firelaw newsletter

Lawrence T. Bennett, Esq. Nov. 2015

FIRE, EMS & SAFETY LAW NEWSLETTER

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Items covered in this Newsletter:

UC:

COMMUNITY PARAMEDICINE - 1-WEEK (3 credit) COURSE FOCUSING ON NEW PROGRAMS – MARCH 21 – 25, 2016

http://ceas.uc.edu/content/dam/aero/docs/fire/CP%202016.pdf

UAV FLIGHT SCHOOL FOR EMERGENCY RESPONDERS – Summer, 2016

FAA certificate issued: http://www.uc.edu/news/NR.aspx?id=21421

File: Chapter 1, American Legal System

U.S. SUPREME COURT – QUALIFIED IMMUNITY EXPANDED – UNLESS "EVERY REASONABLE OFFICIAL" WOULD KNOW

On Nov. 9, 2015, in Chardrin Lee Mullenix v. Beatrice Luna, rep. of the estate of Israel Leija, Jr., the U.S. Supreme Court (8 to 1; Per Curiam opinion), 577 US ___ (2015), reversed the 5th Circuit, holding that trial judge and 5th Cir. should have granted summary judgment to Trooper Chadrin Mullenix, Texas Department of Public Safety, who fired 6 rifle shots at engine of fleeing vehicle, and mistakenly killed the driver. In this Per Curiam opinion (not authored by just one justice), all agreed with following standard - qualified immunity doctrine protects police and other government officials, including those making risky decisions, unless "every reasonable official" would understand it was improper.

> "The doctrine of qualified immunity shields officials from civil liability so long as their conduct 'does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.' Pearson v. Callahan, 555 U. S. 223, 231 (2009) (quoting Harlow v. Fitzgerald , 457 U. S. 800, 818 (1982)). A clearly established right is one that is 'sufficiently clear that every reasonable official would have understood that what he is doing violates that right.' Reichle v. Howards, 566 U. S. ___(2012) (slip op., at 5) (internal quotation marks and alteration omitted). 'We do not require a case directly on point, but existing precedent must have placed the statutory or constitutional question beyond debate.' Ashcroft v. al-Kidd, 563 U. S. 731, 741 (2011). Put simply, qualified immunity protects 'all but the plainly incompetent or those who knowingly violate the law.' Malley v. Briggs, 475 U. S. 335, 341 (1986)."

Facts:

> "Respondents sued Mullenix under Rev. Stat. §1979, 42 U.S. C. §1983, alleging that he had violated the Fourth Amendment by using excessive force against Leija. Mullenix moved for summary judgment on the ground of qualified immunity, but the District Court denied his motion, finding that "[t]here are genuine issues of fact as to whether Trooper Mullenix acted recklessly, or acted as a reasonable, trained peace officer would have acted in the same or similar circumstances." 2013 WL 4017124, *6.

On the night of March 23, 2010, Sergeant Randy Baker of the Tulia, Texas Police Department followed Israel Leija, Jr., to a drive-in restaurant, with a warrant for his arrest. 773 F. 3d 712, 715–716 (CA5 2014). When Baker approached Leija's car and informed him that he was under arrest, Leija sped off, headed for Interstate 27. 2013 WL 4017124, *1 (ND Tex., Aug. 7, 2013). Baker gave chase and was quickly joined by Trooper Gabriel Rodriguez of the Texas Department of Public Safety (DPS). 773 F.3d, at 716.

Leija entered the interstate and led the officers on an 18-minute chase at speeds between 85 and 110 miles per hour. Ibid. Twice during the chase, Leija called the Tulia Police dispatcher, claiming to have a gun and threatening to shoot at police officers if they did not abandon their pursuit. The dispatcher relayed Leija's threats, together with a report that Leija might be intoxicated, to all concerned officers.

As Baker and Rodriguez maintained their pursuit, other law enforcement officers set up tire spikes at three locations. Officer Troy Ducheneaux of the Canyon Police Department manned the spike strip at the first location Leija was expected to reach, beneath the overpass at Cemetery Road. Ducheneaux and the other officers had received training on the deployment of spike strips, including on how to take a defensive position so as to minimize the risk posed by the passing driver. Ibid.

DPS Trooper Chadrin Mullenix also responded. He drove to the Cemetery Road overpass, initially intending to set up a spike strip there. Upon learning of the other spike strip positions, however, Mullenix began to consider another tactic: shooting at Leija's car in order to disable it. 2013 WL 4017124, *1. Mullenix had not received training in this tactic and had not attempted it before, but he radioed the idea to Rodriguez. Rodriguez responded "10–4," gave Mullenix his position, and said that Leija had slowed to 85 miles per hour. Mullenix then asked the DPS dispatcher to inform his supervisor, Sergeant Byrd, of his plan and ask if Byrd thought it was "worth doing." 773 F.3d, at 716–717. Before receiving Byrd's response, Mullenix exited his vehicle and, armed with his service rifle, took a shooting position on the overpass, 20 feet above I–27. Respondents allege that from this position, Mullenix still could hear Byrd's response to "stand by" and "see if the spikes work first." Ibid. *
[*Although Mullenix disputes hearing Byrd's response, we view the facts in the light most favorable to respondents, who oppose Mullenix's motion for summary judgment….]

***

Approximately three minutes after Mullenix took up his shooting position, he spotted Leija's vehicle, with Rodriguez in pursuit. As Leija approached the overpass, Mullenix fired six shots. Leija's car continued forward beneath the overpass, where it engaged the spike strip, hit the median, and rolled two and a half times. It was later determined that Leija had been killed by Mullenix's shots, four of which struck his upper body. There was no evidence that any of Mullenix's shots hit the car's radiator, hood, or engine block. Id., at 716–717; 2013 WL 4017124, *2–*3.

Respondents sued Mullenix under Rev. Stat. §1979, 42 U.S. C. §1983, alleging that he had violated the Fourth Amendment by using excessive force against Leija. Mullenix moved for summary judgment on the ground of qualified immunity, but the District

> Court denied his motion, finding that "[t]here are genuine issues of fact as to whether Trooper Mullenix acted recklessly, or acted as a reasonable, trained peace officer would have acted in the same or similar circumstances." 2013 WL 4017124, *6. Mullenix appealed, and the Court of Appeals for the Fifth Circuit affirmed."

Justice Scalia, in his Concurring Opinion, discussed "risky enterprise" – but agreed officer still enjoys qualified immunity

> "Here, however, it is conceded that Trooper Mullenix did not shoot to wound or kill the fleeing Leija, nor even to drive Leija's car off the road, but only to cause the car to stop by destroying its engine. That was a risky enterprise, as the outcome demonstrated; but determining whether it violated the Fourth Amendment requires us to ask, not whether it was reasonable to kill Leija, but whether it was reasonable to shoot at the engine in light of the risk to Leija."

Justice Sotomayor - Sole Dissenter – Rogue Conduct / No Training In Shooting At Engine Block

> "Chadrin Mullenix fired six rounds in the dark at a car traveling 85 miles per hour. He did so without any training in that tactic, against the wait order of his superior officer, and less than a second before the car hit spike strips deployed to stop it. Mullenix's rogue conduct killed the driver, Israel Leija, Jr. Because it was clearly established under the Fourth Amendment that an officer in Mullenix's position should not have fired the shots, I respectfully dissent from the grant of summary reversal.
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> By sanctioning a 'shoot first, think later' approach to policing, the Court renders the protections of the Fourth Amendment hollow. For the reasons discussed, I would deny Mullenix's petition for a writ of certiorari. I thus respectfully dissent."

Legal Lesson Learned: The 8 justices have imposed a very high standard for removing an officer's qualified immunity protection. This decision will be very helpful to Fire & EMS Incident Commanders and others who must also sometimes make high risky decisions in an emergency situation.

File: Chap. 1, American Legal System

DC – CELL PHONE TOWER DATA – U.S. SUP. CT. DECLINES TO HEAR APPEAL OF ARMED ROBBER – SETTLED LAW

On Nov. 9, 2015, in Davis v. United States, the U.S. Supreme Court declined to hear the appeal of Quartavious Davis, and he will be in prison for next 1,941 months (he needed at least 4 justices to vote to hear his appeal). Davis was convicted of 7 armed robberies in Florida, and U.S. Attorney's Office had obtained a search warrant from U.S. Magistrate, showing his cell phone was used near 6 of those robberies. This decision may be very helpful not only to police, also to arson investigators.
http://www.supremecourt.gov/orders/courtorders/110915zor_4g25.pdf.

Facts:

The U.S. Court of Appeals for Eleventh Circuit on May 5, 2015, upheld his conviction and introduction to jury of the cell phone locator information, in en banc decision (all the Judges on court), http://pdfserver.amlaw.com/nlj/DAVIS_CA11_20150505.pdf , (a three-Judge panel had held that cell phone records should not have been shown to jury, but it was good faith error).

> "In the controversy before us, there is no GPS device, no physical trespass, and no real-time or prospective cell tower location information. This case narrowly involves only (1) government access to the existing and legitimate business records already created and maintained by a third - party telephone company and (2) historical information about which cell tower locations connected Davis's cell calls during the 67 - day time frame spanning the seven armed robberies.
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> Hence, the § 2703(d) [under Stored Communications Act] order permitting government access to MetroPCS's records comports with applicable Fourth Amendment principles and is not constitutionally unreasonable."

Robberies (following facts are from 11 Circuit en banc decision):

> "Quartavius Davis committed seven separate armed robberies in a two-month period. From the beginning of August 2010 to the beginning of October 2010, Davis and accomplices, bearing an array of firearms, terrorized a wide range of South Florida businesses, including a pizzeria, a gas station, a drugstore, an auto parts store, a beauty salon, a fast food restaurant, and a jewelry store.
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> All of Davis's [5] codefendants pled guilty to various counts. Davis alone went to trial. The jury convicted Davis on all charged counts.
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> ***
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> One member of each conspiracy testified for the government. Codefendant Willie Smith ('Smith') testified as to the first conspiracy, encompassing six robberies at commercial establishments, including a Little Caesar's restaurant, an Amerika Gas Station, a Walgreens drug store, an Advance Auto Parts store, a Universal Beauty Salon, and a Wendy's restaurant. Codefendant Michael Martin ('Martin") testified as to the second conspiracy, encompassing the robbery of a Mayors Jewelry store. Smith and Martin testified that Davis was involved in each robbery , where they wore masks, carried guns, and stole items such as cash, cigarettes, and watches. Separately, an eyewitness, Edwin Negron, testified regarding Davis's conduct at the Universal Beauty Salon and the adjacent martial arts studio. He testified that Davis pointed a gun at his head, pushed both a 77 year-old woman and Negron's wife to the ground, and took several items from Negron and others. Another eyewitness, Antonio Brooks, testified that Brooks confronted Davis and his accomplices outside the Wendy's after that robbery. Brooks testified that Davis fired a gun at Brooks, and that Brooks returned fire towards the getaway car.

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In addition, the prosecution introduced telephone records obtained from MetroPCS for the 67-day period from August 1, 2010, through October 6, 2010, the time period spanning the first and last of the seven armed robberies. The toll records show the telephone numbers for each of Davis's calls and the number of the cell tower that connected each call. A MetroPCS witness identified his company's cell tower glossary, which lists the physical addresses, including longitude and latitude, of MetroPCS's cell towers. A police witness then located on a map the precise addresses (1) of the robberies and (2) of the cell towers connecting Davis's calls around the time of six of the seven robberies. While there was some distance between them, the cell tower sites were in the general vicinity of the robbery sites."

Holding:

"The government sought [a search warrant from U.S. Magistrate] clearly-delineated records that were both historical and tailored to the crimes under investigation. The government did so following the explicit design of the governing statute, the Stored Communications Act ('SCA'), 18 U.S.C. § 2701 et seq. Section 2703 of the SCA provides that a federal or state governmental entity may require a telephone service provider to disclose 'a record . . . pertaining to a subscriber to or a customer of such service (not including the contents of communications)' if 'a court of competent jurisdiction' finds 'specific and articulable facts showing that there are reasonable grounds to believe' that the records sought 'are relevant and material to an ongoing criminal investigation.' Id. § 2703(c)(1)(A),(B), (d). The court order under subsection (d) does not require the government to show probable cause.

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Importantly though, MetroPCS's business records did not show (1) the contents of any call; (2) the contents of any cell phone; (3) any data at all for text messages sent or received; or (4) any cell tower location information for when the cell phone was turned on but not being used to make or receive a call. The government did not seek, nor did it obtain, any GPS or real-time (also known as 'prospective') location information.

