APRIL 2024 – FIRE & EMS LAW NEWSLETTER

[NEWSLETTER IS NOT PROVIDING LEGAL ADVICE.]

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- **2024: FIRE & EMS LAW – MONTHLY NEWSLETTERS**: monthly review of recent court decisions [send e-mail if wish to be added to our free listserv]: View on the Fire Science Fire & EMS Law Newsletter page
- **2024: FIRE & EMS LAW – RECENT CASE SUMMARIES / LEGAL LESSONS LEARNED**: Case summaries since 2018 from monthly newsletters, view at Scholar@UC
- **2024: FIRE & EMS LAW – CURRENT EVENTS**: View at Scholar@UC
- **TEXTBOOK:** Updating 18 chapters of my textbook (2018 to current). FIRE SERVICE LAW (SECOND EDITION), Jan. 2017: http://www.waveland.com/browse.php?t=708

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OK: RV & STRUCTURE FIRE – DUALING EXPERTS – ORIGIN IN RV'S REFRIGERATOR OR IN LOG PILE – BOTH QUALIFIED

On March 22, 2024, in Kevin W. Hoog and Rebecca Hoog v. Domestic Corporation, United States District Court Judge Jodi W. Dishan, U.S. District Court for Western District of Oklahoma, denied the plaintiffs' motion to exclude the expert testimony of Walter Oliveaux, a certified fire and explosion expert, who will testify that the fire started in wood pile behind the structure, and not from the RV's "gas absorption" refrigerator.

THE COURT HELD:

> "The admissibility of expert testimony is governed by Federal Rule of Evidence 702 and the Supreme Court's opinions in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993) and *Kumho Tire. S*ee *James River Ins. Co. v. Rapid Funding, LLC*, 658 F.3d 1207, 1215 n.1 (10th Cir. 2011) ('If expert testimony is not reliable under *Daubert/Kumho*, it is not admissible under Rule 702.').
> ***
> Mr. Oliveaux has been the Chief Investigator for SOS Investigations, Inc. for 30 years. In that role, he has investigated more than 1,000 fires, including RV fires where gas absorption refrigerators were present. He has provided expert consulting services in fire cause and origin investigations and accident reconstruction for three decades. Additionally, Mr. Oliveaux has served in several different capacities on the West Feliciana Fire Protection District from 1988 to the present, including as a firefighter, instructor, investigator, chief, assistant chief, and interim fire chief. As lead investigator for the department's fire investigations division, he led numerous arson and fire related death investigations. As such, the Court finds that his testimony will be helpful to the trier of fact, and he is qualified to proffer the opinions at issue."

FACTS:

> "This action arises from property damage sustained by Plaintiffs after a fire destroyed their custom-built shop on their property in Arcadia, Oklahoma, on March 30, 2018. Also destroyed in the fire were Plaintiff's two vehicles and their RV, which were all inside the shop. The cause and origin of the fire are disputed with experts from both sides offering conflicting opinions as to both.
>
> ***
>
> Mr. Howell {plaintiff's expert] opines that the fire originated inside the Dometic-manufactured gas absorption refrigerator (the 'Refrigerator') within Plaintiffs' RV. In addition to examining the scene and collecting evidence and witness statements, Mr. Howell, in part, relies on the AEGI engineers' reports of their lab inspection of the Refrigerator. According to Howell's report, AEGI engineers reported that the boiler assembly tubing on the Refrigerator sustained an internal failure and leaked flammable gas. Mr. Howell opines that the flammable gas was ignited 'by one of the many available ignition sources in the area of origin' and that this caused the fire.
>
> ***

Upon examination of Mr. Oliveaux's report and his deposition testimony, the Court concludes that his qualifications encompass those required to proffer the opinions offered here. Mr. Oliveaux is a certified fire and explosion investigator who physically inspected the scene of the fire loss on more than one occasion. He received an associate degree in fire science from Louisiana State University in 1999, and he has completed more than 200 hours of training at the Louisiana State University Fire & Emergency Training Institute. Additionally, Mr. Oliveaux has completed 80 tested hours of fire and arson investigation training through the National Fire Academy and hundreds of hours of training in various fire investigation topics through the Public Agency Training Council and International Association of Arson Investigators.

***

Additionally, Mr. Oliveaux has served in several different capacities on the West Feliciana Fire Protection District from 1988 to the present, including as a firefighter, instructor, investigator, chief, assistant chief, and interim fire chief. As lead investigator for the department's fire investigations division, he led numerous arson and fire related death investigations. As such, the Court finds that his testimony will be helpful to the trier of fact, and he is qualified to proffer the opinions at issue."

Legal Lesson Learned: Expert testimony on origin and cause by both plaintiff and defense is not unusual.

Note: See Footnote 3: "Additionally, the Court notes that Edmond Fire Department Assistant Chief Mike Fitzgerald completed his investigation after his department extinguished the fire in the early morning hours of March 31, 2018. Due to the extreme fire damage sustained by the structure, Mr. Fitzgerald advised he was unable to determine an origin or cause of the fire, and the official cause of the fire was listed as 'undetermined.' However, he did indicate based on physical evidence and witness statements that in his opinion the area of origin was near or in the motor home or along the north wall by the electrical panel."

See article, "RV HVAC | How Absorption Refrigeration Works."

"Absorption refrigeration units use heat to make cold through a process that is somewhat difficult to understand. However, understanding how the unit works can give owners a greater appreciation for and more knowledge about maintaining the device.

Absorption refrigeration units have four main parts – the boiler, condenser, evaporators, and absorber. Inside the boiler, water and liquid ammonia are boiled by heat from an electrical coil or gas flame; the water separates from the ammonia and returns to the boiler while the ammonia travels up through the pipes to the condenser, where it becomes liquid again. After condensing into a liquid, hydrogen vapor is added to the ammonia in the low temperature evaporator, which is located in the freezer section of the refrigerator. At this point, heat from the freezer is absorbed by the liquid ammonia and hydrogen gas mixture in the pipes, then passed on to the exterior of the fridge. From the low temperature evaporator in the freezer, the ammonia and hydrogen travel through more

> pipes to the high-temperature evaporator, which cools the fridge section of the refrigerator, but not as much as the freezer. Once the ammonia has passed through both evaporators, it enters the absorber. In the absorber coils, it is separated from the gaseous hydrogen – which rises back into the evaporators – and mixed with water before returning to the boiler."

File: Chap. 1, American Legal System

U.S. SUPREME CT: CITY MGR. PERSONAL FACEBOOK PAGE – OK TO BLOCK CITIZEN'S NEG. POSTS / ONLY IF PERSONAL

On March 15, 2024, in Kevin Lindke v. James Freed, the United States Supreme Court held (9 to 0; opinion by Justice Amy Barrett) that James Freed, who has a personal FACEBOOK page with family photos, and in 2014 became City Manager of Port Huron, Michigan, cannot be sued for blocking negative comments by a resident. The First Amendment lawsuit was dismissed by a U.S. District Court judge in Michigan, and the dismissal upheld by the U.S. Court of Appeals for 6th Circuit (Cincinnati).

THE COURT HELD:

> "Freed did not relinquish his First Amendment rights when he became city manager. On the contrary, 'the First Amendment protects a public employee's right, in certain circumstances, to speak as a citizen addressing matters of public concern.' Garcetti v. Ceballos, 547 U. S. 410, 417 (2006). This right includes the ability to speak about 'information related to or learned through public employment,' so long as the speech is not 'itself ordinarily within the scope of [the] employee's duties.' Lane v. Franks, 573 U. S. 228, 236, 240 (2014)."

FACTS:

> "As before his appointment [as City Manager], Freed operated his Facebook page himself. And, as before his appointment, Freed posted prolifically (and primarily) about his personal life. He uploaded hundreds of photos of his daughter. He shared about outings like the Daddy Daughter Dance, dinner with his wife, and a family nature walk. He posted Bible verses, updates on home-improvement projects, and pictures of his dog, Winston.
>
> Freed also posted information related to his job. He described mundane activities, like visiting local high schools, as well as splashier ones, like starting reconstruction of the city's boat launch. He shared news about the city's efforts to streamline leaf pickup and stabilize water intake from a local river. He highlighted communications from other city officials, like a press release from the fire chief and an annual financial report from the finance department. On occasion, Freed solicited feedback from the public—for in-

stance, he once posted a link to a city survey about housing and encouraged his audience to complete it.

***

Enter Kevin Lindke. Unhappy with the city's approach to the pandemic, Lindke visited Freed's page and said so. For example, in response to one of Freed's posts, Lindke commented that the city's pandemic response was 'abysmal' and that 'the city deserves better.' When Freed posted a photo of himself and the mayor picking up takeout from a local restaurant, Lindke complained that while 'residents [we]re suffering,' the city's leaders were eating at an expensive restaurant 'instead of out talking to the community.' Initially, Freed deleted Lindke's comments; ultimately, he blocked him. Once blocked, Lindke could see Freed's posts but could no longer comment on them."

Legal Lesson Learned: When fire or EMS are posting on Social Media, they must exercise extreme care to not discuss internal department issues.

Note: Justice Barrett offered this helpful suggestion in her opinion.

> "Had Freed's account carried a label (e.g., 'this is the personal page of James R. Freed') or a disclaimer (e.g., 'the views expressed are strictly my own'), he would be entitled to a heavy (though not irrebuttable) presumption that all of the posts on his page were personal."

The U.S. Supreme Court also decided a second case involving two school board members who used their FACEBOOK and TWITTER pages for official purposes. They were sued by parents who were blocked. That case sent back to U.S. District Court in California. Michelle O'Connor-Ratcliff, et al. v. Christopher Garner, et al.

File: Chap. 2, LODD and Safety

PA: PSYCH SEVERLY INJURED EMT - TRANSPORT FROM HOSP TO PSCH UNIT – NO PROOF HOSP MALPRACTICE

On March 20, 2024, in Cori Larsen v. Wayne Memorial Hospital and Paige Castelino, et al., the Superior Court of Pennsylvania, held (3 to 0) that the trial court judge properly granted defense motion for summary judgment; the EMT was severely injured by the minor patient during transport: detached retina, fractured teeth, concussion, and contusions of the knee and ribs, but the EMT failed to prove a breach of standard of care when hospital released the patient to a psychiatric facility. The EMT's expert witness affidavit was from an ER doctor, not an Internal Medicine / mental health physician.

THE COURT HELD:

"On appeal, Larsen argues the trial court erred in granting Appellees' motion for summary judgment because (1) Appellees owed Larsen a duty, notwithstanding the fact that Larsen was not Appellees' patient, and (2) Larsen's liability expert was qualified to

opine on breaches of the standard of care by Appellees. Due to our disposition on the second issue, we need not reach the first issue - as even if we assume, arguendo, that Appellees owed Larsen a duty, we agree with the trial court that Larsen failed to meet her burden of producing a qualified expert to opine on a breach of the standard of care by Appellees.

Dr. Kenneth Robinson authored a report in which he concluded "that Dr. Castelino and [WMH] failed to meet the standard of care, and that these failures caused the significant injuries sustained by [] Larsen." Brief in Support of Motion for Summary Judgment, 4/3/23, at Exhibit P.

"In its opinion, the trial court concluded Dr. Robinson is not qualified to render an opinion regarding the standard of care of Appellees, explaining as follows:

'Dr. Robinson is board certified in emergency medicine while Dr. Castelino is board certified in internal medicine. Dr. Castelino, in her role as a specialist in internal medicine, treated T.D. and monitored her mental health over the course of T.D.'s multi-day commitment at WMH. Dr. Castelino is a hospitalist who coordinates the care of a patient during his or her stay. This is much different than the role of Dr. Robinson, chief of a hospital's department of emergency medicine. Further, Dr. Robinson states generally in the conclusion of his report that he has years of experience treating 'a wide variety of patients' including 'Behavioral Health patients.' However, his curriculum vitae, while replete with experience, certifications and acclaim in the areas of emergency medical services and trauma, is silent with regard to internal medicine and experience coordinating care of mental health patients."

FACTS:

"[Larsen] commenced this suit by filing a complaint on December 22, 2020 against [Appellees] for injuries she sustained in her capacity as an emergency medical technician for Cottage Hose Volunteer Ambulance Company. On December 30, 2018, [Larsen] was part of the EMS crew transporting a minor patient (initials T.D.) from Wayne Memorial Hospital (hereinafter, 'WMH') in Honesdale, Pennsylvania to a psychiatric facility in Pittsburgh, Pennsylvania. T.D. was involuntarily admitted to WMH on or about December 25, 2018 pursuant to Section 7302 of the Mental Health Procedures Act. Paige Castelino, M.D. (hereinafter, "Dr. Castelino') treated T.D. while T.D. was a patient of WMH. Dr. Castelino authored the discharge summary for T.D, as follows:

Patient admitted for suicidal intent and depression. Patient during admission had extremely combative behavior and medicated extensively and warranted multiple attempts at restraints including physical. Patient now accepted at the in patient psych in Pittsburg [sic]. Explained and warned EMS crew that patient is extremely combative can give IM Ativan and IM Haldol as per psych recommendations en route. Requested ALS for medical personnel however EMS crew stated psych facility won't accept a sedated patient and they would be ok with BLS transport. Patient d/c at this time.

Dr. Castelino was not present during T.D.'s discharge on December 30, 2018. During the ambulance trip that day, while en route to Pittsburgh, T.D. attacked and injured [Larsen]. [Larsen]'s alleged injuries include a detached retina, fractured teeth, concussion, and contusions of the knee and ribs."

Legal Lesson Learned: The EMT failed to meet her burden of producing a qualified expert to opine on a breach of the standard of care by hospital MD.

File: Chap. 2 – Line Of Duty Death / Safety

NJ: FF BACKGROUND CHECK – POOR DRIVING RECORD, FIRED FROM PD, DISORD. CONV – FF PROPERLY NOT HIRED

On March 19, 2024, In the Matter of Albert Gonzales, Jr., Fire Fighter (M1844W), Jersey City, the Superior Court of New Jersey, Appellate Division, held (2 to 1) that the New Jersey Civil Service Commission properly denied the applicant's appeal.

