College of Engineering & Applied Science

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

Phone (513) 556-6583

Dec. 2023 – FIRE & EMS LAW NEWSLETTER

[NEWSLETTER IS NOT PROVIDING LEGAL ADVICE.]

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

Prof. Bennett uses these two National Fire Academy / FESHE model courses:

- **Political & Legal Foundations for Fire Protection (CO258) – Bachelor Degree at UC**
- **Legal Aspects of Emergency Services (CO272) – Associate Degree at Cincinnati State**

Updating 18 chapters of my textbook (2018 to current). FIRE SERVICE LAW (SECOND EDITION), Jan. 2017.
Free, online resources:

- **2023: FIRE & EMS LAW – RECENT CASE SUMMARIES / LEGAL LESSONS LEARNED**: Case summaries since 2018 from monthly newsletters.
- 2023: FIRE & EMS LAW – **CURRENT EVENTS.**

15 RECENT CASES

File: Chap. 1, American Legal System

CO: ARSON – 5 KILLED IN HOME – SEARCH WARRANTS ON GOOGLE FOR "REVERSE KEYWORD" - LOCATED ARSONIST

On Oct. 16, 2023, in The People of the State of Colorado v. Gavin Seymour, the Supreme Court of Colorado, upheld (5 to 2) the use of evidence obtained in the "reverse keyword" search warrant that located information on the defendant's Google account that shows he focused on the house. The majority decision agreed with the trial judge that the search of a massive Google data bank was executed in good faith under several court-ordered search warrants, and therefore evidence was admissible at trial.

The Majority wrote:
"On August 5, 2020, a fire broke out at a Denver home, killing five people. Investigators suspected arson because they concluded that an accelerant had been used to start the fire, and a neighbor's home-security surveillance footage showed three masked individuals with what appeared to be a gas canister at the house when the fire started.

In the following weeks, DPD investigators interviewed neighbors, reviewed surveillance footage from nearby gas stations, and obtained at least twenty-three search warrants, but these efforts proved unfruitful. After more than two months of rigorous investigation, law enforcement had exhausted all their leads without identifying a single suspect.

Despite this dead end, investigators surmised that the perpetrators had intentionally targeted the address. In pursuing this theory, they inferred that the perpetrators would have researched the property before burning it down or, at the very least, looked up directions to get there. So, investigators sought and obtained a series of reverse-keyword warrants, which required Google, the dominant search-engine company, to identify users who had searched the address within a specified period.

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Five of the eight accounts had Colorado-based IP addresses. DPD then successfully retrieved the names and other personal information associated with those five Colorado accounts through another warrant, to which Google submitted without objection. One individual was eliminated as a suspect because she was related to the alleged victims. DPD also sent warrants to social media platforms and internet service providers to obtain information about the remaining four people. Based on this information, DPD was able to rule out another suspect. Seymour, one of the remaining three suspects, was eventually charged with numerous felonies, including multiple counts of first-degree murder, arson, and burglary.

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We agree with the trial court that the deterrent purpose of the exclusionary rule would not be served by suppressing evidence from a warrant—several iterations of which were approved by two judges—that authorized a relatively new and previously unchallenged investigative technique. At every step, law enforcement acted reasonably to carry out a novel search in a

constitutional manner. Suppressing the evidence here wouldn't deter police misconduct. Thus, we conclude the good-faith exception applies."

The Dissent:
"The scale of a reverse-keyword search is staggering. 'By their nature, reverse keyword searches allow law enforcement to obtain information about every single person searching for specific terms,' or keywords, that law enforcement selects. Brief for Elec. Priv. Info. Ctr. as Amicus Curiae Supporting Defendant, at 5–6. In Google's case, this means that, when law enforcement so directs, Google scans the histories of its approximately one-billion users to identify which of those histories, if any, contain records of searches for those keywords within a specific timeframe."

Legal Lesson Learned: New technology leads to arrest of arsonist; evidence collected in "good faith" by law enforcement using a search warrant is admissible in evidence.

File: Chap. 2 – FF Safety & LODD
File: Chap. 3 – Homeland Security
File: Chap. 4 – Incident Command, Training

File: Chap. 5

OH: AMBULANCE TURNING LEFT NON-EMER. TRANSPORT - RUNS OVER FOOT PEDESTRIAN – LAWSUIT REINSTATED

On Nov. 22, 2023, in Kiranmai Parker v. City of Cleveland, et al., the Ohio Court of Appeals for Eighth Appellate District (Cuyahoga County) held (3 to 0) that the trial court improperly dismissed the lawsuit. The ambulance driver, Ms. Sampson-Hall, and her partner were transporting a minor injury patient to hospital and was turning left in an intersection. The pedestrian had a "walk" sign when the vehicle's front left tire crushed Pakeer's right foot, causing several fractures leading to the amputation of her big toe.

The Court wrote:

> "She claims to have slowed but kept moving in one continuous motion, and despite the five-second delay between the pedestrian light and the yellow arrow on Chester Avenue, Sampson-Hall still collided with Pakeer. Thus, there is an issue of fact as to the timing of the traffic lights as they relate to Sampson-Hall's travel. The pedestrian's 'walk' signal illuminates five seconds after the Chester Avenue traffic control light for turning traffic illuminates the yellow arrow. The collision undisputedly occurred after the "walk" signal illuminated and Pakeer took one or two steps into the intersection (meaning additional time passed after the walk signal was illuminated). There is enough evidence, construing the disputed evidence in Pakeer's favor, demonstrating that she possessed the right of way to cross the street. *** At the least, the City has not demonstrated the absence of genuine issues of material fact with respect to whether Sampson-Hall's operation of the vehicle constituted wanton misconduct for the purposes of R.C. 2744.02(B)(1)(c). That

question is one for the jury to decide based on whose version of events is deemed more credible."