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Before turning to Davis's case, we review the Fifth Circuit's recent decision holding that a court order under §2703(d) compelling production of business records —showing this same cell tower location information— does not violate the Fourth Amendment and no search warrant is required. In re Application of the United States for Historical Cell Site Data ('In re Application" (Fifth Circuit) 724 F.3d 600, 611-15 (5th Cir. 2013).
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More importantly … Davis has no subjective or objective reasonable expectation of privacy in MetroPCS's business records showing the cell tower locations that wirelessly connected his calls at or near the time of six of the seven robberies."

Legal Lessons Learned: This should be very helpful in arson investigations where investigators need to prove location of a suspect shortly after a fire. With 11th Circuit, and 5th Circuit, both finding no reasonable expectation of privacy with cell phone location

information, and U.S. Supreme Court declining to hear an appeal, the law has become fairly clear. Evidence of cell phone location data, obtained via a court order, is admissible in evidence.

File: Chap. 1, American Legal System

MN: COURT OVERTURNS HOME FIRE SPRINKLER RULES BY DEPARTMENT OF LABOR – LEGISLATION HAD ALSO FAILED

On Oct. 13, 2015, in Builders Association of the Twin Cities v. Minnesota Department of Labor and Industry, the Court of Appeals held (3 to 0) that the Sprinkler Rule is invalid. http://mn.gov/lawlib/archive/ctappub/2015/opa150116-101315.pdf

Facts:

> "In October 2013, respondent released a Statement of Need and Reasonableness (SONAR) outlining the proposed changes to the MRC [Minnesota Residential Code]. Respondent proposed adopting the 2012 IRC with amendments. This included an amendment to the sprinkler requirement. Rather than require sprinkler systems in all newly constructed one-and two – family dwellings, the proposed rule required sprinkler systems in all newly constructed townhouses and one-and two-family dwellings, with an exception for one-family dwellings with a floor area under 4,500 square feet (Sprinkler Rule).
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> The October 2013 SONAR for the Sprinkler Rule indicates that the 4,500-square-foot threshold was chosen in response to an argument made by the fire service that 'homes between 4,000 and 5,000 square feet and larger provide the greatest initial life safety risk to the public.' The record does not support this assertion.
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> Because the record does not include evidence of any reasoned determination to indefinitely exempt new one-family dwellings under 4,500 square feet, the Sprinkler Rule must be declared invalid.
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> ***
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> "Testimony at the public hearing from representatives of the Fire Chiefs Association also called for sprinkler systems in all dwellings. A proposal aimed at requiring sprinkler systems in all dwellings does not provide support for respondent's subsequent - implicit determination the life - safety benefits of sprinkler systems justify the increased costs only in new dwellings exceeding 4,500 square feet.
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In fact, on a relative basis, sprinkler systems would be more expensive in smaller two-family dwellings than in larger two-family dwellings. Yet, respondent has imposed the sprinkler mandate on every two-family dwelling, regardless of size.

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We are mindful today that we are declaring a rule adopted by an administrative agency of the state invalid. We do not do so lightly, but rather thoughtfully and unanimously. Nevertheless, we are bound to apply the law."

LEGAL LESSONS LEARNED: The administrative record to support a sprinkler rule must be very strong, to overcome Minnesota Realtors argument that the rule would have added $10,000 to the cost of home.
http://www.twincities.com/localnews/ci_28963112/minnesota-rule-requiring-home-fire-sprinklers-overturned

File: Chap. 1, American Legal System

OH: AGGRAVATED ARSON (HOME) & ARSON (POLE BARN) - 14 YEARS IN PRISON – THOROUGHLY INVESTIGATED

On Sept. 11, 2015, in State of Ohio v. Christopher Egbert, 2015-Ohio-3693, the Ohio Court of Appeals for 6th Appellate District, Wood County, held (3 to 0) that jury properly convicted the defendant of aggravated arson and arson, among other offenses, and trial judge sentenced him to 14 years imprisonment. http://www.supremecourt.ohio.gov/rod/docs/pdf/6/2015/2015-Ohio-3693.pdf

Facts:

"Appellant's wife, Tiffeny Egbert, testified that on the morning of March 26, 2013, she and appellant left their home in Rising Sun, Sandusky County, Ohio, on a four-wheel ATV and proceeded to the Rollersville Tavern where they each had two drinks. After about one hour, they went to Snuffy's Reloaded Bar on State Route 6 in Wood County, Ohio. At Snuffy's, the two played pool, ate, and drank beer. Egbert testified that she consumed four beers and appellant had six beers. After approximately two hours, Egbert stated that appellant got 'angry' and began yelling and using profanity.
Egbert stated that after being asked to leave they headed to the parking lot where appellant began 'pummeling"' her. She stated that appellant 'bounced' her head off a truck and threw her to the ground. Egbert stated that she was yelling for help and that two men came to her aid. After briefly losing consciousness, Egbert stated that she observed appellant bite one of the men and began walking away.

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Wood County Sheriff's Deputy Dustin Kindle testified that on March 26, 2013, he was driving home when dispatch reported a call of a suspicious person walking in the area of Greensburg Pike and State Route 23, south of Snuffy's. Deputy Kindle located appellant

who informed him that he had gotten into an altercation with his wife at the bar and was walking home. Kindle noted a strong odor of alcohol coming from appellant.

Deputy Kindle stated that he drove appellant home, returned his personal effects that were confiscated during the pat-down, and walked him through the attached garage which contained a Chevrolet Avalanche truck and then proceeded into the house. Kindle stated that they engaged in "friendly" conversation and that appellant remained respectful. Kindle did not encounter anyone else in the home. After four to five minutes, Deputy Kindle left appellant's residence.

Deputy Kindle testified that after leaving the house he proceeded west on County Road 1 toward State Route 23 and heading toward home. Kindle stated that his home was approximately eight to 12 miles away. Upon arriving home, Deputy Kindle realized that he mistakenly gave appellant his key fob in addition to appellant's keys. Kindle proceeded back to appellant's home.

When Deputy Kindle arrived back in the area fire trucks were blocking the State Route 23 and County Road 1 intersection; he observed a fire in the distance. Deputy Kindle estimated that 20 to 24 minutes had elapsed from the time he left appellant's residence to the time he saw the fire trucks.

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Wyatt McGough and Joseph Lash testified that on March 26, 2013, at 8:30-9:00 p.m., they were returning from Fostoria, Ohio, and traveling east on County Road 1 when a vehicle pulled out in front of them from a driveway, overcorrected and then spun out into the trees. They decided to make sure the driver was not hurt and turned around in a driveway and proceeded back to the trees. According to the two, the vehicle drove out of a ditch and passed them at a high rate of speed. The vehicle was a Chevrolet Avalanche and one of the taillights was dangling.

At that point, on the property they noticed a fire coming from a barn and the home's garage door. After a few minutes they noticed fire coming from the home's windows. They called 9-1-1 and waited for the emergency crews to arrive.

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Appellant and his vehicle were found on Greensburg Pike in Wood County, Ohio, near property owned by appellant. Responding to a call, volunteer firefighter Daniel Corbin arrived on the scene and observed appellant lying in the yard and a pickup truck in a small ravine. Corbin approached the vehicle and noticed that it was still in drive. He stated that he depressed the brake, put the car in park, and removed the keys. Corbin noted that there was a cinder block down next to the gas pedal. Corbin testified regarding the photographs of the vehicle that he took and were admitted into evidence.

Paramedic Andrew Carter responded to a call of an accident. He met a neighbor out front and she directed him to appellant who was under a blanket. Carter testified that when he removed the blanket he could smell an accelerant and observed that appellant had burns from his med-section down. His right knee was especially affected. Carter stated that the burns were 'fairly significant' and were of varying degrees. Appellant also admitted to consuming alcohol and had a strong odor on his breath.

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Frank Reitmeier, from the Ohio fire marshal's office conducted an investigation of the fires at appellant's residence. Reitmeier first determined that the fires were separately set due to the fact that the buildings are 35 feet apart and there were no burn marks on the ground in between. Reitmeier noted that there were cuts on some of the furniture in the home and a distinct odor of gasoline.

Reitmeier determined that the house fire began in the master bedroom and the gasoline pour or burn pattern on the floor continued through the home and the fire was ignited in the garage. Reitmeier also examined appellant's Chevrolet Avalanche and took a sample from the driver's side floor mat and seat. Reitmeier's photographs were admitted into evidence.

Reitmeier also opined as to the cause of the Greensburg Pike accident. Reitmeier surmised that appellant exited the vehicle, put the cinder block on the gas pedal, and reached in to put the vehicle in gear. According to Reitmeier, at that point appellant was struck by the vehicle, knocked down and likely run over.

Reitmeier also testified regarding the nature of appellant's injuries and the fact that his pants were burned and attached to his skin. This fact, combined with the findings that gasoline started the fire at the residence led him to conclude that appellant started the fire.

Christa Rajendram, employed at the state fire marshal's forensic laboratory, testified that she analyzed 13 items from appellant's home, vehicle, person, and Tiffeny Egbert's clothing and boots for the presence of ignitable fluid. Rajendram testified that her findings revealed the presence of gasoline on appellant's clothing and vehicle and the carpet samples from the home. The finding was also positive for Egbert's boots. Rajendram explained that Egbert's jeans, sweat pants, and a scarf tested positive for a solvent which is found in goop off cleaner. Rajendram admitted that the results could not pinpoint when or where the items came into contact with gasoline. Rajendram's report was admitted into evidence."

Holding:

"Appellant next contends that his convictions for arson and aggravated arson were not supported by sufficient evidence. Arson, R.C. 2909.03(A)(1), is established where an individual causes or creates, by fire or explosion, a substantial risk of harm to another's property. Aggravated arson, R.C. 2909.02(A)(2), includes the element of an occupied structure. As to these convictions, appellant argues that his identity as the perpetrator was never established.

Again, we conclude that viewing the evidence in the state's favor, sufficient evidence was presented to find that appellant set the fires in the pole barn and residence. The evidence presented at trial showed that when Deputy Kindle dropped off appellant at his home there was no evidence of other individuals on the property. Witnesses McGough and Lash observed appellant's vehicle pull out of the driveway, go into a ditch, and drive off with its taillight dangling. Appellant's burn injuries as well as the gasoline found on his clothing also support the theory that he started the fire. Finally, appellant gave inconsistent stories as to what had occurred that night.

Based on the foregoing, we find that appellant's convictions were supported by sufficient evidence.

Legal Lesson Learned: This was a thoroughly investigated case, with strong circumstantial and direct evidence.

File: Chapter 3, Homeland Security

DC: TELEPHONE METADATA – NEW LAW USA FREEDOM ACT, AFTER NOV. 30, 2015 – DoJ APPEALING INJUNCTION

On Nov. 11, 2015, the U.S. Dept. of Justice, in Larry Klayman, et al v. Barack H. Obama, filed with the U.S. Court of Appeals for the D.C. Circuit an "Emergency Motion For Stay Pending Appeal And For Immediate Administrative Stay." U.S. District Court Judge Richard Leon on Nov. 9 had issued an injunction against NSA, concerning calls of plaintiff, attorney J.J. Little and his law firm. The government's brief has an informative discussion on how telephone metadata will be collected starting in Dec. 2015 under the new USA FREEDOM ACT.
https://assets.documentcloud.org/documents/2511010/doj-dccircuit-nsa-20151110.pdf

Facts:

> "On November 9, 2015, the district court entered a preliminary injunction that requires the government to cease collection and analysis of the telephony metadata of certain plaintiffs (the Little plaintiffs) under the government's Section 215 program for collection of bulk telephony metadata. As the government explained to the district court, however, the technical steps necessary to comply with such a targeted injunction would require at least several weeks to complete. Absent a stay, therefore, immediate compliance with the district court's injunction would effectively require the abrupt termination of that important counter-intelligence program, as explained below. Such a result is contrary to Congress's judgment that the Section 215 program should instead end only after a transition period (ending less than three weeks from now) to avoid a gap in intelligence collection that could harm national security. As the Second Circuit recently held, that considered legislative decision should be respected and not overturned on the basis of uncertain constitutional claims that will be rendered moot in a matter of weeks. ACLU v. Clapper, 2015 WL 6516757, at *8-9 (2d Cir. Oct. 29, 2015)."

Bulk Collection Program:

> "This case arises out of a challenge to the Section 215 bulk telephony-metadata program, an important intelligence-gathering program designed to detect and prevent terrorist attacks, which is authorized by orders issued by the Foreign Intelligence Surveillance Court. Under that program, the government acquires business records from certain telecommunications companies, in bulk, that contain telephony metadata reflecting the time, duration, dialing and receiving numbers, and other information about telephone calls, but that do not identify the individuals involved in, or the content of, the calls. Pursuant to new legislation, that program will end in less than three weeks when the

government transitions to a new intelligence program based on targeted rather than bulk collection of telephony metadata.

