Edward Byrne Memorial Justice Assistance Grant Program ('Byrne Program'), codified at 34U.S.C.§§10151–10158, is the vehicle through which Congress annually provides more than $250 million in federal funding for State and local criminal justice efforts.
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> ***
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> The Attorney General's authority to disapprove Byrne applications not satisfying the program's statutory requirements is implicit in the statutory provision tempering that authority with a required opportunity for correction: the Attorney General 'shall not finally disapprove' a deficient application 'without first affording the applicant reasonable notice of any deficiencies in the application and opportunity for correction and reconsideration.' Id. §10154."

Holding:

> "In sum, we conclude that the plain language of §10153(a)(5)(D), authorizes the Attorney General to require certification in a form that specifically references federal laws applicable either to the Byrne grants sought or to the State or locality seeking that grant. Because 8U.S.C.§1373 is a law applicable to all plaintiffs in this action, the Attorney General was authorized to impose the challenged Certification Condition and did not violate either the APA or separation of powers by doing so."

Legal Lessons Learned: Sanctuary cities are a "hot" political issue; the states who brought this lawsuit may now request U.S. Supreme Court to hear their appeal (requires vote of 4 of 9 justices for the Court to hear an appeal). Federal appeals courts in Philadelphia, Chicago and San Francisco have upheld injunctions against these federal restrictions.
See article on the decision of the Federal appeals court decisions concerning sanctuary cities.

Chap. 6, Employment Litigation

LA: RIDING OUT-OF-RANK – INJUNCTION UPHELD - FD MAY NOT THREATEN FF WITH DISCIPLINE FOR REFUSING

On March 4, 2020, in Brian Drumm, et al. v. City of Kenner, the Fifth Circuit Court of Appeals of Louisiana upheld (2 to 1) the trial court's injunction.

> "Kenner's position, that the Fire Chief may force persons to work jobs outside their class against their will under threat of disciplinary action denies the existence of a voluntary, contractual agreement of employment in which both parties may freely negotiate their duties and responsibilities. Recognizing that plaintiffs' employment with Kenner is a voluntary, contractual agreement, we conclude that the 'appointment' referenced in La. R.S. 33:2496 is in the nature of an offer and acceptance of employment. Forcing an employee to work out of class against his will under threat of discipline or other employment action is an unlawful act, and therefore plaintiffs were not required to show irreparable harm. Accordingly, we find Kenner's argument that the district court legally erred in granting the preliminary injunction is without merit.

Facts:

> "In this case arising from an employment dispute between the City of Kenner ('Kenner') and its firefighters, Kenner appeals a judgment of the district court granting a preliminary injunction prohibiting Kenner from forcing firefighters to work 'out of class' on temporary or substitute appointments under threat of disciplinary or other employment action.
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> ***
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> In the petition, plaintiffs alleged that Kenner has ordered Mr. Drumm and other employees of the fire department to temporarily work 'out of class' against their wills and under threat of disciplinary action. Plaintiffs alleged further that Kenner is forcing lower ranking employees to temporarily work 'out of class' instead of calling available employees who hold the higher positions on an overtime basis, or creating new permanent higher ranking positions, in an effort to reduce payroll costs to Kenner.
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> Footnote 2: The statute [La.R.S. 33:2496] also allows emergency appointments to be made at any time the needs of the service require because of a local emergency of a temporary and special nature. The parties concede that the temporary appointments being made in this case are substitute appointments, not emergency appointments, and the judgment granting the preliminary injunction makes no reference to emergency appointments."

Holding:

> "Forcing an employee to work out of class against his will under threat of discipline or other employment action is an unlawful act, and therefore plaintiffs were not required to show irreparable harm. Accordingly, we find Kenner's argument that the district court legally erred in granting the preliminary injunction is without merit."

Legal Lessons Learned: Riding-out-rank is quite common in career FDs and is obviously a method to reduce overtime costs. The Court noted this testimony: "The interim Fire Chief testified that when he needed a captain for a shift, he did not ask already qualified captains to step in temporarily because paying them overtime is more expensive than paying lower ranked employees an extra $1.16/hour to work out of class."

File: Chap. 6, Employment Litigation

NC: FIREFIGHTER / ALSO FD BOARD MEMBER – OPPOSED NEW AERIAL - FIRED – FREE SPEECH LAWSUIT TO PROCEED

On March 2, 2020, in Michael Cole v. Andrew Weatherman & Lake Norman Volunteer Fire And Rescue Department, et al., U.S. District Court Judge Kenneth D. Ball, Western District of North Carolina (Statesville Division) held that the lawsuit may proceed; plaintiff was one of 20 paid firefighters on this "volunteer" fire department.

> "Defendants contend that Plaintiff's free speech claim fails because he was speaking as an employee on an internal LKNVFD[Lake Norman Volunteer Fire & Rescue Department] matter. The Court disagrees. Plaintiff's Amended Complaint alleges that he was a member of 'the statutorily authorized commission of the fire protection district, which administered the taxes levied for and appropriated to it by the County.' (Doc. No. 13, at ¶ 11). This Board is comprised of employees and volunteers of the LKNVFD as well as members of the community at large. *Id*. Even though Plaintiff was an employee of LKNVFD, Plaintiff alleges that his statements opposing the purchase of the new truck were made as a citizen duly elected to the board and not as a firefighter exercising his job duties as an employee of LKNVFD. His comments on the wasteful expenditure of public money appropriated from a special tax levy on property in the fire protection district are adequately alleged to be a public matter, not purely an internal employment issue. *See Pickering v. Bd. of Educ*., 391 U.S. 563, (1968) (holding that a teacher's concerns about a school board's use of tax dollars was a matter of public concern); *Urofsky v. Gilmore*, 216 F.3d 401, 406-07 (4th Cir. 2000) (en banc) (noting speech upon matters of 'social, political, or other interest to a community' is protected under the First Amendment).

Facts:

> "For purposes of this motion, the Court accepts as true all well-pled facts and draws all reasonable inferences in Plaintiff's favor. Plaintiff first volunteered as a fireman for LKNVFD, which serves the tax-supported "fire protection district" in southern Iredell County, about six years before his termination. (Doc. No. 13: Amended Complaint, at ¶ 10). Under state law, LKNVFD is treated as a municipal corporation. *Id*. at ¶ 2. Plaintiff later became one of 20 paid firefighters for LKNVFD and held that position for three and a half years before he was terminated. *Id*. at ¶ 10. Though classified as part-time, Plaintiff worked enough hours to earn a significant income and regularly earned overtime pay. *Id*.
>
> ***
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> Several months before Plaintiff was fired as an employee, the ladder on the LKNVFD's ladder truck failed to retract properly while a fire marshal was using the ladder's bucket to inspect a fire scene. *Id*. at ¶ 14. Though the ladder was repaired, Defendant David Brawley, LKNVFD's Operations Deputy Chief, sought to purchase a brand-new ladder truck and formed a subcommittee of the Board to consider various options regarding the ladder truck. *Id*. at ¶¶ 14-15. Plaintiff, as an elected member of the Board, was named to the subcommittee. *Id*. at ¶ 13.
>
> Plaintiff openly opposed the purchase of a new ladder truck because he was concerned that the significant cost of about $1 million in tax dollars was unnecessary and wasteful. Id. at ¶¶ 14-17. He voiced his opposition to this significant tax expenditure both at a Board meeting and during an informal discussion

among a group gathered at the LKNVFD station that included Brawley. Id. at ¶¶ 17-18. Hours before the scheduled Board meeting at which the vote on the truck purchase was to take place, Defendant Andrew Weatherman, Chief of LKNVFD, terminated Plaintiff, claiming he had damaged the air conditioning shroud on the existing ladder truck during a routine test that occurred months earlier. Id. at ¶¶ 21, 30. Weatherman also informed Plaintiff that he no longer had a seat on the board due to his termination, even though the bylaws of the board did not require Plaintiff's removal. Id. at ¶¶ 19-20, 30-31. LKNVFD then purchased the new truck. Id. at ¶ 20."

***

Under Supreme Court precedent dating back to 1968, public employees cannot be terminated for speaking on matters of public concern, without some showing that the disruption caused at work by the speech outweighed the First Amendment right of the speaker. Pickering, 391 U.S. at 568, 573-74. Over the 50 years since Pickering, the Supreme Court and the Fourth Circuit have consistently reinforced this right. See, e.g., Lane v. Franks, 573 U.S. 228 (2014); Garcetti v. Ceballos, 547 U.S. 410 (2006); Connick v. Myers, 391 U.S. 563 (1968); Grutzmacher, 851 F.3d 332; McVey, 157 F.3d 271. Accordingly, the Court finds that Plaintiff has plausibly alleged a section 1983 claim against Weatherman and Brawley in their individual capacities."

Holding:

"North Carolina's Constitution provides the same, if not more, protection than the United States' Constitution. Therefore, Defendants' motion to dismiss Plaintiff's state law claims related to free speech meets the same fate, for the same reasons, as Defendants' motion to dismiss Plaintiff's section 1983 claim and will be denied."