Legal Lesson Learned: Jury will now decide if EMS driver conduct was "wanton misconduct."

Note: Apparently the non-emergent patient left the scene. The Court wrote: "After Sampson-Hall stopped to assist Pakeer, the individual being transported decided against continuing on with the EMS personnel, telling them: 'I don't want to be transported by you guys. You all run people over.'"

File: Chap. 5, Motor Vehicle Operations

MI: MOTORIST KILLED – PULLED LEFT INTO ENGINE GOING AGAINST TRAFFIC – 44 MPH / 35 MPH ZONE, CASE PROCEED

On Nov. 21, 2023, in Harold T. Sullivan, Personal Representative of the Estate of India D. Sullivan v. Brett Matthew Stiles and the City of Detroit, the Michigan Court of Appeals held (3 to 0) that trial court improperly dismissed the lawsuit. On a run for a structure fire, because of heavy traffic the first responding engine went into the oncoming lane. FAO Brett Stiles, driving the second engine a few seconds behind the first, was going about 44 mph in a 35 mph area, also went into the oncoming lane. The deceased had her left turn signal on and turned left into the second engine.

The Court wrote:

"Applying these facts to the due care requirements as explained by Chief Green, there is a genuine issue of material fact whether Stiles was driving with the statutorily required due care, and thus, negligently operating the fire truck. Stiles was speeding at the time of the accident by 8 to 18 miles per hour despite the training for fire truck drivers in emergencies to maintain a reasonable speed and to significantly reduce speeds and cover the brakes when approaching intersections and passing vehicles in the oncoming lane of traffic. There were conflicting expert opinions regarding whether Stiles exercised due care or was negligent. A trier of fact could reasonably conclude from the record evidence that Stiles was negligent because he failed to exercise due care in proceeding into the opposing lane of traffic to pass Sullivan's vehicle because he did so at an excessive speed and without covering his brake as a precaution against the possibility of civilian drivers failing to respond appropriately to the lights and sirens of the emergency vehicle. When underlying issues of fact exist regarding whether the operation of the government- owned motor vehicle was negligent, then it is proper for the jury to decide those factual issues regarding negligence concerning both the application of the motor vehicle exception to governmental immunity and the governmental agency's ultimate liability…. Because there is a genuine issue of material fact whether Stiles was negligently operating the fire truck, the trial court erred by granting summary disposition in favor of the City.

Legal Lesson Learned: Fire & EMS Departments should have an SOG requiring very reduced speed when traveling in a lane against oncoming traffic.

File: Chap. 5, Emergency Vehicle Operations

OH: MUTUAL AID – WATER TENDER FROM WV – BACKING, KILLED TWO CIVILIAN - NO BACKING ALARM, NO BACKER

On Nov. 14, 2023, in Craig W. Wakefield, as the Personal Representative and Administrator of the Estate of William A. Reed, Jr. and Karolyn Reed v. Williamstown Volunteer Fire Company, et al., Chief U.S. District Court Judge Algenon L. Marbley, U.S. District Court for Southern District of Ohio (Cincinnati), held that defense motion for summary judgment is denied and case will proceed with pre-trial discovery.

> The Court wrote:
> "This case involves the tragic deaths of Mr. William A. Reed, Jr. and Mrs. Karolyn Reed. On April 29, 2021, a fire ignited at Mr. and Mrs. Reed's daughter's residential, mobile home located in Marietta, Ohio. (ECF No. 1 ¶¶ 10-12). Defendant Williamstown Volunteer Fire Company ('Williamstown') was one of several fire agencies to respond to the fire. (*Id*. ¶ 13). Williamstown is a non-profit corporation located in Williamstown, West Virginia, right over the Ohio River from Marietta, Ohio. (ECF No. 11 ¶ 6). Williamstown was designated as the city's fire department and operates under the supervision of the West Virginia State Fire Marshal's Office. (*Id*.). Williamstown was dispatched to the fire on April 29, 2021 by the Washington County, Ohio 911 Services. (*Id*. ¶ 13).

Defendant Keith Willhide was part of the Williamstown crew who responded to the fire on April 29, 2021. (ECF No. 1 ¶¶ 17-18). Defendant Willhide was operating the Williamstown firetruck at the time. (*Id*. ¶ 19). Once Williamstown arrived at the scene, Defendant Willhide was directed by an Ohio fire department and/or Ohio authorities in charge of the scene to park the Williamstown firetruck on County Road 9. (ECF No. 11 ¶ 23).

Mr. and Mrs. Reed arrived at the scene of the fire and were permitted to remain on scene. (ECF No. 1 ¶¶ 24, 25). Mr. and Mrs. Reed stood on County Road 9 behind the Williamstown firetruck for a period of time. (*Id*. ¶ 26). Defendants claim, after sitting stationary in their firetruck on County Road 9 for some time, they were advised by an Ohio agency to dump their water. (ECF No. 15 at PageID 67). While Mr. and Mrs. Reed were still standing on the roadway behind the Williamstown firetruck, Defendant Willhide began backing the firetruck down the roadway as directed. (*Id*.; ECF No. 1 ¶ 31). Plaintiff claims the fire was under control at the time Defendant Willhide began backing up the firetruck. (ECF No. 1 ¶ 41).

> Mr. and Mrs. Reed were ultimately struck by the firetruck as Defendant Willhide was backing up. (*Id*. ¶ 36). Mrs. Reed sustained blunt force trauma and crushing injuries which resulted in her death. (*Id*. ¶ 37). Mr. Reed was dragged and trapped underneath the firetruck where he remained for several minutes before succumbing to his injuries. (*Id*. ¶¶ 38-40). A subsequent investigation found that the reverse alarm in the firetruck was not working properly at the time of the fatal accident. (*Id*. ¶ 45).
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> ***

For all these reasons, this Court finds a genuine issue of material fact exists as to whether Defendants were acting under a mutual aid agreement and, thus, are entitled to immunity under Ohio law. Accordingly, Defendants are not entitled to judgment as a matter of law."