THE COURT HELD:

"Appellant appeals from the February 7, 2022, Final Administrative Action (Final Action) of the Civil Service Commission (CSC) denying his motion for reconsideration and upholding his removal from the Jersey City firefighter eligibility list. Appellant was removed from the eligibility list after the review of his background report revealed he was terminated as a police officer from the Jersey City Police Department (JCPD) in 2009 and from another job in 2017. In addition, the report listed arrests in 2009 and 2010. He was convicted of a disorderly persons offense in 2010 and his driving record showed a history of motor vehicle violations and accidents.

***

Appellant's disciplinary adjudications and his disorderly persons conviction all involved instances of dishonesty and deceit-traits not tolerated in a position of public service and of a firefighter. In such a visible position, the public must have the utmost confidence and trust in a firefighter and expects the candidate to have an impeccable character. Quite simply, a firefighter candidate must show respect for the law and the rules."

FACTS:

"Plaintiff graduated from the Jersey City Police Academy in December 2006 and began working as a probationary police officer. In February 2007, appellant was arrested for an incident that occurred before he entered the Police Academy (incident), charged in an indictment, and suspended indefinitely from JCPD pending the outcome of the charges. After the victim involved in the incident recanted his accusation, the indictment was dismissed, and the charges were expunged.

In investigating the matter, JCPD discovered numerous images of appellant on social media displaying what it determined to be gang hand signs and activity. Appellant was charged with administrative violations regarding his conduct surrounding the incident leading to his criminal charges and for the social media posts. After two days of hearings, defendant was found guilty of administrative charges: neglect of duty for failing to notify the department of his knowledge of the incident leading to the criminal charges; lack of truthfulness for denying knowledge of the incident despite being present during the event; conduct unbecoming an officer or neglect of duty; and conduct unbecoming a public employee under N.J.A.C. 4A:2-2.3(a)(6). He was terminated from his employment as a police officer in November 2009. He did not appeal from the decision.

In 2010, Point Pleasant police officers were responding to a verbal dispute at a residence when they found appellant urinating in the bushes outside of the home. Appellant told the officers he was a Jersey City police officer. When asked for identification, appellant produced a 'police style wallet' without a badge or police identification card and told the officers he had worked the previous day, and his badge was still on his shirt. The officers contacted JCPD and learned that appellant had been fired from the department in 2009. Appellant was charged with impersonating an officer. He later 'plead[ed] guilty to an amended charge of disorderly conduct and pa[id] a fine.'

In October 2016, appellant began working at Amazon. He was terminated from that position the following year. The reasons for the termination are not disclosed in the record."

Legal Lesson Learned: Thorough background checks are essential in hiring fire & EMS.

File: Chap. 3 – Homeland Security, incl. Active Shooter, Cybersecurity, Immigration

U.S. SUP. CT: MUSLIM REFUSED TO BE FBI INFORMANT – PLACED ON "NO-FLY LIST" – CASE MAY PROCEED

On March 19, 2024, in Federal Bureau of Investigations v. Yonas Fikre, the U.S. Supreme Court held (9 to 0) that case is not moot just because he has been removed from No-Fly List; he still risks being placed back on the list at any time.

THE COURT HELD:

Justice Gorsuch wrote opinion: "Yonas Fikre, a U. S. citizen, brought suit alleging that the government placed him on the No-Fly List unlawfully. Later, the government removed him from the list. The only question we are asked to decide is whether the government's action suffices to render Mr. Fikre's claims moot.

***

Viewed in that light, this case is not moot. To appreciate why, it is enough to consider one aspect of Mr. Fikre's complaint. He contends that the government placed him on the

No Fly List for constitutionally impermissible reasons, including his religious beliefs. In support of his claim, Mr.Fikre alleges (among other things) that FBI agents interrogated him about a mosque in Portland he once attended and threatened to keep him on the No Fly List unless he agreed to serve as an informant against his co-religionists. Accepting these as-yet uncontested allegations, the government's representation that it will not relist Mr. Fikre based on 'currently available information' may mean that his past actions are not enough to warrant his relisting. But, as the court of appeals observed, none of that speaks to whether the government might relist him if he does the same or similar things in the future—say, attend a particular mosque or refuse renewed overtures to serve as an informant."

FACTS:

"When he was a child and war broke out in his home country of Eritrea, Mr. Fikre and his family moved to Sudan before eventually immigrating to the United States. In time, Mr. Fikre became a U. S. citizen, and as an adult he lived in Portland, Oregon. After working for an American cell phone company, he decided to start his own business involving the distribution and retail sale of consumer electronic products in his native East Africa. In pursuit of this new venture, he traveled to Sudan in late 2009 where some of his extended family still lived.

On arrival, Mr. Fikre informed U. S. officials of his interest in pursuing business opportunities in the country. Eventually, he received an invitation to the U. S. embassy—ostensibly for a luncheon. But, once there, Fikre was whisked instead to a small meeting room with two FBI agents. The agents told him that the government had placed him on the No Fly List, so he 'could not return to the United States.' The agents then questioned him 'extensively about the events, activities, and leadership' of the Portland mosque he attended. They asked him to serve as an FBI informant and report on other members of his religious community, offering to 'take steps to remove [him] from the No Fly List' if he agreed. Mr. Fikre refused and eventually departed. The next day, an agent told him over the phone that, '[w]henever you want to go home[,] you come to the embassy.' Mr. Fikre took this to mean that he 'would not be removed from the No Fly List and he could not travel to the United States unless he became' an FBI informant.

Several weeks later, Mr. Fikre traveled to the United Arab Emirates to advance his business plans. Eventually, however, authorities there 'arrested, imprisoned, and tortured him. They interrogated him, too, about his Portland mosque, its events, leader, and fundraising activities. One interrogator told Mr. Fikre that the FBI had solicited his interrogation and detention. After holding him for 106 days, authorities arranged to have Mr. Fikre flown to Sweden where he had a relative. He remained there until February 2015, when the Swedish government returned him to Portland by private jet."

Legal Lesson Learned: Case is not moot since he risks being placed back on No Fly List.

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

NC: FIRE 2-STORY BLDG – 4 TEENAGERS DIED - 911 "HUNKER DOWN" – $9 MILLION – 2 INSUR. CO. PAY

On March 13, 2024, in Velers Indemnity The Travelers Indemnity Company v. American Alternative Insurance Corporation, United States District Court Judge Loretta C. Biggs, U.S. District Court for Middle District of North Carolina, held that after Travelers (insured Surry County) settled for policy limit ($9 million), is entitled to $1 million contribution from AAIC (insured Surry County Emergency Services) for the May 20, 2019 fire at two-story apartment building where four teenagers died of smoke inhalation. The 911 Dispatcher advised the caller to "hunker down and shelter in place," promising that she and the other Victims would be rescued. Court agreed with Travelers that the 911 Operators were performing operations "incidental to" the emergency services provided by S.C. Emergency Services and are therefore covered by the AAIC policies.

THE COURT HELD:

> "Plaintiff The Travelers Indemnity Company ('Travelers') initiated this action under the Declaratory Judgment Act, 28 U.S.C. § 2201, seeking a declaratory judgment against American Alternative Insurance Corporation ('AAIC'), alleging that AAIC failed to fulfill its obligation to contribute to the defense and settlement of two underlying state actions involving AAIC's insured, Surry County, and its employees.
> ***
> In sum, the Court concludes that AAIC is required to contribute to the settlement of the Underlying Lawsuits with respect to its AAIC General Liability Policy in the amount of $1,000,000."

FACTS:

> "On February 2, 2022, counsel for the Victims in the Underlying Lawsuits made a 'Confidential, Time-Limited Policy Limits Demand' to settle all the Victims' claims against Surry County and the 911 Operators for 'combined policy limits of $9,000,000. Travelers demanded that AAIC contribute to this settlement, but AAIC refused to do so. Travelers ultimately paid its policy limits of $9,000,000 to settle the claims, but reserved the right to seek contribution from AAIC.
>
> ***
> As a result, this Court resolves this ambiguity in favor of the construction offered by Travelers and interprets the AAIC General Liability Policy to apply to any operations incidental to S.C. Emergency Services' firefighting, ambulance, rescue, or other emergency services."

Legal Lesson Learned: 911 Dispatchers should review their policy regarding advice to victims trapped in 2nd floor apartment fire.

File: Chap. 5 – Emergency Vehicle Operations

PA: MENTAL STOLE ANBULANCE – HOUR LONG LOW SPEED CHASE - 4-8 YEARS IN PRISON – LOCK THE AMBULANCE

On March 26, 2024, in Commonwealth of Pennsylvania v. Mark Giwerowski, the Superior Court of Pennsylvania, held (3 to 0) that sentence was appropriate. Defendant waived jury trial; at the trial's conclusion, the court found defendant guilty of the remaining thirty-six offenses, which included robbery of a motor vehicle, aggravated assault-attempt to cause bodily injury to police or enumerated persons, and ten other felonies.

THE COURT HELD:

> "Finally, while the prison sentence imposed for robbery of a motor vehicle was itself above the aggravated minimum range of the sentencing guidelines, Appellant was nonetheless convicted of eleven other felony offenses, the sentences for all of which were run concurrently. Had the trial court exercised its discretion to run them consecutively, even if each was within the standard range, Appellant could have faced more than the minimum of ten years in prison that the Commonwealth requested.
>
> For all the above reasons, we do not find that the sentence imposed by the trial court was the product of an abuse of its considerable sentencing discretion, and therefore it must be upheld."

FACTS:

> "At approximately 9:00 p.m. on February 28, 2020, emergency services were dispatched to the Roosevelt Inn, a hotel located in Philadelphia, based on the report of a combative male. Firefighter Albert Buclary responded first to the scene, where he encountered Appellant arguing with security and staff in the lobby of the hotel. Appellant was wearing nothing but his boxers and had dried blood on his hands and mouth. Firefighter Buclary tried on several occasions to have Appellant sit down so that he could be assessed, but Appellant instead continued walking up and down the hallways, shouting various proclamations, including that he was God.
>
> After approximately ten minutes, both medic units and police arrived. The medics vacated their ambulance but kept the engine running. While responding police officers were still initially assessing the scene, Appellant quickly walked outside the hotel and got into the driver's side of the ambulance. Firefighter Buclary observed this and entered the vehicle from the passenger side, attempting to push Appellant out through the driver's door. Appellant pushed back, and at one point, placed his bloody finger into Firefighter Buclary's mouth. Thereafter, a colleague pulled the firefighter out of the vehicle for his safety. Firefighter Buclary later testified that, because of the incident, he underwent extensive disease testing for about six or seven months, though the results were ultimately negative.
>
> While Firefighter Buclary was attempting to push Appellant out of the ambulance from the passenger side, Philadelphia Police Officer Timothy Kelley was trying to remove Appellant from the driver side. Appellant ignored repeated commands to get out of the vehicle. Since Appellant was not wearing any clothes or shoes, the officer had trouble

establishing any grip. Officer Kelley then noticed that Appellant was attempting to put the vehicle in gear and resorted to using his baton to strike Appellant several times in the leg. Appellant was able to shift into reverse and began backing up, striking a police cruiser. Appellant then shifted into drive and began to leave the parking lot. As he did so, Officer Kelley fired approximately six shots from his service weapon toward Appellant, striking him three times in the lower half of his body.

Despite being shot, Appellant led police on an hour-long slow speed chase throughout the northeastern portion of Philadelphia. During the pursuit, he abided by the speed limit and generally avoided colliding with traffic, but nonetheless hit several law enforcement and civilian vehicles. Law enforcement deployed a helicopter to assist in tracking Appellant. At one point, Appellant exited the vehicle and appeared as if he was surrendering. However, when officers approached him, he threatened to kill them and he got back into the vehicle, driving off. Ultimately, the chase ended when officers utilized tire spikes to disable the ambulance."

Legal Lesson Learned: When arriving at scene of mental call, turn off the ambulance and secured your keys.

File: Chap. 5 – Emergency Vehicle Operations

TX: ENGINE TO DUMSTER FIRE – 10 MPH OVER, THROUGH RED LIGHT, COLLISION – NO GOVERNMENTAL IMMUNITY

On March 7, 2024, in City of Houston v. Chelsea Manning, et al., the Fourteenth Court of Appeals of Texas, held (3 to 0) that trial court properly denied their motion for summary judgment on the emergency response exception to tort liability; on this second appeal the city is again denied immunity.

THE COURT HELD:

"This is the second appeal by the City of Houston in this personal injury suit arising from a collision between a fire truck and appellees' vehicle. In the first appeal, the City challenged an order denying its traditional summary-judgment motion on immunity grounds. We held that a genuine and material fact question existed as to the good-faith element of the City's employee's official immunity, and we affirmed in part the trial court's denial of the City's motion.

***

After the first appeal, the City moved for summary judgment again on immunity grounds, relying on its earlier evidence but adding some new evidence and arguments. The trial court denied the City's second motion. In this appeal, we again conclude that the City has not established conclusively that it is immune as a matter of law.

***

Thus, fact questions exist whether the City complied with all three applicable laws it cited. A factfinder could reasonably conclude that Schmidt (1) drove above the speed limit, (2) did not slow his speed while entering the intersection, and (3) proceeded against a red light. Thus, disputed and material fact issues preclude summary judgment in the City's favor on the emergency response exception."

FACTS:

"The facts are familiar to the parties and to this court. A Houston Fire responded to a dispatch for a dumpster fire at an apartment complex. En route, the fire truck collided with a car driven by Chelsea Manning at the intersection of Ludington Drive and Fondren Road. Also in Manning's car were three minor passengers, two of whom, Cierra Williams and Aaliyah Mitchell, reached the age of majority during the pendency of this suit; the third minor we refer to as T.N.

Appellees' remaining claims are for negligence and negligence per se. Appellees alleged that they had the green light and that the City was vicariously liable for Schmidt's negligence, specifically his failure to properly proceed with 'duty and care"' through the intersection and failure to slow the fire engine as necessary for safe operation before proceeding through a red light."

Legal Lesson Learned: On emergency response, proceed with due care and slow down at red lights to confirm safe to proceed.