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[Under] USA FREEDOM Act, Pub. L. No. 114-23, 129 Stat. 268 (2015), Congress authorized the continuation of the program during the 180-day transition period to the new intelligence program.

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As the FBI has explained, the United States faces an 'increasingly diffuse threat environment,' Paarmann Decl. ¶ 9 (Dkt. # 150-6) (see Attachment E), in which the Islamic State of Iraq and the Levant and other foreign terrorist organizations encourage small-scale attacks against the United States that can be planned and carried out more quickly than large-scale attacks, yet can be more difficult to detect. Id. ¶¶ 5-7. Although various sources of information can each be used to provide separate and independent indications of potential terrorist activity, the best and most timely analysis occurs when intelligence information obtained from all of those sources can be considered together to compile as complete a picture as possible of that threat. Id. ¶ 10. Information gleaned from NSA analysis of telephony metadata can be an important component of the information the FBI relies on to dependably execute its threat detection and prevention responsibilities. Id."

New Targeted Collection Program:

"Consistent with the President's objective to replace the Section 215 program with a targeted collection program that provides greater privacy protections, just several months ago Congress enacted the USA FREEDOM Act. The Act prohibits the government from conducting the bulk collection of telephony metadata under Section 215 as of November 29, 2015, and provides for a new system of targeted production of call detail records. See USA FREEDOM Act §§ 101, 103.

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After the transition period ends, no further bulk collection of telephony metadata will occur under Section 215, and analytic access to previously collected metadata will also cease – the data will not be used for intelligence or law-enforcement purposes, and will not be disseminated. Further, the underlying data will be destroyed as soon as possible.
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The USA FREEDOM Act reflects the judgment of Congress and the President that a targeted collection approach can appropriately serve the United States' interests in national security while further enhancing the substantial protections for personal privacy already built into the Section 215 program."

Legal Lessons Learned: The USA FREEDOM ACT, enacted June 2, 2015, reflects a new balance in right of privacy versus need to protect our nation. See statement of President Obama: https://www.whitehouse.gov/the-press-office/2015/06/02/statement-president-usa-freedom-act

“For the past eighteen months, I have called for reforms that better safeguard the privacy and civil liberties of the American people while ensuring our national security officials retain tools important to keeping Americans safe. That is why, today, I welcome the Senate’s passage of the USA FREEDOM Act, which I will sign when it reaches my desk.”

Chap. 5, Emergency Vehicle Operations

OH: DRIVER OF BMW - CLAIMS LIQUID SPRAYED ON HER FROM COLUMBUS AMBULANCE – APLASTIC ANEMIA

On Oct. 27, 2015, in Maureen Koeppen, et al. v. City of Columbus, Division of Fire, 2015-Ohio-4463, the Ohio Court of Appeals for 10th Appellate District held (3 to 0), reversed the trial judge in the Court of Common Plea, who had denied the city’s motion for summary judgment, and had held that Plaintiff may proceed to trial on her claim the liquid caused her to contract “aplastic anemia” which is a condition that happens when a person has too few blood cells. The Court of Appeals agreed with the city: (2) no evidence city knew of any such mechanical problem, and (2) they was no negligent operation of the ambulance. The city moved for summary judgment, asserting that it was immune from liability under R.C. Chapter 2744. The Koeppens responded that the city lost entitlement to immunity pursuant to the R.C. 2744.02(B)(1) exception, which provides that "political subdivisions are liable for injury, death, or loss to person or property caused by the negligent operation of any motor vehicle by their employees when the employees are engaged within the scope of their employment and authority."
http://www.leagle.com/decision/In%20OHCO%2020151027509/KOEPPEN%20v.%20CITY%20OF%20COLUMBUS

Facts:

> “On the evening August 6, 2013, plaintiff-appellee, Maureen Koeppen, stopped her BMW 128i convertible at a red light at the intersection of Fifth Avenue and Olentangy River Road.[1] The roof of Koeppen's convertible was retracted. To Koeppen's immediate left, an ambulance was stopped in the left-turn lane.
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> As she waited for the light to change, Koeppen felt liquid hit the left side of her body. She turned her head to the left, and a warm liquid sprayed into her face. Later, Koeppen stated the liquid had a chemical or medicinal taste and ‘was not a dark color.’ (Koeppen depo., at 18, 28.) The liquid appeared to ‘com[e] out at an angle’ from ‘somewhere below the windshield’ of the ambulance. (Koeppen depo., at 16.)[2]
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> Koeppen began frantically waving her hands and yelling, ‘Stop. Stop. * * * It's in my face.’ (Koeppen depo., at 11-12.) The person sitting in the passenger seat of the ambulance turned towards her and waved. Koeppen remembers thinking or saying at that point, ‘No. No. I'm not waving at you hi. I'm telling you to stop.’ (Koeppen depo., at 11-12.)
>
> When the light changed to green, the ambulance turned left and drove off. Koeppen drove through the intersection and stopped on the first cross street. Her hair, face, and neck were soaked with the liquid that had come from the ambulance.

After being hit with the liquid, Koeppen's face and chest broke out, and she ‘gradually started to feel worse and worse.’ (Koeppen depo., at 22.) Approximately one week after the incident, Koeppen went to the emergency room of Dublin Methodist Hospital. Koeppen was ultimately diagnosed with aplastic anemia, a condition that happens when a person has too few blood cells.”

1. We draw the facts set forth in this decision largely from Koeppen's deposition. For purposes of summary judgment, the city does not contest Koeppen's version of events.

2. The Koeppens maintain that, in her deposition, Maureen Koeppen testified that the fluid appeared to come from where the engine was located on the ambulance. Koeppen, unfortunately, did not testify clearly on that point. When asked in her deposition whether the fluid originated from ‘somewhere in the region of the engine,’ Koeppen replied that she could not ‘say with certainty with the visual you're giving me to answer that exactly.’ (Koeppen depo., at 17.) She then repeated, ‘[I]t was coming out from somewhere below the windshield.’ (Koeppen depo., at 17.)”

Claimed illness:

“After being hit with the liquid, Koeppen's face and chest broke out, and she ‘gradually started to feel worse and worse.’ (Koeppen depo., at 22.) Approximately one week after the incident, Koeppen went to the emergency room of Dublin Methodist Hospital. Koeppen was ultimately diagnosed with aplastic anemia, a condition that happens when a person has too few blood cells.

***

On August 30, 2013, Koeppen and her husband, David M. Koeppen, filed suit against the city, alleging claims for negligence and loss of consortium. Through discovery, the Koeppens discovered that an ambulance operated by the Columbus Division of Fire (‘CDF’) had driven through the Fifth Avenue and Olentangy River Road intersection at the time and date of the incident. John Endicott and Anthony Klein, who are both CDF paramedics, were assigned to that ambulance on the evening of August 6, 2013.[3]

***

The R.C. 2744.02(B)(1) exception only applies when the alleged injuries are ‘caused by’ the negligent operation of a vehicle. To establish causation, the Koeppens adduced the affidavit testimony of Maureen Koeppen, who testified that she had no history of illness prior to being sprayed with liquid on August 6, 2013. Koeppen began feeling poorly after the incident, and she was diagnosed with aplastic anemia approximately two and one-half weeks later. The Koeppens also introduced a document from Maureen Koeppen's medical records entitled "Patient Education — Diseases and Procedure." That document reads:

> “What causes aplastic anemia? — Aplastic anemia is caused by damage to your bone marrow. Some people are born with damaged bone marrow. In older children or adults, many things can damage bone marrow, including: • Certain medicines used to treat arthritis and epilepsy • Certain chemicals used in industry and farming • Infections from viruses • Problems with your body's infection

fighting system. But for many people, doctors don't know the cause of aplastic anemia."

***

At best, this evidence might demonstrate that the fluid sprayed on Maureen Koeppen caused her to develop aplastic anemia. However, the evidence does not show that the paramedics contributed to the development of that condition by failing to stop and assist Koeppen. Conceivably, the paramedics could have helped Koeppen by dousing her with water or performing some other early intervention. On the other hand, it is equally conceivable that the damage to Koeppen was done upon exposure to the fluid. Without evidence, we can only speculate, and speculation is insufficient to establish a question of fact regarding causation. *See Mills v. Best Western Springdale*, 10th Dist. No. 08AP-1022, 2009-Ohio-2901, ¶ 20 ('It is well settled that the issue of proximate cause is not subject to speculation and that conjecture as to whether a breach caused the particular damage is insufficient as a matter of law.'); *Lhamon v. Prater*, 3d Dist. No. 1-09-34, 2009-Ohio-5904, ¶ 26 (`If evidence on the question of proximate cause is so meager and inconclusive that a finding of proximate cause would rest on speculation and conjecture, the defendant is entitled to summary judgment as a matter of law.').

In sum, we conclude that the Koeppens have not established that the R.C. 2744.02(B)(1) exception to immunity applies to their claim that the paramedics negligently failed to assist Maureen Koeppen after the incident. We thus find that the trial court erred in not granting the city summary judgment on that claim.'

Holding:

"Courts employ a three-tier test to determine whether a political subdivision is immune from liability for tort claims under R.C. Chapter 2744. *Riffle v. Physicians & Surgeons Ambulance Serv., Inc.*, 135 Ohio St.3d 357, 2013-Ohio-989, ¶ 15. In the first tier, the court applies the general rule that a political subdivision is immune from liability incurred during the performance of either a governmental or proprietary function. *Id.*; *Doe v. Marlington Local School Dist. Bd. of Edn.*, 122 Ohio St.3d 12, 2009-Ohio-1360, ¶ 11; R.C. 2744.02(A)(1). That immunity, however, is subject to the five exceptions contained in R.C. 2744.02(B). *Doe* at ¶ 12. Accordingly, the second tier of the analysis requires a court to determine whether any of the R.C. 2744.02(B) exceptions apply. *Riffle* at ¶ 15. If the court answers affirmatively, then it must move to the third tier: determining whether any of the R.C. 2744.03 defenses against liability require the court to reinstate immunity. *Riffle* at ¶ 15; *Doe* at ¶ 12.

***

Here, there is no dispute that the city established its immunity under the first tier of the immunity test. Pursuant to R.C. 2744.02(A)(1), 'a political subdivision is not liable in damages in a civil action for injury, death, or loss to person or property allegedly caused by any act or omission * * * in connection with a governmental or proprietary function.' The provision of emergency medical services constitutes a governmental function. *Riffle* at ¶ 2; R.C. 2744.01(C)(2)(a). Consequently, the city is not liable to the Koeppens unless the Koeppens can demonstrate that an R.C. 2744.02(B) exception applies.

***

Here, we must determine whether the city had a duty to guard against the risk that fluid would spray from the ambulance. To do that, we must examine the ambulance's repair records. If those records show that the city knew or should have known that the spray would occur, then the city had a duty to undertake reasonable precautions to prevent it.

The record contains work orders reflecting repairs performed on the ambulance from January 5, 2011 to September 12, 2013. In 2013, the ambulance underwent repairs in March, May, June, July, and August. In March 2013, mechanics fixed an oil leak. In May 2013, mechanics repaired the air conditioning unit on the ambulance. In June and July 2013, mechanics fixed various lights on the ambulance, removed and replaced the rear leveling valves and dump valve solenoids, and installed a new clutch fan solenoid, fan belt, idler pulley, and belt tensioner.

***

Two days after the August 6, 2013 incident, the city returned the ambulance to the repair shop because it was 'running sluggish[l]y' and had 'no pick up on acceleration.' (R. 54, exhibit No. 7.) Examination of the engine revealed problems with the injectors and other components. Those problems were serious enough that a new engine was installed.

Review of the repair records reveals that none of records show that fluid had previously sprayed from the ambulance in the manner Maureen Koeppen described. Thus, there is no prior incident that would have made a second such incident foreseeable.

***

Here, the Koeppens do not identify the malfunction that caused the spray to emit from the ambulance. Without knowing the malfunction, a factfinder cannot determine what the city could have done, but did not do, to safeguard against the incident here. A factfinder, therefore, cannot decide if the exercise of ordinary care would have corrected the malfunction or not. Consequently, the Koeppens failed to adduce evidence to create a question of fact regarding whether the city breached the standard of ordinary care.

In sum, we conclude that the Koeppens have not established a genuine issue of material fact as to whether the paramedics were negligent in driving the ambulance. Consequently, the R.C. 2744.02(B)(1) exception does not apply to that claim, and the trial court erred in denying the city summary judgment on that claim."

