**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

# Jan 2024 – 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

- **2024: FIRE & EMS LAW – MONTHLY NEWSLETTERS:** monthly review of recent court decisions [send e-mail if wish to be added to our free listserv]: Case summaries since 2018 from monthly newsletter.
- **2024: FIRE & EMS LAW – RECENT CASE SUMMARIES / LEGAL LESSONS LEARNED**: Case summaries since 2018 from monthly newsletter can be viewed via Scholars@UC
- **2024: FIRE & EMS LAW – CURRENT EVENTS**: View via Scholars@UC
- **TEXTBOOK:** Updating 18 chapters of my textbook (2018 to current). FIRE SERVICE LAW (SECOND EDITION), Jan. 2017

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File: Chap. 1, Arson

## LA: ARSON – NEIGHBOR'S APT / GASOLINE – MOM HEARD 2ND MAN TELL SON "YOU PUT TOO MUCH" - CONV. UPHELD

On Dec. 27, 2023, in State of Louisiana v. Terone R. Thomas, the Louisiana Fifth Circuit Court of Appeals held (3 to 0) that jury properly found defendant guilty, sentenced 5 years in prison, but judge's restitution order $4,500 to neighbor requires evidence of the amount of the victim's loss. The Court wrote: "[Defendant's mother] testified that she heard the other man telling Defendant 'You put too much' or 'You did too much.' She did not hear Defendant say anything. She saw Defendant and the man get in 'a little gray Mitsubishi, or whatever it was' and leave the scene."

FACTS:

> "On September 19, 2019, the Jefferson Parish District Attorney filed a bill of information, charging Defendant, Terone R. Thomas, with two counts of aggravated arson, in violation of La. R.S. 14:51, against Debra Lindsey (count one), and a six-year-old female (count two) [gasoline explosion in their apartment on Dec. 12, 2018].
>
> ***
>
> Debra Lindsey testified that she lived at 2032 James Drive for 10 years. The residence was a duplex, and she lived in 2032, the front unit. She testified that Terri Stewart and Defendant (Ms. Stewart's son) lived in 2034, the back unit. She explained that she had a positive relationship with Ms. Stewart at first, but their relationship changed over a parking spot dispute. When Ms. Stewart first moved to the residence, Ms. Lindsey did not have a vehicle; so, Ms. Stewart parked in her spot. Ms. Lindsey explained that when she got a vehicle and parked it in the spot to get groceries out, Ms. Stewart went 'ballistic'

and called the police. She testified that Ms. Stewart called the police on her multiple times and made things up, like that they had broken into her house and damaged her vehicle.

***

[Deputy Eric Glorioso] testified that he wrote an initial report regarding the incident, and he included in his report that Ms. Lindsey told him that she heard defendant say, 'We did it wrong. That's too much.' 4

Footnote 4: Ms. Stewart later testified that she did not hear Defendant say this but heard someone else say it to Defendant."

***

Sergeant Rivere asked Defendant [at hospital where he was being treated for burns] if he would consent to having his clothes examined because he was a burn victim, and Defendant consented. Sergeant Rivere explained that the clothing was photographed by JPSO's crime scene technician. He explained that it was seized and photographed because he smelled an odor, and it could be evidence in the fire investigation.

***

As to the cause of the fire, [ATF & Explosives] Agent Trimber concluded that the first fuel ignited was gasoline and that there was a fuel air explosion. He explained there was a quantity of gasoline that sat, and an introduction of an open flame device to the gasoline vapors caused a "flash fire and fuel air explosion followed by a rapidly [growing] fire that within five minutes extended out the front door." He came to this conclusion from the presence of gasoline in the interior and the area of origin, the glass evidence found in the yard, and the injuries that were sustained.

HOLDING:

"After review, we find that the record does not contain sufficient evidence to support the amount of restitution ordered. The trial court in this matter imposed restitution in the amount of $4,500 without the introduction of any evidence of the amount of the victim's loss or Defendant's ability to pay the amount ordered, as required by La. C.Cr.P. art. 875.1. Accordingly, like the court in Douglas, supra, we vacate Defendant's sentence and remand the matter to the trial court for a restitution hearing to be held. The trial court is instructed to hold a hearing that fully complies with La. C.Cr.P. art. 875.1."

**Legal Lesson Learned: Thorough investigation, clothing seized by consent, crime scene evidence collected with search warrant, expert testimony.**

File: Chap. 1, Arson

## MA: ARSON CHURCH – PROBABLE CAUSE SEARCH WARRANT CAR OF CHURCH MEMBER – PORTIONS DELETED

On Dec. 8, 2023, in Commonwealth v. Lys W. Vincent, the Appeals Court of Massachusetts held (3 to 0) that trial court motions judge properly found the affidavit to search the car was supported by probable cause. The Court held: "The defendant argued in his motion that the warrant affidavit contained unlawfully obtained information. The motion judge agreed that portions of the affidavit were based on an unconstitutional search and interrogation but concluded that, even after the unlawful portions of the affidavit were excised, it still established probable cause for the search. Without the unlawfully obtained information, the affidavit established the following. *** The timing of the car's arrival and departure in relation to the time of the fire, the fact that the car was registered to a church member, and the footage of the driver apparently carrying into the building a bag that could have contained the accelerant, went well beyond mere presence and established a sufficient nexus between the car and the crime. Accordingly, there was probable cause to issue the search warrant, and the evidence found in the car -- including gasoline residue on the passenger-side carpet -- was properly admitted at trial."

FACTS:

> "On September 24, 2017, Methuen firefighters responding to a fire at a multi-use building reported a strong odor of gasoline. They contacted police, who found that the fire was limited to a room being used as a church. Police observed several areas of charring on the carpet, forming an irregular burn pattern, and they found burned pages from what appeared to be a Bible on the floor next to the charred areas. Police also detected a strong odor of gasoline, and a specially trained police dog detected an accelerant in several spots on the carpet and on one of the pews. As a result, police believed that the fire was set intentionally by applying an open flame to ignitable liquid vapors.
>
> The next day, police obtained video surveillance footage from another tenant in the building showing that a man in an older model, dark-colored Toyota Camry with the partial license plate number "921" arrived at the building at 9:53 p.m. on the night of the fire. From the video, it appeared that he went inside the building with a black bag, returned to his car at 10:10 p.m. without the bag, and promptly left. A 911 call reporting the fire was placed between one and three minutes later.
>
> Using the partial plate number, police ran a search in the registry of motor vehicles database. It returned a potential match for a dark blue 1998 Camry registered to Lys Walker Vincent. A list of church members provided to police by the pastors also showed a member named Walker Vincent. Upon arriving at Vincent's registered address, police observed a dark blue 1998 Camry with the Massachusetts license plate 6FM921. Based on these facts, police sought a warrant to search the car for evidence that someone intentionally set the fire at the church."

HOLDING:

> "After a Superior Court jury trial, the defendant appeals from his convictions of burning a building, G. L. c. 266, § 2, and breaking and entering with intent to commit a felony, G. L. c. 266, § 18. We affirm.
>
> ***

> Probable cause exists to issue a search warrant when the affidavit contains 'sufficient information for an issuing magistrate to determine that the items sought are related to the criminal activity under investigation, and that the items reasonably may be expected to be located in the place to be searched at the time the search warrant issues.' Commonwealth v. Wilson, 427 Mass. 336, 342 (1998). On appeal, the defendant does not challenge that there was probable cause to conclude a crime was committed, but he contends that the car's presence at the scene was not enough to establish a nexus between the car and the crime. We need not decide whether mere presence was enough to establish probable cause, however, because here there was more. The timing of the car's arrival and departure in relation to the time of the fire, the fact that the car was registered to a church member, and the footage of the driver apparently carrying into the building a bag that could have contained the accelerant, went well beyond mere presence and established a sufficient nexus between the car and the crime. Accordingly, there was probable cause to issue the search warrant, and the evidence found in the car -- including gasoline residue on the passenger-side carpet -- was properly admitted at trial."

**Legal Lesson Learned: Search warrant of car will be upheld where church video showed suspicious activity.**

File: Chap. 1, Arson

## OH: ARSON – PLEAD TO MISDEMEANOR - MAX VICTIM RESTITUTION IS $999.99 – MARSY'S LAW NOT APPLICABLE

On Dec. 4, 2023, in State of Ohio v. Timothy A. Messer, the defendant entered plea deal with prosecutor; he was indicted for aggravated arson in violation of R.C. 2909.02(A)(2), a second-degree felony, but pled guilty to misdemeanor of arson in violation of Ohio Rev. Code 20909.03(A)(1); he was sentenced probation, and victim restitution in the amount of $15,315 (actual loss). Court of Appeals reduced restitution to $999.99 since misdemean statute is for property damage up to $1,000. "The state agrees that a straightforward application of our prior precedent would mean that the trial court erred in awarding restitution in an amount more than $999.99. However, the state argues that Marsy's Law, a victim's rights amendment to the Ohio Constitution effective February 5, 2018, and its effect on restitution was not addressed by the court. The relevant provision of Marsy's Law gives a victim of a crime the right 'to full and timely restitution from the person who committed the criminal offense or delinquent act against the victim.' Article I, Section 10a(A)(7), Ohio Constitution. The state asks us to consider the impact of Marsy's Law on our previous precedent, which limited restitution by the offense. *** Nothing in Marsy's Law changes our analysis. Marsy's Law gives the victim the right 'to full and timely restitution from the person who committed *the criminal offense* or delinquent act against the victim.' (Emphasis added.) Article I, Section 10a(A)(7), Ohio Constitution. The criminal offense committed against the victim here was a first-degree misdemeanor arson offense. Thus, the victim is entitled to full and timely restitution for economic loss of any amount equal to or less than $999.99."

FACTS:

> "In October 2020, an Allen County Grand Jury indicted Messer on one count of aggravated arson in violation of R.C. 2909.02(A)(2), a second-degree felony. (OR 3)

Messer initially pleaded not guilty, but later entered a negotiated plea of guilty to the amended offense of arson in violation of R.C. 2909.03(A)(1), a first-degree misdemeanor. (OR 9, OR 216) The case proceeded to a sentencing hearing and the trial court sentenced Messer to a 180-day jail term with the term suspended pending successful completion of community control. (OR 238) The conditions of Messer's community control required that he pay restitution to the victim in the amount of $15,315.00. The trial court set the restitution amount after hearing testimony from the victim about the value of the items lost in the fire and testimony from the fire chief about the extensive fire, smoke, and water damage caused by the fire."

HOLDING:

"Likewise here, Messer pleaded guilty to a first-degree misdemeanor arson offense, which defines the property value or physical harm as less than $1,000. The trial court's restitution order of $15,315.00 exceeded the maximum amount of $999.99 for the offense on which he was convicted. In accordance with *Brown* and *Rohrbaugh,* we find that the restitution order was contrary to law and the trial court abused its discretion in imposing it."

**Legal Lesson Learned: When citizens of Ohio voted to amend state Constitution to add Marsy Law giving victims a right to restitution (effective 2018), it did not change other Revised Code provision limiting restitution amount.**

Note: See Ohio Marcy's Law restitution request form.

File: Chap. 2, FF Safety

## CA: FIREHOSE - FF SERIOUSLY INJURED – CITY MUNI BUS DROVE OVER HOSE – CAN'T SUE CITY OR BUS DRIVER

On Dec. 12, 2023, in Matthew Vann v. City and County of San Franciso, et al., the California Court of Appeals, First District, Second Division, held (3 to 0) that trial court properly dismissed the firefighters lawsuit against the city. The Court wrote: "Here, in contrast, we are dealing with the Workers' Compensation Act, which must be liberally construed in favor of awarding workers' compensation benefits. (§ 3202; *King v. CompPartners, Inc*., *supra*, 5 Cal.5th at p. 1051.) Application of these principles cuts against concluding that SFMTA [San Francisco Municipal Transportation Agency] and SFFD [San Francisco Fire Department] are distinct entities, and therefore that Yu and appellant have separate employers. To do so would have the effect of circumventing the workers' compensation exclusivity rule, which prevents employees from bringing actions against fellow employees acting in the scope of employment, such that the fellow employees' negligence could be imputed to their employers."

FACTS:

"On November 2, 2020, appellant, a firefighter with the SFFD, responded to an emergency on Spear Street between Market Street and Mission Street in the City and County of San Francisco. Yu, a bus driver with the SFMTA, then drove a bus through the

location of the active emergency. The bus went over a firehose, which became entangled with the bus's wheels and stretched until it broke off the fire engine it was attached to. When the firehose broke away, it hit appellant's legs, sweeping him off his feet and causing him to slam backwards onto the ground. His helmet flew off, and the back of his head struck the street surface. As a result, appellant sustained catastrophic injuries, including a traumatic brain injury, a fractured left clavicle, an internal hemorrhage in his right eye, and damage to his throat and vocal chords.

***

On March 23, after holding a hearing, the trial court issued an order sustaining the demurrer to the complaint without leave to amend. Relying on *Walker* and *Colombo*, the court was unpersuaded by appellant's attempt to draw an analogy between SFMTA and SFFD as two separate corporate entities within a large corporation. Instead, the court determined: 'In 1999, the City's municipal transportation agency was formed to, inter alia, operate the City's street cars and buses. However, that agency, along with the City's fire department, remains part of 'a single governmental entity'-the City.' And the court held, '[appellant] is receiving workers' compensation and the City correctly asserts that is his sole remedy.'"

HOLDING:

"Based on all of the above, we reject appellant's assertion that SFMTA was 'plainly intended' to exist independently of the City. While SFMTA undoubtedly enjoys autonomy over various aspects of its operations, in other significant areas it still must collaborate with, or answer to, other departments of the City and its elected officials. SFMTA is simply a part of, and subordinate to, the City it serves.

***

**The Workers' Compensation Exclusive Remedy Rule**. Section 3600, subdivision (a) provides that, with exceptions not relevant here, an employer's liability to pay compensation under the Workers' Compensation Act is 'in lieu of any other liability whatsoever' if specified 'conditions of compensation[3] concur ....' (§ 3600, subd. (a); *Kuciemba v. Victory Woodworks, Inc.* (2023) 14 Cal.5th 993, 1006.) So, when the statutory conditions for recovery are met, the employer is immune from civil damages liability for on-the-job injuries because workers' compensation is the injured employee's 'exclusive remedy.' (§§ 3600, 3601, 3602, subd. (a).)

A parallel exclusive remedy provision is section 3601, subdivision (a), which 'prohibits actions against co-employees for injuries they cause when [acting within the scope of their employment.]' (*Hendy v. Losse* (1991) 54 Cal.3d 723, 730.) 'To prevent employees from circumventing the exclusivity rule by bringing lawsuits for work-related injuries against co-employees, who in turn would seek indemnity from their employers, the Legislature . . . provided immunity to co-employees acting within the scope of their employment. (§ 3601, subd. (a) ....) In other words, the purpose of the exclusivity rule would be defeated if employees could bring actions against fellow employees acting in the scope of employment such that the fellow employees' negligence could be imputed to their employers. [Citation.] Therefore, workers' compensation was also made the

exclusive remedy against fellow employees acting within the scope of employment.' (*Torres v. Parkhouse Tire Service, Inc.* (2001) 26 Cal.4th 995, 1002 (*Torres*).) In short, '[f]or conduct committed within the scope of employment, employees, like their employers, should not be held subject to suit.' (*Ibid.*)"

**Legal Lesson Learned: Both the FD and the bus department are part of the same city; cannot sue the City or the bus driver; only remedy for injured firefighter is workers comp.**

File: Chap. 2, FF Safety

## CA: BLOCKING ENGINE - MOTORIST RAN INTO ENGINE AT MVA - 2 FF HURT - FF GET NEW JURY TRIAL FOR DAMAGES

On Nov. 29, 2023, in Michael Rattary and Stephen Rogness v. Brian Favro, the California Court of Appeals, First District, Fourth Division, held (3 to 0) that the two firefighters are entitled to a new civil jury trial since the attorney for Favro told jury in closing argument an improper standard on liability (jury voted against awarding damages to Rattery 10-2, and against Rogness 12-0). Their initial lawsuit was dismissed by trial court judge based on Fireman's Rule; but Court of Appeals reversed and ordered case to be tried on motorist's duty of ordinary care when approach accident scene. Now the Court of Appeals orders a new trial, because Favro's attorney in closing argument told jury FFs can only get damages if "faced from the person they are suing was *beyond the risk that's inherent to their job*." (Italics added.) The Court of Appeals reverses, writing:

> Section 1714.9, subdivision (a)(1) concerns liability to a firefighter for tortious "conduct . . . occur[ring] after the person knows or should have known of the presence of the . . . firefighter." (§ 1714.9, subd. (a)(1).) … "Although most of the cases analyzing the effect of section 1714.9 treat it as stating an exception to the firefighter's rule (e.g. *Gibb v. Stetson* [(1988)] 199 Cal.App.3d 1008, 1014-1015), thethe Supreme Court has more accurately described the effect of the statute as reimposing 'a duty of ordinary care (see [Civ. Code,] § 1714), which would otherwise be abrogated by the firefighter's rule.'" (*Boon v. Rivera* (2000) 80 Cal.App.4th 1322, 1330-31, quoting *Calatayud v. State of California* (1998) 18 Cal.4th 1057, 1068.)

FACTS:

> "Plaintiffs Michael Rattary and Stephen Rogness (the firefighters) are firefighters who brought a personal injury suit against respondent Brian Favro, who crashed his car into a firetruck before receiving aid from the plaintiffs. At trial, the firefighters alleged that Favro was negligent in failing to comply with their directions and that Favro's failure in this respect caused them to be harmed by yet another crashing vehicle. On appeal, the firefighters argue that Favro's counsel committed misconduct by misrepresenting to the jury the law applicable to these unusual circumstances. They further contend that the trial court's subsequent admonition failed to cure the error. We agree and therefore reverse the judgment, remanding the matter for a new trial.
>
> ***

The firefighters initially sought to hold Favro liable for both crashing his car and failing to cooperate after the crash.

***

After the presentation of evidence, the trial court instructed the jury with a modified version of the Judicial Council's California Jury Instruction No. 473 – 'Assumption of Risk/Exception/Occupation Involving Inherent Risk' (instruction No. 473). In relevant part, the court instructed the jury as follows: 'Stephen Rogness[] and Michael Rattary claim that they were harmed by Brian Favro while they were performing their job duties as firefighters/emergency medical personnel. Brian Favro is not liable if . . . Rogness[] and Rattary's injuries arose from a risk inherent in the occupation of firefighter/emergency medical personnel.... Rogness[] and Rattary may recover, however, if they prove: [¶] (1) Brian Favro increased the risk to . . . Rogness[] and Rattary through conduct occurring after he knew or should have known of the presence of fire-fighters or emergency personnel.'

***

Question 1 on the Special Verdict Form asked jurors: 'Did Brian Favro increase the risks to . . . Rogness[] and Rattary through conduct occurring after he knew or should have known of the presence of the firefighters or emergency personnel?' The presiding juror marked, 'No,' thereby deciding the form's dispositive question in Favro's favor."

