firelaw newsletter

Lawrence T. Bennett, Esq. July, 2017

FIRE, EMS & SAFETY LAW NEWSLETTER

[NEWSLETTER IS NOT PROVIDING LEGAL ADVICE].

Sign up (free) at: http://www.mailermailer.com/u/signup/1008287f
or
http://aerospace.ceas.uc.edu/FireScience -click ONLINE BENNETT

Larry is Program Chair, UC Fire Science & Emergency Management at University of Cincinnati (see bio, last page). lawrence.bennett@uc.edu; Cell 513-470-2744. He is the author of this newsletter, and new textbook: **FIRE SERVICE LAW (Second Edition)**, Jan. 2017 (ISBN 978-1-4786-3397-6); Waveland Press: http://www.waveland.com/browse.php?t=708

NEW ITEMS COVERED IN THIS NEWSLETTER

Chap. 1: Amer. Legal System	PA: First Amend. Right To Videotape Police In Public
	VA: Public Corruption / New U.S. Supreme Court Standard
Chap. 3: Homeland Security	DC: U.S. Military Drones In Yemen, Courts No Jurisd.
Chap. 6: Emp. Litigation	TX: Union President Fired, Facebook Post
Chap. 7: Sexual Harassment	CO: PD Fitness Test Not Valid; Adverse Impact
	TN: Employer Not Liable, Non-Superv; No Complaints
Chap. 13: EMS	NY: FDNY Not Liable For EMTs Failure To Help
	IL: Jury Found Two Paramedics Not Liable
Chap. 16: Discipline	MI: Fire Chief Did Not Provide "Loudermill" Meeting
Chap. 18: Legislation	OH: Arson, Disfiguring, Extra 6 Years In Prison
	OH: Conceal Carry License, Keep Firearm In Car At Work

Chap. 1 – American Legal System

PA: THIRD CIRCUIT – VIDEOTAPING POLICE IN PUBLIC PLACES IS CONSTITUTIONAL RIGHT

On July 7, 2017, in Richard Fields v. City of Philadelphia, the U.S. Court of Appeals for 3rd Circuit (Philadelphia) held 3 to 0 that individuals "have a First Amendment right of access to information about how our public servants operate in public…. Every Circuit Court of Appeals to address this issue (First, Fifth, Seventh, Ninth, and Eleventh) has held that there is a First Amendment right to record police activity in public…. Today we join this growing consensus. Simply put, the First Amendment protects the act of photographing, filming, or otherwise

recording police officers conducting their official duties in public.
https://assets.documentcloud.org/documents/3890443/Document.pdf
Facts:

> "On September 2012, Amanda Geraci, a member of the police watchdog group 'Up Against the Law,' attended an anti-fracking protest at the Philadelphia Convention Center. She carried her camera and wore a pink bandana that identified her as a legal observer. About a half hour in to the protest, the police acted to arrest a protestor. Geraci moved to a better vantage point to record the arrest and did so without interfering with the police. An officer abruptly pushed Geraci and pinned her against a pillar for one to three minutes, which prevented her from observing or recording the arrest. Geraci was not arrested or cited.
>
> One evening in September 2013, Richard Fields, a sophomore at Temple University, was on a public sidewalk where he observed a number of police officers breaking up a house party across the street. The nearest officer was 15 feet away from him. Using his iPhone, he took a photograph of the scene. An officer noticed Fields taking the photo and asked him whether he 'like[d] taking pictures of grown men' and ordered him to leave. J.A. 8. Fields refused, so the officer arrested him, confiscated his phone, and detained him. The officer searched Fields' phone and opened several videos and other photos. The officer then released Fields and issued him a citation for 'Obstructing Highway and Other Public Passages." These charges were withdrawn when the officer did not appear at the court hearing.
>
> Fields and Geraci brought 42 U.S.C. §1983 claims against the City of Philadelphia and certain police officers. They alleged that the officers illegally retaliated against them for exercising their First Amendment right to record public police activity and violated their Fourth Amendment right to be free from an unreasonable search or seizure.
> ***
> The District Court nonetheless granted summary judgment in favor of Defendants on the First Amendment claims."

Holding:

> "We need not, however, address at length the limits of this constitutional right. Defendants offer nothing to justify their actions. Fields took a photograph across the street from where the police were breaking up a party. Geraci moved to a vantage point where she could record a protestor's arrest, but did so without getting in the officers' way. If a person's recording interferes with police activity, that activity might not be protected. For instance, recording a police conversation with a confidential informant may interfere with an investigation and put a life at stake. But here there are no countervailing concerns.
> In sum, under the First Amendment's right of access to information the public has the commensurate right to record — photograph, film, or audio record —police officers conducting official police activity in public areas.
>
> ***
>
> Having decided the existence of this First Amendment right, we now turn to whether the officers are entitled to qualified immunity. We conclude they are…. [W]e we cannot say that the state of the law at the time of our cases (2012 and 2013) gave fair warning so

> that every reasonable officer knew that, absent some sort of expressive intent, recording public police activity was constitutionally protected. Accordingly, the officers are entitled to qualified immunity."
>
> [Case remanded to determine if city may have liability.]

Dissenting Justice on police immunity – Richard Nygaard

> "I agree with the majority that the cause must be remanded. Because I conclude that the First Amendment right at issue is and was clearly established, I dissent.
> ***
> The Police Department's official policies explicitly recognized this First Amendment right well before the incidents under review here took place… Directive 145 plainly requires officers to allow citizens to make recordings of police activity. The Directive uses, verbatim, the language of the Department of Justice's recommendation, stating that its purpose was to 'protect the constitutional rights of individuals to record police officers engaged in the public discharge of their duties."

Legal Lessons Learned: Fire & EMS members may also be videotaped in public. We also have an interest in protecting patient privacy under HIPAA, and therefore can take action to "cover" the patient but we cannot ask police to stop individuals from videotaping.

File – Chap. 1 – American Legal System

NY: PUBLIC CORRUPTION / "OFFICIAL ACTS" – U.S. SUP. CT. 2016 CASE – NEW STANDARD FOR ELECTED OFFICIALS

Fire & EMS officials, including fire code inspectors, must continue to be extremely careful to not accept anything of value in return for official acts. Elected officials, however, have a new standard for criminal misconduct, based on the U.S. Supreme Court's 2016 unanimous decision in McDonnell v. United States, 136 S. Ct. 2355 (June 27, 2016). There must be proof of a "formal exercise of governmental power."

The Court (9 to 0), in an opinion by Chief Justice Roberts, set aside the conviction (and two year federal prison sentence) of Bob McDonnell, the former Governor of Virginia and his wife. The Supreme Court, recognizing that elected officials often accept campaign contributions from constituents, held that Federal prosecutors must now prove not only that elected official accepted things of value, but also the elected official did more than simply set up meetings with other government officials. https://www.supremecourt.gov/opinions/15pdf/15-474_ljgm.pdf.

