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APRIL 2023 – FIRE & EMS LAW NEWSLETTER

[NEWSLETTER IS NOT PROVIDING LEGAL ADVICE.]

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- **ONLINE LIBRARY OF CASE SUMMARIES:** View cases via Scholars@UC.
- **TEXTBOOK:** Updating 18 chapters of my textbook (2018 to current). FIRE SERVICE LAW (SECOND EDITION), Jan. 2017: View textbook via Waveland site.

18 RECENT CASES

File: Chap. 1, American Legal System

MI: FIRE MARSHAL DENIED QUALIFIED IMMUNITY, CHANGED RPT "INCENDIARY" – LODD - BLDG OWNER SUES

On March 24, 2023, in George Marvaso, et al. v. Richard Sanchez, et al., U.S. District Court Judge Linda V. Parker, Eastern District of Michigan (Southern Division) held that the lawsuit by the owners of the restaurant and adjacent pool hall may proceed in lawsuit against the Fire Marshal and others for alleged violation of their federal constitutional rights under 4th & 14th Amendment, when Fire Marshall changed his origin and cause report from "undetermined: (May 2013) to "incendiary" (Nov. 2013). During the fire, there was a building collapse and firefighter Brian Woelke was trapped and died. See NIOSH FF Fatality Report. In Aug. 2013, state OSHA issued citations for LODD and FD paid $3,500 in fines.

> The Court denied the Fire Marshall's motion to dismiss the case and referenced the plaintiffs' allegations. "On or about mid-September 2013, Fire Marshal Adams met with Westland City Councilman Bill Johnson. While Adams previously told Councilman Johnson that the cause of the fire was electrical in nature, he now indicated that he was changing his conclusion to an incendiary cause even though he had no new evidence. When Councilman Johnson asked Fire Marshal Adams why he was changing his mind, Fire Marshal Adams answered: 'Because a firefighter died, Bill.'" Plaintiffs further alleged: "In mid-November 2013, Fire Marshal Adams submitted an alleged false fire origin and cause report to the Michigan State Police ('MSP') and Wayne County Prosecutor's Office, which triggered an MSP homicide investigation resulting in the allegedly unlawful search warrants … being executed for Plaintiffs' homes, where records and personal property were seized. Fire Marshal Adams' announcement that the fire had an incendiary cause, and that the MSP would be opening a homicide investigation into Woelke's death was widely reported in the statewide news media."
>
> "*Qualified Immunity as to Alleged Constitutional Violations…* Plaintiffs have presented sufficient evidence that Fire Marshal Adams was aware that his action was unlawful, which occurred when he allegedly responded to Councilman Johnson with his reasoning for changing the report. A reasonable fireman, officer, or anyone with the requisite training, is aware that engaging in such conduct would be unlawful and at the very least, would likely amount to a termination of employment. As such, absent any evidence on the record to rebut that statement, Fire Marshal Adams is not entitled to the protections of qualified immunity."

Legal Lesson Learned: The Fire Marshall may decide to take an immediate appeal to 6th Circuit on denial of qualified immunity.

> Note: The Court dismissed from this lawsuit the Michigan State Police lieutenant who submitted a search warrant affidavit, that included following:
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> (1) multiple tips that the fire was intentionally set,
>
> (2) a vehicle in the parking lot of the business after hours on the night of the fire that matched a description of Marvaso, Jr.'s car,

(3) information from a Marvaso relative that Marvaso, Sr. was distraught because the fire was an insurance job and no one was supposed to get hurt,

(4) a recent fire cause and origin report from Westland determining that the fire was intentionally set,

(5) information that the entry doors were locked and not disturbed,

(6) the inference that no forced entry suggested an inside job,

(7) information about financial difficulties associated with the business,

(8) information that Plaintiffs removed items from the scene of the fire,

(9) information regarding business related items that may be located at Plaintiffs' residences and storage lockers,

(10) information about telephone numbers associated with the business,

(11) information about the role of each Plaintiff in the business, and

(12) information that the insurance coverage was recently raised.

File: Chap. 1, American Legal System

KY: DRUG OVERDOSE – "GOOD SAMARITAN LAW" – DOES NOT PROTECT OVERDOSE VICTIM FOR TRAFFICKING

On March 10, 2023, in Jordan Brown v. Commonwealth of Kentucky, the Court of Appeals of Kentucky held (3 to 0; unpublished decision) that trial court properly denied the defendant's motion to dismiss. "On August 28, 2021, Brown overdosed at the home of Chandra Walker ('Walker'). Walker called 911. Both law enforcement and emergency medical services ('EMS') responded to the call. EMS found Brown unresponsive, administered Narcan, and transported Brown to the hospital. Police searched Brown and his surroundings and discovered a loaded syringe, a scale, heroin, and an ounce of methamphetamine. As a result of this incident, Brown was indicted on one count of trafficking in controlled substances in the first degree. Thereafter, Brown filed a motion to dismiss, arguing KRS 218A.133 bars prosecution for trafficking. The trial court denied the motion. Brown then entered a conditional guilty plea and, upon entry of the final judgment, he was sentenced to seven years' imprisonment. This appeal followed."

> The Court held: "Prosecution for trafficking offenses is not prohibited by KRS 218A.133. It is fundamental to statutory construction that we first look "to the language of the statute, giving the words their plain and ordinary meaning." *Overstreet v. Kindred Nursing Centers Limited Partnership*, 479 S.W.3d 69, 73 (Ky. 2015) (citation omitted). Where the language of the statute is unambiguous, we will not consider extrinsic evidence, including evidence of legislative intent. *Id*. (citation omitted). KRS 218A.133 specifically prohibits charging or prosecuting an individual for criminal offenses related to **possession** of controlled substances and/or paraphernalia. The statute does not mention trafficking offenses. Trafficking offenses are distinct from possession charges. Trafficking is separately defined as 'to manufacture, distribute, dispense, sell, transfer, or possess with intent to manufacture, distribute, dispense, or sell a controlled substance[.]' KRS 218A.010(56). The General Assembly unambiguously chose only to prohibit charging or prosecuting for possession offenses but not for trafficking offenses."

> KRS 218A.133(2), "Exemption from prosecution for possession of controlled substance or drug paraphernalia if seeking assistance with drug overdose."

> > A person shall not be charged with or prosecuted for a criminal offense prohibiting the possession of a controlled substance or the possession of drug paraphernalia if:
>
> > (a) In good faith, medical assistance with a drug overdose is sought from a public safety answering point, emergency medical services, a law enforcement officer, or a health practitioner because the person:
>
> > > 1. Requests emergency medical assistance for himself or herself or another person;
>
> > > 2. Acts in concert with another person who requests emergency medical assistance; or
>
> > > 3. Appears to be in need of emergency medical assistance and is the individual for whom the request was made;

(b) The person remains with, or is, the individual who appears to be experiencing a drug overdose until the requested assistance is provided; and

(c) The evidence for the charge or prosecution is obtained as a result of the drug overdose and the need for medical assistance.

Legal Lesson Learned: Numerous states have enacted similar "Good Samaritan Laws" to encourage drug users and their friends to call 911 if overdose.