HOLDING:

"The closing argument of Favro's counsel, along with the trial court's admonition and the misleading text of instruction No. 473, thus effectively raised the firefighters' burden of proof beyond the requirements of section 1714.9, subdivision (a)(1). On the verdict form, the only finding made by the jury was that Favro had not 'increase[d] the risks' - the very phrase that was given an erroneous meaning by Favro's counsel and the ambiguous jury instructions. And for at least one plaintiff, a hung jury was already within reach. For those reasons, 'it is reasonably probable' that the firefighters 'would have achieved a more favorable result in the absence of' the error."

**Legal Lesson Learned: The firefighters now get a "second chance" at convincing a jury that they are entitled to damages.**

File: Chap. 2, FF Safety

## NJ: BEARDS - BLACK FF GROWING 3-INCH BEARD - ALSO MINISTER – ORDERED NOT RESPOND FIRES – NO CASE

On Nov. 29, 2023, in Alexander Smith v. City pf Atlantic City, et al., U.S. District Court Judge Chritine P. O'Hearn, U.S. District Court for District of New Jersey, granted City's motion for summary judgment. The Court held: "Defendants submit that the grooming policy advances the government's legitimate objectives of (1) firefighter safety and (2) following state and federal regulations which prohibit facial hair. (ECF No. 115-29 at 13-14). Safety is a well-recognized legitimate government objective. *Fraternal Ord.*, 170 F.3d at 366. And a fire department's ability

to comply with state and federal regulations is certainly a legitimate government objective. *See e.g.*, *Hamilton*, 563 F.Supp.3d at 60. The grooming policy is rationally related to these objectives. First, and most obviously, the policy ensures that the ACFD complies with various state and federal regulations that prohibit devices like SCBAs to be worn by those with facial hair. *See*, *e.g.*, 20 C.F.R. § 1910.134(g). Second, there is no dispute that PEOSH and OSHA find that an ill-fitting SCBA creates a safety risk not only to the firefighter wearing it, but also to fellow firefighters who may be tasked with rescuing those with an ill-fitted mask. Firefighter safety is put at risk when anything inhibits the seal of an SCBA, including facial hair. This is contemplated in the text of the policy which provides that '[f]acial hair of any type shall not interfere with the seal of SCBA face piece.'"

FACTS:

> "Plaintiff is an African American male and Christian who was hired as an Atlantic City Fire Department ('ACFD') firefighter in 2004. (Defs. SOMF, ECF No. 115-2 ¶ 8; Pl. SOMF, ECF No. 122-1 ¶ 8; Pl. Suppl. SOMF, ECF 122-2 ¶ 1). Plaintiff is also an ordained minister at a local church. (ECF No. 122-2 ¶ 1). In November 2015, he began working in the Department's Fire Shop as an Air Mask Technician. (ECF No. 115-2 ¶ 9; ECF No. 122-1 ¶ 9). Plaintiff is 'one of only a handful of trained Air Mask Technicians for the ACFD.' (ECF No. 122-2 ¶ 15).
>
> ***
>
> In December 2018, Plaintiff began growing a beard as an exercise of his faith. (ECF 1222 ¶¶ 29-30). On January 3, 2019, Plaintiff submitted a request for a religious accommodation to wear a three-inch beard. (ECF No. 155-2 ¶ 31; ECF No. 122-1 ¶ 31).[4]
>
> After responding to a fire on January 7, 2019, Plaintiff was told that, by instruction from the City Solicitor's office, he was prohibited from responding to fire emergencies until a decision was made on his religious accommodation request. (ECF No. 122-2 ¶¶ 38-40). On January 9, 2019, the New Jersey State Department of Health's Public Employees Occupational Safety and Health ("PEOSH") informed Deputy Chief Culleny by email that there existed no religious exemption for ACFD members who wished to wear a beard. (ECF No. 115-2 ¶ 34; ECF No. 1221 ¶ 34). PEOSH's guidance was based on the Occupational Safety and Health Administration's ("OSHA") interpretation of its regulation requiring the use of respirators in certain scenarios. (ECF No. 115-2 ¶ 35)."

HOLDING:

> "Further, even if the Court were to consider Plaintiff's newly asserted retaliation allegations, Defendants have a 'legitimate, non-retaliatory reason for [their] conduct.' *Moore*, 463 F.3d at 342. Denying Plaintiff's exemption request, charging him with insubordination, and threatening to suspend him for violating the grooming policy all further Defendants' legitimate government interest in safety and ability to enforce the grooming policy, the text and enforcement of which is constitutional and furthers the ACFD's objective safety interests. Plaintiff has provided no evidence that Defendants' "proffered explanation was false, and that retaliation was the real reason for the adverse employment action.' *Id.* Thus, Defendants are entitled to summary judgment on Counts Three and Four."

**Legal Lesson Learned: FF must comply with OSHA standards on facial hair.**

File: Chap. 3, Homeland Security

# TX: TIK TOK - GOVERNOR MAY LIMIT USE ON STATE / UNIVERSITY DEVICES – COMPANY BASED IN CHINA

On Dec. 11, 2023, in Coalition For Independent Technology Research v. Gregg Abbott, et al., U.S. District Court judge Robert Pitman, U.S. District Court for Western District of Texas, granted defense motion to dismiss the lawsuit. TikTok is banned in over 30 states in USA; owned by ByteDance Ltd., Beijing, China. The Court wrote: "While the Court recognizes the importance both of protecting academic freedom and supporting public employees' right to free speech, the Court finds that these important ideals do not dictate the appropriate framework for this case. Texas's TikTok ban is not a restraint on public employee speech. Even as applied to public university faculty, who are entitled to special considerations under the law, the Court finds that the ban is not a restraint on speech in a public forum, but rather a restriction on a nonpublic forum motivated by Texas's data protection concerns regarding TikTok, an app owned by a company based in China. (Compl., Dkt. 1, at 2). Texas's TikTok ban is limiting the use of an app on state-provided devices and networks, which is not a blanket prohibition. Public university faculty-and all public employees-are free to use TikTok on their personal devices (as long as such devices are not used to access state networks). Therefore, the Court disagrees with Plaintiff's characterization of the ban as falling under the category of public employee speech. The Court finds nonpublic forum analysis to be the proper framework for Plaintiff's challenge, as the ban relates to Texas's regulation of its own governmental property."

FACTS:

> "In December 2022, Defendant Greg Abbott, the Governor of Texas, issued a directive ordering 'every state agency in Texas' to 'ban its officers and employees from downloading or using TikTok on any of its government-issued devices.' (Directive, Dkt. 1-2, at 2).
>
> ***
>
> Pursuant to the Governor's directive and in anticipation of a codified TikTok ban, the University of North Texas System ('UNT') promulgated its own policies regarding the TikTok ban. (Compl., Dkt. 1, at 15-16). In December 2022, UNT's Information Technology Office required UNT faculty and staff to 'immediately cease using or downloading TikTok on any institutionally issued and/or managed devices.'
>
> ***
>
> Plaintiff, a group of 'academics, journalists, civil society researchers, and community scientists,' brought suit challenging Texas's TikTok ban, which 'extends to all faculty at public universities.'(Compl., Dkt. 1, at 2). Plaintiff argues that the ban 'is preventing or seriously impeding faculty from pursuing research that relates to TikTok' and has 'made it almost impossible for faculty to use TikTok in their classrooms.' (*Id.*)."

HOLDING:

> "The Court finds that Texas's limited TikTok ban is 'reasonable in light of the purpose which the forum at issue serves.' *Perry*, 460 U.S. at 49. Unlike other states' more

sweeping TikTok bans of late, Texas's TikTok ban applies only to state devices and networks, leaving those impacted by the ban free to use TikTok on their personal devices on their own networks (as long as they are not used to access state networks). While the Court agrees with Plaintiff that the ban prevents certain public university faculty from using state-provided devices and networks to research and teach about TikTok, the Court finds that the ban is a reasonable restriction on access to TikTok in light of Texas's concerns. "The Government's decision to restrict access to a nonpublic forum need only be *reasonable;* it need not be the most reasonable or the only reasonable limitation." *Cornelius*, 473 U.S. at 808. Here, Texas has cited data privacy concerns that have motivated its decision to limit access to TikTok on state-operated devices and networks. Texas has also limited the scope of the ban to state employees. Further, there are numerous other ways for state employees, including public university faculty members, to access TikTok, such as on their personal devices. Thus, the Court draws a distinction between Texas's TikTok ban and the law recently considered in *Alario v. Knudsen*, in which the United States District Court for the District of Montana preliminary enjoined Montana's total TikTok ban, which was far broader than Texas's TikTok ban. No. CV 23-56-M-DWM, 2023WL 8270811, at *6-*7 (D. Mont. Nov. 30, 2023) (finding that 'even applying intermediate scrutiny, the State fails to show how [Montana's TikTok ban] is constitutionally permissible' because it 'completely bans a platform where people speak'). "

**Legal Lesson Learned: State employees, including university professors, may still use TikTok on their personal devices.**

Note: "Federal interim rule implements TikTok ban on devices used in the performance of federal contracts." July 13, 2023).

File: Chap. 3, Homeland Security

## CA: DEPORTATION – HELD FOR 2-YRS BY ICE – GETS BOND HEARING – WAS CA INMATE "FIRE CAMP" FIREFIGHTER

On Dec. 1, 2023, in John Doe v. Moises Becerra, U.S. District Court Judge P [Patrick] Casey Pitts, U.S. District Court Judge for Northern District of California (San Jose) ordered U.S. Immigration and Customs Enforcement (ICE) to give the detainee ("John Doe" - proceeding under a pseudonym) awaiting deportation to Mexico (2 years in ICE custody) a bond hearing before an Immigration judge. The Court wrote: "While in state custody, Mr. Doe joined the California Department of Corrections and Rehabilitation Fire Camp program and spent the last three years of his incarceration working as a firefighter. He completed his sentence in September 2021 and is on state parole until September 2024. If he is able to remain in the United States, Mr. Doe hopes to take advantage of a new law that enables Fire Camp participants like him to become professional firefighters upon release. *** On September 30, 2021, following his release from state detention, ICE took Mr. Doe into custody and detained him at the Golden State Annex (GSA) in McFarland, California. GSA is a private immigration detention facility operated for profit by GEO under contract with ICE. It is located outside the Northern District.

FACTS:

> "Mr. Doe [now almost 50 years old] was born in Mexico and brought to the United States by his mother as an infant. He is not a U.S. citizen, but his daughter, partner, brother, sister, mother, and stepfather are all U.S. citizens who reside in the United States.
>
> Mr. Doe joined a gang when he was 12 or 13 years old. In 1997, he was convicted of assault and sentenced to five years of probation with a four-year suspended prison sentence. In 2001, he was convicted of robbery and attempted robbery … was ultimately sentenced to twenty-six years and four months in prison, with enhancements based on his previous conviction and gang involvement.
>
> ***
>
> On September 30, 2021, following his release from state detention, ICE took Mr. Doe into custody and detained him at the Golden State Annex (GSA) in McFarland, California. GSA is a private immigration detention facility operated for profit by GEO under contract with ICE. It is located outside the Northern District."

HOLDING:

> "For the reasons set out below, the Court concludes that it has jurisdiction over Mr. Doe's petition and that Mr. Doe's prolonged detention without a bond hearing violates his procedural due process rights. The government is therefore ordered, by December 15, 2023, to provide Mr. Doe with a bond hearing before an immigration judge at which the government must prove by clear and convincing evidence that Mr. Doe's continued detention is justified by the need to prevent Mr. Doe's flight or protect the public."
>
> ***
>
> Immigration is of course an area where Congress's prerogatives and the Executive's interests are at their strongest. At the same time, however, Mr. Doe's liberty interests are also substantial. A bond hearing will greatly reduce the risk that Mr. Doe is being deprived of his physical freedom unnecessarily. And because the decision maker will necessarily consider exactly the kinds of risks that the government points to as justifying Mr. Doe's detention, requiring such a hearing will not unduly burden the government or the broader public."

**Legal Lesson Learned: Even immigrants in custody for two years awaiting deportation have due process rights to a bond hearing.**

> Note: "The History of California's Inmate Firefighter Program; The initiative, which finds prisoners working as first responders and rescuers, dates back to the 1940s."
>
> "Since World War II, California has relied on a unique group of firefighters to battle its conflagrations: inmates. Prisoners who want to enter the Conservation Camp Program must meet security requirements and undergo two weeks of training. The all-inmate crews live in so-called fire camps and are led by personnel from the California Department of Forestry and Fire Protection, or Cal Fire. They earn between $2.90 and $5 a day depending on their duties—and slightly more when actively fighting a fire. Though

their numbers have fluctuated over the years, they have often comprised approximately one-third of California's firefighting force."

File: Chap. 4 – Incident Command / Drones

## CA: PD DRONE VIDEOS – "FIRST IN COUNTRY" FAA PROGRAM – VIDEOS MOUNTAIN LION, WATER LEAK PUBLIC

On Dec. 27, 2023, in Arturo Castanares v. The Supervisor Court of San Diego County, and City of Chula Vista, the Court of Appeal, Fourth Appellate District, Division One, Stare of California, held (3 to 0) that trial court judge improperly held that all police videos (370 flights) were exempt from disclosure under CA "catchall" provision protecting police investigations and individual privacy. The Court remanded the case to trial court judge for further review of videos. The Court wrote: "We agree with Castañares that the superior court erred in determining, as a matter of law, all video footage from the drone program is exempt under section 7923.600, subdivision (a) as records of investigations. However, it might be the case, after further inquiry, consistent with this opinion, that the majority of the video footage is exempt. That said, we cannot make that determination on the record before us. *** For example, a 911 call about a mountain lion roaming a neighborhood, a water leak, or a stranded motorist on the freeway could warrant the use of a drone but do not suggest a crime might have been committed or is in the process of being committed."

FACTS:

> "There is evidence before us that the requested drone video footage for March 2021 consists of videos from about 370 responses to calls, and Castañares received call logs and AARs [After Action Reports] related to each of those flights.
>
> ***
>
> We are simply considering the possibility that a drone could be dispatched in response to a call to service from the public wherein the use of the drone could not be considered investigatory in nature. As discussed ante, we can imagine such situations (e.g., potentially dangerous wildlife roaming the neighborhood, a stranded motorist, a water leak).
>
> ***
>
> The Federal Aviation Authority (FAA) selected the City's police department as the first in the country to test the use of drones as first responders. Previously, police agencies relied on responding officers to launch drones when on scene. The City's innovation was to dispatch drones before officers arrived and, similar to the use of helicopters, provide incident commanders and responding officers livestreamed video of the scene before arrival, so they could respond more effectively and safely. Before launching its program, the City engaged in extensive outreach to civil rights groups, media, and in other public fora, soliciting input on policies for police use of drones. The City's policy, which prohibits use of drones for general surveillance or patrol, reflects that outreach and the City's extensive planning and research.

Moreover, the City's drone policy adopted many of the American Civil Liberties Union's 2013 recommendations to Congress including: (1) restricting use of drones to calls for service; (2) privacy controls limiting access to and retention of videos; (3) community engagement and online access to flight path data through a website and links to City's policies and media coverage, as well as offering program tours to civic groups, police agencies, and others; (4) City Council and citizen advisory committee oversight of policy decisions; (5) internal auditing and tracking; and (6) banning weaponization.

***

In this matter of first impression, we consider a request made by a private citizen under the California Public Records Act (Gov. Code,1 § 7923.500; CPRA) to obtain video footage recorded by drones operated by the City of Chula Vista's (City) police department. The City operates a pilot program to use drones as first responders for certain 911 calls. Per this program, a police officer determines when sending a drone to examine a situation is an appropriate response to a public call for assistance. If the officer decides that the use of a drone is suitable, a remote pilot flies the drone to the area in question, streaming video to the officers to better inform them how to respond to the situation.

***

Arturo Castañares, a journalist and private pilot, made a CPRA request for information related to the City's use of drones, including the video footage for all drone flights from March 1 to March 31, 2021. Ultimately, the City provided Castañares with all the information he requested except for the video footage but not before Castañares filed suit against the City.

***

The matter proceeded to trial, and, as detailed in its minute order, the superior court determined that the video footage was exempt under section 7923.600, subdivision (a) as records of investigations. Further, the court found that any benefit of turning over the videos was outweighed by the 'unreasonable burden' placed on the City in redacting the videos before they could be provided to Castañares."

HOLDING:

"We agree with Castañares that the superior court erred in determining, as a matter of law, all video footage from the drone program is exempt under section 7923.600, subdivision (a) as records of investigations. However, it might be the case, after further inquiry, consistent with this opinion, that the majority of the video footage is exempt. That said, we cannot make that determination on the record before us. Similarly, we acknowledge that the catchall provision of the CPRA, codified at section 7922.000, may also support the City's position that the drone video footage does not have to be provided to Castañares, but the record does not allow us to engage in the necessary balancing to determine if that provision applies."

**Legal Lesson Learned: New technologies can lead to new legal issues; trial court judge may now have to make a disclosure decision on each video.**

File: Chap. 4, Incident Command

# CA: GAS LEAK HOME – CAPTAIN ALLOWED SOLAR PANEL WORKER GET TOOLS - EXPLODED – LAWSUIT PROCEED

On Nov. 30, 2023, in Anthony Borel v. City of Murrieta, the California Court of Appeals, Fourth District, Third Division, held (3 to 0; unpublished decision), that trial court judge improperly granted summary judgment to the City. The Court wrote: "Anthony Borel was on a residential worksite in Murrieta (the City) the summer of 2019 when the home exploded due to a natural gas leak. Borel alleged the fire crew that responded to the report of a leak failed to establish a perimeter or evacuation zone around the leak area and allowed people to go in and near the home. He was amongst the people allowed to go near the home to retrieve his tools. While he was doing this, the homeowner asked the captain on the scene if she could enter the house to retrieve some personal items. Shortly after she entered, the home exploded and Borel was seriously injured. He seeks to recover damages for his injuries from, among others, the City of Murrieta. *** In response to Borel's public entity negligence claim, the City successfully moved for summary judgment, on the ground its firefighters' conduct at the scene was subject to emergency services immunity under Health and Safety Code section 1799.107. Section 1799.107 creates immunity for public entities and emergency rescue personnel for injuries caused when they take action to provide emergency services, so long as the actions are not performed in bad faith or with gross negligence. While we agree the City can invoke section 1799.107, we conclude there is sufficient evidence to create triable issues of material fact as to whether the firefighters acted with gross negligence."

