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MAY 2023 – FIRE & EMS LAW NEWSLETTER

[NEWSLETTER IS NOT PROVIDING LEGAL ADVICE.]

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- **NEWSLETTERS:** If you would like to be added to UC Fire Science listserv, just send him an e-mail. View current and past newsletters via Fire Science webpage.
- **TEXTBOOK:** Updating 18 chapters of my textbook (2018 to current). FIRE SERVICE LAW (SECOND EDITION), Jan. 2017: View textbook via Waveland site

26 NEW CASES – added to ONLINE LIBRARY (case summaries 2018 - present):

View cases via Scholar@UC

File: Chap. 1, American Legal System

CA (4/12/2023) – SAFER GRANT – FRAUD – RECRUITING VOL. FF - 12 MONTHS PRISON, $1.2 MILLION RESTITUTION

United States v. Samuel Thomas Lanier, U.S. District Court Chief Judge Kimberly J. Mueller.

"The United States and defendant Samuel Lanier dispute the amount of restitution he must pay to the Federal Emergency Management Agency (FEMA) under the Mandatory Victim Restitution Act. The United States has carried its burden to demonstrate the amount of restitution due is $1,223,552, as explained in this order.*** The court declines to adopt Lanier's proposal, which relies on the implicit and unsupported assumption that every expense other than the three listed expenses was legitimate and accurately invoiced. It is also unclear how that assumption can be reconciled with the admissions Lanier made in adopting the factual basis of his plea agreement. For example, he agreed he invoiced FEMA for $18,500 in EMT training for the Shasta association, but he admitted that training never occurred. Plea Agreement at A-3. He also agreed he invoiced FEMA $204,000 for training on behalf of the Siskiyou fire chiefs association but spent only $60,442.21. *Id.* at A-2. Despite these admissions, Lanier does not list firefighter and EMT training among the types of overbilled expenses in his restitution proposal."

Legal Lesson Learned: Fraudulent charges to Fed. Government can lead to prison time and restitution.

> **Note: See Oct. 17, 2022 Press Release – "Siskiyou County Man Sentenced to 1 Year in Prison for Major Fraud Against the United States for Taking FEMA Grant Funds."**

File: Chap. 2, LODD, Safety

WV (4/10.2023) – VOL. FF WATERTAKER LOST CONTROL – DIED – WIFE DEATH BENEFITS – CARDIAC NOT PROVEN

Clover-Roane Volunteer Fire Department v. Sarah Horwich, dependent of Mark Horwich, Intermediate Court of Appeals of West Virginia.

The issue on appeal is whether the Board erred in affirming the April 25, 2022, decision of the Workers' Compensation Office of Judges ("OOJ") that reversed the claim administrator's order denying Ms. Horwich's request for dependents' benefits. *** This case involves the death of volunteer firefighter, Mark Horwich, on January 11,2020. Mr. Horwich was involved in a single vehicle crash in Newton, Roane County, West Virginia as he drove a fire truck carrying water to a structure fire. *** Ms. Horwich filed a claim for workers' compensation dependents' benefits after Mr. Horwich's death, asserting that he died as a result of an occupational injury. Clover-Roane retained Christopher Martin, M.D., an occupational medicine specialist, to review Mr.

Horwich's medical records. Dr. Martin issued a report dated December 7, 2020, in which he concluded that Mr. Horwich suffered a cardiac event that caused his death. *** By decision dated April 25, 2022, the OOJ reversed the claim administrator's denial of benefits. The OOJ found that the medical evidence was insufficient to show that Mr. Horwich's hypertensive cardiovascular disease, the underlying cause of death which resulted in a dysrhythmia, caused Mr. Horwich to have the motor vehicle accident. The OOJ found that there was evidence of equal weight concerning whether Mr. Horwich's heart condition that caused his death occurred before the fire truck ran off the road and started the chain of events which led to the rollover accident, or whether his heart condition resulted in his death after the accident occurred.*** The OOJ observed that if, after weighing all of the evidence regarding an issue, there is a finding that an equal amount of evidentiary weight exists for each side, the resolution that is most consistent with the claimant's position will be adopted, pursuant to West Virginia Code § 23-4-1g (2003). Thereafter, the Board affirmed the OOJ's order, adopting the same findings of fact and conclusions of law. Clover-Roane has not made a showing that the Board's affirmance is clearly wrong. Therefore, we must affirm. Accordingly, we affirm the Board's September 27, 2022, order."

Legal Lesson Learned: Courts will not overturn Workers Comp Board unless decision is clearly wrong.

> **Note: See Jan. 13, 2020 article, "West Virginia firefighter killed in crash while responding to fire."**

Chap. 3 Homeland Security, incl. Active Shooter, Cybersecurity (51 cases)

Chap. 4 Incident Command, incl Training, Drones (28 cases)

File: Chap. 5, Emergency Vehicle Operations

IN (4/28/2023) – BLUE LIGHTS VOL. FF – NON-VOL CITED HAVING TWO BLUE LIGHTS ON INSIDE BACK WINDOW

Bryan C. Falletti v. State of Indiana, Court of Appeals of Indiana.