Note: See Ohio Good Samaritan law, Ohio Rev. Code 2925.11,

"(viii): 'Qualified individual' means a person who is not on community control or post-release control and is a person acting in good faith who seeks or obtains medical assistance for another person who is experiencing a drug overdose, a person who experiences a drug overdose and who seeks medical assistance for that overdose, or a person who is the subject of another person seeking or obtaining medical assistance for that overdose as described in division (B)(2)(b) of this section.

***

Subject to division (B)(2)(f) of this section, a qualified individual shall not be arrested, charged, prosecuted, convicted, or penalized pursuant to this chapter for a minor drug possession offense if all of the following apply:

(i) The evidence of the obtaining, possession, or use of the controlled substance or controlled substance analog that would be the basis of the offense was obtained as a result of the qualified individual seeking the medical assistance or experiencing an overdose and needing medical assistance.

(ii) Subject to division (B)(2)(g) of this section, within thirty days after seeking or obtaining the medical assistance, the qualified individual seeks and obtains a screening and receives a referral for treatment from a community addiction services provider or a properly credentialed addiction treatment professional.

(iii) Subject to division (B)(2)(g) of this section, the qualified individual who obtains a screening and receives a referral for treatment under division (B)(2)(b)(ii) of this section, upon the request of any prosecuting attorney, submits documentation to the prosecuting attorney that verifies that the qualified individual satisfied the requirements of that division. The documentation shall be limited to the date and time of the screening obtained and referral received."

File: Chap. 3 – Homeland Security

NY: FDNY FF KILLED ON 9/11 – FAMILY $8.5 MILLION DEFAULT JUDGMENT - ISLAMIC REPUBLIC OF IRAN

On March 28, 2023, in the multidistrict litigation - In re Terrorist Attacks on September 11, 2001, in case of Chairnoff v. Islamic Republic of Iran, U.S. District Court George B. Daniels, U.S. District Court, Southern District of New York, awarded partial final default judgment to the family of Geoffrey E. Guja, a New York City firefighter who was killed in the terrorist attacks on September 11, 2001.

> "Plaintiff now moves for solatium damages on the ground that her close relationship with her stepfather Geoffrey E. Guja, who was killed in the September 11, 2001 terrorist attacks ('9/11 Attacks'), merits a finding that she is a functionally equivalent family member of the victim…. Court grant Plaintiffs motion and award Plaintiff $8,500,000 in solatium damages."
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> **"ORDERED** that Plaintiff Jamie K. Hawkins be awarded $8,500,000 for solatium damages; and it is
>
> **ORDERED** that prejudgment interest is awarded at a rate of 4.96 percent per annum, all interest compounded annually for the period from September 11, 2001 until the date of the judgment for damages; and it is
>
> **ORDERED** that Plaintiffs not appearing on this motion and who were not previously awarded damages may submit in later stages applications for punitive, economic, and/or other damages awards that may be approved on the same basis as currently approved for this Plaintiff or in prior filings."

Legal Lesson Learned: Hopefully the family of this fallen firefighter can now find assets of the Islamic Republic of Iran which can be seized to pay off this judgment.

File: Chap. 4 – Incident Command
File: Chap. 5 – Emergency Vehicle Operations

File: Chap. 6, Employment Litigation

IL: PART-TIME FF – CLAIMED NOT HIRED FT - RETALIATION SUPPORTING MAYOR'S OPPONENT IN 2005 – NO CASE

On March 30, 2023, in Brian E. Carroll v. City of Oak Forest, U.S. District Court Judge L. Jorge Alonso, U.S., District Court for Northern District of Illinois, Eastern District, granted the City's motion for summary judgment; insufficient evidence of "retaliation because of his political activities while he was employed as a part-time firefighter with the City of Oak Forest."

The Court described his claims: "In 2005, Carroll and his father, Edward Carroll, campaigned for a candidate running against JoAnn Kelly, one of the mayoral candidates for the City of Oak Forest at that time. Edward Carroll was an outspoken member of the Oak Forest political community who served as an alderman and a three-term commissioner of the Oak Forest Board of Fire and Police Commissioners (hereafter the 'Board')….Carroll claims that, because of his campaigning and political affiliations, he has been harassed and retaliated against while working as a part-time firefighter with the Oak Forest Fire Department. To wit, he claims that he was subjected to general harassment within the department; made fun of for his reaction to his mother passing away in 2006; threatened with 'blackballing,' termination, and other reprimands; not allowed to join the South Suburban Emergency Response Team; refused accommodations for light-duty work after an injury in 2019; and refused additional hours for part-time firefighters in the department in 2019." He also claimed he was improperly denied an opportunity to take full-time exam in 2018 (he was not eligible; over age 35), having failed 2014 written exam.

"Even if the Court reached the merits, however, Carroll does not come forward with sufficient evidence to sustain a First Amendment claim based on the alleged pre-2017 acts of retaliation. For starters, his claim about general harassment is too vague to survive summary judgment.

***

Likewise, the record does not demonstrate any retaliation related to the 2014 firefighter exam. Any such claim suffers from a causation deficiency because the Board allowed Carroll to sit for the exam and he did not pass it because he failed the written portion. He does not dispute that he failed the written portion or assert that the Board purposefully failed him because of his political activities. Instead, he claims that comments directed toward him by Nagel "rattled" him and prevented him from passing the written portion of the test. But the Court finds that no reasonable juror could infer that he failed to pass the exam because of Nagel's comment, even if the comment was rude or disparaging. *See Riley v. City of Kokomo*, 909 F.3d 182, 192 (7th Cir. 2018) (declining to draw an unreasonable inference at summary judgment)."

Legal Lesson Learned: The plaintiff failed to prove retaliation for his 2005 political activities; his allegations of harassment were too vague.

File: Chap. 6, Employment Litigation

IL: FF STROKE – WINS "OCCUP. DISABILITY PENSION" – BLOOD THINNER 3 YRS PRIOR – STATUTORY PRESUMPTION

On March 22, 2023, in The City of East Peoria, Illinois v. Charles Melton II, the Court of Appeals of Illinois, Fourth District, upheld the decision of the Board of Trustees of the Firefighter's Pension Fund of the City of East Peoria, which voted "three to two in favor of an oral motion to find that the disability resulted from service as a firefighter, entitling him to an occupational disease disability pension." Lieutenant Melton (age 56) was at home on March 11,

2020 and suffered right cerebellar ischemic stroke and has fully recovered but must remain on blood thinner rest of his life. Per NFPA 1582, he was not allowed to return to full duty for one year, and FD had no light duty. On July 8, 2020, he applied for an occupational disease disability pension. The Pension Board majority vote relied on report of one of three Independent Medical Experts who reviewed his file (none did physical exam or testified before the Board) that "one cannot discount the cumulative effects of active-duty firefighting in regard to his stroke." The City appealed the Pension Board's decision.

The Court of Appeals ruled the Independent Medical Experts were not required by state law to physically examine the firefighter. The Court also held he was entitled to a work-related disability pension, referencing state statutory presumption statute.