File: Chap. 6 – Employment Litigation, incl. Work Comp., Age, Vet Rights

WV: VOL. FIRE CHIEF HEARING LOSS AS COAL MINOR (17.5%) – CLAIM ADDITIONAL LOSS FD DENIED / DIABETES

On March 25, 2024, in Wilburn T. Preece, Jr. v. Kermit Volunteer Fire Department, the West Virginia Intermediate Court of Appeals upheld (3 to 0) the Administrative Law Judge, and the Workers' Compensation Board of Review decision denying him additional worker's comp. He had previously been granted 17.5% permanent partial disability (PPD) award in 2015 related to work as a minor and failed to prove additional hearing loss (22%) was due to service starting in 2014 as the Fire Chief at the volunteer fire department.

THE COURT HELD:

"Mr. Preece was evaluated by David Phillips, M.D., who drafted a report dated December 14, 2022. Dr. Phillips found that Mr. Preece had a total of 22% whole person impairment ('WPI') related to hearing loss. Dr. Phillips noted that Mr. Preece has a medical history of diabetes, hypertension, and elevated cholesterol, all of which can contribute to progressive hearing loss. Thus, Dr. Phillips attributed 17.5% of Mr. Preece's hearing loss to prior mining occupational noise exposure and 4.5% to nonoccupational factors.

***

Upon review, we cannot conclude that the Board was clearly wrong in finding that Mr. Preece failed to establish that his job as fire chief has caused additional hearing loss. As the Supreme Court of Appeals of West Virginia has set forth, "[t]he 'clearly wrong' and the 'arbitrary and capricious' standards of review are deferential ones which presume an agency's actions are valid as long as the decision is supported by substantial evidence or by a rational basis." Syl. Pt. 3, *In re Queen*, 196 W.Va. 442, 473 S.E.2d 483 (1996). With this deferential standard of review in mind, we cannot conclude that the Board was clearly wrong in affirming the claim administrator's order rejecting the claim."

FACTS:

"In 2014, Mr. Preece began working as fire chief full-time for the KVFD. In a previous claim, Mr. Preece was granted a 17.5% PPD award in 2015 for occupational hearing loss related to his employment with another employer for whom he worked as a coal miner. Mr. Preece filed an Employees' and Physicians' Report of Occupational Hearing Loss dated August 25, 2020; indicating that he has occupational hearing loss due to noise exposure related to his employment at KVFD. On March 9, 2022, the claim administrator issued an order denying Mr. Preece's application for benefits due to a finding that he was not exposed to hazardous noise in the course of and resulting from his employment at KVFD. Mr. Preece protested this order.

***

Mr. Preece was deposed on May 13, 2022. Mr. Preece indicated that his job as fire chief required him to be at the fire station on a daily basis. Mr. Preece testified that he answered 90% of the calls received by the fire department and that during the calls he would be exposed to loud noise from the sirens. Mr. Preece further testified that the fire department answers between 300 and 500 calls each year and that answering a call could take between twenty and thirty minutes wherein he would be exposed to the noise from the engine and siren.

***

Mr. Preece was evaluated by David Phillips, M.D., who drafted a report dated December 14, 2022. Dr. Phillips found that Mr. Preece had a total of 22% whole person impairment ('WPI') related to hearing loss. Dr. Phillips noted that Mr. Preece has a medical history of diabetes, hypertension, and elevated cholesterol, all of which can contribute to progressive hearing loss."

Legal Lesson Learned: Hearing loss can be attributed to multiple factors, including diabetes, hypertension, and elevated cholesterol.

File: Chap. 6 – Employment Litigation, incl. Work Comp., Age, Vet Rights

TX: PANCREATIC CANCER NOT COVERD UNDER FF PRESUMPTION LAW – WIDOW DENIED WORK COMP

On March 7, 2024, in City of Stephenville v. Anna Belew, et al., the Eleventh Court of Appeals of Texas, held (3 to 0) in a lengthy decision, that the City's appeal is granted, reversing the award of workers comp death benefits to widow of Michael Belew, a firefighter for the City of Stephenville who passed away in 2014 after a battle with pancreatic cancer.

THE COURT HELD:

> "The IARC [International Agency for Research on Cancer] is the cancer research agency of the World Health Organization. The IARC conducts critical reviews and evaluations on the carcinogenicity of a wide range of human exposures. These are done by a working group of experts in the subject field and the IARC publishes the results of this working group's evaluations in monographs.
>
> ***
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> Appellees [widow and family] did not proffer any expert testimony or opinions, or other evidence for that matter, to explain and support their nuanced argument that individual studies within the Monograph indicate that the IARC has 'determined' pancreatic cancer to be a type of cancer that is covered by the statute. On the other hand, the City presented the affidavits of two qualified experts, each of whom opined that the IARC has not determined that pancreatic cancer is a type of cancer that is covered by the statute."

FACTS:

> "In June of 2014, after serving more than a dozen years in this capacity for the City (and also serving as a volunteer firefighter and emergency medical technician for the nearby City of Dublin), Michael noticed pain, as well as redness and swelling, in and around his left thigh. He sought treatment and was diagnosed with deep vein thrombosis; blood thinners were prescribed. Michael's condition did not improve and in July he and Anna presented to the emergency room of a Fort Worth hospital. After a series of tests over the course of that day, Michael was diagnosed with metastatic pancreatic cancer; he passed away shortly thereafter in early August.
>
> Anna and Michael's children, as his legal beneficiaries, applied for workers' compensation death benefits under the TWCA; the disposition of the ensuing proceedings culminated in this appeal.
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> ***
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> Texas has joined a growing trend in other states across the nation by enacting Chapter 607, Subchapter B of the Government Code. The statute in effect at the time that Michael's claim arose provides that, for purposes of benefit claims, qualified first responders—namely firefighters and emergency medical technicians—who suffer certain injuries or diseases that result in death or disability are presumed to have suffered the injury or disease in the course and scope of their employment. See GOV' T § 607.051–.059."

Legal Lesson Learned: Under the firefighter statutory presumption law must show that IARC has classified the cancer as likely caused by the job.

File: Chap. 6, Employment Litigation

WI: PART-TIME CAPTAIN LOST TITLE – ALL OFFICERS MUST APPROVED COMMISSION - DUE PROCESS CASE PROCEED

On March 20, 2024, in Richard Haffner v. Joshua Bell, The City of New Richmond, et al., United States District Court Judge James D. Peterson, U.S. District Court for Western District of Wisconsin, held that Fire Chief Joshua Bell is dismissed since he enjoys qualified immunity, the part-time Captain was denied due process in loss of his rank.

THE COURT HELD:

> "For years, the City of New Richmond elected the subordinate officers in its fire department without the formal approval of the city's Police and Fire Commission. This process did not conform to state law. In 2021, the city brought its promotion practices into compliance, and it authorized its fire chief, defendant Joshua Bell, to start fresh with a new slate of officers. Plaintiff Richard Haffner is a part-time firefighter with the department. At the time of the change in promotion practice, he was a captain and the health and safety officer. But he was not among those whom Bell chose as new officers. Haffner contends that defendants demoted him from his officer positions without providing him the procedural protection he was due under state law, violating his right to due process under the Fourteenth Amendment.
>
> ***
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> Under *Loudermill*, 'some kind of a hearing' is required before discharging an employee with a property interest. 470 U.S. at 542. The court need not define the minimum procedural requirement here other than to say that it is more than the nothing that Haffner got.
>
> ***
>
> Defendants' argument is based on a statutory interpretation. In essence, defendants contend that the statutory protections in § 62.13(5)(em) are available only to officers whose hiring or promotion was approved by the commission, as required by § 62.13(4)(a). Nothing in the text of the statute supports such a reading. And this interpretation would allow a municipality to avoid affording job protection to its firefighters and law enforcement officers simply by withholding commission approval of their hiring and promotion. This is an absurd result that frustrates the purpose of the statute, so the court must reject the defendants' interpretation."

FACTS:

> "In August 2021, the city amended its ordinance governing fire department officer selection to comply with state law. The new ordinance did away with officer elections

and gave the fire chief the authority to appoint officers-subject to confirmation by the Police and Fire Commission. In accordance with the new ordinance, the new fire chief, defendant Joshua Bell, appointed a slate of officers and the Police and Fire Commission approved those officers at its next meeting. Bell did not appoint Haffner to an officer position. Haffner remained a firefighter with the department.

> ***
>
> Haffner has adduced evidence from which a jury could find that his officer positions were more than merely informal or dignitary. For his role as the health and safety officer, he received extra pay, a $28 monthly stipend. The captain position came with no additional pay, but Haffner has adduced evidence that the captains supervised other firefighters and had additional duties and responsibilities. Defendants point out that there was no formal job description for officers, and they dispute whether captains had any formal duties that would make the role more than merely dignitary … But at summary judgment, the court must construe any genuinely disputed fact in Haffner's favor. He has raised a genuine dispute of fact whether his officer positions involved more than an informal title.

Legal Lesson Learned: Provide due process (such as a hearing before Commission) before removing officer's title.

File: Chap. 8 – Race / National Origin Discrimination

NY: CAPT SOON TO BE PROMOTED BC - RESCINDED – DRUNK PUBLIC / PANTS DOWN - NO RACE DISCRIMINATION

On March 11, 2024, Jeremy Clawson v. The City of Albany Department of Fire & Emergency, the U.S. Court of Appeals for Second Circuit (New York City), in a Summary Order upheld the grant of summary judgment for the city, dismissing the race discrimination lawsuit by Black Captain.

THE COURT HELD:

> "The AFD, however, has articulated a legitimate, non-discriminatory rationale for rescinding Clawson's promotion offer. Before he was slated to become battalion chief, Clawson consumed at least seven pints of beer, and proceeded to 'expos[e] himself' outside of a Dunkin' Donuts, prompting first responders to call an ambulance for 'a very old male who [was] highly intoxicated and . . . pooped on himself,' and who was 'incoherent with his pants down around his ankles.' Following that incident, the AFD determined that Clawson's promotion to battalion chief would undermine the AFD's internal morale and its public perception, as well as Clawson's effectiveness as a leader. In these circumstances, the AFD has stated a sufficient, non-discriminatory rationale for the adverse employment action.
>
> ***
>
> First, Clawson argues that the circumstances of his meeting with the AFD, in which his promotion offer was rescinded, are indicative of discriminatory animus. Specifically, Clawson points to evidence in the record that the chief of the AFD, Joseph Gregory,

requested the presence of a police officer at the meeting and then explained that the police officer was there because '[y]ou never know how people are going to react to bad news.' Clawson contends that Gregory's request for a police officer to be present at the meeting—and his explanation for the request—reflects the AFD's stereotypical and discriminatory view that 'black men are dangerous.' Under the circumstances here, a reasonable jury could not infer from this evidence that Gregory's actions were related to Clawson's race.

***

As evidence of his allegedly superior qualifications, Clawson points only to the fact that the person ultimately selected to be battalion chief, Captain Kowalski, scored second on the civil service exam after Clawson. Clawson thus ignores the undisputed record evidence that he engaged in an act of misconduct only days before his planned promotion. And Clawson does not even contend— nor could he, on the record before us—that Kowalski committed acts of misconduct or otherwise misbehaved during his tenure at the AFD. Therefore, Clawson has failed to present sufficient evidence that the AFD's decision to promote Kowalski, whose score on the civil service exam placed him next in line for the battalion chief position, was motivated by race discrimination."

FACTS:

"Clawson has been an employee of Defendant-Appellee Albany Fire Department ('AFD') since 1993, serving as a firefighter until his promotion to lieutenant in 2005 and then as a lieutenant until he was promoted to captain in 2010.

In 2019, Clawson was offered a provisional promotion to battalion chief, the third highest-ranking position at the AFD, that was to take effect after a swearing-in ceremony. Shortly before the ceremony, Clawson was drinking, while off duty, and became so intoxicated that first responders found him 'incoherent with his pants down around his ankles' and with feces on him. The AFD subsequently rescinded Clawson's promotion offer."

Legal Lesson Learned: The FD had a legitimate reason to rescind the promotion.

File: Chap. 9 – Americans With Disabilities Act

OH: DISPATCHER & DATA ENTRY CLERK – BIPOLAR - CAN NO LONGER PERFORM AS DISPATCHER – NO CASE

On March 18, 2024, in Charity Hunt v. Randy Thorp, Licking County Sheriff, the U.S. Court of Appeals for Sixth Circuit (Cincinnati) held (2 to 1; unpublished decision) that trial court judge properly dismissed the case.

THE COURT HELD:

"This case arises from Charity Hunt's complaint of disability discrimination suffered in her workplace. The Licking County Sheriff's Office (LCSO), in May 2018, hired Hunt as

a dispatcher. After approximately one year, she transferred to a new position, the LCSO Dispatcher-Data Entry Specialist. In that job, she primarily entered warrants and protective orders into the LCSO's data system. But she was also expected to continue performing dispatch duties when needed.

After a bipolar episode severe enough to warrant an extended leave, Hunt attempted to return to work. She requested that she no longer be required to perform dispatch duties because of the stress of that task. After the LCSO rejected her request, Hunt sued for violations of the Americans with Disabilities Act (ADA) and Family and Medical Leave Act (FMLA).

This appeal comes down to one question: whether dispatch duties are an essential function of Hunt's position as a Dispatcher-Data Entry Specialist. The district court determined that they are and thus held that Hunt was not a qualified individual under the ADA. Accordingly, she was not entitled to the ADA's protections, or related FMLA protections. For reasons that follow, we agree with the district court and therefore AFFIRM.

***

Hunt's FMLA-interference claim fails for the same reason her ADA claim fails. That is, because Hunt was not released to perform the essential functions of her position at the end of her FMLA leave (i.e., dispatch duties), the LCSO did not deny Hunt any benefits to which she was otherwise entitled."

FACTS:

"In May 2018, the LCSO hired Hunt as a dispatcher. After working in that capacity for over a year, Hunt applied to be a Dispatcher-Data Entry Specialist. According to the LCSO job posting, this position was a transfer opportunity.

On August 2, 2019, the LCSO hired Hunt to be the first Dispatcher-Data Entry Specialist. The LCSO also hired someone to replace Hunt in her prior dispatch role and removed her from the dispatcher schedule. After Hunt started her new position, dispatchers largely stopped entering warrants and civil protection orders into LEADS, as this was now primarily Hunt's responsibility. From August 2, 2019, until April 2, 2020, Hunt typically spent eight hours a day entering warrants and protection orders, doing validations, and working on other entries associated with her new position, although her desk remained in the 'radio room' with the other dispatchers so that she could jump on calls when needed.