"Indiana Code section 36-8-12-11(a) allows members of a volunteer fire department to "display [illuminated] blue lights on their privately-owned vehicles while en route to scenes of emergencies or to the fire station in the line of duty [,]" subject to certain conditions on the type and placement of the lights. A person who is not a member of a volunteer fire department "may not display an illuminated blue light on a vehicle." Ind. Code § 36-8-12-11(c). To do so is a

Class C infraction. Ind. Code § 36-8-12-11(e). *** Trooper Fulfur then positioned himself behind Falletti's vehicle and "observed two (2) blue lights in the rear window that were facing outward. One on each side across the top of the back window." *** Falletti contends the trial court erred in determining he violated subsection (c) of this statute upon finding the statutory language is clear he could not display "two rear fac[ing] emergency style" illuminated blue lights whether "affixed on the interior or exterior" of the car. Appealed Order at 2. Falletti argues the phrase "on a vehicle" in subsection (c) is ambiguous and the rule of lenity should apply such that the phrase is interpreted in his favor to mean "on *the exterior of* a vehicle." See Brief of Appellant at 8. *** The fact the statute restricts the type and placement of blue lights on a volunteer firefighter's vehicle does not leave the field open for vehicles belonging to nonvolunteer firefighters to display other types of lights in other places as Falletti urges. To interpret the statute in such a way would give non-volunteer firefighters more leeway in displaying blue lights than the group the statute was intended to benefit and would be at odds with the statute's purpose of distinguishing volunteer firefighters from the rest of the motoring public."

Legal Lesson Learned: Unless you are a volunteer firefighter, may not have blue lights on top of your vehicle, or in your vehicle, in Indiana.

File: Chap. 5, Emergency Vehicle Operations

NY (4/20/2023) – VOL. FF DROVE FIRE TRUCK "SLOWLY" THROUGH RED LIGHT – NO LIAB. VOL. – FD ALSO IMMUNE

Courtney Anderson v. Commack Fire District, New York Court of Appeals.

"The question presented on this appeal is whether these statutes authorize a claim against a fire district for the "negligence" of a volunteer firefighter when the firefighter's actions are otherwise privileged and subject to a heightened recklessness standard under Vehicle and Traffic Law § 1104. We hold that imposition of vicarious liability for a driver's negligence in this context would be contrary to legislative intent, this Court's precedent, and general principles of negligence law and vicarious liability. *** Plaintiff commenced this personal injury action after her vehicle collided with a fire truck owned by defendant Commack Fire District (the District) and operated by a District volunteer firefighter. The accident occurred at an intersection controlled by a traffic light which, at the time of the accident, was illuminated green in plaintiff's direction and red in the fire truck's direction. *** Based on undisputed testimony that the firefighter was responding to an alarm of fire, had activated the fire truck's lights and sirens, stopped the fire truck before entering the intersection, and proceeded slowly through the red light, Supreme Court held that the firefighter had "established prima facie entitlement to the exemption in Vehicle and Traffic Law § 1104," and that plaintiff had failed to raise a triable issue in opposition as to whether the firefighter acted with reckless disregard. The court therefore granted summary judgment to the firefighter. However, the court reached a different result with respect to the vicarious liability of the District. Relying on General Municipal Law § 205-b, "which states, in part, that 'fire districts created pursuant to law shall be liable for the negligence of volunteer firefighters,'" the court concluded that questions of fact existed regarding whether

the firefighter "was negligent in failing to see plaintiff's vehicle approaching," and, thus, the District was not entitled to summary judgment. *** Our holding that the statutes in question do not impose vicarious negligence liability on a fire district for conduct that is privileged under Vehicle and Traffic Law § 1104 is consistent with this Court's precedent addressing vicarious liability claims against municipalities under that statute."

Legal Lesson Learned – Volunteer firefighters, and their fire departments, enjoy qualified immunity for emergency vehicle operations that do not violate state statutes.

File: Chap. 6, Employment Litigation

KY (4/27/2023): FF HAD BOTH KNEES REPLACED – WORK RELATED TRAUMA - PERMANENT PARTIAL DISABILITY

Lexington Fayette Urban County Government v. Michael Gosper, et al., Supreme Court of Kentucky.

"Gosper testified by deposition and at the final hearing. In his Form 101, he alleged his bilateral knee injuries had been caused by cumulative trauma sustained over a roughly eighteen-year period while he worked exclusively for LFUCG as a firefighter and EMT paramedic, beginning on June 18, 2001. He testified his heavy and strenuous duties required him to wear and carry up to eighty pounds of gear, tools, and associated firefighting items while climbing and crawling up and down trucks, ladders, and locales; lifting and dragging heavy hoses; pulling and demolishing ceilings and other structures; and extricating, dragging, or carrying patients and victims. In addition, he was required to complete vigorous training exercises four times per year. *** Following the final hearing, the ALJ determined Gosper's cumulative trauma injury was work-related. The ALJ also concluded Gosper suffered permanent partial disability and awarded him $835.04 per week for 425 weeks. The ALJ further awarded Gosper "medical expenses including but not limited to provider fees, hospital treatment surgical care nursing supplies and appliances as may be reasonably required for the cure and relief from the effects of the work-related injury." LFUCG filed a petition for reconsideration, which the ALJ denied. The Board unanimously affirmed the decision of the ALJ. The Court of Appeals affirmed the decision of the Board. This appeal followed. *** Having reviewed the opinions below, the evidence of record, and LFUCG's arguments, we are convinced the ALJ's findings were supported by substantial evidence and should not be disturbed."

Supreme Court of Kentucky appellant case No. 2021-SC-0386-WC.

Legal Lesson Learned: Testimony concerning 18 years of strenuous on duty activities was important.

File: Chap. 6, Employment Litigation

TX (4/27/2023) – FF NOT HIRED BY SAN ANTONIO FD – ONLY CITY EMPLOYEES CAN APPEAL CITY CIVIL SERVICE COMM.