> "We conclude that the Board's finding that Melton's stroke resulted from his 'service as a firefighter' was not against the manifest weight of the evidence." *** Melton himself does not dispute that he had numerous preexisting conditions that could have contributed to the stroke. However, a firefighter is 'not required to prove that a duty-related accident or illness was the primary or originating cause of his disability; rather, he only needed to prove that a duty-related accident or illness aggravated, contributed, or exacerbated his disability.' *Covello v. Village of Schaumburg Firefighters' Pension Fund*, 2018 IL App (1st) 172350, ¶ 43. In other words, Melton did not have to prove that his stroke resulted solely from his firefighting duties. Though the City disputes that Melton demonstrated that he was subject to hazardous work conditions, Melton testified that his duties included being on firefighting calls and that he performed all of the duties listed in the job description for his position. The occupational disease disability statute itself, section 4-110.1, includes legislative findings that firefighters are exposed to dangerous conditions as a result of their employment. See also *Bremer v. City of Rockford*, 2016 IL 119889, ¶ 31 ("[S]ection 4-110.1 recognizes that firefighters work in dangerous conditions and provides compensation when a firefighter contracts one of the listed diseases from repeated exposure to those conditions over a set period of time."); *Lindemulder*, 408 Ill.App.3d at 503 ("Courts are not empowered to adjudicate the accuracy of legislative findings, but must accord great deference to the legislature's fact-finding authority."). As these diseases are recognized as possibly resulting from repeated exposures over long periods of time, that Melton suffered the stroke at home as opposed to while at work does not undermine his claim."

One of three IME, Dr. Williamson-Link, wrote a helpful report:

> "Dr. Jeffrey D. Williamson-Link, who was board certified in occupational medicine, similarly outlined Melton's medical history. On the subject of the nature and extent of any disability, Williamson-Link stated that Melton suffered from a cerebellar infarction that would, under NFPA 1582, require a waiting period of at least 12 months and meeting additional criteria before being considered to return to active duty without limitations or restrictions. 'Additionally [Melton was] also on long term anticoagulation treatment for history of Factor V Leiden and Pulmonary Embolism which would restrict him from performing Essential Job Task #8 which involves climbing ladders, operating from heights and uneven surfaces.' The lifelong need to remain on anticoagulation would

prevent him from being "able to be cleared for full firefighting duties.' In response to the question of whether any disabilities were the result of service as a firefighter, Williamson-Link wrote:

> 'It is my medical opinion that one cannot discount the cumulative effects of active duty of Firefighting in regards to his stroke. Though the firefighter did have other risk factors, the occupational stressors of active firefighting is well-documented and its effects on the Cardiovascular System. Additionally the Firefighter has a history of Factor V Leiden, and has subsequently developed Pulmonary Embolism. Based on the review of the medical records, this appears to be a genetic disorder and would not be considered to be part of cumulative effects of active duty."

Legal Lesson Learned: The Court relied on language in the Illinois statutory presumption statute.

> Note: See Ohio Revised Code, Section 4123.68 | Schedule of compensable occupational diseases. (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."

File: Chap. 7, Sexual Harassment

PA: CRUDE COMMENTS BY MALE SENIOR EMS TO FEMALE EMS – ONE INCIDENT - NOT "HOSTILE WORKPLACE"

On March 22, 2023, in Tracy Szyper v. American Medical Response Mid-Atlantic, Inc., et al., the U.S. Court of Appeals for Third Circuit (Philadelphia), held (3 to 0; "Non Precedential" decision) upheld the dismissal of the lawsuit by U.S. District Court judge Chad F. Kenney. The plaintiff had only been on the job for one month, when a senior EMS person made crude remarks to her. When the company did not fire the employee, she resigned and sued.

> The 3rd Circuit held: "District Court granted the Defendants' motions for summary judgment on all claims "because the record evidence, even when viewed in the light most favorable to Plaintiff, does not establish that the alleged harassment was sufficiently 'severe or pervasive' to rise to the level of a Title VII or PHRA violation. *** We agree with the District Court that Szyper did not show that Brock's conduct was sufficiently

‘severe or pervasive’ as to ‘alter the conditions of [her] employment and create an abusive working environment.’ *Meritor Sav. Bank, FSB*, 477 U.S. at 67 (citation and quotation marks omitted). When assessing hostility or abusiveness, courts must look ‘at all the circumstances,’ such as the ‘frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance.’ *Faragher v. City of Boca Raton,* 524 U.S. 775, 787-88 (1998) (citation omitted). ‘[O]ffhand comments[ ] and isolated incidents (unless extremely serious) will not amount to discriminatory changes in the 'terms and conditions of employment.'’ *Id.* at 788.”

“AMR hired Szyper to work as an emergency medical technician…. About a month after Szyper started, [Mr.] Leslie Brock, a more senior employee, grabbed Szyper's wrist and made two crude and offensive sexual comments. [1]

> [Footnote 1] Szyper documented the incident in a report recounting that ‘Brock had told me to cover my ears. I looked at him & said jokingly 'I'm not listening to you anyway.' He asked me again to cover my ears. I cupped my hands over my ears but could still hear what was said. Brock said to [two other employees], 'that made my dick hard.' I uncupped my hands and told him I heard what he said. Brock then proceeded to grab me by my wrist and say something along the lines of 'Help me fix my problem.' I told him to 'get the fuck off me.' I proceeded to put my cigarette out and go back inside. This incident made me feel extremely uncomfortable."

Szyper filed a complaint and was interviewed by Daniel Brown, AMR's operations manager in charge of AMR's Essington Avenue location, and Sonsaraye Byers, an AMR human resources generalist…. Szyper alleged no other incidents of harassment by Brock or any other AMR employees. Byers recommended Brock's termination…. Brown preferred sanctions short of firing, a conclusion shared by Edward Powers, the AMR regional director responsible for Brock's discipline…. AMR issued Brock a ‘Final Written Warning’ for inappropriate behavior, punishment just short of termination…. Szyper resigned from AMR as a result, stating she could not continue working with Brock.’”

Legal Lesson Learned: Inappropriate comments, worthy of discipline; but hard to understand how this resulted in a lawsuit and an appeal to 3rd Circuit.

File: Chap. 9, ADA

UT: ADA - FEMALE BAT. CHIEF DEMOTED CAPT – ANXIETY, NO ACCOMMOD. / SEXIST COMMENTS – CASE PROCEED

On March 31, 2023, in Martha Ellis v. Salt Lake City Corporation, Karl Lieb, Brian Dale, and Robert McMicken, U.S, Magistrate Judge Jared C. Bennett denied the City and individual defendants' motion for summary judgment. Martha Ellis joined the Salt Lake City Fire Department as a firefighter in 1994; in 2004, she was promoted to Fire Captain and served as the Fire Marshal for the Salt Lake City International Airport; in 2009, she was promoted to Battalion Chief and assigned as the City Fire Marshal and Fire Prevention Bureau Division Chief. She served in this capacity until 2014. On May 3, 2016, she was demoted to Captain; she filed charge of discrimination with EEOC, and went on FMLA leave for severe anxiety, and when no light duty accommodation was offered, she was fired in March 2017 due to "your unavailability to return to work at this time." Shortly after she was fired, the City's Civil Service Commission reversed her demotion, but she was never allowed back to work.