Legal Lessons Learned: Another decision reviewing the U.S. Supreme Court's "balancing test." FD need to use extreme caution in terminating a firefighter for speaking on matters of public concern, particularly if they also serve on the FD's Board.

File: Chap. 6, Employment Litigation

OH: CAPTAIN PROMOTION – SENIORITY POINTS ONLY FOR THOSE SCORED AT LEAST 70 – NEW SELECTION

On Feb. 5, 2020, in State ex rel. Michael A. Rimroth v. City of Harrison, the Ohio Court of Appeals for the First District (Hamilton County), held (3 to 0) that the promotion of the candidate who only scored 65 was inappropriate, since only the two candidates (plaintiff and one other) who scored 70 or higher were entitled to added points for seniority. The Court reversed the trial judge's order for a new written test, since the test was fair. Case sent back to the city's Civil Service Commission, and Mayor can now make a new promotion decision between plaintiff (scored 74) and the other candidate (scored 75).

"[Michael] Rimroth was a firefighter employed by the city of Harrison. On April 4, 2015, he took the written promotional examination for the position of fire captain, along with firefighters Dennis Helcher and Cameron Kugler. Kugler received a score of 75, Rimroth received a 74, and Helcher received a 65. A passing score for the examination was 70. As a result, only Kugler and Rimroth were listed as having passed the examination. *** In this case, both sides agree that it was inappropriate for the commission to include the service credit before determining if the candidates received a passing score. We agree with this consensus. The issue that remains is determining if the trial court's remedy was proper and, if not, what remedy lies for the violation of the statute. *** The proper remedy, therefore, is to remand the cause to the civil service commission for the appropriate award of credit to only those individuals who had received a passing score on

the written examination: Kugler and Rimroth. Once those scores are calculated, the commission should forward the resulting list for further consideration."

Facts:

"Helcher argued that he was entitled to additional credit on his test score because the city had previously awarded the seniority or military credit *before* determining whether an examinee had passed the test. The city law director instructed the civil service commission to adjust Helcher's score, and he received a passing grade as a result.

***

After the adjustments, all three candidates proceeded to the interview portion of the selection process. Of the three candidates, Kugler was eliminated first as a candidate. The mayor then decided to promote Helcher.

***

After the adjustments, all three candidates proceeded to the interview portion of the selection process. Of the three candidates, Kugler was eliminated first as a candidate. The mayor then decided to promote Helcher. The chief of the fire department testified that, between the two of them, he would have chosen Rimroth over Helcher—though the mayor had the final say. He also said that, had only Kugler and Rimroth been under consideration, he and the mayor would have taken a closer look at the two candidates. The record does not indicate whether the mayor would have chosen Rimroth if he had to choose between Rimroth and Kugler.
A year later, Rimroth complained to the commission that he should have been promoted because the commission should not have used seniority as a factor to determine whether Helcher passed the examination. The commission declined to issue Rimroth a promotion. Rimroth then filed an administrative appeal of that decision with the trial court. He also filed a petition for a writ of mandamus in which he sought an order compelling his promotion with back pay.
The magistrate conducted a bench trial and issued an opinion in which he ordered Helcher to be demoted, the promotion list to be vacated, and the city to conduct a new examination. Rimroth objected to the decision of the magistrate. He argued that the proper remedy was to award the position to him since he was the only candidate not eliminated by the mayor who was legally eligible for promotion. The trial court overruled Rimroth's objections and adopted the decision of the magistrate.

***

While the facts in this case are the exact opposite of those in *Davis*, we find the remedy fashioned by the court in *Davis* [*Davis v. Mun. Civ. Serv. Comm. for City of Marion*, 3d Dist. Marion No. 9-78-5, 1979 WL 207993 (Jan. 12, 1979] to be appropriate. As in *Davis*, we have an examination that was properly administered, but the award of extra credit for seniority and other factors was improperly applied. As in *Davis*, the grades are salvageable merely by properly crediting the seniority credits.:

Holding:

"The proper remedy, therefore, is to remand the cause to the civil service commission for the appropriate award of credit to only those individuals who had received a passing score on the written examination: Kugler and Rimroth. Once those scores are calculated, the commission should forward the resulting list for further consideration."

Legal Lessons Learned: Promotion processes should clearly specify when seniority and military credits can be added to test scores.

PA: PREGNANT MEDIC – SUPERVISOR COMMENTS – MAY SOON "HATCH" - NOT HOSTILE WORKPLACE – SHE WAS SUSPENDED FOR CAUSE

On March 4, 2020, in Janel Fritz v. Uwchlan Ambulance Corps, Inc., U.S. District Court Judge Nitza I. Alejandro, Eastern District of Pennsylvania, granted defense motion for summary judgment, finding no pregnancy or gender discrimination.

> "Plaintiff also contends that Defendant's employees repeatedly urged her to begin maternity leave prior to the birth of her child, and prior to the date required and directed by her doctor. When Supervisor John Applegate ('Supervisor Applegate') encouraged Plaintiff to go out on leave earlier than Plaintiff had planned, he told her that he would 'save her spot' for twelve weeks. Supervisor Applegate made the following comments to Plaintiff while she was pregnant: 1) Plaintiff's shirt looked like 'a tent,' 2) Plaintiff looked like she was 'ready to pop,' 3) Plaintiff should not work too hard because she may 'hatch,' and 4) Plaintiff should let him know 'if [she] hatch[es].' *** "[T]his Court finds that the record does not contain any evidence to support a nexus between Plaintiff's pregnancy and her suspension. The record clearly reflects, and Plaintiff repeatedly acknowledges, that she was suspended for accusing a coworker of benefiting from nepotism. Although Plaintiff baldly contended in her complaint that the proffered reason for her suspension was pretextual and baseless, she continually acknowledges that she was suspended because of her statements about Matthew not being subject to discipline due to his familial relationship with a supervisor. Because there is no nexus between Plaintiff's pregnancy and her suspension, she cannot satisfy the fourth element of her pregnancy discrimination claim. Therefore, summary judgment is granted in favor of Defendant with respect to Plaintiff's pregnancy discrimination claim."

Facts:

> "Plaintiff, a female Emergency Medical Technician/Paramedic ('EMT/P'), was employed by Defendant Uwchlan Ambulance Corps, Inc. at all relevant times. In the complaint, Plaintiff describes instances of negative treatment at work, which she contends were based on her gender and her pregnancy. While Plaintiff references a series of interactions with coworkers and supervisors that she found offensive, the most relevant instances are detailed below.
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> ***
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> In June 2017, Plaintiff was in the third trimester of her pregnancy and requested an accommodation from Defendant in the form of lifting assistance during the remainder of her pregnancy. In response to her request, Defendant assigned a second EMT/P to Plaintiff's shifts.
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> ***
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> Footnote 4: "[I]n Plaintiff's list of specific grievances; "After he called me a bitch, I told Matt Applegate the only reason he gets what he does it because of who his father is." . . . Supervisor McCarthy 'told me, 'pack your stuff and go home. We don't stand for people saying they get what they want because of who their daddy is.'); Fritz Dep. at 112:25-113:4 (when asked why Supervisor McCarthy suspended Plaintiff, Plaintiff said, 'I was suspended because Matt was upset and I think people were offended that I said he was who he was because of who his daddy is.'"

Holding:

> For the reasons stated herein, Plaintiff's claims fail as a matter of law and Defendant's motion for summary judgment is granted. Accordingly, judgment is entered in favor of Defendant and against Plaintiff on all counts of the complaint. An Order consistent with this Memorandum Opinion follows."

Legal Lessons Learned: Great quote by Court: "As the United States Supreme Court has continuously held, Title VII 'does not set forth a general civility code for the American workplace.' Burlington Northern & Santa Fe Ry. v. White, 548 U.S. 53, 68 (2006)."

File: Chap. 7, Sexual Harassment

PA: FEMALE EMS INSTRUCTOR FIRED – RUDE TO STUDENTS & STAFF – NOT GENDER DISCRIMINATION

On Feb. 26, 2020, in Kimberly Brandt v. Thomas Jefferson University Hospitals, Inc., U.S. District Court Judge Harvey Bartle, III, Eastern District of Pennsylvania, granted the Hospital's motion for summary judgment.

> "Simply put, the undisputed facts do not suggest that Brandt's employment was terminated due to discrimination in which she was less favored than her male colleagues. By contrast, the record is filled with evidence that suggests her termination was due to her mistreatment of students and unprofessional behavior toward staff. Accordingly, the court will grant the motion of defendant for summary judgment as to Brandt's claims for gender discrimination under Title VII."