Legal Lesson Learned: When backing an emergency vehicle, have a backer; tankers should have a backing alarm; keep mutual aid agreement current.

Note: See Ohio Administrative Code: Rule 4123:1-3-06 | Motor vehicles, mechanized equipment and marine operations.

(D) Motor vehicles.

(1) All trucks shall be equipped with an audible warning device, in an operable condition, at the operator's station.

(2) On mobile equipment having an obstructed view to the rear, the employer shall:

(a) Provide a reverse signal alarm audible above the surrounding noise, or

(b) Provide an observer to signal the assured clear distance.

File: Chap. 5, Emergency Vehicle Operations

TX: HOUSTON ROCKETS NBA PLAYER DRIVING FD HIGH-WATER VEHICLE - 3-DAY SUSPENSION – NO REHEARING

On Nov. 7, 2023, in City of Houston v. Steven M. Dubar, the Texas Fourteenth Court of Appeals denied the motion for rehearing (2 to 1) by District Chief Steven Dunbar, who received a three-day suspension for not submitting an official report about Houston Rockets personnel on board the FD's High-Water Vehicle with a Rockets player driving the vehicle with lights and sirens activated. Dissenting Justice Jerry Zimmerer again wrote that he would give Chief Dubar another hearing.

Justice Zimmer wrote in dissent:

"[Assistant Fire Chief Richard] Galvan admitted he had numerous phone conversations, voice, text, and video messages from Dunbar. Dunbar sent Galvan a social media video post. He told Galvan the video was on social media and would hit the news, and that all [heck] would break loose, yet Galvan posits this was not a 'report' because he and Dunbar were 'just talking as friends.'"

On May 23, 2023 the Court (2 to 1) upheld the suspension, reversing a trial judge's decision.

"Finally, Dunbar argues that, even if he had been required to report a violation, he did so when he discussed the event with deputy chief Richard Galvan on the day of the event and in the days following. However, during the HFD investigation, Dunbar himself stated that he did not 'report' any violation. Dunbar's suspension letter, which was admitted

into evidence, states that, '[w]hen asked during the investigation if he reported the violations, DC Dunbar stated, 'No, I did not observe what I would consider violations in relation to past events. I have personally seen pro ball players drive an HFD ambulance, as well as seen civilians sitting on the aerial ladders of several HFD apparatus.'"6 Galvan, moreover, testified that during his conversations with Dunbar, Dunbar made no report of any violation occurring during the event."

Legal Lesson Learned: When sports team members or other civilians are on fire apparatus, a FD member must always be in control of the vehicle.

File: Chap. 6, Employment Litigation

CO: FF HAND INJURED - LIGHT DUTY / RETIRED - MUST FILE EEOC CHARGE IN 300 DAYS AFTER INFORMED FD RETIRING

On Nov. 13, 2023, in David Perez v. City and County of Denver, the U.S. Court of Appeals for Tenth Circuit (Denver) held (3 to 0) that trial court properly dismissed the lawsuit for failure to timely file charge with EEOC. The firefighter represented himself (pro se) instead of retaining an attorney. He also failed to timely file the lawsuit (90 days) when he received "Right To Sue" letter from EEOC.

The Court wrote:
"Mr. Perez was a firefighter with the Denver Fire Department (DFD) when on March 13, 2019, he sustained a debilitating Line of Duty (LOD) injury to his right hand (his dominant hand) while fighting a house fire. As a result of the injury, he was placed on work restrictions. According to Mr. Perez, between March 19, 2019, and November 13, 2019, (1) he received various modified duty positions that either did not comply with his work restrictions or exacerbated his injury and (2) he was passed over for other, more appropriate positions within the DFD for which he was qualified. On October 21, 2019, Mr. Perez filed a complaint with the Colorado Civil Rights Division (CCRD), which alleged that he was retaliated against and denied the use of Leave Without Pay (LWOP) to attend a medical appointment because he had exhausted his sick leave to be treated for his LOD injury.

Mr. Perez was placed on LWOP on December 6, 2019. Based on his belief that the DFD had failed to accommodate his LOD injury and forced him to quit, on February 27, 2020, Mr. Perez informed DFD's chain of command that he was taking disability retirement and his employment would end on March 2. On December 28, 2020, he filed a charge of disability discrimination and retaliation with the Equal Employment Opportunity Commission (EEOC) based on events from March 19, 2019, through February 27, 2020, when he tendered his resignation.

***
A constructive discharge claim under Title VII accrues "when the employee gives notice of his resignation, not on the effective date of that resignation." *Green v. Brennan*, 578 U.S. 547, 564 (2016). The same rule applies to a claim for constructive discharge under the ADA. *See Haynes*

v. Level 3 Commc'ns, LLC, 456 F.3d 1215, 1222 (10th Cir. 2006) (applying the same standard to the accrual of a cause of action under Title VII, the Age Discrimination in Employment Act, and the ADA). Therefore, Mr. Perez's ADA claims accrued on February 27, 2020, when he gave notice of his intent to retire, which means that his charge of discrimination filed with the EEOC on December 28, 2020, was untimely as to his constructive discharge claim or any claims involving acts that pre-dated the constructive discharge.

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[Footnote 1] Mr. Perez later argued that he received a right-to-sue letter from the CCRD on November 20, 2020. Pursuant to Colo. Rev. Stat. § 24-34-306(11)(b), Mr. Perez was required to file a civil action within ninety days after jurisdiction of the commission ends. The commission's jurisdiction ends when '[t]he complainant has requested and received a notice of right to sue.' Colo. Rev. Stat. § 24-34-306(11)(a)(II). But Mr. Perez did not file suit until May 7, 2021-long after the ninety-day deadline expired. However, we need not address whether the suit was timely because Mr. Perez ultimately abandoned his claims under the CADA."