***

[During COVID, moved to 3rd Shift, then to 2nd Shift.] After notifying Keene of her health issues, Hunt submitted her FMLA paperwork to obtain leave from May 15, 2020, through June 22, 2020. The basis for FMLA leave was that she was experiencing a bipolar episode 'triggered by the COVID conditions in the workplace.' Hunt explained that her recent episode had been triggered by the switch to third shift. She had 'the

extreme stress of worrying about contracting COVID because [of] a suppressed immune system due to strong rheumatoid arthritis medication.'

***

On July 28, 2020, Hunt submitted a completed fitness-for-duty packet. Her physician cleared her to perform 'data entry' work but, because of the bipolar disorder, restricted her from working third shift and performing dispatch duties. At that time though, Hunt was still needed for dispatch work, while the need for data-entry work remained low and in case of an emergency. Keene therefore believed that Hunt was not fit for duty. Loper, Sheriff Thorp, and Colonel Dennis all agreed. On July 31, 2020, Loper notified Hunt that she would not be permitted to return to work until her physician released her to perform dispatch duties.

***

On August 5, 2020, Loper formally emailed Hunt that the only vacant positions required dispatching. That email also included a letter notifying Hunt that (1) her FMLA leave would expire on August 13, 2020, and (2) if she was unable to return to unrestricted work on August 13, 2020, she could request a leave of absence without pay pursuant to the collective bargaining agreement. Hunt did not request an unpaid leave of absence. She did file for unemployment compensation. Her application for those benefits led the LCSO to believe that she had abandoned her position, and in response, the LCSO terminated her employment."

DISSENT – JUDGE HELEN N. WHITE:

"When Charity Hunt served as the LCSO's Dispatcher-Data Entry Specialist, dispatching emergency personnel was a virtually nonexistent element of her day-to-day duties.

***

The LCSO knew that Hunt suffered from anxiety and bipolar disorder and knew her limitations were caused by those conditions, yet it refused to work with Hunt on an accommodation—even after Hunt's doctor approved her to perform call-taking duties. Thus, I believe that a reasonable jury could conclude that the LCSO failed to fulfill its duty to engage in an interactive accommodation process with Hunt."

Legal Lesson Learned: Under ADA, an employee seeking accommodation must still be able to perform the essential functions of the job.

File: Chap. 9 – Americans With Disabilities Act

MD: VOL. FF IN PA WITH COCHLEAR IMPLANT / SCBA COOLING MASK – SEEKS VOL. MARYLAND - CASE PROCEED

On March 1, 2024, in Charles Hine v. Prince George's County, Maryland, United States District Court Judge Theodore D. Chuang, U.S. District Court for Maryland, denied motions for summary judgment for both parties; the County offered the firefighter an administrative position which he understandably rejected.

THE COURT HELD:

"Here, there is no serious dispute that the County rejected Hine's application based on the results of Hine's medical examination and Concentra's determination, based on his self-reported hearing test results, that he did not meet the NFPA hearing standard. There is also no material dispute that, although Hine requested an individualized assessment of whether, despite that hearing test score, he could still perform the job of an operational firefighter, no such individualized assessment occurred. Accordingly, the County's absolute reliance on the results of a medical examination or a general policy without conducting an individualized assessment of whether Hine could actually perform the job with a reasonable accommodation runs contrary to the requirements of the ADA. *See, e.g., PGA Tour, Inc.,* 532 U.S. at 690; *Gillen,* 283 F.3d at 29; *Rodriguez,* 436 F.3d at 482.

***

Thus, regardless of whether the County imposed a discriminatory blanket policy or failed to engage in an individualized inquiry, Hine is entitled to a finding of liability only if he establishes that he was a qualified individual, which in turn requires a determination that he could perform the essential functions of an operational firefighter with or without a reasonable accommodation."

FACTS:

"In support of its argument that Hine cannot perform the role of an operational firefighter with or without reasonable accommodations, the County primarily relies on the testimony of Dr. Daniel G. Sarno, a physician who works on the technical committee that established the NFPA hearing standard. Dr. Sarno testified in his deposition that the NFPA hearing standard was authored by a committee comprised of physicians, industrial hygienists, and firefighters to establish minimum safety requirements for firefighters to perform their duties. In discussing the NFPA hearing standard, Dr. Sarno testified that firefighters need to be able to rely on their hearing to locate trapped occupants, hear alarms, and understand orders. He also testified that thermal imaging technology now used to locate people trapped in a fire does necessarily identify all victims, and it is unclear whether hearing aids are able to withstand the heat and water present at a fire. For these reasons, Dr. Sarno offered the view that individuals who cannot meet the NFPA hearing standard cannot perform the essential functions of an operational firefighter and are a safety threat to themselves and others.

***

In contrast, however, Hine has offered evidence that he could perform the functions of an operational firefighter with reasonable accommodations. This evidence includes the facts that he successfully completed fire academy training prior to applying to MVFD, and that, as he informed the County, he previously Pennsylvania: the Limerick Fire Department, the Carlisle Fire Department, and the Exeter Fire Department. It is undisputed that the Exeter Fire Department found his work 'exemplary.' Stipulation of Uncontested Facts ¶ 4, ECF No. 72. In a letter of recommendation, Christopher J. Bickings, the Captain of the Exeter Fire Department, stated that at 'emergency scenes.' Hine had the ability to

"accomplish any task or assignment." Hine has also provided deposition testimony on how he performed firefighter duties successfully. Specifically, he carried a thermal camera and used his cochlear implant with a cooling mask to protect it from heat damage. Finally, although Hine has acknowledged that he does not meet the NFPA hearing standard, his 2010 test results of 40 dB at a frequency of 500 Hz, 40 dB at 1,000 Hz, 40 dB at 2,000 Hz, and 35 dB at 3,000 Hz appear to place Hine very close to the benchmark set forth in the NFPA hearing standard, which is an average hearing level of no greater than 40 dB across these frequencies in the unaided, better ear."

Legal Lesson Learned: Pre-trial discovery will now proceed; employers cannot simply rely on NFPA to turn down an applicant without an individualized assessment.

File: Chap. 10 – Family Medical Leave Act.

CT: MEDIC SUPERVISOR – BACK INJURY – JOB REPLACED WHEN RETURNED PARTTIME - MISSED WORK - FIRED

On Feb. 23, 2024, in Robert Larose v. American Medical Response of Connecticut, United States District Court Judge Vernon D. Oliver, U.S. District Court for District of Connecticut, granted the defense motion for summary judgment on ADA and FMLA claims. After numerous leaves of absence, he returned to work as part-time per diem medic, but failed to work the required one shift per week.

THE COURT HELD:

"Here, Plaintiff alleges that after his shoulder injury, 'the medical restriction that was preventing him from returning to work was that his doctor did not want him to do any heavy lifting.' He further asserts that 'his injury caused [him] to be substantially limited in both the major life activities of 'lifting' and 'working,' thereby establishing that he was, at the time, a disabled person.' Plaintiff provides absolutely no medical records, evidence, or other information to support his claim that his neck/shoulder injury caused him to be substantially limited in the major life activities of lifting and working.

***

As a preliminary matter, Plaintiff does not contend that AMR denied any FMLA leave he requested. Indeed, Plaintiff expressly concedes that he received all the leave to which he was entitled when he took leave twice between 2018-2019. Therefore, to prevail on his interference claim, Plaintiff must show that AMR interfered with his FMLA rights in some manner other than by denying him leave."

FACTS:

"In 2010, Plaintiff took leave approved under the FMLA to take care of a sick son, and received all leave to which he was entitled under the FMLA. Plaintiff began experiencing pain in his neck and tingling in his arm and hand in or around August 2018. Plaintiff was

diagnosed with a herniated desk and took a second leave of absence approved under the FMLA from October 16, 2018 to January 6, 2019, which amounted to a total of twelve weeks, for surgery on his neck. Following his leave, Plaintiff returned to his position as Senior Operations Supervisor and resumed his regular duties. Twelve days later, on January 18, 2019, Plaintiff began a third leave after falling on ice and hurting his left shoulder. Plaintiff received all leave to which he entitled under the FMLA and exhausted all protected leave on February 15, 2019, at which point he was authorized to take an extended leave of absence beyond February 15, 2019 pursuant to AMR policy. Plaintiff was advised by his treater to remain out of work until February 25, 2019. However, Plaintiff was scheduled to have shoulder surgery on March 4, 2019 and would not be able to return to work for at least two to three months.

***

After Plaintiff had exhausted his protected leave, he received a letter from [General Manager Robert] Retallick on February 22, 2019 stating that Plaintiff had exhausted all available FMLA time, that Plaintiff's continued absence was not protected under the law, and that AMR was no longer able to hold the Senior Operations Supervisor position open for Plaintiff given that AMR did not know if and when Plaintiff would return to work.

***

Plaintiff was authorized by his medical provider to return to 'full duty' work starting on May 14, 2019, and he accepted AMR's offer to work as a per diem paramedic starting on June 8, 2019. Pursuant to the Collective Bargaining Agreement ('CBA') applicable to Plaintiff, he was required to work at least one shift per week as a per diem employee. On September 25, 2019, Plaintiff received a written warning for failing to report to work that day. Plaintiff repeatedly failed to comply with the minimum shift requirements required by the CBA, and his employment with AMR was terminated on March 13, 2020 as a result."

Legal Lesson Learned: After employee uses all FMLA leave, employer does not have to hold open former position.

Note: FMLA Leave:

"Twelve workweeks of leave in a 12-month period for:

- the birth of a child and to care for the newborn child within one year of birth;
- the placement with the employee of a child for adoption or foster care and to care for the newly placed child within one year of placement;
- to care for the employee's spouse, child, or parent who has a serious health condition;
- a serious health condition that makes the employee unable to perform the essential functions of his or her job;
- any qualifying exigency arising out of the fact that the employee's spouse, son, daughter, or parent is a covered military member on "covered active duty;" or

Twenty-six work weeks of leave during a single 12-month period to care for a covered servicemember with a serious injury or illness if the eligible employee is the servicemember's spouse, son, daughter, parent, or next of kin (military caregiver leave)."

File: Chap. 11 – Fair Labor Standards Act

TN: HOSPITAL MEDIC - 30-MINUTE UNPAID MEAL BREAKS – BREAKS INTERRUPTED - RN/PARAMEDIC CASE PROCEED

On March 20, 2024, in Carlos Colon and Candace Harris v. HCA Healthcare, Inc. and CHC Payroll Agent, Inc., U.S. District Court Judge William L. Campbell, United States District Court, M.D. Tennessee, Nashville Division, denied the hospital's motion to dismiss, where hospital claimed that they were not the employer (asserting the payroll company was employer).

THE COURT HELD:

"Plaintiffs allege HCA required a 30-minute deduction from Plaintiffs' recorded hours worked per shift for meal breaks, regardless of whether they actually received an uninterrupted 30-minute meal period. Plaintiffs assert that they were not paid for time worked during meal periods. Plaintiffs allege that during unpaid meal breaks, they substantially performed their regular patient care job duties and responsibilities.

***

Based only on the allegations set forth in the First Amended Complaint, the Court concludes that Plaintiffs have sufficiently alleged facts that, accepted as true, support Defendants' status as employers. While discovery and subsequent motion practice may provide the Court with additional arguments on that issue, at this juncture, Plaintiffs have satisfied their pleading burden."

FACTS:

"Specifically, Plaintiffs allege that HCA controls, oversees, and directs Plaintiffs, including their work, schedules, and assignments, and promulgates and enforces policies affecting the payment of wages, meal breaks, performance standards, and other employment policies. Plaintiffs also assert that HCA has the authority to hire, fire, and discipline Plaintiffs and that HCA implements common timekeeping, payroll, overtime, meal breaks, and codes of conduct that apply to all HCA facilities."

Legal Lesson Learned: Only "bona fide" (uninterrupted) meal breaks can be considered as hours not worked; Fire & EMS departments should be very cautious in applying this exemption.

Note: 29 CFR § 785.19 Meal.

"(a) ***Bona fide meal periods.*** Bona fide meal periods are not worktime. Bona fide meal periods do not include coffee breaks or time for snacks. These are rest periods. The employee must be completely relieved from duty for the purposes of eating regular meals. Ordinarily 30 minutes or more is long enough for a bona fide meal period. A shorter period may be long enough under special conditions. The employee

is not relieved if he is required to perform any duties, whether active or inactive, while eating. For example, an office employee who is required to eat at his desk or a factory worker who is required to be at his machine is working while eating. (*Culkin* v. *Glenn L. Martin, Nebraska Co.,* 97 F. Supp. 661 (D. Neb. 1951), aff'd 197 F. 2d 981 (C.A. 8, 1952), cert. denied 344 U.S. 888 (1952); *Thompson* v. *Stock & Sons, Inc.,* 93 F. Supp. 213 (E.D. Mich 1950), aff'd 194 F. 2d 493 (C.A. 6, 1952); *Biggs* v. *Joshua Hendy Corp.,* 183 F. 2d 515 (C. A. 9, 1950), 187 F. 2d 447 (C.A. 9, 1951); *Walling* v. *Dunbar Transfer & Storage Co.,* 3 W.H. Cases 284; 7 Labor Cases para. 61.565 (W.D. Tenn. 1943); *Lofton* v. *Seneca Coal and Coke Co.,* 2 W.H. Cases 669; 6 Labor Cases para. 61,271 (N.D. Okla. 1942); aff'd 136 F. 2d 359 (C.A. 10, 1943); cert. denied 320 U.S. 772 (1943); *Mitchell* v. *Tampa Cigar Co.,* 36 Labor Cases para. 65, 198, 14 W.H. Cases 38 (S.D. Fla. 1959); *Douglass* v. *Hurwitz Co.,* 145 F. Supp. 29, 13 W.H. Cases (E.D. Pa. 1956))

(b) ***Where no permission to leave premises.*** It is not necessary that an employee be permitted to leave the premises if he is otherwise completely freed from duties during the meal period."