The U.S. Court of Appeals for Second Circuit has recently issued two decisions applying the new "McDonnell standard" to elected officials: July 13, 2017 (setting aside a conviction of Sheldon Silver, former Speaker of New York General Assembly; defendant to be retired) and July 10, 2017 (upholding a conviction of former NY State Assemblyman William Boyland Jr.).

McDonnell Facts:

> "In 2014, the Federal Government indicted former Virginia Governor Robert McDonnell and his wife, Maureen McDonnell, on bribery charges. The charges related to the acceptance by the McDonnells of $175,000 in loans, gifts, and other benefits from Virginia businessman Jonnie Williams, while Governor McDonnell was in office.
> ***
> Williams was the CEO of Star Scientific, a Virginia-based company that developed and marketed anatabloc, a nutritional supplement made from anatabine, a compound found in tobacco. Star Scientific hoped to obtain Food and Drug Administration approval of anatabloc as an anti-inflammatory drug. An important step in securing that approval was initiating independent research studies on the health benefits of anatabine. Star Scientific hoped Virginia's public universities would undertake such studies, pursuant to a grant from Virginia's Tobacco Commission."

Holding - Chief Justice Roberts, writing for the unanimous court, described the new standard:

> "Setting up a meeting, hosting an event, or calling an official (or agreeing to do so) merely to talk about a research study or to gather additional information, however, does not qualify as a decision or action on the pending question of whether to initiate the study. Simply expressing support for the research study at a meeting, event, or call—or sending a subordinate to such a meeting, event, or call—similarly does not qualify as a decision or action on the study, as long as the public official does not intend to exert pressure on another official or provide advice, knowing or intending such advice to form the basis for an 'official act.'
> ***
> To qualify as an 'official act,' the public official must make a decision or take an action on that 'question, matter, cause, suit, proceeding or controversy,' or agree to do so. That decision or action may include using his official position to exert pressure on another official to perform an 'official act,' or to advise another official, knowing or intending that such advice will form the basis for an 'official act' by another official. Setting up a meeting, talking to another official, or organizing an event (or agreeing to do so)—without more—does not fit that definition of 'official act.

Impact on lower courts:

On July 13, 2017, in United States of America v. Sheldon Silver, the U.S. Court of Appeals for Second Circuit (NY City), held (3 to 0) that conviction in 2015 for $4 million in bribes and kickbacks (and 12 year sentence) of the former Speaker of New York Assembly must be set aside because the jury instructions did not define unlawful "official act," as re-defined by U.S. Supreme Court in U.S. v. McDonnell. The U.S. Attorney's Office has announced it will retry Silver under the new standard.

The 3-judge panel of Second Circuit wrote:

> "We recognize that many would view the facts adduced at Silver's trial with distaste. The question presented to us, however, is not how a jury would likely view the evidence presented by the Government. Rather, it is whether it is clear, beyond a reasonable doubt, that a rational jury, properly instructed, would have found Silver guilty."

http://www.ca2.uscourts.gov/decisions/isysquery/91e662ab-7cf4-409b-9504-284e62c1e7f4/1/doc/16-1615_opn.pdf#xml=http://www.ca2.uscourts.gov/decisions/isysquery/91e662ab-7cf4-409b-9504-284e62c1e7f4/1/hilite/

On July 10, 2017, another 3-judge panel of Second Circuit upheld the conviction of William Boyland, Jr., a former member of New York Assembly, for accepting bribes (sentenced to 168 months in federal prison) for a "proposed carnival and in connection with a proposed real estate venture for which New York State … grant monies were to be obtained." The evidence of "official acts," including testimony by undercover FBI agents, was so overwhelming the Second Circuit refused to set aside the conviction: "we conclude that the 'plain error' standard is not met; and we find no basis for reversal in defendant's other contentions." US v. Boyland, http://www.courthousenews.com/wp-content/uploads/2017/07/boyland.pdf

Legal Lesson Learned: Fire & EMS officials who enforce life safety codes must be extremely careful to avoid even an appearance of impropriety, including accepting free tickets to sporting or other events.

File: Chap. 3, Homeland Security

DC: U.S. MILITARY DRONES IN YEMEN – KILLED FAMILY MEMBERS – "POLITICAL QUESTION" DOCTRINE, NO JURIS.

On June 30, 2017, in Ahmed Salim Bin Ali Jaber v. United States of America, the U.S. Court of Appeals for the D.C. Circuit, upheld (3 to 0) the dismissal of lawsuit claiming family members were unlawfully killed in Yemen in 2012. The Court held:

> "'The nonjusticiability of a political question' as articulated by the Supreme Court 'is primarily a function of the separation of powers.' Baker v. Carr, 369 U.S. 186, 210 (1962). *** Plaintiffs will no doubt find this result unjust, but it stems from constitutional and pragmatic constraints on the Judiciary. In matters of political and military strategy, courts lack the competence necessary to determine whether the use of force was justified."

https://www.cadc.uscourts.gov/internet/opinions.nsf/55ACB57812F8FC918525814F00517DA6/$file/16-5093-1682112.pdf

Facts:

> "Following the terrorist attacks of September 11, 2001, Congress authorized the President 'to use all necessary and appropriate force' against al-Qaeda, the Taliban, and associated forces. See Authorization for Use of Military Force, Pub. L. No. 107-40 § 2(a), 115 Stat. 224 (2001). Since then, the Executive has increasingly relied upon unmanned aerial vehicles, or 'drones,' to target and kill enemies in the War on Terror. This case concerns an alleged drone misfire — a bombing that resulted in unnecessary loss of civilian life.

***

In late -August 2012, the bin Ali Jaber family gathered in Khashamir, Yemen for a week -long wedding celebration. On August 24th, Ahmed Salem bin Ali Jaber ('Salem'), an imam in the port town of Mukalla, was asked to give a guest sermon at a local Khashamir mosque. His sermon, a direct 'challenge[to] alQaeda to justify its attacks on civilians,' JA 19, apparently did not go overlooked by local extremists. On August 29th, three young men arrived at Salem's father's house and asked to speak with Salem.