Legal Lesson Learned: The time requirements for filing charge with EEOC, and then filing lawsuit after right-to-sue EEOC letter must be followed; even by those handling case pro se (no attorney).

File: Chap. 7 – Sexual Harassment
File: Chap. 8 – Race Discrimination

File: Chap. 9, ADA

MN: "ALCOHOL USE DISORDER" – DOJ FIRST ADA SETTLEMENT REQ. CITY PAY TREATMENT CDL DRIVERS

On Nov. 20, 2023, in United States of America v. City of Blane, Minnesota, the parties entered a consent decree. While this case does not specifically involve firefighters, this is "first ADA settlement" involving voluntary disclosure by CDL drivers. In the Press Release, the DoJ stated: "The lawsuit alleges that the city discriminated against an employee with alcohol use disorder who voluntarily disclosed that he was to undergo treatment by requiring him to pay for alcohol and controlled substances testing and evaluation based on his disability. This is the Justice Department's first ADA settlement resolving a claim of employment discrimination based on alcohol use disorder."

The Consent Decree states:
"Specifically, Defendant will revise its policies, practices, and procedures to provide that it will pay for services of a Substance Abuse Professional ('SAP') and testing required by a SAP where: (1) an employee either voluntarily discloses alcohol use disorder, discloses other information indicating a disability, and/or participates in a drug or alcohol educational or treatment program; (2) the employee possesses a commercial driver's license (CDL)and is subject to U.S. Department of Transportation ("DOT") laws and regulations; and (3) A CDL

driver does not self-identify as misusing alcohol or controlled substances in order to avoid testing under the requirements of the applicable DOT regulation."

Legal Lesson Learned: Fire & EMS Departments should review their EAP policies regarding voluntary disclosure of substance abuse.

File: Chap. 10. Family Medical Leave Act, incl. Military Leave

File: Chap. 11 - FLSA

WV: WORKING ON HOLIDAY – STATE LAW REQ. OT OR COMP TIME – BUT HRS THAT DAY - NOT 24HR SHIFT / NOT 12 HRS

On Nov. 8, 2023, in Jayson Nicewarner, et al. v. The City of Morgantown, the Supreme Court of Appeals of West Virginia, held (4 to 1) that Lieutenant Nicewarner (then President ofIAFF Local 313) and fifty-three other current and former firefighters are not entitled to 24-hours of comp time off when their 24/48 hour shift includes a state or federal holiday. The City has for 48 years, based on a State Attorney General opinion about 2004 statute, granted firefighters 12-hours of comp time; the union claimed they were entitled to 24 hours since they worked 24/48 shift (8 am one day to 8 am next day). The WV Supreme Court disagreed with both, holding that under State statute firefighters only get equivalent time off for hours worked on that holiday day – not entire 24-hour shift. The Court ordered City to recalculate for past five years under new standard, including retired firefighters who may have lost vacation pay.

The Court wrote:

> "Because the City chose to compensate firefighters with extra time off, the circuit court correctly found that the City's firefighters were entitled to time off equal to the hours worked during a legal holiday, or for the hours the firefighter would have worked but for being regularly scheduled off. In general, the City's firefighters would be eligible for either eight or sixteen hours of extra time off, rather than the blanket twelve hours provided by the City for legal holidays. A firefighter's compensation under Section 10a is tethered to each firefighter's actual schedule during the legal holiday. Conversely, there is nothing in Section 10a to support the City's decision to afford firefighters generic compensation of twelve hours for each legal holiday irrespective of how firefighters' hours are scheduled 'during a legal holiday,' and there is likewise nothing to support the firefighters' suggestion that the City must automatically compensate them for twenty-four hours. Thus, we find no error in this holding by the circuit court."

Dissent: "Taking Christmas as an example, a firefighter whose shift begins at 8:00 a.m. on December 24 would be entitled to eight hours of compensatory time, as only the last eight hours of the shift fall on the holiday, while a firefighter whose shift begins at 8:00 a.m. on December 25 would be entitled to sixteen hours of compensatory time, as only the first sixteen hours of the shift fall on the holiday. This was the circuit court's interpretation, which is adopted wholesale

by the majority. *** I would award the petitioner firefighters what they are justly owed: twenty-four hours of compensatory time off for every holiday worked during the five years preceding the institution of their lawsuit, and every holiday worked thereafter until February, 2020, when the City adopted a resolution changing its policy."

Legal Lesson Learned: The statute was not clear; both union and City had different interpretations and Court rejected both.

File: Chap. 12, Drug-Free Workplace

File: Chap. 13, EMS

CO: HOSPITAL PARAMEDIC FIRED – EPINEPHRINE TO WOMAN PARKING LOT – QR FILES CONFIDENTIAL

On Nov. 14, 2023, in Jordan Christensen v. Denver Health And Hospital Authority, doing business as Denver Heath Paramedic Division, U.S. Magistrate Judge Kathryn A. Starnella, U.S. District Court for District of Colorado, denied Plaintiff's Motion to Compel Production of the Quality Review File. The termination decision was made by the Medical Director of the Paramedic Division, not on the hospital's Quality Review Committee; the QR file is confidential under Federal and State statutes.