The City of San Antonio Fire Fighters' And Police Officers' Civil Service Commission, et al. v. Gabriel Saenz, Court of Appeals of Texas, Fourth District, San Antonio.

"Saenz is a fire fighter with the City of Canyon Lake. He applied for employment with the San Antonio Fire Department, but his application was disqualified. Saenz then filed an appeal with the Commission. On February 14, 2022, the Commission held a hearing and orally denied Saenz's appeal. On February 24, 2022, an employee of the Commission emailed Saenz a letter stating the Commission's decision. *** Saenz is a member of the City of Canyon Lake Fire Department, and there is no dispute that he was appointed to that department in compliance with Chapter 143. However, the parties dispute whether Saenz is a "fire fighter" with respect to the San Antonio Fire Department and the City of San Antonio Fire Fighters' and Police Officers' Civil Service Commission. We hold he is not. *** Because Saenz has not established a waiver of governmental immunity, pursuant to section 143.015 or otherwise, we reverse the trial court's order denying the Commission's plea to the jurisdiction and render judgment dismissing Saenz's lawsuit."

Court of Appeals of Texas, Fourth District, San Antonio case No. 04-2-00347-CV

Legal Lesson Learned: Civil Service Commission appeals are only for city employees.

File: Chap. 6, Employment Litigation

IL (4/24/2023) – FF - LEUKEMIA – RECEIVES LINE OF DUTY DISABILTY PENSION & PAID HEALTH INSURANCE

James Ivetic, on behalf of his spouse, Nancy Ivetic v. Bensenville Fire Protection District No. 2, Court of Appeals of Illinois, First District, First Division.

"James Ivetic developed a debilitating form of cancer during the course of his nearly 30-year career as a firefighter with the Bensenville Fire Protection District No. 2 (District). After James retired, he was awarded a line-of-duty disability pension (40 ILCS 5/3-114.1 (West 2010)) by the Board of Trustees of the Bensenville Pension Fund (Board) after the Board determined that James' acts of duty were either the cause of or a contributing cause of his cancer. James subsequently applied for health insurance premium benefits for him and his wife, Nancy Ivetic (plaintiffs), pursuant to section 10 of the Public Safety Employee Benefits Act (Act) (820 ILCS 320/10 (West 2014)). *** The District denied James' request, concluding that he suffered from cancer, which was a disabling "illness," rather than an "injury," and therefore, he was not entitled to the additional health insurance benefits. *** Because the exposures at least contributed to James' cancer, plaintiffs can recover under the Act."

Court of Appeals of Illinois, First district, First Division Case No. 1-22-0879

Legal Lesson Learned: Firefighter entitled to health insurance benefit for him and his wife.

File: Chap. 6, Employment Litigation

PA (4/20/2023) – FF RIGHT SHOULDER INJURY – LIGHT DUTY UNTIL FELT HE HAD RETIRE – DISABILITY BENEFITS

City of Wilkes-Barre v. Thomas Snyder (Workers' Compensation Appeal Board),
Commonwealth Court of Pennsylvania.
[Unpublished Decision.]

"The WCJ specifically rejected Claimant's testimony that he retired due to his work injury, "when the record reflects that he voluntarily chose to retire, and is now, after the fact, attempting to attribute it to his work-related injury for secondary gain." Claimant was employed as a firefighter by Employer when he was injured at work on October 1, 2017, after he tripped over some equipment and fell, injuring his right shoulder… Employer recognized Claimant's injury by way of an Amended Notice of Compensation Payable dated August 7, 2018, for a strain or tear to the right shoulder, and Claimant began receiving temporary total disability benefits (TTD) as of October 2, 2017…. Claimant's TTD benefits were suspended as of August 6, 2018, when Claimant returned to work in a modified-duty position. *Id.* Claimant continued working in a modified-duty position until November 26, 2018, when Claimant submitted a resignation letter confirming that he was retiring as of November 26, 2018, due to a work-related injury. *** Because Claimant sustained his burden to prove that he was forced into retirement when his temporary, modified-duty work assignment would be eliminated when he was deemed unable to return to work as a firefighter, Claimant was not required to prove that he retired from the entire labor market. In sum, we discern no error in the Board's reversal of the WCJ's decision denying the reinstatement of Claimant's benefits."

Commonwealth Court of Pennsylvania Case No. 289 C.D. 2021

Legal Lesson Learned: If injury will not allow you to return full duty, document with management the need for disability retirement.

File: Chap. 6, Employment Litigation

NY (4/10/2023) – FDNY – HIP INJURY AT FIRE – ORDINARY DISABILITY - NOT ACCIDENTAL DISAB - DEGENERATIVE HIP

Kevin Barnabee v. The New York City Fire Pension Fund, et al., Supreme Court, New York County.

"Petitioner reported that, on August 20, 2018, while standing on a fire escape after responding to a fire emergency at a 3-story building, a large piece of wood struck his helmet and shoulder, causing him to fall to his knees and injure his left hip. (NYSCEF Doc. No. 2, *member injury report).* On August 25, 2018, petitioner was examined by the FDNY Bureau of Health Services, which noted "marked pain in hip with difficulty walking." (NYSCEF Doc. No. 3, *examination reports).* Petitioner underwent an MRI on August 27, 2018, which made the following findings: "Mild degenerative changes are present in the left hip with superficial cartilage loss involving less than 50% the cartilage thickness…." *** Notwithstanding Dr. Long's opinion that the August 20, 2018, incident caused petitioner's labral tear and was not due to chronic degenerative joint disease, especially since petitioner did not present symptoms of hip pain prior to his injury, this court notes that "[a]ny conflict in the medical evidence regarding the cause of the disability is within the sole province of the Medical Board to resolve."*** Accordingly, respondent's denial of petitioner's accident disability retirement benefits was not arbitrary and capricious and may not be judicially disturbed … All other arguments have been considered and are either without merit or need not be addressed given the findings above. Based on the foregoing, it is hereby ORDERED that petitioner's application is denied and dismissed."