The men first arrived in the 'early afternoon,' but Salem's father told them Salem was 'visiting neighboring villages.' JA 20. The three men left and returned around 5:00pm that same day, when Salem's father informed them they might find Salem 'at the mosque after evening prayers.' JA 21. The men again departed before reappearing at the mosque around 8:30pm. Fearful of the men, Salem asked Waleed bin Ali Jaber ('Waleed'), one of the town's two policemen, to accompany him to meet them. According to the Complaint, 'Two of the men sat down with Salem under a palm tree near their parked car, while the third [man remained a short distance away, watching the meeting.' JA 21. Shortly thereafter, members of the bin Ali Jaber family 'heard the buzzing of the drone, and then heard and saw the orange and yellow flash of a tremendous explosion.' Ibid

According to witnesses, 'the first two strikes directly hit Salem, Waleed[,] and two of the three strangers. The third missile seemed to have been aimed at where the third visitor was located . . . . The fourth strike hit the [men's] car." JA 21–22.

Plaintiffs now contend a U.S.-operated drone deployed the four Hellfire missiles that killed the five men."

Holding:

"[I]t is the Executive, and not a panel of the D.C. Circuit, who commands our armed forces and determines our nation's foreign policy. As explained at length above, courts are not constitutionally permitted to encroach upon Executive powers, even when doing so may be logistically, if not constitutionally, manageable."

Concurring Opinion, by Circuit Justice Janice Rogers Brown – "OUR DEMOCRACY IS BROKEN"

"Theory holds that courts must apply the political question doctrine to circumstances where decision-making, and the constitutional interpretation necessary to that process, properly resides in the political branches of government. But theory often does not correspond with reality . The world today looks a lot different than it did when the Supreme Court decided Baker v. Carr, 369 U.S. 186 (1962). Our latest phase in the evolution of asymmetric warfare continues to present conundrums that seem to defy solution. Today, the Global War on Terror has entered a new chapter — in part because of the availability of 'sophisticated precision-strike technologies' like drones. Philip Alston, The CIA & Targeted Killings Beyond Borders, 2 HARV.NAT'L SEC. J. 283, 441 (2011). Yet the political question doctrine insures that effective supervision of this wondrous new warfare will not be provided by U.S. courts.

***

> Of course, this begs the question: if judges will not check this outsized power, then who will?
> ***
> Our democracy is broken. We must, however, hope that it is not incurably so. This nation's reputation for open and measured action is our national birthright; it is a history that ensures our credibility in the international community. The spread of drones cannot be stopped, but the U.S.can still influence how they are used in the global community — including, someday, seeking recourse should our enemies turn these powerful weapons 180 degrees to target our homeland. The Executive and Congress must establish a clear policy for drone strikes and precise avenues for accountability."

Legal Lessons Learned: The "Political Question" doctrine prevents courts from reviewing military decisions on use of drones. On Oct. 12, 2016, however, the 4th Circuit held that a lawsuit by four prisoners abused at Abu Ghraib prison, located near Baghdad, Iraq, in 2003 and 2004 can proceed since they were suing the CIA contractor that supplied interrogators. "In 2008, they filed this civil action against CACI Premier Technology, Inc. (CACI), which provided contract interrogation services for the military at the time of the alleged mistreatment. * We hold that conduct by CACI employees that was unlawful when committed is justiciable, irrespective whether that conduct occurred under the actual control of the military." Al Shimari v. CACI Premier Technology, Inc., 840 F.3d 147 (4th Cir. 2016).**
http://www.leagle.com/decision/In%20FCO%2020161021098/AL%20SHIMARI%20v.%20CACI%20PREMIER%20TECHNOLOGY,%20INC.

File – Chap. 6, Employment Litigation

TX: SOCIAL MEDIA – IAFF PRES. FIRED, FACEBOOK POST ENDORSING CITY COUNSEL MEMBERS - LAWSUIT PROCEED

On July 12, 2017, in Stephen Dorris v. City of McKinney, Texas, et al., a U.S. District Court judge held:

> "Plaintiff has sufficiently alleged Defendants terminated him in retaliation for his association with and speech on behalf of Local 2661. '[T]he law is clearly established that such a retaliatory action, if proved, violates the First Amendment.' *Burnside v. Kaelin*, 773 F.3d 624, 629 (5th Cir. 2014). Defendants are therefore not entitled to qualified immunity at this time."

See also April 10, 2017 decision denying motion of Fire Chief and Deputy City Manager to be dismissed from case based on qualified immunity: http://law.justia.com/cases/federal/district-courts/texas/txedce/4:2016cv00069/165652/50/

Facts:

> "Plaintiff worked for the City of McKinney, Texas (the 'City') Fire Department from March 2003 to July 16, 2015. During his employment with the Fire Department, Plaintiff served as the elected president of the International Association of Fire Fighters, Local 2661 ('Local 2661' or the 'Association'). Plaintiff alleges that the City terminated his employment after he organized a photo shoot for Local 2661's political action committee and its endorsed candidates for City Council.
>
> After the political action committee posted photographs from the photo shoot on its Facebook page, City Fire Chief Daniel Kistner ('Defendant Kistner') asked the City Police Department to open an administrative inquiry to determine whether the post violated any City policy or rule. After an initial inquiry, Defendant Kistner commenced a full Internal Affairs investigation into Plaintiff. On July 16, 2015, at the conclusion of the Internal Affairs investigation, Defendant Kistner signed a Notice of Disciplinary Action (the 'Notice') terminating Plaintiff for violating the City's policy on insubordination. The Notice stated that Plaintiff failed to follow an order given by the City Manager's office not to use City equipment to endorse candidates and failed to use his chain of command for his request to use City-owned property. Deputy City Manager Jose Madrigal ('Defendant Madrigal') approved Plaintiff's termination."

Holding:

> "In order for a public employee to recover for a free speech retaliation claim, the plaintiff must satisfy four elements: (1) the plaintiff must suffer an adverse employment decision; (2) the plaintiff's speech must involve a matter of public concern; (3) the plaintiff's interest in commenting on matters of public concern must outweigh the defendant's interest in promoting efficiency; and (4) the plaintiff's speech must have motivated the defendant's actions. *Burnside v. Kaelin*, 773 F.3d 624, 626 (5th Cir. 2014).
>
> ***
>
> Plaintiff's complaint sufficiently alleges a causal link between Plaintiff's protected acts and his termination. Plaintiff alleges Defendants terminated him four months after he organized the photo shoot (Dkt. #13 at ¶17). Although Defendants argue Plaintiff failed to follow an order not to use City equipment to endorse candidates and failed to use his chain of command to request to use City property, Plaintiff alleges he did not personally attend the photo shoot and was not personally involved with the movement of the fire truck during the photo shoot (Dkt. #13 at ¶ 11, 20).
>
> Plaintiff likewise alleges that Defendant Kistner 'interrogated eight members of the Association, asking them about the photo shoot' (Dkt. #13 at ¶ 16). Plaintiff alleges Defendant Kistner questioned two members of the Association's executive board 'more extensively' and that Defendant Kistner told one of the members 'he should expect to be disciplined because he was a leader in the Association." (Dkt. #13 at ¶16). Plaintiff further alleges 'both the questions asked and the manner of questioning were intimidating and made members of the Association afraid to associate with Local 2661 and engage in political activity on behalf of the Association and its members.' (Dkt. #13 at ¶16).

