June 2024 – FIRE & EMS LAW NEWSLETTER

[NEWSLETTER IS NOT PROVIDING LEGAL ADVICE.]

Prof. Bennett and his pet therapy dog, FRYE.

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21 RECENT CASES

- **TEXTBOOK:** Updating 18 chapters of my textbook (2018 to current). FIRE SERVICE LAW (SECOND EDITION), Jan. 2017: View at the Waveland Press, Inc. site
- **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
- **2024: AMERICAN HISTORY – LEGAL LESSONS LEARNED FOR FIRE & EMS**, view at Scholar@UC

File: Chap. 1, American Legal System

U.S. SUP. CT: ARIZONA PRISONER DEATH SENTENCE REINSTATED – FED. HABEAS CORPUS DENIED

On May 30, 2024, in Ryan Thornell, Director, Arizona Department of Corrections v. Danny Lee, the United States Supreme Court held (6 to 3) that the 3-judge panel of the U.S. Court of Appeals for 9th Circuit (San Francisco) incorrectly granted habeas corpus relief. The defendant stole guns from a home of a person with whom he was drinking to fund a trip to Las Vegas, and killed was a baseball bat three in the home, including 7-year-old girl. He was convicted by a jury in Arizona state court, and at sentencing hearing his defense counsel called as an expert witness a Court-appointed forensic psychiatrist who testified about the defendant's troubled childhood. The State judge sentenced him to death, affirmed on appeal by Arizona Supreme Court. He then sought habeas corpus relied in Federal Court, and a U.S. District Court judge had held a hearing about the defendant's terrible childhood, and then refused habeas corpus. The U.S. Supreme Court majority (Justice Samuel Alito wrote opinion):

> "Jones also alleges significant childhood abuse. Brief for Respondent 44. Again, however, Arizona courts had heard much on this topic. They knew that Jones's father abused his pregnant mother, that his first stepfather beat both of them, and that his grandfather introduced him to drugs at young age. And they received testimony that any period of normalcy during Jones's childhood was 'too late' and 'not strong enough to counter the earlier abuse.' 4 Record 1069–1070. They nevertheless concluded that this abuse did not warrant leniency, primarily because it appeared unconnected to the murders. Jones, 185 Ariz., at 490–491, 917 P. 2d, at 219–220; 9 Record 2465. In federal court, Jones added two new allegations. First, he asserted that the grandfather who introduced him to alcohol also sexually abused him. Second, he claimed that his second stepfather, Randy, physically abused him. It is not likely that these allegations would have moved the state court either.
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> When a capital defendant claims that he was prejudiced at sentencing because counsel failed to present available mitigating evidence, a court must decide whether it is reasonably likely that the additional evidence would have avoided a death sentence. This analysis requires an evaluation of the strength of all the evidence and a comparison of the weight of aggravating and mitigating factors. The Ninth Circuit did not heed that instruction; rather, it downplayed the serious aggravating factors present here and overstated the strength of mitigating evidence that differed very little from the evidence presented at sentencing. Had the Ninth Circuit engaged in the analysis required by Strickland, it would have had no choice but to affirm the decision of the District Court denying habeas relief. We therefore reverse the judgment of the Court of Appeals and remand the case for further proceedings consistent with this opinion."

FACTS:

> "Thirty-two years ago, Danny Lee Jones murdered Robert Weaver, his 7-year-old daughter Tisha Weaver, and his grandmother Katherine Gumina. Jones knew that Robert owned a $2,000 gun collection, and after spending a day drinking and talking with Robert, Jones decided he wanted to steal the guns. He grabbed a baseball bat, beat Robert

into unconsciousness, and headed indoors to find the collection. Once inside, Jones encountered Gumina, who was watching television, and Tisha, who was coloring in a workbook before heading to bed. Jones struck Gumina hard enough to crack her skull, leaving her unconscious on the living room floor. Tisha apparently watched Jones attack her great-grandmother and ran to hide under her parents' bed. Marks on the carpet show that Jones dragged the girl out from under the bed before beating her hard enough 'to create a wound several inches wide, extending from her left ear to her left cheek.' State v. Jones, 185 Ariz. 471, 489, 917 P. 2d 200, 218 (1996). Jones then asphyxiated Tisha with a pillow Jones next began loading Robert's guns into Gumina's car. At that point, Robert regained consciousness. 'Blood smears at the scene showed that [Robert] attempted to run from' Jones, but Jones 'struck [him] in the head several more times. The last blow . . . was delivered while [Robert] knelt helplessly on the floor of the garage." 9 Appellant's Excerpts of Record in No. 18–99005 (CA9), p. 2449 (Record). Jones then skipped town with the guns, using them to pay for a trip to Las Vegas.

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Jones claims that his Sixth Amendment right to the effective assistance of counsel was violated during the sentencing phase of his capital trial. To succeed on such a claim, a defendant must show that counsel provided a 'deficient' performance that 'prejudiced' him. Strickland, 466 U. S., at 687 [Strickland v. Washington, 466 U. S. 668 (1984)]. When an ineffective-assistance-of-counsel claim is based on counsel's performance at the sentencing phase of a capital case, a defendant is prejudiced only if 'there is a reasonable probability that, absent [counsel's] errors, the sentencer . . . would have concluded that the balance of aggravating and mitigating circumstances did not warrant death.' Id., at 695. 'A reasonable probability is a probability sufficient to undermine confidence in the outcome. That requires a substantial, not just conceivable, likelihood of a different result." Pinholster, 563 U. S., at 189 (citation and internal quotation marks omitted). This standard does not require a defendant to show that it is more likely than not that adequate representation would have led to a better result, but '[t]he difference' should matter 'only in the rarest case.' Strickland, 466 U. S., at 697."

DISSENT [Opinion by Justice Ketanji Onyika Brown Jackson]:

"I agree with JUSTICE SOTOMAYOR that we are not the right tribunal to parse the extensive factual record in this case in the first instance. That is doubly true where the Ninth Circuit committed no legal error in reviewing that record to begin with. I respectfully dissent."

Legal Lesson Learned: Hopefully this decision will lead to far fewer habeas corpus decisions by Federal courts of prisoners convicted in state court.

File: Chap. 1, American Legal System

MI: CODE ENFORCEMENT – DRONE VIDEOTAPED SAVAGE YARD WITHOUT WARRANT – EXCLUS. RULE NOT APPLY

On May 3, 2024, in Long Lake Township v. Todd Maxon and Heather Maxon, the Supreme Court of Michigan held (7 to 0) that the video is admissible in zoning action. The Court held:

> "We hold that the costs of applying the exclusionary rule in this case would outweigh the benefits. Applying the exclusionary rule would prevent the Township from effectuating its nuisance and zoning ordinances—a serious cost. It would do so for little benefit given that exclusion of the photographs and video here would not deter future misconduct by law enforcement officers or their adjuncts, proxies, or agents. We agree with the Court of Appeals' conclusion that '[t]he exclusionary rule was not intended to operate in this arena,' and application of the rule in this case would serve no valuable function. We therefore affirm the judgment of the Court of Appeals and remand to the circuit court for further proceedings."

FACTS:

"In 2016, neighboring residents complained to Township officials that the Maxons were storing excessive junk on their property. The Township hired a contractor to take aerial photographs and video of the Maxons' property by using a flying drone. Aerial photographs and video of the property were taken on three occasions between April 2017 and May 2018. The contractor remotely controlled the drone from an open area near Long Lake Township Hall. In 2018, the Township initiated the instant lawsuit, alleging that by storing excessive amounts of salvaged material on their property the Maxons' use of their property was in violation of Long Lake Township Zoning Ordinance, § 10.2 and Long Lake Township Nuisance Ordinance, §§ 2B and 2G. The Township alleged that the Maxons significantly increased the volume of salvaged materials stored on their property after the 2008 settlement agreement, and it sought to enjoin the salvaging activity, arguing that the property constituted an impermissible salvage yard. The Township relied on the photographs and video taken from the aerial drone to support its case. The Maxons brought a pretrial motion to exclude the photographs and video from use in the civil action, arguing that they were the product of an unreasonable search in violation of the United States and Michigan Constitutions.

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> The Maxons moved to suppress the aerial photographs and all other evidence obtained by the township from use of the drone, asserting that the search was illegal under the Fourth Amendment of the United States Constitution. The court, Thomas G. Power, J., denied the Maxons' motion, reasoning that the drone surveillance did not constitute a search.
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> The Court of Appeals granted the Maxons' application for leave to appeal. In a split decision, the Court of Appeals, J ANSEN , P.J., and R ONAYNE KRAUSE, J. (FORT HOOD, J., dissenting), reversed, holding that the targeted drone surveillance of the Maxons' property violated the Fourth Amendment because it intruded into an area where the Maxons had a reasonable expectation of privacy and because the township obtained the photographs without a warrant and no traditional exception to the warrant requirement applied. 336 Mich App 521 (2021) (Long Lake I).
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Accordingly, the costs of applying the exclusionary rule in this case outweighed the benefits, and the photographs and video taken by the drone could not be suppressed. Because the exclusionary rule did not apply in this civil proceeding to enforce zoning and nuisance ordinances, the Court declined to address whether the use of an aerial drone under the circumstances of this case was an unreasonable search or seizure for purposes of the United States or Michigan Constitutions."

FACTS:

"This case has a long procedural history. In 2007, the Township sued Todd Maxon for allegedly violating its zoning ordinances by, among other things, storing salvaged vehicles on his property. The parties reached a resolution of that litigation and memorialized it in writing. The resolution was favorable to Mr. Maxon because the Township agreed to dismiss its complaint against Mr. Maxon with prejudice and 'not to bring [any] further zoning enforcement action . based upon the same facts and circumstances [that] were revealed during the course of discovery and based upon the Long Lake Township Ordinance as it exist[ed] on the date of [the] settlement agreement.' Mr. Maxon released the Township and its representatives from any causes of action he may have had against them. Although Mr. Maxon did not indicate that he would cease doing any activity that gave rise to the lawsuit, it may reasonably be inferred from the Township's agreement not to bring further zoning actions against Mr. Maxon for the same facts and circumstances discovered in the original action that no future zoning violation would be pursued against him if he maintained the status quo.

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[Footnote 1.] The use and availability of aerial drones in the public and private sector has dramatically expanded. Drone technology is rapidly evolving, as are people's expectations of privacy in the face of this technology, and there remains uncertainty as to how trespass law applies to low-altitude drone flights. Because we do not need to decide the issue to resolve this case, we leave this question for another day."

Legal Lesson Learned: To avoid motions to suppress, consider getting an administrative search warrant prior to using drone to videotape zoning violation.

File: Chap. 2, Safety

PA: FF KILLED - OTHERS INJURED - WOMAN DROVE JEEP BAD BREAKS INTO ACCIDENT SCENE – 12-24 YRS PRISON

On May 17, 2024, in Commonwealth of Pennsylvania v. Jacquelyn Walker, the Superior Court of Pennsylvania held (3 to 0) that the sentence was appropriate. The accident scene on July 24, 2021 was westbound on I-76 at 3 am. The defendant drove her 2004 Jeep Grand Cherokee over the rumble strips and into the right berm, and struck three members of the Belmont Hills Fire

Department, killing firefighter Thomas Royds, and also striking a Trooper. The Superior Court agreed with the Sentencing Judge who wrote: “Who protects those first responders who are willing to expose themselves to possible harm or death to protect us? *Id*. at 83. [T]hey should not have to be exposed to sustained reckless behavior amounting to malicious conduct almost certain to cause death or serious bodily injury such as the conduct of this defendant.’ *Id*. It answered its own question by concluding that ‘first responders can only be protected by the Court,’ and that it could only do so by imposing "appropriate punishment for this type of malice criminal conduct.’ *Id*. at 84.” The Superior Court held:

“Appellant argues that the sentence imposed ‘amounted to the functional equivalent of a life sentence,’ because she is a 64-year-old disabled woman, and therefore was "at odds with the fundamental norms of the sentencing process.’

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We cannot say that the sentencing court abused its discretion by imposing an aggregate term of 12 to 24 years' imprisonment where Appellant admitted to acting with such recklessness that it amounted to legal malice and which resulted in the killing of one person, caused severe injuries to two others, and endangered several more, all of whom were first responders who had clearly marked the road with sufficient warnings. The three sentence terms that make up the aggregate sentence are all within the standard range, and each are for a different victim: murder in the third degree of Firefighter Thomas Royds; aggravated assault by vehicle of Firefighter Alex Fischer; and aggravated assault by vehicle of Firefighter Sam Sheffer.

Appellant's implicit argument is that the severity of the crime and admitted malice with which she caused death and serious injury could not warrant standard range sentence terms. As the sentencing court explained: The amount of pain and suffering that this defendant has caused is enormous. The terrible impact of her crime is certainly enduring. It's clearly apparent that the injuries could have been far worse; we have firefighters and the Trooper Burnett who escaped death or serious bodily injury just simply by inches that day. She acted recklessly and she acted with malice. She did not care about the rules of the road or the safety of others. She had no justification or excuse for her conduct.”