FACTS:

> **"**On July 15, 2019, Borel was working as a solar panel installer for Horizon Solar. That morning, he was working on the roof of a residence located at 23562 Wooden Horse Trail in Murrieta when a coworker advised an underground gas line was leaking along the side of the home. Borel got down from the roof and waited for further instructions. His coworkers called 911 emergency services to report the leak.
>
> The City's fire protection district responded to the call with personnel Captain Shad Chanley, Engineer Andy Stang, and Paramedic Randy Lopez arriving on scene at approximately 10:57 a.m. They confirmed there was indeed gas leaking alongside the house and they waited for personnel from Southern California Gas company (the Gas Company) to come and remediate the problem. The Gas Company arrived at around 11:23 a.m. and began working on the leak. To remediate it, they had to shovel and jackhammer around the area of the leak.
>
> Shortly thereafter, the Gas Company employees informed Captain Chanley that he and his crew could leave the scene, indicating the risk from the gas leak was low. Nonetheless, he decided to keep his crew at the scene 'in order to continue to render aid as needed.' However, his team did not set up a perimeter around the home or evacuate the vicinity to keep the public away. Instead, they stayed in the vicinity and watched the Gas Company attend to the leak.
>
> A few minutes after noon, the owner of the house, a Mrs. Haaland, asked Captain Chanley if she could enter her residence in order to retrieve some personal items she needed. Captain Chanley told her she could enter. Five minutes later, the gas inside the

house ignited, causing an explosion. Unbeknownst to anyone at the scene, the gas had migrated from the exterior to the interior of the home. Borel was standing within feet of the garage door when the house exploded, and was blown across the street. He was knocked unconscious and suffered a serious head injury as well as burns to his body."

HOLDING:

"Our review here is informed by our conclusion section 1799.107 was clearly designed to encourage emergency personnel to engage in life-saving activities without fear of being held liable for injuries they cause - a point ably made by Borel's counsel in the trial court. But we cannot find anything in our record to support a finding they were engaged in such active rescue activity. We therefore conclude the presumption has been sufficiently rebutted to allow the question of whether there has been gross negligence to go to the jury.

***

The evidence indicates the firefighters were not aware the gas had migrated inside the home and believed it was dissipating into the atmosphere. As such, they did not think bystanders or any in the vicinity required protection. They were also clearly relying on the Gas Company to remediate the leak. But we are still left to wrestle with the question of why they stayed on the scene. Captain Chanley indicated it was policy to do so 'in case something happen[ed].' The necessary follow-up question then is: what did they think might 'happen'? The evidence suggests the fire crew knew there was an ongoing risk from the gas leak and knew what consequences might result. Yet they admit they took no steps to keep people away from the danger. If you were there in case something happened, it is hard to explain why you allowed people inside and next to the house.

Since most people use or own natural gas-powered grills or stoves, and are aware that natural gas ignites easily, we do not think expert testimony is necessary for a reasonable juror to conclude no one should have been permitted within a certain radius of the gas leak. Even more egregious, in the eyes of a reasonable juror, could be the decision to allow Mrs. Haaland to go back into the house to retrieve items. Captain Chanley did not know whether the gas leak had been stopped. At the same time, he knew Mrs. Haaland could introduce another potential ignition source through static electricity or through misadventure. It is difficult to reconcile.

The City may argue the firefighters' action and lack thereof represents a mere departure from the ordinary standard of care, rather than an extreme one. That may be a successful argument. But a reasonable jury might also conclude this was not a mere departure from the standard of care but a complete abandonment of the standard of care -in other words, gross negligence. We conclude the decision ought to be left to them."

**Legal Lesson Learned: The "gross negligence" standard may be difficult to prove, but this may be a case that calls for a settlement rather than a jury trial.**

File: Chap. 5, Emergency Vehicle Operations

# TX: PD & EMS REPORTS GAVE CITY ADEQUATE "NOTICE" PD AT FAULT INJURED MOTORIST – LAWSUIT PROCEEED

On Dec. 28, 2023, in City of Houston v. Marvis Huff, the Court of Appeals of Texas, First District, held (3 to 0) that trial court judge properly denied the City's motion for summary judgment; the personal injury lawsuit may proceed even if injured party didn't give City formal notice of his claim within 90 days (was 60 days late). "Officer Rangel concluded in the crash report that Officer Miller improperly turned from the wrong lane and that this improper turn was the sole contributing factor to the accident. The report does not assign any fault to Huff or to any other party—other than Miller. Thus, the report in this case does more than just imply Miller's fault—it expressly assigns fault to him. An incident that triggers an investigation and accident report will impute actual notice where there is evidence to connect the accident to an action or omission by the governmental unit such that it should have known of its potential culpability."

FACTS:

> "On May 18, 2021, Huff was traveling northbound on 6400 Main Street in Houston, Texas. Houston Police Department ('HPD') Officers D. Miller and M. Flores were traveling southbound on 6400 Main Street when Miller, who was driving an HPD patrol vehicle, made an improper left turn 'through a green light, from the straight traffic only lane' and struck Huff's vehicle, which was traveling straight through the intersection. Huff was found 'l[]ying on the street' by Houston Fire Department ('HFD') Firefighters/Paramedics, and he complained of 'cervical neck pain, lower back pain, and a headache' during HFD's initial assessment at the accident scene. Huff 'didn[']t walk on scene' and was 'collared and backboarded' by HFD and transported to Memorial Hermann Hospital in the Medical Center.
>
> ***
>
> The City later moved for summary judgment as to Huff's negligence claims on jurisdictional grounds, arguing that Huff did not provide the required notice within 90 days of the vehicle collision, as required by the City's charter. The City also argued that it did not have actual notice of Huff's claims because the crash report was not sufficient to provide notice."

HOLDING:

> "In addition to the crash report, Huff attached a report prepared by the HFD firefighters/paramedics that treated him at the scene and transported him to the hospital.[6] In that report, the officers described Huff's complaint as "neck/back pain" and stated that his primary symptom was "pain, back." The narrative section of the report stated:
>
> > A007 AOSTF 35YO BLK M LAYING ON THE STREET, C COLLARED AND BACKBOARDED BY E033. PT WAS INVOLVED IN MODERATE MVA, HIS CAR WAS STRUCK BY HPD VEHICLE RESPONDING TO EMERGENCY IN MED CENTER, JUST TWO BLOCKS FROM MEMORIAL HERMANN MTC. A007 ASSUMED PT CARE UPON ARRIVAL. PT WAS AXO4 GCS 15 AND DIDNT WALK ON SCENE. PT DENIED LOC BUT STATED CERVICAL NECK PAIN, LOWER BACK PAIN, AND A HEADACHE UPON INITIAL ASSESSMENT. PT HAD NO OBVIOUS WOUNDS, NO DCAP-BTLS NOTED. PT WAS LOADED UP AND TRANSPORTED TO MEMORIAL HERMANN MTC WHERE CARE WAS TRANSFERRED TO THE ER STAFF UPON TRIAGE.

> For the reasons below, we conclude the above evidence is sufficient to create a fact issue as to whether the City had both subjective knowledge of Huff's injuries and of its alleged fault in contributing to that injury."

**Legal Lesson Learned: City ordinance requiring 90- day notice can be set aside when PD and EMS reports confirmed injury.**

File: Chap. 6, Employment Litigation

## WV: LONGEVITY PAY - CITY MAY CORRECT THE OVER PAYMENTS - SHIFTS CHANGED 48-HR TO 54-HR PER

On Dec. 27, 2023, in City of Parkersburg v. Wayne White, Michael Wood, Joshua Gandee, and IAFF LOCAL 91, the West Virginia Intermediate Court of Appeals held (3 to 0) that the City may correct the application of the 2008 longevity pay ordinance to the new shift schedule. Case remanded about whether City gave adequate notice of correction of EMT bonus ($1,040 per year) to new shift schedule. The Court wrote: "The City of Parkersburg asserts that this payment scheme was meant to result in each firefighter receiving the same amount of compensation per longevity year regardless of their number of scheduled hours, so that a person working a 40-hour work week would be eligible for $624.00 multiplied by the number of years worked, just as a person working a 48-hour work week would be eligible for $624.00 multiplied by the number of years worked, just as a person working a 54-hour work week would be eligible for $624.00 multiplied by the number of years worked. *** After the firefighters became 54-hour employees in November 2011 until March 2017, the City of Parkersburg continued to calculate and pay the longevity pay and the EMT certification benefits according to the 48-hour schedule, rather than recalculating and applying the rate set for the 54-hour workweek schedule. This meant that the respondents received the $.25 longevity pay rate in the 2008 ordinance rather than the $.2222 rate for longevity pay, which the City of Parkersburg maintains was a substantial overpayment. *** Moreover, we find that the fact that the City of Parkersburg paid the 48-hour rate in error does not create a vested interest in such an overpayment to the respondents in perpetuity. We find nothing in the briefs or record below to support such a contention, nor do we find any such support in our jurisprudence."

FACTS:

> "In 2008, the City of Parkersburg established a new longevity increment to its hourly rate of pay for fire civil service employees. The City of Parkersburg had enacted several longevity pay ordinances prior to 2008, with each new ordinance prospectively increasing longevity pay for each year worked thereafter. The 2008 longevity pay plan provided that, effective July 1, 2008, appointed part-time employees would receive longevity pay of $624.00 per year for each year of city service, while fire civil service employees working a 40-hour work week would receive longevity pay of $.30 per hour for each year of city service, those working a 48-hour work week would receive longevity pay of $.25 per hour for each year of city service, and those working a 54-hour work week would receive $.2222 per hour for each year of city service, payable on their work anniversary. This longevity pay was also to be included in each fire civil service employee's base pay for the purposes of overtime.

***

The City of Parkersburg argues that the 2008 longevity ordinance unambiguously states different pay rates for 48-hour and 54-hour employees and that once the fire civil service employees changed to 54-hour per week shifts on November 8, 2011, they should have been paid at the 54-hour rate of $.2222 per hour for each year of service. The City of Parkersburg further claims that its failure to make that change in the affected employees' pay rates in 2011 was an error that resulted in an overpayment, and its effort to rectify that error in 2017 was simply the correct and required application of the 2008 ordinance, not a change in pay rates that would trigger the application of the WCPA's notice requirements.[6]

FOOTNOTE 6:
City of Parkersburg Finance Director Eric Jiles testified that for the years 1994 through 1996, the annual longevity increment was $250.00 per year of service. For the years 1997 through 2001, the longevity increment was described as 'twenty ($.20) cents per hour ($416.00 per year) for each year' of service. In 2002 through 2007, the longevity increment was $416.00 per year of service for appointed part-time employees, $.20 per hour for each year of service for 40-hour employees, and $.17 per hour for each year of service for 48-hour employees."

HOLDING:

"The respondents argue, and the circuit court agreed, that this change in 2017 was in violation of nine years of pay practices which created a vested interest in being paid the higher amount of longevity pay. We disagree. First, we do not find that the application of the 54-hour rate explicitly denoted in the 2008 longevity pay plan constitutes a change or reduction in wages such as that contemplated by the WCPA. Because the 54-hour rate was expressly provided for in the City of Parkersburg's Compensation Plan, the City of Parkersburg's application of that pay rate is not an affirmative change to the longevity pay plan.

Moreover, we find that the fact that the City of Parkersburg paid the 48-hour rate in error does not create a vested interest in such an overpayment to the respondents in perpetuity. We find nothing in the briefs or record below to support such a contention, nor do we find any such support in our jurisprudence.

***

While we do not dispute that the City of Parkersburg had the authority to prospectively alter the EMT rate of pay and arguably had a duty to correct an outdated pay rate, we are also mindful of the need for compliance with the notice requirements of the WPCA. Unfortunately, despite the parties' competing motions for summary judgment and years of protracted litigation, it is not clear from the appendix record whether the City of Parkersburg provided any written notice to the respondents before prorating the rate to $.37. Accordingly, we are unable to determine if the WPCA has been violated, and remand this issue to the circuit court to consider whether the City of Parkersburg

provided prior notice to the respondents of the alteration in the rate in conformity with West Virginia Code § 21-5-9."

**Legal Lesson Learned: City may correct its overpayments for longevity pay; EMT bonus pay issue remanded regarding whether adequate notice given to firefighters.**

File: Chap. 6, Employment Litigation

## TN: PTSD - CHATTANOOGA – COURT ORDERS FIRE & POLICE FUND GRANT FF JOB-RELATED DISAB. PENSION

On Dec. 18, 2023, in Matthew Long v. Chattanooga Fire And Police Fund, the Court of Appeals of Tennessee held (3 to 0) that trial court judge properly ordered the Fund a job-related disability pension for firefighter's PTSD. Board's policy requiring proof of "undesigned and unexpected" traumatic event makes it impossible for most fire and police to receive pension. The Court wrote: "The Policy provides that an applicant can only obtain benefits for a job-related disability based on PTSD if the disability "is a direct result of a traumatic event that is . . . b. undesigned and unexpected[.]" However, the Policy makes no effort to define the term 'unexpected,' nor is that term defined in any controlling legal authority or caselaw. As a result, this portion of the Policy is ambiguous. *** Here, "unexpected" is not defined in the Plan, and there is no binding Tennessee caselaw construing a similar plan provision. Yet, the Fund essentially argues that the term "unexpected" should be construed to mean that the event giving rise to benefits is entirely unforeseeable." *** Accordingly, the Board relied on an undefined, ambiguous term in the Plan to deny Long's benefits and then offered no explanation as to its reasoning. Inasmuch as the Board construed the Plan's terms in favor of the Fund, instead of in favor of Long, its decision was arbitrary, capricious, and contrary to Tennessee law."

FACTS:

"Long began working as a firefighter for CFD in 2005 and was promoted to senior firefighter in 2007. As a senior firefighter, in addition to fighting fires, he served as a 'relief driver' of emergency vehicles and as an emergency medical technician ('EMT').

***

In late June or early July of 2019, Long reported to his supervisor, Travis Williams, that he needed help with his mental health. Williams emailed a representative of the City on July 2, 2019, requesting approval for Long to receive services through the City's Employee Assistance Program ('EAP'). Long took FMLA leave to address his mental health and ultimately never returned to CFD as a firefighter.

***

In January and February of 2020, Long spent 30 days at the International Association of Fire Fighters Center of Excellence in Maryland (the 'Center'), where he received inpatient treatment designed especially for firefighters. Long reported the same symptoms to the providers at the Center that he had reported to Wallace and Dr. Caruso

and reported that he had noticed PTSD symptoms since 2008. While at the Center, Long participated in cognitive processing therapy five times per week to "process the trauma and reduce[] impact of events," along with daily group therapy sessions. Long's discharge plan from the Center included Long having follow-up visits with a psychiatrist and therapist, and an appointment was scheduled for Long to see a therapist in Knoxville on February 18, 2020. Long was discharged from the Center on February 15, 2020.

***

On June 11, 2020, Long was again evaluated by Dr. Caruso, who noted that Long had 'responded relatively well to treatment for PTSD and MDD, although he remains residually vulnerable to retriggering of PTSD symptoms, which likely would also lead to relapse in his depressive symptoms.' … Accordingly, Dr. Caruso '[did] not recommend that [Long] return to work as a firefighter' and opined that he was 'permanently and totally disabled as a firefighter.'

***

On July 27, 2020, Long applied to the Fund for job-related disability pension benefits. Long stated that his disability was "PTSD/Tra[u]ma," and when asked to "describe . . . the accident(s), incident(s), or conditions(s) forming the basis for [his] application," he wrote: "car wreck Bailey/Willow" and "2 kids burnt/Highland Park one lived." The next day, Katrina Abbott, Fund Administrator, drafted a narrative regarding her meeting with Long to complete his application paperwork and included the following details:

> We discussed a call approximately 13 years ago on Highland Park in which a mother had left the residence and locked her kids inside, with burglar bars on entryways. They were able to get both kids out, one did not make it and the other survived only to come by years later to thank him, however he was badly disfigured. Mr. Long stated that was hard because they typically don't know the outcome of survivors and can create whatever they want to deal with it. This provided him with a harsh reality for the child survivor.
>
> We discussed another call that involved a MVA in which a mother and her three children were involved in [sic]. The mother was using her Budweiser as an armrest, a small infant out of its car seat was bounced around like a ping pong ball inside the car and crushed its skull and died. He said that was hard. It threw the teenager out the back window and killed her. He stated her insides were mush. He stated it threw the 8 year-old a good distance, of which survived. The mother was unharmed and smelled of alcohol. She didn't typically have custody, they just moved in with here [sic] to attend a better school and hadn't been with her very long at all.
>
> We discussed another call in which he describes a couple that the man pushed the woman out of the way and was hit. He called it thunderstruck. It was hard with the family there upset and screaming, asking if he was going to be ok. He was spitting out pieces of his lungs."

HOLDING:

> "The Policy provides that an applicant can only obtain benefits for a job-related disability based on PTSD if the disability 'is a direct result of a traumatic event that is . . .b. undesigned and unexpected[.]' However, the Policy makes no effort to define the term 'unexpected,' nor is that term defined in any controlling legal authority or caselaw. As a result, this portion of the Policy is ambiguous. The Fund argues that an event is only 'unexpected' if it is 'outside the realm of normal duties that firefighters routinely face and are expected to handle.' In making this argument, the Fund relies upon caselaw from the State of New Jersey and Tennessee workers' compensation cases. We deem these cases to be inapposite.
>
> ***
>
> Furthermore, adopting the Fund's argument that a member should not be entitled to disability pension benefits when the member's disability is caused by the 'type' of event at issue – e.g., a house fire or motor vehicle accident – would mean that these members could never meet the Policy requirements. In addition to the 'unexpected' requirement, the Policy requires that the event have occurred 'during and as a result of the [member]'s regular or assigned duties[.]' Assuming, as the Fund has done in this case, that CFD trains all of its firefighters to deal with the type of events they would encounter while performing their regular or assigned duties, the broad construction of 'unexpected' advanced by the Fund would result in no member being able to satisfy these requirements.
>
> In summary, the Fund's proposed construction creates a nearly insurmountable burden on employees suffering from mental injuries caused by traumatic events that occur during and as a result of the member's regular or assigned duties. We agree with the trial court's decision that the Board's denial of Long's application is arbitrary and capricious."

**Legal Lesson Learned: The Board needs to better define "unexpected" traumatic events that will be covered for PTSD disability pension.**

Note: See video of oral argument before Court of Appeals in this case.

Chap 6, Employment Litigation

## FL: FF HEART REPLACEMENT – STATUTORY PRESUMPTION - COUNTY FAILED PROVE CAUSED BY OFF DUTY COVID-19

On Dec. 13, 2023, in Seminole County, Florisa and John Eastern Company, Inc. v. Chad Braden, the Florida Court of Appeals, First District, held (3 to 0) that the Judge of Compensation Claims (JCC), properly awarded workers' compensation benefits to firefighter Chad Braden. The Court wrote: "Rather, we consider only whether Seminole County met its burden to overcome the

statutory burden of work causation. Under these facts, we find competent evidence supports the JCC's determination that Seminole County failed to rebut the statutory presumption."

FACTS:

"Braden was hired by Seminole County as a firefighter in 1993 after a clean pre-employment physical. In the early 2000s, he suffered cardiac problems that Seminole County accepted as compensable. Braden received treatment, including an ablation of the heart. Thereafter, Dr. Pollack, an authorized cardiologist, treated Braden yearly, including a visit about ninety days before Barden's heart attack in 2021. At that appointment, Dr. Pollack reported that Braden was doing well and released him with no work restrictions.

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Evidence presented at the hearing established that one coworker was out of work starting on December 18, 2020, due to COVID-19; another worked with Braden on December 22, 2020, and tested positive on December 24, 2020; a third worked with him on December 22, 2020, and tested positive five days later. In the ten days before Braden's positive COVID-19 test, he worked two 24-hour shifts-one on December 22, 2020, and another on December 25, 2020.