> Plaintiff has sufficiently pleaded a causal link between his protected activity and his termination. *See Burnside*, 773 F.3d at 628 (citing *See Beattie v. Madison Cnty. Sch. Dist.*, 254 F.3d 595, 601 (5th Cir.2001) (stating that the protected conduct need only be a motivating factor in the adverse employment action)).”

Legal Lessons Learned: The lawsuit will now proceed to pre-trial discovery. Fire Departments should consider adopting a Social Media policy. See author of this Newsletter's June 15, 2017 handout at National Fire Academy's National Professional Development Conference:
http://ceas.uc.edu/content/dam/aero/docs/fire/Social%20Media.pdf

Chap. 7 – Sexual Harassment (also Chap. 14, Physical Fitness)

CO: PHYSICAL FITNESS TEST – ADVERSE IMPACT ON FEMALE PD – NOT VALID MEASUREMENT OF JOB DUTIES

On July 12, 2017, in Rebecca Arndt, et al. v. City of Colorado Springs, 12 female police officers won a decision by U.S. District Court judge, who wrote:

> “Ordinarily a court may not substitute its judgment on an employer's decision as what is an appropriate job requirement. A physical ability requirement may be reasonable for selection of new employees if it does not impose a barrier to that opportunity for any group protected by Title VII. To retroactively impose that requirement on women who have invested their lives as career police officers is fundamentally unfair. That is not to say that there can be no fitness requirement to maintain employment but to use physical tests that are not valid measures of the level of fitness that job duties actually require is a violation of Title VII when, as here, there is a disparate impact on women officers. For the reasons stated the plaintiffs have prevailed on their claim that requiring them to pass the PAT to maintain their employment with the Colorado Springs Police Department violates Title VII.”

https://www.csindy.com/TheWire/archives/2017/07/12/female-cspd-police-officers-win-federal-court-decision-about-physical-testing

Facts:

> “In 2009, Chief of Police Richard Myers decided to implement physical fitness testing for all officers working in the Colorado Springs Police Department (‘Department’).
>
> The City of Colorado Springs contracted with Human Performance Systems, Inc. (‘HPS’), a company based in Beltsville, Maryland, to develop a physical abilities test for use by the Department to evaluate all of its officers for fitness for duty. The policy determination was that all officers must demonstrate the ability to perform all of the tasks of a patrol officer and if an officer failed the result could be termination of employment.

On the recommendation of HPS, the Department adopted a four-part physical abilities test ('PAT'), comprised of a one-minute sit-up test; a one-minute push-up test; an agility run; and a running test known as a BEEP test …These four tests were selected because they were considered to be a significant predictor of job performance and met the Department's administrative decision to conduct the testing indoors. *Id*.

***

The scoring system adopted was a compensatory scoring method. With that method, a participant's scores on each component skill test are combined into one final score and there is only one overall cut-off score. For the PAT, a maximum of 8 points was assigned to each of the four skills tests, for a total maximum score of 32 points. The passing score was set at twenty points, with at least one point on each of the four components…. The same passing score applied to male and female officers.

In the early months of 2013, the Department administered the PAT to applicants. A total of 421 recruits took the PAT (343 males and 78 females). Of those, 50% of the females failed, compared to a 6% of the males.

***

The Department issued Bulletin 548-14 on December 14, 2014, stating *inter alia*, that officers placed on light duty due to unsatisfactory PAT performance were prohibited from responding to a scene or any type of field work environment; were subject to restrictions with respect to overtime work; could not be placed on-call or standby or have a take-home vehicle; were not allowed to be in uniform or wear any attire that would identify him/her as a police officer, and were subject to certain restrictions with respect to the carrying of a firearm.

At the conclusion of the 2014 testing cycle, approximately 96 % of all officers passed the PAT on their first attempt, and the majority of those who initially failed ultimately passed on subsequent attempts. Tr. Vol. VI (Eells) at 578:14 - 579:17. Of those who never passed the PAT, some left the Department and some did not retake the test due to injuries

***

All twelve plaintiffs initially failed the PAT. Nine of them passed on subsequent testing. Sergeant Garrett, Detective Thrumston and Lieutenant Santos have not passed the test."

Holding:

"Plaintiffs complain that requiring all sworn officers to pass the PAT annually or risk disciplinary actions, including termination of employment, has a disparate impact on female officers over the age of 40 and/or all female officers.

***

Evidence presented at trial supports the conclusion that the PAT disparately impacts women. As set forth above, when the Department used the PAT to screen applicants in 2013, 50% of the females failed, compared to a 6% of the males. Henderson Ex. 4. Those test results are significant and are evidence of adverse impact on women. If the plaintiffs were applicants for employment as patrol officers it would be clear that the use of the PAT as a screening method presented a gender barrier to this employment.

***

In 2014, when the mandatory test was administered, 555 men were tested, and 544 achieved a passing score on their first attempt, for a passing rate of 98%. Kraiger Ex. 10, ¶ 4 at pp. 2 - 3. Seventy-nine (79) women took the 2014 test, and 64 achieved a passing score on their first attempt, for a passing rate of 81%. *Id*. It is undisputed that for that test, the ratio of passing rates for all women and all men is 82.6%. That impact ratio is slightly above the 80% threshold.

***

The failure to pass initially has had a devastating effect on the plaintiffs who have had to endure the indignity of being denied recognition as a police officer by the restrictions imposed by the Department. They have been shamed and ostracized.

***

Promoting physical fitness in the Department's employees is a laudable goal, particularly for employees tasked with protecting public safety. That much is not disputed. The plaintiffs have not challenged the decision to require all officers to have the physical ability to perform the duties of a patrol officer. The contention made is that the PAT does not measure that ability. That is, that the PAT does not correlate with actual job performance.

***

The City emphasizes that HPS had expertise in designing physical abilities tests and validation studies, that the HPS study was extensive and its report contains voluminous analysis. These facts do not justify reliance on HPS's work. An HPS study was found invalid in other litigation. *See, e.g., Ernst v. City of Chicago*, 837 F.3d 788, 802 (7th Cir. 2016) (finding that validity study prepared by Gebhardt was faulty and not sufficient to show that City of Chicago's physical skills testing of paramedic applicants was job-related).

The fact that officers who failed the test were given multiple opportunities to pass it does not relieve the City of showing that the PAT is a valid test.

The fact that the overall passing rate was high does not show that the PAT is valid.