BRUNNER, *J.*, concurring separately.

"I concur with the result and reasoning of the majority's decision, but I would note further that no evidence in the nature of expert testimony was offered in opposition to summary judgment that could have causally explicated Mrs. Koeppen's condition to the liquid alleged to have sprayed her from the ambulance. Nor was there expert testimony offered to show just what fluid could have sprayed from the ambulance, based on its records of repair, which included replacing its engine very soon after this alleged incident. It is not a matter that this incident did not happen. That we reverse is more a matter of not having sufficient evidence in the record to create a genuine issue as to any material fact as to what happened that day and how it created or affected Mrs. Koeppen's condition. Without

such evidence, based on what evidence is in the record, Mrs. Koeppen's claims fail as a matter of law."

Legal Lessons Learned: Keep detailed maintenance records on you apparatus. Never know when a "strange" claim may be made.

File: Chap. 5 – Emergency Vehicle Operations

OH: POLICE OFFICER IN HOT PURSUIT OF CAR IN HEAVY TRAFFIC – SOP VIOLATED - NO QUALIFIED IMMUNITY

On Nov. 5, 2015, in Regina Hardesty v. Officer Jose Alcantara, et al., 2015-Ohio-4591, the Ohio Court of Appeals for Eight District, Cuyahoga County, held (3 to 0) that the trial judge properly denied motion of City of Euclid Police Officer Alcantara to be dismissed from the civil lawsuit. An employee of a political subdivision enjoys immunity under R.C. 2744.03(A)(6)(b) if the employee's actions are not "with malicious purpose, in bad faith, or in a wanton or reckless manner." http://www.supremecourt.ohio.gov/rod/docs/pdf/8/2015/2015-Ohio-4591.pdf

Facts:

> "Officer Alcantara is a police officer for the city of Euclid. On March 28, 2012, just before 5:00 p.m., Officer Alcantara was on routine patrol in the area of Euclid Avenue and East 193rd Street. As he turned onto East 193rd Street from Euclid Avenue, he observed a black Cadillac, which he stated in his affidavit was 'impeding the flow of traffic in violation of Euclid Codified Ordinance 333.04.' Officer Alcantara stated that the black Cadillac 'was stopped in the roadway and remained there while the occupants were speaking with a male standing outside the vehicle before the male eventually entered the black Cadillac.' Officer Alcantara averred in his affidavit that '[t]he conduct of the occupants of the Cadillac is consistent with that of a drug transaction.'
>
> After the male who had been standing on the street entered the black Cadillac, Officer Alcantara observed the Cadillac proceed north on East 193rd Street, but then it turned around in a circular driveway, and reentered East 193rd Street heading southbound toward Euclid Avenue. Officer Alcantara also turned around in the same driveway, and was immediately behind the black Cadillac at the traffic light at the corner of Euclid Avenue and East 193rd Street.
>
> Officer Alcantara said that when the Cadillac turned around, he was able to see that the driver of the vehicle was 'a young, black male.'
>
> At 4:59:12 p.m., while directly behind the Cadillac at the traffic light, Officer Alcantara entered the license plate of the vehicle into his mobile data terminal to conduct a search of the Law Enforcement Automated Data System ('LEADS'). The LEADS search revealed that there was an outstanding warrant for the arrest of Antoine Howard for

felony domestic violence out of Akron. The LEADS report described Howard as a 28-year-old black male.

As soon as the Cadillac turned right onto Euclid Avenue, Officer Alcantara activated his overhead lights and siren of his patrol car to conduct a traffic stop of the black Cadillac for 'impeding traffic and to determine whether the driver was Antoine Howard.' At 5:02:01 p.m., Officer Alcantara radioed Euclid police dispatch that he was on 'Euclid Avenue westbound trying to get a vehicle to stop for [him] at 191. Victor-131433.' Officer Alcantara said the Cadillac 'rolled slowly to a stop near the intersection of Euclid Avenue and East 191st Street where the passenger door of the cadillac swung open as if its occupants were going to bail-out and run from the vehicle.' At that point, the Cadillac 'sped off westbound on Euclid Avenue before any of the occupants could exit the Cadillac.'

At 5:02:47, Officer Alcantara radioed dispatch that the vehicle was 'taking off on me,' and '[w]e are westbound on Euclid — Upper Valley. Traffic's heavy.' At 5:03:01 p.m., Officer Alcantara stated 'I'm still going to lights. Still going westbound.'

Officer Alcantara averred that the Cadillac 'continued to flee westbound on Euclid Avenue at speeds between 80 to 100' m.p.h., driving 'through traffic signals and intersections without slowing.' The speed limit on Euclid Avenue in that area is 35 m.p.h.

At 5:03:11 p.m., Officer Alcantara said, 'Let Cleveland know and East Cleveland radio. Doing about 80 miles an hour radio. Still westbound. 80 miles an hour. At 5:03:35 p.m., Officer Alcantara informed dispatch, 'Still westbound. Doing about 100 radio. 100 miles an hour. Still westbound. Traffic's very heavy.'

In his deposition, Officer Alcantara stated that when he said 80 and 100 m.p.h., he was giving the Cadillac's estimated speed, not his own.

Officer Alcantara stated that '[b]ecause he slowed at all traffic signals and intersections, the Cadillac quickly pulled away from [his] patrol car.' Officer Alcantara averred that 'near the intersection of Euclid Avenue and London Road, [he] observed that the Cadillac was at least a third (1/3) of a mile ahead and was pulling [farther] away from [him].' Officer Alcantara said that he 'terminated the pursuit of the Cadillac in the area of Euclid Avenue and London Road.' Officer Alcantara stated that he slowed his patrol car and deactivated his overhead lights and siren. He stated that he lost sight of the Cadillac at that point.

Officer Alcantara said that he continued traveling westbound on Euclid Avenue. He stated that as he neared the intersection of Ivanhoe Road and Belvoir Boulevard, he 'observed a cloud of black smoke and then saw the Cadillac had crashed into another vehicle.'

At 5:03:46 p.m., Officer Alcantara reported to dispatch: 'Going right. They just wrecked. They just wrecked radio. Just wrecked. Vehicle just wrecked radio. We're at Ivanhoe and Belvoir. Ivanhoe Belvoir. They're bailing. They are bailing out. Bailing out.'

In his deposition, Officer Alcantara could not explain why he said 'going right,' because he said he 'was nowhere near the vehicle when it wrecked.' Also in his deposition,

Officer Alcantara denied seeing the wreck, even though he transmitted to dispatch that the vehicle 'just wrecked.'

The driver of the Cadillac, who was later identified as Antoine Howard, took off running after he crashed. When Officer Alcantara reached the scene of the accident, he saw Howard running away from the scene. Officer Alcantara chased Howard on foot until he caught him. Howard crashed into a vehicle being driven by plaintiff-appellee, Regina Hardesty, who was seriously injured in the accident."

Officer Disciplined

Officer Alcantara was disciplined for his actions on March 28, 2012. In a letter dated April 5, 2012, Lieutenant (at the time of the pursuit) Robert Payne informed Officer Alcantara that he was receiving an oral reprimand because he 'failed to terminate the pursuit.' Lieutenant Payne further stated that based on 'all the circumstances; the crime, the warrant, the time of day, the location, the vehicular traffic, and the actions the fleeing vehicle, it would have been prudent and advisable to end the pursuit in a timely fashion. The risk to the public was too high.

***

The Euclid police driving committee also reviewed the pursuit, and issued a formal criticism to Officer Alcantara regarding the events of March 28, 2012. After reviewing the facts and Euclid police policies and procedures, it concluded that '[t]ermination of this pursuit was the better course of action in this pursuit due to traffic conditions."

***

Euclid Police Standard Operating Procedure ("S.O.P.") 08-001-442 states:

> Responsibility: A pursuit is a rare occurrence, and one that should not be taken lightly. Officer(s) will initiate or continue a pursuit of a suspect fleeing in a motor vehicle only when justified by the illegal flight of a law violator, and then only when the pursuit will be executed with caution so as not to create extreme or unreasonable danger for either police or the public."

Holding / Citing Massillon fire truck case

> "In Anderson v. Massillon, 134 Ohio St.3d 380, 2012-Ohio-5711, 983 N.E.2d 266, the Ohio Supreme Court set forth the meaning of the terms wanton and reckless conduct. The Supreme Court held: Wanton misconduct is the failure to exercise any care toward those to whom a duty of care is owed in circumstances in which there is great probability that harm will result. (Hawkins v. Ivy, 50 Ohio St.2d 114, 363 N.E.2d 367 (1977), approved and followed.) Reckless conduct is characterized by the conscious disregard of or indifference to a known or obvious risk of harm to another that is unreasonable under the circumstances and is substantially greater than negligent conduct. (2 Restatement of the Law 2d, Torts, Section 500 (1965), adopted.) Anderson at paragraphs two and three of the syllabus.
>
> ***

Significantly, Officer Alcantara never communicated to dispatch that he terminated the pursuit. Lieutenant Payne testified in his deposition that Officer Alcantara was given an oral reprimand because — 'the truth was he failed to terminate the pursuit.'

Howard also testified in his deposition that he looked in his rearview mirror late in the chase and Officer Alcantara's police vehicle was right behind him.

The final fact that is significant — and undisputed — is that Officer Alcantara did not continuously run his siren; rather, he admittedly toggled it on and off during the pursuit when he transmitted information to dispatch. He stated that he did so because his K9 partner was barking and he was concerned that the dispatcher would not hear what he was saying. While this may be true, it is our view that whether it was reasonable to do so, in light of the fact that traffic was heavy and speeds were very high, raises a genuine issue of material fact. If the factfinder decided that it was not reasonable to do so, it would be another important point to consider in determining whether Officer Alcantara's actions were wanton or reckless.

***

We further note that the Ohio Supreme Court made clear that '[t]he violation of a statute, ordinance, or department policy enacted for the safety of the public is not per se willful, wanton, or reckless conduct, but may be relevant to determining the culpability of a course of conduct.' Anderson , 134 Ohio St.3d 380, 2012-Ohio-5711, 983 N.E.2d 266, at paragraph five of the syllabus.

In this case, it is undisputed that Officer Alcantara violated several department policies, including toggling off his siren when he communicated to dispatch during the pursuit, not informing dispatch regarding the reason for the pursuit, and the fact that he terminated the pursuit (if he did). But most notably was the fact that Officer Alcantara was disciplined under Euclid police standard operating procedures for failing to terminate the pursuit. Thus, these facts would also have to be considered by the factfinder when determining whether Officer Alcantara's actions were wanton and reckless."

Legal Lessons Learned: Breach of emergency vehicle policy can cause loss of qualified immunity. This case will now either go to trial, or be settled. If officer is found liable, he may seek indemnification from City of Euclid. But "wanton or reckless conduct" is excluded. Ohio Revised Code 9.87, Indemnification of public officers and employees.

File: Chapter 6, Employment Litigation

IL: TATTOOS - CHICAGO PD's NEW POLICY REQUIRING ALL VISIBLE TATTOOS BE COVERED – FED. JUDGE UPHOLDS

On Oct. 27, 2015, in Daniel Medivci, Dennis Leet & John Kukielka v. City of Chicago, U.S. District Judge Charles P. Kocoras granted the City's motion to dismiss the lawsuit, prior to any pre-trial discovery. http://www.scribd.com/doc/287733720/Medici-Et-Al-v-City-of-Chi

> "In the instant case, the Court finds that Plaintiffs' tattoos area form of personal expression, and not a form of speech on matters of public concern. When an individual decides to place a symbol, a set of words, or a design on his or her body, he or she is engaging in a form of personal expression, rather than a form of commentary on the interests of the public. Furthermore, on-duty Plaintiffs are not part of the citizenry at large, but instead government employees, whose speech may be subject to restrictions that, if applied to the general public, maybe unconstitutional. Therefore, because the 'speech' at issue does not involve citizens commenting on matters of public concern, the Pickering balancing test is not applicable. City of San Diego, Cal., 543 U.S. at 82 (citing Connick , 461 U.S. at143)."