Facts:

> "Beginning in February 2017, TJUH [the hospital] received multiple complaints regarding Brandt's behavior toward students and staff. On February 2, 2017, student Jillian Valentine ('Valentine') sent an email to Gretz complaining about Brandt's behavior toward her that day in class. Valentine stated:
>
> > I am an adult and I deserve respect. I refuse to deal with any abuse that she's giving . . . [t]he rudeness, disrespect, unprofessionalism, and the feeling of being antagonized . . . I'm coming to Jeff Stat to learn not to be treated wrongly while doing so.
>
> During the class at issue, Valentine had confided in Brandt that she did not know how to perform a certain skill at the CPR station. Brandt responded that the skill was demonstrated to the class the previous day. Valentine then approached another instructor, at which point Brandt told Valentine: 'if [you do] not know what [you are] doing at this point in time, [you] need to go home and reflect upon why [you are] in the course and [what you are] doing.'
>
> ***
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> On February 9, 2017, while Brandt was suspended, Brandt made formal allegations of gender discrimination for the first time since being employed at TJUH.
>
> ***
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> Following Brandt's return [to work on Feb. 20, 2017], TJUH received four additional complaints against Brandt. Two of these complaints were from students and two were from Brandt's colleagues. The complaints highlighted Brandt's unprofessional behavior, inappropriate use of language, and failure to provide proper instructions. TJUH investigated each complaint and interviewed relevant individuals.
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> ***
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> TJUH's Employee Disruptive Conduct Policy and its Code of Conduct require employees to act respectfully and professionally. Any 'abusive or offensive behavior, or willful misconduct, which disrupts the smooth and efficient operations' of TJUH is prohibited. As a result of their investigation, TJUH concluded that Brandt had violated TJUH policies by verbally abusing employees and students. TJUH, through Barber, the JeffSTAT [Education Program] Director, terminated Brandt's employment on May 1, 2017."

Holding:

> "No reasonable factfinder could conclude that Brandt was terminated for any reason other than her violation of TJUH's Employee Disruptive Conduct Policy and TJUH's Code of Conduct."

Legal Lessons Learned: Prompt and thorough investigation by employer established breach of Code of Conduct.

File: Chap. 7, Sexual Harassment

AR: PUMP BREAST MILK WHILE ON DUTY – FD SPACE "FREE FROM INTRUSION" – $3.8M JURY SET ASIDE / $250K TO SETTLE

On Feb. 24, 2020, in Carrie Ferrara Clark v. City of Tucson, U.S. District Court Judge Cindy K. Jorgenson, District Court for District of Arizona, has given plaintiff thirty days to accept $250,000, or the case must be retried to another jury. The first jury, after 10 days of trial, awarded her $3,800,000.

> "Plaintiff has been an employee of the City of Tucson Fire Department ('TFD') since 2007. In July 2012, Plaintiff gave birth to her first son, Austin Clark, and decided to breast feed while on maternity leave and to pump breast milk when she returned to work. Plaintiff breast fed Austin while on maternity leave and contacted her superiors at TFD to ensure she would have a proper place to pump and express breastmilk when she returned to work. Upon her return to work, Plaintiff believed that the lactation spaces she was being provided were not legally compliant and initiated the underlying lawsuit in 2014. *** "The Court finds Defendant's first issue regarding a grossly excessive jury verdict to be sufficient and will not address, in detail, the merits of the remaining issues…. Defendant's Motion for Remittitur is granted in the amounts provided above [$250,000]. Plaintiff has thirty (30) days with which to accept or decline the Remittitur.

Facts:

> "The City of Tucson Office of Equal Opportunity Programs (OEOP) inspected and evaluated each and every fire station in Tucson and concluded that nine of the 21 stations (or 43%) as of March 2013 did not comply with the FLSA.
> [The inspector believed that under newly revised FLSA statute, there had to be a space with lock on the door; but see below statute.] The relevant statute [part of Fair Labor Standards Act] provides, in pertinent part:
>
> > (r)Reasonable break time for nursing mothers
> > (1) An employer shall provide—
> > (A) a reasonable break time for an employee to express breast milk for her nursing child for 1 year after the child's birth each time such employee has need to express the milk; and
> > (B) a place, other than a bathroom, that is shielded from view and free from intrusion from coworkers and the public, which may be used by an employee to express breast milk.
> > 29 U.S.C. § 207(r).
>
> ***
> Defendant argues that it is entitled to judgment as a matter of law on the issue of whether it provided Plaintiff with a suitable space to express breast milk in compliance with §207(r) of the FLSA.
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> More specifically, Defendant argues:
>
> > 'Aspirational, non-legal requirements aside, the only evidence Clark introduced at trial regarding whether the stations where Clark was assigned had lactation spaces that were "free from intrusion" is Clark's own testimony that, despite expressing breast milk in multiple stations over more than one year, not one single person ever intruded into any space that she used. Clark's own experience is dispositive of the question submitted to the jury. Given the evidence presented, a reasonable juror,

unmoved by passion or prejudice and applying the FLSA's standards only, could find only in the City's favor.'

***

Although Defendant's conclusion may be correct, its reasoning is flawed. That Plaintiff achieved a desired result is not dispositive evidence of compliance. *** As is evident, [FLSA's] section (r)'s requirements are unambiguous. Employers must provide a reasonable break time for nursing mothers to express breast milk and a place, other than a bathroom, that is shielded and free from intrusion with which to do so.

***

In March 2013, OEOP inspector Matthew Larsen ('Mr. Larsen') conducted an inspection at twenty-one Tucson Fire Department stations in order to verify compliance with Section 7 of the FLSA. At the time Mr. Larsen conducted his inspection, the break-time mandate for nursing mothers codified in section 207(r) of the FLSA was new and Mr. Larsen testified that he could not rely upon any established legal guidance or interpretation. *See* (Doc. 261, pg. 6) ('It was a relative[ly] new law at this point, so there was not anywhere where we could find it had been tried; and by that I mean tested. There had been no rulings on it, no interpretations offered, so kind of going really what we had to go off of was the letter of what was actually written . . . .')

Based upon his interpretation of § 207(r), Mr. Larsen determined that TFD Stations 1, 4, 5, 6, 7, 8, 11, 13, 14, 15, 16, and 17 were compliant, but that Stations 3, 9, 10, 12, 18, 19, 20, 21, and 22 were not in compliance. *See* (Doc. 304-1, pg. 29-30). Excluding Station 9, Mr. Larsen believed that the non-compliant stations could be brought to compliance with the addition of a lock for any unsecured doors. *See e.g.*, *id*. at 32 ('Must install locks on all dorm room doors per the office of equal opportunity's inspection report.'). Although Mr. Larsen determined that some stations at Tucson Fire were not in compliance due to the lack of a lock, nowhere within section 7(r) of the FLSA is there a requirement that a door must have a lock.

At trial, Mr. Larsen acknowledged that, at the time of his investigation, if he had been aware that a lock was not a requirement under the FLSA, he would have determined that every TFD station, excluding Station 9, complied with federal law.

***

In contrast, Defendant presented testimony that TFD stations were compliant with federal law. For example, Chief Michael Fischback testified that, based on his interpretation of § 207(r), TFD's stations were in compliance because they contained a private room that was free from intrusion. See (Doc. 281-1, pg. 6-7) ('[T]hey said that you had to have a lockable door, and my understanding was all you needed was a private place where someone could be in a private place without threat of somebody coming in and disturbing them. And it had worked that way previously for us.')."

Holding:

"The Court concludes that a remittitur is appropriate and grants remittitur in the amounts described below and adjusting for the Court's finding that Defendant is entitled to judgment as a matter of law on some of Plaintiff's claims:

- Title VII Disparate Treatment: $0.00
- Title VII Retaliation: $0.00
- Fair Labor Standards Act [breast milk]: $ 50,000.00
- Fair Labor Standards Act Retaliation [breast milk]: $ 200,000.00."

Legal Lessons Learned: Plaintiff must now either accept the lower amount or have new trial. Employers, including fire & EMS departments must provide "a place, other than a bathroom, that is shielded from view and free from intrusion from coworkers and the public, which may be used by an employee to express breast milk."

File, Chap. 8, Race Discrimination

MD: TWO AFRICAN AMERICANS PROMOTED B/C – BUT LIST HAD EXPIRED - WHITE CAPTAIN PASSED OVER – LAWSUIT PROCEED

On March 3, 2020, in Donald Dziwulski v. Mayor & City Council of Baltimore, U.S. Magistrate Judge Deborah L. Boardman, District of Maryland (Northern Division) denied the City's motion for summary judgment concerning Dziwulski's claim for race discrimination based on failure to promote and his retaliation claim based on the reclassification of Carter's position.

> "Defendant argues that, throughout the entire process, [then Fire Chief James] Clack was planning to promote Claggett and Stokes into the two new positions. They were ranked first and second on the Eligibles List in effect at the time. To make their promotions possible despite the Board's failure to act on May 8, 2013, Clack promoted them on May 13, 2013, before the Board approved the position…. [But] by the time Clack acted on May 13, 2013, the Eligibles List that included Claggett and Stokes had expired. *** On the record before me, Defendant has offered a legitimate, non-discriminatory reason for each of its employment decisions when considered individually. Thus, a reasonable jury, weighing the facts on the record before me as to each employment decision one at a time, could find that no race-based discrimination occurred. Nonetheless, considering the combined effect of these decisions, which collectively 'undermine the credibility of the employer's stated reasons,' Captain Dziwulski has identified sufficient evidence of pretext to survive Defendant's Motion for Summary Judgment. *** Most significantly, over the course of several months, Captain Dziwulski repeatedly was not selected for promotions for which he was eligible, even though he was ranked first on the Eligibles List in effect at the time. Each time, either African Americans were selected instead of him or the position was left open. Considering these events cumulatively, a genuine dispute exists regarding whether the Department's reasons each time were legitimate and non-discriminatory or pretext."