***

Based on the foregoing, it is

DECLARED that the Colorado Springs Police Department's employment policy of using the physical abilities test designed by Human Performance Systems, Inc. as the exclusive standard for determining whether an incumbent officer is fit for regular duty violates Title VII of the Civil Rights Act of 1964, as amended."

Legal Lessons Learned: The Chicago Fire Department was also sued by female applicants for paramedic positions. On Sept. 19, 2016, the 7th Circuit held: the "lack of connection between real job skills and tested job skills is, in the end, fatal to Chicago's case," and "the plaintiffs should have prevailed on their Title VII disparate-impact claims." *Ernst v. City of Chicago*, 837 F.3d 788, 802 (7th Cir. 2016); http://law.justia.com/cases/federal/appellate-courts/ca7/15-2030/15-2030-2016-09-19.html. See also this blog: http://www.employmentlawblog.info/2016/09/ernst-v-city-of-chicago-no-14-3783-7th-cir-sept-19-2016.shtml

File – Chap. 7, Sex Harassment

TN: SEXUAL HARASSMENT – NO LIAB. FOR EMPLOYER – STORE MGR. NOT SUPERVISOR, NO EMPLOYEE COMPLAINT

On June 9, 2017, in EEOC v. AutoZone, Inc., the U.S. Court of Appeals for 6th Circuit held (3 to 0) that the Federal District Court judge properly dismissed this lawsuit:

"Because he did not take any tangible employment action against his co-workers and indeed had no authority to do so, the manager was not a supervisor under Title VII and thus AutoZone cannot be liable for the conduct alleged. Even if that were not the case, even in other words if the manager had been a supervisor of his victims, AutoZone established an affirmative defense to the claim. We affirm."

http://caselaw.findlaw.com/us-6th-circuit/1864185.html

Facts:

"Robyn McEuen began working for AutoZone Store #335 in Cordova, Tennessee, in March 2010 and soon earned a promotion to a commercial specialist position. LaKindal Smith started work for AutoZone as a parts sales manager in July 2011. And AutoZone hired Cherrelle Green (neé Willett) as a commercial driver in April 2012.

In May 2012, AutoZone transferred Gustavus Townsel to the store and made him the store manager. Ira Graham was the district manager for the store and visited at least once a week. Townsel could hire new hourly employees and write up employees at the store for misbehaving, but both sides agree that he could not fire, demote, promote, or transfer employees. Authority over firing, promoting, and transferring rested with Graham.

According to Smith, Townsel began making lewd and obscene sexual comments to her in August 2012. Townsel allegedly told her, for example, that he was going to schedule Smith and himself for a 5:15 AM shift when he would 'take [her] in the bathroom and

wear that pussy out.' R. 10 at 4. Townsel repeatedly made sexual advances toward Smith. She claims that Townsel, around August 17, 2012, grabbed her around the waist and pulled her toward him from behind so that her rear end pressed against his front. Smith responded to Townsel's alleged harassment by 'laugh[ing] it off' and gently rebuffing him. R. 50-8 at 3.

In September 2012, Townsel propositioned her over the phone and several times at work. Around September 25, Townsel grabbed Smith in her genital area, and she pushed him away. On September 27, Townsel rubbed his hand down Smith's back and said that 'I'm not gonna be your boss anymore so I can really get that pussy now.' R. 50-8 at 6.

In late September, Smith told Chad Berry, a commercial sales manager at another AutoZone store, about Townsel's harassment. The co-worker did not take any action after speaking with Smith because '[s]he didn't seem upset' and wasn't making a sexual harassment complaint, which he and Smith would have to take up the chain of command or to human resources. R. 50-11 at 2.

In mid- to late-October 2012, Smith told Graham that Townsel was harassing her. Graham talked to McEuen, who confirmed that Townsel had made offensive comments that McEuen would just brush off.

On Friday, November 2, 2012, Graham informed Melody Deener, the regional human resources manager, that Townsel was 'saying stuff in the store.' R. 49-3 at 4. The following Monday, Graham told Smith to call Deener. During the phone call, Smith complained about operational issues such as AutoZone's new scheduling system. In the afternoon, Smith faxed Deener a letter, at Deener's request, that outlined her complaints. Smith's three-page letter mainly discusses the operational issues but concludes with a brief section alleging that an unidentified person at work had sexually harassed her.

Deener went to the Cordova store the next day, November 6, 2012, to speak to Smith. Smith reported Townsel's harassment. Deener interviewed McEuen and Willett, who both said that Townsel had made lewd sexual comments. Willett also told Deener that Townsel had tried to show her pornography on his phone. Deener talked to Townsel, who denied harassing his female co-workers.

On November 14, 2012, Deener returned to the store and informed Smith that AutoZone would transfer Townsel out of the store on November 18. Smith said that she had no problem working with Townsel until his transfer because AutoZone would schedule an additional person to work on the days when they were both at the store. AutoZone transferred Townsel on November 18 and fired him on December 6, 2012.

The [EEO] Commission filed a complaint alleging that AutoZone subjected Smith, McEuen, and Willett to sexual harassment. After discovery, AutoZone moved for summary judgment. The district court reasoned that Townsel was not a supervisor under Title VII, precluding the company from being vicariously liable for his actions. It thus granted AutoZone's motion for summary judgment. The Commission appealed."

Holding:

> "As this case comes to us, the parties share some common ground. No one denies that Townsel's behavior was repulsive. And no one denies that he got what he deserved when AutoZone fired him. The only questions are legal ones. First, was Townsel a supervisor of Smith, McEuen, and Willett or their co-worker? If Townsel was merely a co-worker of his victims, both parties agree that Title VII does not impose liability on AutoZone for Townsel's harassment. Second, even if Townsel was a supervisor under the statute, is AutoZone eligible for the affirmative defense to liability?
>
> ***
>
> Under Title VII, '[i]f the harassing employee is the victim's co-worker, the employer is liable only if it was negligent in controlling working conditions'—that is, if the employer knew or should have known of the harassment yet failed to take prompt and appropriate corrective action. Vance v. Ball State Univ., 133 S. Ct. 2434, 2439–42 (2013). Different rules apply if the harasser is the victim's supervisor. Id. at 2439. In those cases, a non-negligent employer may become vicariously liable if the agency relationship aids the victim's supervisor in his harassment. Id.; see also Faragher v. City of Boca Raton, 524 U.S. 775, 801–04 (1998); Burlington Indus., Inc. v. Ellerth, 524 U.S. 742, 761–62 (1998).
>
> Consistent with the district court's decision, AutoZone is not vicariously liable for Townsel's harassment because Townsel did not supervise any of the employees he harassed. '[A]n employee is a 'supervisor' for purposes of vicarious liability under Title VII if he or she is empowered by the employer to take tangible employment actions against the victim.' Vance, 133 S. Ct. at 2439. Tangible employment actions are those that 'effect a significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits.' Id. at 2443 (quotation omitted). AutoZone did not empower Townsel to take any tangible employment action against his victims. Townsel could not fire, demote, promote, or transfer any employees. And he could not hire employees that AutoZone already employed, such as Smith, McEuen, and Willett. Townsel's ability to direct the victims' work at the store and his title as store manager do not make him the victims' supervisor for purposes of Title VII. Id.; see, e.g., Noviello v. City of Bos., 398 F.3d 76, 96 (1st Cir. 2005) (shift supervisor not a supervisor under Title VII); Reynaga v. Roseburg Forest Prod., 847 F.3d 678, 689 (9th Cir. 2017) (lead millwright not a supervisor); Chavez-Acosta v. Sw. Cheese Co., 610 F. App'x 722, 730 (10th Cir. 2015) (member of the leadership hierarchy not a supervisor).
>
> ***
>
> Even if we treated Townsel as a supervisor, AutoZone has established an affirmative defense to liability. The defense has two elements: (1) 'that the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior'; and (2) that the harassed employees 'unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise.' Faragher, 524 U.S. at 807; see also Ellerth, 524 U.S. at 764–65. AutoZone meets both requirements.
>
> ***