The Court held the lawsuit may proceed:

> **"FAILURE TO ACCOMMODATE…** After examining each party's analysis of the facts, the court finds that Ellis's evidence is sufficient to support her failure to accommodate claim…. Ellis claims that the City rejected two plausibly reasonable accommodations: (1) medical leave for her condition until the CSC appeal was resolved, and (2) the opportunity to receive some form of training from the Department on a temporary part-time schedule of five-hours a day, four-days a week…. The court agrees with Ellis that her requests for these accommodations were plausibly reasonable.
>
> ***
>
> **DISABILITY DISCRIMINATION AND RETALIATION…** Thus, a jury could find that the City's reason for termination was pretextual. In sum, Ellis has established that she has viable discrimination and retaliation claims under the ADA. As a result, all three of her ADA claims may proceed to trial.
>
> ***
>
> **SEX DISCRIMINATION AND RETALIATION CLAIMS…** In sum, Ellis establishes prima facie cases of sex discrimination and retaliation under Title VII and § 1983. Because she presents evidence tending to show that Defendants' proffered reasons for taking adverse employment actions against her are pretextual, her claims survive summary judgment.
>
> ***
>
> **HOSTILE WORK ENVIRONMENT CLAIMS…** A jury could find that this treatment of Ellis, along with the sexist insults lobbed her way, significantly impeded her ability to work and, thus, constituted a hostile work environment."

The Court noted that shortly after she was fired, the three-member Civil Service Commission met (Match 18, 2017) and unanimously voted to overturn and reverse Ellis's demotion.

"The CSC ultimately found that:

1. 'McMicken was looking for reasons to discipline Ellis.'

2. '[A]legations of Ellis' lack of performance are not supported by substantial evidence.'

3. The reasons for Ellis's demotion were 'trivial in nature.'

4. The 'allegations appear to the Commission to be an attempt to manufacture misconduct and allege failure of performance to justify the disciplinary action, when there were no performance issues.'

Although the CSC overturned Plaintiff's demotion, the Department never restored Ellis to her original position or reinstated her, since by this time her employment had been terminated. Ultimately, she was only paid the salary that she lost due to her demotion - $7,166.74."

Legal Lessons Learned: The case will now proceed to trial, unless settled.

File: Chap. 9. ADA

UT: ADA – PARAMEDIC BACK INJURY – LIGHT DUTY – CLAIMS GIVEN HEAVY DUTIES – CASE MAY PROCEED

On March 28, 2023, in Patrick John v. Murray City, U.S. Magistrate Judge Daphne A. Oberg, U.S. District Court for District of Utah, held that his ADA lawsuit may proceed to trial on his claim that after a back injury on Nov. 24, 2017, he was on light duty for six weeks, and was inappropriately ordered to perform tasks like moving boxes that caused him pain. The City fired him in September 2018, after he was on probation, for "attitude, reckless driving, lack of initiative, and the Needle Stick Incident."

While the Judge granted City's motion for summary judgment on his claim he was fired in retaliation for his six workers comp claims (Dec. 2007; April 2016; Oct. 2016, Nov. 2017, June 2018), the Judge ordered case to trial on whether the City properly accommodated him while on light duty following another back injury on November 24, 2017. The Judge held that following testimony by the paramedic is "sufficient to create a genuine issue of material fact concerning whether the City accommodated John after his November 2017 injury." *** On December 4, he went to Clements [his Physician Assistant] for treatment. Clements issued a work restriction note recommending the paramedic be allowed 'to modify bending, lifting, twisting, carrying, stooping, kneeling as tolerated while being treated for the next 6-8 weeks.' *** "During the restriction period after this injury, John met with Harris [who later became Fire Chief] 'every morning' to discuss light-duty work assignments for the day. At several of these meetings, John remembers Harris making disparaging remarks. For example, Harris told John that light-duty assignments were

‘unacceptable, especially [for] somebody on probation’ who was trying to prove he wanted to keep his job. According to John, Harris seemed ‘really frustrated and angry’ and repeatedly said some version of, ‘Well what are we going to do with you today?’ Harris also ‘forced him to complete tasks,’ like cleaning the gear room, ‘that were outside of his medical restrictions, causing him further pain.’”

“John's Monthly Probation Reports

John continued to receive monthly performance reviews as part of his probation. From October 2017 through December 2017, the reports were ‘mixed.’ However, from January through May 2018, John's supervisor noted he was improving and rated him as ‘meeting expectations.’ John signed each of these reports.

In the June 2018 report, the supervisor rated John as ‘needing improvement’ in the categories of safety, following instructions, and fire skills. These ratings were based on three incidents.

First, John ‘jeopardized his safety during a defensive fire operation’ when he entered a burning and abandoned building that his captain and crew told him not to enter (the Fire Incident). This was an ‘unreasonable risk’ because there was a partially collapsed wall and ‘heavy smoke.’

Second, John accidentally exposed himself to a needlestick by recapping a bent needle (the Needle Stick Incident). The supervisor explained that recapping a bent needle is ‘against standard paramedic practice and should be avoided.’

Third, the supervisor received reports that John had ‘been driving the ambulance recklessly and going back to his old ways with attitude.’

***

The City Terminates John

John's pre-disciplinary hearing was on August 28, 2018. At the hearing, John was able to present his ‘version of the facts’ and other information he considered relevant.[Fire Chief] Harris, two assistant chiefs, and the City's human resources director attended the hearing and later investigated concerns John raised.

After the investigation, the City terminated John on September 6, 2018.]Harris wrote John a letter explaining the reasons for the termination. For example, the letter described concerns about attitude, reckless driving, lack of initiative, and the Needle Stick Incident.”

Legal Lesson Learned: When accommodating a paramedic with light duty for a back injury, assign the medic duties consistent with recovery for that injury.

File: Chap. 9, ADA

IL: ADA - CHICAGO FF – FAILED ANNUAL STRESS TEST – CO-PAYS PRIVATE TESTING WHILE ON PAID LEAVE – NO VIOL.

On March 20, 2023, in Darren Verderber v. City of Chicago, U.S. District Court Judge Franklin U. Valderrama, U.S., District Court for Northern District of Illinois, Eastern Division, granted the City's motion to dismiss. Even though the firefighter had to submit numerous test results, and personally pay insurance co-pays, there was no "materially adverse employment action" as required to bring ADA lawsuit.