Facts:

> "The following facts are undisputed. First, Captain Dziwulski is Caucasian, and the two open Battalion Chief positions in May 2013 and the Battalion Chief position created in June 2013 were filled by African Americans. Second, when Carter retired in January 2014, his Battalion Chief position remained open. Third, Carter's position was reclassified twice (rendering Captain Dziwulski ineligible) and ultimately filled by an African American. These facts satisfy the fourth prong of Dziwulski's *prima facie* case.
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> ***
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> It is undisputed that the Department is supposed to follow the 'Rule of One' and, in theory, has no discretion in its promotions to Battalion Chief; it promotes the employee ranked first on the applicable Eligibles List. *See* Def.'s Mem. 5; Pl.'s Opp'n 6. The record before me shows, however, that the Department did not follow the Rule of One. As of May 13, 2013, Captain Dziwulski was ranked first on the Eligibles List, but he was not promoted for either of the two open Battalion Chief positions when they were filled on that day. And in June 2013, he was ranked first, yet he was not promoted to the newly-created Battalion Chief position. Nor was he promoted to the open position in 2014, when he still was ranked first.

***

Defendant contends that the Department had a legitimate, non-discriminatory reason for each of its decisions regarding the open Battalion Chief positions. Def.'s Mem. 28. According to Defendant, the May 2013 vacancies existed because [Fire Chief James] Clack 'create[d] two Battalion Chief EMS positions' through a 'process' that Clack began months earlier in February 2013 by obtaining the approval of two local unions whose membership would be affected. Def.'s Mem. 21. It was the end of April before he had the support of one union and agreement from the other not to oppose the request for the new positions. *Id*. The Board of Estimates still had to approve the positions before they could be filled. *Id*. That step should have happened on May 8, 2013, but the item was not added to the Board's agenda due to 'administrative oversight.' *Id*.

***

Defendant argues that, throughout the entire process, Clack was planning to promote Claggett and Stokes into the two new positions. They were ranked first and second on the Eligibles List in effect at the time. To make their promotions possible despite the Board's failure to act on May 8, 2013, Clack promoted them on May 13, 2013, before the Board approved the positions.

To do so, he 'used the City's in lieu procedures to place Claggett and Stokes into Battalion Chief positions, in lieu of Executive Level I and Command Staff II slots, only until the anticipated Battalion Chief positions were approved by the BOE [Board of Estimates].' Def.'s Mem. 9 (footnote omitted). The Board approved the positions on May 15, 2013. Defendant asserts that, "[a]lthough the purpose of the in lieu policy was to allow an employee to gain experience in a position in hopes of promoting into that position, the Department's practice had been to also use the in lieu policy as a 'placeholder' until a position is created.' Id. By the time Clack acted on May 13, 2013, the Eligibles List that included Claggett and Stokes had expired. Def.'s Mem. 11; Pl.'s Opp'n 11-12.

Although it is disputed whether Clack was aware at the time that the list had expired, Clack clearly knew that the time in which he could promote Claggett and Stokes soon would expire. See Def.'s Mem. 8-9 (stating that, after the promotions were not included on the May 8, 2013 Board meeting agenda, Clack 'had to decide what to do next' because '[t]he current Eligibles List was due to expire prior to the next meeting of the BOE on May 15, 2013').

In Defendant's view, Clack's reasons for his actions regarding the May 2013 promotions were legitimate and non-discriminatory because, following his discussions with the unions, 'there was an expectation on the part of the unions and [their] membership that the promotions would be off the 2011 Eligibles List,' so he 'decided to proceed with his original decision and promote from the 2011 List.' Id. at 23-24.

***

The reasons offered by [former Fire Chief] Clack and [interim Fire Chief Segal for the creation of the Battalion Chief position given to Carter are sufficiently inconsistent that they raise more questions than answers about why the position was created and why Carter was placed in it."

Holding:

"Even though Captain Dziwulski did not mention race, the November 2013 hearing was the culmination of the grievance process he began in May 2013, at which time both the union representative and the Battalion Chief who received the grievance, Shiloh, understood that Dziwulski was complaining that the Department made a race-based decision to promote Claggett and Stokes instead of him. When I 'examine the course of a plaintiff's conduct through a panoramic lens, viewing the individual scenes in their broader context and judging the picture as a whole,' as the Fourth Circuit requires, I find that a reasonable jury could conclude that the grievance process, which began in May 2013 with a specific recognition that Dziwulski complained

of race discrimination in the grievance, and ended with the November 2013 hearing about the Department's promotion of Claggett and Stokes instead of Dziwulski, qualified as protected activity."

Legal Lessons Learned: Making promotions from expired lists can lead to litigation.

File: Chap. 9, ADA

LA: DISPATCHER FIRED - POOR WORK PERFORMANCE – CLAIMED ANXIETY – DIDN'T REQUEST ACCOMODATIONS

On Feb. 26, 2020, in Denise Watkins v. Sheriff Michael Tregre, U.S. District Court Judge Greg Gerard Guidry, Eastern District of Louisiana, granted the Sheriff's motion for summary judgment.

> "The Court finds Plaintiff has failed to produce competent summary judgment evidence to make out a *prima facie* failure-to-accommodate claim. Plaintiff has not produced evidence to show that the consequential limitations of Plaintiff's alleged disability were known to Defendant or that Defendant failed to make reasonable accommodations for such limitations. Therefore, Defendant is entitled to judgment as a matter of law dismissing Plaintiff's failure-to-accommodate claim."

Facts:

> "Plaintiff's employment with Defendant as a 9-1-1 dispatcher commenced in the summer of 2012. On February 9, 2018, Defendant's employee and Plaintiff's immediate supervisor, Lt. Marshall Carmouche, verbally counseled Plaintiff regarding her poor work performance, which included incidents of Plaintiff sleeping while working, missing license plate recognition ('LPR') hits, and delaying dispatching of EMS to a call. Lt. Marshall Carmouche asked Plaintiff to address the concerns with her work performance in a written response.
>
> On February 20, 2018, Plaintiff was diagnosed with anxiety and submitted a note to Lt. Marshall Carmouche requesting time off due to her medical diagnosis. On February 22, 2018, Lt. Carmouche requested a disciplinary board review of Plaintiff's poor work performance. Also, on February 22, Plaintiff emailed Lt. Carmouche and Defendant's other employees, Lt. Conrad Baker and Chief Guidry, regarding the verbal counseling and explaining the reasons for her poor work performance. On March 1, 2018, the disciplinary board convened regarding Plaintiff's poor work performance. The disciplinary board ultimately decided to terminate Plaintiff, and Defendant terminated Plaintiff on March 2, 2018.
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> ***
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> Defendant asserts Plaintiff incorrectly instructed dispatchers under her supervision that a vehicle was not registered as being reported stolen, failed to timely dispatch an ambulance to an accident with injury, improperly failed to remove a recovered firearm from the national database, excessively making personal phone calls while on duty, and repeatedly sleeping on duty while at her console, even after having been warned. Additionally, Defendant cites testimony from Lt. Baker and Plaintiff's follow-up email explaining her work performance where Plaintiff does not dispute her poor work performance. The Court finds that Defendant has established that Defendant had legitimate, non-discriminatory reasons for terminating Plaintiff."

Holding:

> "Plaintiff has not produced evidence to show that the consequential limitations of Plaintiff's alleged disability were known to Defendant or that Defendant failed to make reasonable accommodations for such limitations. Therefore, Defendant is entitled to judgment as a matter of law dismissing Plaintiff's failure-to-accommodate claim."

Legal Lessons Learned: As explained by the Court, "Under the ADA, an employer is only required to 'accommodate the known limitations of an employee's disability." A *prima facie* case of failure-to-accommodate requires that: '(1) the plaintiff is a 'qualified individual with a disability;' (2) the disability and its consequential limitations were 'known' by the covered employer; and (3) the employer failed to make 'reasonable accommodations' for such known limitations.'"