Supreme Court, New York County Case No. 154756/2021

Legal Lesson Learned: Degenerative hip medical history does not qualify for accidental disability benefits.

File: Chap. 7, Sexual Harassment, Gender Discrimination

OH (4/19/2023): EMT IS TRANSGENDER WOMAN – FIRED FOR NEG. COMMENTS HOSPITAL STAFF – CASE BE DISMISSED

Rayne S. Fedder v. Ohio Medical Transportation, Inc., U. S. Magistrate Judge Chelsey M. Vascura, U.S. District Court for Southern District of Ohio, Eastern Division.

"On the evening of April 19, 2022, Plaintiff and her partner were dispatched to O'Bleness Memorial Hospital to transport a psychiatric patient to Columbus Springs Dublin. (*Id.* at ¶¶ 104, 110.) Plaintiff felt that O'Bleness staff were not performing their jobs properly and voiced criticisms of the use of an armed security officer ("asking what he even needed that gun

holstered to his hip for, and quipp[ing] that he probably did not know how to operate it") and the poor quality of the paperwork provided by the nursing staff ("Plaintiff does not remember saying that the report from the charge nurse about the patient was 'shitty,' though Plaintiff does concede that the sentiment was there."). (*Id.* at ¶¶ 115, 185.) Plaintiff also alleges that the desk attendant asked how Plaintiff was doing, and Plaintiff said "something about how she would be doing much better if she passed or if she did not work with a bunch of creepy bigots, or something of the sort." (*Id.* at ¶ 117.) *** On the morning of April 20, 2022, an O'Blenness manager contacted Defendant to complain about Plaintiff's "unprofessional" and "disrespectful" behavior. (*Id.* at ¶¶ 142-44, 151.) The O'Blenness manager reported that a doctor present during Plaintiff's pickup felt that Plaintiff might need a "blue gown" (*i.e.*, involuntary hospitalization for a psychiatric emergency) because Plaintiff was making "off the wall comments" and saying "unnecessary" and "oddly inappropriate things." (*Id.* at ¶ 305.) A nurse who was present during Plaintiff's pickup also emailed Defendant, stating that Plaintiff had been "rude an inappropriate" and exhibited "rude, bizarre, and erratic behavior," and that the nurse "might have reservations about releasing a patient" to Plaintiff. (*Id.* at ¶ 306.) Later that morning, Defendant placed Plaintiff on administrative leave with pay pending Defendant's investigation of the O'Blenness staff's complaints. (*Id.* at ¶ 168-69.) On May 3, 2022, Plaintiff attended a meeting at Defendant's office, during which Defendant terminated her employment based on the complaint by O'Blenness staff. (*Id.* at ¶¶ 201-07.) *** Here, Plaintiff alleges she was terminated on the basis of her sex and/or transgender status. But Plaintiff cannot satisfy the fourth element of her prima facie case, because she has not alleged that any similarly situated male or cisgender employees were treated more favorably. Indeed, Defendant's stated basis for terminating Plaintiff's employment was the O'Blenness staff's complaint regarding Plaintiff's rude, unprofessional, and erratic behavior."

Legal Lesson Learned: EMS must act professionally, not only with patients but also with hospital staff.

File: Chap. 8

NY (3/31/2023) – FDNY – PROB. FF FROM PERU – HAZING, ONLINE HARASSMENT, PTSD, SUSP. - CASE PROCEED

Joseph Mendoza v. The City of New York, et al., U.S. District Court Judge Lashann Dearcy Hall, U.S. District Court for Eastern District of New York.

"Plaintiff became employed by the FDNY as a firefighter starting June 29, 2015. (*Id.* ¶ 18.) Plaintiff began reporting to Engine 297/Ladder 130 in College Point, New York, as a probationary firefighter. (*Id.* ¶ 21.) On his first day, other firefighters dumped a bucket of water, followed by flour, on Plaintiff from a window above the entrance. (*Id.*) Plaintiff believes that this behavior was part of a hazing practice to which probationary firefighters are routinely subjected. (*Id.* ¶ 22.) Still, Plaintiff complains that he was subjected to insults and demeaning comments from several firefighters relating to his race, national origin, disability, and uniformed service. (*Id.* ¶ 23.) *** On April 1, 2018, Plaintiff voluntarily checked into a rehabilitation center. (*Id.* ¶

50.) Plaintiff received in-patient care for approximately one month, after which he participated in outpatient care for approximately two months. *** As Plaintiff correctly argues, the amended complaint alleges a continuous and ongoing period of racial harassment that began in 2015 and continued through at least May 2019, when he alleges he received a racially offensive text message in the group chat. (*See* Pl's Opp'n at 6-7; *see also* Am. Compl. ¶¶ 23, 38, 56.) Plaintiff alleges he was subjected to racially demeaning conduct throughout this time period, and none of those individual comments or racial incidents could constitute a discrete act or be considered unrelated to the racial incidents he experienced within the limitations period. *** Defendants' motion to dismiss Plaintiff's Section 1983 hostile work environment claim is DENIED."