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On December 27, 2020, Braden tested positive for COVID-19. On January 24, 2021, less than a month later, he suffered a heart attack. Despite extensive medical treatment, Braden's medical condition continued to deteriorate, and he required an angioplasty to open a 100% occluded artery. He declined further, suffering a cardiogenic shock, acute congestive heart failure, and ventricular irritability. Later, he developed a blood clot in his leg, pulmonary emboli (blood clots in the lungs), and suffered an acute non-hemorrhagic occipital stroke (caused by a clot). A permanent defibrillator was placed in his heart. But he suffered blockages in his cardiac stents and repeat surgeries were required. In March 2021, he received a heart transplant.

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Braden underwent an independent medical examination (IME), with Dr. Mathias, a cardiologist, who testified, '[i]t's impossible to tell" where Braden caught the virus. Dr. Mathias did not believe that Braden's heart attack or transplant had anything to do with his earlier diagnosis of COVID-19. He admitted that "I don't know one way or another, since there is no definitive test that can be used to clarify this ...."'

HOLDING:

"This is the third case reviewed by this Court in which a first responder claimed entitlement to benefits under section 112.18 after a *viral infection* resulted in a cardiac event. Notably, in all three, the employer/carrier/serving agent conceded that the 'heart lung' statute applied and, thus, its presumption of work causation for the claimant's impairment or condition. Hence, the only question before the JCCs in each of these cases was whether that conceded presumption of work causation was rebutted with competent evidence.

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Rather, we consider only whether Seminole County met its burden to overcome the statutory burden of work causation. Under these facts, we find competent evidence supports the JCC's determination that Seminole County failed to rebut the statutory presumption."

**Legal Lesson Learned: The FL statutory presumption properly puts burden on employer to prove heart issues were not caused by the job.**

File: Chap. 6, Employment Litigation

## OR: PROSTATE CANCER – STAUTORY PRESUMPTION – EMPLOYER FAILED TO OVERCOME PRESUMPTION

On Dec. 6, 2023, In the Matter of the Compensation of Stephen Smith; Marion County Fire District #1 v. Stephen Smith, the Court of Appeals of Oregon held (3 to 0; nonprecedential memorandum opinio) that the Workers' Compensation Board properly held for the firefighter. The Court wrote: "This case concerns whether the Workers' Compensation Board (board) properly construed and applied the so-called 'firefighter's presumption' when it reversed employer's denial of claimant's occupational disease claim. *** The board reasoned that Dr. Beer's opinion was largely based on the conclusion that the causes of prostate cancer are unknown. The board correctly noted that in *Thompson,* the Supreme Court held that an opinion that the cause of a condition is unknown is "a confession of an inability to identify a cause," rather than evidence that the condition was not related to employment. *Thompson,* 360 Or at 168. The board went on to note several internal inconsistencies in Dr. Beer's opinion that left the board unpersuaded by the opinion. We conclude that the board's representation of Dr. Beer's opinion is reasonable and supported by substantial evidence. While employer characterizes Dr. Beer's opinion differently, we are not convinced that the board was required to view the opinion the way employer urges. The board reasonably could find, for the reasons the board stated, that Dr. Beer's evidence did not meet employer's burden of persuasion."

FACTS:

"Under the firefighter's presumption, when certain predicate facts are demonstrated, a qualifying disease is presumed to be caused by the firefighter's employment 2

> Footnote 2: Those predicate facts include that the individual worked as a non-volunteer firefighter for a political division for at least five years; was diagnosed with a qualifying type of cancer (including prostate cancer); was first diagnosed after July 1, 2009; and, in the case of prostate cancer, was diagnosed prior to reaching age 55. ORS 656.802(5).

It is undisputed that claimant established those predicate facts. An employer may rebut the presumption and deny a claim only on the basis of 'clear and convincing medical evidence that the condition or impairment was not caused or contributed to in material

part by the firefighter's employment.' ORS 656.802(5)(b). The board concluded that several medical opinions did not persuasively meet employer's burden, and consequently employer had not rebutted the statutory presumption that claimant's prostate cancer resulted from his employment as a firefighter and was a compensable occupational disease."

HOLDING:

"The board went on to note several internal inconsistencies in Dr. Beer's opinion that left the board unpersuaded by the opinion. We conclude that the board's representation of Dr. Beer's opinion is reasonable and supported by substantial evidence. While employer characterizes Dr. Beer's opinion differently, we are not convinced that the board was required to view the opinion the way employer urges. The board reasonably could find, for the reasons the board stated, that Dr. Beer's evidence did not meet employer's burden of persuasion."

**Legal Lesson Learned: With the statutory presumption, the employer failed to rebut the presumption that the firefighter's prostate cancer resulted from his employment as a firefighter.**

Note: The Court of Appeals on same date, Dec. 6, 2023, upheld the award to another Oregon firefighter with another fire department. In the Matter of the Compensation of Robert M. Shannon, Claimant. v. Robert M. Shannon. North Douglas County Fire & EMS (view case).

File: Chap. 7, Sexual Harassment

## OH: TRANSGENDER WOMAN / EMT – FIRED FOR SOCIAL MEDIA POSTS / OUTBURST HOSP - CASE DISMISSED

On Dec. 28, 2023, in Rayne Fedder v. Ohio Medical Transportation, Inc., U.S. District Court Judge Sarah D. Morrison, U.S. District Court for Southern District of Ohio, Eastern Division, granted the employer's motion to dismiss; judge overturned recommendation by U.S. Magistrate judge that her ADA claim that she "appeared" as disabled.

FACTS:

"Plaintiff, a transgender woman, alleges that she was employed by OMT as an emergency medical technician from March 14, 2022, through May 3, 2022. (Compl., ECF No. 15, ¶¶ 1-2, 201-07.) During pre-employment screening, Plaintiff informed her supervisor of her mental health issues, which include depression, anxiety, and PTSD. (¶ 4.) She also reported that she was receiving hormone replacement therapy. (*Id.*)

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It was only after Plaintiff's outburst at O'Bleness Memorial Hospital and her conduct on social media that she was terminated for behavioral problems. In light of these

allegations, Plaintiff has failed to plausibly allege that she was terminated because of her perceived impairment as opposed to her poor performance or some other reason.

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According to Plaintiff, she was disciplined for making derogatory posts about her coworkers and law enforcement on her public Facebook page. (¶¶ 43-67, 77-85, 9599.)

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Plaintiff also claims that she was singled out through the company's social media policy. Even assuming that the discipline she received for her policy violation constituted an adverse action, she did not identify any cisgender employees who engaged in similar behavior on social media and were treated differently for it. The closest she gets to identifying such an employee is Williams, who she alleges wore an offensive arm patch at work. If true, Williams may have violated an office policy, however, he did not violate the *social media* policy and is therefore not a suitable comparator."

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Approximately a month into Plaintiff's employment, staff members at O'Bleness Memorial Hospital filed an incident report stating that she had behaved unprofessionally while on site. (¶¶ 151, 177-80, 306.) Plaintiff was terminated approximately two weeks later on May 3, 2022. (¶ 212.)"

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She further alleges that he told her coworkers to 'keep an open mind' about her and other transgender individuals. (Compl. at ¶¶ 9, 25.) These allegations do not create a plausible inference that the supervisor's statements were motivated by transgender animus. Quite the opposite. Her supervisor's statements indicate that he wanted her to succeed and that was concerned about the possibility of transgender animus and wanted to guard against that possibility.

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Plaintiff cites a handful of instances where coworkers asked her inappropriate questions in private (Compl. at ¶¶ 23-27, 105) and made inappropriate comments in front of others. (*Id.* at ¶¶ 30, 88.) But she does not allege that she, or anyone else, reported this alleged harassment. While some of these remarks and questions may have been hurtful or inappropriate, Plaintiff does not plausibly allege that these interactions were so severe or pervasive that Defendant should have known about them. Nor does she allege how her employer could have learned of the alleged harassment through other means."

**Legal Lesson Learned: The Supervisor wisely told co-workers to keep am "open mind."**

File: Chap. 8, Race Discrimination

# DE: BLACK LT. – 2020 "BAND ONE" FOR CAPTAIN – 5 WHITES PROMOTED – 2022 LOWERED "BAND TWO" - CASE PROCEED

On Dec. 15, 2023, in Craig Black v. City of Wilmington, U.S. District Court Judge Gregory B. William, U.S. District Court for District of Delaware, denied most of the City's motion to dismiss; the complaint alleges sufficient facts to permit pre-trial discovery. The Court wrote: "Here, Black has alleged numerous acts of retaliation by Defendants over a thirteen-month timeframe, which include denying Black promotions to the rank of Captain on several occasions; dispersing General Order 2022-15 that altered the City's procedures for promotions by requiring that promotions to Captain be made only from Band One; and ultimately demoting Black to Band Two despite the fact he was previously placed on Band One. *** Additionally, while Defendants stress that Black was found guilty of a disciplinary action in an attempt to further distinguish him from the five comparators … the Court notes again that it cannot consider new evidence that was not alleged in Black' s pleadings, including the status of his disciplinary action and the disciplinary records of the five comparators."

FACTS:

> "Plaintiff Black is a Lieutenant firefighter with Defendant City's Fire Department and has worked with the Fire Department for over twenty years. D.I. 10 11 2, 20. Black alleges that, during this time, he "'as received high employment evaluations and countless commendations.' Id. Yet, despite his considerable experience, Black contends that Defendants discriminated and retaliated against him on the basis of his African American race during a promotional process for selecting Captains that began in 2020. D.I. 16 at 2-3.
>
> According to Black, the City' s Fire Department has a procedural process for selecting employees to promote to Captain. D.I. 10121. This promotional process begins by testing any firefighters who apply for a promotion and placing the applicants into different promotional bands based on their scores. Id. at ,r 22. The highest band, according to Black, is Band One and, upon a vacancy for Captain, the Chief of Fire selects a firefighter to promote from the Band One candidates list. Id. at ,r 23. If the Band One list is exhausted, the Chief of Fire typically would select a firefighter to promote to Captain from the Band Two promotional list. D.I 16 at 2.
>
> Black contends that he tested to be part of a promotional band list in or around April 2020. D.I. 10 ,r,r 23-24. Shortly after, in July 2020, Black was selected with eight other Lieutenant-level firefighters as part of Band One. Id. at ,r 25. Of the nine Band One firefighters, Black was the only African American. Id. at ,r 26. However, according to Black, almost immediately following his placement on the Band One list, he began to face workplace discrimination. Id. at ,r 27. Specifically, Black alleges that he was brought up on 'fictitious charges regarding miscommunication of a notification of Sick Leave in September of 2020.' Id.

Then, from November 2020 through July 2021, Black alleges that five vacant promotional Captain positions became available and, while he was eligible for each, Defendants filled the vacant positions with five of the eight Caucasian males in Band One. Id. at ,r,r 28-30. For instance, Black alleges that, in or around November and December 2020, the then-Fire Chief Michael Donahue selected Jacob Morente, Andrew Cavanaugh, and Griffith Jordan, all Caucasian males with several less years of experience and tenure than Black, to fill the vacant Captain positions. Id. at ,r,r 31-33. Black contends that he has more experience and qualifications than each Morente, Cavanaugh, and Jordan. Id. at ,r 37
On April 28, 2021 , after three of the five promotion decisions were made, Black filed a Charge of Discrimination alleging race discrimination and retaliation with the Delaware Department of Labor ('DDOL') which was dual filed with the Equal Employment Opportunity Commission ('EEOC'). Id. at ,r 10 . Shortly after he filed the Charge of Discrimination, Defendant Fire Chief Looney, who was appointed as the new Fire Chief on May 13, 2023, selected Matthew Marsella and Jason Strecker, both Caucasian males with nine years and eighteen years of experience as firefighters, respectively, for the last two of the five vacant positions. Id. at ,r,r 35 36. Like the prior three Lieutenants to be promoted, Black had more experience than both Marsella and Strecker. Id. at 137 .

Black alleges that he continued to face retaliatory treatment when, on June 14, 2022, Defendant Looney dispersed General Order 2022-15 which held that promotions to positions of Captain would be made from Band One only. Id. at 11 38-39. Significantly, on the same day, Black alleges that Defendant Looney released the 2022 promotional list, which now listed Black in Band Two despite his previous Band One placement. Id. at 140. Black alleges that he was demoted to Band Two 'in retaliation for reporting race discrimination and for filing a Charge of Discrimination against' the City. D.I. 16 at 3-4."

HOLDING:

"Here, Black has alleged numerous acts of retaliation by Defendants over a thirteen-month timeframe, which include denying Black promotions to the rank of Captain on several occasions; dispersing General Order 2022-15 that altered the City's procedures for promotions by requiring that promotions to Captain be made only from Band One; and ultimately demoting Black to Band Two despite the fact he was previously placed on Band One.

Accordingly, viewing the factual allegations from the pleadings in the light most favorable to Black, the Court finds that Black has pled sufficient facts to support an inference a pattern of retaliatory actions to show causation. Thus, Defendants' Motion to Dismiss Black's claim of Title VII retaliation is denied."

**Legal Lesson Learned: Pre-trial discovery will now proceed.**

File: Chap. 9, ADA
File: Chap. 10. Family Medical Leave Act, incl. Military Leave

File: Chap. 11, FLSA

# CA: FLSA - FF HAVE HEALTH INSUR. WITH SPOUSE CAN "OPT OUT" – OPT OUT FEE IS NOT PART "REGULAR WAGES"

On Nov. 30, 2023, in Anthony Sanders, et al. v. County of Ventura, the U.S. Court of Appeals for the 9th Circuit (San Francisco) held (3 to 0) that trial court judge properly granted summary judgment to the County. For example, PFA [Professional Firefighters Association] members in 2022 received a Flex Credit of $482, but their opt-out fee was $334.75, resulting in a net cash payment of $147.25 per pay period. The Court of Appeals wrote: "What this means is that § 207(e)(4) permits an employer to exempt from an employee's regular rate of pay employer contributions made pursuant to bona fide health plans that are designed to alleviate the burden of a shrinking risk pool for the employees who choose to remain in the plans. When an employer, as here, decides to allow employees to retain some portion of an unused health insurance credit, it can permissibly structure the program to prop up the employee health plans without treating the full amount of the health credit as part of the FLSA regular rate of pay."

FACTS:

> "Plaintiffs are Ventura County, California firefighters and law enforcement officers who (except for one plaintiff) are members of two unions, the Ventura County Professional Firefighters' Association (PFA) and the Ventura County Deputy Sheriffs' Association (DSA). The County sponsors various health insurance plans for its eligible employees and their dependents. Under agreements between the unions and the County, plaintiffs were eligible to enroll in union-sponsored health insurance plans instead of the County's plans.
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> ***
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> Specifically, an employee who already has medical insurance from another source, such as a spouse's plan, may choose to 'opt out' of the Flexible Benefits Program. Employees who opt out are allotted the same Flex Credit but must pay an opt-out fee.
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> ***
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> Both the Flex Credit and opt-out fee appear on employees' paystubs: the Flex Credit is listed under 'Earnings' and the 'opt-out fee' appears as a 'before tax deduction.'"

HOLDING:

> "And although plaintiffs do assert that the opt-out fee was taken from them 'involuntarily,' it was plaintiffs who voluntarily chose to participate in the Flexible Benefits Program. The terms of that program, including the opt-out fee, were clearly set forth and negotiated by union representatives. We therefore conclude that the County's Flexible Benefits Program is 'bona fide' within the meaning of § 207(e)(4)."

**Legal Lesson Learned: FF working overtime get time and one half of their "regular rate" of pay; the County does not want to include "opt out" fees in their regular rate of pay.**

File: Chap. 12, Drug-Free Workplace

File: Chap. 13, EMS

# NY: TOWN DIDN'T RENEW VOL. AMBUL. CO. – SLOW RESPONSE TIMES / NO PAID CREWS - 60 DAYS NOTICE

On Dec. 28, 2023, in Rampo Valley Ambulance Corps, Inc., et al. v. Town of Rampo, et al., United States District Court Judge Phillip M. Haper, Southern District of New York, granted the Town's motion to dismiss the May 11, 2022 lawsuit. The Court wrote: "The Agreement did not protect RVAC from the Town's revocation of a status. *** However, the Court has already found in the procedural due process context that RVAC does not have a constitutionally protected property interest derived from the Agreement. *** Here, RVAC alleges that the Town "controlled the billing, dispatching, payments, and staffing of RVAC, and, did so in a wholly different and in a discriminatory manner than the way the Town executed its contracts and requirements, as well as, managing relationships with and for the other ambulance corporations servicing the people of Ramapo." (Opp. at 21). This conduct, even in the context of providing emergency medical services, does not amount to conduct that is so 'truly brutal and offensive to human dignity' as to shock the conscience."

FACTS:

> "The Agreement between RVAC and the Town includes a provision that '[t]his agreement shall be automatically renewed for additional terms of one (1) year, unless either party shall notify the other, no later than sixty (60) days prior to the end of the term, of its election not to renew.'(*Id*., Ex. 2 at p. 5). RVAC asserts that on or about August 16, 2022, the Town terminated its Agreement. (*Id*. ¶ 62). RVAC contends that this termination was undertaken without cause and with intent to punish RVAC, and was arbitrary, capricious, and discriminatory. (*Id*. ¶¶ 43-44).
>
> ***
>
> Here, the Court concludes that the Agreement is sufficiently ordinary and/or routine such that RVAC's [Ramapo Valley Ambulance Corps] property interest in the Agreement is not a property interest that the Due Process clause protects. The Agreement did not protect RVAC from the Town's revocation of a status. Nor does RVAC receive special treatment as an employment contract. Rather, the Agreement was the product of a voluntary contractual relationship between RVAC and the Town for the provision of emergency medical services. The Agreement also contained a provision which permitted termination by either party for any reason."

NO PAID CREWS

> "RVAC further asserts that "systematic measures have been taken by the Town since 2019 to force the closure of [RVAC] and the Town has employed certain unwarranted tactics . . . solely against [RVAC]." (*Id*. ¶ 45). For instance, RVAC alleges that starting in 2020, the Town required it to employ paid crews at all times in order to be dispatched, and imposed reporting requirements in connection therewith. (*Id*. ¶¶ 75-80, 83-84). RVAC further asserts that "systematic measures have been taken by the Town since 2019

to force the closure of [RVAC] and the Town has employed certain unwarranted tactics . . . solely against [RVAC]." (*Id*. ¶ 45). For instance, RVAC alleges that starting in 2020, the Town required it to employ paid crews at all times in order to be dispatched, and imposed reporting requirements in connection therewith. (*Id*. ¶¶ 75-80, 83-84).

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The Agreement between RVAC and the Town includes a provision that "[t]his agreement shall be automatically renewed for additional terms of one (1) year, unless either party shall notify the other, no later than sixty (60) days prior to the end of the term, of its election not to renew." (*Id*., Ex. 2 at p. 5). RVAC asserts that on or about August 16, 2022, the Town terminated its Agreement. (*Id*. ¶ 62). RVAC contends that this termination was undertaken without cause and with intent to punish RVAC, and was arbitrary, capricious, and discriminatory. (*Id*. ¶¶ 43-44).