Facts:

> "Plaintiffs claim that on June 8, 2015, the CPD issued changes to its uniform policy, requiring on-duty officers 'representing the Department, whether in uniform, conservative business attire or casual dress,' to cover tattoos on the hands, face, neck, and other areas not covered by clothing, with skin tone adhesive bandages or tattoo covers (the 'Tattoo Policy').Plaintiffs allege that the City not only failed to bargain with the Police Union before changing the dress code, but that it also failed to fully consider possible alternatives to this broad-sweeping ban. Plaintiffs also allege that the City's explanation for the Tattoo Policy is to 'promote uniformity and professionalism.
>
> Medici has two tattoos—one relating to his military service as a Marine and the other relating to his religious beliefs. Kukielka and Leeteach have a religious tattoo. Under the Tattoo Policy, these tattoos must be covered up while the officers are on-duty or representing the CPD. Patrol officers who must wear extra clothing or cover-up adhesive bandages allege that since the creation of the Tattoo Policy, they have experienced overheating in warm weather months, as well as skin irritation and discomfort from the adhesive bandages."

Holding:

> "This Court is convinced that the City's Tattoo Policy does not violate Plaintiffs' First Amendment rights under the analysis articulated in Pickering or NTEU.

However, before the Court can engage in the balancing test articulated in Pickering, we must first determine whether the employee is speaking as a citizen and whether the speech at issue involves matters of public concern. The Supreme Court has noted that '[t]he repeated emphasis in Pickering on the right of a public employee 'as a citizen, in commenting upon matters of public concern,' was not accidental.' Connick v. Myers, 461 U.S. 138, 143 (1983). 'To require Pickering balancing in every case where speech by a public employee is at issue, no matter the content of the speech, could compromise the proper functioning of government offices.' City of San Diego, Cal., 543 U.S. at 82 (citing Connick, 461 U.S. at 143). The Supreme Court has provided some guidance for determining what constitutes 'a matter of public concern' For example, they have stated that 'public concern is something that is a subject of legitimate news interest; that is, a subject of general interest and of value and concern to the public at the time of publication.' City of San Diego, Cal., 543 U.S. at 83-84.

***

In this case, the City's interest in maintaining a professional and uniform police force substantially outweighs Plaintiffs' interests in personal expression through the display of their tattoos while on-duty. Police officers have the difficult responsibility of ensuring public safety and maintaining order among the populous. See Volkman v. Ryker, 736 F.3d 1084, 1092 (7th Cir. 2013) (citing Kokkinis v. Ivkovick, 185 F.3d 840, 845 (7th Cir. 1999)). In order to achieve these goals, the public must trust and respect the police officers charged with this difficult duty. Due to a tattoo's unique character, if this Court allowed on-duty police officers to display their tattoos, we would undermine the CPD's ability to maintain the public's trust and respect, which would negatively impact the CPD's ability to ensure safety and order.

***

For the aforementioned reasons, Defendant's motion to dismiss is granted.

Legal Lesson Learned: This decision may be appealed, but the legal analysis may encourage other police departments, as well as Fire & EMS departments, to adopt similar policies. See opinion article, "Tattoo Ban For Chicago Cops Long Overdue," http://www.chicagotribune.com/news/opinion/zorn/ct-cops-tattoos-ban-uniforms-perspec-0610-20150618-column.html See Oct. 29, 2015 article: http://www.fox32chicago.com/news/local/40596005-story

File – Chap 6, Employment Litigation

MS: DREADLOCKS – FD CAPT. FIRED – NO FIRST AMEND. – BUT IMMUNIZATION CLAIM MAY PROCEED

On Oct. 23, 2015, in Roger L. Mann v. City of Moss Point, U.S. District Court judge Keith Starrett, granted the city's motion to dismiss concerning termination of the Captain for violating the grooming policy, since this is not a matter of public concern protected by Constitution, but he

denied motion regarding complaints about the Fire Chief.
https://scholar.google.com/scholar_case?case=15160424602481125195&hl=en&as_sdt=6&as_vis=1&oi=scholarr

> "Defendants claim that Plaintiff has not pleaded this element sufficiently because his speech was not a matter of public concern. While it is true that the grooming policy imposed on a public employee does not rise to the level of a public concern, Plaintiff also claims he was terminated because he communicated Parks' negligence in his duties to a former human resource director and the city's clerk. 'It is well-established . . . that speech relating to official misconduct . . . almost always involves matters of public concern.' As Plaintiff's speech related to an alleged dereliction of Parks' official duties, it would be a matter of public concern. Furthermore, because the duties Plaintiff claimed Parks did not perform pertained to the immunization of first responders on medical calls, there is little doubt that the communication was on a matter of public concern. (*See* Plaintiff's Exhibit B [11-2] at p. 2.) As such, the First Amendment retaliation claim under § 1983 will not be dismissed."

Facts:

> "Pro se Plaintiff [not represented by legal counsel] Rodger L. Mann ('Plaintiff') commenced this action on June 6, 2014, after he was terminated from his position as fire captain by the Moss Point Fire Department.
>
> Before his termination, Plaintiff challenged Parks, the fire chief at the time, about the department's grooming policy, which forbade the wearing of long hair, such as the dreadlocks Plaintiff habitually wore. Plaintiff claimed that the policy was racist. In a separate incident, Plaintiff also complained to former Human Resources Director Nicole Jacobs and the City's Clerk Adlean Liddel about Parks' negligence in not having his department "immunized against infectious" diseases." (*See* Amended Complaint [6] at ¶¶ 1-2.)
>
> Parks recommended Plaintiff be terminated from his position, and Plaintiff was afforded hearings before both the Board of Alderman and the Moss Point Civil Service Commission. At the time of these hearings, Plaintiff had a separate civil suit pending against the City of Moss Point.
>
> Plaintiff now brings suit against Defendants, claiming his termination was in violation of 2 U.S.C. §§ 1981, 1983, and 1985, as well as Title VII of the Civil Rights Act."

Grooming Policy

a. Equal Protection

> "The policy he cites is a facially neutral policy that makes no mention of race and lists a number of examples of hairstyles that would be in violation of the policy, one of which is dreadlocks. (*See* Plaintiff's Ex. A [11-1] at p. 7.) For facially neutral laws, '[p]roof of racially discriminatory intent or purpose is required to show a violation of the Equal Protection Clause.' *Veasey v. Abbot*, 796 F.3d 487, 498 (5th Cir. 2015) (quoting *Village of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 265, 97 S. Ct. 55, 50 L.Ed.2d 450 (1977))."

b. Free Exercise of Religion

"There is no indication that the grooming policy Plaintiff complains about was anything but neutral and generally applicable. Therefore, there has been no violation of Plaintiff's rights under the Free Exercise Clause."

c. Freedom of Speech

"Plaintiff asserts a First Amendment retaliation claim against Defendants under § 1983. Plaintiff claims that he was terminated because he exercised his right under the Free Speech Clause of the First Amendment to challenge Parks on the grooming policy and to report Parks for violations of a separate public policy program. The Supreme Court has articulated a two-step inquiry to determine whether a public employee's speech is protected by the First Amendment: 1) the speech was made 'as a citizen on a matter of public concern' and 2) whether there was 'adequate justification for treating the employee differently from any other member of the general public.' *Lane v. Franks*, ___ U.S. ___, 134 S. Ct. 2369, 2378, 189 L.Ed.2d 312 (2014) (quoting *Garcetti v. Ceballos*, 547 U.S. 410, 418, 126 S. Ct. 1951, 164 L.Ed.2d 689 (2006)). The first step in this inquiry 'set out two predicates for public-employee speech to receive First Amendment protection; the speech must be made *as a citizen* and on *a matter of public concern.*' *Gibson v. Kilpatrick*, 773 F.3d 661, 667 (5th Cir. 2014) (emphasis in original). The only argument Defendants advance for dismissal of this claim is that Plaintiff's speech was not on a matter of public concern.

Defendants claim that Plaintiff has not pleaded this element sufficiently because his speech was not a matter of public concern. While it is true that the grooming policy imposed on a public employee does not rise to the level of a public concern, Plaintiff also claims he was terminated because he communicated Parks' negligence in his duties to a former human resource director and the city's clerk. "It is well-established . . . that speech relating to official misconduct . . . almost always involves matters of public concern." As Plaintiff's speech related to an alleged dereliction of Parks' official duties, it would be a matter of public concern. Furthermore, because the duties Plaintiff claimed Parks did not perform pertained to the immunization of first responders on medical calls, there is little doubt that the communication was on a matter of public concern. (*See* Plaintiff's Exhibit B [11-2] at p. 2.) As such, the First Amendment retaliation claim under § 1983 will not be dismissed."

Legal Lessons Learned: FD grooming policies are not matter of public concern, and lawsuit claiming deprivation of First Amendment was properly dismissed Pre-trial discovery, including depositions, may now proceed on the immunization issue.

File: Chapter 6, Employment Litigation

PA: PROMOTIONS – PHILADELPHIA DELAYED PROMOTIONS UNTIL NEW 2-YEAR LIST – PA SUPREME COURT UPHOLDS

On July 20, 2015, in Philadelphia Firefighter's Union, Local 22 v. City of Philadelphia, the PA Supreme Court held (5 to 0) that city could hold off making 17 promotions to Fire Captain and Fire Lieutenant off the May 2011 list, which was to expire in less than three weeks, and instead promote from the top candidates on new May, 2013 list.
http://caselaw.findlaw.com/pa-supreme-court/1708374.html

Facts:

> "On May 25, 2011, following civil service testing and ranking, the City established a promotional list for the positions of Fire Captain and Fire Lieutenant that was set to expire by operation of law on May 25, 2013 (hereafter, the May 2011 list), two years from the date it was established. The City thereafter promoted 35 employees into the position of Fire Captain and 78 into the position of Fire Lieutenant from the list, leaving 82 individuals on the list for the position of Fire Captain and 140 on the list for Fire Lieutenant.
>
> Near the end of the May 2011 list's two-year term, an additional 17 positions became vacant. The City, however, declined to fill these vacancies through utilization of the May 2011 list. Instead, on May 3, 2013, the Director of Public Safety announced at a City Council hearing the City's decision to await the expiration of the May 2011 list by operation of law in three weeks' time, and to fill the vacancies with the top-ranking candidates from the next promotional list. This new list was to be established following civil service testing and ranking after May 25, 2013. The Director of Public Safety explained that the City wanted to allow the May 2011 list to expire because the candidates who remained on the list were ranked near the bottom, and the City would prefer to choose the highest ranked candidates from a new list.
>
> ***
>
> Dissatisfied with the City's intended course of conduct in this regard, on May 13, 2013, the Union filed an emergency motion in the Philadelphia Court of Common Pleas for preliminary injunction or for peremptory judgment in mandamus directing the City to promote immediately six Union members to Fire Captain and 11 to Fire Lieutenant from the May 2011 list. The City responded that it was not legally required to fill vacancies before the May 2011 list expired.
>
> The trial court heard oral argument on the Union's emergency motion for preliminary injunction and mandamus on May 14, 2013. Following oral argument, the court entered an order granting the Union peremptory judgment in mandamus and directing the City to fill vacancies for the positions of Fire Captain and Fire Lieutenant prior to May 25, 2013. The trial court relied on Section 7–401(e) of the Home Rule Charter to hold that vacancies must be filled by promotion at the first possible opportunity rather than at the City's discretion. Finding no impediment preventing the City from doing so, and specifically finding that the vacancies at issue were already 'budgeted,' the trial court

found that peremptory judgment in mandamus was appropriate to compel the performance of the ministerial act of immediately promoting candidates from the promotional list, and to vindicate the Union's clear legal right to this relief.

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The City appealed to the Commonwealth Court, arguing that the trial court erred because neither the Home Rule Charter nor the Civil Service Regulations require vacancies to be filled immediately; rather, they merely mandate that when the positions are filled, it must be by promotion as opposed to outside hiring. The City further argued that mandamus relief was inappropriate because the Fire Commissioner has discretion to decide whether or when to promote candidates and, therefore, the promotion process does not involve a ministerial act by the City or a clear legal right to relief for the Union.

The Commonwealth Court agreed with the City, reversed the trial court's order, and remanded to the trial court to dismiss the Union's complaint. Philadelphia Firefighters' Union v. City of Philadelphia, 78 A.3d 16 (Pa.Cmwlth.2013). Examining Sections 7–401(e) of the Home Rule Charter and 9.021 of the Civil Service Regulations, the Commonwealth Court interpreted them to mean that promotion from the promotional list is the required method of filling vacancies (unless the vacancy is filled by demotion, transfer, reinstatement, or from a layoff list, in accord with Regulation 9.021), and found nothing in these provisions requiring promotion as soon as a position becomes vacant.

***

The Union also attempts to undermine the Commonwealth Court's holding on policy grounds, arguing that the civil service system exists to limit and control employment premised on favoritism, cronyism, and discrimination by maintaining objectivity in employment decisions. Under the Commonwealth Court holding, according to the Union, the Fire Commissioner could keep vacancies open for any length of time, years or decades in fact, for the sole purpose of awaiting the appearance of a desired candidate on an eligibility list. Addressing the City's suggestion that individuals from the top of a new list would be better candidates than those at the bottom of the expiring list, the Union argues that every candidate who was on the May 2011 list was there because the City deemed them objectively qualified."