See also: U.S. Department of Labor, FLSA Hours Worked Advisor. "The Fair Labor Standards Act (FLSA) **does not** require an employer to provide meal periods or rest breaks for their employees. Many employers, however, do provide breaks and/or meal periods. Breaks of short duration, from 5 to 20 minutes, are common. As a general rule, **rest** breaks are considered hours worked and *bona fide* **meal** periods are not considered hours worked.

Some states do have laws requiring rest breaks and/or meal periods. Such state requirements will prevail over the silence of the FLSA on this subject. In those situations where an employee is subject to both the FLSA and state labor laws, the employee is entitled to the most beneficial provisions of each law." FLSA Hours Worked Advisor.

See also this article: "Firefighters, Unpaid Meal Periods, and the FLSA." Sept. 16, 2019. "Needless to say, deducting mealtime from firefighters can prove tricky."

File: Chap. 11 – Fair Labor Standards Act

MO: FLSA – CLASS ACTION CERTIFIED - PAY WHEN WORKING OUT-OF-POSITION – 5% INCREASE ON WAGE

On March 5, 2024, in Donnie Shook, individually and on behalf of all others similarly situated v. City of Independence, Missouri, United States District Court Judge Greg Kays, U.S District Court for Western District of Missouri, with no objection by the City has conditionally certified this class action lawsuit, where fellow firefighters with IAFF Local 781 may opt into the case as it proceeds in pre-trial discovery. Under the CBA, firefighters working "out-of-position" (for example, firefighter serving as Acting Lieutenant) receive a five percent increase in their regular hourly wage for those hours; the dispute concerns how this impacts the "regular hourly wage" rate of the firefighter.

THE COURT HELD:

"Plaintiff alleges Defendant's pay calculation policy violates the FLSA because it dilutes overtime compensation for hours worked out-of-position, resulting in overtime not being paid at a rate of at least one and a half times the regular rate. Defendant denies these allegations and maintains its pay calculation policy accounts for all hours and pay rates worked during a 27-day pay cycle.

***

Accordingly, the Court conditionally certifies the following class:

> All current and former Independence, Missouri firefighters who worked out-of-position at a higher rate of pay and worked more than 204 hours in the sme 27-day period at any time beginning three years prior to joining this lawsuit.'

***

Conclusion

The class is conditionally certified. Defendant shall produce to Plaintiff the names, job titles, dates of employment, last known addresses, and email addresses of potential plaintiffs within seven (7) days of this Order. Plaintiff is authorized to send notice and consent forms, by mail and email to potential class members. Each potential plaintiff shall have sixty (60) days from the date the mailing list is provided to opt-in to the litigation."

FACTS:

"Plaintiff was a firefighter for Defendant and subject to a collective bargaining agreement ('CBA') between Defendant and the International Association of Firefighters, Local 781 ('Local 781'). The CBA governs a firefighters' work schedule and compensation in several respects. First, it sets the regular work schedule at 204 hours per 27-day pay cycle. Second, it provides overtime compensation at one and a half times a firefighters' regular hourly wage. Third, it provides an additional two to five percent pay increase for firefighters who obtain various certifications such as a paramedic or hazardous materials technician. Fourth, firefighters can work 'out-of-position' and receive a five percent increase in their regular hourly wage for those hours.

Plaintiff alleges Defendant's pay calculation policy violates the FLSA because it dilutes overtime compensation for hours worked out-of-position, resulting in overtime not being paid at a rate of at least one and a half times the regular rate. Defendant denies these allegations and maintains its pay calculation policy accounts for all hours and pay rates worked during a 27-day pay cycle."

Legal Lesson Learned: Lawsuit will now proceed with pre-trial discovery.

Note: See this Notice from plaintiff's law firm:

YOUR RIGHT TO PARTICIPATE IN THIS LAWSUIT

If you fit the definition above, you may join this suit (that is, you may "opt in") provided that you file or cause to be filed the attached Consent to Join Collective Action. **You have two options: (1) you may file electronically by clicking here before October 20, 2023; or (2) you may download and sign and mail the consent form before October 20, 2023 to:**

Boyd Kenter Thomas & Parrish, LLC
PO BOX 439
Independence, Missouri 64050

If you choose option (2), your consent form must be enclosed in an envelope that is postmarked on or before October 20, 2023.

File: Chap. 12 – Drug-Free Workplace, inc. Recovery

MD: FF SUPPORTIVE 1st DUI - WENT TO IAFF CENTER OF EXCELLENCE – 2nd DUI / FIRED, NOT BECAUSE PTSD

On March 28, 2024 in Deanna Jones v. Cecil County, Maryland, United States District Court Judge Richard D. Bennett, U.S. District Court for District of Maryland, granted County's motion for summary judgment.

THE COURT HELD:

> "Even assuming arguendo that Jones is a qualified individual with a disability under the meaning of the ADA, she has not plausibly stated that she was terminated because of her disability. Jones provides nothing more than conclusory statements that she was terminated because of her alcohol use disorder. As discussed, the facts alleged by Jones indicate that she was terminated because of her second DUI, not because of her disability. Moreover, the Department's support of Jones after her first DUI undermines her claim of discrimination. Jones admits that the Department was supportive of her following her first DUI and that it was only after her second DUI that she was terminated."

FACTS:

> "In June 2020, Jones was involved in a motor vehicle accident and charged with Driving Under the Influence ('DUI') after officers detected high blood alcohol concentration levels in her system. She was found guilty of that offense. Jones alleges that she has alcohol use disorder. She notified the then-Chief of the Cecil County Department of Emergency Services Richard Brooks, Deputy John Donohue, and the president of her union, Patrice Burchett, of her DUI charge and her intention to seek treatment for alcohol use disorder at the International Association of Fire Fighters Center of Excellence for Behavioral Health Treatment and Recovery ('Center of Excellence'). Brooks offered to support Jones in court proceedings, and Cecil County leadership committed to supporting her through her treatment. Brooks explained to Jones that she would not be disciplined but that the DUI would be noted in her employee personnel file and that she would be

suspended from treating patients until she completed treatment. Jones began her treatment at the Center of Excellence on June 22, 2020, and she graduated from that program one month later on July 31, 2020. During treatment, she was diagnosed with anxiety, depression, and post-traumatic stress disorder ("PTSD"). Her treatment provider determined that Jones experienced numerous traumatic events as a paramedic that contributed to the onset of her conditions. After concluding treatment, Jones met with Brooks and Burchett, and they welcomed her back to full duty without restrictions.

In January 2021, Jones was charged with a second DUI. She informed the president of her union, Bill Adams, of her charge. Adams told her that Cecil County policies did not require her to report the charge to the Department unless she was convicted. Jones did not report the second DUI. That same month, Jones spoke over the phone with the newly appointed Chief of the Emergency Services Department, Wayne Tome.

***

In May 2021, Jones learned that a new full-time paramedic was hired at a much higher salary than usual. Jones voiced concerns about this hiring at a supervisors' meeting with Assistant Chief Andrew Budzialek. She 'also shared her concerns with the union and assisted in filing employee grievances.' The grievance process revealed that Cecil County hired paramedic Bethany Broderdorp at a rate of $10,000 more per year than at least 20 more experienced employees. Jones alleges Broderup had a prior sexual relationship with Assistant Chief Budzialek.

***

On July 2, 2021, Cecil County Human Resources Director Angela Lawson called Jones and informed her that she was placed on administrative leave pending an investigation. Lawson further stated that Jones did not have a right to know the purpose of the investigation. Cecil County never contacted or interviewed Jones during the investigation. On July 9, 2021, Lawson called Jones again and advised her that she was terminated because of her second DUI charge. Lawson stated the charge violated the Department's policies and was a 'disgrace to the county.'"

Legal Lesson Learned: Fire & EMS departments should require in their policies an immediate written notice of DUI arrests, not just convictions.

File: Chap. 13, EMS

PA: VA PATIENT REFUSES TRANSPORT – CLINIC ADVISES NEEDS GO – SEDATED BY EMS – NOT FALSE IMPRISONMENT

On March 26, 2024, in Thomas Sutton v. Secretary, U.S. Department of Veterans Affairs, et al., the U.S. Court of Appeals for Third Circuit (Philadelphia) held (2 to 1) that trial court properly dismissed the plaintiff's lawsuit against two EMT for "allegedly falsely imprisoning, and assaulting and battering him while transporting him from a local clinic where he sought medical care to a nearby hospital for higher level care." In medical malpractice cases, the lawsuit must include an affidavit from an MD with certificate of merit.
THE COURT HELD:

"In the course of transporting Sutton to the hospital, the technicians allegedly 'restrained [Sutton] and forcefully sedated him.' It is undisputed that these actions, whether medically justified or not, occurred in the course of the technicians' professional relationship with Sutton. And as Sutton himself observed, '[m]edical malpractice is defined as the unwarranted departure from the generally accepted standards of medical practice resulting in injury to a patient, including *all liability-producing conduct arising from the rendition of professional medical services*.'

Although the Dissent observes that Sutton averred certain 'intentional' actions these actions sounded in medical malpractice and, thus, he was required to file a certificate of merit to 'signal[] to the parties and the trial court that . . . he [wa]s in a position to support [his] allegations . . . and that resources w[ould] not be wasted if additional pleading and discovery [were to] take place.' *Bisher*, 265 A.3d at 3690 (internal quotation marks and citation omitted)."

DISSENT – Circuit Judge Thomas Hardiman:

"Sutton alleges intentional torts, not mere negligence. He accuses Fayette EMS of sedating him and transporting him to a hospital without his consent. Such claims do not require a certificate of merit. *See* Pa. R. Civ. P. 1042.3(a); *Montgomery*, 798 A.2d at 749. These claims also fall outside the ambit of immunity under Pennsylvania's Emergency Medical Services Act and could support punitive damages."

FACTS:

"In March 2022, Sutton, who is 'a disabled veteran with various diagnosed medical conditions including . . . chronic obstructive pulmonary disease and a chronically elevated heart rate,' arrived at a Fayette County clinic for a medical appointment. A nurse practitioner observed Sutton 'experiencing a highly elevated heart rate,' and advised that he be transported to a hospital for further medical observation and treatment. Sutton, however, expressed that he did not wish to go and would not consent to be transported there by ambulance because his medical conditions did 'not present emergent medical issues that require[d] immediate hospitalization.' Still, the nurse practitioner and another medical professional at the clinic would not allow him to leave without addressing his condition and requested transportation for him. In response to this request, two medical technicians from Fayette EMS arrived at the clinic to take him to the hospital by ambulance. According to Sutton, once the EMS technicians arrived, they conspired with the nurse practitioner and the other clinician to 'restrain[] and forcefully sedate[] him,' to 'transport [him] to the hospital against his will and without his consent.' Once there, hospital staff exercised their own medical judgment and admitted him as a patient. He remained there for two days until he was discharged."

Legal Lesson Learned: Medical practice cases require a "certificate of merit" by an MD to proceed.

File: Chap. 13, EMS

OK: EMT HELPING PD - GRAB ARM / LEG - TRANSPORTED IN HANCUFFS / CPR / DIED – QUALIFIED IMMUNITY

On March 26, 2024, in John Kruer, individually and as Co-Administrator of Estate of Jeffret Krueger v. Sheriff Chris Elliott, et al., United States District Court Judge Ronald A. White, U.S. District Court for Eastern District of Oklahoma, granted the EMT's motion for summary judgment – qualified immunity.

THE COURT HELD:

> "Plaintiffs have not identified any cases holding that an EMT violates an individual's Fourth Amendment right to be free from excessive force by briefly assisting officers in cuffing that individual, especially when that individual is struggling with officers in the middle of a busy highway where he stopped his car. As Plaintiffs have not satisfied their "burden of identifying cases that constitute clearly established law on these facts," *Id.* (citing *Quinn v. Young*, 780 F.3d 998, 1015 (10th Cir. 2015)), Smith and Patterson are entitled to qualified immunity on Plaintiffs' Fourth Amendment claims of excessive force. The motion for summary judgment motion is granted as to the excessive force claims against Smith and Patterson."

FACTS:

"It is undisputed that on July 1, 2019, Wagoner County Deputy Sheriffs Orr and Phillips encountered Mr. Krueger, attempted to take him into custody, and a physical altercation ensued. During the altercation, Deputy Orr radioed requesting assistance stating, 'one fighting.' After EMS services were requested, the EMT Defendants arrived on the scene to an unknown medical emergency and observed three adult males in a physical altercation in the middle of a busy highway.

Once the EMT Defendants were on the scene, one of the deputies immediately requested assistance in controlling and restraining Mr. Krueger. At the time, Mr. Krueger was fighting back, kicking, and not complying with the deputies' ordersThe EMT Defendants then assisted the officers by briefly holding Mr. Krueger's legs and one arm, which enabled the officers to handcuff him. Specifically, Smith reached down to get Mr. Krueger's right arm to help the deputies handcuff him, and Patterson held his legs.

***

After a hobble chain was placed on Mr. Krueger, Officer Blair noticed his breathing was altered and asked, 'He's still breathing ain't he? Officer McFarland then determined that Mr. Krueger had shallow breathing and called for the EMT Defendants to assist. The EMT Defendants retrieved a cot and placed Mr. Krueger on it. They placed him in the ambulance to transport him to the nearest hospital. A police officer drove the ambulance so that both Smith and Patterson could provide Mr. Krueger with medical assistance.

The EMT Defendants did not remove Mr. Krueger's cuffs. Smith testified that he did not have a key and had no idea who had the keys to the cuffs. Smith testified that he did not ask

the deputies to take the cuffs off because '[h]e had an immediate life threat that needed immediate attention. And by uncuffing him that's wasting time, and his brain is dying.'

Mr. Krueger was in the ambulance and connected to the monitor at approximately 22:05:29, whereupon vital signs were obtained and breathing assistance was provided - first by a bag valve mask and then by intubation. At 22:07:30, Patterson or Smith proactively requested air medical services be positioned at the local hospital should a higher level of care be required for Mr. Krueger. When Mr. Krueger went into cardiac arrest, the EMT Defendants began CPR procedures and continued them until they arrived at the Wagoner Hospital emergency department at approximately 22:13:57. Mr. Krueger died on July 1, 2019 at Wagoner Community Hospital."