The Court wrote:
"Plaintiff Jordan Christensen brought this employment discrimination lawsuit following Defendant Denver Health's termination of his job as a paramedic on January 7, 2021. *Am. Compl.* [#21] at 1-2, 5. He alleges that Denver Health 'repeatedly subject[ed] [him] to ongoing harassment and discrimination after he announced on Facebook that he was gay in 2015." *Id.* ¶ 1. As part of that discrimination, Denver Health allegedly disciplined Plaintiff but not his heterosexual colleagues for certain infractions. *See id.* ¶¶ 54-65, 68-82. Plaintiff Christensen also alleges that despite a general policy of 'not terminat[ing] paramedics for medical mistakes,' Denver Health terminated him following an alleged incident on December 8, 2020, when he administered epinephrine to a woman who was experiencing a medical emergency in a parking garage on Denver Health's campus. *Id.* ¶¶ 130-147. Plaintiff Christensen contends that Denver Health's decision to terminate him was pretextual and based on his sexual orientation, and that he was 'treated differently than his counterparts who do not openly identify as gay' and who were present during the December 8, 2020 incident. *Id.* ¶¶ 148-152. Plaintiff further contends that he was terminated in retaliation for his complaints to Denver Health's Human Resources Department regarding the discrimination he experienced since disclosing his sexual orientation. *Id.* ¶ 152.

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Because Dr. McVaney's testimony will be based on his direct knowledge and involvement in Plaintiff's termination, and because there is no evidence that Denver Health provided Dr.

McVaney the Quality Review File to formulate his factual testimony, as depicted in Defendant's Rule 26(a)(2) disclosures, the Court finds that Denver Health has not waived the privilege that federal and state law bestow upon the Quality Review File.

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Denver Health identified the Quality Review File in its privilege log and, as grounds for privilege, cited 42 U.S.C. §§ 299b-21 to 299b-22, Colo. Rev. Stat. § 25-3-109, Colo. Rev. Stat. § 25-3.5-904, the Health Insurance Portability and Accountability Act (HIPAA), and confidentiality. In a supplemental privilege log, Denver Health clarified that the Quality Review File 'is a Quality Management record that is part of Denver Health's Quality Management Program[,]' and the 'Program complies with the component requirements in Colorado to achieve the relevant privilege and confidentiality.' *Def.'s Privilege Log* [#59-3] at 4."

Legal Lesson Learned: Hospital QR reviews, and Fire & EMS QRs are confidential in many states.

> Note: See Ohio Revised Code: "Section 4765.12 | Guidelines for care of trauma victims by emergency medical service personnel - conduct of peer review and quality assurance programs by emergency medical service organizations."
>
> "Information generated solely for use in a peer review or quality assurance program conducted on behalf of an emergency medical service organization is not a public record under section 149.43 of the Revised Code. Such information, and any discussion conducted in the course of a peer review or quality assurance program conducted on behalf of an emergency medical service organization, is not subject to discovery in a civil action and shall not be introduced into evidence in a civil action against the emergency medical service organization on whose behalf the information was generated or the discussion occurred."

File: Chap. 13, EMS

WV: 911 DISPATCH NO CPR INSTRUCTIONS – PARENTS TOLD DRIVE TO HOSP – EMS CANCELLED - CASE PROCEED

On Nov. 8, 2023, in Barabara Stine Trivett, Administratrix of the Estate of Jasper Trivett v. Summer County Commission d/b/a Summers County Office of Emergency Management and Carmen Cales, Supreme Court of Appeals of West Virginia, held (3 to 2) that the lawsuit was timely filed and should not have been dismissed by trial judge and remanded case for discovery.

> The Court wrote:
> "On September 15, 2019, at approximately 4:18 a.m., the petitioner found her five-week-old son, Baby Jasper, unresponsive. The petitioner immediately called respondent Emergency Management on its 911 line and was connected to respondent Cales. After the petitioner had described the situation, and while still on the phone with her, respondent Cales made two unsuccessful attempts to contact Emergency Medical Services ('EMS'), the first attempt taking place at 4:19 a.m. and the second at 4:20 a.m.

At this point, the petitioner requested instructions on how to perform cardiopulmonary resuscitation ('CPR') on baby Jasper, a request which respondent Cales declined, stating that 'we do not give directions' on how to perform CPR. The petitioner then asked whether she should transport baby Jasper to Summers County Hospital on her own, and respondent Cales instructed her to do so.

The petitioner and her husband immediately set out on a frantic trip to the hospital, with Mr. Trivett driving the car and the petitioner attempting to perform CPR on baby Jasper. By the time they arrived at the hospital baby Jasper had been deprived of oxygen for at least nine minutes, and although he was revived at the hospital and flown to Ruby Memorial Hospital, he died on September 17, 2019, two days later.

Approximately one week after baby Jasper's death, the petitioner, through counsel, filed a Freedom of Information Act2 request for the 911 audio from September 15, 2019.3 The audiotape, which was received by counsel on October 14, 2019, revealed that respondent Cales had reached EMS on her third attempt, some seventeen seconds after disconnecting from the petitioner. Respondent Cales spoke to ambulance driver Jacob Woodrum, who asked for the petitioner's address so that an ambulance could be dispatched. However, respondent Cales did not provide it, identifying only the general area in which the petitioner lived and instructing Mr. Woodrum that because the petitioner was transporting baby Jasper to the hospital, it wasn't necessary to dispatch an ambulance.

***

In the instant case, the petitioner's expert opined that had an ambulance been dispatched to intercept the petitioner on her way to the hospital, this earlier medical intervention would, at a minimum, have given baby Jasper a chance of survival greater than twenty-five percent."

Legal Lesson Learned: Dispatchers should all be trained in giving CPR instructions.

File: Chap. 13, EMS

NC: PATIENT REFUSED TRANSPORT – 94-YR MENTALY SOUND – DAUGHTER POWER OF ATTY CAN'T OVERRULE

On Nov. 6, 2023, in Justin L. Sutton, as Personal Representative of the Estate of Hartwell Lanier King, Sr. and Betty K. Sutton v. Rockingham County, et al., U.S. District Court Judge Loretta C. Briggs, U.S. District Court for the Middle District of North Carolina, granted the defendants motion for summary judgment. The EMS followed the protocol, conducted several "capacity assessments" of the patient and found him to be capable of making his own decision about transport. The daughter's Power of Attorney could not overrule the patient's decision.