Holding:

"In addition to failing to establish a clear legal right to relief, the Union has failed to establish a corresponding duty in the City. As established above, neither Section 7401(e) of the Home Rule Charter nor Civil Service Regulation 9.021 require the City to fill vacancies immediately, and no other provision of the Charter or regulations imposes such a requirement upon the City. There is no imperative that the City exhaust a promotional list before establishing a new list, or that promotions must occur from a particular list before it expires. Rather, the City is required to expire a list after two years to provide employees 'reasonable opportunity for employment' and to replenish lists with "the names of the most competent candidates available for employment.' 351 Pa.Code § 7.7–401(f); Phila. Civil Serv. Reg. 10.071. Moreover, the regulations provide that the City 'may' certify and appoint eligible candidates at any time after a list is established until it

> expires. Phila. Civil Serv. Reg. 10.022. The regulation does not require the City to do so, nor does it contemplate promotion by a certain date.
>
> ***
>
> Because there is no right to be promoted and no requirement that the City make promotions as soon as positions become vacant, the Commonwealth Court properly concluded that the trial court erred in granting mandamus relief to the Union. The order of the Commonwealth Court is affirmed."

Legal Lessons Learned: City charters can address this issue of timing of promotions. Justice Stevens, in his Concurring Opinion addressed this policy issue: "I write separately to express my concern that the current procedure for promotion of civil service employees, provided for by the existing language of Philadelphia's Home Rule Charter and Civil Service Regulations, does not serve to maintain objectivity in the promotion process, but instead enables the very manipulation of the process that the civil service system was intended to prevent. Re-crafting the Home Rule Charter and the Civil Service Regulations to better prevent the potential for such abuse is not the function of this Court, however. Instead, we must apply the terms of those documents, as written."

File: Chapter 6, Employment Litigation

NJ: MAYOR'S SON PROMOTED - SCORED NO. 2 ON LIST – RULE OF THREE – NEPOTISM NOT PROVEN

On Nov. 9, 2015, in Matter Of Daniel Dunn, City of Wildwood, NJ, the Superior Court of New Jersey, denied the appeal of Daniel Dunn, and upheld the city's Civil Service Commission decision, confirming city's Commissioner of Public Service to promote Ernie Troiano, III as Captain. **"**Troiano and Dunn were permanently appointed to the Fire Department on the same day and Leonetti [who is a firefighter in another community] recognized Troiano's merit-based superior leadership skills and rapport with other firefighters**."**
https://www.judiciary.state.nj.us/opinions/a4293-13.pdf

Facts:

> "Daniel Dunn appeals from an April 10, 2014 final agency decision by the Chairperson of the Civil Service Commission (the Commission) upholding a determination by the appointing authority, Anthony Leonetti, Commissioner of Public Safety, bypassing Dunn's name on the fire captain eligible list for the City of Wildwood (Wildwood). We affirm.
>
> ***

In 2004, Dunn and Ernie Troiano III became full-time firefighters for Wildwood's Fire Department (the Fire Department). Troiano's father is the Mayor of Wildwood. Dunn and Troiano obtained extensive firefighter training and experience on the job and in the classroom. When the position of fire captain (the captain position) became available in Wildwood, Dunn, Troiano, and two other firefighters competed for that promotion. Eligibility for promotion required interested candidates to submit to a civil service test. Four individuals took the promotional examination and Dunn scored the highest marks, with Troiano coming in second place. The difference in their ranking was less than one percent: Dunn scored 94.48 and Troiano 93.57.

Leonetti, who is a firefighter in another community, reviewed the qualifications of the candidates, bypassed Dunn, and selected Troiano for the position. Dunn believed Troiano was less qualified for the promotion than he and that Leonetti's selection of Troiano was the product of improper motives. Dunn appealed Leonetti's decision to the Commission.

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In June 2013, Dunn certified that he believed the bypass was the product of nepotism, cronyism, and retaliation. Dunn indicated that Leonetti and the Mayor are 'good friend[s]' and political allies. Dunn detailed purported instances of nepotism and cronyism on the part of the Mayor, Leonetti, and another commissioner for Wildwood benefiting Troiano's brother.

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Dunn noted his accomplishments, including obtaining a Bachelor of Science degree in Fire Science, a Master's in Public Safety Management, and numerous certifications, awards, and commendations. Dunn highlighted his experience as a firefighter/EMT beginning in 1999, a fire prevention specialist, and from several other positions in Wildwood.

***

In an August 2013 letter to the Commission, Leonetti justified the bypass by relying on Troiano's leadership abilities. Leonetti maintained, as a firefighter himself, that he observed how firefighters work together, and concluded that Troiano not only possessed the requisite leadership skills, but also that Troiano commanded respect 'among the rank and file.' Leonetti disputed that Dunn is more experienced than Troiano, noting Dunn and Troiano were sworn-in as firefighters on the same day."

Holding:

The Commission further reasoned that even if Dunn was more qualified for the captain position, Leonetti properly exercised his discretion under the 'rule of three,' N.J.A.C. 4A:4-4.8(a)(3), which allows a bypass absent improper motives. Id.

The Commission also noted that 'it is within the appointing authority's discretion to choose its selection method'; thus, Leonetti was not required to conduct interviews before appointing Troiano. The Commission concluded that Dunn failed to establish a prima facie case by a preponderance of the evidence 'that his bypass was due to invidious reasons' because Dunn's assertions were 'unfounded and unsupported in the record[.]'

***

> The rule of three is intended to limit, not eliminate, hiring discretion. Commc'ns Workers of Am. v. N.J. Dep't of Pers., 154 N.J.121, 129 (1998). Thus, the appointing authority may bypass a higher-ranked candidate 'for any legitimate reason based upon the candidate's merit.'"

Legal Lessons Learned: "Rule Of Three" is a common practice in civil service commission rules; others have "Rule of 10s", etc.; discretion by the hiring authority is an important part of the decision making process. Interviewing the finalists, however, provides a further sense of due process. See article about the decision: www.nj.com/cape-may-county/index.ssf/2015/11/promotion_of_mayors_son_over_other_firefighter_wasnt_nepotism_court_rules.html

File; Chap. 7, Sexual Harassment

NY: PREG. DISCRIM - ALL PREGNANT SECURITY OFFICERS FORCED TO LIGHT DUTY, GIVE UP GUNS – VIOL. TITLE VII

On Nov. 10, 2015, the U.S. Attorney for Eastern District of New York, announced filing of a lawsuit and a settlement in United States v. Triborough Bridge and Tunnel Authority a/k/a MTA Bridges and Tunnels, Civil Action No. CV-15-6417, to settle violations of Title VII of the Civil Rights Act of 1964. A new fitness for duty policy will be developed, including training, and thirteen female employees will receive total of $206.500.
http://www.justice.gov/usao-edny/pr/united-states-settles-pregnancy-discrimination-action-against-triborough-bridge-and

Facts:

> "In its Complaint, the United States alleges that the Triborough Bridge and Tunnel Authority ("TBTA") routinely required pregnant Bridge and Tunnel Operating Force Officers, whose duties include protecting the safety and security of many of the major bridges and tunnels in the New York City area, to surrender their guns and work in less than full duty status regardless of their physical condition or ability to perform the requirements of the job. In one case, Officer Lori Ann DiPalo, then early in her pregnancy, provided a written opinion from her personal physician certifying that she could perform the full range of her duties. Nonetheless, without examining her, the TBTA determined that simply because DiPalo was pregnant, she could not perform her full duties or safeguard a firearm. The TBTA stripped DiPalo of her firearm privileges and forced her to choose between toll booth duty or disability leave for the remainder of her pregnancy.
>
> Under the terms of the settlement, the TBTA will revise its EEO policy to reflect Title VII's requirements, as well as create a new policy addressing fitness for duty status and workplace accommodations for Bridge and Tunnel Officers. The TBTA will also train all its employees on Title VII and the protection that Title VII affords pregnant employees. The TBTA will pay Officer DiPalo $100,000 in damages and $106,500 in damages

collectively to a group of twelve other officers affected by the TBTA's discriminatory practice.

'Title VII prohibits discrimination against pregnant employees' stated U.S. Attorney Capers. 'This Settlement Agreement ensures that pregnant Bridge and Tunnel Operating Force Officers able to perform their duties will not be forced to accept lesser roles simply because they are pregnant.'"

Legal Lessons Learned: Same law applies to pregnant fire & EMS personnel. See EEOC Enforcement Guidance (June 25, 2015): http://www.eeoc.gov/laws/guidance/pregnancy_guidance.cfm:"In some instances, employers may claim that excluding pregnant or fertile women from certain jobs is lawful because non-pregnancy is a bona fide occupational qualification (BFOQ). The defense, however, is an extremely narrow exception to the general prohibition of discrimination on the basis of sex. An employer who seeks to prove a BFOQ must show that pregnancy actually interferes with a female employee's ability to perform the job, and the defense must be based on objective, verifiable skills required by the job rather than vague, subjective standards."

File: Chap. 13, EMS / HIPAA

OH – HIPAA – HOSP. ADMIN. GOT EPIC RECORDS OF WIFE - SHARED WITH HIS LOVER, OTHERS – HOSP. NOT LIABLE

On Aug. 14, 2015, in Vicky Sheldon v. Kettering Health Network, 2015-Ohio-3268, the Court of Appeals for Second District, Montgomery County, upheld trial court's grant of summary judgment for the defense.

Facts:

"Duane Sheldon, as administrator, commenced at least one extramarital affair with certain others in the Kettering Health Network. In order to enhance his affair, Duane Sheldon improperly accessed extremely sensitive medical information belonging to Vicki Sheldon, and shared such information with his paramour, who is an employee of KPN who reported to D. Sheldon.

In addition, upon information and belief, Duane Sheldon and other parties in his department created one or more fictitious names that do not represent real parties or real users of health information to improperly access protected health information.

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These fictitious names accessed Plaintiffs' protected health information."

Holdimg:

'It is well-established that in order for an employer to be liable under the doctrine of respondeat superior, the tort of the employee must be committed within the scope of employment. Moreover, where the tort is intentional * * * the behavior giving rise to the tort must be 'calculated to facilitate or promote the business for which the servant

was employed * * *.' Byrd v. Faber, 57 Ohio St.3d 56, 58, 565 N.E.2d 584 (1991), quoting Little Miami R.R. Co. v. Wetmore, 19 Ohio St. 110, 132 (1869). An intentional and willful act committed by an employee 'to vent his own spleen or malevolence against the injured person, is a clear departure from his employment' and will not support respondeat-superior liability. Id . at 59. In Byrd, the Ohio Supreme Court found Civ.R. 12(B)(6) dismissal appropriate where the plaintiff attempted to use respondeat superior to hold a religious organization liable for a sexual assault by a pastor against a parishioner.

We reach the same conclusion here, where the complaint alleges that Duane Sheldon intentionally and improperly gained unauthorized access to the plaintiffs' health records for personal reasons in furtherance of an affair. Even construing the complaint, or the proposed amended complaint, most strongly in the plaintiffs' favor, they can prove no set of facts entitling them to relief against KHN on a respondeat-superior basis for Duane Sheldon's alleged behavior."

Indiana - $1.8 Million – Ohio Not So Generous

"We note that a court of appeals in our neighbor state of Indiana has reached an apparent contrary conclusion. In Walgreen Co. v. Hinchy, 21 N.E.3d 99 (Ind. Ct. Appl. 2014), Audra Withers was a Walgreen's pharmacist who was involved in a relationship with plaintiff Hinchy's former boyfriend. Withers accessed Hinchy's prescription profile to find any information about plaintiff's potential STD. The boyfriend, to whom the accessed private information was apparently disclosed, contacted Hinchy a few days later claiming he had a print out of her drug information. A jury awarded $1.8 million in damages and determined Walgreen's and Withers were 80 percent responsible. Upon review, the court of appeals cited portions of the Restatement (Third) of Agency, § 7.07 (2006), including that '[a]n employee's act is not within the scope of employment when it occurs within an independent course of conduct not intended by the employee to serve any purpose of the employer.' Id. at § 707(2). It also referred to Ingram v. City of Indianapolis, 759 N.E.2d 1144 (Ind.Ct.App.2001), for the proposition that when some of the employee's acts are of the same nature as those authorized by the employer and some not, whether the employee is acting within the scope of employment is a question of fact to be determined by the jury. The court concluded that whether 'Withers was acting in the scope of her employment was properly determined by the jury rather than as a matter of law by the trial court.' Hinchy at 108.