> The record confirms that each of Townsel's three victims acknowledged that it was her responsibility to read and understand AutoZone's employment handbook, and on several occasions each one of them signed forms saying so. AutoZone posted the toll-free number for reporting harassment at the store, and Smith acknowledges that she was aware of the phone line. That's enough to show that AutoZone promulgated the anti-harassment policy. A human resources representative need not look over each employee's shoulder as she reads each page of AutoZone's handbook. Even though the victims now claim that they did not in fact read the handbook, that is not AutoZone's fault. It exercised reasonable care by requiring employees to acknowledge their responsibility to read the policy by signing a form to that effect."

Legal Lessons Learned: This decision will be very helpful to employers, including Fire & EMS departments, to avoid vicarious liability, where a low-level officer is alleged to be the harasser. Every new hire should sign a receipt of the Employee Handbook with a sexual harassment policy, and the policy should clearly set out how to make a complaint of sexual harassment.

Chap. 13 - EMS

NY – FDNY NOT LIABLE FOR DEATH WHEN EMTs ONLY CALLED 911 WHILE AT RESTAURANT - NO "SPECIAL DUTY"

On July 5, 2017, in Cynthia Rennix v. Melissa Jackson; New York City Fire Department, et al., the Supreme Court of State of New York, Appellate Division, held (5 to 0) that the City was properly dismissed from the lawsuit since the city owed no "special duty" to the deceased. http://law.justia.com/cases/new-york/appellate-division-second-department/2017/2014-05034.html

Facts:

> "On December 9, 2009, while working at an Au Bon Pain restaurant in Brooklyn, Eutisha Rennix became ill and had difficulty breathing. She was six months pregnant and suffered from asthma. A coworker escorted Rennix to a back room, and Rennix stated that she wanted to go to the hospital. The coworker returned to the sandwich bar in the customer area, where she had seen two Emergency Medical Technicians (hereinafter EMTs), Jason Green and the defendant Melissa Jackson. The coworker approached the EMTs and asked for assistance. Neither responded, but Jackson called 911 from her cell phone and requested an ambulance.
>
> Both EMTs were on duty, in uniform, and assigned to the nearby Emergency Medical Dispatch Center (hereinafter the Dispatch Center). Jackson, however, was not authorized to be on break or away from the Dispatch Center at the time. The EMTs left the restaurant before an ambulance arrived, without ever going to the back room to check on

Rennix. An ambulance arrived 13 minutes after Jackson placed the 911 call. During that time, Rennix had lost consciousness and stopped breathing. Paramedics were unable to resuscitate her, and she was later pronounced dead at the hospital. Rennix's baby was delivered through an emergency cesarean section, but died shortly thereafter."

Holding:

> "The plaintiffs contend that the first category applies to the circumstances here, and a special duty arose from Jackson's violation of Penal Law § 195.00(2), which criminalizes official misconduct. As relevant here, a public servant is guilty of official misconduct when, with intent to obtain a benefit, she or he knowingly refrains from performing a duty which is imposed upon her or him by law or is clearly inherent in the nature of her or his office (see Penal Law § 195.00[2]). The plaintiffs allege that Jackson violated the statute inasmuch as, pursuant to the regulations of her department or inherent in the nature of her office, she had a duty to render assistance to Rennix, but knowingly refrained from so doing so as not to be caught on an unauthorized break outside of the Dispatch Center.
>
> Even assuming the plaintiffs could establish that Jackson was guilty of misconduct, the violation of Penal Law § 195.00(2) does not give rise to a special duty so as to impose tort liability. For a special duty to arise from the breach of a statutory duty, the governing statute must authorize a private right of action (see McLean v City of New York, 12 NY3d at 200; Pelaez v Seide, 2 NY3d at 200). A private right of action 'may be fairly implied when (1) the plaintiff is one of the class for whose particular benefit the statute was enacted; (2) recognition of a private right of action would promote the legislative purpose of the governing statute; and (3) to do so would be consistent with the legislative scheme' (Pelaez v Seide, 2 NY3d at 200; see McLean v City of New York, 12 NY3d at 200; Uhr v East Greenbush Cent. School Dist., 94 NY2d 32, 38; Sheehy v Big Flats Community Day, 73 NY2d 629, 633)."

Legal Lessons Learned: Tragic situation, that has brought lots of negative press, but no governmental liability. See also April 8, 2014 article: **"**While calling one of the cold-hearted medic's behavior 'egregious,' Supreme Court Justice Carolyn Demarest granted the city's motion to dismiss the lawsuit. She based her ruling on a state law that says gross negligence can only be claimed if a 'special duty' is owed to a stricken person — which can only be established if the victim or an immediate family member makes the request for help themselves. *** Criminal charges against EMS dispatcher Melisa Jackson were dropped last year, but she still faces internal discipline for not aiding Rennix, an FDNY spokesman said yesterday." http://www.nydailynews.com/new-york/brooklyn/exclusive-suit-tossed-medics-didn-woman-article-1.1749017