The Court wrote:

"On October 3, 2020, at approximately 10:30 AM, a Rockingham County Emergency Medical Services ('EMS') paramedics unit was dispatched to the residence of Mr. King in Reidsville,

North Carolina, in response to a call regarding a patient experiencing potential respiratory distress. (ECF Nos. 35-1 ¶ 8; 35-2 ¶ 9; 35-3 ¶ 8; 35-10 at 54:23-55:8.) The paramedic unit included three paramedics: Defendants Taylor Carter, Paul Higgins, and Chasity Wall (collectively, 'EMS Defendants'). (ECF Nos. 35-1 ¶ 8; 35-2 ¶ 9; 35-3 ¶ 8.) Upon EMS Defendants' arrival at Mr. King's residence, Benjamin Fullerton, Mr. King's home health aide, informed them that he believed Mr. King was experiencing increased respirations and a fever. (ECF Nos. 35-1 ¶ 9; 35-2 ¶ 10.) Mr. King was 94 years old and suffered from quadriplegia, which confined him to a bed for seventeen years. (ECF Nos. 35-6 ¶ 1; 37-9 at 17:8-12, 38:3-5, 131:16-22.)

After conducting a medical assessment of Mr. King that involved taking vital signs and temperature, Defendants Carter and Wall determined that Mr. King had a fever, a lower-than-normal oxygen level, and an elevated respiratory rate. (ECF Nos. 35-1 ¶ 12; 35-2 ¶ 13.) Defendants Carter and Wall also determined that, due to these conditions, Mr. King needed to be transported to the hospital for further medical treatment and evaluation. (ECF Nos. 351 ¶ 14; 35-2 ¶ 16.) Defendants Carter and Wall then informed Mr. King that, based on his vital signs, he needed to be transported to the hospital; however, Mr. King verbally communicated to them that he did not want to go to the hospital, specifically stating, 'No, I don't want to go to the hospital. I'm not going.' (ECF Nos. 35-1 ¶ 14; 35-2 ¶ 16.)

After Defendants Carter and Wall again informed Mr. King that he needed to be transported to the hospital and explained that he could be risking death by not going, Mr. King again refused transport. (ECF Nos. 35-1 ¶ 15; 35-2 ¶ 17.) Mr. King repeatedly refused transport after multiple attempts of Defendants Carter and Wall to convince him otherwise. (ECF Nos. 35-1 ¶ 15; 35-2 ¶ 17; 35-8 at 46:18-47:17.) Defendants Carter and Wall then conducted a capacity assessment on Mr. King in order to determine whether he had the mental capacity to decide to refuse transport to the hospital. (ECF Nos. 35-1 ¶¶ 16-17; 35-2 ¶¶ 18- 19.) It was determined that Mr. King was 'alert, oriented and did not have an altered mental status,' and that Mr. King had the capacity to make his own decision regarding transport to the hospital. (ECF Nos. 35-1 ¶ 19; 35-2 ¶ 21.) EMS Defendants conducted several capacity assessments throughout their visit on the morning of October 3, and consistently arrived at this same determination that Mr. King had the capacity to make his own decisions. (ECF Nos. 35-1 ¶ 19; 35-2 ¶ 21; 35-3 ¶¶ 14, 17-18.).

***

The decisions to honor Mr. King's refusal of transport to the hospital and to decline to recognize Plaintiff Betty Sutton's power of attorney did indeed result in EMS Defendants' ultimate decision to decline to transport Mr. King. However, those decisions are 'not determinative.' *Wood*, F.Supp.3d at 844. Those two decisions were only made because EMS Defendants conducted capacity assessments on Mr. King, and he successfully performed, demonstrating that he had the capacity to refuse transport to the hospital."

Legal Lesson Learned: The EMS personnel followed their protocol and properly declined the daughter's Power of Attorney.

File: Chap. 14, Physical Fitness
File: Chap. 15 – CISM, PTSD
File: Chap. 16 - Discipline

MI: FIRE CHIEF FIRED – MAYOR REFUSED TO FIRE TWO FF AFTER DEATH 2 BOYS – 1st AMEND. RETALIATION PROCEED

On Nov. 20, 2023, in Raymond C. Barton v. Sheldon Neely and City of Flint, Michigan, U.S. District Court Judge Nancy G. Edmunds held that the former Fire Chiefs claim of First Amendment retaliation may proceed against the Mayor and the City. The Court refused to grant qualified immunity to the Mayor and ordered pre-trial discovery to proceed. While the Fire Chief was an "at will" employee, he is protected from retaliation for telling City Council that he recommended termination of two firefighters for failure to find two boys during search second floor of house fire. Mayor's repeatedly told Fire Chief to only suspend the firefighters since Mayor was running for reelection and wanted Union support.

The Court wrote:

> "Here, Plaintiff's statements were made publicly, at a city council meeting. While Plaintiff appeared at the city council meeting in his capacity as Fire Chief, the content and context of the statements show that Plaintiff's statements were made outside the chain of command and not in furtherance of the ordinary responsibilities of his employment. Defendant Neely repeatedly instructed Plaintiff to make a public announcement saying Plaintiff initiated and agreed with changes to the original findings and recommendations regarding the fire. (ECF No. 2, PageID.23.) Plaintiff repeatedly refused. (Id.) Instead, Plaintiff stated that he did not make or agree to the change in the final report and that he had recommended the firefighters be dismissed."

Legal Lesson Learned: Even "at will" Fire Chiefs are protected from retaliation for his First Amendment comments to City Council as a private citizen.