FACTS:

“By way of a brief factual recitation, Appellant admitted, *inter alia*, that on July 24, 2021, a Belmont Hills fire truck had responded to an accident scene involving two cars in the westbound lane of Interstate 76, at mile marker 335. *Id*. at 17. Its lights were activated and parked in the right lane of the roadway to protect the crash vehicles, which were both parked on the berm. *Id*. Fire personnel exited the truck and placed traffic cones in the right lane of travel as a warning to motorists. *Id*. At about 3:06 a.m., Troopers Michelle Naab and Jarred Burnett of the Pennsylvania State Police responded to the scene. *Id*. The state police troopers' marked vehicle, with overhead emergency lights activated, was parked in the right travel lane in front of the Belmont Hills fire truck. *Id*. at 18. Members of the Belmont Hills Fire Department were standing

on the right berm of the roadway next to the fire truck. *Id*. at 19. Trooper Burnett was standing on the driver's side of one of the vehicle[s] involved in the initial crash. *Id*.

At this moment, Appellant drove her 2004 Jeep Grand Cherokee, going westbound, over the rumble strips and into the right berm. *Id*. at 19, 22. She entered the active emergency response area, and her jeep proceeded between the Belmont Hills fire truck and the right concrete barrier. *Id*. at 19. Appellant struck three members of the Belmont Hills Fire Department. *Id*. Appellant's jeep continued westbound until it struck the rear of one of the vehicles involved in the initial crash, propelling that vehicle into the highway. *Id*. Trooper Burnett was struck in the course of that crash. *Id*.

Belmont Hills Firefighter Thomas Royds was found unconscious and unresponsive. He later died of his blunt force injuries. *Id*. at 19-20. Belmont Hills Firefighter Alex Fischer, was also found unconscious with serious injuries including a broken femur, broken pelvis, and broken ribs. *Id*. at 20. The third Belmont Hills Firefighter Samuel Shaffer was unconscious and sustained serious injuries to his head, including an orbital fracture, a concussion, lacerations, and a brain bleed. *Id*. He sustained further injuries to his right leg. *Id*. Pennsylvania Trooper Burnett was unconscious and was treated for a concussion and injuries to his neck, hip, pelvis, and elbow. *Id*. at 20-21.

An investigation of the scene showed that there was no roadway evidence of pre-impact braking by Appellant, and a post-crash investigation conducted on Appellant's vehicle revealed that the vehicle was in very poor condition. *Id*. at 22 - 23. In particular the braking system was in bad condition for a long period of time, and that the driver of the vehicle would have known there was a serious issue. *Id*. at 23.

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The [State Patrol] lieutenant investigated Appellant's vehicle braking system. He testified [at Sentencing hearing] that it was in such disrepair that it was rendered inoperable.

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Essentially, Appellant asks us to reweigh the relevant evidence and provide greater weight to her difficult circumstances than to the effects of her bad decisions. That request is beyond our purview."

Legal Lesson Learned: The sentence imposed was appropriate for pain inflicted.

> Note: See National Fallen Firefighters Foundation article on FF Thomas E. Royds, better known as "Roydsy."

File: Chap. 2, Safety

NY: FDNY EMT INJURED UNEVEN CONCRETE FD – CAN'T SUE CITY NY "FIREMAN'S RULE" – ONLY WORKER COMP

On May 15, 2024, in Maritza Sanchez v, The City of New York, Judge J. Machelle Sweeting, Supreme Court, New York County, granted the City's motion to dismiss this lawsuit. The EMT

was injured on July 25, 2022, filed for workers' compensation, and received approximately $8,767.85 in workers' compensation benefits and $8,767.85 in medical benefits. While NY has amended the "fireman's rule" to allow police and firefighters to sue third parties for injuries at premises cause by breach of statutes and safety codes, this does not allow lawsuits against their employer. The Court held:
"More importantly, even if GML 205-e [amending Fireman's Rule'] were applicable here, the New York Court of Appeals has made clear that an employee who receives workers' compensation benefits cannot also seek to hold his employer liable under GML 205-e. *See Matter of Diegelman v City of Buffalo*, 28 N.Y.3d 231 (2016): 'It is well settled that workers' compensation benefits are generally the 'sole and exclusive remedy of an employee against his [or her] employer for injuries in the course of employment,' and that the receipt of such benefits 'precludes suits against an employer for injuries in the course of employment' *(Weiner v. City of New York,* 19 N.Y.3d 852, 854, 947 N.Y.S.2d 404, 970 N.E.2d 427 [2012])."

FACTS:
" Plaintiff Maritza Sanchez alleges that on July 25, 2022, while working as an Emergency Medical Technician ('EMT') for the New York City Fire Department ('FDNY'), she was restocking her ambulance, that was parked at the FDNY EMS (Emergency Medical Services) station 4 located at Pier 36, when she stepped on broken, uneven, and defective concrete, which caused her to lose her balance and fall.

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The City argues that plaintiff is now precluded by the Worker's Compensation Law from holding the City liable for her injury. In support of its arguments, the City submitted, *inter alia*, a sworn Affidavit by Levi Grosswald, who is employed as the Deputy Chief of the Workers' Compensation Division of the New York City Law Department (NYSCEF Doc. 12). The Affidavit states, in part, that plaintiff filed Workers' Compensation claim number W057-22-96024 with respect to the subject incident, and that to date, plaintiff has received approximately $8,767.85 in workers' compensation benefits and $8,767.85 in medical benefits.

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The court first notes that it is unclear on this record that GML 205-e applies in this case, as this section of the statute appears to apply to police officers only, whereas at the time plaintiff was injured, she was employed by the New York Fire Department. *See* 15 N.Y. Practice, New York Law of Torts 12:7 (Premises liability-Statutory abolition of firefighter's rule and statutory causes of action for injuries or death to firefighters and police personnel):
In 1989, after the Court of Appeals had in 1988 extended the firefighter's rule to police officers, the Legislature enacted section 205-e of the N.Y. Gen. Mun. Law to create a statutory cause of action on behalf of police employees or their surviving relatives. .

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More importantly, even if GML 205-e were applicable here, the New York Court of Appeals has made clear that an employee who receives workers' compensation benefits cannot also seek to hold his employer liable under GML 205-e. *See Matter of Diegelman v City of Buffalo*, 28 N.Y.3d 231 (2016)…."

Legal Lesson Learned: EMT's only remedy is worker's comp.

Note: Several states have abolished the "Fireman's Rule" to allow fire and police to sue third parties for injuries at a premises. Ohio has not abolished the Fireman's Rule. Florida.

Minnesota's "Fireman's Rule".

New Jersey. "In a decision issued on March 13, 2007, the Supreme Court of New Jersey ruled that the common law doctrine prohibiting first responders from recovering damages from a property owner for a personal injury sustained while confronting an emergency on the owner's premises, is no longer in effect."

Ohio has not abolished the Fireman's Rule. "In a victory for the rights of police officers and firefighters throughout the State of Ohio, on March 25, 2009, an unanimous Ohio Supreme Court refused to extend Ohio's Fireman's Rule to allow independent contractors to escape liability where an emergency responder (police officer, firefighter, etc.) is injured in the course of their employment as a result of a defective condition created by that contractor. In announcing its decision in the case of *Torchik v. Boyce*, the Court wrote that it 'ruled today that an independent contractor whose negligent work is alleged to have caused injury to a public safety officer is not covered by a common law 'fireman's rule' that immunizes property owners from civil liability for injuries suffered by public safety officers who enter their property while on duty.'"

File: Chap. 3, Homeland Security

U.S. SUP. CT: PARKLAND SHOOTING – NRA CAN SUE STATE OF NY – 1st AMEND – TOLD INSUR. COMPANYS DROP NRA

On May 30, 2024, in National Rifle Association v. Vullo (Maria Vullo, former Superintendent of the New York Department of Financial Services), the U.S. Supreme Court held (9 to 0) that NRA's lawsuit for alleged violation of First Amendment shall be reinstated and proceed to pre-trial discovery, thereby reversing U.S. Court of Appeals for 2nd Circuit which had ordered case dismissed. In 2017, a gun-control advocacy group had advised Vullo that insurance companies in New York were illegally insuring NRA members who purchased "Carry Guard" that they would be insured even for intentional criminal acts; Vullo opened an investigation of two insurance companies (who were fined and cancelled their policies). On Feb. 14, 2018, February 14, 2018, a gunman opened fire at Marjory Stoneman Douglas High School, murdering 17 students and staff members. The Governor and Vullo then started warning NY insurance companies to not insure NRA, including a "private meeting" by Vullo with insurance executives.

The Court held:

"As discussed below, Vullo was free to criticize the NRA and pursue the conceded violations of New York insurance law. She could not wield her power, however, to threaten enforcement actions against DFS-regulated entities in order to punish or suppress the NRA's gun-promotion advocacy. Because the complaint plausibly alleges that Vullo did just that, the Court holds that the NRA stated a First Amendment violation.

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For the reasons discussed above, the Court holds that the NRA plausibly alleged that Vullo violated the First Amendment by coercing DFS-regulated entities to terminate their business relationships with the NRA in order to punish or suppress the NRA's advocacy."

FACTS:

"In the midst of the investigation, tragedy struck Parkland, Florida. On February 14, 2018, a gunman opened fire at Marjory Stoneman Douglas High School, murdering 17 students and staff members. Following the shooting, the NRA and other gun-advocacy groups experienced 'intense backlash' across the country. 49 F. 4th, at 708. Major business institutions, including DFS-regulated entities, spoke out against the NRA, and some even cut ties with the organization. App. to Pet. for Cert. 244. MetLife, for example, ended a discount program it offered with the NRA. On February 25, 2018, Lockton's chairman 'placed a distraught telephone call to the NRA,' in which he privately shared that Lockton would sever all ties with the NRA to avoid 'losing [its] license' to do business in New York.' Id., at 298, Complaint ¶42. Lockton publicly announced its decision the next day. Following Lockton's decision, the NRA's corporate insurance carrier also severed ties with the organization and refused to renew coverage at any price. The NRA contends that Lockton and the corporate insurance carrier took these steps not because of the Parkland shooting but because they feared 'reprisa[l]' from Vullo. Id., at 210, ¶44; see id., at 209–210, ¶¶41–43.

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The NRA and the Solicitor General [of the United States] reject the Second Circuit's application of the framework, while Vullo defends it. The Court now agrees with the NRA and the Solicitor General. To state a claim that the government violated the First Amendment through coercion of a third party, a plaintiff must plausibly allege conduct that, viewed in context, could be reasonably understood to convey a threat of adverse government action in order to punish or suppress the plaintiff 's speech. See 372 U. S., at 67–68. Accepting the well-pleaded factual allegations in the complaint as true, the NRA plausibly alleged that Vullo violated the First Amendment by coercing DFS-regulated entities into disassociating with the NRA in order to punish or suppress the NRA's gun-promotion advocacy.

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As DFS superintendent, Vullo had direct regulatory and enforcement authority over all insurance companies and financial service institutions doing business in New York. See N. Y. Fin. Servs. Law Ann. §§202, 301. Just like the commission in Bantam Books, Vullo could initiate investigations and refer cases for prosecution. Indeed, she could do much more than that. Vullo also had the power to notice civil charges and, as this case shows, enter into consent decrees that impose significant monetary penalties. Against this backdrop, consider Vullo's communications with the DFS-regulated entities, particularly with Lloyd's. According to the NRA, Vullo brought a variety of insurance-law violations to the Lloyd's executives' attention during a private meeting in February 2018."

Legal Lesson Learned: This unanimous First Amendment decision will undoubtedly lead to other cases against government officials; fire code enforcers should use great care in publicly discussing targets of investigation.

File: Chap. 3, Homeland Security

DC: RETIRED NY COP - TRUMP RALLY / U.S. CAPITOL - ATTACKED PD – WORE BODY ARMOR - 10-YRS PRISON

On May 28, 2024, in United States of America v. Thomas Webster, the U.S. Court of Appeals for the District of Columbia Circuit held (3 to 0) that jury conviction of five felonies, and judge's sentence of 10 years in prison, is confirmed. The Court held:

"Thomas Webster attended former-President Trump's rally on January 6, 2021, and then went to the Capitol. Upon arriving, Webster confronted a line of police officers and violently assaulted Officer Rathbun of the Metropolitan Police Department. A jury convicted Webster of five felonies and one misdemeanor offense. The district court imposed a ten-year prison sentence. Webster appeals, raising challenges both to his convictions and his sentence. We have considered each of Webster's challenges and, because none of them succeed, we affirm his convictions and sentence. … Turning to Webster's sentence, he challenges the district court's inclusion of a four-level, use-of-body-armor enhancement. He also argues that the length of his sentence was substantively unreasonable as compared to other January 6th defendants. Neither of those arguments succeeds."