The Court held:

> "The Court agrees with the City that Verderber has failed to plausibly allege a materially adverse employment action. True, Verderber has alleged that he was required to undergo a series of medical examinations after his failed physical exam. But courts have repeatedly held that the ADA permits fitness for duty examinations for public safety employees….Nor has he alleged that other similarly situated firefighters were subjected to less testing after a failed stress test. Furthermore, in his Complaint, Verderber alleges that he was warned by the CFD how 'physically demanding' his job was, which supports that the series of medical examinations were within the scope of Verderber's employment…. Thus, Verderber has not plausibly alleged that the series of medical examination requirements was a materially adverse employment action. *** Apparently, the issue of whether payment of out-of-pocket expenses can constitute an adverse employment action has not been addressed in the Seventh Circuit. In short, Verderber has not plausibly alleged that the out-of-pocket medical costs are a materially adverse employment action. All in all, Verderber has not plausibly pled a materially adverse employment action, and so has not stated a claim under the ADA.
>
> CFD requires members of the Special Operations Division to undergo an annual physical exam…. The physical exam includes a stress test… Verderber underwent his annual physical exam on July 23, 2020…. Verderber alleges that during the stress test portion of the July 23 exam, one of the cardiac monitor leads fell off Verderber's chest, negatively impacting the results and causing Verderber to 'not satisfactorily pass' the stress test….. That same day, Verderber requested a second stress test, but his request was denied.
>
> ***
> From August 2020 to February 2021, Verderber was required to submit to various medical consultations, examinations and tests and obtain numerous medical releases….. Beginning on July 31, 2020, Verderber scheduled a medical consultation with his general practitioner, after which the doctor provided a medical release authorizing his return to work…. Verderber also scheduled an appointment with his cardiologist on August 3, 2020, who also gave him a written medical release….. However, after submitting both medical releases on August 4, 2020, the CFD Medical Division informed Verderber that the medical releases were insufficient without an echocardiogram.

***

On August 21, 2020, Verderber saw a new cardiologist who performed an echocardiogram that produced normal and within range test results…. Following submission of the normal echocardiogram's results to the CFD, Verderber was informed on September 28, 2020 that he also needed to complete a Thoracic Aneurysm test…. Verderber complied, and submitted to the test, which came back normal and within range…. However, the CFD still did not allow Verderber to return to work and warned him about the 'physically demanding' work of his job…. Verderber underwent additional testing between October 29, 2020, when he was placed on extended layup, and February 25, 2021….. Verderber was told in late February 2021 to obtain a new medical release from his primary cardiologist, and Verderber complied.

Verderber was allowed to return to duty on February 26, 2021, following his final medical release from his cardiologist…. Although Verderber received full pay and benefits from the CFD during his layup, Verderber was unable to work his secondary employment during the same period due to the conditions of his secondary employment contract."

Legal Lessons Learned: The ADA is not violated when a firefighter incurs co-pays to prove he is physically fit for a physically demanding position.

Chap. 10 – Family Medical Leave Act, incl. Military Leave

File: Chap. 11, FLSA

KS: RETIRED CAPT. CLAIMS BCs MISCHARDING VACATION TIME – NOT FLSA VIOLATION – FLSA CASE DISMISSED

On March 30, 2023, in Tim Lepage v. City of Salina, Kansas, et al., U.S. District Court Judge Julie A. Robinson granted the City's motion to dismiss the FLSA claim since his investigation of Battalion Chiefs never involved violations of FLSA, but rather "time card fraud" where BCs on vacation allegedly recorded their time as on duty. The case will now return to State court for further discovery. Lepage became frustrated that the City stalled on the investigation, and per his request he was placed on paid leave and retired in June 2021, and then brought this lawsuit.

The Judge wrote: "Here, LePage fails to demonstrate a genuine issue of material fact about whether he engaged in protected activity under this objective standard. In terms of content, it is uncontroverted that LePage never explicitly invoked the FLSA when he complained about the BCs' alleged time card fraud. And while this fact standing alone is not fatal to his claim, the substance of his complaint did not involve conduct that is regulated by the FLSA. The FLSA 'sets forth employment rules concerning minimum wages, maximum hours, and overtime pay.' LePage did not complain about violations of the federal minimum wage or maximum hour laws."

> "In September 2019, LePage began working with Human Resources Specialist Diane Turner on a project to save money. Specifically, LePage began keeping track of the days BCs were taking vacation, knowing that their use of vacation would require more captain overtime, costing the City money. LePage began what he considered to be an in depth investigation with Human Resources ('HR') on this issue because HR did not have access to the DataTracker and 'FD outlook calendar.' LePage would send HR the days he knew BCs were gone and the reason they had provided. LePage believed that all three [BCs] were . . . taking ten days of vacation, reporting they were on duty, thusly banking those hours and then taking an additional five days off, reporting it correctly and selling the other five days. After a week or two of review, it was found to be well north of $100K stolen in the previous 6 years.
>
> ***
> The Court finds that there are no substantial grounds for jurisdiction over the remaining claims for retaliatory discharge and defamation and that the state court is in a better position to evaluate LePage's claims under state law."

Legal Lessons Learned: The FLSA protects employees from retaliation, but only where there are claims of FLSA violations.

File: Chap. 12 – Drug Free Workplace

File: Chap. 13 - EMS

NY: COVID-19 – EMS LAWSUIT AGAINST UNION DISMISSED – CITY BARGAINED WITH DC37 – NO RATIFICATION REQ.

On March 29, 2023, in John Garland v. City of New York, et al., U.S. District Court Judge Kiyo A. Matsumoto, U.S. District Court for Eastern District of New York, granted the City's motion to dismiss. The Judge in December, 2021 had dismissed firefighters' lawsuit seeking reinstatement and back pay, noting: "Indeed, any FDNY employees who challenged whether the Vaccine Mandate should apply to them not only 'had the opportunity to seek a religious or medical accommodation,' they also 'remain[ed] on pay status pending the decision on their request or appeal, so long as their accommodation requests were submitted prior to October 27, 2021." On Jan. 5, 2022, the EMS plaintiffs then filed an Amended Complaint against their Union - District Council 37, AFSCME AFL-CIO ('DC37') - and Harry Garrido, DC37's Executive Director.

> The Judge held: "Plaintiffs also argue that, even though the FDNY *did* bargain and negotiate with DC37 concerning the Vaccine Mandate, the resulting DC37 Agreement

was never ratified by DC37's union members ….Plaintiffs assert that under New York City Admin. Code Section 12-307(a)(4), the DC37 Agreement could not amend the existing procedures of DC37's collective bargaining agreement without ratification by its members…. As the Court has repeatedly stated, however, 'the Court looks to federal constitutional standards rather than state statutes to define the requirements of procedural due process…. Courts repeatedly have held that state statutes do not determine constitutional due process requirements."

"Plaintiffs allege in the Amended Complaint that seventy-seven out of the eighty-six total Plaintiffs have requested a medical or religious accommodation to be exempt from the Vaccine Mandate; seventy-one Plaintiffs have been denied and six were awaiting an initial determination; thirty-seven Plaintiffs have appealed the denial of their request for a reasonable accommodation; and one Plaintiff's appeal has been denied, while thirty-six are awaiting a decision.

***

The Vaccine Mandate was revoked by the City on February 10, 2023 and is no longer in effect."

Legal Lesson Learned: Hopefully litigation over Covid-12 vaccinations will soon be over.