United States District Court, E.D. New York, Case No. 21-CV-2731 (LDH) (JRC)

Legal Lesson Learned: Allegations are far more than just hazing.

File: Chap. 8, Race Discrimination

NB (3/31/2023) – BLACK FEMALE FF – GEAR ON FLAGPOLE WHEN LEFT IT BEHIND - RESIGNED - LAWSUIT PROCEED

Jane Crudup v. City of Omaha, Senior U.S. District Court Judge Joseph H. Bataillon, U.S. District Court of District of Nebraska.

"On or about 3, 2020, Crudup reported to Station 41 after an off-site training academy. Filing No. 65 at 58. She had not taken her firefighting gear, such as her helmet and coat, with her. Filing No. 65 at 61. Upon arriving at the station, she found her helmet and gear hanging from the flagpole in the front of the station in a manner that signified a mock lynching to her. Filing No. 65 at 58-61. *** Crudup claims the City of Omaha discriminated against her when her gear was put up the flagpole in the form of a mock lynching, eventually resulting in her having to go on unpaid leave and later quitting her job due to mental health issues. *** The City of Omaha does not dispute that Crudup is a member of a protected class based on being Black and that she was qualified for her job as a firefighter. It argues, however, that she did not suffer an adverse employment action and that she was not treated differently than similarly situated non-class members. As to the latter, the City of Omaha presented evidence from three other firefighters that they had had their gear put up the flagpole. For example, Tisthammer and Salmon, both white firefighter candidates, averred they had their gear run up the flagpole for leaving it behind at the station. Filing No. 62-11; Filing No. 62-12. A third white firefighting candidate, Schack, had his shirt put up the flagpole but did not know the reason why. Filing No. 62-13. The City has not demonstrated that these white firefighters were similarly situated to Crudup such as would preclude her race discrimination claim. First, these incidents occurred years prior to the incident involving Crudup-in Salmon's case, nearly 20 years earlier. Second, as to Schack, the incident occurred at a different station (Station 42), and he testified he did not know the reason why his gear was put up the flagpole. Third, while Tisthammer and Salmon averred their gear was put up the pole as a corrective action for leaving their gear behind, Crudup testified the action was racially motivated and symbolized a mock lynching. Crudup's gear was positioned so the helmet was a few feet above the firefighting suit, making it look like a body. Filing No. 65-7 at 1. The

City failed to present evidence of the manner in which the white firefighters' gear was suspended from the flagpole and whether it also resembled a hanging body. Thus, there is a dearth of evidence from which the Court can conclude Crudup was treated in the same manner and from which the Court can conclude the white firefighters were similarly situated. *** For the reasons set forth herein, the City of Omaha's motion for summary judgment is denied as to all of Crudup's causes of action."

United States District Court, D. Nebraska case no. 8:21CV45

Legal Lessons Learned: Flag pole incidents and similar practices can lead to litigation.

Chap. 9 Americans With Disabilities Act (28 cases)
Chap. 10 Family Medical Leave Act, incl. Military Leave (14 cases)

File: Chap. 11, FLSA

NC (4/21/2023) – FLSA – COUNTY EMS LAWSUIT WILL BE CLASS ACTION – OVERTIME RATE CALCULATIONS

Sarah B. Conner v. Cleveland County, North Carlina, Chief U.S. District Court Judge Martin Reidinger, U.S. District Court for Western District of North Carolina, Asheville District.

"The Plaintiff appealed the Court's dismissal, and on January 5, 2022, the Fourth Circuit issued an opinion vacating the Court's August 21, 2019, order, concluding that the Plaintiff had stated a cognizable claim for an FLSA violation and remanding for further proceedings on the merits of the Plaintiff's claims. *Conner v. Cleveland Cnty.*, 22 F.4th 412, 429 (4th Cir. 2022). On April 18, 2022, the Plaintiff filed a Motion to Revive her earlier Motion for Collective and Class Certification. *** The Court will certify as a class action pursuant to Rule 23 a class comprised of 24 on/48 off employees who were employed by Cleveland County anytime between January 2, 2016, and December 31, 2017. The Court will order Cleveland County to submit objections to the proposed notice within the time frame as set out above. *** The Plaintiff asserts that calculating a 24 on/48 off employee's pay according to Plan I contradicted the contract of employment as set forth in the Ordinances. Based thereon, the Plaintiff argues that the revised semimonthly rate used for 24 on/48 off employees prior to January 1, 2018, undercompensated employees for overtime. [*Id.* at ¶ 21]. The Plaintiff contends that by using $26,208, rather than $36,900, as the starting point for her yearly salary before adding overtime pay, Cleveland County used overtime pay to fill a "gap" between 24 on/48 off employees' yearly rates as calculated

using the revised semi-monthly rate and their true annual salary as established by the Ordinances. *[Id.]*."

Legal Lessons Learned: FLSA provides for class action lawsuits.

File: Chap. 11, FLSA

CA (4/19/2023) – MEDIC WITH AMR – NO MEAL / REST BREAKS - CASE DISMISSED – 2018 VOTERS PROP. 11

Vaughn Banta v. American Medical Response, et al., California Court of Appeals, Second District, Second Division. [Unpublished Decision.]