FACTS:

> "Two days before the rally, Webster drove from his home in New York to Washington, D.C. He brought an assortment of gear with him, including body armor and a United States Marine Corps flag on a metal flagpole. J.A. 1120–1122. Webster attended former-President Trump's speech on January 6th, wearing his body armor and carrying his Marine Corps flag. After that, he joined the crowd in marching on the Capitol. Webster made his way toward the Capitol's West Terrace. As he got closer, he heard 'flash bangs going off[,]' 'sense[d] that there was some gas[,]' and 'saw people being injured.' J.A. 1140. He continued forward until he reached the leading edge of the rioters. A single row of bicycle racks separated them from a police line. He recognized that the bicycle racks were meant to keep people back. But he tried to get past them nonetheless.
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> Officer Noah Rathbun of the Metropolitan Police Department was one of the officers on the other side of the police line. Webster approached him, yelling and accusing him of being a communist who was attacking Americans. Officer Rathbun pushed Webster back from the barrier several times, and Webster responded by pushing the bicycle rack toward Officer Rathbun. Webster then swung his flagpole toward Officer Rathbun 'in a chopping motion.' J.A. 852. The flagpole struck the bicycle rack. Officer Rathbun grabbed the flagpole and wrested it from Webster. Shortly thereafter, the mob broke through the police line. Webster charged Officer Rathbun, knocking him to the ground. He got on top of Officer Rathbun and began pushing Officer Rathbun's gas mask into his face. After about ten seconds of struggling, Webster got up, and the two men broke apart.

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Turning to Webster's sentence, he challenges the district court's inclusion of a four-level, use-of-body-armor enhancement. He also argues that the length of his sentence was substantively unreasonable as compared to other January 6th defendants. Neither of those arguments succeeds.

Webster's first objection to his sentence is to the district court's imposition of an enhancement for 'us[ing] body armor during the commission of the offense[.]' U.S. SENT'G GUIDELINES MANUAL § 3B1.5(2)(B) (U.S. SENT'G COMM'N 2021). Under the relevant Guideline, '[u]se' means 'active employment in a manner to protect the person from gunfire[,]' or 'as a means of bartering.' *Id.* § 3B1.5 cmt. n.1. It does not mean 'mere possession[,]' such as if 'the body armor was found in the trunk of the car but not used actively as protection[.]' *Id.*

Webster used body armor while committing his assault. *See* U.S.S.G. § 3B1.5(2)(B). He put it on that morning, in part, for protection. He wore it throughout the day, including as he attacked Officer Rathbun. Given those facts, the district court correctly applied the enhancement. *See United States v. Shamah*, 624 F.3d 449, 459 (7th Cir. 2010); *United States v. Barrett,* 552 F.3d 724, 727-728 (8th Cir. 2009).

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In imposing a criminal sentence, a district court must consider 'the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct[.]' 18 U.S.C. § 3553(a)(6). Webster argues that the district court failed that task because his 120-month sentence is disproportionate to ten January 6th-related cases in which the defendants received sentences ranging from 33-90 months.

That is a false comparison. There are material differences between Webster's case and each of those he cites. *See United States v. Alford*, 89 F.4th 943, 953-954 (D.C. Cir. 2024). For example, seven of the ten sentences Webster references resulted from plea agreements rather than trials.[3] Defendants who go to trial are not 'similarly situated' to those who plead guilty, and therefore 'the disparity in their treatment is generally permissible. *United States v. Otunyo*, 63 F.4th 948, 960 (D.C. Cir. 2023); *see Alford*, 89 F.4th at 954."

Legal Lesson Learned: Federal Sentencing Guidelines authorizes an enhanced sentence for defendants who wear body armor.

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

Chap. 5 – Emergency Vehicle Operations

File: Chap. 6, Employment Litigation

IL: CORONARY ARTERY DISEASE – LT. 28 YEARS FIRE SERVICE – CAN'T PROVE CAUSED BY JOB – NO WORK COMP

On May 24, 2024, in Jerry Faruzzi v. The Illinois Workers Compensation Commission, the Court of Appeals of Illinois, First District, Workers' Compensation Commission Division, held (5 to 0) that the firefighter failed to prove the artery disease was caused by the job. The Court held:

"The claimant argues that Dr. Moisan's testimony that the claimant's firefighting activities contributed in part to his development of coronary artery disease is a judicial admission by the Village based on Dr. Moisan's position as medical director for the Village's fire department. We disagree…. As noted earlier, Dr. Moisan's causation opinion is hardly unequivocal. When asked directly whether the claimant's coronary artery disease was caused or contributed to by his firefighting duties, Dr. Moisan stated: 'I can't know that. I can't exclude it.'"

FACTS:

"At all times relevant, the claimant was a firefighter/paramedic employed by the Village. He had been employed in that capacity for more than 28 years, rising to the rank of lieutenant. The claimant's duties as a firefighter/paramedic required him to perform hazardous tasks under emergency conditions, involving strenuous exertion under adverse conditions such as fire, heat, smoke, darkness, and cramped and confined surroundings. He was also subjected to emotional and psychological stress.

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The Village's firefighters are required to undergo periodic fitness-for-duty examinations. Prior to January 2015, the claimant underwent 13 such examinations and was found fit for duty. The claimant testified that, prior to 2015, he had no problems with his heart and had not received medical treatment for heart problems. He admitted that he experienced shortness of breath with heavy exertion going back to the summer of 2014 and had experienced palpitations and light headedness. The claimant also admitted that he smoked less than one pack of cigarettes per day for a period of 10 years but had not smoked since 1994. Medical records of the claimant's primary care provider, Dr. Amit Joshi, admitted in evidence reflect that the claimant had high cholesterol levels from 2000 through 2014 and was treated for the condition with Lipitor. Dr. Joshi's records also reflect that, on March 29, 2004, the claimant underwent echocardiography due to chest pains he had experienced one year earlier and recent heart palpations. When the claimant was seen by Dr. Charles Berkelhammer, a gastroenterologist, on April 29, 2011, he reported a family history of heart problems but denied chest pains, shortness of breath, or congestive heart failure."

***

The Commission found that the claimant failed to prove that his development of coronary artery disease arose out of and in the course of his employment as a firefighter and set forth the evidence it relied upon in reaching that conclusion. Based on the record before us, we cannot conclude that the Commission's decision is against the manifest weight of the evidence. For the reasons stated, we affirm the order of the circuit court which confirmed the decision of the Commission.

***
The opinions of Drs. Moisan and Everett on the issue of causation were at best equivocal and at worst internally contradictory. Dr. Samo's opinion, however, was unequivocal; the duties of a firefighter cannot cause coronary artery disease. It was the function of the Commission to resolve conflicts in the evidence, including medical testimony; assess the credibility of the witnesses; assign weight to the evidence; and draw reasonable inferences from the evidence. *ABBF Freight System v. Illinois Workers' Compensation Commission*, 2015 IL App (1st) 141306WC, ¶ 19. The Commission particularly referenced the equivocal portions of the deposition testimony of Drs. Moisan and Everett and the unequivocal passage from Dr. Samo's deposition."

Legal Lesson Learned: Extremely difficult to prove coronary artery disease caused by the job.

> Note: In Ohio, the legislature has enacted a "statutory presumption" law for certain firefighter diseases. Section 4123.68 | Schedule of compensable occupational diseases.

For example:

"(W) Cardiovascular, pulmonary, or respiratory diseases incurred by firefighters or police officers following exposure to heat, smoke, toxic gases, chemical fumes and other toxic substances: Any cardiovascular, pulmonary, or respiratory disease of a firefighter or police officer caused or induced by the cumulative effect of exposure to heat, the inhalation of smoke, toxic gases, chemical fumes and other toxic substances in the performance of the firefighter's or police officer's duty constitutes a presumption, which may be refuted by affirmative evidence, that such occurred in the course of and arising out of the firefighter's or police officer's employment.

***
(X)(1) Cancer contracted by a firefighter: Cancer contracted by a firefighter who has been assigned to at least six years of hazardous duty as a firefighter constitutes a presumption that the cancer was contracted in the course of and arising out of the firefighter's employment if the firefighter was exposed to an agent classified by the international agency for research on cancer or its successor organization as a group 1 or 2A carcinogen."

See IAFF list of states with statutory presumption laws.

Chap. 6, Employment Litigation

PA: PHILADELPHIA FF - TRANSGENDER FEMALE - DENIED INSUR. "FACIAL SURGERY" – CASE DISMISSED / CAN REFILE

On May 16, 2024, in Jane Doe [not actual name] v. City of Philadelphia, Independent Blue Cross, Firefighters' & Paramedics Union, IADD Local 22, the plaintiff, a member of the FD for three decades, was denied insurance coverage for "facial feminization surgery." United States District Court Judge Wendy Beetlestone granted the defendants' motion to dismiss her lawsuit

since it is not specific regarding alleged unlawful conduct of each of the three defendants, but the dismissal is "without prejudice" meaning she can refile with a more specific Complaint. The plaintiff had filed an EEOC complaint and received a "Right to Sue" letter from EEOC, so she has properly taken steps to file a lawsuit. The Court held:

"Here, Doe levies most of her allegations against Defendants as a whole, without identifying the conduct for which the City specifically is responsible. The only non-conclusory allegations against the City are that: (1) it employed Doe; (2) as her employer, the City was 'responsible for the provision of benefits to [her] including employer-sponsored healthcare benefits;' (3) the City funded that plan; and, (4) '[i]t is believed and therefore averred that' the City, along with the other Defendants 'exercised extensive control over benefits,' including health insurance. The key allegations relating to Defendants' liability-that they denied Doe health insurance coverage for treatments necessary to treat her gender dysphoria and misapplied her policy's cosmetic surgery exclusion in doing so-do not distinguish between the conduct of the City, Independence Blue Cross, and Local 22. The Amended Complaint therefore does not plead facts sufficient to show that Doe is plausibly entitled to relief from the City.

***
For the foregoing reasons, the City of Philadelphia's Motion to Dismiss will be granted, and Doe's Amended Complaint will be dismissed without prejudice."

FACTS:

"Doe is a longtime firefighter who has been employed by the City for almost three decades. She is a member of her union, Defendant Philadelphia Firefighters' & Paramedics' Union, I.A.F.F., Local 22 ('Local 22'). She receives health insurance through a self-funded employer-sponsored health plan, underwritten and administered by Defendant Independence Blue Cross.

Doe is a transgender woman. She has been diagnosed with gender dysphoria, a medical condition recognized in the Diagnostic and Statistical Manual of Mental Disorders 5 (DSM-5). The World Professional Association for Transgender Health ('WPATH'), which publishes 'widely accepted standards of care for the treatment of gender dysphoria,' notes that 'medically necessary treatment for gender dysphoria may require facial feminization surgery' ('FFS'). "[I]n an attempt to alleviate [her] gender dysphoria," Doe sought preauthorization for insurance coverage from Defendants for FFS. Doe's health insurance policy covered treatment for "functional impairments" but excluded cosmetic surgeries from coverage. Defendants allegedly applied this exclusion in a discriminatory fashion, concluding that, in seeking to undergo FFS, Doe merely "was attempting to 'improve her appearance.'" Doe's multiple appeals of this decision were unsuccessful. The denial of her request has caused Doe profound distress, to the point that she has considered suicide. Doe has 'found it difficult to function at work and in public and is constantly misgendered because, without FFS, she is read as not passing or not conforming to the sex assigned to her at birth.'

***

She filed a complaint with the EEOC and received a right to sue letter. That was sufficient to exhaust her PFPO claims even though she did not cross-file with the PHRC or the Philadelphia Commission. *Id.* The City's Motion will be denied on this ground.

***

The entirety of Doe's Amended Complaint, however, fails to identify which of the three Defendants committed which alleged wrongful acts with sufficient specificity to survive dismissal."

Legal Lesson Learned: This lawsuit will likely be refiled, focusing on the Insurance Company's cosmetic surgery exclusion.

> Note: See this abstract (Aug. 12, 2023): **"**The Limited Coverage of Facial Feminization Surgery in the United States: A Literature Review of Policy Constraints and Implications."
>
> "In 2014, the Department of Human Health Services (HHS) lifted the transgender exclusion policy, leading to an increase in policies regarding GASs for both private and state insurance. However, there are differences in medical necessity requirements among policies, which may not align with the World Professional Association for Transgender Health (WPATH) criteria. States that prohibit exclusion tend to offer better coverage for FFS. These states are mainly located in the western and northeast regions, whereas states in the southern and middle east regions have less coverage. Among the procedures, chondrolaryngoplasty is the most covered, while facial and cervical rhytidectomy are the least covered. To enhance transgender care, it is crucial to reach a consensus on how to offer coverage for facial feminization surgery. However, there is a lack of adequate research on this topic, and there is a need for resources and tools to assess the results of FFS procedures."