Note:
See March 10, 2023 City Re-Hiring Memo: "Are employees who were terminated for failure to comply with the vaccine mandate eligible for rehire? Yes, employees who were terminated due to the vaccine mandate are eligible for rehire by any City agency, with the understanding they meet all conditions for employment in the rehire position and haven't otherwise signed a waiver indicating they will not return."

See Oct. 26, 2022 article, "Judge: NYC must rehire and pay back workers who violated vaccine mandate." A judge with the New York State Supreme Court on Tuesday ruled that New York City Mayor Eric Adams' October 2021 mandate requiring all municipal workers to receive a Covid-19 vaccine was unlawful and ordered the city to rehire and provide back pay to all sanitation workers who lost their jobs for violating the mandate.

See Sept. 23, 2022 article, **"**Judge strikes down COVID vaccine mandate for PBA, orders New York City to reinstate unvaccinated police officers." A Manhattan Supreme Court judge on Friday overturned the city's vaccine mandate for the New York Police Benevolent Association and said members who lost their jobs for being unvaccinated should be reinstated.

File: Chap. 13

NY: COVID-19 VACCINATION - FDNY CLAIMED "RELIGIOUS EXEMPTION" AS A CATHOLIC – FIRED - CASE DISMISSED

On March 24, 2023, in Jude Pierre v. Fire Department of the City of New York, City of New York, Judge Lori S. Sattler, Supreme Court, New York County (unpublished decision) held that the FDNY properly fired him on September 7, 2022, after his administrative appeal to City of New York Reasonable Accommodation Appeals Panel was rejected on December 21, 2021, and he was put on unpaid leave.

> The Court held: "Petitioner fails to demonstrate how his religious beliefs conflict with [the City's] vaccine requirement notwithstanding that he designates his religion as Catholic on the religious exemption request form. His assertion that he is 'not comfortable using a vaccine that has used stem cells from fetuses' is presented without any connection to a sincerely held religious belief and does not set forth an actual religious request for accommodation. Similarly, the language in the remainder of this section of the Accommodation Request - that he is concerned about the 'manufacturers, government and department' not being held liable for adverse long-term side effects, sees no reason to take the risk of 'taking an expedited treatment,' and that he will be solely responsible for dealing with 'unforeseen consequences' - indicate that Petitioner's request was based on his personal preferences."
>
> "A New York City vaccine mandate was issued on October 20, 2021 requiring that all employees of the City of New York verify vaccination against COVID-19 by October 29, 2021.
>
> ***
> Petitioner, a New York City Firefighter, filed a Form EEO-7 'REQUEST FOR A REASONABLE ACCOMODATION FOR RELIGIOUS OBSERVANCES, PRACTICES OR BELIEFS' on November 21, 2021 … 'Accommodation Request'). Under the section 'Identify Religion/creed' he specified Catholic. The form further asks the applicant to 'Describe the religious practice(s) in conflict with the work rule(s) or requirement(s).' He stated:
>
> > I am not comfortable using a vaccine that has used stem cells from fetuses in it's [sic] development. I am also cautious in the fact that manufacturers, government, and department are not liable for any adverse long-term side effects. Why shall I take the risk of taking an expedited treatment if something were to happen and I'm will [sic] solely to be responsible with dealing with any unforeseen consequences?
>
> ***
> Here, the Court finds that Respondents' decision was not arbitrary and capricious and that there was a rational basis to support its determination. Although Petitioner points to other decisions regarding the use of "form" denials of religious accommodation requests by the FDNY, in this instance, Petitioner's application does not set forth a request for

accommodation based on his religious beliefs but rather states his personal preferences regarding the vaccine…."

Legal Lesson Learned: The firefighter failed to show a basis for religious accommodation.

File: Chap. 13, EMS

NY: HOSP. BASED EMT PUNCHED MENTAL PT – FF HOLDING PATIENT FELL & INJURED - CAN'T SUE HOSPITAL

On March 23, 2023, in Michael McGovern and Laura McGovern v. The St. Luke's-Roosevelt Hospital, et al., Justice Lyle E. Frank, Supreme Court, New York County (unpublished decision), granted the hospital motion for summary judgment. Fire & EMS responded for unconscious person; EMT gave sternum rub and patient became agitated and aggressive ("emotionally disturbed person"). Video shows an EMT throwing a punch at the patient, as the firefighter was restraining the patient and both the firefighter and patient fell to the ground.

> "The Court finds that whether the non-party EMT was in fact negligent in failing to follow the proper protocols, that conduct was not the proximate cause of plaintiff's injuries. The Court finds the non-party EMT's conduct to be intentional, therefore not in the purview of negligence…. The law is well established that there cannot be vicarious liability for the intentional tort of an employee when the underlying act is outside of the scope of employment…."
>
> "[T]here are two videos of the incident that have been provided by the parties and reviewed by the Court. Both are extremely short in duration, but both clearly show one of the EMT's shoving the non-party patient, the plaintiff retraining the [patient], the same EMT throwing a punch in the direction of the … patient and the plaintiff, causing the plaintiff and the … patient to fall to the ground.
>
> ***
>
> The crux of plaintiff's position is that defendants' employees were negligent in following protocol by not creating a safe zone and not calling the police, with these failures causing plaintiff to intervene in a physical altercation between the non-party patient and the [EMT]. However, the Court finds that, consistent with the defendants' position, the ensuing physical altercation and the intervention by plaintiff does not impute vicarious liability onto the defendants.
>
> The Court finds that whether the [paramedic] was in fact negligent in failing to follow the proper protocols, that conduct was not the proximate cause of plaintiff's injuries. The Court finds the non-party EMT's conduct to be intentional, therefore not in the purview of negligence."

Legal Lesson Learned: Hospital employer not liable for intentional misconduct of their EMT.

Chap. 14 – Physical Fitness, incl. Heart Health

File: Chap. 15 – CISM, Mental Health

IL: PTSD - DENIED LINE-OF-DUTY DISABILITY PENSION – FELL OFF LADDER 2007 – STRESS FROM DEMOTION 2019

On March 24, 2023, in Arthur Szymala v, Romeoville Firefighters' Pension Fund, et al., the Court of Appeals of Illinois, Third District, held (3 to 0) that the Pension Board, and the trial court judge, each properly held that the firefighter was not entitled to Line-Of-Duty disability; the firefighter claimed he was disabled due to his posttraumatic stress disorder (PTSD) and major depressive disorder.

