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FIRE & EMS LAW – RECENT CASE SUMMARIES / LEGAL LESSONS LEARNED

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- **2025: FIRE & EMS LAW – RECENT CASE SUMMARIES / LEGAL LESSONS LEARNED**: Case summaries since 2018 from monthly newsletters: https://doi.org/10.7945/j6c2-q930

  Updating 18 chapters of my textbook (2018 to current). **FIRE SERVICE LAW** (Second Edition; Jan. 2017): http://www.waveland.com/browse.php?t=708
- **2025: FIRE & EMS LAW – CURRENT EVENTS:** https://doi.org/10.7945/0dwx-fc52
- **2025: AMERICAN HISTORY – U.S. SUPREME COURT – KEY LEGISLATION – IMPACT ON FIRE & EMS: https://doi.org/10.7945/av8d-c920**

NOT PROVIDING LEGAL ADVICE

15-35

TX: SUICIDE ATT. – DORM FIRE – AIR FORCE DISCHARGE

On Dec. 23, 2024, in United States v. Randy B. Giles, Jr., Airman Basic (E-1), U.S. Air Force, the United States Air Force Court of Criminal Appeals, held (3 to 0) that the bad-conduct discharge, confinement for 30 days, and forfeiture of $1,917.00 pay for one month was appropriate penalty, given the attempted suicide by starting a fire on Aug. 16, 2022 in his dormitory room at Sheppard Air Force Base (AFB), Wichita Falls, Texas. Instructors had sent him to be evaluated by Air Force mental, which allowed him to return to his dorm. The Court wrote:

> "We are not persuaded Appellant's bad-conduct discharge is inappropriately severe. Contrary to Appellant's argument, he was not prosecuted for attempting suicide; he was prosecuted for the serious offense of aggravated arson and related offenses, which created a risk to the health and safety to many of his fellow Airmen as well as himself. Appellant pleaded guilty to the charges, unconditionally admitting his criminal responsibility. Based on his guilty pleas, Appellant faced a maximum punishment that included a dishonorable discharge and confinement for 25 years, among other penalties. Through the admitted evidence and Appellant's unsworn statements, the court members were well-informed of the nature of his mental health problems and the progress of his inpatient treatment. The court members likely took these factors into account when they adjudged a relatively lenient sentence including only 30 days of confinement and one month of forfeitures—entirely nullified by the sentence credit the military judge awarded—in addition to the bad-conduct discharge. Having given individualized consideration to Appellant, the nature and seriousness of the offenses, Appellant's record of service, and all other matters contained in the record of trial, we conclude Appellant's sentence is not inappropriately severe." **https://afcca.law.af.mil/afcca_opinions/cp/giles_-_40482_u_2091447.pdf**

HOLDING:

> "The findings as entered are correct in law, the sentence as entered is correct in law and fact, and no error materially prejudicial to the substantial rights of Appellant occurred. Articles 59(a) and 66(d), UCMJ, 10 U.S.C. §§ 859(a), 866(d). Accordingly, the findings and sentence are AFFIRMED."

Legal Lesson Learned: A fellow airman properly reported the arson threat to Instructors, who promptly referred him for mental evaluation. It is unfortunate that the evaluation did not immediately lead to inpatient treatment.

15-34

AR: FF DENIED WORKERS COMP – LACK PROOF PTSD CAUSED BY JOB

On September 26, 2024, in Jerald Franzmeier v. Industrial Commission of Arizona; City of Tolleson, the Court of Appeals of Arizona, First Division, held (3 to 0) that the firefighter was properly denied workers comp. While fighting a fire in November 2021, Franzmeier experienced a "sudden alteration in [his] mental status" that left him confused and disorientated, and caused him to hallucinate; he was diagnosed by a psychiatrist with PTSD. In May, 2022 he filed a worker's comp claim that alleged he got COVID from fellow firefighter on Aug. 21, 2020 [a week after he had flow to Maryland wearing mask and gloves on the plane] and that "long COVID" was the cause of his PTSD. The Court wrote: "However, Franzmeier offered no competent evidence showing, with a reasonable degree of medical probability, that his COVID-19 infection contributed to his mental injury." https://cases.justia.com/arizona/court-of-appeals-division-one-unpublished/2024-1-ca-ic-23-0013.pdf?ts=1727375455

THE COURT HELD:

> "Thus, Franzmeier needed to offer medical expert opinion evidence linking his mental injury to his employment, but he offered none. Instead, he testified to what his doctors told him, that there was 'the possibility of a COVID claim,' but his testimony made clear that these opinions were speculative. The Respondents presented the only competent medical evidence on causation through Dr. Lee, who opined that Franzmeier was probably infected during his cross-country trip.
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> Meanwhile, in preparation for the February 2023 hearing [before Worker's Comp. Administrative Law Judge] , neurologist Dr. Leo Kahn performed an independent medical examination of Franzmeier at the Respondents' request. Dr. Kahn physically examined Franzmeier and reviewed the available records, including medical records. Dr. Kahn acknowledged Franzmeier's underlying psychological condition but concluded that no objective evidence supported Franzmeier's claim that he sustained a neurological injury from contracting COVID-19 in 2020."

FACTS:

> "For nearly two decades, Franzmeier worked as a paramedic and firefighter for the City of Tolleson ('City'). On August 18, 2020, he flew home to Arizona after visiting family in Maryland. The next day, he returned to work for a 48-hour shift, working closely with others at the fire station. On August 21, a co-worker tested positive for COVID-19. Five days later, Franzmeier tested positive. For the next ten days, Franzmeier quarantined at home before returning to work without incident. He experienced mild symptoms but never sought medical attention.
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More than a year later, while fighting a fire in November 2021, Franzmeier experienced a "sudden alteration in [his] mental status" that left him confused and disorientated, and caused him to hallucinate. He was taken off duty and evaluated by a psychiatrist, who diagnosed him with post-traumatic stress disorder ('PTSD'). Franzmeier believed his PTSD and other mental health symptoms resulted from 'long COVID' or a post-COVID condition. He also believed he contracted the COVID-19 virus in August 2020 while at work and not during his earlier travels to and from Maryland.

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The week before the scheduled hearing (Nov. 2022), Franzmeier's wife checked him into an inpatient care facility for PTSD. Consequently, the ICA hearing was postponed to February 2023.

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Franzmeier represented himself and, outside of his own testimony, called no witnesses. When asked why he had not requested a medical expert to testify on his behalf, Franzmeier responded, 'I believe that the -- the incident speaks for itself as -- as far as -- as mathematical possibilities.' Franzmeier then testified that he believed he contracted the virus in August 2020 while at work, not while traveling to or from Maryland. In describing the injury he suffered, he recounted his PTSD symptoms and other cognitive events experienced in November 2021 and the months that followed. The ALJ asked Franzmeier whether he was asserting a claim that COVID-19 caused his mental health issues. Franzmeier testified that he had undergone an MRI that suggested 'the possibility of a COVID claim because of COVID exposures,' and further stated that the flashback he experienced in November 2021 'could be an exacerbation of COVID.' But when the ALJ pressed whether any doctor had opined that COVID-19 caused his PTSD symptoms, Franzmeier admitted that none had. Franzmeier concluded his testimony by asserting that during the relevant '14-day incubation period,' he had worked and slept for 304 hours (out of the 336 total hours), which he claimed established only a 10% probability that he became infected outside of work."

Legal Lesson Learned: The firefighter never offered any expert testimony or other proof that his PTSD was caused by exposure to COVID-19.