See also: May 13, 2024 decision by U.S. Court of Appeals for the 11th Circuit, Anna Lang v. Houston County, Georgia:

> "Anna Lange is a transgender woman…. Lange was formally diagnosed with gender dysphoria by a healthcare provider in 2017. The next year, Lange informed the Sheriff's Office that she was transgender and would be living as a woman. Following her formal diagnosis, Lange's healthcare providers started her on a treatment plan to align her physical characteristics with her gender identity. The plan comprised of hormone therapy and gender-affirming surgery, both of which are shown to alleviate symptoms of gender dysphoria. In 2018, her healthcare providers determined that a vaginoplasty—a surgical procedure to feminize her genitals—was medically necessary. Lange turned to her health insurance to cover her medically necessary surgery. However, Lange's request for coverage was denied based on the Health Plan's exclusion of '[d]rugs for sex change surgery' and '[s]ervices and supplies for a sex change and/or the reversal of a sex change' (together, the Exclusion)…. In granting summary judgment to Lange on the Title VII claim, the district court found the Exclusion facially discriminatory

as a matter of law. The Title VII claim then proceeded to trial, and a jury awarded Lange $60,000 in damages. After trial, the district court entered an order declaring that the Exclusion violated Title VII and permanently enjoined the Sheriff and Houston County from any further enforcement or application of the Exclusion."

The 11th Circuit agreed:

"[W]e conclude that the district court was correct in finding that the Exclusion violated Title VII. There is no genuine dispute of fact or law as to whether the Exclusion unlawfully discriminates against Lange and other transgender persons. The Exclusion is a blanket denial of coverage for gender-affirming surgery. Health Plan participants who are transgender are the only participants who would seek gender-affirming surgery. Because transgender persons are the only plan participants who qualify for gender-affirming surgery, the plan denies health care coverage based on transgender status."

File: Chap. 6, Employment Litigation

NJ: EMT SLIPPED ON ICE – RETIRED – ACCIDENTAL DISABILITY PENSION DENIED – NOT "UNEXPECTED"

On May 14, 2024, in Dennis McCool v. Board of Trustees, Public Employees' Retirement System, the Superior Court of New Jersey, Appellate Division, upheld the Board and the Administrative Law Judge decision denying ADR [accidental disability pension] benefits. ADR is 72.7% of base salary at time of traumatic event, ordinary is 43.6% of final average salary. The Court held (3 to 0):

"On January 4, 2019, petitioner applied for ADR benefits. In his application he wrote:

On January 9, 2018[,] I slipped on icy snowy steps returning to vehicle from assisting a patient into residence [,] which resulted in a large piece of disc shearing off and compressing [my] sciatic nerve. I then underwent multiple surgeries and now have permanent nerve damage[,] a spinal nerve stimulator[,] and limited mobility.

On October 17, 2019, the Board denied McCool's application for ADR benefits because his disability was not the result of a traumatic event that was 'undesigned and unexpected.'

***

McCool's contention that his case is similar to *Richardson* and *Moran v. Board of Trustees, Police &Firemen's Retirement System*, 438 N.J.Super. 346 (App. Div. 2014), is not convincing. In *Richardson*, a corrections officer was injured while attempting to subdue an inmate. 192 N.J. at 193. There, the officer straddled the inmate to hold him down. *Ibid.* The inmate continued to kick, punch, and throw his body around, and eventually pulled himself loose. *Ibid.* The inmate then forcefully jerked up from the ground and knocked the officer backward, injuring him. *Ibid.*

In *Moran,* the court found an undesigned and unexpected event occurred when a 'combination of unusual circumstances . . . led to [the member's] injury.' 438 N.J.Super. at 354. In that case, a firefighter was injured after kicking down a door to a burning building because he heard voices yelling from inside. *Id.* at 349-50. The firefighter was part of the 'engine company' that brought

hoses to burning buildings and not part of the ‘truck company’ that brought equipment used to forcibly enter buildings. *Id.* at 349. The ‘truck company’ was running late so the firefighter attempted to rescue victims trapped inside the building despite not having the proper equipment. *Id.* at 354. We concluded the firefighter's injury was caused by an undesigned and unexpected event because the firefighter faced unusual circumstances, including the presence of victims inside the burning building, the "truck company's" delay, and the lack of equipment to break down the door. *Ibid.*

Unlike in *Richardson* and *Moran*, petitioner's injury did not result from an ‘unexpected happening.’ He did not face unusual circumstances like in *Moran*; nor was he injured as a individual like in *Richardson*. After considering all of the evidence presented and the applicable legal standards, the ALJ determined McCool failed to prove by a preponderance of the evidence his disability was caused by an undesigned and unexpected event. The ALJ's decision was based on ample findings supported by substantial credible evidence in the record and was not arbitrary, capricious, or unreasonable. We discern no basis to disturb the Board's decision adopting the ALJ's findings and denying McCool's application for ADR benefits.

The Board's decision is supported by sufficient credible evidence on the record as a whole. *R.* 2:11-3(e)(1)(D). To the extent we have not otherwise addressed McCool's arguments, they are without sufficient merit to warrant discussion in a written opinion. *R.* 2:11-3(e)(1)(E).”

FACTS:
“McCool was employed as an emergency medical technician (‘EMT’) by the Voorhees Township Fire Department from 2006 to 2019, when he retired. On January 9, 2018, McCool and his partner responded to a call for assistance. When they arrived at the scene, they found an elderly man sitting in the passenger side of a vehicle at the base of his driveway. The "driveway was a solid sheet of ice up[]hill," and the patient could not walk up the driveway to his house. Prior to their arrival, the patient attempted to make his way up the driveway, slipped, and fell outside the vehicle. The patient declined medical attention but requested assistance to get up the driveway and into his residence.

***
McCool and his partner assisted the patient ‘up the[] walkway to [his] front door into the residence.’ While his partner was attending to the patient, McCool ‘offered to the elderly woman, the wife of the [patient,] to spread some salt down their driveway, [be]cause it was a solid sheet of ice and she had some salt in her garage.’ After he salted the driveway, McCool went back inside the residence where his partner was finalizing the accident report. McCool did not salt the walkway leading to the residence.

To leave the scene, McCool and his partner ‘had to go back down the walkway that [they] assisted the patient up through[,] which was covered in snow and ice." As they were doing so, McCool warned his partner ‘to be careful not to slip and not long after [he] said that, [McCool] slipped.’ McCool ‘did[not] fall . . . [he] caught [himself].’ According to McCool, his ‘foot went out and [he] dropped down but . . . [he] caught [himself] with balance.’ McCool continued back to the ambulance.

He returned to the station and was not experiencing 'any trouble.' He finished his shift, responded to other calls, and returned home where he slept for a few hours. When McCool woke, '[his] feet were numb and tingling, [his] right leg . . . would[not] work. So, [he] couldn't get out of bed.' He was not scheduled to work the following two days. During that time, he did not report any injury. He 'assumed [he] just tweaked a muscle or something' and used a heating pad. McCool's condition did not improve, and he called out sick for his next shift. His supervisor contacted him to find out why he called out, and McCool explained what happened."

Legal Lesson Learned: Enhanced accidental disability pension for traumatic injury is limited to those injuries that are an "unexpected."

File: Chap. 7, Sexual Harassment

NB: FEMALE FF FIRED – INVEST. CAPT. WAREHOUSE FIRE – WON ARBITRATION - CITY SETTLES $650K / ATTY FEES

On May 13, 2024, in Amanda Benson v. City of Lincoln, et al., United States District Court Judge Brian C. Buescher greatly reduced attorney fees to be award to the plaintiff's attorneys for "over litigation" of the case [claim. $1,666,600, but court awarded only $638,156]. The judge first described how litigation arose.

"Matters between Benson and Mahler came to a head on April 26, 2021, when LFR was called to a cardboard fire within a warehouse. *Filing 378 at 43* (¶ 224). Benson and T1 arrived at the scene before Mahler and T8. *Filing 378 at 44* (¶ 233). Mahler and his crew were called to the warehouse fire mid-morning. *Filing 378 at 44* (¶ 230). The parties disputed several circumstances about that fire and the interaction between Benson and Mahler during that fire. When Benson spoke to and submitted a complaint to her superiors at LFR on May 5, 2021, Benson alleged Mahler had abandoned her during the fire, and that she and her crew could have been killed or injured. *Filing 397 at 59* (¶ 290) (admitting this much of ¶ 290). The LFR conducted an investigation that found no rules violations, although Benson disputed its adequacy. *Filing 397 at 60* (¶ 292).

***

After pre-disciplinary investigations and proceedings, Benson was terminated effective November 2, 2021. *Filing 394 at 1* (¶ 1); *see also Filing 380*-83 at 4 (dismissal letter). Fire Chief David Engler, who is not a party to this litigation, determined that Benson had made false allegations against Mahler and that her actions were 'a direct hindrance to the effective performance of LFR's functions and reflect[ed] undue discredit upon the department,' establishing 'good cause' for dismissal. *Filing 380 at 3* (dismissal letter).

***

Plaintiff's Motion for Approval of Application for Attorney Fees, Expenses, and Costs, *Filing 502,* and Plaintiff's Supplemental Motion for Approval of Supplemental Application for Attorney Fees, Expenses, and Costs, *Filing 513,* are granted in part and denied in part as follows:
a. Plaintiff is awarded $638,156.07 in attorney fees; and
b. Plaintiff is awarded $88,719.97 in expenses and costs.

FACTS:

"Plaintiff Amanda Benson was hired by Lincoln Fire & Rescue (LFR) on July 1, 2013, as a Firefighter/EMT. *Filing 394 at 1* (¶ 1).[2] Defendants in this action are the City of Lincoln, Nebraska, various city officials, and various officers in the LFR. *Filing 378 at 1*-3 (¶¶ 2-10). Benson eventually became the Acting Captain on Engine 1 (E1) at Station 1 in November of 2020, then later became the Acting Captain of Truck 1 (T1) at that Station. *Filing 378 at 39* (¶ 203).

Benson alleges that she was subjected to sexual discrimination and sexual harassment for almost the entirety of her employment with LFR. She filed charges of discrimination with the Nebraska Equal Opportunity Commission (NEOC) on August 15, 2016, *see Filing 394 at 2* (¶ 3), and four years later with the federal Equal Employment Opportunity Commission (EEOC), on October 14, 2020, *see Filing 394 at 2* (¶ 6). It is safe to say that many-but not all-of Benson's allegations of discrimination, harassment, and retaliation were based on conduct by Shawn Mahler, who was the Captain of the Truck Crew at Station 8. *Filing 397 at 3* (¶ 25) (admitting Mahler's position).

***

After pre-disciplinary investigations and proceedings, Benson was terminated effective November 2, 2021. *Filing 394 at 1* (¶ 1); *see also Filing 380*-83 at 4 (dismissal letter). Fire Chief David Engler, who is not a party to this litigation, determined that Benson had made false allegations against Mahler and that her actions were 'a direct hindrance to the effective performance of LFR's functions and reflect[ed] undue discredit upon the department,' establishing 'good cause' for dismissal. *Filing 380 at 3* (dismissal letter).

After an arbitration, Benson was reinstated to the LFR on December 21, 2022. *Filing 394 at 14*-15 (¶ 27) (allegation and response). Benson concedes that any backpay period ended on the date she was reinstated to LFR. *Filing 406 at 12*-13; *see also Filing 440 at 115*. Reinstatement likewise eliminated any front pay claim based on sexual discrimination, harassment, or retaliation at issue in this case."

Legal Lesson Learned: Case wisely settled; along with another case by female FF – see below.

> Note: Feb. 5, 2024 article. "City of Lincoln settles LFR sexual discrimination lawsuits for $900,000."
>
> "The city of Lincoln has settled two lawsuits which alleged sexual discrimination against two former firefighters. City officials released settlement agreements for Jessie Lundvall and Amanda Benson, both of whom had been fired following their lawsuits. Lundvall and Benson will be paid $250,000 and $650,000, respectively. The agreements also ensure city officials and the former firefighters won't defame one another. In the settlement, the city denied any wrongdoing. Notably, Benson's agreement allows her to continue pursuing a separate claim against the city as well as her disability pension. Lundvall's agreement also acknowledges her good standing within Lincoln Fire and Rescue.

Benson's agreement, however, prevents her ability to be reemployed by the city at any time."

File: Chap. 7, Sexual Harassment

U.S. SUP. CT: FEMALE POLICE OFFICER - JOB TRANSFER WITH NO LOSS OF PAY – LAWSUIT PROCEED "SOME HARM"

On April 17, 2024, in Jatonya Clayborn Muldrow v. City of St. Louis, Missouri, et al., the United States Supreme Court held (9 to 0) that Police Sergeant Muldrow's lawsuit may proceed with pre-trial discovery; the case had been dismissed by a U.S. District Court judge, and the dismissal upheld by three-judge panel of U.S. Court of Appeals for 8th Circuit. The U.S. Supreme Court held (opinion by Justice Elena Kagan) held:

> "The courts below rejected the claim on the ground that the transfer did not cause Muldrow a 'significant' employment disadvantage. Other courts have used similar standards in addressing Title VII suits arising from job transfers. Today, we disapprove that approach. Although an employee must show some harm from a forced transfer to prevail in a Title VII suit, she need not show that the injury satisfies a significance test. Title VII's text nowhere establishes that high bar."