File – Chap. 13, EMS

IL – ANAPHYLACTIC SHOCK, PEANUT ALLERGY - TWO CHICAGO PARAMEDICS FOUND NOT LIABLE BY JURY – BATTLE OF EXPERTS

On July 10, 2017, in Huong Bui v. City of Chicago, William Steiner and John Pearson, the Appellate Court of Illinois held (3 to 0) that jury verdict will not be overturned: "In this case the

jury was confronted with a classic battle of the experts and after each side presented their case, the jury found in favor of defendants. The plaintiffs presented the testimony of Nagorka, Jubanyik, Phillips, and Ritter, who all testified that various actions taken by Steiner and Pearson were reckless. The defense presented testimony of Koenigsberg, Rodger, and Dugan that defendants did not act recklessly in attending to Bui and their actions were not the proximate cause of her injuries. They also opined that Bui herself was negligent in failing to have an EpiPen and waiting so long to seek medical assistance."
http://www.illinoiscourts.gov/R23_Orders/AppellateCourt/2017/1stDistrict/1161549_R23.pdf

Facts:

> "On June 14, 2012, [Paramedics] Steiner and Pearson responded to an emergency call about an individual having an allergic reaction. Bui and her husband, Jan, were eating Chinese food in their hotel room when Bui went into anaphylactic shock after biting into an egg roll containing peanuts. Steiner and Pearson provided treatment when they arrived then transported Bui to the hospital. Upon arrival at the hospital, Bui was suffering from cardiac arrest and in serious distress. While doctors were able to save Bui's life, she suffered brain damage from incident.
>
> ***
>
> The couple walked to the restaurant, placed an order, and walked back to their hotel to eat around 7:45 p.m. Bui's meal had come with an egg roll and upon biting into it, she immediately spat it out. At trial, Kretzschmar testified that upon spitting out the egg roll, Bui stated, 'I think there's something in here that I'm allergic to.' Bui then took two Benadryl because her tongue started to itch. Bui, a trained EMT, did not think it was an emergency situation requiring outside help.
>
> ***
> After making the second call, Kretzschmar carried Bui to the elevator to take her down to the lobby. Bui began to vomit and lost consciousness. When they arrived in the lobby, Kretzschmar put Bui on a couch, found her pulse, and started providing rescue breaths because Bui had stopped breathing. He continued until the paramedics arrived and by this time Bui's lips were purple and her eyes were swollen.
>
> Kretzschmar told the paramedics that Bui was having an allergic reaction, was not breathing, but did have a pulse. He further explained that he had been giving rescue breaths; she had already taken two Benadryl, and needed epinephrine.
>
> Steiner and Pearson were operating Ambulance 2 on June 14, 2012, and were dispatched at 8:57 p.m. for an allergic reaction. They were with Bui by 9:01 p.m. An additional firefighter crew, Truck 9, which included an additional paramedic and EMT, ccompanied them. Steiner and Pearson knew that Bui was in respiratory distress. They measured her at 8 breaths per minute. Pearson testified that he knew Bui's breathing was inadequate and that it was caused by her severe allergic reaction, which needed to be reversed. They used pulse oximetry to measure the oxygen in Bui's blood and according to Steiner, Bui's oxygenation was still good.
>
> The 'run report' prepared by Steiner after dropping of f Bui at the hospital detailed the treatment provided at the hotel. Upon arrival at the scene, firefighters placed a non-rebreather mask on Bui. At 9:04 p.m., the paramedics took Bui's vitals. They then gave

her a 1 milligram shot of epinephrine, which is contrary and greater than the Standing Medical Order (SMO) for anaphylaxis calls of .3 milligrams. Steiner explained that he probably administered the shot because Pearson was trying to place the IV. Steiner gave the higher dose due to the severity of Bui's anaphylaxis when they arrived. A hotel employee present at the scene observed the paramedics administer "something" and immediately noticed Bui's swelling decline.

The run report noted two failed attempts to intubate Bui at approximately 9:14 p.m. Bui's jaw was clinched, which prevented the paramedics' intubation attempts. Unlike an emergency room, paramedics do not carry the device necessary to relax a jaw. Despite Bui's jaw, Steiner attempted to intubate in part because the swelling in her face had decreased. Steiner explained that an intubation attempt would include using a bag mask to hyperventilate the patient before attempting to insert the endotracheal tube. The paramedics utilized a bag valve mask between the two attempts and used the mask consistently after the second failed attempt. After the second failed intubation attempt, one of the paramedics administered a second 1 milligram dose of epinephrine. This was at 9:15 p.m.

The paramedics chose not to give Bui Benadryl because she had already taken 50 milligrams in the past hour and if it was not working at this point, it was not going to do anything. Steiner also explained that Benadryl can act as a depressant. They chose not to provide albuterol because of the time it would take to administer and would not be effective without intubating Bui.

They left for the hospital at 9:21 p.m. with Steiner in the back of the ambulance with Bui while Pearson drove. According to the hospital records, it was informed of Bui's status at 9:24 p.m. During that call with the hospital, Steiner reported Bui's respiratory rate as 8, but they were 'bagging' her at 16. During the ambulance ride an IV was successfully placed. They arrived at Resurrection Hospital at 9:26 p.m.

***

As the ambulance arrived at the hospital, Bui went into cardiac arrest. In the emergency room, doctors worked to both restart Bui's heart and regulate her breathing. Bui was successfully intubated four minutes after arrival with use of paralytics to relax her jaw. According to emergency room records, Bui's pulse returned eight minutes after intubation."

Holding:

"The defense called Dr. Max Koenigsberg, an emergency physician and paramedic, to rebut most of plaintiffs' case. Dr. Koenigsberg opined that Bui's heart attack was not aused by the paramedics but a combination of Bui's allergies and her asthma. In his opinion, the paramedics were within the standard of care when they immediately injected Bui with epinephrine before taking other steps listed in the SMO. The paramedics did not have to administer Benadryl because it was not a lifesaving intervention and did not need to administer albuterol, because it is supplementary to epinephrine. He also agreed with the paramedics testimony that because Bui's blood pressure did not drop below 100, there

was no reason to administer a fluid bolus. He also disagreed with Nagorka that the failure to place the IV required Pearson to proceed to an interosseous placement. Moreover, the twenty minutes the paramedics spent on scene was average for a call involving respiratory distress.

***

Giving the conflicting testimony at trial, we cannot say that all of the evidence, viewed favorably to Steiner and Pearson, so overwhelmingly favors Bui 'that no contrary verdict based on that evidence could ever stand.' Pedrick, 37 Ill. 2d at 510. Hence, we conclude that the trial court did not err in refusing to grant plaintiffs' judgment n.o.v.

Legal Lessons Learned: A thoroughly documented EMS run report, supported by expert testimony, resulted in a jury verdict for the two paramedics.