15-33

IL: FEMALE FF / MEDIC – PTSD AFTER FATHER'S DEATH – NO "LINE-OF-DUTY" PENSION – RECEIVES NON-DUTY PENSION

On September 25, 2024, in Cheryl Mayer v. The Board of Trustees of the Calumet City Firefighters Pension, the Court of Appeals of Illinois, First District, Third Division, held (3 to 0) that the Board correctly denied her a "line-of-duty" pension based on findings of four

independent medical evaluators, and the fact that prior to her father's death in April, 2020, she could handle difficult EMS and other runs, including 2015 (active shooter scene), 2018 (suicide by hanging), and 2019 (suicide by self-inflicted gunshot wound). The Court wrote: "Contrary to plaintiff's contentions, the record reveals that the Board did not solely rely on the independent medical evaluators' opinions as to the cause of her medical condition. The Board also relied on plaintiff's own testimony, where she acknowledged that she did not abuse alcohol or suffer from depression or PTSD, until after her father's death."
https://ilcourtsaudio.blob.core.windows.net/antilles-resources/resources/519d3cc5-abe9-4494-b624-73bca90ee228/Mayer%20v.%20%20Calumet%20Firefighters%20Pension%20Fund,%202024%20IL%20App%20(1st)%20232059-U.pdf

THE COURT HELD:

> "To be entitled to a line-of-duty disability pension, a claimant is required to establish a causal connection between the claimant's disability and an act of duty.
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> Here, the independent medical evaluators all agreed that plaintiff suffered from preexisting mental and emotional issues that contributed to her disability, namely, depression, anxiety disorder, and PTSD. The issue is whether plaintiff's preexisting conditions were aggravated by her duties as a firefighter/paramedic, thereby establishing a causal connection between her disability and service as a firefighter/paramedic.
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> ***
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> Contrary to plaintiff's contentions, the record reveals that the Board did not solely rely on the independent medical evaluators' opinions as to the cause of her medical condition. The Board also relied on plaintiff's own testimony, where she acknowledged that she did not abuse alcohol or suffer from depression or PTSD, until after her father's death. The documentary evidence and testimony presented at the administrative hearing gave rise to a factual issue concerning whether plaintiff's preexisting conditions were aggravated by her duties as a firefighter/paramedic.
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> The Board made a factual finding that plaintiff failed to meet her burden of establishing a causal connection between her preexisting conditions and her duties as a firefighter/paramedic. In light of the record before us, and the deference we must afford to a board's credibility determinations and factual findings, we cannot say that the Board's finding that plaintiff failed to meet her burden of proof was against the manifest weight of the evidence. We find that the Board's finding was supported by competent evidence."

FACTS:

> "Plaintiff was 46 years old at the time of the hearing and the married mother of two sons,

both over twenty-one years of age. Plaintiff's background included instances of domestic conflict between her mother and father; the murder of her older brother when she was nine years old; sexual molestation by a neighbor's teenaged son when she was ten and eleven years old; and verbal and physical abuse by her mother, until she left home at eighteen. In 1998, plaintiff was successfully treated with Zoloft for post-partum depression after the birth of her second son.

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Plaintiff joined the Calumet Fire Department as a firefighter/paramedic on March 1, 2009. Before she was hired, plaintiff underwent and passed physical and psychological examinations. She was neither diagnosed with nor receiving treatment for any psychiatric conditions.

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In July 2020, plaintiff began receiving psychological counseling from Dr. Katie Johnson, a licensed clinical professional counselor. On August 14, 2020, plaintiff reported to Johnson that she had suicidal ideations and had posted to Facebook that she put a firearm to her head and contemplated committing suicide. Plaintiff was eventually referred to Dr. Kelsey Oster, for a neuropsychological evaluation. She was admitted into a 28-day inpatient substance-abuse program at Advanced Recovery Systems in Orlando, Florida. Plaintiff testified that the program helped her stop drinking. After her discharge from the program, plaintiff continued working full duty without restrictions. At the time of the hearing, plaintiff was still seeing Dr. Johnson 'every week to two weeks.'

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On February 12, 2021, plaintiff responded to a call involving a man in full cardiac arrest. As plaintiff was attempting resuscitation efforts, a female family member, who did not have a 'do-not-resuscitate' order or a power of attorney, started yelling not to touch him. When plaintiff's supervisor instructed emergency personnel to honor the woman's wishes, plaintiff became upset and asked why they were not following the pandemic protocols. Plaintiff left the house and began complaining and swearing to a nearby police officer. Plaintiff returned to the station, but did not finish her shift, claiming she was sick and needed to go home. That was the last day plaintiff worked in a full and unrestricted capacity as a firefighter/paramedic for the Calumet Fire Department."

Legal Lesson Learned: The Board's independent medical experts found that she could perform her duties as firefighter / medic, despite her anxiety and depression, until death of her father.

Note: Dr. Ganellen noted that plaintiff's medical records revealed she was being treated for anxiety and depression as early as 2018, but that these conditions "markedly" worsened after the death of her father in April 2020.

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Dr. Conroe noted that plaintiff exhibited symptoms of anxiety and depression prior to her father's death, but that 'they were moderate and did not interfere with her functioning at work.' According to the doctor, the death of plaintiff's father 'lessened her stress tolerance and affected her ability to respond appropriately to similar subsequent emergencies.' Dr. Conroe determined that work events 'were not the cause of [plaintiff's] disability, but rather her father's death and the surrounding circumstances fueled her emotional reactions to these demanding situations.'"

15-32

ME: DROWNING / PSYCH - FF SHOUTED: "GONNA KICK HIS ASS IF HE GETS OUT OF THAT WATER" – CASE DISMISSED

On Aug. 1, 2024, in John Cohen v. City of Portland, et al., the U.S. Court of Appeals for 1st Circuit (Boston), held (3 to 0) that Federal District Court judge properly granted summary judgment to City, police officers and the firefighter who made the "kick ass" comments. Regardling the claim against the firefighter, on appeal "the estate simply asserts that Cohen was in shallow water, and therefore 'may have been able to come out of the water' absent [firefighter Ronald] Giroux's threat. Even if we assume that Cohen could have come out of the water in defiance of Giroux's bellowed threat, this assumption would not justify finding that (1) he would have done so, (2) he would have done so before the rescue boat arrived, or (3) doing so would have prevented his eventual death." https://caselaw.findlaw.com/court/us-1st-circuit/116442772.html

THE COURT HELD:

"We first consider the state-created danger claim against Giroux. Giroux arrived at the Back Cove at 1:42 p.m. Cohen had already been in the water for around twenty minutes. Giroux did not know that Cohen was in the midst of a psychotic episode. He knew only that Cohen had assaulted his girlfriend before fleeing into the water. At 1:43 p.m., Giroux called out: "Tell him we're gonna kick his ass if he gets out of that water." Giroux's only other involvement at the scene was to hand [Police Sergeant Michael] Rand a life jacket for [police officer Blake] Cunningham [a former U.S. Coast Guard rescue swimmer].

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Here, the district court found that no reasonable jury could conclude that Giroux's threat factually or legally caused Cohen's death. See Cohen ex rel. Est. of Cohen v. City of Portland, No. 2:21-CV-00267-NT, 2023 WL 8187213, at *10 (D. Me. Nov. 27, 2023).

Specifically, the court found that a jury could only find causation via a series of increasingly speculative inferences:

> [The jury] would have to find that Cohen could have made the deliberate choice to come to shore while in a state of alleged psychosis, would have been able to get himself to shore after having been in the cold water for twenty minutes already, could have done so faster than the rescue boat ultimately did, and would not have died of hypothermia or drowning if he had started for the shore at the time the comment was made."

Legal Lesson Learned: No liability but avoid making threatening remarks at an emergency scene; particularly dealing with psycho patient.

Note: Court remarked about Police Department's rescue efforts at the scene.

> "'Protect and serve' is the motto of the Portland Police Department. Even acknowledging the challenge posed by Cohen's behavior, the efforts of the responding officers likely fell short of the aspirations behind that motto. That being said, this appeal turns on whether any defendant violated Cohen's constitutional rights. And for the foregoing reasons, the answer is clearly no. The district court's dismissal and summary judgment orders are therefore affirmed."