File: Chap. 9, ADA

NY: AFRICAN AMERICAN FFs WITH PFB – FDNY NEW POLICY REQUIRED FF TO SHAVE CHIN HAIR - VIOLATES ADA

On Jan. 29, 2020, in Salif Bey, et al. v. City of New York, Senior U.S. District Court Judge Jack B. Weinstein, Eastern District of New York, granted summary judgment to four FF who brought the lawsuit. From Aug. 2015 until Dec. 2017, FDNY allowed 16 FF with PFB to have hair on their chin so long as they passed fit test, but changed the policy in 2018 to more strictly comply with OSHA requirements. Judge, however, cited OSHA interpretation letter: *Facial hair is allowed as long as it does not protrude under the respirator seal, or extend far enough to interfere with the device's valve function.*

> "Salik Bey ('Bey'), Clyde Phillips ('Phillips'), Steven Seymour ('Seymour') and Terrel Joseph ('Joseph') (collectively, 'Plaintiffs') are African American men who were employed as firefighters by the Fire Department of the City of New York ('FDNY' or 'Department') when the relevant events began. Amended Complaint ('Am. Compl.') ¶ 9, ECF No. 19. They suffer from Pseudofolliculitis Barbae ("PFB")—a physiological condition that causes disfigurement of the skin in the hair-bearing areas of the chin, cheek, and neck. *Id.* at ¶¶ 22-23. *** By a letter dated May 9, 2016, OSHA interpreted the relevant RPS provision as clearing the way for Plaintiffs to maintain facial hair that does not protrude under the respirator seal:
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> > The Respiratory Protection standard, paragraph 29 CFR 1910.134(g)(1)(i)(A), states that respirators shall not be worn when facial hair comes between the sealing surface of the facepiece and the face or that interferes with valve function. *Facial hair is allowed as long as it does not protrude under the respirator seal, or extend far enough to interfere with the device's valve function.* Short mustaches, sideburns, and small goatees that are neatly trimmed so that no hair compromises the seal of the respirator usually do not present a hazard, and, therefore, do not violate paragraph 1910.134(g)(1)(i). May 9, 2016 OSHA Interpretative Letter at 2, ECF No. 48-15 (emphasis added). *** On the theory and facts of the 'failure to accommodate' and disability discrimination claims under the Americans with Disabilities Act ('ADA'), Plaintiffs are entitled to summary judgment against Defendants and to reinstatement of the accommodation previously in effect."

Facts:

> "There are two regimes relevant to the case: one from August 2015 to December 2017 when firefighters could have maintained facial hair in the chin, cheek and neck area if it did not cause leakage around the mask's seal ('prior accommodation'); and one now in effect where a full duty firefighter must shave with a razor down to the skin or be given desk work ('present non-accommodation').
>
> ***
>
> Observing no leakage from the FDNY-approved mask when it was worn by individuals like Plaintiffs with closely-cropped facial hair, the requested accommodation was granted by the FDNY. Bey's accommodation was granted on August 27, 2015; Phillips' on August 3, 2015; Seymour's on August 28, 2015; and Joseph's on January 3, 2018. Def. Statement of Facts ¶¶ 30-33, ECF No. 38. Subsequent Fit Tests administered by the Department concluded that the medical accommodation did not compromise the safety or productivity of any

individual plaintiff. By Defendants' admission, the accommodation was fully applicable for two and a half years before the present non-accommodation regime.

***

After a review of the Department's safety standards initiated by then-FDNY Acting Chief of Safety Joseph Jardin, the medical accommodation was revoked. *See generally*, Joseph Jardin Deposition ("Jardin Dep."), ECF No. 48-9. By a letter dated May 9, 2018, Plaintiffs were notified that maintaining closely-cropped facial hair—between 1 millimeter and a quarter inch long— would no longer be in compliance with the Grooming Policy. Am Compl. ¶ 68, ECF No. 19. The sixteen full duty FDNY firefighters, including Plaintiffs, who had been covered under the prior accommodation were directed to report to the Bureau of Health Services ('BHS'). BHS is the FDNY agency responsible for administering Fit Tests and evaluating employees' duty status.

***

The following criteria were set by the FDNY: If Plaintiffs shaved all facial hair in the chin area, they would maintain their status as full duty firefighters; otherwise, they would be placed on light duty.

***

Having established that PFB is an ADA-qualifying disability, remaining is the question of whether a reasonable trier of fact could find that the FDNY refused to provide a reasonable accommodation. The court answers yes.

Defendants admit that no heightened safety risk to firefighters or the public was presented by the accommodation previously in effect. Two and a half years passed without incident, and Plaintiffs continued to perform their jobs satisfactorily. The FDNY's decision to abandon the prior accommodation was not based on any actual safety risks to firefighters or the public. Rather, driving the calculus was bureaucracy. Defendants cite no case law indicating that such bureaucratic considerations are a viable undue hardship defense; the court declines to so find."

Holding:

"Plaintiffs are entitled to summary judgment on the failure to accommodate claim and to reinstatement of the prior accommodation."

Legal Lessons Learned: The OSHA interpretation letter, not requiring complete shaved face, was very important in this ADA litigation.

Chap. 12, Drug-Free Workplace

KY: DRUG USER - GOOD SAMARITAN STATUTE – IMMUNITY FROM PROSECUTION – EVEN IF 911 CALLER LEAVES

On Feb. 21, 2020, in Jeremy Logsdon v. Commonwealth of Kentucky, the Kentucky Court of Appeals held (3 to 0) that the defendant enjoys immunity from prosecution, even if the 911 caller took off (had outstanding warrants) before police & EMS arrived, reversing the decision of the [Boone Circuit Court] judge.

"We agree with both Appellant … that the Boone Circuit Court's ruling is not supported by a strict interpretation of KRS 218A.133(2). Throughout this statute, 'the person' may reasonably be construed as the individual experiencing a drug overdose, and for whom a third-party caller requested medical assistance. When read in this light, KRS 218A.133(2) does not require a third-party caller to be present with the

individual experiencing a drug overdose when medical personnel arrive. As such, the circuit court erred in concluding that Appellant was not entitled to the KRS 218A.133(2) exemption from prosecution. Accordingly, we REVERSE the judgment of the Boone Circuit Court."

Facts:

"On August 18, 2018, someone referring to himself as 'Kyle' called 911 to report that Appellant was experiencing a heroin overdose. The caller stated that he would not stay with Appellant until medical assistance arrived because the caller had outstanding warrants. Boone County Deputy Sheriff Jennifer Crittenden responded to the call, and upon arrival observed that Appellant was conscious but confused. According to Deputy Crittenden, Appellant was holding a syringe with a needle and residue. On the table in front of Appellant was a used container of the narcotic overdose treatment Narcan, a spoon, and a folded paper with what appeared to be heroin residue. Another deputy arrived, as did Florence EMS. Appellant told EMS personnel that a friend had been over, and he gave conflicting statements as to who had administered the Narcan. Appellant refused medical treatment and would not cooperate with the deputies. Based on the foregoing, Appellant was charged with one count of possession of a controlled substance in the first degree, second offense, and one count of possession of drug paraphernalia.

***

The circuit court then interpreted KRS 218A.133(2) as not providing an exemption from prosecution for Appellant unless the person requesting medical assistance, in this case Kyle, remained with the person requiring assistance (Appellant) until medical assistance arrived.

Said the court,

> Put another way, because 'Kyle' is the caller, he is also 'the person' under Section (2)(a)(1). This makes 'Kyle" "the person' under Section (2)(b). Thus, 'Kyle' is the subject of the sentence. If the subject of the sentence ("Kyle') stays with the overdosing party, immunity applies. Or, if the subject of the sentence ('Kyle') is one and the same person as the overdosing party who is the object of the sentence (namely, the Defendant), immunity applies. In this case, the person seeking assistance 'Kyle', an otherwise unknown person, refused to remain with the individual experiencing a drug overdose, who was the Defendant (Mr. Logsdon). Because 'Kyle' had outstanding warrants. Defendant likewise fails the alternative condition in Section (2)(b) because 'Kyle' (the person seeking assistance) is not also Mr. Logsdon (the Defendant) who was the individual experiencing the drug overdose.

***

Based on the denial of this motion, Appellant appeared in open court on March 6, 2019, and entered a plea of guilty to one count of possession of a controlled substance in the first degree, second offense, and possession of drug paraphernalia. On May 20, 2019, the court sentenced Appellant to three years in prison, plus costs. Appellant's motion for probation was granted, and this appeal followed."

Holding:

"Accordingly, we conclude that the person experiencing a drug overdose may be entitled to the exemption irrespective of whether the caller is present when medical personnel arrive. The statutory language does not require the caller's presence in this circumstance, and the apparent legislative purpose - *i.e.*, to encourage the summoning of medical assistance without fear of prosecution - is given effect."

Legal Lessons Learned: Many states have enacted drug-user Good Samaritan statutes, to encourage the user or friend to call 911.

File: Chap. 12, Drug-Free Workplace

RI: DRUG USER - GOOD SAMARITAN ACT - PD FOUND 6 MARIJUANA PLANTS – IMMUNITY EVEN IF DEALER

On Feb. 7, 2020, in State of Rhode Island v. Daniel Disalvo, the Superior Court (Washington County) Judge Melanie Thunberg held that the criminal complaint must be dismissed, since the defendant is covered by the Good Samaritan Act even though he appears to be a dealer.