FACTS:

> "From 2008 through 2017, Sergeant Muldrow worked as a plainclothes officer in the St. Louis Police Department's specialized Intelligence Division. During her tenure there, she investigated public corruption and human trafficking cases, oversaw the Gang Unit, and served as head of the Gun Crimes Unit. By virtue of her Division position, Muldrow was also deputized as a Task Force Officer with the Federal Bureau of Investigation—a status granting her, among other things, FBI credentials, an unmarked take-home vehicle, and the authority to pursue investigations outside St. Louis. In 2017, the outgoing commander of the Intelligence Division told her newly appointed successor that Muldrow was a 'workhorse'—still more, that "if there was one sergeant he could count on in the Division, 'it was Muldrow. 2020 WL 5505113, *1 (ED Mo., Sept. 11, 2020).
>
> But the new Intelligence Division commander, Captain Michael Deeba, instead asked the Department to transfer Muldrow out of the unit. Deeba wanted to replace Muldrow—whom he sometimes called 'Mrs.' rather than the customary 'Sergeant'—with a male police officer. See id., at *1–*2. That officer, Deeba later testified, seemed a better fit for the Division's 'very dangerous' work. Id., at *2; App. 139. The Department approved the transfer against Muldrow's wishes. It reassigned her to a uniformed job in the Department's Fifth District.

> While Muldrow's rank and pay remained the same in the new position, her responsibilities, perks, and schedule did not. Instead of working with high-ranking officials on the departmental priorities lodged in the Intelligence Division, Muldrow now supervised the day-to-day activities of neighborhood patrol officers. Her new duties included approving their arrests, reviewing their reports, and handling other administrative matters; she also did some patrol work herself. Because she no longer served in the Intelligence Division, she lost her FBI status and the car that came with it. And the change of jobs made Muldrow's workweek less regular. She had worked a traditional Monday-through-Friday week in the Intelligence Division. Now she was placed on a 'rotating schedule' that often involved weekend shifts."

Legal Lesson Learned: This unanimous decision sends a clear message that job transfers can be basis of Title VII litigation.

Chap. 8 – Race / National Origin Discrimination

Chap. 9 – Americans With Disabilities Act
Chap. 10 – Family Medical Leave Act

File: Chap. 11, FLSA

OK: FLSA SETTLEMENT – SHIFT DIFFERENTIAL - $350,000 / UP TO 130 EMS MAY JOIN – AGREEMENT MUST BE PUBLIC

On May 23, 2024, in Jerry Sherley v. Muskogee County EMS, U.S. District Court Judge John F. Heil has agreed to review the terms for fairness the proposed settlement of class action after plaintiff submits a proposed notice to all 130 EMS, and the settlement must be a public record. The Court held:

"Plaintiff should file a motion for conditional certification and approval of the proposed notice to the putative class members…. Lastly, Plaintiff argues that public interest is advanced by allowing the proposed settlement agreement to be sealed because doing so would 'encourage[] settlement negotiations and agreements, and preserve judicial resources.' Dkt. No. 24 at 4. This conclusory statement does not demonstrate that the stated interest would outweigh the right to access underlying the Court's task in approving an FLSA settlement. *See McGee*, 2017 WL 4679818, at *2 (noting that the parties failed to present evidence that allowing public access would discourage settlement and observing that 'this contention may be contradicted by the fact that numerous FLSA settlement agreements contain no confidentiality provision, have been filed unrestricted, and/or have been filed redacted.'). Accordingly, sealing the proposed settlement agreement is not warranted in this case."

FACTS:

"Plaintiff, an Emergency Medical Techician ('EMT'), brought this FLSA collective action, alleging that Muskogee County EMS ('MCEMS') failed to pay all the overtime wages owed to

him and other similarly situated EMTs. Dkt. No. 2 at 1-4. Plaintiff claims that MCEMS calculated overtime wages based on EMTs' base hourly wages, instead of their regular hourly wages, which included a shift differential. *Id.* at 3.

***
On March 25, 2024, the parties notified the Court that they reached an agreement to resolve the case. Dkt. No. 20. On May 9, 2024, Plaintiff filed the current motions seeking leave to file the proposed settlement agreement under seal and seeking a court order approving the settlement. Dkt. No. 24; Dkt. No. 25. Under the proposed settlement agreement, MCEMS agrees to pay the gross settlement amount of $350,000 (including attorney's fees and costs, as well as administration expenses) for up to 130 putative class members. Dkt. No. 24-1 at 3-4.

This amount includes: (1) $192,800 in individual settlement awards to the putative class members (which represents 73% of each member's unpaid wages); (2) $140,000 in attorney's fees; (3) up to $7,200 in attorney's costs; and (4) $10,000 in administration expenses. Dkt. No. 24-1 at 3, 6-7, 15-16.

***
IT IS THEREFORE ORDERED that Plaintiff's Motion to for Leave to File Sealed Document [Dkt. No. 24] and Motion to Approve Settlement Agreement under the Fair Labor Standards Act ("FLSA"), 29 U.S.C. §§ 201-19 [Dkt. No. 25] are DENIED."

Legal Lesson Learned: Under FLSA, employers must calculate the "regular rate of pay" that includes all renumerations paid to the employee.

> Note: See 29 Code of Federal Regulations 778.108.
>
> "Section 7(e) of the Act requires inclusion in the 'regular rate' of 'all remuneration for employment paid to, or on behalf of, the employee" except payments specifically excluded by paragraphs (1) through (7) of that subsection. (These seven types of payments, which are set forth in § 778.200 and discussed in §§ 778.201 through 778.224, are hereafter referred to as 'statutory exclusions.')"
>
> See also: "FLSA Overtime Calculator Advisor for Nonexempt Employees."

File: Chap. 12, Drug-Free Workplace

CA: FIREFIGHTER - U.S. ARMY - FIRED POSITIVE RANDOM DRUG TEST METH – WAS IN TREATMENT - NO CASE

On May 22, 2024, in Roger E. Greer v. Christine Wormuth (Secretary of U.S. Army), United States District Court Judge Maxine M. Chesney, U.S. District Court for Northern District of California, granted defense motion to dismiss (firefighter filed lawsuit pro se; without an attorney). Ten months (Aug. 2014) prior to his notice of removal (June 26, 2015), he told Supervisor he was in treatment and detoxification for drug use under 'Safe Harbor' under the

government's DFWP [Drug-Free Workplace Program. On April 16, 2015, he tested positive for tested positive for amphetamine and methamphetamine/d-methamphetamine. The Court held: e:

"Further, even assuming Greer is, in some manner, disabled, his reliance on the Rehabilitation Act's 'safe harbor' provision is unavailing. In particular, said statutory provision sets forth three 'exceptions' to the general rule that, if 'currently engaged in the illegal use of drugs,' an employee is not disabled where the employer 'acts on the basis of such use.' *See* 29 U.S.C. § 705(20)(C)(i). Each such exception, however, requires a showing that the employee 'is no longer' or 'is not' engaging in the illegal use of drugs, *see* 29 U.S.C. § 705(20)(C)(ii),[1] and Greer, at best, alleges he stated to his supervisor that he was 'seeking treatment and detoxification,' not that he was no longer using illegal drugs."

FACTS:

"In his Complaint, Greer alleges he was terminated from his employment with the Army. *(See* Compl. ¶ 2.) According to a Decision issued by the Equal Employment Opportunity Commission on January 4, 2024, which Decision is attached as an exhibit to the Complaint, Greer, who was employed by the Army as a firefighter, was 'subject to random urinalysis tests' and, on April 16, 2015, 'tested positive for amphetamine and methamphetamine/d-methamphetamine.' *(See* Compl. Ex. at 1.) According to the Decision, the Army, based on Greer's illegal drug use, issued a notice of proposed removal on June 26, 2015, and terminated Greer's employment as of August 31, 2015.

***

"Greer alleges the termination was 'discriminatory,' on the ground it constituted '[r]etaliation for known MSPB [Merit Systems Protection Board] and EEO [Equal Employment Opportunity] protected activity' and, additionally, that it was the result of a 'failure to accommodate [Greer's] disability under reported Safe Harbor prior to drug testing by the defendant.' *(See* Compl. ¶ 5(e).) With respect to his failure to accommodate theory, Greer alleges that Dennis A. Timmons, the official who proposed to remove Greer, testified at a deposition that Greer had 'voluntarily identified himself as seeking treatment and detoxification for drug use under 'Safe Harbor' under the government's DFWP [Drug-Free Workplace Program].' *(See* Compl. ¶ 6.)

***

Footnote 3: "In his opposition, Greer states he engaged in 'EEO protected activity' on August 12, 2014 *(see* Pl.'s Objections at 5), i.e., more than ten months prior to issuance of the notice of proposed removal. Such interval of time is insufficient to establish the requisite causal link. *See Clark County School Dist. v. Breeden*, 532 U.S. 268, 273-74 (2001) (noting cases finding causal link based on timing between protected activity and adverse employment action "uniformly hold that the temporal proximity must be 'very close'; citing with approval circuit court decisions holding three-month and four-month intervals insufficient)."

***

For the reasons stated above:
1. The motion to dismiss is hereby GRANTED, and the Complaint is hereby DISMISSED.

2. Should Greer wish to file a First Amended Complaint ("FAC") for purposes of curing any or all of the above-referenced deficiencies, Greer shall file such FAC no later than June 14, 2024."

Legal Lesson Learned: The "Safe Harbor" provisions of the federal Rehabilitation Act, similar to ADA, does not protect employees who continue to use illegal drugs.

> Note: "Addiction and the ADA: The "Current User," Safe Harbor."
>
> "When it comes to drugs and alcohol, those addicted to drugs and alcohol are not treated the same way as persons with other disabilities. For example, an employer has the right to evaluate an alcoholic employee or an employee addicted to drugs as if the disability didn't exist. 42 U.S.C. § 12114(c)(4); EEOC interpretive guidance on 29 C.F.R. § 1630.16(b). Also, under 42 U.S.C. § 12114(a) a person currently using illegal drugs or alcohol is not protected. Finally, a person who is in a rehabilitation program or has completed a rehabilitation program and is no longer engaging in the use of alcohol or drugs can be protected under the ADA. 42 U.S.C. § 12114(b)(1),(2). In short, a person using drugs or alcohol is not protected, but a person with a record of using drugs or alcohol can be. Case law often refers to this as a safe harbor. Case law may also refer to it as a person not being qualified since that is the statutory language."

File: Chap. 13, EMS

DC: ELDERLY WAITED 5 MIN. CALL 911 – DIED UNRELATED ILLNESS – NOT ADMISSIBLE TRIAL - "EXCITED UTTERANCE"

On May 23, 2024, in Joshua C. Austin v. United States, the D.C. Court of Appeals held (3 to 0) that robbery jury conviction should be reversed; but burglary and assault convictions upheld. He followed 68-year-old woman from grocery store to her apartment, threw her down steps and stole $60. She called 911 about 5 minutes after the incident and gave a good description of the assailant. Prior to trial, the victim died from long illness unrelated to the assault. The Court held:

"Here, a reasonable person—from the perspective of either Ms. Marvil or the 911 operator—would not have believed that there was an ongoing emergency at the time of the 911 call. *** Considering the factors on the whole, we conclude that the emergency had subsided by the time Ms. Marvil called 911."

FACTS:

> "In October 2019, Emilie Marvil called 911 and reported that she had been pushed down and robbed in the stairwell of her apartment building about five minutes earlier by an individual she described to the 911 operator. Police officers found appellant Joshua C. Austin a short time later and arrested him in connection with the incident. Before Mr. Austin's jury trial on multiple charges, Ms. Marvil died from unrelated causes. The trial court admitted the 911 call as evidence against Mr. Austin and Mr. Austin was convicted.
>
> ***

The government moved to admit Ms. Marvil's 911 call, arguing that the call fell under the present-sense-impression and excited-utterance exceptions to the rule against hearsay. Mr. Austin opposed the admission of the call, asserting that the call was testimonial and that its admission would therefore violate the Sixth Amendment's Confrontation Clause. Mr. Austin also objected to the 911 call as hearsay.

After briefing and argument by the parties, the trial court first ruled that the admission of the 911 call did not run afoul of the Sixth Amendment because it was not 'testimonial.' See Crawford v. Washington, 541 U.S. 36, 53-54 (2004); Davis v. Washington, 547 U.S. 813, 822 (2006).

***

Under the Sixth Amendment's Confrontation Clause, criminal defendants enjoy the right to confront witnesses against them. The Clause was intended to preclude conviction in circumstances where the defendant was not given the opportunity to test the reliability of the witness's statements in the crucible of cross-examination. The Confrontation Clause therefore prohibits the admission of certain statements made outside the courtroom by witnesses who are unavailable to testify.