15-31

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

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

> "Looking first to the retroactivity test, the legislature did not adopt any language explicitly providing for retroactivity. Mr. Shaw argues that the legislature's choice of various adjectives and verbs reveal retroactive intent. We reject this reasoning. An explicit choice as to retroactivity is not one that turns on analyzing subtle textual clues. The legislature is well aware that it must make an explicit declaration if it intends a statute to have retroactive effect. It is accustomed to passing statutes with clear and explicit statements as to retroactivity. *See, e.g.*, RCW 51.32.187(5)(c); RCW 67.16.300; Laws of 2023, ch. 171 § 13; Laws of 2019, ch. 159 § 6; Laws of 2007, ch. 317, § 3. But

no explicit statement was made here. Mr. Shaw's arguments to the contrary fail." https://casetext.com/case/shaw-v-kittitas-valley-fire-rescue

Legal Lesson Learned: PTSD statute was not retroactive.

Note: See this law firm review of new WA law.
https://www.firstresponderptsdclaims.com/faq/

"Eligible 'firefighters' must meet at least one of the definitions set forth in RCW 41.26.030(17)(a)(b)(c) and (h), which include:

- Any person who is serving on a full time, fully compensated basis as a member of a fire department of an employer and who is serving in a position which requires passing a civil service examination for firefighter, and who is actively employed as such;
- Anyone who is actively employed as a full time firefighter where the fire department does not have a civil service examination;
- Supervisory firefighter personnel; and,
- Any person who is employed on a full-time, fully compensated basis by an employer as an emergency medical technician that meets the requirements of RCW 18.71.200 or 18.73.030(12), and whose duties include providing emergency medical services as defined in RCW 18.73.030.

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Washington State is taking steps to help our firefighters, paramedics, and police officers suffering from PTSD due to their inherently stressful jobs. More work remains to be done as the new law does not apply to volunteer firefighters, reserve police officers or other professional first responders depending upon their membership in certain state retirement plans."

15-30

AR: PTSD – CAREER FF DISABILITY RETIREMENT – BUT STILL VOL. FF – NOT ELIGIBLE DUTY- RELATED DISABILITY

On April 24, 2024, in Gregory Mills v. Arkansas Local Police And Fire Retirement System, the Arkansas Court of Appeals held (3 to 0) the retirement Board decision was supported by substantial evidence. Oct. 2019 FD placed him on medical leave when informed by his doctor needed to avoid trauma events; terminated April 4, 2020 when he was approved long-term disability. Retirement board rejected his claim for duty-related disability retirement benefits since he is still running as a volunteer at another FD; trial court agreed. State statute:

> "Any active member who while an active member becomes totally and permanently physically or mentally incapacitated for any suitable duty as an employee as the result of a personal injury or disease that the board finds to have arisen out of and in the course of his or her actual performance of duty as an employee may be 3 retired by the board upon proper application filed with the board by or on behalf of the member or former member."

https://cases.justia.com/arkansas/court-of-appeals/2024-cv-22-650.pdf?ts=1713971302

COURT HELD:

> "On April 4, 2020, the Bella Vista Fire Department terminated his employment because Mills was notified that he had been approved for a long-term disability policy.
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> The Board's designated physician, Dr. Podkova, examined Mills and reviewed his medical records submitted to LOPFI. On June 29, 2020, Dr. Podkova issued a detailed report and determined that Mills was not totally and permanently disabled from his firefighting activity. Dr. Podkova concluded that Mills met the criteria for PTSD and that it was more likely than not that Mills's PTSD arose from his employment. However, she opined that the disability was not total and permanent due, among other things, to Mills's mental status, the severity of his impairment, his noted improvement in symptoms with treatment, his presentation, and the fact that he continued to volunteer with the Little Flock Fire Department in addition to his full-time employment with the Bella Vista Fire Department for a period of years after he started seeking help for his PTSD symptoms."

Legal Lesson Learned: Firefighter failed to prove he was "totally and permanently physically or mentally incapacitated for any suitable duty as an employee."

NY: PTSD - PERUVIAN FDNY FF – HAZING – HOSTILE WORK ATMOSPHERE – 2015-2021 – FIRED - CASE PROCEED

Jan. 5, 2024, Court granted FDNY motion for protective order (pre-trial discovery extended to March 15, 2024). On March 31, 2023, in Joseph Mendoza v. City of New York, et al., U.S. District Court Judge Lashann Dearcy Hall, U.S. District Court for Eastern District of New York, dismissed most of the plaintiff's claims, but denied the defense motion to dismiss Section 1983 hostile work environment claim.

The Court held:

> "Plaintiff's hostile work environment claims warrant different treatment. "A charge alleging a hostile work environment claim . . . will not be time barred so long as all acts which constitute the claim are part of the same unlawful employment practice and at least one act falls within the time period." *Sotomayor v. City of New York*, 862 F.Supp.2d 226, 250 (E.D.N.Y. 2012) (quoting *Morgan*, 536 U.S. at 122). As Plaintiff correctly argues, the amended complaint alleges a continuous and ongoing period of racial harassment that began in 2015 and continued through at least May 2019, when he alleges he received a racially offensive text message in the group chat. (*See* Pl's Opp'n at 6-7; *see also* Am. Compl. ¶¶ 23, 38, 56.) Plaintiff alleges he was subjected to racially demeaning conduct throughout this time period, and none of those individual comments or racial incidents could constitute a discrete act or be considered unrelated to the racial incidents he experienced within the limitations period." https://casetext.com/case/mendoza-v-the-city-of-new-york-3

Legal Lesson Learned: Continuous hazing can lead to hostile work atmosphere litigation.

15-28

OH: MENTAL CALL / SUICIDE GUNSHOT – DEPUTIES NOT RECKLESS - CALLED MOBILE CRISIS - NOT LIABLE

On Dec. 28, 2023, in Sarah Wilson, Administrator of the Estate of Jack Huelsman, et al. v. Eric Gregory, et al., the Court of Appeals of Ohio, Twelfth District, held (3 to 0) that lawsuit against two Deputy Sheriff's for not taking the patient to mental health facility was properly dismissed, since patient at that time did not appear to be a risk to himself or others. The Court held: "We find that the Deputies did not engage in reckless conduct because there is no evidence in the record that they consciously disregarded or were indifferent to a known or obvious risk of harm to Jack [Huelsmann].".https://cases.justia.com/ohio/twelfth-district-court-of-appeals/2023-ca2023-06-039.pdf?ts=1703791198

Legal Lesson Learned: A tragic outcome to a mental health run; lengthy litigation, if the Deputies had not cancelled EMS there would have been four witnesses to testify about patient's condition.

Note: FEDERAL LAWSUIT. Plaintiff had originally filed a lawsuit against the Deputies in Federal court. On Sept. 30, 2020, U.S. District Court granted summary judgment to the Deputies. https://caselaw.findlaw.com/court/us-dis-crt-s-d-ohi-wes-div/2089388.html. On July 1, 2021, the 6th Circuit Court of Appeals directed District Court judge "to determine whether to exercise supplemental jurisdiction" over the state law claims that remain." https://www.opn.ca6.uscourts.gov/opinions.pdf/21a0151p-06.pdf.] On Aug. 18, 2021, the U.S. District Court judge declined to exercise supplemental jurisdiction and dismisses all remaining claims without prejudice. https://casetext.com/case/wilson-v-gregory-4

6th Circuit focused on EMS being cancelled.

In the meantime, emergency medical services (EMS) personnel had arrived and were waiting for the Deputies' go-ahead. Though EMS personnel's ability to provide mental health services was limited to asking basic questions to test a person's mental acuity, their training and policy permitted them to assess a person's mental condition and make a recommendation to a deputy that the person should or should not be detained. Within four minutes of his arrival at the Huelsmans' home, Deputy Gregory called off EMS.