> "At issue here is whether the State may prosecute Defendant for possession of controlled substances with the intent to deliver despite the fact that law enforcement would not have discovered the contraband but for Defendant's need for medical attention. The parties dispute the application of G.L. 1956 § 21-28.9-4, the Good Samaritan Overdose Prevention Act of 2016 (the Act). Their arguments turn on whether the individual who experiences an overdose may seek immunity under the Act; whether the drug or alcohol user needs to actually overdose in order for the protections of the Act to apply; and whether the Act immunizes only possession related crimes—not the crime of possession with the intent to deliver. *** Again, the language contained in § 21-28.9-4(b) is dispositive. This section provides that qualifying individuals 'shall not be charged or prosecuted for any crime related to the possession of a controlled substance or drug paraphernalia, possession or transportation of alcohol by an underage person, or the operation of a drug-involved premises, if the evidence . . . was gained as a result of the overdose and the need for medical assistance.'Section21-28.9-4(b) (emphasis added). *** The outcome of this dispute turns on whether the crime of unlawful possession of a controlled substance with the intent to distribute is a crime 'related to the possession of a controlled substance.' Id. Clearly, it is. An individual must possess the controlled substances with which he or she intends to distribute in order to be guilty of possession with the intent to deliver. Moreover, the unambiguous language of § 21-28.9-4(b) establishes that the Legislature intended that the individual who overdoses or experiences a drug-or alcohol-related medical emergency receive immunity for 'any crime related to the possession of a controlled substance or drug paraphernalia. . . .' Section 21-28.9-4(b) (emphasis added). The Legislature chose to use the words 'any crime related to the possession of a controlled substance' to delineate the crimes that would fall under the umbrella of protection afforded by the Act. The Legislature could have carved out crimes related to the delivery or distribution of controlled substances; however, as demonstrated by the existing statute, it did not.

Facts:

> "On December 21, 2017, Donna Maclean (Ms. Maclean) called 911 to request emergency assistance for Defendant, who was unresponsive in the basement of her residence in South Kingstown, Rhode Island. (Narrative, patrolman Christopher Sarasin, Dec. 21, 2017.) Upon arrival, South Kingstown police and emergency responders were led by Ms. Maclean to her basement where Defendant was found lying on the ground, unresponsive, but conscious…. Another individual, Jason Carlson (Mr. Carlson), was present…. Ms. Maclean and Mr.Carlson informed police and emergency responders that Defendant's lips and face were blue, and he was unconscious before help arrived.
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> Officer Sarasin of the South Kingstown Police Department questioned Defendant as to whether he had ingested any drugs. Id. He also advised Defendant that he would not be charged for having taken any drugs or for any drugs that were found on his person. Id. Defendant did not respond to Officer Sarasin's inquiry. Id. Defendant was transported by ambulance to South County Hospital. Id. According to Officer Sarasin, upon entering the basement of Ms. Maclean's residence, he smelled a 'very strong odor' of marijuana. Id. Moreover, he reported that he observed the following items in plain view: marijuana smoking pipes; hardened hash oil pieces; a butane torch;a small pipe with white residue; a jar filled with marijuana; a bag filled with marijuana; and a four-level stacking of marijuana leaves. Id

Emergency responders suspected that carbon monoxide poisoning may have caused Defendant's condition…. Narrative, Detective Robert F. Costantino II, Dec. 21, 2017. Therefore, the local fire department was summoned to Ms. Maclean's residence to check carbon monoxide levels. (Narrative, patrolman Sarasin.) Officer Sarasin reported that while he was escorting members of the fire department throughout the basement to check carbon monoxide levels, he observed six marijuana plants; a marijuana patient card that was issued to Defendant; and an unidentified number of infant marijuana plants."

Holding:

"Defendant's motion to dismiss the information is granted."

Legal Lessons Learned: This Good Samaritan Act was written to broadly protect drug users and others who call 911 for help.

Chap. 13, EMS

IL: OFF-DUTY PARAMEDIC - IN HOT TUB WITH FEMALE - SHE INJURED HEAD WHEN SLIPPED BATHROOM – CANNOT SUE CITY

On Feb. 28, 2020, in Kylie Didonato v. Tim Panatera and City of Chicago, U.S. District Court Judge Virginia M. Kendall, Northern District of Illinois (Eastern Division), granted the motions to dismiss by the paramedic and the city.

"As this Court noted before, DiDonato's claim is that Panatera failed to do anything more than wrap her head in a towel and that he denied her proper medical care by failing to call 911 or taking her to a hospital for emergency care. (Dkt. 37 at 10; Dkt. 51 at 4; Dkt. 52 at 3). This inaction, as DiDonato has alleged it, relates more to Panatera's role as a bystander than a paramedic, and actions unrelated to a state actor's official duties are not taken under color of law."

Facts:

"[From Plaintiff's lawsuit allegations.] Panatera entered the bathroom after DiDonato fell, saw DiDonato bleeding on the floor next to the bathtub, and said 'Holy shit, that's bad.' (*Id*. at ¶ 11). Panatera then attended to DiDonato's injuries, picking her up and placing her in the bathtub to rinse the blood from her head. (*Id*. at ¶ 14). Panatera then lifted DiDonato from the bathtub, placed her on the floor, and wrapped her head with a non-sterile bathroom towel. (*Id*. at ¶ 18). DiDonato then attempted to crawl out of the bathroom. (*Id*. at ¶ 20). Panatera picked up DiDonato, took her to his bed, laid her upon it and then covered her with a bedsheet. (*Id*. at ¶ 21). DiDonato could not get out of Panatera's bed or stand up. (*Id*. at ¶ 23). While immobile and unable to care for herself, DiDonato felt and then observed Panatera "assault her by attempting to mount her in a sexual manner to have non-consensual sexual intercourse with her." (*Id*. at ¶ 25). DiDonato then lost consciousness. (*Id*. at ¶ 25). The next morning on March 19, 2018, DiDonato was awakened by Panatera's body on top of hers, again having non-consensual intercourse with her. (*Id*. at ¶ 26)."

Holding:

"As this Court noted before, DiDonato's claim is that Panatera failed to do anything more than wrap her head in a towel and that he denied her proper medical care by failing to call 911 or taking her to a hospital for emergency care…. This inaction, as DiDonato has alleged it, relates more to Panatera's role as a bystander than a paramedic, and actions unrelated to a state actor's official duties are not taken under color of law."

Legal Lessons Learned: The Court had previously given plaintiff and opportunity to file an amended complaint: Aug. 20, 2019. The case may now go back to State court on her claims against the paramedic (not the city) for negligence, assault, battery, and willful and wanton misconduct.

Chap. 13, EMS

NC: PARAMEDIC FIRED – ET TUBE PLACEMENT, MEDS – EMS BOARD REDUCED TO EMT-B – NOT RACE DISCRIMINATION

On Feb. 11, 2020, in Danny Cade v. County of Bladen, U.S. District Court Judge Louise W. Flannigan, Eastern District of North Carolina (Western Division), granted the County's motion for summary judgment, dismissing the race-discrimination lawsuit.

> "Defendant meets its burden by coming forward with legitimate nondiscriminatory reasons for plaintiff's suspension and termination. Bowman testified that, on January 27, 2017, plaintiff failed properly to use an endotracheal tube to help the patient breathe. (Bowman Dep. (DE 40-3, 43-3) 41:5-43:15, 48:16-49:10, 52:6-25). Bowman asked if any medication had been given, plaintiff responded he had administered two epinephrine pills, though all the epinephrine pills were still in the bag. (Bowman Dep. (DE 40-3, 43-3) 43:16-44:4, 48:9-15). Bowman testified that plaintiff failed properly to take a diagnostic of the patient's heart. (Bowman Dep. (DE 40-3, 43-3) 46:14-22, 59:1-11). Singletary, who was also on the call with plaintiff, and Bowman both filed reports identifying deficiencies in the care administered by plaintiff to the patient. (Cade Dep. (DE 40-2) Ex. 12, 13). *** A peer review committee was convened to review the call and determined that a state investigation was necessary regarding whether plaintiff failed to follow proper treatment protocol, negligently performed his duties, and falsified patient records. (Cade Dep. (DE 40-2) Ex. 15). Defendant suspended plaintiff without pay pending investigation of these issues by the state, and it explained that plaintiff's continued employed with the state would be contingent on the state findings of investigation. (Cade Dep. (DE 40-2) Ex. 15, 16). The state investigation [by North Carolina Office of Emergency Medical Services] found numerous deficiencies in plaintiff's performance on the job, determined that plaintiff falsified details of the call, and revoked plaintiff's EMT-P credential. (Cade Dep. (DE 40-2) Ex. 20). Relying on the same factual findings as the state, defendant terminated plaintiff's employment for violating county policy. (Cade Dep. (DE 40-2) Ex. 21, 22)."

Facts:

> "In January 2017, plaintiff and Marcus Singletary ('Singletary'), another EMT, responded to an emergency call for a patient who had congestive heart failure and was possibly having a heart attack. (Cade Dep. (DE 40-2, 43-1) 128:7-22). While en route to the hospital, plaintiff called for assistance from another EMS unit. (Cade Dep. (DE 40-2, 43-1) 128:23-25; Bowman Dep. (DE 40-3, 43-3) 32:14-33:5, 35:16-20). Bowman met plaintiff's ambulance and came on board to help treat the patient, but the patient died in transit to the hospital. (Cade Dep. (DE 43-1) 129:15-130:18, Ex. 17; Bowman Dep. (DE 40-3, 43-3) 40:24-41:4).
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> NCOEMS [North Carolina Office of Emergency Medical Services] notified plaintiff on March 28, 2017, that it would investigate the matter. (Cade Dep. (DE 40-2) Ex. 19). Plaintiff met with the state disciplinary committee on July 12, 2017. (Cade Dep. (DE 40-2, 43-1) 170:22-171:14). On August 11, 2017, the state notified plaintiff that it had determined plaintiff failed to properly assess the patient, falsified information in the patient care report, and provided substandard or unacceptable patient care. (Cade Dep. (DE 40-2) Ex. 20). Based on its findings, the state reduced plaintiff's EMT-P credential to EMT-Advanced until plaintiff

completed an approved EMT training course and other remedial instruction. (Cade Dep. (DE 40-2, 43-1) 171:15-176:11, Ex. 20).