File – Chap. 16 - Discipline

MI: FIRE CHIEF DID NOT PROVIDE PRE-DISCIPLINARY "LOUDERMILL" MEETING BEFORE FIRING FIREFIGHTER

On June 30, 2017, in Peter Hudson v. City of Highland Park, et al., U.S. District Court judge denied City's motion to dismiss firefighter's claim of deprivation of due process. Career firefighter was terminated for falsifying time sheets, but was not given pre-disciplinary notice or meeting as required by U.S. Supreme Court in Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532, 538 (1985). Claim may now proceed to trial. http://cases.justia.com/federal/district-courts/michigan/miedce/2:2016cv12369/312200/72/0.pdf?ts=1498911890

Facts:

"The City of Highland Park employed Hudson as a full-time firefighter. Also, Hudson worked part-time for Leona Group, LLC (at the Highland Park Renaissance Academy, a local charter school) as a handyman and coach. Hudson alleges that [Fire Chief Derek Hillman] and [City HR Director Makini Jackson suspended his employment because he claimed pay as a Fire Engine Operator, and then terminated his employment because he had claimed to work for the Leona Group while he was working for the Fire Department

***

Hudson alleges that Leona Group principal Carmen Willingham provided his timesheets—without his permission— to Hillman and Jackson. The timesheets showed that Hudson claimed to work for Leona Group on the same week days he claimed to have worked at the fire station. Hudson submits that he actually worked for Leona on the weekends, and Willingham instructed him to record his weekend work as weekday work

on the timesheets because the school's payroll system would not allow her to pay him for weekend work.

***

Hudson claims to be a devout Christian. He alleges that [FD] discharged him based on his Christian faith and his outspoken criticism of sexual misconduct in the firehouse. Hudson contends that—as a result of sexual misconduct—his co-workers were not present for duty during fire alarms, and neglected to maintain life-saving equipment like oxygen tanks."

Holding:

"Count Four - Deprivation of Due Process: 42 U.S.C. § 1983

Hudson alleges that Highland Park, Hillman, and Jackson violated his constitutional right to a pre-termination notice and hearing while acting under color of law. Id. ¶¶ 109–29. Defendants failed to directly respond to this count and instead argue for blanket qualified immunity.

Hudson had a property right in continued employment with the Fire Department because his contract barred discharge without 'just cause.' ECF 61, PgID 1387. As a result, Hudson had clearly established constitutional due-process rights related to his employment. See, e.g., Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532, 538 (1985). When an employee has a property right in continued employment, due process requires the state to provide pre-termination "notice of the charges against him or her, an explanation of the employer's evidence, and an opportunity to present his or her side of the story to the employer." Buckner v. City of Highland Park, 901 F.2d 491, 494 (6th Cir. 1990).

Hudson claims he did not receive adequate notice prior to his termination. Specifically, Hudson alleges that he and his union representative had scheduled a meeting with Hillman and Jackson to dispute his suspension for claiming Fire Engine Operator pay. At the meeting, Hudson contends that—without any prior warning—Hillman and Jackson terminated his employment because he 'improperly claimed hourly wages at the [Leona Group] school when he was actually working for the City.' ECF 67, PgID 1919; see also ECF 61 ¶ 113. Assuming his claim is true—as the Court must when reviewing the sufficiency of the pleadings under a motion to dismiss—Hudson did not receive adequate pre-termination notice of the reason for his discharge. Hudson's complaint sufficiently alleges a clearly established constitutional due process violation and therefore defeats Hillman's and Jackson's claims for qualified immunity. Lane v. City of Pickerington , 588 F.App'x 456, 468 (6th Cir. 2014) (holding that qualified immunity was not available because "a jury could find that [plaintiff] was terminated based on allegations not contained in the notice of the pre-disciplinary conference; a reasonable official would thus have known the notice was constitutionally inadequate')."

LEGAL LESSONS LEARNED: Career firefighters have a property interest in their jobs, and are entitled to a pre-disciplinary notice and meeting to "tell their side of the story."

File – Chap. 18, Legislation

OH: ARSON – NEW STATUTE ADDS 6 YRS. IN PRISON IF ATTACKER DISFIGURES A PERSON – "JUDY'S LAW"

On July 17, 2017, Ohio Governor John Kasich signed into law a new statute increases prison time when an accelerant is used to disfigure someone.

> "Judy's Law was inspired by Judy Malinowski, who was set on fire by her ex-boyfriend, Michael Slager, in August 2015. Slager was sentenced to 11 years in prison for felonious assault and aggravated arson in December 2016. Malinowski died in June. *** The law will go into effect in 90 days. Following her death the Franklin County Prosecutor's Office said it will seek murder charges against Slager."
> http://myfox28columbus.com/news/local/governor-kasich-signs-judys-law

Ohio House Bill 63 was passed unanimously by Ohio House of Representatives on May 24, 2017. http://www.10tv.com/article/ohio-house-passes-judys-law-woman-who-inspired-bill-declines . It was then passed unanimously by Ohio Senate on June 28, 2017, one day after Judy's death. http://www.10tv.com/article/ohio-house-passes-judys-law-woman-who-inspired-bill-declines

Legal Lessons Learned: A tragic criminal act led to enactment of this statute; hopefully the defendant will now be convicted of murder. The bill can be read:
https://openstates.org/oh/bills/132/HB63/

File – Chap. 18, Legislation

OH: CONCEALED CARRY – LICENSED CCW – MAY NOW STORE IN VEHICLE AT WORK

Effective March 21, 2017, employees in Ohio, including firefighters, with concealed carry license may now keep their firearm and ammo in their vehicle while at work.

> ### *2923.1210 Transporting or storing a firearm or ammunition on private property.*
>
> (A) A business entity, property owner, or public or private employer may not establish, maintain, or enforce a policy or rule that prohibits or has the effect of prohibiting a person who has been issued a valid concealed handgun license from transporting or storing a firearm or ammunition when both of the following conditions are met:
>
> (1) Each firearm and all of the ammunition remains inside the person's privately owned motor vehicle while the person is physically present inside the motor vehicle, or each firearm and all of the ammunition is locked within the trunk, glove box, or other enclosed compartment or container within or on the person's privately owned motor vehicle;

(2) The vehicle is in a location where it is otherwise permitted to be."

Added by 131st General Assembly File No. TBD, SB 199, §1, eff. 3/21/2017.

The Ohio State Budget bill was signed by Governor Kasich on July 1, 2017. The bill included a new provision allowing employees to bring a civil lawsuit against an employer that violates the law allowing firearms in private vehicles. http://www.fishelhass.com/news/1/522/

Legal Lessons Learned: Fire & EMS departments in Ohio should modify their Employee Handbook or SOGs to reflect the new law.

Newsletter author:

Lawrence T. Bennett, Esq.
Program Chair
Fire Science & Emergency Management,
College of Engineering & Applied Science
Lawrence.bennett@uc.edu
Cell 513-470-2744

Bio: http://ceas.uc.edu/aerospace/FireScience/faculty_mentors.html