We do not believe Ohio law is so generous.
***

Contrary to the language in OhioHealth Corp. v. Ryan upon which KHN relies, we find it imprecise to say that HIPAA 'does not allow a private cause of action.' What we should determine is whether HIPAA prohibits common-law tort claims based on the wrongful release of confidential medical information unrelated to and independent from HIPAA itself. Indeed, the State of Ohio has recognized an independent tort for the 'unauthorized, unprivileged disclosure to a third party of nonpublic medical information [.]' Biddle v. Warren Gen. Hosp., 86 Ohio St.3d 395, 401, 715 N.E.2d 518 (1999), paragraph one of the syllabus. Biddle, however, was decided before HIPAA's privacy-rule regulations were published on December 28, 2000 and before its security-rule regulations took effect on April 21, 2003. Therefore, we must first determine whether Biddle's common-law right of action recognized in 1999 survives HIPAA.

***

HIPAA is a combination of the statute and the regulations adopted under its authority. The HIPAA statute states that it 'shall supersede any contrary provision of State law.' 42 U.S.C. § 1320d–7(a)(1); see also 45 C.F.R. § 160.203. But the statute specifically directs that any regulations shall not supersede state law that is 'more stringent' than the requirements under HIPAA. Section 264(c)(2) of Public Law 104-191. The regulations provide that state law is 'contrary' to HIPAA when (1) it is 'impossible to comply with both the State and Federal requirements;' or (2) 'state law stands as an obstacle to the ' accomplishment and execution' of the act. 45 C.F.R. § 160.202. The 'more stringent' exception is adopted in 45 C.F.R. § 160.203(b). The regulations also explain that a state law is 'more stringent' than HIPAA if the state law provides greater privacy protection, provides the patient greater rights of access or access to more information than HIPAA, or narrows the scope or duration of the use or disclosure of information HIPAA would allow. 45 C.F.R. § 160.202. Significantly, 'State law means a constitution, statute, regulation, rule, common law, or other State action having the force and effect of law.' (Emphasis added). Id

.

Upon review, we conclude that HIPAA does not preempt the Ohio independent tort recognized by the Ohio Supreme Court in Biddle 'for the unauthorized, unprivileged disclosure to a third party of nonpublic medical information that a physician or hospital has learned within a physician-patient relationship.' Biddle, at paragraph one of the syllabus.

However, we further conclude that federal regulations—as opposed to an Ohio statute that sets forth a positive and definite standard of care—cannot be used as a basis for negligence per se under Ohio law.

Additionally, in our view utilization of HIPAA as an ordinary negligence 'standard of care' is tantamount to authorizing a prohibited private right of action for violation of HIPAA itself, and moreover, in specific regard to plaintiffs' allegation that monitoring access to medical records was too infrequent, HIPAA does not provide a standard of care as to the frequency of review of information-system activity.

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Biddle itself dealt with deliberate intentional disclosure of patient information by a hospital to a law firm to screen patients for SSI eligibility to see if that source could pay patients' outstanding hospital bills. The attorneys were to be paid a contingency for patients where an SSI claim paid the hospital. For 'two and one-half years, the hospital released all of its patient registration forms to the law firm without obtaining any prior consent or authorization from its patients to do so, and without prescreening or sorting them in any way.' Biddle at 395. Under any set of circumstances, pre- or post-HIPAA, with or without reference to HIPAA regulations, the intentional, unauthorized disclosures in Biddle should be actionable.

Accordingly, we conclude that the independent tort recognized in Biddle is still viable after HIPAA although the parameters of such a claim may have been impacted by HIPAA preemption.

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In Biddle, as here, the plaintiffs alleged claims for invasion of privacy, intentional infliction of emotional distress, and negligence."

Legal Lessons Learned: In Ohio, patients may sue in damages for improper disclosure of HIPAA protected PHI (patient health information). In this case, while the hospital was properly dismissed from the lawsuit, Vicki Sheldon may sue her former husband.

File: Chap. 13, EMS / HIPAA

OH: HIPAA – MEDICAL DOCTOR WAS "AT WILL" EMPLOYEE – HER COMPLAINTS TO MGT. ABOUT HIPAA DO NOT PROTECT HER

On Sept. 16, 2015, in Mary McGowan, M.D. v. Medpace, Inc., 2015-Ohio-3743, the Ohio Court of Appeals for First District, Hamilton County held (3 to 0) that the trial judge should have set aside the jury verdict awarding her $300,000 in compensatory damages, $500,000 in punitive damages, and attorney fees. "Because McGowan failed to identify a clear public policy in support of her wrongful-discharge claim, we hold that the trial court erred by failing to grant a directed verdict to Medpace.
http://www.supremecourt.ohio.gov/rod/docs/pdf/1/2015/2015-Ohio-3743.pdf

Facts:

"Medpace is a research facility that designs and conducts clinical trials to test new pharmaceuticals. In the spring of 2011, Medpace hired McGowan as an at-will employee to take over duties from one of its retiring physicians, Dr. Evan Stein. McGowan was hired as the executive director of both Medpace's Clinical Pharmacology Unit ('CPU') and its Metabolic and Atherosclerosis Research Center ('MARC'). The CPU conducted phase one studies to observe participants' first exposure to a drug.

***

Shortly after taking over the CTC, McGowan observed several practices in the facility that troubled her. Stein had prescribed patients a larger dose of medication than was medically necessary, and had then directed the patients to split the prescribed pills. McGowan felt that this practice of pill splitting constituted insurance fraud and compromised patient safety because the written prescription provided to the pharmacy did not match the instructions in a patient's chart. McGowan was further troubled by Stein's practice of combining into one chart the medical records of CTC patients who were enrolled in a MARC study. In her opinion, personal information necessary to the CTC chart was irrelevant to treatment in the MARC and should not be contained in the MARC files. Last, McGowan was concerned with the MARC's practice of leaving patient charts open on carts outside of treatment rooms. She felt that these two practices were in violation of the Health Insurance Portability and Accountability Act ('HIPAA').

McGowan contacted a health-care attorney regarding her concerns about Stein's pill-splitting and prescription-writing practices. After receiving confirmation from this

attorney that her concerns were legitimate, McGowan called a staff meeting on July 22, 2011. At this meeting, she instructed the staff that they had to change the way that prescriptions were written and the way that charts were handled. McGowan stated that Stein's prescription-writing practices had been fraudulent. After learning of this meeting and McGowan's accusations, Stein removed McGowan from all activity in both the MARC and CTC via an email sent on July 25, 2011.

***

On July 27, 2011, McGowan met with August Troendle, Medpace's president and CEO, and Tiffany Khodadad, Medpace's executive director of hum resources. During this meeting, McGowan raised her concerns about Stein's prescription-writing practices and the HIPAA violations that she felt she had observed. Troendle told McGowan that it was inappropriate for her to have accused Stein of fraud in front of the staff. He stated that her concerns would be investigated, and he encouraged her to investigate them as well. According to Troendle, McGowan was adamant that Stein had committed fraud and that she had the right to air her concerns to whomever she wished.

***

On August 17, 2011, McGowan attended a standard Medpace staff meeting. At Troendle's request, she stayed after the meeting to speak with him. Troendle acknowledged that McGowan had hired an attorney to negotiate her departure from Medpace, but expressed his desire for her to continue her employment. McGowan told Troendle that she was disappointed that he had lied about calling Stein an asshole. Troendle again told McGowan that it had been inappropriate to accuse Stein of fraud in front of the staff. McGowan stated that Troendle could not stop her from speaking the truth and she accused Troendle of trying to intimidate her.

After that meeting, Troendle determined that he had to terminate McGowan's employment with Medpace. On August 18, 2011, two representatives from Medpace's department of human resources informed McGowan that she had been fired."

Holding:

"Medpace had employed McGowan as an at-will employee. Under the common law employment-at-will doctrine, the employment relationship between an employer and an at-will employee may be terminated by either party for any reason, and the termination of such an employee generally does not give rise to an action for damages. See Collins v. Rizanka, 73 Ohio St.3d 65, 67, 652 N.E.2d 653 (1995); see also Dohme v. Eurand America, Inc., 130 Ohio St.3d 168, 2011-Ohio-4609, 956 N.E.2d 825, ¶ 11.

But in Greeley v. Miami Valley Maintenance Contrs., Inc., 49 Ohio St.3d 228, 551 N.E.2d 981 (1990), the Ohio Supreme Court recognized an exception to this employment-at-will doctrine. The Greeley court held that an at-will employee may maintain a cause of action for wrongful discharge when the employee is terminated in violation of a clearly expressed public policy. Greeley at 234. To establish a claim for wrongful discharge in violation of public policy, an employee must demonstrate that a clear public policy existed (the clarity element); that the employee's dismissal jeopardized the public policy (the jeopardy element); that the employee's dismissal was motivated by conduct related to the public policy (the causation element); and that the employer did not have an overriding business

justification to support dismissal of the employee (the overriding justification element). See Collins, at 69-70 The clarity and jeopardy elements present questions of law, while the causation and overriding-justification elements present questions of fact. Id.

***

A claim for wrongful discharge in violation of public policy was created as an exception to the employment-at-will doctrine. As recognized by the Crowley court, absent a narrow interpretation of the types of public policy applicable to these claims, the exception becomes the rule. With the continued and ongoing explosion in statutes, governmental regulations, and policies found under the Ohio Revised Code and the Ohio Administrative Code, as well as federal laws and regulations, if exceptions to the at-will-employment doctrine are not narrowly construed, the so-called 'exceptions' will speedily and overwhelmingly undermine and eliminate the concept of at-will employment in this state. The employment-at-will doctrine is, as conceded by all parties herein, the starting point for an employment-law analysis for this type of claim. This doctrine has remained untouched by the legislature since its inception, and is effectively one of Ohio's most basic 'public policies' on employment issues. If this court were to disregard now longstanding case law like Hale and Dean, this most important public policy would be destroyed. Such a change in basic Ohio public policy should be left to the legislature, not this court.

***

HIPAA manifests an important and useful public policy, but the protection of patient privacy is not the type of public policy contemplated by Hale and Dean.

Because McGowan failed to establish that she was discharged in violation of a clear public policy that imposed an affirmative duty on an employee to report a violation, that prohibited an employer from retaliating against an employee who had reported a violation, or that protected the public's health and safety, she has failed to satisfy the clarity element of her wrongful-discharge claim. Consequently, reasonable minds could only reach one conclusion on the evidence submitted—that McGowan could not succeed on her claim for wrongful discharge in violation of public policy. We hold that the trial court erred by failing to grant Medpace a directed verdict on this claim."

Legal Lesson Learned: In Ohio, the "At Will" doctrine continues to be enforced by the courts; plaintiff may seek an appeal to the Ohio Supreme Court on whether the internal reporting of HIPAA violations meets the public policy exception.

File – Chap. 16, Discipline

OH: FIRE CHIEF RESIGNS - TRUSTEES LATER RELEASE POLICE INVESTIGATION REPORT - PUBLIC RECORD

On June 15, 2015, in Joyce Teodecki v. Litchfield Township, 2015-Ohio-2309, the Ohio Court of Appeals for Ninth District, County of Medina, held (3 to 0) that former Fire Chief could not sue Trustees for releasing police investigation report, since it is a public record; any confidentiality agreement with Trustee was not enforceable. Former Chief can't sue for defamation unless proof of malice.
http://www.supremecourt.ohio.gov/rod/docs/pdf/9/2015/2015-Ohio-2309.pdf

Facts:

> "In January 2011, the Litchfield Township Trustees, Nancy Wargo, Michael Pope, and Dennis Horvath ('Trustees'), appointed Sergeant Joseph McDermott pursuant to R.C. 505.38 to investigate the activities of Joyce Teodecki in her capacity as fire chief of the Litchfield Fire Department. The investigation stemmed from the Trustees learning that the Litchfield Township Fire Department had compliance issues with Ohio law.
>
> On July 25, 2011, Sergeant McDermott issued a report ('Report') containing the findings of his investigation. The Report implicated Mrs. Teodecki in the fire department's noncompliance with Ohio law. Sergeant McDermott sent a copy of the Report to the Medina County Prosecutor's Office through Assistant Prosecutor Carol Shockley. Sergeant McDermott also claims to have sent a copy to Mrs. Teodecki in July of 2011, although Mrs. Teodecki claims that she never received the Report at that time.
>
> At a Trustees meeting held on July 25, 2011, Mrs. Teodecki and the Trustees agreed that Mrs.Teodecki would resign from her position as fire chief in exchange for the township not pursuing charges against her. They also agreed that Mrs. Teodecki would stay on as a consultant for the fire department through the end of the year. The Trustees memorialized this agreement in Litchfield Resolution No. 22-11. This resolution also accepted Mrs. Teodecki's resignation. At the bottom of Litchfield Resolution No. 22-11, the assistant prosecutor added a handwritten note, stating: 'The results of the investigation shall be kept confidential between the Medina County Prosecutor's Office and the Investigator.' It is disputed whether this added confidentiality clause was part of the agreement struck at the Trustees meeting between the Trustees and Mrs. Teodecki.
>
> In October 2011, Mrs. Teodecki penned an open letter to the citizens of Litchfield in a local newspaper wherein she criticized the three Litchfield Township Trustees by name and accused them of employing 'bully tactics' in order to further their own agendas. The letter referenced the township's investigation of her and the fire department. The Trustees then held a special meeting in November of 2011, where they unanimously voted to remove the handwritten confidentiality clause from Litchfield Resolution 22-11 and to release the Report to the public.
>
> Trustee Wargo read a statement at the meeting, stating that Mrs. Teodecki knew that the charges against her involved misfeasance, malfeasance, nonfeasance and misconduct in office, the creation of a hostile work environment, and gross neglect of duty.