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Even assuming *arguendo* that RVAC had a constitutionally protected property interest in the Agreement, this claim for relief would be dismissed on a separate basis. RVAC must demonstrate, in order to state a claim for violation of substantive due process, "that the government action was 'so egregious, so outrageous, that it may fairly be said to shock the contemporary conscience.'" *Pena v. DePrisco*, 432 F.3d 98, 112 (2d Cir. 2005). Defendants argue that the FAC fails to suggest that the Town's alleged conduct "even approaches the shocking the contemporary conscience standard." (Def. Br. at 17). RVAC contends that the Town's actions-namely, the imposition of hurdles and unreasonable requirements upon RVAC which were not imposed on other ambulance corporations, the control over RVAC's billing, collecting payments, tax money, and grants, and the refusal to fund RVAC's operations-especially given the life and death nature of RVAC's services, may fairly be said to shock the contemporary conscience. (Opp. at 21). The Court is not persuaded."

**Legal Lesson Learned: The volunteer ambulance company did not have a "constitutionally protected interest" in the agreement with the Town; if feel being mistreated, bring it to attention of elected officials.**

Note: See this article. Aug. 16, 2022: **"**Ramapo Valley Ambulance Corps defunded after disputes; see why, town's plan for service."

"Recently there has been a range of serious issues involving Ramapo Valley Ambulance Corps (RVAC), including missed dispatch calls, delayed response times, and poor response rate," Specht said in statement. "Despite the town's best efforts to urge RVAC to rectify what regrettably became a critical and unacceptable situation, the RVAC leadership, unfortunately, failed to do so, thereby compelling the town to take action to best protect Ramapo families."

File: Chap. 13, EMS

# KY: HIPAA – NO PRIVATE RIGHT TO SUE - HOSPITAL REPORTED PRISONER TRYING "DRINK HIMSELF TO DEATH"

On Dec. 21, 2023, in Michael Shane Reid v. Med Center Health / EMS, Senior U.S. District Court Judge Joseph H. McKinnley, Jr., U.S. District Court for Westen District of Kentucky, Bowling Green Division, dismissed a lawsuit against a hospital brought by a prisoner filing lawsuit pro se [no attorney]. The Court held: "Plaintiff's only claim in this action is based upon HIPAA. Title II of HIPAA, codified at 42 U.S.C. § 1320a *et seq.*, was created to protect against the unauthorized disclosure of health records and information by a medical provider. However, only the Secretary of the Department of Health and Human Services may file suit to enforce its provisions… Private citizens have no standing to sue for a violation of HIPAA because HIPAA does not authorize a private cause of action."

FACTS:

> "This is a *pro se* prisoner civil action…. Plaintiff is incarcerated at the Warren County Regional Jail. He sues 'Med Center Health/EMS' [Bowling Green Hospital]. Plaintiff alleges that was transported to The Medical Center by EMS on February 1, 2023. He states that a Bowling Green police officer followed EMS to the hospital. Plaintiff further states that upon the officer's arrival, medical staff advised the officer that Plaintiff 'was trying or attempting to drink himself to death.' Plaintiff asserts that this disclosure violated his rights under the Health Insurance Portability and Accountability Act of 1996 (HIPAA). Plaintiff also alleges that because the officer shared this information in court, it 'aided in indicting' Plaintiff. As relief, Plaintiff seeks damages."

HOLDING:

> 'Plaintiff's only claim in this action is based upon HIPAA. Title II of HIPAA, codified at 42 U.S.C. § 1320a *et seq.*, was created to protect against the unauthorized disclosure of health records and information by a medical provider. However, only the Secretary of the Department of Health and Human Services may file suit to enforce its provisions. 42 U.S.C. § 1320d-5(d); *Sneed v. Pan Am. Hosp.*, 370 Fed.Appx. 47, 50 (11th Cir. 2010). Private citizens have no standing to sue for a violation of HIPAA because HIPAA does not authorize a private cause of action. *Faber v. Ciox Health, LLC*, 944 F.3d. 593, 596-97 (6th Cir. 2019). Thus, this action must be dismissed for failure to state a claim upon which relief may be granted."

**Legal Lesson Learned: HIPAA does not authorize citizen lawsuits.**

> Note: See HIPAA Enforcement Actions. Enforcement Results as of October 31, 2023. "Since the compliance date of the Privacy Rule in April 2003, OCR has received over 344,607 HIPAA complaints and has initiated over 1,179 compliance reviews. We have resolved ninety-nine percent of these cases (341,304)."
>
> **For example: Dec. 30, 2019: "Ambulance Company Pays $65,000 to Settle Allegations of Longstanding HIPAA Noncompliance."**

"West Georgia Ambulance, Inc. (West Georgia), has agreed to pay $65,000 to the Office for Civil Rights (OCR) at the U.S. Department of Health and Human Services (HHS) and to adopt a corrective action plan to settle potential violations of the Health Insurance Portability and Accountability Act (HIPAA) Security Rule. West Georgia is an ambulance company that provides emergency and non-emergency ambulance services in Carroll County, Georgia.

OCR began its investigation after West Georgia filed a breach report in 2013 concerning the loss of an unencrypted laptop containing the protected health information (PHI) of 500 individuals. OCR's investigation uncovered long-standing noncompliance with the HIPAA Rules, including failures to conduct a risk analysis, provide a security awareness and training program, and implement HIPAA Security Rule policies and procedures. Despite OCR's investigation and technical assistance, West Georgia did not take meaningful steps to address their systemic failures."

For more examples of HIPAA enforcement actions can be found at the US Department of Health & Human Services.

File: Chap. 13, EMS

## PA: HOSPITAL AMBUL. EMS "GOOD SAMARITAN" IMMUNITY - NON-EMERG. TRANSPORT, STOPPED TO PERFORM CPR

On Dec. 20, 2023, in Desiree Lamarr-Murphy. Individually and as Administratrix of the Estate of Christopher B. Murphy, deceased, and Briannah Lahmarr v. Delaware County Memorial Hospital, et al., the Superior Court of Pennsylvania held (3 to 0; non-presidential decision) that trial court properly entered judgment for two EMS and hospital. "Thus, DCMH, acting in its limited role as a provider of emergency ambulatory services, and its emergency responder employees, DCMH EMS, were protected under the Good Samaritan Act." After an 8-day jury trial, the jury found 39-year-old patient with history of blood clots in his legs was 51% contributory negligent for not seeking medical attentions large blood clot led to cardiac arrest in ambulance.

FACTS:

"On the morning of Sunday, April 24, 2016, while at home on Sellers Avenue, Upper Darby Township, Decedent began having difficulty breathing. *See* N.T., 6/14/21, at 101. One of his daughters, Imani Lamarr, heard a 'thud' and observed her father laying partly on the basement steps. *Id.* at 99, 101. She then called 9-1-1 and DCMH EMS was dispatched at approximately 11:16 a.m. to the residence.

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DCMH EMS arrived on the scene at approximately 11:17 a.m. *See* N.T., 6/16/21, at 13. At approximately 11:21 a.m., they moved Decedent from the steps to the kitchen floor.

*See* N.T., 6/14/21, at 103; N.T., 6/22/21, at 31. They then placed him on a stretcher and transported him to the ambulance.

***

[EMT Ryan] Arnold indicated he made the decision to take Decedent to Lankenau [Hospital] based on Decedent's 'chest pain and shortness of breath' and because '[h]is signs and symptoms were extremely consistent not only with pulmonary embolism but also extremely consistent with . . . acute coronary syndrome[.]' N.T., 6/16/21, at 55. Moreover, Lankenau had a primary percutaneous coronary intervention (PPCI) center and an extracorporeal membrane oxygenation (ECMO) machine which led Arnold to 'believe that Lankenau would be able to take care [of him] either way.' *Id.* at 56. DCMH did not have those machines. *Id.* at 58.

***

[Transported non-emergency; stopping at red lights.] At approximately 11:36 to 11:38 a.m., when they were three to four minutes away from Lankenau, Decedent's respiratory rate increased suddenly and he went into cardiopulmonary arrest. *See* N.T., 6/16/21, at 34, 78; N.T., 6/22/21, at 39. Arnold ordered Brown to stop the vehicle so that he and Brown could administer cardiopulmonary resuscitation (CPR)…. The ambulance arrived at the Lankenau's emergency department at 11:56 a.m. [pronounced dead upon arrival].

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As mentioned above, approximately 39 to 40 minutes had elapsed from the time DCMH EMS arrived at Decedent's home to when they arrived at the hospital.

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Defense witness, Gregory C. Kane, M.D., an expert in the areas of, *inter alia*, pulmonary medicine, myocardial infarction, the performance of diagnostic testing, the performance of CPR and resuscitation, and the transit of patients by ambulance crews from the field into the hospital, testified at trial. *See* N.T, 6/17/21, at 56. He stated DCMH EMS's 'actions were within the standard of care for what [his] expectation was and [his] awareness of the Pennsylvania guidelines for providing EMS support, both BLS and ALS, of [Decedent] in his transport' to Lankenau. *Id.* at 67. Dr. Kane testified that Decedent's blood clot was 'large' and 'it led him to have a cardiac arrest while being transported to the hospital.' *Id.* at 81

***

The jury also heard from defense witness, James P. McCans, an expert in EMT paramedic care, CPR, and operations of the vehicle, who testified that DCMH EMS's ambulance operation and care and treatment rendered met the applicable standard of care. *See* N.T., 6/17/21, at 133-34. He noted that Pennsylvania 'has adopted a less [ambulance] lights and sirens model for EMS response.' *Id.* at 137.

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On June 22, 2021, the jury found the following: (1) Arnold was grossly negligent in his care and treatment of Decedent; (2) Brown was not grossly negligent in his care and

treatment of Decedent; (3) Arnold's grossly negligent act was a factual cause of harm to Decedent; (4) Decedent was negligent and his ordinary negligence was a factual cause of the harm he sustained; and (5) Arnold was 49% negligent while Decedent was 51% negligent. *See* Verdict Sheet, 6/22/21, at 1-2 (unpaginated)."

HOLDING:

" Thus, while the jury did find Arnold's actions amounted to gross negligence, it could reasonably determine that Decedent's liability in his failure to seek treatment greatly outweighed Arnold's liability.

***

Lastly, to the extent Appellants allege Paramedic Brown is not entitled to immunity for his 'operation or use' of the ambulance based on purported negligent actions like failing to activate the ambulance's lights and sirens, taking a different route to the hospital, stopping and waiting at red lights, and failing to use his horn, we find this argument is misdirected. Appellants' Brief at 36. Indeed, Appellants fail to present any case law that Brown's acts amounted to **gross negligence** like intended instances where an ambulance collides with another vehicle or hits a bystander during transportation."

**Legal Lesson Learned: Expert witnesses confirmed non-emergency transport was consistent with PA protocols; PA "Good Samaritan" statute provides immunity for EMS, unless acting with gross negligence, including hospital based EMS.**

Note: The PA Good Samaritan Act provides, in pertinent part:

> (a) General rule. - Any person, including an emergency response provider, whether or not trained to practice medicine, who in good faith renders emergency care, treatment, first aid or rescue at the scene of an emergency event or crime, or who moves the person receiving such care, first aid or rescue to a hospital or other place of medical care, shall not be liable for any civil damages as a result of rendering such care, except in any act or omission intentionally designed to harm or any grossly negligent acts or omissions which result in harm to the person receiving emergency care or being moved to a hospital or other place of medical care.

File: Chap. 13, EMS

## MN: MEDIC RESIGNED AFTER PUT ON PIP – NO 1st AMEND. SPEECH CASE - SPOKE ABOUT EMS TRAINING RECORDS

On Dec. 20, 2023, in Joseph Paul Baker v. The City of Woodbury, et al., U.S. District Court Judge David S. Doty, U.S. District Court for District of Minnesota granted the City's motion for summary judgement. The Court wrote: "Baker claims that defendants Wallgren, Klein, and Guiton retaliated against him for questioning the EMS training records and complaining about Ehrenberg's request to prepare ketamine by placing him on a PIP, in violation of his right to free

speech under the First Amendment. *** To determine whether the employee engaged in speech protected by the First Amendment, the court must first consider whether 'the employee spoke as a citizen on a matter of public concern.' *Garcetti v. Ceballos*, 54 7 U.S. 410, 418 (2014). 'If the answer is no, the employee has no First Amendment cause of action based on his ... employer's reaction to the speech.*** When Baker made statements about the training records, the undisputed facts show that he did so within the scope of his duties as a member of the education group. In that role, Baker was responsible for, among other things, assessing and maintaining training documentation for submission to the EMSRB. Baker discovered the alleged deficiencies when carrying out those duties. He would not have been able to make such a discovery without access to the training records of each paramedic, along with their corresponding certifications. It is undisputed that those detailed records are not available to the general public. Further, Baker reported the alleged deficiencies to his superiors after first discussing it with his fellow education group members, thus tying his concerns directly to his role in the education group rather than merely as a concerned citizen. Under these circumstances, there is no serious debate that Baker's speech owes its existence to his professional responsibilities and therefore is not protected by the First Amendment."

FACTS:

"The City hired Baker in June 2018. Baker Dep. at 58:14-19. In addition to the requisite certifications and emergency medical skills, the City required paramedics like Baker to (1) demonstrate 'effective written and oral communication skills[;]' (2) 'accept criticism and/or discipline;' (3) 'promote a cooperative atmosphere in the department;' (4) 'have a positive attitude;' (5) engage maturely with colleagues; and (5) 'work effectively and respectfully with department heads, elected officials, staff, and other agencies[.]' Hruby Decl. Ex. 1, at 2-3; *see also* Baker Dep. at 58:23-61:16. Baker understood that he would be assessed on how well he performed these essential job duties. Baker Dep. at 61:17-21.

***

**Alleged Training Deficiencies**

On May 13, 2019, Baker told his education group colleagues that he believed there were deficiencies in training records submitted to NREMT. Hruby Decl. Ex. 14; Asauskas Dep. at 11:816; Baker Dep. at 127:20-28:1. Baker was concerned that paramedics may not have attended proper or sufficient courses to maintain their required certifications. Asauskas Dep. at 33:14. Asauskas recommended that Baker raise the issue with Guiton. *Id.* at 13:23-14:6, 33:9-11.

Baker proactively contacted Regions EMS department to arrange for a refresher course before he met with Guiton and the other members of the education group to discuss the perceived training deficiencies. Baker Dep. at 158:1-9, 159:9-13. When Baker called Regions, he said that he did not want the City's EMS training records to be "perceived as inappropriate or fraudulent." *Id.* at 158:12-17. Asauskas was aware that Baker planned to call Regions, but their superiors were not. *Id.* at 162:12-21.

***

Unbeknownst to Guiton [J.B. Guiton was the Emergency Medical Services Commander], Baker also sent an email raising concerns about paramedic training to Dr. Burnett, the City's medical director, a Regions Hospital emergency room physician, and an EMSRB board member.

***

**Shooting Incident**

In July 2019, Baker responded to the scene of an officer-involved shooting. Baker Dep. at 245:12-18. According to Baker, Wallgren was so upset that so many of the City's ambulances were unavailable to take other emergency calls that he called those on the scene to complain. *Id.* at 245:19-22. Baker alleges that Wallgren's conduct disrupted patient care. *Id.* at 245-22-46:12.

***

**Ketamine Incident**

On September 22, 2019, Woodbury Police Sergeant and certified paramedic Tom Ehrenberg responded to a call involving someone in a mental health crisis. Ehrenberg Dep. at 5:8-6:24, 10:2-11, 13:6-9. Paramedics were also called, among them Baker. *Id.* at 14:16-15:2.

Ehrenberg observed that the person was "extremely volatile." *Id.* at 15:8-12, 27:16-18. As a result, he asked Baker to prepare a sedative in the form of Ketamine to calm the person, if needed. *Id.* at 15:16-16:11. According to Ehrenberg, Baker's "body language indicated that he was not prepared and not willing" to do so. *Id.* at 16:14-16. Ehrenberg and his partner were ultimately able to remove the person from the scene without the use of a sedative. *Id.* at 21:8-22:8, 30:3-25, 34:18-19.

**PIP / RESIGNATION**

On November 19, 2019, Klein placed Baker on a Performance Improvement Plan (PIP) due to his increasingly poor attitude and communication.

On November 20, 2019, the day after the PIP meeting, Baker applied for, and was later offered, an EMT position elsewhere. Hruby Decl. Ex. 39. On December 5, before HR could complete its investigation, Baker submitted his resignation and two weeks' notice to the City. Hruby Decl. Ex. 44; Baker Dep. at 304:8. The City accepted his resignation, later determining that Baker was not eligible for re-hire due to his communication issues. Klein Dep. at 93:1-13."

HOLDING:

"So, the question presented is whether Baker's stated concerns about the EMS training records and Ehrenberg's request for him to prepare ketamine were made within the scope of his duties. The record establishes that they were, despite Baker's insistence that he was acting simply as a concerned citizen regarding both matters…. Accordingly, Baker's speech is not protected by the First Amendment and his claim fails on this basis alone.

***

Baker has failed to establish that he was constructively discharged. He argues that Guiton's single threat, coupled with the PIP, constituted constructive discharge."

**Legal Lesson Learned: PIP can be an effective management tool, either to get employee to improve or to look for another job.**

File: Chap. 13, EMS

## PA: EMT'S CERT REVOC. WAS TOO HARSH – CUSTODY DISPUTE 11-YR-OLD SON – 2d DEG. FELONY STANGULATION

On Dec. 13, 2023, in Eugene Knelly v. Pennsylvania Department of Health, the Commonwealth Court of Pennsylvania (2 to 1) vacated the revocation order of the Department of Health, Bureau of Emergency Medical Services, which based its decision on (1) EMT pled "nolo contendere" to charges of felony 2nd degree strangulation; Knelly had primary physical and legal custody of his 11 year old son at the time; he didn't report conviction to State Board within 30 days. The Court remanded matter for imposition lesser penalty; period of suspension for EMT with 26 years of experience. The Court wrote: "Ms. Hoffman [Board investigator] acknowledged that, in conducting her audit, she did not speak with anyone involved with Knelly's case, including the investigating police officer, Knelly himself, Knelly's son, Knelly's son's mother, or any treating physicians, and accordingly had no firsthand knowledge of the circumstances underlying the charge. (C.R. at 071-72.) Ms. Hoffman did not believe that an in-person investigation was necessary because she had read the facts alleged in the affidavit of probable cause. (C.R. at 072.) *** The Department disregarded and mischaracterized, as a 'collateral attack' on his conviction, Knelly's explanation that he and his son's mother were engaged in a bitter custody battle and that the allegations that gave rise to the criminal charges were untrue and fabricated by his son at his mother's prompting. Knelly at no point challenged his conviction before the Department. Rather, he argued before the Department, and argues again here, that he pleaded no contest because he believed such a plea was in his and, more importantly, his son's best interest. He explained his understanding that he received a lenient sentence chiefly because the district attorney was aware that the allegations had been fabricated. Most tellingly, Knelly also confirmed that he currently has at least partial custody of his son pursuant to an informal agreement with his son's mother. There is no meaningful discussion or weighing of these facts anywhere in the Department's Final Determination, which absence we find to be manifestly unreasonable."