Legal Lesson Learned: EMS may assist police in restraining a prisoner.

File: Chap. 13, EMS

CA: PD HANCUFFED MENTAL – STOPPED RESISTING, BUT MEDIC INJECTED VERSED / DIED – CASE PROCEED

On March 15, 2024, in Ivan Gutzalenko, et al. v. City of Richmond, et al., United States District Court Judge Edward M. Chen, U.S. District Court for Northern District of California, denied the motion to dismiss by AMR and paramedic Damon Richardson, who had administered 5 milligrams of Versed into his left bicep, and the detainee stopped breathing. Plaintiffs claim Mr. Richardson did not 'aspirate' the syringe when he administered the Versed to ensure it was not in the vein. Plaintiffs allege that the decedent stopped breathing within 90 seconds of the Versed administration and that he was pronounced dead after he was taken to Summit Hospital in Oakland.

THE COURT HELD:

"Taking the allegations as true, if Mr. Richardson administered Versed into the decedent's body even though the decedent was not resisting arrest and could not consent, thus resulting in the decedent's death, these facts could constitute battery.

***

But whether there was a medical emergency here that warranted the injection of Versed is at least a factual question inappropriate for resolution on a motion to dismiss. The Court denies summary judgment and thus cannot dismiss Plaintiff's claim for assault and battery because factual issues remain.

***

Because the Court finds that Plaintiffs sufficiently alleged that Mr. Richardson assisted police officers in detaining and arresting the decedent, Mr. Richardson could be liable for the false arrest claim if he acted in a law enforcement rather than medical capacity."

FACTS:

"On March 10, 2021, a Richmond police officer responded to a call for service about a man causing a disturbance in a furniture store on San Pablo Avenue in Richmond, California. When the police officer arrived at the scene, he saw a man matching the call description and approached him on foot. The man was Mr. Gutzalenko, the decedent. The decedent was 'in need of medical aid and was possibly intoxicated and/or experiencing a medical or mental health crisis.' The decedent had a dark purple mark on his forehead, was bleeding profusely from one of his hands, and had difficulty focusing on and communicating with the police officer.

The Defendants, AMR West and the paramedic Mr. Richardson, arrived in an ambulance and attempted to bandage the decedent's hands. Plaintiffs allege that the decedent became agitated and attempted to keep his hands away. Police officers then handcuffed the decedent after a 'struggle' for '2 to 3 minutes.' While the decedent was handcuffed on the ground, Defendant Mr. Richardson injected the decedent with Versed, a chemical restraint. Plaintiffs claim Mr. Richardson did not 'aspirate' the syringe when he administered the Versed to ensure it was not in the vein. Plaintiffs allege that the decedent stopped breathing within 90 seconds of the Versed administration and that he was pronounced dead after he was taken to Summit Hospital in Oakland. An autopsy determined the cause of death was prone restraint asphyxia and cardiac arrest while under the influence of methamphetamine."

Legal Lesson Learned: If detainee is not struggling, carefully follow protocol about when to administer a sedative.

Note: See County Prosecutor's investigation report, including interview of Medic Richardson (page 19).

File: Chap. 13, EMS

SC: COMBATIVE PT IN AMBULANCE – GIVEN 2nd KETAMINE – LIVED - NOT "SHOCK THE CONSCIOUS" - NO FED. CASE

On March 14, 2024, in Randy Botten v. Charleton County EMS and Christopher Cox, United States District Court Judge David C. Norton, U.S. District Court for South Carolina (Charleston Division) granted defense motion to dismiss; plaintiff alleges he suffered acute respiratory failure because of second injection of ketamine, but he was so combative in back of the ambulance they had to pull over to control him.

THE COURT HELD:

"The heart of Botten's allegations in this lawsuit is that these two ketamine injections were done without his consent and in a dangerous manner. He says that EMS employees determine how much ketamine to administer by 'looking at the person and guessing their weight.' Botten claims that injecting an intoxicated person with 500 milligrams of ketamine is extremely dangerous and can result in that person's death, and he says that the defendants had been told he was drunk prior to their injecting him. He further states

that Cox did not consult with medical control prior to administering the second ketamine dose, which violated EMS's protocol. Botten believes the defendants did not have a legitimate medical purpose for injecting him with ketamine and instead administered the drug 'solely for the purpose of behavioral control.

***

The court finds that Botten's § 1983 claim must be dismissed because Botten's allegations do not give rise to a constitutional violation. The Fourth Circuit recently outlined what is necessary for a plaintiff to assert a due process violation based on an invasion of bodily integrity. *See Washington v. Hous. Auth.,* 58 F.4th 170, 177 (4th Cir. 2023). Namely, the plaintiff must show that the 'defendant's behavior was 'so egregious, so outrageous, that it may fairly be said to shock the contemporary conscience.' To be conscience shocking, a defendant's behavior must lack 'any reasonable justification in the service of a legitimate governmental objective.' *Id.* (citation omitted) (first quoting *Dean ex rel. Harkness v. McKinney,* 976 F.3d 407, 413 (4th Cir. 2020); and then quoting *Cnty. of Sacramento v. Lewis,* 523 U.S. 833, 846 (1998))."

FACTS:

"Botten brings this action based on injuries he sustained while in the care of defendants on or about July 9, 2021. That evening, Botten and his fiancé were on Folly Beach celebrating their upcoming wedding when Botten, who was apparently intoxicated, fell and hit his head. Both the police and the defendants responded to the scene shortly thereafter.

As they were responding, EMS employees called EMS's physician on duty ('medical control') and determined that Botten 'lacked capacity to refuse medical care.' After that determination was made, Botten agreed to be taken to the hospital in an ambulance, but he became combative during the trip. As a result, the ambulance was forced to pull over at an intersection, and EMS employees contacted the police and put Botten in a 'four-point restraint with a belt across his chest.' After Botten continued to try to remove the belt, Cox injected Botten with 300 milligrams of ketamine. About fifteen minutes later, Cox administered a second dose with an additional 200 milligrams of ketamine. Botten claims that he suffered acute respiratory failure as a result of these two ketamine injections."

Legal Lesson Learned: Follow your protocol on administering second injection of ketamine.

File: Chap. 13, EMS

TX: BLS TRANSPORT AFTER MVA – BILLED $1,830.50 – NO MEDICAL EXPERT FRAUD - CASE PROPERLY DISMISSED

On March 14, 2024, in Alstonia Louis v. Liberty County Emergency Medical Service, Inc., the

Court of Appeals of Texas, Fourteenth District held (3 to 0) that trial court properly granted defense motion to dismiss since this is in effect a medical malpractice claim that under Texas law must be supported by affidavit from medical expert.

THE COURT HELD:

> "Both Louis's pleadings and affidavit establish that he was transported by ambulance and received health care from Liberty County EMS. For example, Louis acknowledged that Liberty County EMS checked his vital signs. Therefore, we are confronted with another situation in which the conduct of the health-care provider and the determination of the care provided is at issue. The resolution of Louis's challenge to the level of care provided to him and appropriate commensurate billing for those services is not within lay knowledge. Therefore, the fact-finder would need expert medical testimony to confirm whether (1) the care received by Louis was 'basic-life support' as he was billed for and (2) the amount Louis was charged was appropriate for the services provided.
>
> ***
>
> Following this court's precedent and the statutory directives of chapter 74, we conclude the trial court did not err in determining that Louis brought a healthcare-liability claim and for dismissing the claim due to lack of compliance with the expert-report requirements."

FACTS:

> "After being involved in a 2019 motor-vehicle accident, Louis was transported to the hospital by Liberty County EMS. According to the EMS report, Louis reported pain in his wrist and tenderness in his ribs, and the ambulance crew placed Louis's wrist in a splint and transported him to the hospital in a stretcher.
>
> Louis later received a bill in the amount $1,830.50 listing charges for 'BLS emergency transport' and 'BLS disposable supplies,' as well as mileage. Louis filed suit against Liberty County EMS in 2021 alleging deceptive-trade practices on the basis that he did not receive 'basic-life-support transport.' Liberty County EMS answered the suit, asserting both governmental immunity and that Louis's claim was a health-care-liability claim subject to chapter 74. Louis later amended his petition and added a breach-of-contract cause of action."

Legal Lesson Learned: The plaintiff needed an affidavit from a medical expert to support his claim of fraudulent billing.

File: Chap. 13, EMS

IN: PT STROKE CO. BREAK ROOM – CO. MEDICS RAPID RESPONSE – 8 MIN / WIFE TOLD "ONE HOUR" – NO CASE

On March 14, 2024, in Estate of Keith J. Hopkins v. Cleveland-Cliffs Steel, LLC, United States Magistrate Judge Andrew P. Rodovich, U.S. District Court for Northern District of Indiana (Hammond Division) granted the company's motion to dismiss. The widow was told by two co-workers at the wake that medics took "one hour" to respond, but EMS report (8 minute response time) and hospital records showed prompt response and transport (arrived 27 minutes after medic on scene).

THE COURT HELD:

> "The parties dispute the facts surrounding the emergency care that the paramedics provided to Hopkins. Paramedic William Webb stated the call for help was made at 6:59 p.m., and that he arrived with another paramedic at 7:07 p.m. Webb suspected that Hopkins was having a stroke, because his face was drooping and the right side of his body was flaccid. The paramedics assessed Hopkins, checked his blood sugar and vital signs, gave him intravenous fluids and oxygen, and prepared him for transportation by ambulance. The ambulance left for St. Catherine Hospital, in East Chicago, at 7:25 p.m., and arrived at 7:34 p.m. This timeline was recorded in an "Ambulance Report," which was prepared by ArcelorMittal dispatch personnel based on information reported by the paramedics. [Webb Decl. ¶¶ 12-13].
>
> ***
>
> The court infers from the briefing that the Estate believes the paramedics did not attend to Hopkins until at least an hour after they were called. Felita Hopkins, Hopkins's widow, testified that at his wake two of his co-workers told her that 'it took over an hour' for the paramedics to arrive and that ArcelorMittal's report was changed to say that they responded within three[3] minutes. [Hopkins Dep. 39:1-6, 39:22-40:21]. Although this fact is not properly alleged, *see* N. D. Ind. L. R. 56-1(b)(2)(D), the court will consider the Estate as having made that allegation based on Hopkins's deposition testimony.
>
> ***
>
> Therefore, the injury for which the Estate seeks compensation arose out of and in the course of employment, and the IWCA [Indiana Wrongful Death Act] provides the exclusive remedy."

FACTS:

> "On July 12, 2020, Keith Hopkins, a shift worker at ArcelorMitta in East Chicago, Indiana, suffered a stroke in the employee break room. ArcelorMittal paramedics attended to him and transported him to a local hospital, where he was discovered to have a large brain hemorrhage with a poor prognosis for recovery. Hopkins died on July 20, 2020. His estate brings a claim under the Indiana Wrongful Death Act, alleging that ArcelorMittal caused his death because the paramedics arrived late and did not provide him with appropriate care.
>
> ***

The events following Hopkins's arrival at the hospital are undisputed. Hopkins underwent a brain CT scan, which showed a "large left sided basal ganglia intraparenchymal hemorrhage." Dr. Armita Bijari, a neurologist who reviewed the ArcelorMittal and hospital records, concluded that the hemorrhage 'was very large with extremely grave prognosis at onset' and that Hopkins developed the hemorrhage because of his pre-existing conditions of hypertension, diabetes militius, and renal failure. Hopkins was transferred to Community Hospital in Munster, Indiana, because St. Catherine did not have neurosurgery coverage and he needed 'a higher level of care.' Despite surgery and other treatments attempted at Community Hospital, Hopkins died on July 20, 2020. Based on the timeline presented in the records, '[n]othing different could have been done for him by the paramedics or hospital staff that would have changed the outcome.' [Def Ex. D, Declaration of Armita Bijari, ¶¶ 7-11]."

Legal Lesson Learned: The estate's only remedy is under Indiana Wrongful Death Act (worker's comp). It is a shame that co-workers told widow that response time was one hour.

File: Chap. 13, EMS

MN: COMBATIVE PATIENT - MEDIC MILITARY TRAINING – PRESSURE ON CAROTID ARTERY - FIRING UPHELD

On March 11, 2024, in Kenneth Zepeda v. City of Sant Paul, the Minnesota Court of Appeals held (3 to 0) that the arbitrator properly determined that the city had just cause to terminate Zepeda's employment.

THE COURT HELD:

> "Despite the patient's physically combative behavior in the ambulance, the video supports the arbitrator's statement that the patient was, nonetheless, not in a position to inflict harm on the responders at that point.
>
> ***
>
> The arbitrator reasoned that 'the rest of the crew, having received the same level of training, knew not to interact with the patient as Zepeda did,' that Zepeda's behavior on the video 'reflects someone who did not control their anger rather than someone who did not know better,' and that 'supporting documentation' is not necessary to establish that behaviors such as 'yelling, taunting, belittling and physically abusing a patient' are prohibited and could be considered misconduct."

FACTS:

> "On January 17, 2021, at approximately 1:30 a.m., Zepeda responded to a medical call in downtown St. Paul, along with a captain of the fire department, two emergency medical technicians, and two paramedics. The patient was outdoors near the downtown transit

station, disoriented, wearing hospital scrubs, and without shoes. The patient was also wearing a bloody face mask.

Initially, the patient was cooperative, but the circumstances changed when the responders attempted to direct the patient to the inside of an ambulance for evaluation and care. The patient did not cooperate with the crew's instructions. Instead, he became combative and attempted to punch one of the responders with his fist. Once the responders were able to get the patient inside of the ambulance, he swore at them and physically resisted their attempts to restrain him by kicking and spitting at them. The six responders were able to subdue the patient after Zepeda manipulated a pressure point on the patient. Once the patient was restrained and placed in a spit hood, he was transported to a hospital. Portions of the incident were captured on the body-worn camera of a transit police officer who was present at the scene, including Zepeda's manipulation of the patient's pressure point to cause his submission in the ambulance. Zepeda's employer reviewed the body-worn camera video footage, placed the responders on paid administrative leave, and arranged for another county to investigate the incident. The results of the investigation were presented to the Minneapolis City Attorney's office for consideration of criminal charges. That office considered the possibility of a fifth-degree assault charge but ultimately did not file any charges.