> The Court of Appeals referenced Board decision, which was made after the firefighter was examined by three independent medical experts (IMEs): "The Board concluded that the plaintiff did not prove a disability, noting: (1) the minor injuries reported after the fall that he fully recovered from, (2) Dr. Eschbach's opinion linking the fall and his condition was based on incomplete and inaccurate information, (3) the plaintiff succeeded in his career for many years following the fall and was promoted after a competitive test, (4) the plaintiff reported a change in work conditions when the department brought in a new battalion chief who frequently challenged the plaintiff's work performance (evidencing a personal dispute rather than a deficit in brain functioning from a fall seven to eight years prior), and (5) the plaintiff only ever reported the claimed conditions immediately following his demotion."
>
> "In 2013, the plaintiff was promoted to lieutenant following a competitive promotional testing process. However, he testified that management decided that his performance as lieutenant was inadequate between 2015 and 2018. Around May 2017, the plaintiff was placed on a 'Performance Improvement Plan', which included an evaluation of his work performance as lieutenant from May 24, 2017, through February 28, 2018. He entered into a 'Last Chance Agreement' in April 2018, where he acknowledged deficiencies in his work performance and agreed to improve these areas during a period of 60 work shifts or risk a demotion. The agreement provided that he failed to meet various guidelines, such as working as a team, leading personnel, communicating effectively, and working calmly in stressful situations.
>
> ***
> On January 29, 2019, the plaintiff attended a meeting with Chief Kent Adams, other fire department officials, and the Union Executive Board. During the meeting, Chief Adams informed the plaintiff that he failed to satisfactorily complete the Performance

> Improvement Plan and terms of the Last Chance Agreement and that his performance as lieutenant remained inadequate. The plaintiff was also informed that he was being demoted from lieutenant to firefighter/paramedic effectively immediately."

Legal Lesson Learned: Demotion and working for a "difficult" Battalion Chief may definitely cause stress, but it is not proof of a line-of-duty disability.

File: Chap. 16, Discipline

FL: FIRE CHIEF HAS "ABSOLUTE IMMUNITY" DEFAMATION – 6 FF FIRED DEFACING BLACK LT's FAMILY PICTURES

On March 24, 2023, the Florida Supreme Court declined to hear the appeal of three firefighters, who were part of a group of six fired on Nov. 1, 2017. Three firefighters won their jobs back after arbitration and then sued the Fire Chief and City for defamation. They alleged they were put in a false light when the Fire Chief issued a Press Release with their photos, and held a Press Conference that connected the three firefighters (A-Shift firefighters) not only with drawing of the phallic images on the family photos of a Black Lieutenant (occurred on Sept. 9, 2017, A-Shift), but also falsely connected them with and the placing of a string shaped like a noose over one of the Lt's family photos (Sept. 10, 2017, B-Shift firefighters).
The State Supreme Court thereby declined to set aside the Florida Third District Court of Appeals decision on Aug. 24, 2022 which held Fire Chief enjoys "absolute immunity" from defamation lawsuit. Court of Appeals held (3 to 0), "In Florida, public officials are absolutely immune from suit for defamation as long as their allegedly defamatory statements were made within the scope of their duties….Here, Chief Zahralban is the director of the City's fire-rescue department…. Therefore, Chief Zahralban and the City are absolutely immune from suit for Chief Zahralban's written and oral statements relating to the City's termination of the Respondents as the statements were made within the scope of Chief Zahralban's duties as the director of the City's fire-rescue department." City of Miami, et al. vs David Rivera, et al.

> The Fire Chief issued a written Press Release on Nov. 2, 2017, and held a Press Conference on Nov. 3. The written Press Release stated, in part, as follows:
>
> > "On September 9th, 2017, a member with the City of Miami Fire Rescue was a victim of a hideous, distasteful act of hate in one of our fire stations. This Lieutenant of 17 years with the department, discovered his family photos were defaced with lewd and sexually explicit renderings and a noose draped over one [of] the photos. This was immediately reported to my staff and as a result, I personally responded to the station. Appalled by my observation, I immediately requested the Miami Police Department investigate the matter and temporarily transferred all personnel assigned to that station, per our department policy. During the investigation, findings determined eleven (11) personnel had some involvement with the incident and they were relieved of duty. Additional evidence

> discovered identified six (6) of those individuals directly involved and swift administrative action was implemented. Under my authority, a Captain, a Lieutenant and 4 firefighters were terminated for offenses surrounding egregious and hateful conduct."

Legal Lesson Learned: Helpful Florida decision about a "hideous, distasteful act of hate."

> Note: See March 27, 2023 Press Coverage: "Florida Supreme Court turns down Miami firefighter defamation case."

File: Chap. 16, Discipline

TN: FF CONV. ASSAULT WITH .38 - FIRED – LIMITED CROSS-EXAM CHIEF OTHER FF DISCIPLINE WAS APPROPRIATE

On March 21, 2023, in Paul Zachary Moss v. Shelby County Civil Service Merit Board, the Supreme Court of Tennessee, held (5 to 0) that the Civil Service Board properly limited cross-examination of the Fire Chief after he testified about his "uniform" policy of terminating firefighters convicted of misuse of firearms. The Court noted that at the Board hearing: "During cross-examination, counsel for Mr. Moss attempted to question Chief Benson about whether he had uniformly applied this policy to prior disciplinary incidents, specifically asking about a firefighter who had committed sexual assault. Chief Benson testified that 'a firefighter who committed sexual battery would likely be terminated.' When Mr. Moss's attorney asked Chief Benson why he had not terminated that particular firefighter, counsel for the Fire Department objected to the line of questioning as irrelevant. The Board sustained the objection and declined to hear evidence relating to the prior discipline." The TN Court of Appeals held this violated the firefighters due process rights.

> The TN Supreme Court ruled overturned the Court of Appeals: "If allowed to stand, the Court of Appeals decision would confine civil service agencies to a level of imposed discipline in line with previous instances. For example, if a civil service agency wants to "crack down" on particularly troubling behavior within the agency, it would be limited to whatever discipline was previously meted out in the past, essentially nullifying any deterrent effect. There is also the issue of pragmatism. If Mr. Moss's argument carries the day, merit boards (and the courts to which their decisions are appealed) will sift through instances of past discipline to determine whether the prior instances are analogous to the cases before them. And, at the very least, Mr. Moss's position does not fit within the "limited scope of review" utilized by this Court in reviewing administrative agency decisions and would undermine the deference we have traditionally given to agencies with regard to personnel matters…. In sum, the Board's decision to exclude Mr. Moss's disparate discipline evidence was not a clear error in judgment…. The Board did not abuse its discretion in determining that the evidence was irrelevant to the issue of whether there was just cause to terminate Mr. Moss's employment."

"On November 1, 2013, several individuals held a political rally on an interstate overpass in Memphis. Rally participants held signs that advocated for the impeachment of then-President Barack Obama, and at least one individual wore a plastic mask depicting President Obama. Passing motorists reacted negatively to the demonstration. Fearful of the possibility of violence, participants called the Memphis Police Department ('MPD') for assistance.

Paul Zachary Moss arrived at the overpass after his wife, a rally attendee, said she feared for her safety. Mr. Moss approached the scene armed with a .38 caliber handgun. Upon learning that an attendee, Thomas Mason Ezzell, Jr., wore the 'Obama mask,' Mr. Moss became angry. The situation escalated into a physical altercation between Mr. Moss, Mr. Ezzell, and another rally attendee, Earl Mayfield. Mr. Moss pointed his handgun at both men, threatening to kill them. Mr. Ezzell and Mr. Mayfield relented, and Mr. Moss returned to his truck where he was disarmed and arrested by MPD officers. Mr. Moss informed the Fire Department about the incident.