But not all out-of-court statements fall within the purview of the Confrontation Clause. Only those that are 'testimonial' in nature—that is, akin to testimony that would be offered at trial in aid of prosecution—are constitutionally prohibited from being used against the defendant. Mr. Austin asks us to decide whether the statements in Ms. Marvil's 911 call were of this kind.

***

We agree with Mr. Austin that the 911 call was testimonial and that the admission of the call therefore violated his Sixth Amendment rights…. Rather, the crime ended, five minutes passed, and only then did Ms. Marvil call 911. We therefore weigh the five-minute interval between the robbery and Ms. Marvil's call in favor of finding that the emergency had subsided. Second, Ms. Marvil was physically separated from the scene of the crime. With the help of Ms. Canales, she had returned to her apartment before the call. Although we cannot necessarily describe Ms. Marvil's apartment as 'tranquil,' Davis, 547 U.S. at 827, it afforded her a degree of separation from the crime and protection from further harm.

Additionally, both Ms. Marvil and the 911 operator knew that Mr. Austin had left the apartment building immediately after the robbery, presumably on his bike. Mr. Austin's retreat distinguishes this case from those in which the presence or close proximity of the perpetrator strongly suggested an ongoing emergency, even where the victim had some physical separation from the assailant. See, e.g., Lewis v. United States, 938 A.2d 771, 780-81 (D.C. 2007) (finding an ongoing emergency where assaultive spouse was still on the scene when police arrived); United States v. Robertson, 948 F.3d 912, 916-17 (8th Cir. 2020) (finding an ongoing emergency where '911 caller breathlessly described the shooting by saying Robertson 'just now shot at Urva' and pleaded with the dispatcher, saying 'Hurry, hurry! He's going to

> come back with a gun!'); United States v. Johnson, 509 F. App'x 487, 494 (6th Cir. 24 2012) (finding an ongoing emergency where 911 caller "describe[d] an ongoing situation requiring police assistance: 'He's going towards McDougal and Gratiot. He got a gun . . . . He's walking towards McDougal now.'") (ellipses in the original). Rather, as with the later parts of the 911 call in Davis, Mr. Austin's departure from the crime scene suggests that there was no ongoing emergency. 547 U.S. at 828-29."

Legal Lesson Learned: The "excited utterance" exception is well established in numerous court decisions – admissible if the declarant is still under stress from a startling event; the trial court judge made a well-reasoned decision.

> Note: **"**Excited utterance, under the Federal Rules of Evidence , is defined as a statement that concerns a startling event, made by the declarant when the declarant is still under stress from the startling event. Excited utterance is an exception to the hearsay rule."
>
> The defendant will be resentenced; he was originally sentenced to 24 years in prison. The Court wrote:
>
> > "We further conclude that the government has failed to demonstrate that the error was harmless beyond a reasonable doubt as to Mr. Austin's robbery conviction and his assault-with-intent-to-rob conviction. We are satisfied beyond a reasonable doubt, however, that, even without the erroneous admission of the 911 call, a rational jury would have found Mr. Austin guilty of burglary and simple assault as a lesser-included offense of assault with intent to rob. We therefore reverse Mr. Austin's robbery and assault-with-intent-to-rob convictions, affirm Mr. Austin's burglary conviction, and remand for entry of a conviction for assault and resentencing."

File: Chap. 13, EMS

AR: PATIENT CONV. ASSAULT 2 PHOENIX FF - PT THEN SUES 5 PHOENIX FF EXCESSIVE FORCE – CASE PROCEED

On May 30, 2024, in Alan Troy Nimer v. Justin Broek, et al., the U.S. Court of Appeals for the 9th Circuit, held (3 to 0; unpublished decision) that trial court improperly granted defense motion to dismiss. The patient was convicted in state court of two counts of aggravated assault against two EMS – injuring two firefighters. The Court held:

"Hence, Nimer's claims are not *Heck*-barred because Nimer's success in this action would not *necessarily* contradict his conviction. To the contrary, viewing the evidence in the light most favorable to Nimer, there is a genuine dispute of fact as to whether Defendants engaged in excessive force after Nimer completed the aggravated assault. *See Smith*, 394 F.3d at 699. We therefore reverse the district court's grant of summary judgment in favor of Defendants with respect to Nimer's excessive force and unconstitutional seizure claims. We remand for the district court to consider the merits of those claims in the first instance."

FACTS:
“To convict Nimer, the sole evidence the jury was required to believe was that (1) Nimer shoved one firefighter and swung his fist at another; (2) Defendant Broek and Defendant Lang suffered physical injury; and (3) Nimer knew or had reason to know that Broek and Lang were firefighters engaged in the execution of any official duties.

But evidence in the record-including Nimer's deposition testimony and testimony at Nimer's state criminal trial-supports that the firefighters held Nimer on the ground, punched him, and choked him ‘subsequent to the time’ Nimer committed those acts that were necessary to the factual basis of his conviction. *See Sanford*, 258 F.3d at 1120. The jury in Nimer's criminal trial could have convicted Nimer of aggravated assault without considering Defendants' subsequent use of force. Therefore, the jury did not necessarily reject evidence ‘that the alleged excessive force continued after Plaintiff was restrained and compliant,’ and the district court erred in holding otherwise.

***
There is undisputed evidence in the record that, once Defendants arrived on the scene in response to Nimer's request for medical assistance, Defendants immediately worked as a team to gather symptom information from Nimer, asked him about his complaint, and unloaded medical equipment from the fire truck. Defendants also began to monitor Nimer's heart upon their arrival. Defendants withdrew their medical care only after Nimer started becoming aggressive towards them. Moreover, after the physical altercation ended, Defendants continued providing medical care to Nimer and arranged for an ambulance to transport Nimer to the hospital.

***
The district court erred when it held Nimer's excessive force and unconstitutional seizure claims[1] are barred by *Heck v. Humphrey*, 512 U.S. 477 (1994). A § 1983 claim is barred by *Heck* only if a judgment in favor of the plaintiff would necessarily imply the invalidity of his conviction because such a judgment would "negate an element of the offense" or depend on "facts inconsistent with the plaintiff's conviction." *Sanders v. City of Pittsburg,* 14 F.4th 968, 970-71 (9th Cir. 2021). We must examine the record of the state criminal case-including the jury instructions-to determine "which facts the jury necessarily found" in the criminal trial, and whether specific factual allegations in the § 1983 complaint are necessarily inconsistent with those findings. *Lemos v. Cnty. of Sonoma*, 40 F.4th 1002, 1006-07 (9th Cir. 2022) (en banc). A § 1983 excessive force claim is not barred by *Heck* if the officers "used excessive force subsequent to the time" the plaintiff engaged in the conduct that formed the factual basis of his conviction, *Sanford v. Motts*, 258 F.3d 1117, 1120 (9th Cir. 2001), even if the incident involves ‘a single continuous chain of events lasting a very brief time,’ *Hooper*, 629 F.3d at 1131.”

Legal Lesson Learned: Patients assaulting EMS are unfortunately quite common, but a decision allowing a lawsuit to proceed against EMS by a patient convicted for assaulting the EMS is quite rare. Body cameras could hopefully avoid similar cases.

File: Chap. 13, EMS

NC: PATIENT CONVICTED ASSAULTING "EMT" DURING TRANSPORT – THIS INCLUDES ASSAULT ON "PARAMEDIC"

On May 21, 2024, in State of North Carolina v. Rachel Shalom Juran, the Court of Appeals of North Carolina held (3 to 0) that under N.C. statutes, assault on a paramedic is considered an assault on an EMT. During transport, the defendant became agitated and forcefully grabbed and squeezed the paramedic's hand, and the ambulance driver had to pull over to assist the medic. The EMS Supervisor came to scene along with PD and rode in ambulance to hospital. When the patient was released from hospital she was arrested. Jury convicted but Judge only sentenced her to 6 to 17 months' imprisonment suspended for 24 months' supervised probation The Court held:

"Here, Defendant was charged with assault on an EMT as the indictment stated, in relevant part, Defendant "unlawfully, willfully and feloniously did assault [Lueth], an emergency medical technician[.]" Notably, although N.C. Gen. Stat. § 14-34.6 does not specifically define emergency medical technician, other statutes within this same chapter define 'emergency medical technician' to include a paramedic. *See* N.C. Gen. Stat. § 14-69.3(a)(1) (2023). Nonetheless, even if 'emergency medical technician' as applied under N.C. Gen. Stat. § 14-34.6 was not intended to include paramedics, whether the victim was an emergency medical technician or paramedic is a distinction without difference for the purpose of the charging statute. While we recognize the credentials of a paramedic differ from those of an EMT, the gist of the offense at issue remains the same notwithstanding the victim's credentials. *See* N.C. Gen. Stat. § 131E-155(10), (15a) (2023). Moreover, Defendant would be charged under the same statute regardless of whether she assaulted a paramedic or an EMT."

FACTS:
"On 1 September 2019, Defendant called 911 after experiencing intermittent chest pain. K. Lueth, a paramedic for Pender County EMS and Fire Department, along with her partner, responded to Defendant's home. Defendant was placed in an ambulance to be transported to Onslow Memorial Hospital. While in transit, Defendant became agitated and forcefully grabbed and squeezed Lueth's hand.

Lueth's partner, who was driving the ambulance, found a safe place to pull over and called both Lueth's supervisor and the police. A patrol sergeant with Onslow County Sherriff's Office and Lueth's supervisor arrived on scene. Lueth's supervisor rode in the ambulance with Defendant and Lueth the remainder of the way to the hospital. Upon release from the hospital, Defendant was arrested.

On 3 December 2019, Defendant was indicted for assault on an emergency personnel and communicating threats. On 3 April 2023, the matter came on for jury trial before Judge Stevens in Onslow County Superior Court. On 5 April 2023, the jury returned a verdict finding Defendant guilty of assault on an emergency personnel and not guilty of communicating threats. Defendant was sentenced to 6 to 17 months' imprisonment suspended for 24 months' supervised probation.

***
Relevant here, Defendant was charged with violating N.C. Gen. Stat. § 14-34.6, which states:

A person is guilty of a Class I felony if the person commits an assault or affray causing physical injury on any of the following persons who are discharging or attempting to discharge their official duties:
(1) An emergency medical technician or other emergency health care provider.
(2) A medical responder.
N.C. Gen. Stat. § 14-34.6 (2023). Likewise, the indictment against Defendant specifically alleged she, unlawfully, willfully and feloniously did assault [Lueth], an emergency medical technician, who was employed by Pender County Emergency Services, by grabbing the victim's hand and squeezing it very hard, and cause physical injury to the victim, bruising to the hand. At the time of this offense, the victim of the assault was discharging her official duties: transporting [D]efendant to the hospital.

***
The indictment, jury instruction, and verdict sheet reference Lueth under various classifications. However, this variance is in no way prejudicial. As noted above, the gist of the offense is the same regardless of the victim's classification based on credentials. Not only this, but the fact that the jury convicted Defendant after being instructed it could find Defendant guilty if it found Lueth was an emergency medical technician, an emergency health care provider, a medical responder, or a licensed health care provider, unequivocally indicates the jury would not have reached a different result if the instruction had referenced Lueth solely as an EMT."
Legal Lesson Learned: Strange appeal the NC statute clearly applies to "An emergency medical technician or other emergency health care provider."

File: Chap. 13, EMS

PA: DISPATCHER SENT WRONG AMBULANCE – 1 HOUR AWAY – PREGANT PATIENT LOST BABY – NOT FED. CASE

On May 15, 2024, in Chad Reiner and Stephanie Reiner v. Northumberland County, et al., Chief United States District Court Judge Matthew W. Brann dismissed the lawsuit, which can now be filed in state court. The dispatcher failed to notify the closest ambulance (10 miles) or the second ambulance (24 miles), but instead toned out ambulance in Harrisburg that took one hour to arrive. The patient was bleeding out and repeatedly called 911, but dispatcher refused to advise location of responding ambulance. The Court held:

"The law does not always align with what one may believe is right, just, or fair. This painful fact is the necessary reality of a well-ordered legal system. In this case, the careless conduct of a 911 dispatcher led to a terrible tragedy. But for the individual citizen, the United States Constitution is mainly a charter of negative liberties. It provides no remedy for this harm. Nor is federal court an appropriate forum to talk through questions of state law. So this lawsuit is dismissed with prejudice.

***
Plaintiffs' Section 1983 claims fail because they have alleged no violation of their federal constitutional rights. Because there are no surviving federal claims, the Court declines to exercise supplemental jurisdiction over Plaintiffs' state law claims.

***

The Third Circuit has long-standing precedent that there is no constitutional right to receive emergency ambulance services, nor is there 'an affirmative obligation on the State to provide competent rescue services if it chooses to provide them.' So any injuries resulting from flawed or incompetent emergency rescue services are not constitutional injuries, and hence not actionable under Section 1983. Plaintiffs' argument that they only waited an hour for the ambulance because they did not know it would take so long requires a closer analysis of this Circuit's 'state-created danger' theory of liability.