Holding:

> "In her first assignment of error, Mrs. Teodecki argues that the trial court erred in granting summary judgment in favor of Defendants-Appellees as to her breach of contract, intentional infliction of emotional distress, defamation, and abuse of process claims. We disagree with respect to all four claims.
>
> ***
>
> "Similarly, a contract may be void if it violates public policy, 'the legal principle which declares that one may not lawfully do that which has the tendency to injure the public welfare.' Garretson v. S.D. Myers, Inc., 72 Ohio App.3d 785, 788 (9th Dist.1991).
>
> Ohio's Public Records Act requires a public office or person responsible for public records to promptly disclose a public record unless the record falls within one of the clearly defined exceptions to the mandate of R.C. 149.43. R.C. 149.43(B)(1). As used in R.C. 149.43, public records are 'records kept by any public office, including, but not imited to, state, county, city, village, township, and school district units * * *." (Emphasis added). R.C. 149.43(A)(1). Moreover, 'records' include 'any document * * * created or received by or coming under the jurisdiction of any public office * * * which serves to document the organization, functions, policies, decisions, procedures, operations, or other activities of the office.' R.C. 149.011(G). A 'public office' includes 'any state agency, public institution, political subdivision, or other organized body, office, agency, institution, or entity established by the laws of this state for the exercise of any function of government." R.C. 149.011(A).
>
> We conclude that the Report prepared by Sergeant McDermott following his extensive investigation into the Litchfield Township Fire Department and Mrs. Teodecki falls squarely within R.C. 149.43's definition of a public record. The Report, which was commissioned by the township and kept in the township's possession, was a document detailing findings concerning the fire department's alleged noncompliance with state law. The township's fire department is without question a public office. Thus, by statute, the Report is required to be disclosed to the general public. See R.C. 149.43.
>
> Mrs. Teodecki does not argue on appeal that any exception to R.C. 149.43's mandate applies in this case. As such, we conclude that because enforcement of the confidentiality clause in this case would violate Ohio's Public Records Act, that contractual provision constitutes an invalid contract."

NO DEFAMATION / MUST PROVE MALICE

> "At that meeting, Trustee Wargo read the following statement aloud: '[Mrs. Teodecki] and her attorney met with the prosecutors [sic.] office and therefore, [Mrs. Teodecki] knew that the charges [against her] included allegedly being guilty of misfeasance, malfeasance, nonfeasance and misconduct in office, creating a hostile work environment and gross neglect of duty. [Mrs. Teodecki] chose to resign from the department rather than face these charges.' Trustee Wargo's statement was later published in a local newspaper. No criminal charges were ever filed against Mrs. Teodecki. Mrs. Teodecki claims that Trustee Wargo's public statement at the Trustees meeting was defamatory.
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> ***

However, the parties here do not dispute that, as the former fire chief of Litchfield Township, Mrs. Teodecki is a public official. Therefore, in regard to the fault element, Mrs. Teodecki must demonstrate that the offending statement was made with actual malice. New York Times Co. v. Sullivan, 376 U.S. 254, 279-280 (1964).

The Supreme Court of Ohio has defined actual malice as follows:

> The proof of actual malice must be clear and convincing. In making that measurement, the focus is upon the defendant's attitude toward the truth or falsity of the published statements, rather than upon the existence of hatefulness or ill will. The plaintiff's burden is to show with convincing clarity that: (1) the false statements were made with a high degree of awareness of their probable falsity, or (2) the defendant entertained serious doubts as to the truth of the publication. On appeal, the appellate court must exercise its independent judgment in deciding whether the evidence of record meets these tests. (Internal citations omitted.) Perez v. Scripps-Howard Broadcasting Co., 35 Ohio St.3d 215, 218 (1988).

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After thoroughly reviewing the record, and specifically Trustee Wargo's March 8, 2013 deposition, we determine that Mrs. Teodecki has failed to meet her burden of showing with convincing clarity that Trustee Wargo made her public statement with actual malice. To the contrary, Trustee Wargo expressly stated in her deposition that she believed that Mrs. Teodecki had engaged in criminal activity during her tenure as fire chief, and that the contents of the Report could have been grounds for the prosecutor's office bringing charges against Mrs. Teodecki.

Even assuming arguendo that Trustee Wargo's public statement was false, there is no clear evidence in the record indicating that she was either highly aware that her statement was probably false, or that she made her statement while seriously doubting its veracity. Thus, Mrs. Teodecki's defamation claim cannot survive summary judgment because there is no evidence in the record demonstrating the existence of a genuine issue of material fact as to the actual malice element.

LEGAL LESSONS LEARNED: Report to Township Trustees of investigation of the fire department is a public record. Fire Chief is a public official and must prove malice to sue for defamation.

File – Chap. 17, Arbitration / Mediation

MA: ARBITRATION – DECISION OF ARBITRATOR FINDING "ACTING" PROMOTIONS IMPROPER IS UPHELD – BACK PAY AWARDED

On Aug. 13, 2015, in City of Springfield v. Local Union No. 648, IAFC, 88 Mass. App. Ct. 1, the Court of Appeals (3 to 0) held that arbitrator's decision is enforceable.
http://masscases.com/cases/app/88/88massappct1.html

"Following the arbitration of a public employee union's grievance alleging that a municipality's practice of appointing firefighters to fill vacant higher positions purportedly in an 'acting' capacity violated the terms of the collective bargaining agreement between the municipality and the union, a Superior Court judge properly confirmed the arbitration award consisting of retroactive wages and benefits, where the arbitrator had not exceeded his authority in ordering an award that amounted to compensation for actions found by him to have violated the agreement."

Facts:

"Background. Because the arbitration award incorporated by reference certain legal conclusions of the Civil Service Commission (commission), we first summarize the commission proceedings, followed by the arbitration proceedings. Under the civil service law, G. L. c. 31, in order to fill a vacant position, the city may appoint either a 'permanent' replacement, or, if the vacancy or the position is temporary, a 'temporary' replacement. See G. L. c. 31, §§ 6-8. In either event, the appointment must be made through the detailed procedural steps set out in the civil service law.

As the commission ultimately found, for an extended period of time the city's appointments to vacant positions in the fire department did not comply with the above requirements. Rather, in 2009 and 2010, the city filled certain vacancies in its fire department not by promoting firefighters, but by making extended appointments of firefighters to higher-ranking civil service positions on an 'acting' basis. These firefighters were paid additional out-of-grade compensation pursuant to the terms of art. 31 of the collective bargaining agreement (CBA) between the union and the city. Even with this additional out-of-grade amount, their compensation and other benefits fell short of that set forth in the CBA for the positions in which they were serving. The city's justification for this discrepancy was that the firefighters were serving only on an 'acting' basis.

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In the meantime, on September 15, 2010, the same firefighters who were the subject of the union grievance filed two appeals in their individual capacities with the commission under St. 1993, c. 310 (c. 310), contending that their 'acting, out of grade' appointments violated the civil service law. On November 18, 2010, the commission ruled on the appeals filed with it by the individual firefighters. The commission ruled that 'nothing in the civil service law and rules recognizes the designation of 'acting' in any civil service position. . . . In the current scenario, there can be no question, and it does not appear disputed, that Springfield's use of 'out-of-grade' promotional assignments for extended period[s] of time such as those that have occurred here, have circumvented, and continue to circumvent the civil service law."

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On November 21, 2011, the arbitrator, relying on the commission's finding that the city had violated the civil service laws, found that the city had also violated the CBA, which provides that the city 'shall recognize and adhere to all Civil Service Laws.' He ordered a make-whole remedy consisting of lost wages and benefits, retroactive to August 8, 2010. In December, 2011, the city filed the instant suit to vacate the arbitration award."

Holding:

> "Finally, the city appears to argue that the commission has exclusive jurisdiction with respect to any remedy for the violation of the civil service laws. That argument also fails.
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> The city cites no authority in support of its contention that where a city binds itself by contract to comply with the civil service law, it may not be held to have breached the contract by failing to do so. Indeed, G. L. c. 150E, § 8, quoted supra at note 2, envisions just such circumstances and indicates the availability where they occur of both a remedy before the commission and of one under the CBA. 'When possible, we attempt to read the civil service law and the collective bargaining law, as well as the agreements that flow from the collective bargaining law, as a "harmonious whole." Fall River v. AFSCME Council 93, Local 3177, AFL-CIO, 61 Mass. App. Ct. 404 , 406 (2004), quoting from Dedham v. Labor Relations Commn., 365 Mass. 392 , 402 (1974).
>
> To the extent the city means to argue that the specific order of the commission in this case meant that only the commission had jurisdiction to award further relief it is incorrect. By its terms the order merely permitted the filing before the commission of motions for further relief in the event either party chose to do so. It did not provide that the commission's jurisdiction over further relief was to be exclusive of any otherwise available forum."

Legal Lesson Learned: Arbitration awards will normally be enforced, unless Court finds arbitrator exceeded his authority.

File: Chap. 18, Legislation

OK: VOLUNTEER FIREFIGHTERS MAY NOW JOIN OVER AGE 45 – CAN NOT BE IN STATE PENSION SYSTEM

Effective Nov. 1, 2015, volunteers may join FDs over the age of 45.

"OKLAHOMA CITY, OK – Volunteer fire departments around the state will be able to recruit new volunteer firefighters over the age of 45 when a new law takes effect Nov. 1. House Bill 2005, by state Rep. Mike Sanders, eliminates an age limit that was put in place to address a pension dilemma. In order for the pension system to work, new enrollees must be under a certain age. His legislation gives potential volunteers the option to join without a pension if they are above that age.

'Basically, the law was keeping people from serving just because the state didn't want to pay a pension for someone starting their firefighting career at 45; it just didn't work," said Sanders, Kingfisher-59 (R). "But there were men and women who would like to serve, even if it had to be without a pension. So, this law just opens that door to them. The men and women I talked to said that they already had pensions, that they were looking to serve and didn't need to be part of the pension system.'

http://fortysixnews.com/stories/2015/10/29/oklahoma-law-to-expand-volunteer-firefighter-base-takes-effect-nov-1/

House Bill 2005: http://www.oklegislature.gov/AdvancedSearchForm.aspx

B. On or after the effective date of this act, a person who performs volunteer services as a firefighter, who has attained the age of forty-five (45) or more years as of the first date such volunteer services are performed, for a municipality or a county shall not be eligible to be a member of the Oklahoma Firefighters Pension and Retirement System for any purpose, shall not be eligible for any benefit payable by the System and shall not receive any form of service credit from the System resulting from such volunteer services. The person responsible for decisions regarding the performance of firefighting services having jurisdiction, which in the absence of any other requirement to the contrary shall be the Fire Chief, shall make the final determination on applicants for positions that would involve the performance of volunteer firefighting services if the applicant is over the age of forty-five (45) years based on local rules, regulations, ordinances, guidelines and standard operating procedures.

SECTION 1. This act shall become effective November 1, 2015.

Legal Lesson Learned: It is nice to see an impediment to volunteer firefighters being removed.

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FIRE SERVICE LAW ($30): http://www.textbooks.com/Fire-Service-Law-08-Edition/9780131552883/Lawrence-T-Bennett.php?CSID=A2OK2ZAUOBJKBD2CTO2UKASAB

EMS LAW ($30): http://www.textbooks.com/BooksDescription.php?BKN=1529563&CSID=A2OWSZM2KCCDKAUAQM2QCUSAB

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