***

[At the Board hearing] Mr. Moss said he became upset and yelled at Mr. Ezzell because Mr. Moss's wife had been put in a dangerous situation. He admitted saying to Mr. Ezzell, 'Are you stupid?' He also acknowledged that he was 'trying to be heard,' but denied swinging at, grabbing, or punching Mr. Ezzell. Mr. Moss explained that Mr. Mayfield hit him from behind and put him on the ground in a headlock, and Mr. Ezzell tried to grab his arms. When Mr. Moss freed himself, he pulled his gun because he felt he was in imminent danger. The police arrested Mr. Moss and took him to the police station. After his release, Mr. Moss reported his arrest to his battalion chief.

***

Later, a grand jury indicted Mr. Moss on two counts of aggravated assault. He entered an *Alford* plea to one count of aggravated assault. After successfully completing three years of judicial diversion, the diverted charge was dismissed."

Legal Lesson Learned: Serious facts involving improper use of firearm led to termination.

File: Chap. 17 – Arbitration, Labor Relations

TX: STATE SUP. CT. STRIKES DOWN CITY OF HOUSTON FIRE / POLICE "PAY PARITY" – CBA REVIEW BY COURT

On March 31, 2023, in City of Houston v. Houston Professional Fire Fighters' Association, Local 341, consolidated with Houston Police Officer's Union v. Houston Professional Fire Fighters' Association, Local 341, the Texas Supreme Court held that the 2018 "Pay-Parity" change to City Charter [known as Proposition B], requiring firefighters be paid same as police officers, violates State law. The State law is known as "The Fire and Police Employee Relations Act in Local Government Code Chapter 174." Chapter 174 is a comprehensive framework that governs collective bargaining for those municipal employers whose voters have adopted it [adopted by Houston voters in 2003], and under that State law since Local 341 has reached an impasse with the City [last CBA was 2011-2017], they are entitled to Court intervention to reach pay agreement that is "substantially equal" to those in comparable private-sector employment.

The Texas Supreme Court held:

> "We hold that Chapter 174 establishes reasonable standards for judicial enforcement such that it does not violate the constitutional separation of powers. Accordingly, we reject the City's constitutional challenge to judicial enforcement of the statute's compensation standard. We further hold that the Fire Fighters met all prerequisites for seeking Chapter 174 enforcement, and thus the statute waives the City's immunity from the Fire Fighters' lawsuit for Chapter 174 compensation. Finally, we hold that Chapter 174 preempts the pay-parity amendment. Local law may not supplant Chapter 174's rule of decision by requiring an inconsistent compensation measurement. Because the court of appeals held differently, we reverse its judgment in the second suit. We affirm its judgment in the initial suit and remand the case to the trial court for further proceedings to establish whether the City has complied with Chapter 174's compensation standards and, if not, to set appropriate firefighter compensation."
>
> "Local regulations are preempted when they prescribe a governing rule that is inconsistent with a state statute's standards, even if enforcement of the local law might hypothetically result in the same outcome as enforcement of the statute. A court enforcing Chapter 174 may happen to reach a result consistent with the pay-parity amendment. In such cases, no inconsistency exists. The pay-parity amendment, however, never functions as the governing rule of decision in such an instance because it can never force a result different from that which Chapter 174 compels. Local regulations are not 'ancillary to and in harmony with' state statutes when they prescribe a different rule of decision that coincidentally converges with the statutory rule."

Legal Lesson Learned: The City of Houston and Police Union have won their challenge to Prob B; but the City must now go to collective bargaining with Local 341.

> Note: See March 31, 2023 article, "Texas Supreme Court strikes down 'Prop B' years after Houston voted for firefighter pay parity." Both Houston city officials and the firefighter's union took home a win in the ruling, and both are claiming victory… However, Thursday's decision wasn't just a win for those opposed to Prop B. The court

also ruled in favor of the firefighter's union in another case about a state law that handles firefighter pay. The law, which the Supreme Court ruled is constitutional, says firefighters have to be paid substantially equal to similar jobs in the private sector, and that the two sides should use collective bargaining to reach a deal."

File: Chap. 17

CT: CBA UNCLEAR ON SICK PAY – TWO FF RESIGNED, NOW GETTING PENSION - CITY WINS NEW TRIAL ON SICK PAY

On March 28, 2023, in Dickie K. Murchison, Jr. and John J. Bigham v. City of Waterbury, the Court of Appeals of Connecticut held that the trial court's award of sick pay of $28,307.98 to Murchison, and $33,451.55 to Bigham is reversed. Each firefighter resigned after 20 years, but prior to 25 years to be eligible for retirement. Now each firefighter is eligible for deferred vested pension benefits after the twenty-fifth anniversary of their respective hire dates, and they also now want unused sick pay. The CBA does not explicitly address whether they are now entitled to unused sick pay. On appeal the City first claims that the trial court erred in awarding the plaintiffs terminal leave pay, arguing that the plaintiffs only *resigned* from employment with the defendant, and did not "retire," for purposes of the terminal leave pay provision.

The Court of Appeals agreed. "The [City] claims that, because there was no evidence in the record that it drafted the agreement, the trial court erred in construing any ambiguity in the terminal leave pay provision against it. The plaintiffs counter that, regardless of any ambiguity in the provision, the evidence established that the term 'retirement' refers to the date that they became eligible to collect, and/or began collecting, their pension benefits. We agree with the defendant."

"The language at issue in the present case is found in the terminal leave pay provision of the agreement, the relevant text of which previously has been set forth in full in this opinion. That provision details that firefighter employees become eligible for terminal leave pay '[u]pon . . . retirement,' where the first of four installments is due, as is relevant here, on the 'date of retirement.' The term 'retirement' is not defined in the terminal leave pay provision or anywhere else in the agreement. In the absence of such a definition and in order to interpret the use of that term in the terminal leave pay provision, the parties have turned to the various uses and definitions of the term "retirement" in the ordinance, the relevant text of which also has been set forth previously in this opinion.

***

In sum, we conclude that the term 'retirement' as used in the terminal leave pay provision is ambiguous because it is susceptible to more than one reasonable interpretation. Because the [trial] court failed to resolve that ambiguity, it could not have properly found that the plaintiffs were entitled to terminal leave pay.

***

The judgment is reversed and the case is remanded for a new trial."

Legal Lesson Learned: When a CBA is unclear about when firefighters are eligible for unused sick pay, the ambiguity cannot be used against the City without proof the City drafted the CBA provision.

Note: On Aug, 14, 2018, Judge Brazzel-Massaro denied summary judgment for either side, and ordered the case be tried. "In sum, the bargaining agreement and ordinance are susceptible to more than one reasonable interpretation and are therefore ambiguous." See unpublished decision.

On Nov. 7, 2019, the case went to trial before a different Judge – bench trial (no jury) before Judge Gordon. On October 1, 2021, the trial court judge issued a memorandum of decision rendering judgment in favor of the plaintiffs, awarding terminal leave pay in the amounts of $28,307.98 to Murchison and $33,451.55 to Bigham. This appeal followed.

File: Chap. 18 – Legislation