"Plaintiff alleged he was employed as a field paramedic and defendants falsely informed their employees that special rules applied to emergency medical providers that preclude them from having the same legal rights as other employees to receive meal and rest breaks. *** In paragraph 32, plaintiff alleged that defendants refused to provide employees with a 30-minute uninterrupted meal break or a 10-minute uninterrupted rest break, as mandated by section 512, and defendants refused to pay the premium pay required by section 226.7 for each occasion on which employees were required to work without a full, uninterrupted statutory rest break. *** This was the law when plaintiff filed the SAC in 2010 that regulated working conditions as an emergency medical provider. However, eight years later, voters approved Proposition 11, codified at sections 880 to 890. These statutes became effective on December 19, 2018. Section 887, subdivision (a), one of the newly enacted provisions, states: "In order to maximize protection of public health and safety, emergency ambulance employees shall remain reachable by a portable communications device throughout the entirety of each work shift." Subdivision (b) states "[i]f an emergency ambulance employee is contacted during a meal or rest period, that particular meal or rest period shall not be counted towards the meal and rest periods the employee is entitled to during his or her work shift." EMT's, therefore, do not have a right to an uninterrupted rest or meal period because they are on call throughout their entire work shift. *** Thus, after the passage of Proposition 11, plaintiff's claims that he was not provided an uninterrupted rest and meal break no longer contained sufficient facts to constitute a violation of sections 512 and 226.7 or Wage Order 9. Newly enacted section 887 required EMT's, like plaintiff, to be reachable by a portable communication device during his entire work shift."

Legal Lesson Learned: California voters passed Proposition 11, requiring meal and rest period breaks for most employers, but not EMS.

Chap. 12 Drug-Free Workplace (21 cases)

File: Chap. 13, EMS

KY (4/27/2023): EMS TOOK ASSAULT VICTIM TRAUMA HOSP - CRIM. TRIAL ED DOC TESTIFIED VIA ZOOM – CONV. REV.

Donnie Campbell v. Commonwealth of Kentucky, Supreme Court of Kentucky.

"There was no showing of necessity, other than convenience to the doctor, or balancing of a victim's interests that justified the surrender of the Defendant's constitutional rights of confrontation. Thus, by allowing Dr. Tucker to testify via Zoom as a convenience to him, the trial court erred. *** And because there is a reasonable possibility his testimony contributed to the guilty verdict on the charge of assault in the first-degree, we reverse the judgment of the Adair Circuit Court on that charge."

Supreme Court of Kentucky Case No. 2021-SC-0479-MR

Legal Lesson Learned: Timely subpoena ED doctor and other key witnesses to appear in person for criminal trials.

File: Chap. 13, EMS

IL (4/19/2023) – COVID 19 - CHICAGO MUST REHIRE EMPLOYEES – ALJ - ILLINOIS LABOR RELATIONS BOARD

Coalition of Unionized Public Employees and American Federation of State, County and Municipal Employees, Council 31 v. City of Chicago.

"The Respondent violated Sections 10(a)(4) and (1) of the Act by implementing its vaccination policy without first bargaining over its effects to impasse or agreement. *** Take the following affirmative action necessary to effectuate the policies of the Act:
a. Rescind the vaccination policy except those terms that the Charging Parties may seek to retain.
b. Rescind any discipline that issued to employees for violations of the vaccination policy and expunge it from employees' personnel files.
c. Reinstate any employees terminated as a result of the Respondent's unilateral application of its vaccination policy and expunge any record of the termination from their personnel files.
d. Make employees whole for the loss of any pay or benefits resulting from the failure to negotiate over the impact of the vaccination policy on the employees' wages and other terms

and conditions of employment, with interest at seven percent per annum."

State of Illinois Labor Relations Board Case No. L-CA-22-014/ L-CA-22-015

Legal Lesson Learned: The City of Chicago must bargain over the effects of the vaccination mandate.

> Note: See also April 20, 2023 article, "Labor board judge: Chicago trampled union bargaining rights by firing workers who refused Covid vax."

File: Chap. 13, EMS

IL (4/17/2023) – MENTAL TRANSPORT - BRUTALY ASSAULTED EMT IN AMBULANCE – 7 YRS PRISON

The People of the State of Illinois v. Cortez Peters, Court of Appeals of Illinois, First District, First Division.

"At trial, McDermott testified that on June 10, 2019, she and her partner DeJesus were working as EMTs for "MedEx," a private ambulance company that responds to the same calls as the Chicago Fire Department and other EMT services. *** At around 3 a.m. on June 10, 2019, McDermott and DeJesus were assigned to transport defendant from the University of Chicago Hospital to Hartgrove, a psychiatric hospital. *** During the transport, DeJesus drove and McDermott sat in the back of the ambulance with defendant. *** Defendant struck McDermott in the head with a "cellular brick-type phone" they kept in the ambulance, causing her to briefly lose consciousness. When McDermott regained consciousness, she was "violently and repeatedly" being thrown against the wall of the ambulance. *** McDermott was subsequently treated at the University of Chicago Hospital for a broken nose, fractured left orbital, and microfractures on the bottom grill of her teeth. She lost two-thirds of her front teeth and was diagnosed with concussion syndrome, causing periods of forgetfulness. She also suffered vertigo and migraine-like headaches for about a year after the incident. *** Defendant argues that he did not know that McDermott and DeJesus were EMTs because he was a psychiatric patient, drowsy from medication, and asleep when the transport was initiated. However, defendant was able to follow directions when being moved from the hospital bed to the stretcher and coherent enough to instruct the nurse not to disclose his personal information while being loaded into the ambulance."

Court of Appeals of Illinois, First District, First Division Case No. 1-21-1591

Legal Lesson Learned: Transporting mentally ill patient can be high risk; adopt a protocol on securing such patients.