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A reasonable juror could conclude from some combination of these indicia that the risk of Mr. Huelsman's suicide was indeed obvious and that Deputies Gregory and/or Walsh acted recklessly as a result. It may well be that when presented with this case, a jury would conclude Deputies Gregory and/or Walsh did not act recklessly on the rationales that the separate writing discusses. But on this record and given Ohio courts' strong preference for a jury to determine whether particular acts or decisions demonstrate recklessness, the grant of statutory immunity to Deputies Gregory and Walsh, and therefore the grant of summary judgment in their favor on the Huelsmans' state law claims, was also error.

Note – Pink Slip

In Ohio, police officers have authority to "pink slip" an individual for 72 hour mental health hold, under Ohio Rev. Code 5122.10: "substantial risk of physical harm to self or others." https://codes.ohio.gov/ohio-revised-code/section-5122.10/9-17-2014

See also this research publication by Legislative Service Commission for Ohio General Assembly, "Involuntary Treatment for Mental Illness." https://www.lsc.ohio.gov/assets/organizations/legislative-service-commission/files/involuntary-treatment-for-mental-illness.pdf

15-27

WV: MENTAL CALL / SUICIDE – LAWUIT PROCEED SHERIFF POLICY "NO SUNDAY" RESPONSES – EMS / PD IMMUNITY

On Dec. 21, 2023, in Rex Eagon and Diane Egon, individually as co-administrators of the Estate of Darien M. Eagon v. Cambell County Emergency Medical Service, et al., U.S. District Court Judge Robert C. Chambers, United States District Court, S.D. West Virginia, Huntington Division, held that City of Huntington police officers and County EMS are immune from liability, but plaintiffs may proceed with pre-trial discovery on allegations that County Sheriff. The Court wrote: "Certainly, there are no allegations that Sheriff Zerkle or any employee of the Sheriff's Department were at the scene, had any knowledge of Ms. Eagon's situation, or ever had any contact with her. Without any of these connections with Ms. Eagon, the Court agrees with the County Defendants that Plaintiffs have not plausibly alleged Sheriff Zerkle acted with direct 'intent' to inflict emotional distress upon Ms. Eagon or her parents. However, for purposes of a motion to dismiss, the Court must assume the truthfulness of Plaintiffs' allegation that Sheriff Zerkle adopted, enforced, and made known to EMS and HPD that his Department had a custom, practice, or policy of not dispatching deputies to respond to any mental health crises on a Sunday, regardless of how urgent or dire the situation presents. From this vantage, the Court finds this allegation is sufficient to plausibly allege Sheriff Zerkle intentionally acted so recklessly that it was substantially certain that someone like Plaintiffs would suffer emotional distress. Additionally, it is plausible that such custom, practice, or policy could be found to be 'atrocious, intolerable, and so extreme and outrageous as to exceed the bounds of decency[.]' *Hoops*, 2022 WL 2400039, at *7 (internal quotation marks and citation omitted). Therefore, the Court finds Count IV is sufficient as to Sheriff Zerkle and **DENIES** the County Defendants' motion to have this Count dismissed against him."
https://public.fastcase.com/ZZhmr5v9wN%2FXOe5IsQ%2FqD7d2ApzwrZCQvAZQlM%2B4VVcvgALpNi2VKyyjI%2Bz22f3P?utm_medium=email&_hsmi=226712652&_hsenc=p2ANqtz-9QV0nznODHw4_m_j0AE4K8p0b7Wes2e9d7AzOOyb86IGbeyJ8jbpovdpcqHFVtvrmWyxti44YX_ZuNCNTYmJshWS7Dxw&utm_content=226712652&utm_source=hs_email

Legal Lesson Learned: Police body camera footage of interaction with patient very helpful; EMS should likewise consider using body cameras on mental health and other patient refusals.

> Note: The Court referenced in its decision (Footnote 3) this interview. West Virginia Public Broadcasting, Cabell Sheriff Says System Broken As 20 Percent Of Mental Safety Pickups Go Unanswered In County (Apr. 5, 2021) *https://perma.cc/4EPP-E4TC*.
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> "Cabell Sheriff Says System Broken As 20 Percent Of Mental Safety Pickups Go Unanswered In County," April 5, 2021. https://perma.cc/4EPP-E4TC

"In West Virginia, when a person is thought to be a threat to themselves or others, they can be involuntarily committed to a mental health facility through a process known as a 'mental hygiene petition.' These petitions, usually taken out by a family member or outreach worker, have to be approved by a county court and require a sheriff's deputy to help transport the person being committed.

But in Cabell County, data from a mental health facility show at least 75 mental hygiene orders went unanswered by the Cabell County Sheriff's Department in 2020. The sheriff says his department is overwhelmed.

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Cabell County Sheriff Chuck Zerkle explains the mental hygiene process at his office in Huntington, West Virginia, on Wednesday, March 31, 2021.

Zerkle added that in 2020 alone, his office received approximately one mental hygiene order *a day* from the courts. And per the WV State Code, only sheriffs and their deputies are approved to execute mental hygiene. He says his office can't keep up.

> **"**We all want to agree that we're all wanting to help ourselves dig out of this opioid issue and the mental health issue. But you've got a small minority of law enforcement that is saddled with doing this.

For Zerkle, the only way to fix the problem is to change the law regarding mental hygiene orders. He doesn't see why lawmakers can't approve all law enforcement agencies to do these pickups.

> "My perfect world would be law enforcement would secure them, get them to the facility, get the stuff started, and then we leave and turn it over to someone else that's medically trained to take care of these people," he said.

Currently, two bills have been introduced by Sen. Charles Trump, a Republican from Morgan County, that would address mental hygiene orders in the state. The new bills would expand the window deputies have to pick people up from 10 to 20 days and remove the need for deputies to first take people to the hospital prior to transporting them to a mental health facility. Both of these bills have made it out of the senate and are currently being heard by the House Health and Human Resources Committee."

15-26

WA: NEW PTSD LAW NOT RETROACTIVE – FF HAD EXHIBITED PTSD PRIOR EFFECTIVE DATE – NOT COVERED

On Oct. 2, 2023, in Frank DeYoung v. The City of Mount Vernon and the Department of Labor and Industries, the Court of Appeals of the State of Washington, held (3 to 0) that the new PTSD statute for police and fire, making PTSD a occupational disease, is not retroactive. The Court held that the firefighter's claim on Oct. 24, 2019 is not covered by the statute. "DeYoung also asserts that the requirement in RCW 51.32.185(5) that a firefighter must have served at least ten years before they are eligible to make a claim indicates the legislature's intent to apply the statute retroactively. According to DeYoung, applying the statute prospectively would mean that no firefighter will be eligible to file a claim for occupational disease benefits for PTSD until 2028. Id. The plain language of the statute does not support such an interpretation. The statute establishes that only firefighters who have served the minimum number of years may file a claim for occupational disease benefits for PTSD. Nothing about the provision is indicative of retroactivity." https://cases.justia.com/washington/court-of-appeals-division-i/2023-84561-6-0.pdf?ts=1696273779

Legal Lesson Learned: Legislatures when drafting new benefits for firefighters should in the statute or the legislative history make clear whether the law is retroactive.

15-25

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

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

> The Court of Appeals referenced Board decision, which was made after the firefighter was examined by three independent medical experts (IMEs): "The Board concluded that the plaintiff did not prove a disability, noting: (1) the minor injuries reported after the fall that he fully recovered from, (2) Dr. Eschbach's opinion linking the fall and his condition was based on incomplete and inaccurate information, (3) the plaintiff succeeded in his career for many years following the fall and was promoted after a competitive test, (4) the plaintiff reported a change in work conditions when the department brought in a new battalion chief who frequently challenged the plaintiff's work performance (evidencing a personal dispute rather than a deficit in brain functioning from a fall seven to eight years prior), and (5) the plaintiff only ever reported the claimed conditions immediately following his demotion." https://ilcourtsaudio.blob.core.windows.net/antilles-resources/resources/92cdfb54-2dda-4342-acee-d86ea11493ea/Szymala%20v.%20Romeoville%20Firefighters%27%20Pension%20Fund,%202023%20IL%20App%20(3d)%20220093-U.pdf

"In 2013, the plaintiff was promoted to lieutenant following a competitive promotional testing process. However, he testified that management decided that his performance as lieutenant was inadequate between 2015 and 2018. Around May 2017, the plaintiff was placed on a 'Performance Improvement Plan', which included an evaluation of his work performance as lieutenant from May 24, 2017, through February 28, 2018. He entered into a 'Last Chance Agreement' in April 2018, where he acknowledged deficiencies in his work performance and agreed to improve these areas during a period of 60 work shifts or risk a demotion. The agreement provided that he failed to meet various guidelines, such as working as a team, leading personnel, communicating effectively, and working calmly in stressful situations.