On January 24, 2022, the city gave notice of its intent to terminate Zepeda's employment based on his use of 'verbal aggression and physical force to restrain and apply pressure to the neck of the patient, prior to and after the patient was fully restrained to an ambulance stretcher.' A three-day evidentiary hearing was held before an arbitrator regarding the city's attempt to terminate Zepeda's employment."

Legal Lesson Learned: Follow your protocol in restraining combative patients.

File: Chap. 13, EMS

MN: PD TRYING TO HANDCUT MAN - MEDIC 350 MIL KETAMINE – NO PROOF EXPERT MEDIC CAUSED INJURIES

On March 11, 2024, in Brandon Currie v. Clayton Aswegan, Elk Rive Police Officer, Brandin Martin, Elk River Police Officer, and Ronnie Lawrence, Paramedic, United States District Court Judge Eric C. Tostrud, U.S. District Court for District of Minnesota, granted the motion to dismiss all defendants. Plaintiff's expert, Dr. A. Keith Wesley, M.D., Medical Director of United Emergency Medical Response in Wisconsin Rapids, in his affidavit fails to describe how the Paramedic and police "share responsibility" for patient's alleged injuries.

THE COURT HELD:

"After Mr. Currie repeatedly denied being on substances, officers requested an ambulance. When the ambulance arrived, Mr. Currie got up from the ground. Several times, the officers directed Mr. Currie to 'get down,' 'stay down,' and 'sit on the curb,' and the officers threatened that if Mr. Currie did not sit down, they would 'make [him] sit down.' Instead of complying with the officers' commands, Mr. Currie fled. The officers

chased and tackled Mr. Currie. After being tackled, Mr. Currie kicked, flailed, and resisted arrest. The officers attempted to handcuff Mr. Currie but struggled to get control of his second hand.

Paramedic Lawrence, who by that time had arrived in the ambulance, administered 350 milligrams of ketamine intramuscularly to Mr. Currie to sedate him. Mr. Lawrence decided to administer ketamine based on his independent medical judgment; he was not influenced by the officers to do so. The officers first learned that Mr. Lawrence had administered ketamine to Mr. Currie only after Mr. Currie was handcuffed. Mr. Currie was arrested; he was later charged with and pleaded guilty to obstruction of legal process, a gross misdemeanor.

***

[Plaintiff's expert, Dr. Wesley] attributed 'likely' causation to persons other than Mr. Lawrence, but the lack of any apportionment opinion means the affidavit fails to describe what negligence on Mr. Lawrence's part caused Mr. Currie's injuries. To put it another way, Dr. Wesley does not 'set out how' he will use this case's facts 'to arrive at' a causation opinion as to Mr. Lawrence. *Sorenson,* 457 N.W.2d at 192-93.

Dr. Wesley's affidavit fails to comply with Minn. Stat. § 145.682, subdiv. 4(a), as the Minnesota Supreme Court has construed the statute. For that reason, and because Dr. Wesley's testimony is essential to Mr. Currie's medical malpractice claim (Dr. Wesley is Mr. Currie's only expert), the claim must be dismissed pursuant to § 145.682, subdiv. 6(c)."

FACTS:

"On September 3, 2018, a clerk working at a Holiday Station store in Elk River, Minnesota observed Mr. Currie acting strangely inside the store. In his deposition, the clerk estimated he had observed Mr. Currie acting strangely for between thirty and forty-five minutes. When asked in his deposition to describe Mr. Currie's demeanor, the clerk testified that Mr. Currie was '[v]ery fidgety. He seemed to be under the influence of methamphetamine. Just wouldn't stop fidgeting with his hands, scratching his skin, sweating profusely. Just kind of looking around a lot....pivoting his head a lot.' Mr. Currie's behavior caused another employee to be 'uncomfortable and kind of scared.' The clerk telephoned police. During this call, the clerk described Mr. Currie's physical appearance and behavior and expressed concern that Mr. Currie appeared to be under the influence of drugs.

Officers Aswegan and Martin responded to the call. Officer Aswegan arrived first. He approached Mr. Currie inside the store and asked: 'How's it going man? . . . You alright?' Officer Aswegan explained to Mr. Currie that people were concerned about him, and Officer Aswegan asked to speak with Mr. Currie outside the store.

***

After Mr. Currie repeatedly denied being on substances, officers requested an ambulance. When the ambulance arrived, Mr. Currie got up from the ground. Several times, the

officers directed Mr. Currie to 'get down,' 'stay down,' and 'sit on the curb,' and the officers threatened that if Mr. Currie did not sit down, they would 'make [him] sit down.' Instead of complying with the officers' commands, Mr. Currie fled. The officers chased and tackled Mr. Currie. After being tackled, Mr. Currie kicked, flailed, and resisted arrest. The officers attempted to handcuff Mr. Currie but struggled to get control of his second hand.

Paramedic Lawrence, who by that time had arrived in the ambulance, administered 350 milligrams of ketamine intramuscularly to Mr. Currie to sedate him. Mr. Lawrence decided to administer ketamine based on his independent medical judgment; he was not influenced by the officers to do so. The officers first learned that Mr. Lawrence had administered ketamine to Mr. Currie only after Mr. Currie was handcuffed. Mr. Currie was arrested; he was later charged with and pleaded guilty to obstruction of legal process, a gross misdemeanor."

Legal Lesson Learned: Follow your protocols, including carefully evaluating the person before administering ketamine.

File: Chap. 13, EMS

KY: EMS NO QUAL. IMMUNITY - DEFIBRILLATOR NOT CHECKED / "ACTIVE 911" APP – HUNG JURY / RETRIAL

On March 8, 2024, in Kristian Brock and Christopher Stone v. Colton T. Hinkel, individually and as administrator of the estate of Charles L, Hinkel, III, the Court of Appeals of Kentucky held (3 to 0; unpublished opinion) that the trial court properly denied qualified immunity for the the EMS; the case must therefore be re-tried to Jury after the first civil jury failed to reach a decision.

THE COURT HELD:

"Factual issues remain for the jury to determine whether they were negligent in not complying with written policy and procedure by using the app rather than the ambulance GPS and paper maps, or whether it was acceptable to use the app in light of the testimony from their supervisor, or whether they were negligent in not consulting the paper maps in conjunction with the app.
Brock and Stone do not challenge the trial court's holding that their duty to check the defibrillator was ministerial and consequently this ruling will not be reviewed here.

CONCLUSION

For the foregoing reasons, the trial court's order is affirmed insofar as Brock and Stone are not entitled to qualified official immunity for the claims that they were negligent in using the Active 911 app to navigate to Hinkel's residence and in allegedly failing to perform the routine check of the LifePak defibrillator."

FACTS:

"Charles L. 'Luke' Hinkel, III awoke in the early morning hours of September 14, 2017, experiencing severe chest pain. He was forty-eight years of age and had previously suffered a heart attack. He called his son, Zachary, who lived about a mile away. Zachary came to Hinkel's home and called 911 about thirty minutes later, at 2:08 a.m. Brock and Stone were dispatched to pick up Hinkel. They used Active 911, a GPS navigation app on a cell phone, to guide them to Hinkel's residence, approximately 3.8 miles from their station. The app misdirected them, and they had trouble locating the house, a difficulty exacerbated by the dark and rainy conditions. They arrived about sixteen minutes after they departed from the ambulance bay.

They found Hinkel lying on the floor experiencing extreme pain in the center of his chest. Because Hinkel's home was difficult to access with a stretcher, Brock and Stone asked if he would be able to get up and walk to the ambulance. He agreed and walked out to the ambulance with their assistance. After he got into the ambulance, he went into full cardiac arrest. Stone attempted to defibrillate Hinkel with the LifePak 12 defibrillator with which the ambulance was equipped, but the monitor on the device failed. Stone attempted to restart the LifePak several times without success. He then began CPR, intubated Hinkel, and administered lidocaine and epinephrine. They contacted another paramedic with a functioning defibrillator who met them on their way to the hospital. They unsuccessfully attempted to defibrillate Hinkel. They arrived at the hospital and transferred Hinkel at 3:18 a.m. Hinkel passed away at 3:31 a.m.

***

The trial court further noted that Brock and Stone in their depositions admitted that Henry County EMS protocols and procedures required them to complete a check sheet of the equipment and supplies in their ambulance unit. This check was to occur at the beginning of each shift. That check sheet includes the LifePak and directions to run a test of its functionality at the beginning of each shift. Upon completion of the daily check sheet, it was to be submitted to the EMS Director for filing. There remains a question of material fact whether the Defendants completed the daily check list and the test of the LifePak at the start of their shift. There is no dispute the LifePak malfunctioned and the daily check list for the day in question has never been produced."

Legal Lesson Learned: Follow your equipment check protocols, including documentation; know your addresses or confirm with GPS or map.

Chap. 14 – Physical Fitness, incl. Heart Health

Chap. 15 – Mental Health, incl. CISM, Peer Support, Pet Therapy

File: Chap. 16, Discipline

IL: FF PLED GUILTY – SEX 17-YR OLD FD CADET – AFTER RETIRED HIS PENSION WAS REVOKED - 5 YRS LATER

On March 20, 2024, in John Trapp v. City of Burbank Firefighters' Pension Fund, et al., the Appellate Court of Illinois, First Judicial District, held (3 to 0) that the Pension Board and trial court judge properly held that the firefighter, who had sex with a 17 year-old-cadet when he was still employed as a firefighter, can lose his pension five years after he retired.

THE COURT HELD:

> "Section 4-138 of the Code provides as follows: 'None of the benefits provided under this Article shall be paid to any person who is convicted of any felony relating to or arising out of or in connection with service as a firefighter.' 40 ILCS 5/4-138 (West 2022).
>
> ***
>
> Here, plaintiff was plainly ineligible for a pension benefit under the terms of section 4-138. The Board was therefore required by statute to divest plaintiff of his pension award because it no longer had the power to pay that money pursuant to section 4-138.
>
> Nonetheless, plaintiff argues that, at the time the Board granted his pension benefit application, it knew of the 'underlying facts of the allegations against [him]' but failed to retain jurisdiction' pending the outcome of the investigation. Plaintiff then concludes that the Board's failure to do so deprived it of jurisdiction to 'review *** and reverse its September 12, 2017, administrative decision.' As noted above, the Board's September 2022 decision was the result of a new action, not a reversal of its September 2017 decision. Moreover, plaintiff's suggestion that the Board retain jurisdiction to enable it to divest a member of his award following a duty-related felony conviction would require the Board to retain jurisdiction in every granting of a member's application for a pension benefit. Plaintiff provides no indication—and we have found none—that the legislature intended such an absurdity."

FACTS:

> "On January 11, 2017, Burbank Fire Chief David Gilgenburg was notified of an inappropriate relationship between plaintiff and a 17-year-old girl (Victim A). Victim A worked as a high school cadet/intern at the Burbank Fire Department. The next day, Gilgenburg placed plaintiff on administrative leave and contacted the Burbank Police Department. On January 17, 2017, plaintiff applied for retirement benefits with an effective date of January 16, 2017. At that time, he was eligible for a pension, having 28 years and 3 months of 'creditable service.' On September 12, 2017, the Board granted plaintiff a 'regular' retirement pension benefit pursuant to section 4-109 of the Illinois Pension Code (Code).
>
> On December 5, 2019, the federal government formally charged plaintiff with violating 18 U.S.C. § 2252A(A)(5)B), which prohibits the knowing possession of child pornography. Plaintiff pleaded guilty to this charge on September 29, 2020. The factual recitation of the plea indicated that, from around December 2016 and continuing through

January 2017, plaintiff had a sexual relationship with Victim A while plaintiff was employed as a firefighter and Victim A worked as a high school cadet/intern at the 'same fire department.' At the time of the offense, plaintiff was 54 years old and aware that Victim A was only 17 years old. During their relationship, plaintiff enticed Victim A to travel to a motel where they had sexual intercourse, and plaintiff further induced Victim A to create and send him two images and one video of her touching her genitals, and another video of her masturbating. On June 17, 2021, plaintiff was convicted and sentenced to 6 months' incarceration.

> ***
>
> On July 18, 2022, the Board held a hearing to determine whether plaintiff's felony conviction caused him to lose or forfeit his right to a pension pursuant to section 4-147 of the Code.
>
> ***
>
> On September 12, 2022, the Board issued a written decision and order finding that plaintiff's federal conviction for possession or receipt of child pornography was 'related to, arose out of, or was in connection with' plaintiff's service as a Burbank firefighter. The Board's decision further ordered plaintiff's retirement pension be "revoked and rescinded" and stated that plaintiff was no longer eligible for any benefits pursuant to article 4 of the Code effective July 19, 2022."

Legal Lesson Learned: A service-connected felony led to forfeiture of his pension; wonder why it took 5 years.

File Chap. 16, Discipline

WI: VOL. FF FIRED AFTER COMPLAINED ABOUT HOW PD QUESTIONED HIM - "WHISTLEBLOWER" CASE PROCEED

On March 22, 2024, in Matthew Donahue v. Village of Elm Grove, et al., United States District Court Chief Judge Pamela Pepper, U.S. District Court for Eastern District of Wisconsin, held the volunteer's claim of retaliation may proceed to pre-trial discovery, after he files an Amended Complaint with more details. On March 6, 2019, he was questioned by officers from the Elm Grove and Brookfield Police Departments after the PD received a complaint from Father Peter Berger of St. Mary's Church. "The plaintiff was a member of St. Mary's congregation; recently Father Berger had officiated at the plaintiff's marriage and on March 6, 2019, the two had exchanged emails regarding a personal issue 'between the Church and [the plaintiff]." The plaintiff filed a complaint against PD, and Village Manager directed Fire Chief to investigate, leading to his termination.

THE COURT HELD:

> "Construing these allegations in the light most favorable to the plaintiff, the court concludes that the plaintiff has alleged that he engaged in activity protected by the First Amendment-making a complaint through his statement of charges. He has alleged that he suffered a deprivation that likely would deter his First Amendment activity in the future-

he was subjected to an investigation, a hearing and removal. And he has alleged that the fact he made complaints caused the fire department to investigate him, which led to the commission's hearing and his removal. He has alleged that [Village Manager David] DeAngelis knew of his First Amendment activity (by alleging that DeAngelis received his statement of charges and advised the village board about them), that DeAngelis basically rejected the plaintiff's complaints by advising the board of trustees not to investigate them and by misrepresenting them and that DeAngelis caused at least one deprivation-the institution of a fire department investigation into the plaintiff-which led to the others. While the allegations against [Village Manager] DeAngelis are sparse, they are sufficient to state a plausible claim at the pleading stage."