FACTS:

"Hearing Officer Michael T. Foerster (Hearing Officer) conducted an online hearing on November 2, 2021…. Knelly testified on his own behalf and presented the testimony of Kenneth Soult, the ambulance chief in Mahanoy City and Knelly's supervisor.

***

Knelly first presented the testimony of Mr. Soult, who testified that he is the chief of the Mahanoy City ambulance service and has been Knelly's supervisor since 2007. (C.R. at 101-02.) He further testified that he has never had any performance issues with Knelly and has never received any patient complaints regarding Knelly's care. He also stated that losing Knelly as an EMT would pose significant hardship on Mahanoy City's ambulance service, possibly putting them "out of service" for a period of time. (C.R. at 101-04, 110.) Mr. Soult had no concerns with Knelly continuing as an EMT and stated that he would trust Knelly with his own family. (C.R. at 104.)

***

Knelly then testified on his own behalf. He testified that he has been employed as an EMT in Mahanoy City for approximately 13 to 14 years and has been an EMT for approximately 26 years. (C.R. at 115-16.) Knelly described the custody dispute that was ongoing at the time of the incident that gave rise to his strangulation charge. Knelly stated that his son's mother had been coaching his son, then 11 years old, to make allegations of abuse against Knelly, which the son eventually did. (C.R. at 118.) At the time of the incident, Knelly had primary physical and legal custody of his son, with his son's mother having supervised visitation due to her drug and related criminal issues. (C.R. at 118.) Knelly indicated that he had raised his son exclusively for six years prior to the incident and that he never strangled, spanked, or abused him physically. (C.R. at 120-21.) He nevertheless decided, on the advice of his criminal counsel, to enter the *nolo contendere* plea to protect his son from having to go to court. (C.R. at 121.) Knelly received a sentence of probation which, according to Knelly's understanding, was acceptable to the district attorney because Knelly's son admitted to lying about the incident at the request of his mother. (C.R. at 123-24.)

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He stated that, despite his attempts to enter the conviction on the Department's website, the website is difficult to navigate and did not give him any confirmation that the information was received by the Department. (C.R. at 126-27.) He further indicated that the Department would be able to check to see if he logged into the system that day. (C.R. at 126.) Knelly indicated that he never intended to not report his conviction and that he told his boss and coworkers that he did report it. (C.R. at 128-29.)

***

[Footnote 6.] “Section 2718(a) of the Crimes Code defines the crime of strangulation as follows:

(a) Offense defined.--A person commits the offense of strangulation if the person knowingly or intentionally impedes the breathing or circulation of the blood of another person by:

(1) applying pressure to the throat or neck; or

(2) blocking the nose and mouth of the person.

18 Pa. C.S. § 2718(a). Although strangulation typically is graded as a second-degree misdemeanor, *see id.* § 2718(d)(1), it is graded as a second-degree felony where, as

pertinent here, it is committed against a "family or household member." *Id.* § 2718(d)(2)(i).”

HOLDING:

“First, there appears to have been throughout the proceedings in the Department an erroneous understanding of the nature and effect of a *nolo contendere* plea and, as the Department now appears to recognize, an inordinate reliance on the facts alleged in the affidavit of probable cause. *Nolo contendere* pleas admit neither to facts alleged in the affidavit or to the elements of the crime charged. Rather, as noted above, defendants entering *nolo contendere* pleas admit that the facts as alleged, if proven, could support a conviction.

***

Second, in its Final Determination, the Department affirmed the revocation of Knelly's certification based exclusively on the definition of the crime of strangulation itself and the fact that the victim was Knelly's 11-year-old son, of whom Knelly had primary physical and legal custody at the time…. The Department's identification of purported risks with Knelly's ‘character trait’ is entirely speculative and does not at all acknowledge that Knelly's work environment with vulnerable strangers is markedly different than a bitter custody dispute where manufactured accusations are often the norm. And, more importantly, there is no evidence that those purported risks have materialized even once on the job in the past 26 years of Knelly's career.”

**Legal Lesson Learned: EMS must carefully consider impact on their certification when deciding to make a “no contest” plea or a guilty plea; very fortunate to have a Court (2 to 1) make detailed review of facts.**

Note: Dissent’s opinion by Judge Ellen Ceisler.
“In this situation, I am uncomfortable reweighing the evidence and substituting our credibility determinations for those of the hearing officer. Because I do not believe the Department abused its discretion in revoking Knelly's EMT certification under the circumstances, I would affirm the Department's Final Determination.”

File: Chap. 14, Physical Fitness

File: Chap. 15, Mental Health

## OH: MENTAL CALL / SUICIDE GUNSHOT – DEPUTIES NOT RECKLESS - CALLED MOBILE CRISIS - NOT LIABLE

On Dec. 28, 2023, in Sarah Wilson, Administrator of the Estate of Jack Huelsman, et al. v. Eric Gregory, et al., the Court of Appeals of Ohio, Twelfth District, held (3 to 0) that lawsuit against two Deputy Sheriff’s for not taking the patient to mental health facility was properly dismissed, since patient at that time did not appear to be a risk to himself or others. The Court held: “We find that the Deputies did not engage in reckless conduct because there is no evidence in the

record that they consciously disregarded or were indifferent to a known or obvious risk of harm to Jack [Huelsmann].”.

FACTS:

> “This case concerns the tragic death of Jack who died on September 19, 2015, of a self-inflicted gunshot wound. Cheryl was Jack's wife; Sarah is their daughter. Jack suffered from bipolar disorder and had terminal cancer. Cheryl is a former nurse who has encountered people experiencing mental health crises and who was on family medical leave to care for Jack. On the morning of September 19, 2015, Jack accused Cheryl of playing recordings of political speeches outside his bedroom, taking and crumpling Korean money, stealing his wallet and keys, and sabotaging his electronic devices. Distressed, Cheryl called Sarah, informed her that Jack was paranoid and agitated and experiencing a mental health episode in which he was hearing voices, and asked for help calming Jack. According to Sarah, once on the phone, Jack repeated his delusions to Sarah and told her that he was a prisoner in his own home, that he did not have a reason to live, and that if he killed himself, Cheryl would be unable to keep their home because she would not get life insurance. He then said goodbye to Sarah and hung up. Sarah called Cheryl back and they decided to call 9-1-1; however, because Cheryl felt she could not do so within Jack's earshot, Sarah made the call.
>
> ***
>
> At 12:08 p.m., Deputy Gregory was dispatched to the Huelsman home along with an EMS unit. Dispatch informed Gregory that the call was for a "64-year-old male hearing voices. At 12:08 p.m., Deputy Gregory was dispatched to the Huelsman home along with an EMS unit. Dispatch informed Gregory that the call was for a "64-year-old male hearing voices.
>
> ***
>
> Gregory arrived first and was admitted into the home where he found Cheryl sitting on the couch and Jack sitting in a recliner. Cheryl was upset and crying; Jack was calm. Seeing no signs of physical injury, Gregory advised EMS to stand down.
>
> ***
>
> Deputy Walsh arrived while Gregory was outside on the porch speaking with Cheryl. Walsh stayed outside with Cheryl while Gregory returned inside the home to speak with Jack. Jack told Gregory that he was upset Cheryl had taken and locked up all his firearms and hidden the keys. Jack further stated that Cheryl had taken his car keys and driver's license, "basically taking away his freedom." Jack expressed his belief that Cheryl was "trying to do everything she could to get him locked up, put away, out of the house." Gregory believed Jack to be calm, rational, and composed during this conversation. Based upon Jack's demeanor, inflection, and conduct, Gregory did not consider Jack to be suicidal.
>
> ***
>
> Gregory returned to his patrol car and contacted his supervisor for authorization to call Mobile Crisis, a mental health service, to respond to the scene and speak with the

Huelsmans. Gregory then returned to the house and advised Jack that Mobile Crisis was on its way to talk to him. Jack informed Gregory that he had terminal cancer and that Cheryl was his nurse.

Gregory went back outside, where he observed Cheryl 'crying uncontrollably' kneeling down by a tree, and took a follow-up call from Mobile Crisis inside his patrol car. From the car, Gregory observed Jack walk out onto the porch and look around for a few minutes before walking back into the house. While Gregory was inside his car writing down the Huelsmans' information, Jack shot and killed himself."

HOLDING:

"After reviewing the record de novo and in a light most favorable to Cheryl, we conclude that no genuine issue as to any material fact remains to be litigated and that the Deputies are entitled to judgment as a matter of law because there is no evidence the Deputies acted in a reckless manner and Cheryl abandoned her claim that the Deputies acted maliciously, in bad faith, or in a wanton manner. The Deputies are entitled to immunity under R.C. 2744.03(A)(6)(b) and to summary judgment."

**Legal Lesson Learned: A tragic outcome to a mental health run; lengthy litigation, if the Deputies had not cancelled EMS there would have been four witnesses to testify about patient's condition.**

Note: FEDERAL LAWSUIT. Plaintiff had originally filed a lawsuit against the Deputies in Federal court. On Sept. 30, 2020, U.S. District Court granted summary judgment to the Deputies.

On July 1, 2021, the 6th Circuit Court of Appeals directed District Court judge "to determine whether to exercise supplemental jurisdiction" over the state law claims that remain."

On Aug. 18, 2021, the U.S. District Court judge declined to exercise supplemental jurisdiction and dismisses all remaining claims without prejudice.

6th Circuit focused on EMS being cancelled.

In the meantime, emergency medical services (EMS) personnel had arrived and were waiting for the Deputies' go-ahead. Though EMS personnel's ability to provide mental health services was limited to asking basic questions to test a person's mental acuity, their training and policy permitted them to assess a person's mental condition and make a recommendation to a deputy that the person should or should not be detained. Within four minutes of his arrival at the Huelsmans' home, Deputy Gregory called off EMS.

***

A reasonable juror could conclude from some combination of these indicia that the risk of Mr. Huelsman's suicide was indeed obvious and that Deputies Gregory and/or Walsh acted recklessly as a result. It may well be that when presented with this case, a jury

would conclude Deputies Gregory and/or Walsh did not act recklessly on the rationales that the separate writing discusses. But on this record and given Ohio courts' strong preference for a jury to determine whether particular acts or decisions demonstrate recklessness, the grant of statutory immunity to Deputies Gregory and Walsh, and therefore the grant of summary judgment in their favor on the Huelsmans' state law claims, was also error.

Note – Pink Slip

In Ohio, police officers have authority to "pink slip" an individual for 72 hour mental health hold, under Ohio Rev. Code 5122.10: "substantial risk of physical harm to self or others."

See also this research publication by Legislative Service Commission for Ohio General Assembly, "Involuntary Treatment for Mental Illness."

File: Chap. 15 – Mental Health

## WV: MENTAL CALL / SUICIDE – LAWUIT PROCEED SHERIFF POLICY "NO SUNDAY" RESPONSES – EMS / PD IMMUNITY

On Dec. 21, 2023, in Rex Eagon and Diane Egon, individually as co-administrators of the Estate of Darien M. Eagon v. Cambell County Emergency Medical Service, et al., U.S. District Court Judge Robert C. Chambers, United States District Court, S.D. West Virginia, Huntington Division, held that City of Huntington police officers and County EMS are immune from liability, but plaintiffs may proceed with pre-trial discovery on allegations that County Sheriff. The Court wrote: "Certainly, there are no allegations that Sheriff Zerkle or any employee of the Sheriff's Department were at the scene, had any knowledge of Ms. Eagon's situation, or ever had any contact with her. Without any of these connections with Ms. Eagon, the Court agrees with the County Defendants that Plaintiffs have not plausibly alleged Sheriff Zerkle acted with direct 'intent' to inflict emotional distress upon Ms. Eagon or her parents. However, for purposes of a motion to dismiss, the Court must assume the truthfulness of Plaintiffs' allegation that Sheriff Zerkle adopted, enforced, and made known to EMS and HPD that his Department had a custom, practice, or policy of not dispatching deputies to respond to any mental health crises on a Sunday, regardless of how urgent or dire the situation presents. From this vantage, the Court finds this allegation is sufficient to plausibly allege Sheriff Zerkle intentionally acted so recklessly that it was substantially certain that someone like Plaintiffs would suffer emotional distress. Additionally, it is plausible that such custom, practice, or policy could be found to be 'atrocious, intolerable, and so extreme and outrageous as to exceed the bounds of decency[.]' *Hoops*, 2022 WL 2400039, at *7 (internal quotation marks and citation omitted). Therefore, the Court finds Count IV is sufficient as to Sheriff Zerkle and DENIES the County Defendants' motion to have this Count dismissed against him."

FACTS:

"In their Complaint, Plaintiffs allege that, on Sunday, January 10, 2021, their daughter Darien Eagon was drinking alcohol and repeatedly expressing thoughts of suicide to her live-in boyfriend. *Compl*. ¶17. In response, the boyfriend called Ms. Eagon's parents and Cabell County 911. *Id*. ¶¶18, 19. Plaintiffs, EMS, and HPD [City of Huntington police] came to the residence. *Id*. ¶20.

The boyfriend told the EMS personnel and the HPD officers that Ms. Eagon needed help. *Id.* ¶24. However, instead of helping Ms. Eagon, Plaintiffs claim the body camera footage from an HPD officer reveals that the EMS personnel said that neither EMS nor HPD could do anything because Ms. Eagon was alert. *Id*. ¶22. According to Plaintiffs, the EMS personnel also stated that, although the Sheriff's Department is supposed to handle these situations, it 'would not come out because they do not do mental hygiene orders on Sundays.' *Id.* ¶21. Plaintiffs further allege both the EMS personnel and the HPD officers said that, even aside from Sundays, the Sheriff Department's response is lackluster. *Id.* ¶25. Plaintiffs claim they were told this situation 'was not an isolated occurrence as the Huntington Police Department and EMS personnel noted 'the last one was really bad' and St. Mary's wouldn't take him.' *Id*. ¶23.

Defendants assert Plaintiffs' factual summary of the body camera footage is inaccurate, misleading, and incomplete. They point out the footage reveals that, when the HPD officers arrived on the scene, they were informed by EMS that Ms. Eagon was 'alert and oriented,' 'doesn't want anyone to bother her,' and 'she won't go.' *Body Camera Video Footage*, Ex. 3 to *The City Defs.' Mot. to Dismiss*, at 1:28, ECF No. 15-3.[1] Rex Eagon also indicates on the footage that Ms. Eagon was unwilling to leave with him or her mother. *Id.* at 5:32.

Eventually, EMS, HPD, and Ms. Eagon's parents left the scene. Later that day, Ms. Eagon's boyfriend also left the residence because "Ms. Eagon was being abusive toward him." *Id*. ¶28 (internal citations omitted). When the boyfriend returned that night with a friend, he found Ms. Eagon had hung herself and tragically died. *Id*. ¶¶30, 31."

HOLDING:

"Ms. Eagon had the right to refuse their assistance and medical care, and the City Defendants cannot be held liable for discrimination for withholding law enforcement services that they did not have the authority to exercise. Moreover, the Court finds the Complaint fails to sufficiently allege how HPD, Captain Merritt, and the individual officers actually discriminated against Ms. Eagon under either the WVHRA or the ADA. Therefore, the Court finds Plaintiffs have failed to state plausible claims of discrimination against the City Defendants and **GRANTS** their motion to dismiss Counts V and VI.

***

**Tort of Outrage/Reckless Infliction of Emotional Distress….** The County Defendants further argue Plaintiffs cannot state a plausible claim against Sheriff Zerkle. For the following reasons, the Court disagrees…. However, for purposes of a motion to dismiss, the Court must assume the truthfulness of Plaintiffs' allegation that Sheriff Zerkle adopted, enforced, and made known to EMS and HPD that his Department had a custom,

practice, or policy of not dispatching deputies to respond to any mental health crises on a Sunday, regardless of how urgent or dire the situation presents. From this vantage, the Court finds this allegation is sufficient to plausibly allege Sheriff Zerkle intentionally acted so recklessly that it was substantially certain that someone like Plaintiffs would suffer emotional distress. Additionally, it is plausible that such custom, practice, or policy could be found to be "atrocious, intolerable, and so extreme and outrageous as to exceed the bounds of decency[.]" *Hoops*, 2022 WL 2400039, at *7 (internal quotation marks and citation omitted). Therefore, the Court finds Count IV is sufficient as to Sheriff Zerkle and **DENIES** the County Defendants' motion to have this Count dismissed against him"

**Legal Lesson Learned: Police body camera footage of interaction with patient very helpful; EMS should likewise consider using body cameras on mental health and other patient refusals.**

Note: The Court referenced in its decision (Footnote 3) this interview

West Virginia Public Broadcasting, Cabell Sheriff Says System Broken As 20 Percent Of Mental Safety Pickups Go Unanswered In County (Apr. 5, 2021).

"Cabell Sheriff Says System Broken As 20 Percent Of Mental Safety Pickups Go Unanswered In County," April 5, 2021.

"In West Virginia, when a person is thought to be a threat to themselves or others, they can be involuntarily committed to a mental health facility through a process known as a 'mental hygiene petition.' These petitions, usually taken out by a family member or outreach worker, have to be approved by a county court and require a sheriff's deputy to help transport the person being committed.

But in Cabell County, data from a mental health facility show at least 75 mental hygiene orders went unanswered by the Cabell County Sheriff's Department in 2020. The sheriff says his department is overwhelmed.

***
Cabell County Sheriff Chuck Zerkle explains the mental hygiene process at his office in Huntington, West Virginia, on Wednesday, March 31, 2021.

Zerkle added that in 2020 alone, his office received approximately one mental hygiene order *a day* from the courts. And per the WV State Code, only sheriffs and their deputies are approved to execute mental hygiene. He says his office can't keep up.

> **"**We all want to agree that we're all wanting to help ourselves dig out of this opioid issue and the mental health issue. But you've got a small minority of law enforcement that is saddled with doing this.

For Zerkle, the only way to fix the problem is to change the law regarding mental hygiene orders. He doesn't see why lawmakers can't approve all law enforcement agencies to do these pickups.

> "My perfect world would be law enforcement would secure them, get them to the facility, get the stuff started, and then we leave and turn it over to someone else that's medically trained to take care of these people," he said.

Currently, two bills have been introduced by Sen. Charles Trump, a Republican from Morgan County, that would address mental hygiene orders in the state. The new bills would expand the window deputies have to pick people up from 10 to 20 days and remove the need for deputies to first take people to the hospital prior to transporting them to a mental health facility. Both of these bills have made it out of the senate and are currently being heard by the House Health and Human Resources Committee."

File: Chap. 16, Discipline

## WV: FF TERMINATION UPHELD - ARRESTS DOMESTIC VIOL – DISCHARGED FIREARM - CIVIL SERVICE COMM. REVERSED

On Dec. 27, 2023, in Nicholas Graley v. City of South Charleston, the Intermediate Court of Appeals of West Virginia held (3 to 0) that the firefighters was properly terminated, upholding the decision of the Circuit Court judge of Kanawha County; the City's Civil Service Commission decision to only suspend firefighter reversed. The Court held: "Further, the final order of the Commission is reversed because the Commission entirely failed to consider important aspects of the case and offered explanations that ran counter to the evidence. For instance, the Commission failed to consider any of the facts related to the May 30, 2019, incident wherein Mr. Graley was involved in an altercation while drinking in public then followed members of that altercation home after being asked not to, discharged his firearm from his vehicle, and initially lied to law enforcement about his actions. The Commission also failed to consider that Mr. Graley lied about, or minimized, his actions concerning this incident to Chief White."