***

On January 29, 2019, the plaintiff attended a meeting with Chief Kent Adams, other fire department officials, and the Union Executive Board. During the meeting, Chief Adams informed the plaintiff that he failed to satisfactorily complete the Performance Improvement Plan and terms of the Last Chance Agreement and that his performance as lieutenant remained inadequate. The plaintiff was also informed that he was being demoted from lieutenant to firefighter/paramedic effectively immediately."

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

15-24

LA: FD FINANCE MGR. – EAP COUNSELING SESSIONS ONLY AFTER WORK – RESIGNED - NO CONSTRUCTIVE DISCHARGE

On March 1, 2023, in Sherita Ann Cooks v. The City of Shreveport, et al., the Court of Appeals of Louisiana, Second Circuit, held (3 to 0) that the trial court properly dismissed her claim of that workplace was so hostile that she was forced to quit. The Court wrote: "The plaintiff's summary judgment evidence falls far short of prima facie proof of constructive termination. The entirety of the evidence that she cites in support of that claim consists of an April 2016 email exchange between her and Chief Tolliver wherein the plaintiff requested an explanation as to why she could not attend an EAP session during her lunch hour, even though it would take more than one hour when including travel time. The plaintiff offered to compensate the City for the time the session required in excess of the allotted one-hour lunch by taking sick leave. In response, Chief Tolliver granted the plaintiff permission to attend one session during her lunch hour, but stated that, thereafter, the plaintiff would have to adhere to the fire department's policy of requiring that

EAP sessions take place after work hours." https://law.justia.com/cases/louisiana/second-circuit-court-of-appeal/2023/54-841-ca.html

> "This case stems from the plaintiff's employment as a financial accreditation manager with the Shreveport Fire Department, which began in June 2014. In or around December 2014, the plaintiff's immediate supervisor, Chief of Communications, Kathy Rushworth ('Chief Rushworth'), allegedly ordered the plaintiff to spend her personal money on official fire department business and indicated that plaintiff would be reimbursed from an "off the books" bank account known as the International CAD Consortium fund ('ICC fund'). It contained money that was to fund a consortium event; the event was later canceled, but the money was not refunded. The plaintiff alleged that her assistant, Ashley Wiggins ('Wiggins'), and Chief Rushworth, used the ICC fund as a 'slush fund,' and that Chief Rushworth instructed her to not open the ICC bank statements or mention the ICC fund to the finance auditor or Violet Anderson, the Assistant Chief of Communications.
>
> ***
>
> Also, in April 2016, because of the stress that the hostile work environment and the slush fund matter allegedly caused her, the plaintiff voluntarily began counseling or psychiatry sessions pursuant to the city's employee assistance program ('EAP'). However, with only one exception, she was not allowed to use her sick leave to attend these sessions during the workday. Furthermore, as previously stated, the plaintiff took a two-month sabbatical beginning in April 2016. It bears repeating that when the plaintiff returned to work in June 2016, both Chief Rushworth and Wiggins were no longer employed with the Shreveport Fire Department. The plaintiff did not quit her job until November 2016."

Legal Lesson Learned: Employee Assistance Programs (EAP) can be very beneficial. Consider adding a provision in employee handbook allowing sick leave to be used.

15-23

FL: BAT. CHIEF "EXTREMELY ANXIOUS" MAKING EMER. RUNS – DENIED OFFICE WORK ONLY - PIP - FIRED

On Feb. 14, 2023, in William Valencia v. Haines City, Florida, U.S. District Court Judge Tom Barber granted City's motion for summary judgment. The Battalion Chief suffered from high blood pressure and anxiety, and in 2018 the Fire Chief allowed him to do administrative work and not make emergency runs. In February 2019, Jeffrey Davidson became the new Fire Chief. Plaintiff asked Davidson to excuse him from running calls. Davidson did not agree, and he asked Plaintiff to provide medical documentation to support the request, which Plaintiff never did. He was placed on a 90-day Performance Improvement Plan [PIPO|] in Nov. 2019, and ultimately fired after a pre-disciplinary hearing on April 10, 2020. The Court held: "In short, Defendant has

pointed to legitimate reasons that would motivate a reasonable employer to take the actions it did, and Plaintiff has not shown that the reasons were pretextual under the standards set forth above. Defendant may have been high-handed, unfair, or wrong, but Plaintiff has pointed to no evidence that its stated reasons were not the real reasons. Accordingly, Defendant's motion for summary judgment is granted."
https://storage.courtlistener.com/recap/gov.uscourts.flmd.392068/gov.uscourts.flmd.392068.43.0.pdf

> "Defendant [Fire Department] has offered legitimate non-discriminatory and non-retaliatory reasons for Plaintiff's discipline and termination, identifying numerous specific incidents and problems with Plaintiff's performance as Battalion Chief in 2019. Chief Davidson supported his recommendation that Plaintiff be terminated by citing the following issues, among others: multiple instances of improper use of a department purchasing card for supplies without using a tax exemption as required by department policy, failure to turn in an assignment in time for Davidson to use at a meeting, failure to send part of another assignment until reminded to do so by Davidson, turning in a report that was due in October on November 1, 2019, failing to attend a training class as directed, failing to prepare a draft purchasing procedure as directed, and coming to a meeting without a list of specific job responsibilities as directed."

Legal Lesson Learned: A "PIP" can be an effective management tool.

> Note: See EEOC description of "reasonable accommodations" obligations under ADA. "An employer doesn't have to provide an accommodation if doing so would cause undue hardship to the business. Undue hardship means that the accommodation would be too difficult or too expensive to provide, in light of the employer's size, financial resources, and the needs of the business." https://www.eeoc.gov/disability-discrimination-and-employment-decisions

15-22

MN: PTSD STATUTORY PRESUMPTION - DEPUTY GET WORKER COMP – COUNTY PSYCH IME NOT FOR 10 MONTHS

On Dec. 21, 2022, in Douglas Juntunen v. Carlton County, et al., the Supreme Court of Minnesota held (7 to 0; including 2 concurring opinions) that Deputy Juntunen is entitled to workers compensation. The Deputy's psychiatrist concluded he suffered from PTSD on the date of the exam, Aug. 20, 2019. The County took 10 months to arrange for their psychiatrist to conduct an independent medical exam (July 20, 2020), who concluded that the Deputy now suffers from major depression but not PTSD. The County therefore failed to rebut the Minnesota statutory presumption for emergency responders. The Deputy also submitted proof of seeking mental help after the suicide of a former partner in 2016. He contacted County EAP who

referred him to Beth Jordan, a licensed mental health clinician, who he saw four our times during next 3 months. Then in Dec. 2018, he renewed meeting with the Beth Jordan when he found it more and more difficult to report to duty. Over the next few months, he met with Jordan a few times a month, and he received eye movement desensitization and reprocessing (EMDR) therapy to process the pursuit and suicide, his partner's suicide, his mother's death, and the death of a 16-year-old boy in MVA who had just received his driver's license. The Workers Comp administrative law judge denied coverage based on the County's psychiatrist's report. On appeal, the Workers' Compensation Court of Appeals reversed since that report was 10 months after the Deputy's report of PTSD (Aug. 20, 2019). The Minnesota statutory presumption law became effective for claims made on or after Jan. 1, 2019.