***
Nothing of the kind is alleged here. Stephanie Reiner was not such a vulnerable person even while injured, the state does not assume responsibility over injured persons by offering assurances, and no would-be protector was displaced. Accordingly, Plaintiffs' Section 1983 claim fails under the state-created danger theory of liability.

***
The Court has great sympathy for the hardship Plaintiffs have suffered, but their case does not belong in federal court because they have not plausibly alleged any violation of the United States Constitution."

FACTS:
"On September 23, 2022, Stephanie Reiner was approximately 32 weeks pregnant with Paisley. Stephanie Reiner began experiencing stomach discomfort that same afternoon, which worsened and became constant. Reiner contacted a triage nurse in the labor and delivery department at Geisinger Medical Center at approximately 3:00 p.m. While on the phone with the nurse, Reiner felt a sensation similar to her water breaking and believed she was going into labor. After Reiner described her condition, the nurse advised her to contact 911 so that she could be admitted to the hospital. After the call, however, Reiner discovered that her water had not broken, and that she was bleeding profusely. She immediately called 911 and spoke to a dispatcher at the 911 Center, informing the dispatcher that this was a medical emergency and that she was in need of an ambulance. The dispatcher advised Reiner that an ambulance would be dispatched immediately.

Reiner's mother-in-law Luann Snyder came to the residence minutes after Reiner called 911. Snyder observed a pool of blood beneath Reiner and throughout the kitchen. After waiting for the ambulance for ten minutes, Snyder called 911 to find out when it would arrive. The dispatcher stated that an ambulance had been dispatched and was on the way. After waiting another ten to fifteen minutes, Snyder called 911 again, asking where the ambulance was coming from and how far away it was. But the dispatcher refused to tell Snyder where the ambulance had been dispatched from. Instead, the dispatcher reiterated that an ambulance had been dispatched and would be there soon, and that Snyder should be patient. Snyder waited another ten to fifteen minutes, and then again called 911. She advised the dispatcher that if they could not get Reiner to an ambulance, they needed to get her to a helicopter because she was bleeding out. After an additional fifteen minutes of waiting, the ambulance finally arrived. Throughout the time Reiner waited for the ambulance to arrive, she experienced severe pain and constant gushes of blood from her vaginal area.

Two ambulance companies are located within approximately ten miles of Reiner's residence, while a third is located approximately 24 miles from her residence. Yet unbeknownst to Reiner and Snyder, the 911 Center never contacted these companies, which were in service and available on the date of Reiner's incident. Instead, the ambulance which actually arrived was in fact coming from Harrisburg, Pennsylvania, which was over an hour away from Reiner's residence. If Reiner and Snyder had known that the ambulance was coming from Harrisburg, they would have driven to the nearest hospital immediately.

***

Reiner was rushed to the operating room for an emergency Caesarean section. Geisiner medical personnel informed Reiner that she had a full placental abruption and hemorrhage. Reiner's surgery continued for five hours because doctors could not stop her bleeding, and doctors were forced to give Reiner large doses of medications to promote blood clotting to attempt to stop the bleeding.

***

Ultimately, Paisley Reiner was delivered stillborn that same day. Reiner's treating physician advised her that if she had arrived at the hospital sooner, Paisley Reiner would have survived the trauma. The physician stated that Reiner's condition started as a partial placental abruption and developed into a complete abruption by the time she arrived at Geisinger. As a result of this incident, Reiner suffers from blood clots and has had three miscarriages.

***

The claims against the remaining Defendants are dismissed with prejudice because granting leave to amend would be futile. A complaint is 'futile' if even, as amended, it would fail to state a claim upon which relief could be granted. Here, applying the holding in *Ye v. United States*, this Court can conceive of no set of facts under which a 911 dispatcher's assurances or misrepresentations would restrain a person's liberty in a manner like incarceration or institutionalization. And Plaintiffs' Section 1983 Due Process claims against these Defendants are based solely on the 911 dispatcher's conduct. So although there is a "liberal pleading philosophy of the federal rules" no amendment will be permitted because another opportunity to plead a case against these defendants would be futile."

Legal Lesson Learned: Dispatch protocol should require nearest ambulance be called [10 miles in this case], and if not available, then next nearest ambulance [24 miles].

> Note: Dispatch protocol was corrected after this run, and a change in management. The Court wrote:
>
> "The Northumberland County District Attorney's Office investigated the incident. In October 2022, the Northumberland County Fire Chiefs Association's vice president claimed that mismanagement of the 911 Center had placed the public in danger; another fire chief expressed concern that mismanagement of the 911 Center would result in civilian death. At this same meeting, fire officials aired grievances concerning prolonged dispatch times and significant dispatcher turnover, and called for Fellman's termination [Russell Fellman, the 911 Coordinator in charge of the Northumberland County 911 Center]. Fellman resigned as 911 Coordinator in December 2022."

Chap. 14 – Physical Fitness, incl. Heart Health

File: Chap. 15

WA: FF WITH PTSD IN 2010 – NO INJURY / NO WORKERS COMP – LAW CHANGED 2018 BUT LAW NOT RETROACTIVE

On May 2, 2024, in Frank Shaw v. Kittitas Valley Fire and Rescue, et al., the Court of Appeals of Washington, Division 3, held (3 to 1; unpublished opinion), that the firefighter paramedic (1989 – 2007) was not entitled to workers' compensation since he suffered no physical injury. On June 7, 2018, the laws in Washington changed, to allow for occupational disease claims resulting from PTSD for certain firefighters, in an amendment to the Industrial Insurance Act, Title 51 RCW. *See* former RCW 51.08.142 (2018); Laws of 2018, ch. 264. The Court held:

"Looking first to the retroactivity test, the legislature did not adopt any language explicitly providing for retroactivity. Mr. Shaw argues that the legislature's choice of various adjectives and verbs reveal retroactive intent. We reject this reasoning. An explicit choice as to retroactivity is not one that turns on analyzing subtle textual clues. The legislature is well aware that it must make an explicit declaration if it intends a statute to have retroactive effect. It is accustomed to passing statutes with clear and explicit statements as to retroactivity. *See, e.g.*, RCW 51.32.187(5)(c); RCW 67.16.300; Laws of 2023, ch. 171 § 13; Laws of 2019, ch. 159 § 6; Laws of 2007, ch. 317, § 3. But no explicit statement was made here. Mr. Shaw's arguments to the contrary fail."

FACTS:
"Frank Shaw worked from 1989 to 2007 as a firefighter and paramedic with the agency that ultimately became Kittitas County Fire and Rescue. In 2010, Mr. Shaw was diagnosed with posttraumatic stress disorder (PTSD) that, according to his treating psychiatrist, was triggered during Mr. Shaw's work with the agency. In 2015, Mr. Shaw filed a workers' compensation claim with the Department of Labor and Industries based on his PTSD diagnosis. The Department rejected his claim because, at the time, claims based on stress-induced mental conditions were not covered by law. Mr. Shaw appealed, but voluntarily dismissed his appeal in late 2015.

On June 7, 2018, the laws in Washington changed, to allow for occupational disease claims resulting from PTSD for certain firefighters, in an amendment to the Industrial Insurance Act, Title 51 RCW. *See* former RCW 51.08.142 (2018); Laws of 2018, ch. 264.

Mr. Shaw filed a new workers' compensation claim for his PTSD based on the 2018 statutory amendment. His claim was again rejected, but this time it was based on the Department's determination that the amendment did not cover Mr. Shaw because it did not apply to PTSD claims that manifested 'prior to the presumptive date of June 7, 2018 as outlined under [S]ubstitute [Senate] [B]ill 6214,' and Mr. Shaw had not been exposed to PTSD events since his last day of work in 2007, which predated the effective date of the amendment allowing for such claims. Admin. Rec. at 89."

Legal Lesson Learned: PTSD statute was not retroactive.

> Note: See this law firm review of new WA law.
>
> "Eligible 'firefighters' must meet at least one of the definitions set forth in RCW 41.26.030(17)(a)(b)(c) and (h), which include:
>
> - Any person who is serving on a full time, fully compensated basis as a member of a fire department of an employer and who is serving in a position which requires passing a civil service examination for firefighter, and who is actively employed as such;
> - Anyone who is actively employed as a full time firefighter where the fire department does not have a civil service examination;
> - Supervisory firefighter personnel; and,
> - Any person who is employed on a full-time, fully compensated basis by an employer as an emergency medical technician that meets the requirements of RCW 18.71.200 or 18.73.030(12), and whose duties include providing emergency medical services as defined in RCW 18.73.030.
>
> ***
>
> Washington State is taking steps to help our firefighters, paramedics, and police officers suffering from PTSD due to their inherently stressful jobs. More work remains to be done as the new law does not apply to volunteer firefighters, reserve police officers or other professional first responders depending upon their membership in certain state retirement plans."

File: Chap. 16, Discipline

CA: FIRE CHIEF FIRED – "RELIGIOUS DISCRIMINATION" CASE WAS DISMISSED – 9th CIR. NO "EN BANC" REVIEW

On May 17, 2024, in Ronald Hittle v. City of Stockton, California, U.S. Court of Appeals for 9th Circuit (San Francisco) a majority of the 29 Circuit Judges declined to hear his appeal, and the 3-Judge panel that originally denied his appeal on Aug. 4, 2023 issued a more detailed second decision. The City fired Chief Hittle on Sept. 30, 2011 after it retained an outside attorney who wrote 250 page investigative report that included allegations the Chief had formed a "Christian Coalition" in FD, including taking three officers in a FD vehicle to Aug. 5 & 6, 2020 a Christian "Global Leadership Summit" conference at a church in Livermore, on city time. The 3-Judge panel in its May 17, 2024 decision held:

> "The City hired an outside independent investigator, Trudy Largent ('Largent'), [CA attorney] to investigate various allegations of misconduct. In a 250-page report referencing over 50 exhibits, Largent sustained almost all of the allegations of misconduct against Hittle. Largent's Report specifically concluded that Hittle: (1) lacked effectiveness and judgment in his ongoing leadership of the Fire Department; (2) used City time and a City vehicle to attend a religious event, and approved on-duty attendance

of other Fire Department managers to do the same; (3) failed to properly report his time off; (4) engaged in potential favoritism of certain Fire Department employees based on a financial conflict of interest not disclosed to the City; (5) endorsed a private consultant's business in violation of City policy; and (6) had potentially conflicting loyalties in his management role and responsibilities, including Hittle's relationship with the head of the local firefighters' union. Based on the independent findings and conclusions set forth in Largent's report, the City removed Hittle from his position as Fire Chief.

***

To summarize, we hold that, based on the record before us, the district court's granting of summary judgment in Defendants' favor was appropriate where Defendants' legitimate, non-discriminatory reasons for firing Hittle were, in sum, sufficient to rebut Hittle's evidence of discrimination, and Hittle has failed to persuasively argue that these non-discriminatory reasons were pretextual. When discriminatory remarks are merely quoting third parties and the real issue is public perception or other forms of misconduct (such as engaging in an activity that does not benefit the employer), there is no genuine issue of material fact that the employer was discriminatory. For the foregoing reasons, the judgment of the district court is AFFIRMED."

FACTS:

"Plaintiff-Appellant Ronald Hittle ('Hittle') was an at-will employee of the City of Stockton, California (the "City") and served as the City's Fire Chief from 2005 through 2011. During his tenure, Hittle engaged in conduct that troubled his employer, and led ultimately to his termination.

***

In May 2010, the City received an anonymous letter purporting to be from an employee of the Stockton Fire Department. The letter described Hittle as a 'corrupt, racist, lying, religious fanatic who should not be allowed to continue as the Fire Chief of Stockton.' In her subsequent affidavit in support of her motion for summary judgment, [Deputy City Manager Laurie] Montes stated that the source of this information was not an anonymous individual but a high-ranking Fire Department manager, who had told her that 'Hittle favored members of that coalition—who all shared his Christian faith,' and that her concern was that 'Hittle was providing favorable treatment and assignments' to these other employees.

***

Montes directed Hittle 'to find and attend a leadership training program.' Montes states that she specifically directed Hittle to 'find a program intended for Fire Chiefs, or at least designed for the upper management of public entities,' and was clear to Hittle that she wanted the leadership training to be related specifically to public sector service. Montes claims that she suggested to Hittle that the League of California Cities may provide such training, and that she was aware that the Federal Bureau of Investigation and the Post Officers Standards and Training offered upper management training programs to police departments through that group. Hittle stated that he reviewed various leadership training

> programs, but was unable to find any that were in California, or at a cost that the Fire Department could afford. Hittle subsequently was gifted four tickets to an event called the Global Leadership Summit (the 'Summit'). The Summit was sponsored by a church, and its registration materials stated that: 'The leadership summit exists to transform Christian leaders around the world with an injection of vision, skill Development and inspiration for the sake of the LOCAL CHURCH.
>
> ***
> Along with three fellow firefighters, Hittle traveled in a City vehicle to Livermore, California to attend the Summit on August 5 and 6, 2010. On September 3, 2010, the City received a second anonymous letter stating that Hittle and other fire department personnel had 'attended a religious function on city time' using 'a city vehicle.' [City Manager Bob] Deis asked Montes to evaluate the issues raised in the letter. According to Largent, Deis's 'concern[] about Hittle attending this event on City time [was] that 'you cannot use public funds to attend religious events; even if under the guise of leadership development. It is not acceptable.'"