FACTS:

> "Mr. Graley was a firefighter for the City of South Charleston Fire Department ('Fire Department') from July 20, 2012, until his termination sometime in late May of 2020. During his employment, he rose to the rank of lieutenant and served as acting captain from time to time.
>
> On May 30, 2019, Mr. Graley was involved in a situation that was described by the investigating police officer as a wanton endangerment incident. According to the officer's narrative, Mr. Graley was drinking at an Applebee's restaurant in South Charleston with friends. The boyfriend of one of Mr. Graley's friends arrived and an argument ensued. The incident culminated in Mr. Graley following the friend and boyfriend on their way to the boyfriend's home, despite being asked by his friend to stop following them, and Mr. Graley discharging his firearm multiple times while driving. The police contacted Mr. Graley, who denied discharging his firearm. However, on June 6, 2019, Mr. Graley and

his attorney met with police again. At that time, Mr. Graley admitted to discharging his firearm during the May 30, 2019, incident. On June 1, 2019, South Charleston Fire Chief Virgil White ('Chief White') received a call from Mr. Graley in which Mr. Graley stated that he needed to come by Chief White's office to discuss something. A meeting was held that day wherein Mr. Graley explained the incident as a simple verbal altercation after which the involved parties went their separate ways. He did not mention that he discharged his firearm in public.

***

On January 30, 2020, Mr. Graley was arrested for domestic assault against Caitlan Wilson, the mother of his child. According to the investigating officer's narrative, the South Charleston Police Department responded to a call from Ms. Wilson wherein she stated that a male had a gun and was telling her to hang up or he would shoot her.

***

On May 9, 2020, Mr. Graley was again arrested for domestic assault against Ms. Wilson. According to the officer narrative, Mr. Graley came to Ms. Wilson's residence to return his child's iPad. Upon his arrival, Ms. Wilson could tell that Mr. Graley had been drinking. She made a comment about Mr. Graley tracking mud into her home with his boots. This caused Mr. Graley to become agitated. He stomped his boots, smashed a glass picture frame, and then raised his fist as if he was going to hit Ms. Wilson. Ms. Wilson called her mother who then called Ms. Wilson's brother-in-law, John Morrison, to go and check on Ms. Wilson. When Mr. Morrison arrived, he found Ms. Wilson and Mr. Graley arguing in the living room in front of two children. Mr. Morrison told Mr. Graley that he needed to leave. Mr. Graley then grabbed two steak knives from the kitchen and held them up to Mr. Morrison and told him that he was going to stab him. Mr. Morrison acted like he was going to leave which caused Mr. Graley to put the knives down. Mr. Morrison then tackled Mr. Graley and the two began to fight until the police arrived. According to the testimony of Mr. Morrison, during the incident, Mr. Graley punched a hole in the drywall of the home. Mr. Graley was arrested and taken to the hospital to receive stitches before being transported to jail.

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On May 11, 2020, an official investigation was opened by the Fire Department into Mr. Graley. On May 14, 2020, Chief White issued a report that summarized the findings of the investigation.

***

On December 8, 2021, the Commission held a de novo hearing. At the hearing, two police officers involved in the incidents testified, as did Mr. Morrison, Chief White, and Ms. Wilson. Mr. Graley did not testify. Ms. Wilson testified that at the time of the hearing before the Commission, her relationship with Mr. Graley was the best it had ever been.2 Ms. Wilson went on to essentially walk back everything she had told to police following the January and May 2020 incidents. She testified, among other things, that Mr. Graley had never raised his hand at her or threatened to shoot anyone; that no one was ever in danger of serious injury; and regarding the May 2020 incident, that she never invited Mr.

Morrison into her home or asked him to remove Mr. Graley and therefore Mr. Morrison was essentially acting as a vigilante. On cross-examination, Ms. Wilson refused to read her prior statement to police on the record but answered questions from the City's attorney about the contents of her prior statement. When one of the commissioners questioned the conflict between her statements to police and her testimony before the Commission, Ms. Wilson and Mr. Graley's attorney attempted to reconcile her statements by saying that she was not recanting her prior statements but was simply trying to say that, in hindsight, Mr. Graley was not objectively a danger. Ms. Wilson eventually stated that she was 'absolutely not' recanting her statements to police."

HOLDING:

"Here, as discussed above, Mr. Graley had been drinking and followed people home with whom he had been in an altercation, after being asked not to, discharged his firearm while driving, lied to law enforcement, lied to or misled his supervisor, threatened others with deadly weapons on multiple occasions, was arrested multiple times, and repeatedly disrespected others. Such actions demonstrate poor judgment, recklessness, and an inability of Mr. Graley to manage his anger; all of which call into question his mental acuity, ability to reason and to make decisions as a firefighter that affect public safety. Such actions by Mr. Graley constitute misconduct of a substantial nature specially related to and affecting Mr. Graley's ability to perform tasks inherent in being a firefighter. Accordingly, there was just cause for Mr. Graley's immediate termination."

**Legal Lesson Learned: Fire Chief properly terminated, not suspended firefighter; four Judges properly overruled Civil Service Commission.**

File: Chap. 16, Discipline

## CA: FD OFFICER WRONGFULLY FIRED – "INTENTIONAL" VIOL. DUE PROCESS BY CHIEF – JURY: $3M DAMAGES

On Dec. 19, 2023, in Timothy O'Hara v. Liberty Rural County Fire Protection District, et al., the California Court of Appeals, Third District, San Joaquin, held (3 to 0; unpublished decision) that jury properly found the Fire Chief intentionally violated the CA Firefighters Procedural Bill of Rights Act by denying Shift Supervisor Tim O'Hara (12 years on FD) due process, and effectively ending his career in fire service at age 51. The Court held: "[Fire Chief] Seifert and the District give similarly short shrift to the deliberate flouting standard with which the jury was instructed and offer no challenge to the special verdict finding that Seifert intentionally trammeled O'Hara's rights under the FPBOR. Under the circumstances, we need not consider whether the evidence compels findings in their favor on the theory they violated substantive due process by intentionally and deliberately flouting the FPBOR as part of a personal vendetta against O'Hara. We need only conclude that Seifert and the District have failed to show the evidence compels findings in their favor on substantive due process as a matter of law. They likewise fail to show the trial court erred in denying the motions for judgment notwithstanding the verdict so far as the section 1983 cause of action was concerned."

FACTS:

"A jury returned a special verdict [on Nov. 4, 2021] finding [Fire Chief Stanley D.] Seifert intentionally and deliberately denied O'Hara due process of law and awarded more than $3 million in economic and noneconomic damages. The trial court ordered an additional award of $1.3 million as a 'tax neutralization gross up' and a civil penalty of $25,000 for violating the FPBOR. [Firefighters Procedural Bill of Rights Act] (Gov. Code, § 3250 et seq.) (Gov. Code, §§ 3254, 3260, subd. (d).) The trial court also awarded O'Hara nearly $600,000 in attorney's fees. (42 U.S.C. § 1988 (section 1988); Gov. Code, §3260.)

***

The District provides fire protection services to a small, mostly rural area within San Joaquin County. [Stanley D.] Seifert has served as the District's fire chief for 44 years. O'Hara joined the District as a shift supervisor in 2005.

***

Things went from bad to worse in 2015 or 2016. Seifert began placing letters of reprimand in O'Hara's personnel file. One such letter accused O'Hara of inappropriately instructing an off-duty employee to seek medical attention for an accidental needlestick before returning to work. Another accused O'Hara of engaging in an altercation with another firefighter. Still another accused O'Hara of failing to reroll hose packs and clean an engine upon returning to the fire station after a deployment. O'Hara, who denies any wrongdoing, was not given an opportunity to appeal the letters of reprimand. (Gov. Code, §§ 3254, subd. (b), 3254.5.)

The relationship deteriorated still further in October 2016, when Seifert purported to place O'Hara on probation for twelve months. 3

> FOOTNOTE 3: Seifert could not really place O'Hara on probation because he was by then a permanent employee. (See generally *Skelly v. State Personnel Board* (1975) 15 Cal.3d 194, 206-207 (*Skelly*).).

O'Hara objected to the attempted discipline but was not given an opportunity to pursue an administrative appeal. (Gov. Code, §§ 3254, subd. (b), 3254.5.) Seifert also froze O'Hara's pay, blocked him from participating in strike teams [wildland fires] (which provided additional income), and refused to certify him as a strike team leader (which would have involved an increase in pay).

He then purported to extend O'Hara's 'probation' by six months. As before, O'Hara objected but was not given an opportunity for an administrative appeal. (*Ibid.*)

***

With tensions mounting, O'Hara applied for a captain's position with the Waterloo-Morada Fire District (Waterloo-Morada) in November 2017. He passed a written test and cleared an assessment panel in February 2018. He was then invited to interview with

Waterloo-Morada's fire chief, Steve Henry, and the battalion chiefs. At the end of the interview, O'Hara was told that Waterloo-Morada would be filling three positions right away, and maintaining a hiring list for a fourth position, which was expected to be opening soon. O'Hara was first on the list for the anticipated vacancy.

Several days later, O'Hara learned that an anonymous letter had been circulating through fire departments in San Joaquin County. The letter was addressed to the 'Hiring Manager' and 'all concerned parties that do the hiring at your station.' It read, in part:

> 'There has been some rumors going around that a Mr. Timothy O'hara [*sic*] has been asked to leave his current station by his Chief Stanley Seifert for reasons unknown at this time. [¶] But, we do know that Mr. O'hara [*sic*] has had lots of issues with many of his co-workers. Many of his co-workers have left the station because of him.' The letter warned that O'Hara 'has a huge attitude problem' and 'lots of old injuries that cause him issues and he may not be able to perform duties as asked.' The letter closed by urging readers to 'be careful in your decision if he has applied to your station.' It was signed, 'All concerned firefighters.'

***

Although he acknowledged laying the groundwork for terminating O'Hara in February 2018, Seifert testified he did not decide to do so until March 2018, when O'Hara called to confront him about the anonymous letter. Seifert recalled that O'Hara accused him of writing the letter and losing control of the District. According to Seifert, O'Hara's accusations and tone of voice demonstrated disrespect for the chain of command, leaving Seifert with no choice but to terminate O'Hara for insubordination."

HOLDING:

"Here, there was evidence from which the jury, and later, the trial court, could infer that (1) O'Hara would not have been terminated had he received due process, and (2) Waterloo-Morada would have hired O'Hara had he not been terminated. It was undisputed that O'Hara was an excellent firefighter, and Seifert and the District terminated him without due process.

***

Siefert and the District next challenge the jury's award of noneconomic damages for emotional distress. They argue the award should be reversed because the evidence fails to show that O'Hara's emotional distress was caused by the denial of due process, rather than the loss of his firefighting career. We are not persuaded."

***

Based on decades of experience in the fire service, O'Hara opined he has no realistic chance of ever getting another firefighter's position. He testified he would have to compete with an applicant pool of 'thousands' of younger, more vigorous candidates for any entry-level position and, at 51 years old, the odds of him outperforming them in physical agility tests (as he would be required to do) were '[n]ext to nil.' Consequently, O'Hara said, it was 'literally impossible' for him to start over from the bottom."

**Legal Lesson Learned: Very expensive lesson learned; the Fire Chief should have held a pre-disciplinary conference, and the Fire Board should have provided a hearing.**

File: Chap. 16, Discipline

# LA: ASSIST. FIRE CHIEF – DEMOTED 6 MO. PROB. PERIOD – TWO REPRIMANDS – CIVIL SERVICE BOARD REVERSED

On Dec. 13, 2023, in E. "Ben" Zahn, III v. Kenner Municipal Fire and Police Civil Service Board, the Court of Appeals of Louisiana, Fifth Circuit, held (3 to 0) that the Civil Service Board incorrectly ordered Joseph Sunseri reappointed as Assistant Fire Chief. The Court wrote:" Mr. Sunseri received written reprimands on January 21, 2019 and March 29, 2019. The first reprimand was issued because he submitted 'vague and then inappropriate documentation' from several of his subordinate firefighters in response to an investigation of property damage that a citizen sustained while the department was responding to a call, in violation of several of the Department's Rules of Conduct. The second reprimand Mr. Sunseri received was for a violation of Rule of Conduct Article 50.2 - Conduct Unbecoming an Officer - after Mr. Sunseri questioned a request to perform welfare checks on Department members out on sick leave due to surgery and stated, 'This is getting absurd.' in a February 28, 2019 email addressed to Chief Ryan Bergeron, Chief of Administration Terence Morris, and Chief of Administration Charles Hudson…***The Board's findings do not provide a rational basis for the Board's conclusory finding that Kenner [Fire Department] did not provide Mr. Sunseri a fair opportunity to prove his ability in the position of Assistant Chief. It is not clear from the report what inferences the Board made, or which facts it determined Mr. Sunseri proved in support of his appeal (other than Kenner's failure to timely provide written notice of his rejection pursuant to La. R.S. 33:2495(C)). The lack of evidence to support the Board's decision left the district court no choice but to conclude that the Board's decision was arbitrary and capricious, and not made in good faith and for statutory cause."

FACTS:

> "Mr. Sunseri began his working test period for the promotional position of Assistant Chief of the City of Kenner Fire Department on September 29, 2018. La. R.S. 33:2495(B)(1) provides that the period of the working test shall commence upon appointment and continue for a period of not less than six months nor more than one year. On an internal Personnel Action Form dated September 25, 2019 (which Mr. Sunseri advises Kenner never provided to him), Kenner wrote, 'Employee failed his working test period as he was unable and unwilling to perform satisfactorily the duties of the position to which he had been appointed.' (caps omitted). Kenner submitted an additional Personnel Action Form to the Kenner Municipal Fire and Police Civil Service Board ('the Board'), notifying the Board of its actions, which was received by the Board on September 26, 2019.
>
> ***
>
> Mr. Sunseri subsequently filed an appeal with the Board on October 3, 2019, alleging in his Request for Hearing of Appeal that Kenner failed "to confirm probational employee in accordance with state and local law". Mr. Sunseri's appeal was heard on December 16,

2021. The hearing was not transcribed, as neither Mr. Sunseri nor Kenner opted to have it transcribed, and the Board advised that it would not be responsible for producing a transcript.

***

The Board then listed the witnesses and exhibits that were offered at the hearing, described the temporary adjournment to executive session, and then rendered the Decision of the Board, stating that Kenner did not give Mr. Sunseri 'a fair opportunity to prove his ability in the position of Assistant Fire Chief and, therefore, the appeal of Joseph Sunseri is granted.'

***

On Kenner's behalf, former Mayor and Appointing Authority, E. "Ben" Zahn, III, appealed the Board's decision to the 24th Judicial District Court. Kenner asserted that, during Mr. Sunseri's working test period as a probational Assistant Chief, Mr. Sunseri received written reprimands on January 21, 2019 and March 29, 2019. The first reprimand was issued because he submitted 'vague and then inappropriate documentation' from several of his subordinate firefighters in response to an investigation of property damage that a citizen sustained while the department was responding to a call, in violation of several of the Department's Rules of Conduct. The second reprimand Mr. Sunseri received was for a violation of Rule of Conduct Article 50.2 - Conduct Unbecoming an Officer - after Mr. Sunseri questioned a request to perform welfare checks on Department members out on sick leave due to surgery and stated, 'This is getting absurd.' in a February 28, 2019 email addressed to Chief Ryan Bergeron, Chief of Administration Terence Morris, and Chief of Administration Charles Hudson, with a carbon copy to Assistant Director of Emergency Management Heather Hilliard.

Kenner asserted in its brief that all three Fire Chiefs under whom Mr. Sunseri served during his test period concurred in the decision to reinstate Mr. Sunseri to the position of District Fire Chief, as he "failed his working test period as he was unable and unwilling to perform satisfactorily the duties of the position of Assistant Chief to which he was appointed."

HOLDING:

**"**In Mr. Sunseri's case, the Civil Service Board did not make any factual findings, or reach any conclusions. The Board's report does not contain factual deductions or inferences drawn from the evidence provided by the parties. Instead, the "Findings of Fact" are merely a recitation of the timeline of events that transpired during his working test period, which the parties do not dispute. The Board's findings do not provide a rational basis for the Board's conclusory finding that Kenner did not provide Mr. Sunseri a fair opportunity to prove his ability in the position of Assistant Chief."

**Legal Lesson Learned: The Civil Service Board failed to write detailed "Finding of Fact" to support reinstatement decision. When appealing to the Board, the firefighter should consider videotaping and transcribing the proceedings.**

File: Chap. 16, Discipline

# IN: FF MEDICAL LEAVE – BUT WORKING MEDIC ANOTHER FD – FALSE DISAB. BENEFITS APPLICATION – FIRED

On Dec. 8, 2023, in Mark A. Goodlett v. Town of Clarksville and Town of Clarksville Fire Department, the Court of Appeals of Indiana held (3 to 0) that trial court judge properly upheld the termination of the firefighter. Progressive discipline policy is only a "guide." The Court held: "The Board [Town of Clarksville Board of Police and Fire Commissioners] properly exercised its authority under Indiana Code section 36-8-3-4 and the department's General Orders. Accordingly, the Board's decision to terminate Goodlett for neglect of duty, immoral conduct, conduct unbecoming an officer, violations of department rules, and breaches of discipline was not arbitrary and capricious, and it did not otherwise violate Goodlett's due process rights."

FACTS:

> "Goodlett was employed by the Town of Clarksville ('Town') as a full-time firefighter. In December 2018, he was injured while working in that position. As a result, he was placed on paid medical leave for 180 days through the Town's worker's compensation program and was placed under lifting and other restrictions. Because the fire department could not accommodate the restrictions, Goodlett remained on leave.
>
> Goodlett was also employed by the New Chapel Fire Department as a paramedic in December 2018. After he was injured in his position as a Clarksville firefighter, Goodlett ceased working as a New Chapel paramedic for a short time. But in January 2019, Goodlett obtained a doctor's note that released him to return to work, and he resumed working as a paramedic that same month. The doctor that issued the note was not affiliated with the Town of Clarksville's worker's compensation program, and Goodlett did not provide the note to the Town.
>
> At the end of February 2019, while still on medical leave from his job as a Clarksville firefighter, Goodlett applied for disability benefits. As part of the application, Goodlett had to state whether he had received or would receive any other income while on disability and the source and amount of the income. He indicated that he would receive income from a limited liability company, but he did not disclose that he had been working for and receiving income from the New Chapel Fire Department as a paramedic. The application also required him to sign an affidavit stating that the information was complete and true and that no material fact had been concealed or omitted.
>
> After being contacted by two individuals from New Chapel who informed him that Goodlett was working as a paramedic, the Fire Chief of the Clarksville Fire Department launched an investigation that included video surveillance of Goodlett on duty as a New Chapel paramedic. In a recorded interview in April 2019, Goodlett admitted to the Fire Chief that he was working as a paramedic for New Chapel."