> "The employer argues that Dr. Arbisi's opinion from July 2020 was sufficient to rebut the presumption. We disagree. The WCCA determined that the County did not rebut the presumption for the following reason:
>
> > The presumption [based on Dr. Keller's diagnosis in September 2019] established that at the time of his disablement from work, the employee had compensable PTSD. To rebut, the employer needed to offer evidence that at the time of the employee's disablement, he did not have a PTSD diagnosis. The employer failed to do so as Dr. Arbisi's opinion was, at the time of his July 2020 evaluation and for the 30 days preceding that evaluation, that the employee did not have a PTSD diagnosis. His opinion, in both his report and his deposition testimony, failed to address the issue surrounding the statutory presumption, specifically whether the employee had a diagnosis of PTSD in September 2019."
>
> https://mn.gov/workcomp-stat/2021/Juntunen%20-%2012-28-21.html

Legal Lesson Learned: Statutory presumption for emergency responders are extremely helpful for those seeking workers comp for PTSD,

> Note: Two of the seven Minnesota Supreme Court Justices issued a concurring opinion. Justice Anderson wrote:
>
> "This [opinion] leaves local government units, and by extension, taxpayers, potentially required to pay disability compensation to any covered employee who is diagnosed with PTSD from the time the employee files the claim until the employer can schedule an independent medical examination, regardless of the validity of the initial diagnosis. *** What amendments, if any, are necessary to clarify the operation of Minn. Stat. § 176.011, subd. 15(e), are within the purview of the Legislative and Executive branches of our government. I write separately only to highlight some potential issues that may, or may not, require further action by those branches."
> https://public.fastcase.com/J%2FJP6pdidelsXxEE4k%2BLMrxVcam7rKBSdRgmN0M2d%2BrW9J8HXjyMcs%2BCJsDK%2Fusk%2B2E9D%2F1BAqASOG07gYFsTW16dm6lb%2FBgwI52A7gDyzw%3D?utm_medium=email&_hsmi=226712652&_hsenc=p2ANqtz-9PBrRsgZ6dWHR_pYoIAB1lqWQVVefDA3UXzg06QZf9i4O0NAY5ywCEjL-xcfOhIm7moLGvuFP1IQS4Gks-qJ07TvkP3Q&utm_content=226712652&utm_source=hs_email

15-21

MN: DEPUTY SHERIFF SUICIDE – "KILLED IN LINE-OF-DUTY" PENSION AWARDED TO WIFE – COURT OVERTURNS ALJ

On Dec. 19, 2022, in In The Matter Of A Public Safety Officer Death Benefit For Jerome Rihcard Lannon (deceased), the Court of Appeals on Minnesota, held (3 to 0) that Administrative Law Judge incorrectly ruled that a deputy's suicide cannot be considered a "line of duty death." Deputy Lannon committed suicide in 2018; he had been employed by Washington County Sheriff's Office since 1999 and had responded to numerous critical incidents including a double murder, multiple suicides, a child's sexual assault, and fatal vehicle crashes. He was also involved in high-stress situations like apprehending a suspect in a domestic dispute who had fired a weapon in the home. Inn 2015, Deputy Lannon was diagnosed with anxiety and depression. In 2016, he began attending therapy to address symptoms of anxiety and depression. In September 2018, he was further injured in a serious car accident and in Nov. 2018 a supervisor brought him to a hospital because he was experiencing suicidal ideations; after his release he committed suicide on Nov. 26, 2018.

> "The primary question before us is whether a public safety officer who dies by suicide as a result of job-related PTSD is 'killed in the line of duty' within the meaning of the death-benefit statute, Minn. Stat. § 299A.44…. We conclude that 'killed in the line of duty,' as used in Minn. Stat. § 299A.44, includes a death by suicide resulting from PTSD caused by performing duties peculiar to a public safety officer. Accordingly, survivors of such an officer may qualify for the death benefit provided by Minn. Stat. § 299A.44. We further conclude that relator has presented sufficient evidence to raise a genuine issue of material fact as to whether Deputy Lannon's death by suicide meets that qualification. We therefore reverse and remand to the Office of Administrative Hearings for further proceedings consistent with this opinion." https://law.justia.com/cases/minnesota/court-of-appeals/2022/a22-0507.html

Legal Lesson Learned: Suicide by public safety officers is a nationwide issue. I hope the widow receives LODD benefits.

15-20

FL: PTSD – MEDIC WINS WORKERS' COMP – WHILE TRAUMA RUNS PRIOR NEW STATUTE, LOSS WAGES AFTER 2018 LAW

On Nov. 2, 2022, in Mandy Lynn Wyatt v. Polk County Board of Commissioners, et al., the Florida Court of Appeals, First District, held (3 to 0) that the firefighter is entitled to workers comp coverage for PTSD. She first began experiencing nightmares in 2016; began seeing a therapist in 2017; after trauma runs involving children in 2017 and 2018, she left the Department on Nov. 27. 2018. Statute no longer requires proof of physical injury for workers comp. claim for mental stress. The new Florida statute expanding coverage for emergency responders with PTSD, without need to prove physical injury, was effective Oct. 1, 2018. She lost wages because her PTSD after the effective date of the statute and is therefore entitled to workers' comp for her prior traumatic incidents.

> "Application of section 112.1815 makes a difference in the determination of a claim like Wyatt's. For example, Wyatt does not claim to have suffered a physical injury at work, and the Workers' Compensation Law generally places strict limits on compensability for a mental or nervous work injury. A compensable physical injury must be the major contributing cause of the mental or nervous injury, and temporary benefits may not be paid for more than six months following the date of maximum medical improvement for the physical injury. See § 440.093, Fla. Stat. (2018). Under this provision (considered alone), Wyatt's claimed injury would not be compensable at all. Since its original enactment in 2007, however, section 112.1815 has eased this limitation for first responders like Wyatt by allowing for medical benefits under section 440.13 to treat a mental or nervous injury suffered at work, even if it was 'unaccompanied by a physical injury.' § 112.1815(2)(a)3., Fla. Stat. (2018).
>
> ***
>
> In 2018, the Legislature added a subsection five to section 112.1815. *See* ch. 2018-124, § 1, at 1655-57, Laws of Fla. The law took effect October 1, 2018, which was after Wyatt's exposure to the various traumas that we identified above, but before Wyatt suffered lost wages as a result of going out of work for her PTSD. *See id.* § 3, at 1657. The new provision expands compensability for first responders who suffer specifically from PTSD, a particular type of mental injury that ordinarily would have to be addressed under subparagraph (2)(a)3., which we just discussed. Subsection five now directs that PTSD suffered by a first responder be considered a 'compensable occupational disease' as provided in section 440.151. § 112.1815(5)(a), (c)1, Fla. Stat. (2018); *see Wilkes*, 309 So.3d at 688. Under section 440.151, then, a first responder who cannot work because of PTSD is entitled to not just medical benefits but also indemnity for lost wages stemming from the disability-even without any accompanying physical injury. *Cf.* § 440.151(1), Fla. Stat. (providing that an employee 'shall be entitled to compensation as provided by this chapter' if the employee becomes disabled as a result of 'an occupational disease'). https://law.justia.com/cases/florida/first-district-court-of-appeal/2022/19-4601.html

Legal Lesson Learned: The new PTSD statute covers loses of income incurred after its effective date.