File: Chap. 13, EMS

NY (4/14/2023) – RESPIR. ARREST – INTUBATION IN ESOPHAGUS – NO EXPERT PROOF CAUSED DEATH

Shaquia Simmons, Administrator of the estate of Judith Prescott v. Elizabeth Rubano, M.D. et al., Supreme Court, Kings County. [Unpublished Decision.]

"On August 12, 2019, the New York City Fire Department Emergency Medical Service ("EMS") found decedent lying in vomit on the floor of her apartment with an altered mental status. Decedent was verbal but not responding to questions. An initial EMS assessment revealed decedent's lungs were clear, equal, and bilateral, the respiratory rate regular and labored, and the heart rate was slow and regular. Thereafter, decedent went into respiratory arrest, then cardiac arrest. EMS started CPR. Resuscitation was attempted with a non-rebreather mask and intubation. Decedent arrived at Brookdale Medical Center ("Brookdale") at 12:42 AM on August 13, 2019. The endotracheal tube was checked upon arrival at the emergency department and found in decedent's esophagus. Brookdale removed the tube, and decedent was reintubated using a glidoscope. Decedent died at Brookdale on August 13, 2019, at 1:09 AM. Decedent's family declined an autopsy. *** For example, plaintiffs' experts did not address the conclusion of defendants' experts that decedent's death was caused by a respiratory event secondary to aspiration pneumonia as complicated by the placement of the endotracheal tube in decedent's esophagus. Nor did they address defendants' experts' claim that there was no indication of cardiac damage either from pulmonary embolism or otherwise until after intubation that pumped air into decedent's stomach instead of her lungs."

Supreme Court, Kings County Index No. 510343/2020

Legal Lesson Learned: EMS should confirm proper placement of ET Tube.

File: Chap. 14, Physical Fitness

TX (4/7/2023) – FEMALE FF – NEW CHIEF PROMOTED HER CAPTAIN – FAILED HIS NAVY FITNESS – FIRED – NO CASE

Rachel Crivelli v. Montgomery County Emergency Services District Number 7, U.S. Court of Appeals for Fifth Circuit.

"Shortly after taking office, Chief Rinewalt changed MCESD7's physical fitness assessment. Before, the assessment had involved activities such as climbing ladders, carrying dummies, and dragging hoses. Chief Rinewalt redesigned the assessment to closely mirror the United States Navy's Physical Fitness Standard. Firefighters were required to perform three exercises: sit-ups, push-ups, and either a timed run or a timed rowing exercise. The new assessment is age- and gender-adjusted. For example, 31-year-old Crivelli was required to do 13 push-ups; a man of her

age would have been expected to do 35. The gravamen of Crivelli's complaint is that she was terminated for repeatedly failing the new physical fitness assessment. Four other individuals never managed to pass the test. All were men, and all were terminated or resigned. Every woman but Crivelli passed the test on their first try, for a pass rate of 80%; the pass rate for men was 77%. *** Because she failed MCESD7's physical fitness assessment, Crivelli was not qualified for the position at issue. It is true that she has significant experience in firefighting, as well as many certifications and training experiences. Yet as the district court correctly noted, qualifications are an employer's prerogative. *Johnson v. Louisiana*, 351 F.3d 616, 622 (5th Cir. 2003) ("An employer may establish job requirements, and rely on them in arguing that a prima facie case is not established because the employee is not 'qualified.'"). MCESD7 was free to establish new physical assessment standards and require its employees meet those standards."

United States Court of Appeals, Fifth Circuit Case No. 22-20312

Legal Lesson Learned: Captain failed to meet minimum physical fitness qualifications.

Chap. 15 CISM, incl. Peer Support, Mental Health (25 cases)

File: Chap. 16, Discipline

IL (4/19/2023) – POLICE DISPATCHER FIRED – CONV. RESISTING PD – NO PD ENTRY HOME DISPUTE WITH KIDS

Nancy McDonald v. Dupage Public Safety Communications d/b/a Du-Comm, U.S. District Court Judge Charles P. Kocoras, U.S. District Court for Northern District of Illinois, Eastern Division.

"On July 1, 2019, the Batavia Police Department responded to a call at McDonald's home (the "July 1 incident"). More than once, the police officers asked McDonald if she would come outside her house so they could speak with her. McDonald refused. Instead, she was "very belligerent" while talking to the police officers at the front door and refused to put her dogs away.*** On July 2, 2019, the police officers obtained a warrant for McDonald's arrest for resisting or obstructing a police officer (among other things).*** On December 6, 2019, McDonald was convicted by a jury of resisting or obstructing a police officer in contravention of 720 ILCS 5/31-1(a). Ten days later, on December 16, 2019, Director Tegtmeyer discharged McDonald via a memorandum. *** As you know, you are a police dispatcher. You interact with police officers on a daily basis. While you acknowledged that a person is expected to comply with a police officer's order, you failed to do so on July 1, 2019, when you obstructed and resisted a Batavia police officer. *** Considering the evidence cumulatively, the Court

concludes that no reasonable factfinder could conclude that McDonald's sex caused her termination"

Legal Lesson Learned: A police dispatcher must avoid conduct leading to arrest for obstructing police.

File: Chap. 17, Arbitration Union Relations

VA (4/20/2023): FIRE CAPT / IAFF OFFICIAL - BACKED MAYOR'S OPPONENT – FACEBOOK - FIRED - CASE PROCEED

Martin J. Misjuns v. Lynchburg Fire Department, U.S. District Court Judge Norman K. Moon, U.S. District Court for Western District of Virginia, Lynchburg District.