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In a letter dated September 12, 2017, defendant informed plaintiff that, based on the findings by the state in the instant case, plaintiff's conduct violated county policies and plaintiff was terminated."

Holding:

"Plaintiff asserts retaliatory animus because NCOEMS merely reduced his EMT credential from EMT-P to EMT-Advanced, and that the state did not mandate his termination…. Therefore, plaintiff speculates, defendant must have terminated him because of the EEOC complaint…. Plaintiff's argument is unpersuasive. Although the punishments meted out by the state and defendant for plaintiff's conduct were different, the record indicates that both punishments were based upon the state's factual findings. Plaintiff fails to come forward with any genuine issue of material fact as to whether his termination was caused by his EEOC complaint. Where plaintiff fails to make a prima facie case, the court grants summary judgment on plaintiff's Title VII retaliation claim."

Legal Lessons Learned: The EMS Department properly notified State EMS Board of serious violations of protocol; suspended Medic and awaited state investigation before terminating the Medic.

File, Chap. 13

MD: CARDIAC RUN - PATIENT WALKED TO AMBULANCE, TO WHEELCHAIR - $3.7M JURY REVERSED - NOT "GROSS NEGLIENCE"

On Aug. 16, 2019, in Joseph Strackle, et al. v. Estate of Kerry Butler, Jr., the Maryland Court of Appeals (4 to 3), reversed the Court of Special Appeals, and agreed with the trial judge that the paramedics were not grossly negligent. Plaintiff alleged breach of City of Baltimore FD protocol when the patient walked from his home to the ambulance, and upon arrival at hospital walked from ambulance to wheelchair. The jury verdict of $3,707,000 was set aside by the trial judge, but reinstated by the Special Court of Appeals; the paramedics appealed to Maryland Court of Appeals, which set aside the jury verdict.

"Petitioners [paramedics] assessed the patient, took his vitals, and promptly transported him to the nearest hospital within approximately seven minutes of first arriving on the scene. Based on the evidence presented at trial, the jury could not have found that Petitioners were grossly negligent by a preponderance of the evidence. We further conclude that Cts. & Jud. Proc. § 5-604(a) unambiguously confers immunity upon municipal fire departments in simple negligence claims. *** Finally, the practical implications of holding otherwise cannot be overstated. Concluding that Petitioners were grossly negligent would have a negative impact on not only the number of individuals who seek employment as first responders in the future, but would create a chilling effect on their conduct. First responders must have broad discretion to proceed in their assessment and treatment of patients without the fear of liability. *** We conclude that there was not sufficient evidence to establish that Petitioners [paramedics] committed gross negligence. The mere fact that Petitioners inaccurately diagnosed and treated their patient does not elevate their conduct to gross negligence.

Facts:

"Just after 1:00 a.m. on March 2, 2011, Mr. Butler woke his wife allegedly complaining of chest pains. Earlier that evening, Mr. Butler had eaten a spicy chicken sandwich and Oreo cookies, and drank a Hawaiian punch beverage prior to going to bed. Ms. Butler called 9-1-1 and reported that her husband was experiencing chest pain and having difficulty breathing and speaking. Ms. Butler helped dress Mr. Butler and

assisted him down the steps to the first floor of their home to wait for the emergency medics. Stracke and Cisneros were dispatched to the Butlers home in response to the 9-1-1 call for a reported chest pain emergency. Stracke and Cisneros are both first responders, whose primary responsibilities involve the assessment and transportation of patients. Neither Stracke nor Cisneros are responsible for diagnosing medical conditions. Petitioners arrived on the Butlers' street at approximately 1:18a.m.

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By the time Stracke reached the Butlers' residence, Ms. Butler was standing just outside the front door and Mr. Butler was sitting in a chair just inside the house. At the time, Mr. Butler was 28 years old, five feet and seven inches tall, and approximately 245 pounds. Without entering the house, Stracke asked in a loud voice 'what seems to be the problem.' Ms. Butler responded that Mr. Butler had told her that he thought he was having a heart attack. According to Ms. Butler, Mr. Butler had his hand on his chest. Stracke asked Mr. Butler 'what's going on my main man[]' and Mr. Butler responded that '[his] right side hurt.' While standing in front of the Butlers' residence, Stracke visually assessed Mr. Butler, in accordance with relevant medical protocols, observing that he was 'a good shape gentleman[.]' Stracke expressed the desire and need to bring Mr. Butler to the ambulance for further evaluation and possible treatment. Ms. Butler then claimed that Mr. Butler stood up and staggered the short distance to the ambulance, approximately 30-40 feet, without the aid of Stracke or a stretcher. Stracke, however, claimed that he instructed Mr. Butler to wait while he retrieved a stretcher, but Mr. Butler declined, stating that he was 'ready to go' and began walking to the ambulance on his own accord. Stracke quickly signaled to Cisneros prior to escorting Mr. Butler from his residence to the ambulance, and Cisneros promptly exited the ambulance with a medical bag and oxygen bottle in order to fully and properly assess Mr. Butler's condition.

Cisneros performed a visual assessment of Mr. Butler as he approached the ambulance. Ms. Butler stated that Mr. Butler was staggering as he walked to the ambulance, while Cisneros observed that Mr. Butler was taking 'perfectly normal' steps and did not appear to be in need of any assistance. According to Petitioners, Mr. Butler entered the ambulance unassisted and without difficulty. When Cisneros asked Mr. Butler what was going on, Mr. Butler responded that his throat was burning (he was holding his hand to his throat) and that he had '[c]hest heartburn.' Although Cisneros recorded this symptom as 'chest hurt' in Mr. Butler's chart, she explained that this was primarily due to a lack of accurate options that were provided from a drop-down menu on the form.

Inside the ambulance, Stracke took Mr. Butler's blood pressure, heart rate, and blood oxygen level, while Cisneros recorded these measurements in Mr. Butler's chart. Cisneros also checked Mr. Butler for reproducible pain under his right arm (there was none), felt his pulse, checked his pupils, looked at his skin, and listened to his lungs, which were 'perfectly clear.' All of Mr. Butler's vitals appeared to be baseline, indicating that he was in stable condition.

Petitioners determined that Mr. Butler should be transported to the nearest hospital, Harbor Hospital, which was less than a mile away. Around 1:24a.m., approximately seven minutes after first arriving on the Butlers' street, Petitioners and Mr. Butler departed for the hospital, with Stracke driving the ambulance and Cisneros remaining with Mr. Butler in the rear of the ambulance. Stracke explained that at this time, it was Petitioners' priority 'to deliver a viable patient to appropriate definitive care, here Harbor Hospital, as soon as possible[.]' According to Cisneros, Mr. Butler was seated in a 'position of comfort' and 'very pleasant' and 'very chatty' during the drive to the hospital. The ambulance arrived at Harbor Hospital approximately three minutes later, around 1:27a.m. Stracke immediately retrieved a wheelchair for Mr. Butler, who exited the ambulance unassisted but without difficulty, and sat in the wheelchair. Stracke pushed Mr. Butler directly into the emergency room while Cisneros alerted hospital staff that Mr. Butler 'had a burning in his throat.' Stracke waited with Mr. Butler in the emergency room for hospital staff to triage Mr. Butler. While waiting in the emergency room, a hospital technician observed Mr. Butler holding his chest and complaining that his

chest hurt. The hospital technician observed this happening for another five to ten minutes, with Mr. Butler's voice growing louder as the time passed. After waiting in the emergency room for approximately ten minutes, Mr. Butler became unconscious and began to slide out of his wheelchair. Stracke prevented Mr. Butler's head from striking the floor as he slid out of the wheelchair. Cisneros observed Mr. Butler's condition and called for a nurse and doctor, who took Mr. Butler to a code room with the assistance of Stracke. After Mr. Butler was taken to the code room, and while he was receiving treatment from hospital staff, Petitioners left the hospital and went back on service to prepare for the next potential dispatch call. Despite the hospital staff's efforts, Mr. Butler could not be resuscitated and ultimately died. At the time of his death, doctors were unable to identify Mr. Butler's cause of death. Following an autopsy, the medical examiner concluded that Mr. Butler died of a myocardial infarction, more commonly known as a heart attack.

***

Following deliberations, the jury found Petitioners were grossly negligent in the treatment of Mr. Butler, that this gross negligence caused Mr. Butler's death, and accordingly, awarded Respondents $3,707,000. Following the announcement of the jury's verdict, Petitioners moved for a JNOV on the same grounds advanced in their earlier motions for judgment. The circuit court granted Petitioners' motion, concluding that Respondents' evidence of gross negligence was insufficient. Judgment in favor of Petitioners was entered by the circuit court on March 21, 2016.