15-19

IL: PTSD - CAPTAIN RESPONDED TO DOG ATTACK ON CHILD - LINE OF DUTY PENSION, AND WORKERS COMP PPD

On June 27, 2022, in City of Springfield v. The Illinois Workers' Compensation Commission (Robert Talbott), the Court of Appeals of Illinois, Fourth District (Workers' Compensation Commission Division), held (5 to 0), 2022 IL App (4th) 210338WC-U, that the Commission properly held that Captain Robert Talbott, who was awarded a line-of-duty disability pension on June 30, 2017, was also eligible to receive workers comp PPD [permanent partial disability] award $721.66 per week for 250 weeks; case remanded to Commission to re-calculate award. The claimant developed PTSD following the dog-attack incident and it was causing emotional symptoms that were preventing him from returning to work. Captain Robert Talbott on April 11, 2015 responded to a terrible dog bite scene, that contributed with subsequent diagnosis of PTSD. Claimant was awarded a line-of-duty disability pension on June 30, 2017. The City challenged an award of "permanent partial disability" arguing he could work in other professions, such as his 14 years parttime work at a funeral home.
https://public.fastcase.com/J%2FJP6pdidelsXxEE4k%2BLMmppr1xeX1%2Bm2bW38%2FPoc%2BjXR15UXAVR8dC2RoWWa4H5Xq9pVObZCpSmCaBhyWr74I1EN1To2hIbHKD6%2F8UayPI%3D

Legal Lesson Learned: PTSD can lead to a line-of-duty disability retirement and a permanent partial disability award.

15-18

NJ: PTSD - OFFICER CALLED TO FF'S SUICIDE WITH SHOTGUN – NOT CLOSE FRIENDS - NO ACCIDENTAL DISAB.

On March 30, 2022, in Barry Mesmer v. Board of Trustee, Police And Firemen's Retirement System, the Superior Court of New Jersey, Appellate Division, held (3 to 0), unpublished decision, the Board properly denied the application for accidental disability retirement; the deceased firefighter was someone he casually knew, but not close friends; under New Jersey case law the traumatic event must be "undesigned and unexpected" in job duties of a police officer.
https://www.njcourts.gov/attorneys/assets/opinions/appellate/unpublished/a3633-19.pdf

> "Mesmer received training, both at the police academy and through the course of his career in law enforcement, in responding to situations involving graphic and gruesome

deaths. Mesmer was not a rookie officer and, during his career in law enforcement, he responded to at least ten calls involving gruesome and disfigured dead bodies or serious injuries. Mesmer conceded he did not experience any disabling mental injury after responding to those deaths and he returned to work without incident after each of those events.

Additionally, while Mesmer knew M.H., the two men were not even casual friends. Mesmer provided no evidence of any close, personal relationship with the deceased that might have satisfied the undesigned and unexpected requirement under *Richardson*.

Mesmer knew he was responding to a suicide at an address where he knew the homeowner. On this record, nothing about the events of February 14, 2016, fell outside the scope of Mesmer's general duties as a police officer. Given the totality of the circumstances, it was not unreasonable for Mesmer to anticipate the aftermath of M.H.'s suicide.

On this record, we are satisfied there is ample credible evidence supporting the denial of Mesmer's application for ADR benefits and the Board's decision was not arbitrary, capricious, or unreasonable."
https://www.njcourts.gov/attorneys/assets/opinions/appellate/unpublished/a3633-19.pdf

Legal Lesson Learned: Under N.J. case law, this single traumatic event leading to PTSD did not qualify for added retirement benefits.

15-17

MD: PTSD - MEDICAL LEAVE 1-YR – OFFERED TAKE DEMOTION TO FF - **CAN'T PERFORM DUTIES** - NO FED. VIOL.

On March 18, 2022, in Stanley Abler v. Mayor and City Council of Baltimore, Beth P. Gesner, Chief U.S. Magistrate Judge, U.S. District Court for District of Maryland, granted the defense motion for summary judgment, finding no violation of the federal Rehabilitation Act since he could no longer perform the duties of a medic or a firefighter. Paramedic Abler suffered from PTSD stemming from an incident in April 2015 [no details about the incident in Court's opinion]. "After reporting to the Baltimore City Public Safety Infirmary ('PSI') for a medical evaluation, plaintiff was placed on medical leave effective June 7, 2015…. Plaintiff remained on medical leave for a year, and his clinician noted he was "disabled from all work." He requested a reduction in rank to return to work as a firefighter, but this was not granted and was forced to retire on November 22, 2016. https://casetext.com/case/abler-v-mayor-of-balt

"Here, plaintiff argues that he and his clinician believed he could perform the essential functions of a firefighter…. Plaintiff, however, provides no evidence to support his claim.

Instead, plaintiff references documents indicating that the BCFD engaged in the interactive process with other disabled employees, but these documents do not provide evidence of *plaintiff's* ability to perform the essential functions of a firefighter or some other position within the BCFD…. Further, plaintiff contends that while his medical providers noted that he was not able to work as a paramedic, they did not otherwise indicate that he was unable to perform as a firefighter or in a variety of other positions…. Plaintiff's argument, however, is not supported by the record. For example, while plaintiff's clinician opined that plaintiff was 'permanently disabled from returning to the BCFD as a Paramedic,' she also noted, two days before plaintiff retired, that plaintiff was 'disabled from *all work* at this time' and that she would 're-evaluate his condition in two months to see if he is prepared to try to enter the job force in a different position.' (emphasis added).

In addition, plaintiff admits that he "was not able to do any job functions, for the entire year [he] was off injured…." Further, plaintiff indicated in his answers to defendant's interrogatories that he suffered from PTSD stemming from an incident in April 2015, and he struggled with 'depression, anxiety, insomnia, flashback [sic], [and] cognitive issues that make it hard to focus, at times it is extremely debilitating where daily activities of living are difficult….' Plaintiff, however, fails to provide any evidence of how, despite his PTSD and 'extremely debilitating' medical conditions, he was able to perform the essential functions of a firefighter, such as extinguishing fires and rescuing emergency victims…. The court, therefore, concludes that plaintiff has failed to offer evidence that he was able to perform the essential functions of a firefighter or some other position within the BCFD…. Accordingly, plaintiff fails to satisfy the third element of his prima facie claim of failure to accommodate under the Rehabilitation Act."
https://casetext.com/case/abler-v-mayor-of-balt

Legal Lesson Learned: The clinician's determination that he was disabled "from all work" meant FD did not need to try find an accommodation.

15-16 [also filed, Chap. 7]

TX: PTSD - FEMALE FF NUDE VIDEO FOR HER HUSBAND (FF) – LEARNED 9 YRS LATER FF WATCHED IT – MAY SUE FD

On March 11, 2022, in Melinda Abbt v. City of Houston, John Chris Barrientes, the U.S. Court of Appeals for 5th Circuit (New Orleans) held (3 to 0) that the lawsuit against the City of Houston and Captain Barrientes should be reinstated. "Abbt has presented sufficient evidence to create a genuine dispute as to whether the City knew or should have known about the

harassment, and thus can be held liable." https://www.ca5.uscourts.gov/opinions/pub/21/21-20085-CV0.pdf

In a Concurring Opinion, Justice James C. Ho wrote:

> "Melinda Abbt is a firefighter. But at least two of her male superiors at the Houston Fire Department-Chris Barrientes and David Elliott-and perhaps countless others treated her as nothing more than a sexual object. They accessed a private, intimate, nude video that Abbt had obviously made exclusively for her husband. They did so without her knowledge or permission. And they watched it repeatedly, both on and off-duty, alone and in front of co-workers, *for over nine years*. The only reason Abbt ever discovered this most invasive violation of privacy was because Elliott finally confessed to her husband. Even to this day, Abbt cannot be sure whether anyone else at the Department has already seen the video-or may watch it in the future."
> https://www.ca5.uscourts.gov/opinions/pub/21/21-20085-CV0.pdf

Legal Lesson Learned: Terrible facts; City would be wise to quickly settle this case.