HOLDING:

> "Goodlett contends the Board's decision to terminate him is arbitrary and capricious because it violated the department's disciplinary procedures and denied him the due

process to which he was entitled. In making this claim, he points to Section 3.4 of the fire department's General Orders entitled 'Fire Department Progressive Discipline,' in which offenses are classified into five different levels. *See* Exhibits Vol. 3, Ex. 2, p. 56. He asserts that the charges filed against him are consistent with the offenses described in Level 5, for which the stated discipline is:
1st offense: Permanent written reprimand &suspension exercised by the Chief
2nd offense: Up to and including termination request of Police and Fire Commissioners

*Id.* at 59, 56. He concludes that, according to the department's rules, this is his first offense for which he could not be terminated.

***
Goodlett's contention that Clarksville failed to retain its rights under Indiana Code section 36-8-3-4 finds no support in the record. First, his argument incorrectly assumes the statute is secondary and subordinate to the department's rules. The rules were enacted pursuant to the statute and not in derogation of it. *See, e.g.*, Ind. Code § 36-8-3-2(d) (granting safety boards authority to adopt rules for government and discipline of firefighters). At all relevant times, Indiana Code section 36-8-3-4, the legal authority for the department's General Orders, remained in operation and effect, and the department was not required to declare that it retained its rights under the very source of its authority.

Although the department did not need to reserve its rights under Indiana Code 36-8-3-4, it nevertheless did so in Sub-section 3.4.3 of the General Orders. The language of Sub-section 3.4.3 states that the department's procedures for disciplinary action are 'merely a guide' that provides 'recommended penalties.' A recommendation is a suggestion, not a command. Thus, this sub-section makes clear that the department retains its rights under Indiana Code section 36-8-3-4 without limitation and notwithstanding adoption of any disciplinary procedures by the department. Indeed, the list in Sub-section 3.4.3 is not an exhaustive, exclusive list, and Indiana Code section 36-8-3-4 is indisputably an 'other pertinent' rule/policy/code of conduct for firefighters."

**Legal Lesson Learned: Progressive discipline policy stated it is "merely a guide."**

File: Chap. 17, Arbitrations

## OH: ARBITRATION - "RULE OF 3" FOR PROMOTION TO LT. - CITY DIDN'T HAVE SELECT HIGHEST SCORING CANDIDATE

On Dec. 19, 2023, in International Association of Fire Fighters, Local 67 [Brandon Lauck] v. City of Columbus, the Court of Appeals of Ohio, Tenth District held (3 to 0) that Judge on Franklin County Court of Common Pleas incorrectly overturned arbitrator; City did not have to promote firefighter Brandon Lauck to Lieutenant even if he was highest scoring candidate. The Court wrote: "Before the arbitrator, the Union argued the promotion decision was improper and violated CBA Section 10.1 because it was inconsistent with the City's past practice of selecting the eligible candidate with the highest examination score for promotion, because

Firefighter Lauck was not provided any reason for why he was not promoted, and because his involvement in a traffic accident years ago may have been considered as a factor against his promotion. *** In denying the Union's grievance, the arbitrator expressly considered and rejected the Union's contention that Firefighter Lauck was not treated in a reasonable, fair, and non-discriminatory manner as required by CBA Section 10.1. Thus, the Union's evidence and related arguments did not persuade the arbitrator. *** Therefore, we conclude the trial court erred in finding the arbitrator failed to determine whether the City violated CBA Section 10.1's requirements when it did not promote Firefighter Lauck to Fire Lieutenant, and the trial court erred in vacating the arbitrator's award based on this incorrect finding. On these bases, we sustain the City's first and second assignments of error."

FACTS:

"Defendant-appellant, City of Columbus ('the City'), appeals from a judgment of the Franklin County Court of Common Pleas granting the motion of plaintiff-appellee, International Association of Fire Fighters, Local 67 ("the Union"), to vacate or modify an arbitration award denying the Union's grievance. For the following reasons, we reverse and remand.

In November 2021, the Union filed grievance No. 21-25 with the City, alleging Firefighter Brandon Lauck was improperly passed over for promotion to the rank of Fire Lieutenant, in violation of Section 10.1 and Article 23 of the collective bargaining agreement ('the CBA') between the Union and the City, effective November 1, 2020 through October 31, 2023. The City denied the grievance, noting that Civil Service Rule IX (C)(3)(c), 'CERTIFICATION,' which was incorporated into the CBA via Article 23, states that 'each appointment shall be made from a group of three eligibles certified from those standing highest on the eligible list and one of said group must be appointed.' (Emphasis omitted.)

As authorized under the CBA, the Union requested arbitration of its grievance. A hearing was held before an arbitrator, and in August 2022, the arbitrator issued his decision denying the grievance.

Pursuant to R.C. 2711.13, the Union then moved the trial court for an order vacating or modifying the arbitration award. In December 2022, the trial court granted the Union's request upon finding the arbitrator exceeded his authority by not considering and resolving whether the City violated Section 10.1 of the CBA. In addition to vacating the arbitration award pursuant to R.C. 2711.10, the trial court ordered the City to promote Firefighter Lauck to the rank of Fire Lieutenant, retroactive to November 10, 2021."

HOLDING:

"Before the arbitrator, the Union argued the promotion decision was improper and violated CBA Section 10.1 because it was inconsistent with the City's past practice of selecting the eligible candidate with the highest examination score for promotion, because Firefighter Lauck was not provided any reason for why he was not promoted,

and because his involvement in a traffic accident years ago may have been considered as a factor against his promotion.

***

In denying the Union's grievance, the arbitrator expressly considered and rejected the Union's contention that Firefighter Lauck was not treated in a reasonable, fair, and non-discriminatory manner as required by CBA Section 10.1. Thus, the Union's evidence and related arguments did not persuade the arbitrator. The arbitrator ultimately concluded that Firefighter Lauck was not improperly denied a promotion to Fire Lieutenant. This denial of the grievance draws its essence from the CBA—it was rational and did not conflict with the express terms of the CBA."

**Legal Lesson Learned: "Rule of Three" was followed; City did not need to select the candidate with highest score even that was a common past practice.**

Note: Union referenced a lawsuit against firefighter Brandon Lauck. See this Complaint filed against Brandon G. Lauck after July 16, 2018 rear end accident on I-270.

File: Chap.18, Legislation, Public Records

## OH: PUBLIC RECORDS - INJURY "TOP THRILL DRAGSTER" AT PARK – PARK PD "FUNCTIONAL EQUIVALENT" PUBLIC PD

On Dec. 20, 2023, in The State Ex Rel. WTOP Television, L.L.C., WKYC, L.L.C. , and WBNS-TV, Inc. v. Cedar Fair, L.P., dba Cedar Fair Entertainment Company, et al., the Ohio Supreme Court held (7 to 0) that the Park's police department is "functional equivalent" of police department, and therefore must respond to Ohio Public Records requests, including Aug. 15, 2021 injury of female guest near the Top Thrill Dragster ride, and records concerning TV station's investigation into sexual assaults at Park's employee housing. The Court also awarded TV stations court costs; but declined to award statutory damages ($100 / day; max $1,000) or attorney fees to each TV station because this was unsettled law in Ohio (two Justices dissenting and would award attorney fees). The Court held: "Here, Cedar Fair and [Police Chief Ronald E.} Gilson asserted as affirmative defenses that they are not required to release privileged records or confidential law-enforcement investigatory records. But they have not offered any argument explaining how any record requested by relators meets the requirements for either of these exceptions to apply. Nor have they submitted any documents for in camera inspection. Thus, Cedar Fair and Gilson have not met their burden to show that these documents, to the extent that they exist, are exempt from disclosure. *** However, we do not order the production of incident or investigative reports created by emergency-medical-services ('EMS') personnel or related to EMS services. WKYC requested, among other things, incident reports and related records created by EMS personnel during the alleged Top Thrill Dragster incident. EMS services are not police services, and there is no evidence in the record indicating that the CPPD provides EMS services or employs EMS personnel. To the extent that Cedar Fair provided EMS services related

to the alleged Top Thrill Dragster incident, relators have produced no evidence showing that these services were provided through the CPPD."

FACTS:

> "Cedar Fair operates amusement parks across the country, including Cedar Point in Sandusky. The Cedar Point Police Department ('CPPD') provides security, policing, and law-enforcement services at Cedar Point. [Ronald E.] Gilson is the director of security at Cedar Point and the chief of police of the CPPD.
>
> ***
>
> Records requested included '[a]ll incident and investigative reports from the Cedar Point Police and associated Emergency Medical Services personnel regarding an incident Sunday, Aug. 15,2021, at Cedar Point Park—specifically an injury sustained by a female guest near the Top Thrill Dragster ride.'
>
> Relators are media companies that broadcast news in Ohio. In August 2021, a guest at Cedar Point was allegedly injured near the Top Thrill Dragster ride and WKYC sent a public-records request to the CPPD asking for records related to the incident. [Including all] 'incident and investigative reports from the Cedar Point Police and associated Emergency Medical Services personnel regarding an incident Sunday, Aug. 15,2021, at Cedar Point Park—specifically an injury sustained by a female guest near the Top Thrill Dragster ride.'
>
> Meanwhile, relators had been investigating sexual assaults that allegedly occurred at Cedar Point employee housing beginning in April 2017. In March and June 2022, WTOL and WBNS sent public-records requests to the CPPD asking for records related to the alleged assaults. Relators allege that they have not received any of the requested records.
>
> Relators filed this mandamus action in July 2022. They seek a writ of mandamus ordering Cedar Fair and Gilson to produce the requested records, and they also seek statutory damages, court costs, and attorney fees. In their answer to the complaint, Cedar Fair and Gilson denied that the CPPD is an entity that is required to respond to public-records requests. They also stated that they did not have any responsive documents and that even if they did, the records are exempt from disclosure as confidential law-enforcement investigatory records and privileged private-security documents.
>
> ***
>
> In addition, after the filing of the complaint, Cedar Fair and Gilson produced some documents—including sexual-assault incident reports—in response to the requests, suggesting that they possess at least some responsive documents. The only relevant evidence
> in the record therefore tends to show that Cedar Fair and Gilson do have records responsive to relators' requests."

HOLDING:

"Pursuant to this agreement [with City of Sandusky], the city manager has commissioned members of the CPPD. Cedar Point police officers swear an oath before the city manager to support the laws of the United States, Ohio, and Sandusky and are commissioned as private police officers for the city. The Ohio Peace Officer Training Commission lists 'Sandusky Police/Cedar Point Division' as a police agency. On social media, the Sandusky Police Department referred to Cedar Point police officers as 'bonded officers, with full law enforcement authority.'

***

As an alternative basis for its position that the CPPD is required to respond to public-records requests, relators argue that the CPPD is the functional equivalent of a public institution for purposes of the Public Records Act under the test established by this court in State ex rel. Oriana House, Inc. v. Montgomery, 110 Ohio St.3d 456, 2006-Ohio-4854, 854 N.E.2d 193. We agree with this argument.

In Oriana House, we held that although private entities generally are not subject to the Public Records Act, a private entity is subject to the act if there is 'a showing by clear and convincing evidence that the private entity is the functional equivalent of a public office.'

***

Here, Cedar Fair and Gilson asserted as affirmative defenses that they are not required to release privileged records or confidential law-enforcement investigatory records. But they have not offered any argument explaining how any record requested by relators meets the requirements for either of these exceptions to apply. Nor have they submitted any documents for in camera inspection. Thus, Cedar Fair and Gilson have not met their burden to show that these documents, to the extent that they exist, are exempt from disclosure.

***

However, we do not order the production of incident or investigative reports created by emergency-medical-services ('EMS') personnel or related to EMS services. WKYC requested, among other things, incident reports and related records created by EMS personnel during the alleged Top Thrill Dragster incident. EMS services are not police services, and there is no evidence in the record indicating that the CPPD provides EMS services or employs EMS personnel. To the extent that Cedar Fair provided EMS services related to the alleged Top Thrill Dragster incident, relators have produced no evidence showing that these services were provided through the CPPD."

**Legal Lesson Learned: The Park should have submitted records for "in camera" review by trial court, so they could then assert investigative exemption. Private EMS companies providing 911 public service would likewise be subject to Ohio Public Records Act.**

Note: DISSENT BY CHIEF JUSTICE SHARON L. KENNEDY – TV STATIONS SHOULD BE AWARDED STATUTORY DAMAGES AND ATTORNEY FEES

"I part ways with the majority, however, in its denial of awards of statutory damages and attorney fees to relators. Based on the law existing at the time of relators' requests, a well-informed person responsible for the requested public records would have reasonably believed that respondents had an obligation under the Public Records Act to produce the requested records. Therefore, relators are entitled to statutory damages and this court should award attorney fees.

***

The Sandusky City Manager, a government official, appoints and maintains the Department's police officers. These officers contractually serve at the pleasure of the city manager. These officers also must be qualified to serve as law-enforcement officers in Ohio, pursuant to both a Sandusky ordinance and the agreement between Sandusky and Cedar Fair, and they swear an oath before the city manager to uphold the laws of Sandusky, the state of Ohio, and the United States. Further, the Ohio Peace Officer Training Commission lists 'Sandusky Police/Cedar Point Division' as a police agency."

File: Chap. 18, Legislation, Public Records

## FL: PUBLIC RECORDS - MARSY'S LAW VICTIMS RIGHTS – TWO PD WHO KILLED TWO ASSAILANTS – NAMES PUBLIC

On Nov. 30, 2023, in City of Tallahassee, Florida v. Florida Police Benevolent Association, Inc., et al., the Supreme Court of Florida, the Court held (5 to 0) that two policers had no right to prevent their names being released to reporters. Each officer, in separate incidents, killed assailants in self-defense and were cleared by a grand jury, and now claimed their names were protected as "victims" under Marsy's Law. Florida residents in 2018 voted to amend the state Constitution so that victim's location information would not be made public, and victims would be kept informed on status of a defendant's case. The Court held: "Marsy's Law does not preclude the City from releasing the names of the two police officers whose conduct is at issue in this case. *** Applying these interpretive principles to this case, we conclude that Marsy's Law does not guarantee to a victim the categorical right to withhold his or her name from disclosure. In their ordinary and plain usage, the relevant words of our Constitution [amended to include Marsy's Law], 'information or records that could be used to locate or harass the victim or the victim's family, or which could disclose confidential or privileged information of the victim,' art. I, § 16(b)(5), Fla. Const., do not encompass the victim's identity."

FACTS:

"Reporters sought disclosure of the officers' names from the City. The officers, however, asserted that they qualified for Marsy's Law protections because they were victims of the assaults from which they had defended themselves. And as Marsy's Law victims, the officers argued, they were entitled to prevent the release of their personal identifying information, including their names. The City was not swayed.

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This case arises from two unrelated but contemporaneous episodes in which a Tallahassee police officer, asserting self-defense, used lethal force in detaining a suspect. Each officer invoked the protections of article I, section 16(b)-(e) of the Florida Constitution, an amendment adopted by Florida voters that is colloquially known as Marsy's Law. The amendment enumerates certain rights of crime victims 'to achieve justice, ensure a meaningful role throughout the criminal and juvenile justice systems for crime victims, and ensure that crime victims' rights and interests are respected and protected by law in a manner no less vigorous than protections afforded to criminal defendants and juvenile delinquents." Art. I, § 16(b), Fla. Const.

The City of Tallahassee (City) proposed to release the two officers' names to the public. The Florida Police Benevolent Association (FPBA) sought an emergency injunction to prevent that from happening. The trial court decided not to issue that injunction; the FPBA appealed, and the trial court's order requiring disclosure of the officers' names was stayed pending appeal. The dispute ultimately made its way here."

HOLDING:

"Marsy's Law guarantees to no victim—police officer or otherwise— the categorical right to withhold his or her name from disclosure. No such right is enumerated in the text of article I, section 16(b) of the Florida Constitution. Nor, as a matter of structure, would such a right readily fit with two other guarantees contained in article I: the right expressed in section 16(a) of the criminally accused 'to confront at trial adverse witnesses,' and the right found in section 24(a) of every person to inspect or copy public records.

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Marsy's Law speaks only to the right of victims to 'prevent the disclosure of information or records that could be used to locate or harass" them or their families. Art. I, § 16(b)(5), Fla. Const. One's name, standing alone, is not that kind of information or record; it communicates nothing about where the individual can be found and bothered.

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We decide only what Marsy's Law says and does not say; we do not pass upon the validity of any statutory right of certain persons, in certain situations, to withhold their identities from disclosure."

**Legal Lesson Learned: Many states have enacted laws protecting from disclosure the home addresses of police, fire, EMS and other public officials.**

Note: **See article, "Florida court rules Marsy's Law doesn't apply to police; similar case pending in Ohio." Nov. 30, 2023**.

Also: Marsy Laws have been enacted in many states; named after Marsy Ann Nicholas, 21-year-old student at University of California, Santa Barbara, when she was murdered on Nov. 30, 1983 by former boyfriend.

"Only one week after her murder and on the way home from the funeral service, Marsy's family stopped at a market to pick up a loaf of bread. It was there, in the checkout line, that Marsy's mother, Marcella, was confronted by her daughter's murderer. Having received no notification from the judicial system, the family had no idea he had been released on bail mere days after Marsy's murder."

See Ohio Marsy's Law and Crime Victim Rights.

"Crime victims are provided certain rights detailed in the Ohio Constitution Article I, Section 10(a) and the Ohio Revised Code, often called "Marsy's Law" or the Ohio Crime Victims' Bill of Rights. Crime victims have the right to reasonable notice, to be present and heard at all court proceedings, to be informed of the release of the offender, to offer input on negotiated pleas, to a prompt conclusion of their case, and to restitution for economic losses resulting from the criminal offense or delinquent act. Some rights are automatic, some must be requested to be exercised."

Note: Ohio Fire, EMS, Police RESIDENTIAL / FAMILY INFORMATION not public records. Ohio Rev. Code Section 149.43 | Availability of public records for inspection and copying.

"Public record" does not mean any of the following: (p) Designated public service worker residential and familial information; (7) "Designated public service worker" means a peace officer, parole officer, probation officer, bailiff, prosecuting attorney, assistant prosecuting attorney, correctional employee, county or multicounty corrections officer, community-based correctional facility employee, designated Ohio national guard member, protective services worker, youth services employee, firefighter, EMT, medical director or member of a cooperating physician advisory board of an emergency medical service organization, state board of pharmacy employee, investigator of the bureau of criminal identification and investigation, emergency service telecommunicator, forensic mental health provider, mental health evaluation provider, regional psychiatric hospital employee, judge, magistrate, or federal law enforcement officer.

See also: Ohio Rev. Code 2921.24: Disclosure of confidential information.

(A)No officer or employee of a law enforcement agency or court, or of the office of the clerk of any court, shall disclose during the pendency of any criminal case the home address of any peace officer, parole officer, prosecuting attorney, assistant prosecuting attorney, correctional employee, or youth services employee who is a witness or arresting officer in the case.