> Note: See Nov. 20, 2023 article, "Judge rules lawsuit filed by former fire chief against Flint mayor can continue."
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> The Court referenced detailed facts from the Fire Chiefs amended complaint:
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> **"**This lawsuit arises out of the discharge of Plaintiff from his position as Flint City Fire Chief by Defendant Neely, Flint City Mayor. On May 28, 2022, a fire broke out at a house on Pulaski Street in Flint, Michigan. (ECF No. 2, PageID.18–19.) Six firefighters arrived at the scene of the fire, where they were told that residents were likely still inside. (Id. at PageID.19.) Two firefighters conducted a search for persons on the second floor of the home. (Id.) Both claimed they thoroughly searched all rooms on the upper level and used infrared equipment and thermal imaging to aid in the search. (Id.) The two firefighters then returned to the first floor and told the other firefighters there was no one else in the home. (Id.) At that point, a second set of firefighters went up to the second floor and immediately found two young boys in a bedroom. (Id. at PageID.20.) Neither boy was covered by any objects or obstructions and were visible to the naked eye. (Id.)

The boys were discovered approximately seven minutes after the first two firefighters had asserted that the house was all clear. (Id.) The boys died as a result of the fire. (Id. at PageID.17.)

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According to Plaintiff, the firefighters did not comply with the investigation and were unwilling to correct factual misrepresentations in their official reports on the fire. (Id. at PageID.21.)

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Plaintiff then recommended that the firefighters be suspended without pay pending a final investigation and discharged at the conclusion of the investigation. (Id.) When Plaintiff informed the city council and other city officials of his recommendations, Defendant Neely instructed Plaintiff to change his factual findings and recommendations. (Id.) Plaintiff's Amended Complaint states that Defendant Neely wanted Plaintiff to 'disguise the firefighters' misconduct, suspend the firefighters with pay, and drop his 3 recommendation that they be discharged.' (Id.) Defendant Neely then informed Plaintiff that Defendant Neely and his wife were up for election and re-election in their respective positions and needed the support of the firefighters' union. (Id.) Plaintiff interpreted that to mean that Defendant Neely wanted to "cover up [the firefighters'] wrongdoing and fraud for the sole purpose of winning personal political support from the firefighters' union." (Id.)

Plaintiff refused to change his findings and recommendations or make false statements about the incident. (Id. at PageID.22.) Defendant Neely continued to insist Plaintiff change his recommendations. (Id.) Plaintiff continued to refuse. (Id.)

In October 2023, Plaintiff learned that Defendant Neely had 'unilaterally and Surreptitiously' changed Plaintiff's official recommendation. (Id.) Defendant Neely then instructed Plaintiff to make a public statement saying Plaintiff initiated the change and agreed with it. (Id. at PageID.23.) Plaintiff refused. (Id.) Defendant Neely continued to insist that Plaintiff make the public statement. (Id.) Plaintiff again refused and told Defendant Neely that he would not make false statements regarding his original findings and recommendations about the incident. (Id.)

File: Chap. 16, Discipline

CO: NEW FIRE BOARD ELECTED – FIRED FIRE CHIEF – MAY SUE RETALIATION – HE REPORTED POSS. ELECTION FRAUD

On Nov. 17, 2023, in Erik Holt v. Florissant Fire Protection District, U.S. District Court Judge Nina Y. Wang, U.S. District Court for District of Colorado, held that the plaintiff's 1st Amendment retaliation claim may proceed to pre-trial discovery, but under Colorado law he cannot sue the Fire District for wrongful termination since it enjoys immunity under the Colorado Governmental Immunity Act ("CGIA"). The Town held an election at the Fire District for Board members and five new members were elected, but Fire Chief was advised that there

was intimidation and harassment of voters at the election and he gathered videotapes which he provided to criminal investigators.

The Court wrote:
"The following overview is based on the allegations in Plaintiff's Complaint and Jury Demand ('Complaint'), [Doc. 1, filed July 14, 2023], which the Court accepts as true for purposes of the instant Motion. FFPD employed Mr. Holt as interim fire chief from April 2022 to September 2022, and then as permanent fire chief from September 2022 through his June 22, 2023, termination. [*Id.* at ¶ 8]. His work performance was 'exemplary.' [*Id.*].

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On May 2, 2023, the Town of Florissant held a Board election at the FFPD fire station. [*Id.* at ¶¶ 10, 12]. Several non-incumbent candidates ran for office, including Paul Del Toro ('Mr. Del Toro'). [*Id.* at ¶ 11]. The election returns 'purportedly show[ed]' that five non-incumbent candidates prevailed, including Mr. Del Toro ('directors-elect'). [*Id.* at ¶ 18]. However, Mr. Holt received complaints that certain candidates and poll watchers 'undermin[ed] the integrity of the election by violating election laws including by intimidating and harassing voters outside of the fire station.' [*Id.* at ¶ 14]. The outgoing Board president, Starla Thompson ('Ms. Thompson'), filed a civil action in Colorado state court against the newly elected Board members and several poll watchers based on their electoral conduct. [*Id.* at ¶ 19]. In connection with a related law enforcement investigation into the Board election, Mr. Holt provided security footage and oral testimony to investigators on May 19, 2023. [*Id.* at ¶ 22].

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On May 26, 2023, Mr. Del Toro froze FFPD's bank accounts so that any transactions would require his personal approval. [*Id.* at ¶ 49]. This measure imperiled FFPD's ability to renew its liability insurance package, which ultimately expired on June 1, 2023, despite Mr. Holt's efforts to process a renewal transaction. [*Id.* at ¶¶ 53-58]. FFPD suspended the provision of emergency services to the community for several hours on June 6, 2023, due to the expiration of its insurance. [*Id.* at ¶¶ 59]. FFPD's coverage was restored later that day, and emergency services resumed shortly thereafter. [*Id.* at ¶ 61]. In a letter to the Florissant community, Mr. Del Toro stated that neither Mr. Holt nor the prior Board members were to blame for the insurance renewal situation. [*Id.* at ¶ 64]. Mr. Del Toro reiterated that Mr. Holt was not at fault in an email sent to a fellow director-elect. [*Id.* at ¶ 65].