DISSENT**:** Three justices dissented from denial of rehearing en banc. Circuit Judge Vandyke wrote:

> "Hittle produced ample evidence of the City's intent to discriminate, and under this court's caselaw, that is enough to at least survive the summary judgment stage.
>
> ***
> Instead of simply accepting the inevitable effect of its prior errors and ruling for Hittle, the panel attempts to quietly paper over them by revising its view of the underlying facts. Now we are told that the 'religious nature of the leadership event' was merely an 'aspect' of Hittle's firing, not its 'gravamen.' One might reasonably expect some kind of explanation for the panel's convenient revelation on this dispositive issue of fact, but none is forthcoming. This willingness to improperly reinvent the facts of this case against Hittle to justify a past outcome is not a good look for our court—particularly when we have a well-established obligation to read the facts in Hittle's favor at this stage of the case." https://cdn.ca9.uscourts.gov/datastore/opinions/2024/05/17/22-15485.pdf

Legal Lesson Learned: Religious discrimination claim is very difficult to prove, particularly after outside investigator submits a 250-page report detailing leadership issues.

> Note: Here is the 3-Judge panel's original Aug. 4, 2023 decision: https://cdn.ca9.uscourts.gov/datastore/opinions/2023/08/04/22-15485.pdf

File: Chap. 16, Discipline

OR: FIRE CHIEF FIRED – SUES FF / BOARD DEFAMATION - MUST PROVE "MALICE" – STRONG "ANTI-SLAPP" DEFENSE

On May 15, 2024, in Joel A. Medina v. Columbia River Fire & Rescue, an Oregon Municipality, Rhonda Melton, et al., United States District Court Judge Marco A. Hernandez, U.S. District Court for the District of Oregon, held that lawsuit may proceed and Chief as a public official can only succeed as can prove "malice" by those who spoke to FD Board and posted items on social media. The judge denied Rhonda Melton's defense motion to immediately dismiss the case under the Oregon "anti-SLAPP" statute (strategic lawsuit against public participation) which is designed to protect public and reporters when commenting on public officials. In April 2023, Defendant Rhonda Melton prepared and published statements on social media about Plaintiff. In May, 2023, three new members were elected to the Board, who sought his termination, and in August the Board terminated him. The Court ordered that the lawsuit proceed with pretrial discovery, noting that the Fire Chief as a public official must prove "malice" to sue others for defamation. The Court held"

"Defendant asserts that her statements, both verbal and written, fall under two of the four categories of protected speech in [Oregon anti-SLAPP statute] O.R.S. 31.150(2). Def. Mot. 7-8. The statute protects "[a]ny oral statement made, or written statement or other document presented, in a place open to the public or a public forum in connection with an issue of public interest" and "[a]ny other conduct in furtherance of the exercise of the constitutional right of petition or the constitutional right of free speech in connection with a public issue or an issue of public interest." O.R.S. 31.150(2)(c) and (d). Defendant made oral statements at CRFR Board meetings and posted written statements on the Columbia County Transparency & Accountability Facebook page. Melton Decl. ¶¶ 2-7, Exs. 1-5; Medina Decl. ¶¶ 5, 6, 8, 11; Exs. 2, 3, 5, 8. In these statements, Defendant criticized actions Plaintiff took as CRFR Chief and expressed concerns about CRFR leadership. Plaintiff acknowledges that Defendant has met her initial burden to show that her statements were made in a public forum and in connection with an issue of public interest. Pl. Resp. 3, ECF 42. The Court agrees that Defendant has met her initial burden under the anti-SLAPP statute.

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However, factual issues preclude a determination of whether Plaintiff is likely to succeed on his claims. The Court therefore concludes that Plaintiff is entitled to discovery on those factual issues.

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To the extent Defendant's statements are actionable under the First Amendment, Plaintiff must be permitted to engage in discovery to determine whether they are true or false. While the purpose of Oregon's anti-SLAPP statute is to avoid extended proceedings on claims that improperly chill free speech, the Court must balance this against Plaintiff's right to fully litigate his claims.

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Plaintiff also acknowledges that because he was a public official at the time Defendant made the statements and they concerned his actions as chief, he must show that Defendant made them with knowledge that they were false or in reckless disregard of whether they were true or false. Pl. Resp. 6 (citing *New York Times Co. v. Sullivan*, 376 U.S. 254, 279-80 (1964))."

FACTS:
"Plaintiff Joel Medina was at all material times the Fire Chief of Columbia River Fire & Rescue ('CRFR'). FAC ¶ 3. He brings claims against his former employer and some of its current and former employees and current board members, as well as the firefighters' union and some of its members. *Id.* ¶¶ 4-14. All Defendants other than Defendant Rhonda Melton have answered the FAC. ECF 36, 39.

Plaintiff alleges that he was hired by Defendant CRFR in December 2020. FAC ¶ 21. He later noticed budget irregularities in CRFR. *Id.* ¶¶ 25-26. In particular, he alleges that in January 2023 an employee discovered that several CRFR employees 'were improperly enrolled in the PERS police/fire classification' and that the problem was reported up to Plaintiff as chief. *Id.* ¶ 28.

He alleges that he corrected the error in a February 2023 memo, specifying which individuals were improperly enrolled. *Id.* ¶ 30. He alleges that a criminal investigation into the misclassification was opened. *Id.* ¶ 32. Defendants began opposing his tenure as chief and tried to discredit him. *Id.* ¶ 33. Plaintiff alleges that Defendant Rhonda Melton made defamatory statements with the goal that the CRFR Board terminate him. *Id.* ¶ 26. He alleges that Defendant Kyle Melton is the son of Defendant Rhonda Melton, and that Kyle Melton informed Rhonda Melton of the misclassification issue. *Id.* ¶ 34. Plaintiff alleges that Defendant Rhonda Melton 'was a PERS retiree that had been misclassified into the Police and Fire section of PERS. She was concerned that her PERS benefits would be affected and that she would lose some benefits to which she was not entitled.' *Id.*

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For example, in remarks made at the May 2023 CRFR Board meeting, Defendant said of Plaintiff: 'He has failed miserably! Over spent District funds, allow unfair treatment of employees, reported verbal and sexual harassment, hires his friends without putting the positions out for the public, lies about the qualifications of his friends which could place employees and the public in harms [sic] way.' Melton Decl. Ex. 2 at 2. Defendant does not appear to dispute that some of her remarks painted Plaintiff in a negative light. Rather, she argues that her statements were expressions of opinion on matters of public concern and therefore are not actionable under the First Amendment. Def. Mot. 8."

Legal Lesson Learned: The former Fire Chief has an uphill challenge – he must prove "malice" and FD Board members and others also have the "anti-SLAPP" statute as a defense.

> Note: See "Reporters Committee For Predom of the Press – Anti-SLAPP Legal Guide."
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> "Anti-SLAPP laws provide defendants a way to quickly dismiss meritless lawsuits — known as SLAPPs or strategic lawsuits against public participation — filed against them for exercising speech, press, assembly, petition, or association rights. These laws aim to discourage the filing of SLAPP suits and prevent them from imposing significant litigation costs and chilling protected speech. In recent years, several states have adopted or amended their anti-SLAPP laws. As of May 2024, 34 states and the District of Columbia have anti-SLAPP laws, including Arizona, Arkansas, California, Colorado,

Connecticut, Delaware, Florida, Georgia, Hawaii, Illinois, Indiana, Kansas, Kentucky, Louisiana, Maine, Maryland, Massachusetts, Minnesota, Missouri, Nebraska, Nevada, New Jersey, New Mexico, New York, Oklahoma, Oregon, Pennsylvania, Rhode Island, Tennessee, Texas, Utah, Vermont, Virginia, and Washington."

File: Chap. 17, Arbitration, Labor Relations

TX: IAFF UNION PRES. FIRED – FOR NOT DISCLOSING PRIOR AUSTIN FD JOB – "BALANCING TEST" – CASE PROCEED

On May 3, 2024, in Michael Teague v. Travis County Emergency Services District 8 and Troy Wenzel, United State Magistrate Judge Susan Hightower issued a Report and Recommendation the U.S. District Court deny the defendants' motion to dismiss. Teague was hired as firefighter in Oct. 2020, and elected President of Local 4820 in Oct. 2022, and served as President until fired in March, 2023. Teague alleges ESD 8 stated in a March 20, 2023 letter that his employment was terminated because he "falsified" his job application by failing to list his employment with the Austin Fire Department. The Magistrate Judge wrote:

"Teague alleges that in his role as Local 4820 President, he repeatedly spoke up about matters of public concern affecting ESD 8 fire fighters in public settings from October 2022 through March 2023. Dkt. 10 ¶ 26. He that Defendants were aware of his association with the union and his speech activities. *Id.* ¶ 58. Teague also alleges that he was retaliated against and ultimately terminated for engaging in such speech. *Id.* ¶¶ 34, 36. The Court finds that Teague's allegations and the close timing between his speech activities and his termination are sufficient to show a causal connection at this stage of the proceedings. *See Benfield v. Magee*, 945 F.3d 333, 337 (5th Cir. 2019) ('Close timing between an employee's protected activity and an adverse action against him may provide the causal connection required to make out a prima facie retaliation case.'); *Burnside,* 773 F.3d at 628 (allegations that employee was transferred three weeks after engaging in speech activities were sufficient to allow a plausible inference of a causal connection); *Evans v. City of Houston*, 246 F.3d 344, 354 (5th Cir. 2001) (noting that 'a time lapse of up to four months has been found sufficient to satisfy the causal connection).

The Court finds that Teague has alleged sufficient facts to state a plausible *prima facie* case of First Amendment free speech/petition retaliation."

FACTS:
"Teague worked as a full-time fire fighter for ESD 8 from October 2020 through March 2023, and Wenzel was the Fire Chief of ESD 8 during his employment. *Id.* ¶¶ 3, 22. Teague alleges that ESD 8's Fire Chief is 'primarily responsible for managing the day-to-day operations of ESD 8, which includes making decisions on hiring and firing personnel, promotions, suspensions, creating and enforcing workplace rules for ESD 8 employees, and anything else which might impact the terms and conditions of a fire fighter's employment with ESD 8.' *Id.* ¶ 17.
Teague alleges that throughout his employment with ESD 8, he 'performed the essential duties of his job, and he performed them well.' *Id.* ¶ 23. Teague was elected president of the local chapter of the International Association of Fire Fighters ("IAFF") union, Local 4820, in October

2022 and held that position through March 2023. *Id.* ¶ 24. During his tenure, Teague 'advocate[d] on a variety of matters of public concern which were affecting ESD 8 fire fighters,' including:

> a. The need for better firefighting equipment that complied with National Fire Protection Association standards;
> b. Lack of personal protective equipment ("PPE") to perform hazardous work;
> c. Pay raises for ESD 8 fire fighters to ensure that they were paid at similar levels to other fire fighters in the region;
> d. Wasteful spending by ESD 8 on boats and cars that ESD 8 fire fighters did not need to perform their jobs; and e. Failure of ESD 8 to spend the budget they were allocated to help fire fighters perform their jobs.

Id. Teague alleges that he spoke about these matters 'because they impaired public safety and were preventing ESD 8, and its employees who were represented by IAFF Local 4820, from protecting the Pedernales community.' *Id.* ¶ 25. He spoke up repeatedly and in various settings, 'including public meetings with the Board of Commissioners, public gatherings within the Pedernales community, and during conversations with members of the Pedernales community.' *Id.* ¶ 26. During these interactions, Teague alleges, he 'was not speaking about matters of public concern as an employee of ESD 8, but as a private citizen and/or President of IAFF Local 4820.'"

Legal Lesson Learned: The lawsuit will now proceed with pre-trial discovery/

> Note: The Magistrate discussed the "balancing test."
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> "In *Pickering v. Bd. of Ed. of Twp. High Sch. Dist. 205, Will Cnty.*, 391 U.S. 563 (1968), the Court laid the framework for analyzing 'whether the employee's interest or the government's interest should prevail in cases where the government seeks to curtail the speech of its employees.' *Lane*, 573 U.S. at 236. This balancing test requires'"balanc[ing] . . . the interests of the [public employee], as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees.' *Pickering*, 391 U.S. at 568. This is known as the "*Pickering* balancing test." *Bd. of Cnty. Comm'rs, Wabaunsee Cnty., Kan. v. Umbehr*, 518 U.S. 668, 668 (1996). In *Pickering*, the Court struck the balance in favor of the public employee, extending First Amendment protection to a teacher who was fired after writing a letter to the editor of a local newspaper criticizing the school board that employed him. *Id.* at 573."