"Also, IAFF Local 1146 decided in the spring of 2020 to support Lynchburg City Council candidates affiliated with the Republican Party, who were running "against candidates supported by the Democrat majority on City Council, which majority includes Dolan and [Vice-Mayor] Wright." *Id.* ¶ 51. "Plaintiff, the Ward I Chair for the Lynchburg Republican City Committee, also supported the Republican candidates in his roles with Local 1146." *Id.* Plaintiff contends that "Deputy Chief Wright immediately began a pattern of harassing behavior that created a hostile work environment for Plaintiff." *** Plaintiff asserts that Mayor Dolan, City Manager Wodicka, and Vice Mayor Wright "began to conspire together to deny Plaintiff his constitutional right to express his deeply held religious beliefs and political views on matters of public concern*** On May 10, 2021 Fire Chief Wormser informed Plaintiff that he decided to suspend Plaintiff from his employment. *Id.* ¶ 103. Deputy Chief Lipscomb ordered Plaintiff to attend a second "interrogation" on June 27, 2021, and that "interrogation" occurred on August 2, 2021. *Id.* ¶¶ 104-05. Plaintiff alleges that, "[i]n the interim, Lipscomb worked to collect false reports accusing Plaintiff of creating a hostile work environment for fellow employees, with the intent to use the false reports to build a record for Wormser to fire Plaintiff." *Id.* ¶ 106. On October 18, 2021, Wormser informed Plaintiff "via letter that he had made the determination to fire Plaintiff." *Id.* ¶ 107. *** Taking the facts alleged in the light most favorable to Plaintiff, as is required at the motion to dismiss stage, Plaintiff's allegations sufficiently demonstrate, based on the close proximity in time between when the emails were sent and when the City-sanctioned investigation into citizen complaints occurred, that City officials disciplined Plaintiff based on his protected speech. Thus, Plaintiff's First Amendment speech claim will survive. *** *** Thus, taking the facts alleged in the light most favorable to Plaintiff, the Court concludes that Plaintiff has sufficiently alleged, under the *Twombly* pleading standard, that Defendants' retaliatory actions against him were due to religious beliefs, not just political beliefs."

United States District Court, W.D. Virginia, Lynchburg Division Case No. 6:21-cv-25

Legal Lesson Learned: Firefighters enjoy First Amendment rights on matters of public concern.

File: Chap. 18, Legislation

CA (4/17/2023) – NATURAL GAS PIPING – CITY OF BERKLEY ORD. NEW BUILDINGS STOP NATURAL GAS VIOL. FED LAW

California Restaurant Association v. City of Berkeley, U.S. Court of Appeals for 9th Circuit.

"By completely prohibiting the installation of natural gas piping within newly constructed buildings, the City of Berkeley has waded into a domain preempted by Congress. The Energy Policy and Conservation Act ("EPCA"), 42 U.S.C. § 6297(c), expressly preempts State and local regulations concerning the energy use of many natural gas appliances, including those used in household and restaurant kitchens. Instead of directly banning those appliances in new buildings, Berkeley took a more circuitous route to the same result. It enacted a building code that prohibits natural gas *piping* into those buildings, rendering the gas appliances useless. The California Restaurant Association, whose members include restaurateurs and chefs, challenged Berkeley's regulation, raising an EPCA preemption claim. The district court dismissed the suit. In doing so, it limited the Act's preemptive scope to ordinances that facially or directly regulate covered appliances. But such limits do not appear in EPCA's text. By its plain text and structure, EPCA's preemption provision encompasses building codes that regulate natural gas *use* by covered products. And by preventing such appliances from *using* natural gas, the new Berkeley building code does exactly that. We thus conclude that EPCA preempts Berkeley's building code's effect against covered products and reverse."

United States Court of Appeals, Ninth Circuit Case No. 21-16278

Legal Lesson Learned: Federal statute preemption of City of Berkeley ordinance.

File: Chap. 18, Legislation

OH (4/6/2023) – VICTIM RIGHTS - HOUSE BILL 343 – NAMES / ADDRESSES NOT PUBLIC – NEW FORM FOR PD TO USE

"Entitles a victim and victim's representative to be present during any public proceeding, other than a grand jury proceeding, and grants the victim, victim's representative, and victim's attorney the right to be heard by the court at any proceeding in which any right of the victim is implicated. *** Requires that a victim's name and identifying information be documented on a separate page in law enforcement records and court filings, which is not a public record. ***Requires the Supreme Court to create the victim's rights request form.

Ohio Legislative Service Commission, Summary H.B.343

Legal Lesson Learned: Ohio fire and EMS will deal with crime victims; important that they understand rights of the victims in the criminal system.

Note: See the new form to be used by PD:

See also history on Marcy's Law: Marsalee (Marsy) Ann Nicholas was born on March 6, 1962, in Cincinnati, Ohio. *** To finish her senior year of college, Marsy returned to UCSB in California. It was prior to her graduation, on November 30, 1983, that Marsy was stalked and murdered by her ex-boyfriend. She was 21 years old. Only one week after her murder and on the way home from the funeral service, Marsy's family stopped at a market to pick up a loaf of bread. It was there, in the checkout line, that Marsy's mother, Marcella, was confronted by her daughter's murderer. Having received no notification from the judicial system, the family had no idea he had been released on bail mere days after Marsy's murder. It took two years for Marsy's murderer to finally be brought to justice.