On June 10, 2023, the new Board members took office and Mr. Holt commenced a two-week vacation. [*Id.* at ¶¶ 66-67]. On June 22, 2023, the Board terminated Mr. Holt for cause. [*Id.* at ¶ 68]. The termination notice stated:

Your termination was made 'for cause' due to your failure to ensure the timely payment of the District's liability insurance when due. This failure resulted in injury or damage to the financial or ethical welfare of the District due to your negligence, misconduct, inabilities or inattention to your duties and responsibilities; and a demonstrated a failure, in the judgment of the Board of Directors, to perform the standard required of the Fire Chief under the terms of the agreement. Mr. Holt alleges that the stated termination grounds were 'false and pretextual,' and that he was actually terminated 'in retaliation for his participation in the criminal investigations of the

incoming Board members' violations of election law, for refusing to follow unlawful orders, and for reporting the employment law violations committed by one of the directors-elect.' [*Id.* at ¶ 69]."

Legal Lesson Learned: The Fire Chief may now proceed with pre-trial discovery under his First Amendment claim of retaliation.

File: Chap. 16, Discipline

MA: BOSTON FF – SOCIAL MEDIA POSTS ATTACKING RELIGION, SEXUAL ORIENTATION, RACE - FIRED

On Nov. 6, 2023, in Octavius Rowe v. Civil Service Commission, the Appeals Court of Massachusetts held (3 to 0) that the Boston Fire Department and the city's Civil Service Commission properly upheld the termination of the firefighter. The Black firefighter claimed that white firefighters were treated less harshly, but two firefighters had resigned and a third received a suspension for less serious misconduct.

The Court wrote:

"Here, the commission affirmed BFD's decision to terminate Rowe's employment as a firefighter based on violations of several of the BFD's rules including those prohibiting discrimination, harassment, and use of abusive or threatening language, as well as their rule regulating the use of social media platforms. The commission conducted a detailed evaluation of the abundance of evidence from Rowe's social media posts that attacked others based on their religion, sexual orientation, and race. The posts, many of which Rowe admitted to having authored, employed abusive, threatening, and offensive language. It was reasonable for the commission to find that all of Rowe's statements and posts constituted conduct unbecoming a firefighter, and prejudicial to good order, whether made on or off duty.

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In an argument that is properly before us, Rowe claims his right to free speech was violated because he was terminated for his social media posts. We disagree.

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In general, a public employer 'may not discharge an employee on a basis that infringes that employee's constitutionally protected interest in freedom of speech.' Rankin v. McPherson, 483 U.S. 378, 383 (1987). However, a public employee's rights are not absolute, and the employee must accept certain limitations on their freedom of speech. See Garcetti v. Ceballos, 547 U.S. 410, 418 (2006).

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[Footnote 5]: For the first time on appeal, Rowe claims that because the initial complaint about him –- the Facebook photograph of him wearing the 'Caucasians' sweatshirt –- did not warrant further investigation, all the evidence of his misconduct that the BFD's investigation uncovered should be excluded as 'fruit of the poisonous tree.' This claim was neither made before the commission, nor in the Superior Court, and accordingly, it is waived. See Rivas v. Chelsea Hous.

Auth., 464 Mass. 329, 336 (2013). Rowe's claims that his rights to free association and freedom of religion were violated meet the same fate.

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[Footnote 7]: Rowe also claims that the BFD discriminated against him based on his race. Rowe, who is Black, claims other white firefighters, who allegedly made racist comments, were not terminated. However, as the judge and the commission noted, two of these firefighters resigned. The third, M.G., was investigated and ultimately suspended, but his cited conduct was more isolated in scope than Rowe's conduct. Although the BFD disciplined M.G., the commission concluded that the department had not pursued the allegations against M.G. with the 'same due diligence' as those against Rowe. As a result of that conclusion, the commission initiated a 'Section 72 inquiry,' see G. L. c. 31, § 72, and ordered the BFD to further investigate whether M.G. allegedly used the 'n-word' in a social media post. The commission stated that M.G.'s section 72 inquiry did not detract from the 'overwhelming' evidence that Rowe made bigoted comments about individuals based on their religion, sexual orientation, and race, and the section 72 inquiry was meant to ensure that any firefighter posting bigoted comments should find another occupation. The BFD investigated and submitted findings that M.G. had lied and did, in fact, make the 'n-word' posting, but it could not determine whether the use of the word was meant to be 'pejorative' and thus suspended M.G. for two tours. Reviewing its limited options provided by G. L. c. 31, § 72, the commission asked the BFD to consider increasing the discipline and closed the inquiry."

Legal Lesson Learned: Social media posts by fire or EMS can result in discipline, including termination.

File: Chap. 17, Arbitration

CT: ARBITRATOR UPHOLDS DISCIPLINE - COVID19, NO MASK, TEMP CHECK, ARGUMENT - 15 DAYS VACATION

On Nov. 6, 2023, in Nicola Tamburo v. City of Stamford, Judge Edward T. Krumeich, judge trial referee of Stamford / Norwalk Judicial District, in unpublished opinion, held that arbitrator properly upheld the discipline of FF / EMT Tamburo, finding there was evidence of "just cause" for the discipline.

The Court wrote:

> "The arbitrator found that during COVID 19 pandemic there were protocols in place that restricted entrance to public buildings, mandated mask-wearing, social distancing and required submission to temperature checks and health questions at a designated spot upon entrance. On April 9, 2020, the arbitrator found Tamburo violated the City's COVID 19 protocols by entering the Fire Headquarters through an undesignated door, without submission to a temperature check or health inquiries, and without wearing a mask. He then walked pass several firefighters to engage in a shouting match with another firefighter. As a result of Tamburo's behavior, he was placed on paid administrative leave

and, after investigation, the City disciplined him, mandating that he forfeit fifteen days' vacation time and that he complete an anger management course."

Legal Lesson Learned: Just cause for the discipline was proven.