***

The [Maryland Court of Special Appeals] reversed the circuit court's grant of Petitioners' JNOV, and ordered the circuit court to reinstate the jury's verdict in favor of Respondents.

***

Accordingly, we reverse the judgment of the Court of Special Appeals."

Holding:

"We conclude that there was not sufficient evidence to establish that Petitioners committed gross negligence. The mere fact that Petitioners inaccurately diagnosed and treated their patient does not elevate their conduct to gross negligence."

Legal Lessons Learned: Follow your Protocols, and on cardiac run if the patient will not wait to get on the cot, or upon arrival at hospital insists on walking out of the ambulance to the wheelchair, thoroughly document the facts.

File, Chap. 16, Discipline

MI: POLICE CHIEF FIRED – MERGER TWO 911 SYSTEMS - POSTED TAXPAYERS "GETTING THE SHAFT" — LAWSUIT TO PROCEED

On March 2, 2020, in Chad Hayse v. City of Melvindale, U.S. District Court Judge Linda V. Parker, Eastern District of Michigan (Southern Division) denied the City's motion for summary judgment. The City fired the Police Chief after he posted comments on Facebook page in opposition to the merger of the City's 911 dispatch with the City of Dearborn's dispatch; hot issue on which the City Council of Melvindale was going to soon vote.

"In 2016, City Council readied itself to vote on the proposed merger of Melvindale's and the City of Dearborn's police dispatch systems. Discussions and debates abounded in public meetings, several of which were held over a two-month period. *** Based on the record, the Court is unable to conclude that

Defendants reasonably predicted that the ‘shaft’ comment would cause disruption within the police department. One reason is that the "shaft" comment did not contain ‘particularly inflammatory,’ ‘abusive,’ or ‘exceptionally insulting’ language that could stir controversy among members of the police department. *See Rodgers*, 344 F.3d at 601. Another reason is that the public's reaction to the ‘shaft’ comment, as detailed in Defendants' arguments, provides little insight into what predictions Defendants made about how the comment would disrupt the police department. Accordingly, the Court finds that the balancing test weighs in Plaintiff's favor and the ‘shaft’ comment was constitutionally protected activity.”

Facts:

“Former Melvindale police officers also voiced thoughts during these meetings: Dearborn's slow response time is ‘unacceptable’; Dearborn's GPS system is inadequate; and Dearborn dispatchers lack critical geographical knowledge.

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The debate spilled onto Facebook. On June 8, in a thread posted in the ‘It Takes A Village’ Facebook page—a closed Facebook group compromised of numerous Melvindale residents, including Plaintiff and Defendant [City Council President Nicole] Barnes—a resident posted a comment about the merger issue.

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Chief Hayse … on June 8, 2016, at 9:07 p.m. [posted], as follows: ‘*The one getting the shaft may be the taxpayers*.’

***

Chief Hayse, while providing a notification concerning the Commission of Public Safety's consideration of entering into a central dispatch agreement with the City of Dearborn for emergency services, publicly and improperly posted his opposition and his own personal and political commentary. Chief Hayse also posted numerous inaccurate and irresponsible comments, which included the following remark on June 8, 2016, at 9:07 p.m., as follows: ‘*The one getting the shaft may be the tax payers*.’

***

Count I goes on to state that "Chief Hayse knowingly and intentionally misled and misinformed the Mayor and City Council regarding the identity of the person responsible." (*Id*. at Pg. ID 10740.)

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On August 29 and 30, Defendants held a pretermination hearing. During this hearing, Plaintiff—on at least six occasions—stated that he posted the ‘shaft’ comment to the It Takes a Village page, not the Melvindale Police Department page. (ECF No. 122-7 at Pg. ID 9103-06, 9109; see also ECF No. 121-7 at Pg. ID 7658.) Nevertheless, Defendants sustained all counts—including Count I—and voted unanimously to terminate Plaintiff's employment "[b]ased on the evidence that was presented." (ECF No. 121-24 at Pg. ID. 8822; ECF No. 122-7 at Pg. ID 9166.)”

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As it concerns content, it is unclear whether Plaintiff's ‘shaft’ comment meant taxpayers would pay more for the same quality of dispatch services, or taxpayers would pay the same amount for less quality dispatch services. However, it is clear under Sixth Circuit precedent that speech about public safety, as well as how ‘increasing or decreasing government spending may affect public health and safety,’ are quintessential matters of public concern. *Stinebaugh v. City of Wapakoneta*, 630 F. App'x 522, 527 (6th Cir. 2015) (citations omitted). Here, Melvindale residents discussed at length the potential increase in costs, increase in response times, and a possible attendant increase in the number of lives lost.”

Holding:

> "In sum, the Court finds that material fact questions regarding whether Plaintiff received a 'sham' pre-termination hearing preclude summary judgment as to this claim."

Legal Lessons Learned: Emergency responders, including Fire & EMS, must be very cautious posting comments on any internal FD issues. In this case, the issue was clearly an public matter, and the Court reviewed the U.S. Supreme Court's "balancing test" and the fact that the Facebook post "was one of many made on a Facebook page visited by many Melvindale residents."

File: Chap. 17, Arbitration

OH: COLUMBUS FD SOUGHT TO CONVERT NUMEROUS FD JOBS "CIVIL" POSITIONS - LOCAL 67 GRIEVANCE UPHELD

On Feb. 4, 2020, in City of Columbus v. IAFF Local 67, the Ohio Court of Appeals For Tenth District, held (3 to 0) affirmed the decision of the Franklin County Court of Common Pleas judge upholding the arbitrator's decision in favor of Local 67.

> "On October 19, 2015, a battalion chief representing the Office of the Fire Chief for the City of Columbus Division of Fire ("Division"), sent an e-mail to the President of Local 67. (Ex. JT2 at 4, exhibit to July 27, 2017 Local 67 Application to Confirm.) The e-mail indicated that the "directors office decided" to civilianize certain special assignments then filled by uniformed firefighters. Id. Attached to the e-mail was a document listing 17 positions that the City intended to civilianize: 'RMS,' 'Fitness Coordinator,' 'Special Events Coord,' 'EMS Supply Tech,' 'ES-1 Liaison,' 'Training Video,' 'FAO Radio Specialist,' 'Public CPR Trainer,' 'R&D Specialist,' 'R&D Specialist,' 'R&D Specification,' 'I.T. Coordinator,' 'Apprenticeship Asst.,' 'FAO Trainer,' 'Community Relations,' 'In Service Training, and 'ES-1 Office Aid. *** The CBA nowhere asserts, affirms, or implies a broad right of the City to civilianize bargaining unit positions. The CBA provides no general right to civilianize the City. Nor do the terms of the CBA, taken as a whole, suggest that Section 7.2 should be read as a narrow exception to a general right to civilianize. Rather the CBA contains, and the arbitrator found, a broad prohibition on civilianizing positions within the Division.

Facts:

> "The following day, Local 67 grieved the proposed action as a potential violation of Section 7.2 of the collective bargaining agreement ("CBA") between the City and the union local. Id. at 1-3.
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> ***
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> Ultimately, the matter was presented to an arbitrator, who issued a decision on March 23, 2017 finding in favor of Local 67. (Mar. 23, 2017 Arbitrator Decision, Ex. 3 to June 22, 2017 Compl.) According to the arbitrator's decision,1 there was essentially no dispute among the parties about the facts underlying the grievance. Id. at 6. Several years before the dispute arose, Local 67 and the City had cooperated in identifying some departmental positions that could be filled by civilians in order to return uniformed firefighters then occupying those positions to street and firehouse positions.
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> The arbitrator noted that the CBA otherwise deals exclusively with uniformed positions and that no right to civilianize is conferred on the City or Division, nor are civilian employees even mentioned in the agreement. (Mar. 23, 2017 Arbitrator Decision at 14.) In that context, the arbitrator concluded that the agreement in Section 7.2 was effectively intended as a promise not to civilianize any Division of Fire positions and that

the terms ‘fire prevention, emergency medical services, or fire suppression services’ were, in essence, to be read as broad, ‘comprehensive’ descriptors rather than limitations.

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Based on this reasoning, the arbitrator in his decision concluded that the City must seek the consent and participation of the union local before civilianizing any of the other positions in the civilianization list.”

Holding:

“We cannot say that the arbitrator's interpretation in this case is ‘without rational support’ in the CBA. FOP at ¶ 9. Nor can we fault the arbitrator's consideration of the parties' prior conduct. The fact that the City previously sought Local 67's cooperation in civilianizing positions could have been interpreted simply as a wise action to foster good relations. But it could also reasonably have been interpreted (as the arbitrator interpreted it) to mean that the City understood that it was prohibited from civilianizing division positions held by bargaining unit members and that Local 67's cooperation or support was therefore necessary.”

Legal Lessons Learned: The arbitrator, and the Courts, relied heavily on the City’s prior cooperation with Local 67 in civilianizing positions.