FACTS:

"From March 4, 2014 through August 31, 2020, the plaintiff was employed as a volunteer firefighter by the Village of Elm Grove Fire Department. He alleges that on March 6, 2019, he was questioned by officers from the Elm Grove and Brookfield Police Departments about a complaint the Elm Grove P.D. had received from Father Peter Berger of St. Mary's Church. The plaintiff was a member of St. Mary's congregation; recently Father Berger had officiated at the plaintiff's marriage and on March 6, 2019, the two had exchanged emails regarding a personal issue 'between the Church and [the plaintiff].' The plaintiff asserts that after the email exchange, Father Berger contacted the Elm Grove Police Department, 'which resulted in the [Elm Grove Police Department] and Brookfield officers visiting [the plaintiff] on March 6, 2019.

***

The plaintiff alleges that Elm Grove police officer Jamie Hawkins 'was rude, unprofessional, and did not explain why he was questioning [the plaintiff].' He alleges that 'Officer Hawkins . . . lied to [the plaintiff] and made unsupported accusations against [the plaintiff].' According to the plaintiff, Hawkins asked the plaintiff to have no contact with the church. The plaintiff says that he asked Hawkins to 'convey the same no contact order to the Church,' but the plaintiff says he later learned that 'this never occurred." The plaintiff avers that he was not issued any citations or charged in connection with this meeting.'

***

The plaintiff asserts that in a January 20, 2020 memo to the board of trustees, DeAngelis (the Village Manager) 'confirmed' that the complaint 'fell within the auspices of the Chief of Police and DeAngelis, the Chief's direct administrative superior.' The memo allegedly advised the board against investigating the plaintiff's complaints and 'made several false accusation against [the plaintiff], [] misrepresented facts concerning [the plaintiff's] underlying complaint' and instructed the fire department to open an investigation into the plaintiff. The plaintiff says that on February 21, 2020, Selzer (the fire chief) placed him on paid administrative leave 'pending the Fire Department's investigation 'involving [the plaintiff's] conduct relating to several matters including disturbances [he had] been involved in and [his] interactions involving [his] fellow Village public safety professionals.' The plaintiff alleges that Selzer ordered him not to enter the fire department premises or any of the non-public areas of the Village without

permission from Selzer or De Angelis, and ordered him not to attend any trainings, meetings or calls without Selzer's permission.

***

The plaintiff avers that '[o]n June 26, 2020, the Fire Department filed its Statement of Charges against [the plaintiff] with the Commission' without interviewing him beforehand. He says that he then 'communicated' to the commission that he'd 'experienced 'inappropriate and unprofessional actions' by the law firms representing the village and the commission, and that he "requested a telephonic hearing to discuss administrative matters' but that his request was denied. The plaintiff says that on August 14, 2020, the commission held a hearing on the village's statement of charges, but that he wasn't present for that hearing because he had not received notice of it. He says that the commission issued a decision 'on or about' August 26, 2020, deciding there was 'just cause' to terminate his employment with the fire department under Wis.Stat. §62.13(5)(e) and (em).'

***

[Plaintiff appealed his termination to state court. On Sept. 27. 2021] the Waukesha County Circuit Court's oral ruling stated, in pertinent part:

> Court finds that [the plaintiff] was on notice of the departments rules and regulations. Court finds that [the plaintiff] was uncooperative and was an obstructionist. Court finds that investigation conducted was fair. Court supports the commission's findings and finds that they were fair and objective. Court finds that the record does not support any allegation of discrimination by [the plaintiff]. Court finds that just cause existed for the firing of [the plaintiff] and that proper procedures were followed by the commission and the commission's actions were reasonable and appropriate. Court affirms the commissions decision in its entirety. *Administrative Agency Review and Petition for Writ of Certiorari, Matthew J. Donahue v. Elm Grove Police and Fire Commission,* Case No. 2020CV1258 (Waukesha County Circuit Court), September 27, 2021 oral ruling, available at the Wisconsin Circuit Court Access site.

Legal Lesson Learned: Filing a complaint about alleged police misconduct is protected conduct under 1st Amendment and state whistleblower law.

File: Chap. 16, Discipline

NH: POLICE OFFICER RESIGNATION / PD INTERNAL AFFAIRS DOCS OUT PERSONNEL FILE – CT. ORDERS DOCS RELEASED

On March 20, 2024, in Jonathan Stone v. City of Claremont, the Supreme Court of New Hampshire, held (5 to 0) that the 2007 resignation agreement with former City police officer and his union, removing from his personnel file the internal affairs investigation and notice of termination, does not protect the requested records from disclosure.

THE COURT HELD:

"The intervenors [ACLU and Union Leader Corp., Union Leader Corp] contend that the purging provision of the Stipulated Award does not state that the relevant records will be destroyed or that they will cease to exist within the CPD. According to the intervenors, the Stipulated Award provides only that the relevant records will be purged from the plaintiff's personnel file but does not state that the records will be purged from all other locations. Similarly, the intervenors argue that the confidentiality provision 'does not provide the blanket confidentiality that [the plaintiff] asserts.' Rather, the Stipulated Award 'makes clear that its confidentiality provision applies 'except to the extent required by . . . law,' which includes the requirements of RSA ch. 91-A.' We agree with the intervenors.

***

In summary, we conclude that the 2007 Stipulated Award does not protect the requested records at issue on appeal from disclosure."

FACTS:

"The plaintiff appeals a decision from the Superior Court (Honigberg, J.) denying his petition for injunctive relief and ordering the City to disclose thirteen internal affairs investigation reports (IA Reports) and four sets of correspondence between the New Hampshire Police Standards and Training Council (PSTC) and the City.

***

The plaintiff is a former police officer with the Claremont Police Department (CPD) and a current public official. In June 2007, the plaintiff, through his union, entered into a Stipulated Award with the City that resolved four grievances that the plaintiff filed in response to several IA Reports. As part of the Stipulated Award, the City agreed to 'purge [the plaintiff's] personnel file of all reference to the one-day suspension of March 8, 2006, the March 27, 2006 notice of termination, and all events leading up to them.' The parties agreed not to report the disposition of the matter to the newspaper or any other media outlet and, if contacted by the media, to make no comment. The Award also contained a confidentiality provision in which the parties agreed 'to keep the existence, terms, and substance of this Award confidential . . . except to the extent required by an order of some other agency, court of competent jurisdiction, or by law.' The Stipulated Award resulted in the plaintiff's negotiated resignation from the CPD."

Legal Lesson Learned: It is common in a resignation agreement to remove investigative documents from a personnel file, but Court may later require disclosure under state public records statute.

Note: Justice Hantz Marconi concurred in the decision, but wrote a Concurring Opinion where he stated:

> "I am concerned that the majority's opinion takes an incremental step, under the facts of this case, to preclude the use of confidential settlements by governmental entities. Such agreements can serve an important purpose, and our developing RSA 91-A jurisprudence, along with

other record retention policies, may reduce or eliminate the availability of this device. Restrictions on confidential settlement agreements with respect to public employees, and in particular, law enforcement officers, raise policy considerations beyond the outcome of this case."

See March 20, 2024 article, "Court denies ex-officer's attempt to block records' release."
"In a decision that could ripple across the law enforcement community around the state, the New Hampshire Supreme Court has ruled that a former Claremont officer and current state legislator's disciplinary records relating to his time as a police officer for the city can be released to the public."

See also Nov. 14, 2023 article, "Rep. Jon Stone's Records As a Cop Are Humiliating, Lawyer Tells NH Supreme Court."
"Whatever is in the Claremont Police Department's internal affairs records that state Rep. Jon Stone is trying to hide from the public, it's bad, his lawyer told the New Hampshire Supreme Court on Tuesday. 'It will embarrass and humiliate my client, and it will embarrass and humiliate multiple people in the city of Claremont,' attorney Peter DeCato said. *** After Stone left the department, then Police Chief Alex Scott would subsequently file a Form B with the New Hampshire Police Standards and Training Council informing the council Stone was terminated for reasons of moral turpitude."

File: Chap. 16 – Discipline, incl. Code of Ethics, Social Media, Hazing

WI: CIVIL UNREST – FF ORDERED TO EVACUATE STATION TO ANOTHER STATION – SAYS MIGHT "LAY UP" – FIRED

On March 5, 2024, in Michael. S. Peden v. City of Milwaukee Board of Fire and Police Commissioners, the Court of Appeals of Wisconsin, District I, held (3 to 0; unpublished decision) that the Board properly upheld the termination after a fair hearing. Peden explained that he believed that another firefighter, who had allegedly framed him in a past sexual assault case, was scheduled to be working at the other station; he never claimed he was actual ill.

THE COURT HELD:

"The Board heard testimony from multiple witnesses, including Assistant Chief Aaron Lipski, Peden, Rebecca Coffee-Peden's former defense attorney who represented him in the sexual assault case-and psychotherapist Jay Schrinsky, who opined that Peden suffers from posttraumatic stress disorder (PTSD) stemming from the sexual assault case. The Board unanimously concluded that Peden should be terminated.

***

In this case, Peden was terminated for his refusal to comply with a direct order to transfer to a different station for the duration of his shift during civil unrest. As the City argued in closing at the administrative hearing, '[t]his case boils down to was [Peden] given a

direct order? Was he capable of following that direct order? Did he choose not to follow that direct order?' The circumstances surrounding the sexual assault case against Peden were not relevant.

***

Footnote 1: In 2017, Peden was charged with second-degree sexual assault of another firefighter, Aleah Ellis. Jason Strzelecki, also a firefighter and Ellis's then-boyfriend, was interviewed in the investigation. In 2019, the criminal case was dismissed."

FACTS:

"On June 17, 2020, MFD Chief Mark Rohlfmg terminated Peden from his position as a heavy-equipment operator. Rohlfing alleged that Peden had violated multiple rules and regulations stemming from an incident on June 5, 2020. In short, on that date, due to civil unrest, several fire stations were ordered to evacuate and relocate in order to keep personnel safe and remain available to respond to emergencies. Peden, who was on duty, was ordered to transfer to a different station. In response, Peden threatened to "lay up," which is a reference to calling out sick, if he was made to transfer. Peden explained that he believed that Jason Strzelecki, who had allegedly framed him in a past sexual assault case,[1]was scheduled to be working at the other station. Peden did not make any claim that he was actually ill or injured at that time. Due to his refusal to obey the order to transfer, Peden was sent home."

Legal Lesson Learned: Violating a direct order can be basis for termination, particularly in a period of civil unrest where fire stations were being evacuated to protect the firefighters.

File: Chap. 17 – Arbitration, incl. Mediation, Labor Relations

OH: CITY ELIMINATED 3 BC – ORDERED TO REINSTATE - GRIEVANCE DELAY – ARBITRATOR DECIDE IF FILED TIMELY

On March 13, 2024, in Youngstown Professional Firefighters, IAFF Local 312 v. City of Youngstown, the Ohio Court of Appeals for Seventh District held (3 to 0) that City cannot refuse to arbitrate because they believe the Grievance was not filed within 14-days; the union says it is a continuing violation of CBA, and the arbitrator can decide this procedural issue. The parties have been in litigation for five years over Battalion Chief positions. In September 2019 the City decided to eliminate three Battalion Chief positions through attrition, and union filed charges with State Employment Relations Board that this was in retaliation for union pushing city to upgrade their radios. The Board ordered City to reinstate those three positions, and in Dec. 2021, the Court of Appeals for the Seventh District agreed with the union and the Board. Two Captains have since been promoted to Battalion Chief (March 2022 and February 2023), but third Battalion Chief position has never been filed since 2021 retirement of Chief Caggiano.

THE COURT HELD:

"The grievance at issue in this appeal, Grievance 22-007, asserts 'the City's refusal to reinstate Battalion Chief positions, violating a [State Employment Relations Board Unfair

Labor Practice] decision and other court rulings, has resulted in violations of the CBA, safety concerns and compensation denied to our members since December 2019. (Grievance 22-007, p. 1.) The grievance further asserts the City has 'yet to acknowledge another vacancy in the rank of Battalion Chief created on 6/5/2021 by the retirement of [Battalion Chief] Sil Caggiano.'

***

For the foregoing reasons, we find the timeliness of the grievance is a procedural issue, which requires an interpretation of the CBA, and must be determined by the arbitrator. As a consequence, the City's assignments of error have no merit and the judgment entry of the trial court sustaining the complaint to compel arbitration is affirmed."

FACTS:

"On August 25, 2022, the Union advanced Grievance 22-007 to Step 3. At Step 3, the Union responded to the City's conclusion regarding timeliness as follows:

> First, the City continues to violate the CBA every third day when 'C turn occurs. The City closes Battalion 2 for 24 hours every 'C turn rather than staff it with 'Out of Class,' the way we have always done prior to this instance and have agreed to in Article 44 of the CBA. Additionally, the grievance is also timely because the City continues to violate the CBA every day that the City refuses to compensate bargaining unit members for time that they should have had in rank through back pay and any other benefits lost as a result of the continuing violation. The City committed a[n] [unfair labor practice] and ignored years of subsequent court rulings in the Union's favor, continuing to benefit from its unlawful action. The City's violation is a continuing violation and the grievance has been timely filed with the City.

***

On November 21, 2022, the City's Deputy Law Director represented the City would not participate in an arbitration hearing without a court order. On November 22, 2022, the Union requested the parties submit the City's procedural arbitrability objection to the Arbitrator. On December 1, 2022, the City's Deputy Law Director represented that the City would not agree to submit the issue to the Arbitrator."

Legal Lesson Learned: Arbitrators can decide the timeliness of a grievance.

Note: See March 16, 2024 article, "City's request to dismiss fire union case falters."
"This issue was the latest in a series of arguments between the two sides on battalion chief positions with the union continuously winning court cases."

Chap. 18 – Legislation, incl. Public Records