15-15

CA: PTSD – CHP TROOPER – FIREARM RETURNED – KILLED WIFE – SHOT HER BOYFRIEND, SUICIDE – NO IMMUNITY

On Feb. 25, 2022, in Phil Debeaubien v. State of California, California Highway Patrol, Todd Brown, et al., U.S. District Court Judge William B. Shubb, U.S. District Court for Eastern District of California, in a lawsuit filed by estranged wife's boyfriend who was shot in arm, denied the State of California and the CHP supervisors' motion for summary judgment. The service weapon had been returned after EAP counselors advised CHP he could return to work. https://public.fastcase.com/waZtJvSA54UAurM2rmIZz6DHvxBXKDNOBT4bWQ9B2C2XMExqnhPDmJ4RTlgjq%2FCO3g5z%2BjC1yjBDqKCmneuiR5bS8Q3ELHfgftRpjN8MXvk%3D

> "Plaintiff Philip Debeaubien ('plaintiff') brought this section 1983 action against the State of California; the California Highway Patrol ('CHP'); CHP officers Todd Brown, Reggie Whitehead, Ryan Stonebraker, Brent Newman, and Jeremy Dobler (collectively the 'CHP defendants'); Joy Graf; and Sabrena Swain; for various alleged constitutional and state tort offenses… The case arises out of events on September 3, 2018, wherein CHP officer Brad Wheat ('Wheat') shot plaintiff before fatally shooting Wheat's wife and himself.
>
> ***

> [Motion to dismiss is] DENIED as to defendants Dobler, Brown, Stonebraker, State of California, and California Highway Patrol on the issue of whether these defendants owed plaintiff a duty not to entrust Wheat with a firearm."

Watch the Jan. 26, 2022 TV interview with Plaintiff - includes bystander video of scene on Sept, 3, 2018 where you can hear shots being fired.

> "He's suing the CHP after an off-duty officer shot him. Here's what he hopes to change. Bystander video shows part of the 2018 murder-suicide incident involving CHP Lt. Brad Wheat and his estranged wife, Mary. Trae deBeaubien, who was dating Mary, was also shot and is suing the agency for returning Wheat's gun after he made threats."
> https://www.sacbee.com/news/local/article257698263.html

Feb. 25, 2022: "An Off-Duty Cop Murdered His Ex-Girlfriend. The California Highway Patrol Ignored the Red Flags." https://gemm.site/2022/02/25/an-off-duty-cop-murdered-his-ex-girlfriend-the-california-highway-patrol-ignored-the-red-flags/

Legal Lesson Learned: Returning a service weapon to a police officer suffering from PTSD or other serious mental should only be done after a Fitness for Duty (FFDE) psychological evaluation (FFDE) by an appropriately trained and competent licensed mental health professional.

> Note: Dr. Eric Birkley, Psychologist, has kindly provided this info on Fitness For Duty Evaluations [posted with her permission]. On May 26, 2022, Dr. Birley and the author of this newsletter, will both be on a panel for First Responder Mental Health Symposium. https://ceas.uc.edu/academics/departments/aerospace-engineering-mechanics/fire-science/news.html
>
> 3/25/2022
>
> Hi Larry,
>
> I would specify that when an employed officer makes specific threats of violence that the criterion standard is (under all circumstances I can think of) met to order a Fitness for Duty psychological evaluation (FFDE) by an appropriately trained and competent licensed mental health professional. Part of that professional's job is to provide feedback to the first responder agency on whether the criterion standard for a FFDE is met given the facts of the case. As mental health professionals, we expect that if a person is referred for a Fitness for Duty evaluation that they will most likely be placed on administrative leave, and/or other actions have been taken by the agency to limit their duties appropriately.

This is the criterion standard for a fitness for duty evaluation: “According to the Americans with Disabilities Act (ADA), when an employer has a reasonable belief, based on objective evidence, that a police officer may have a psychological condition that impairs his or her ability to perform essential job functions or poses a direct threat, an FFDE is “job-related and consistent with business necessity” (42 U.S.C. §12112[d][4][A]; 29 C.F.R. §1630.14[c]). Case law has established that an employer need not wait for objective evidence of impaired performance before justifying an FFDE when the employee is engaged in dangerous work.”

I perform FFDE for LEOs and most often agencies aren’t abreast of the criterion standard for ordering an FFDE and order one too prematurely (when someone is an “asshole” but does not have an identifiable mental health impairment) or wait too long as in this case as they may be unaware of their options. FFDEs are designed to safeguard the public and the agency and save departments/taxpayers millions – they cost around $3500 for a psychologist to perform and some departments don’t consider the alternative cost of a lawsuit.

Hope this is helpful! I attached a key article written by two leading police psychologists who literally wrote the book on FFDEs for LEO with several case law examples included.

> Current Issues in Psychological Fitness-for-Duty Evaluations of Law Enforcement Officers: Legal and Practice Implications (2016): Mayer ^0 Corey 2016 Current Issues in FFD evaluations of LEOs.pdf

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15-14 [also filed Chap. 10]

MA: CAPTAIN PSYCHIATRICT EXAM – FIRE CHIEF DENIED IMMUNITY – ALLEGED RETALIATION / BREACH OF FMLA

On Jan. 26, 2022, in Andrew Brennan v. City of Everett and Anthony Carli, the Appeals Court of Massachusetts held (3 to 0; unpublished decision) that trial judge properly denied the Fire Chief Anthony Carli's motion to be dismissed from lawsuit based on qualified immunity. "Here, Brennan alleged that Carli placed him on leave and provided false information to medical evaluators under the false belief that Brennan was mentally unfit." https://public.fastcase.com/9SKwsfNqTc6OieYDhNMyM%2BsbSTu241pOZ38l1fL3GtOxRE1iLhH6RZm0FIyTdVeF1XRK6Ebg7B5equTDg4ZQiMxFMDQEZko4UYsaxrmOuYk%3D

Legal Lesson Learned: If employee may need psychiatric evaluation, provide specific information to the medical evaluators; and if employee asks about FMLA, provide form to request leave.

> Note: The Court wrote:
>
> *FMLA interference claim*. Employers are required to notify employees of their FMLA rights and to respond promptly to employee questions about the applicability and procedures for FMLA leave. See 29 C.F.R. §§ 825.300 (c)(1), (d) (2019). More specifically, an employer must provide an employee who requests FMLA leave with notice of eligibility within five business days absent extenuating circumstances. See 29 C.F.R. § 825.300(b)(1) (2019). Here, Brennan claimed that Carli interfered with his FMLA rights by refusing to provide him with information about these rights upon request thereby causing damages. On these facts, the complaint alleged violations of clearly established law of which a reasonable fire chief would be aware. Cf. *Crevier v. Spencer*, 600 F.Supp.2d 242, 257 (D. Mass. 2008) ('employer's failure to explain FMLA procedures can constitute interference with employee's FMLA rights' [quotation and citation omitted])." https://public.fastcase.com/9SKwsfNqTc6OieYDhNMyM%2BsbSTu241pOZ38l1fL3GtOxRE1iLhH6RZm0FIyTdVeF1XRK6Ebg7B5equTDg4ZQiMxFMDQEZko4UYsaxrmOuYk%3D

15-13

NY: PTSD - BASED ON SEVERAL INCIDENTS 26 YRS ON FD – WORKER'S COMP – DON'T NEED "EXTRAORDINARY" EVENT

On Dec. 23, 2021, In the Matter of the Claim of Brian C. Reith v. City of Albany, and Workers. Compensation Board, the Supreme Court of New York (Third Department, held (4 to 0) that the Workers Compensation Board is reversed and the firefighter is entitled to workers comp since he

did “sustain a causally-related psychological injury” based on several incidents. New York in 2017 amended statute so no longer must prove stressful incident was “greater than that which other similarly situated workers experienced in the normal work environment.”

> “During the hearing, claimant explained that he had witnessed several traumatic incidents during his nearly 26-year career as a firefighter, including a suicide, a triple homicide of children, car accidents with fatalities and individuals who had been "dead for days stuck to the floor." He also recounted spraining his ankle after he slipped on brain matter while rendering aid to a victim, experiencing CPR regurgitation while attempting to resuscitate a fellow firefighter and dragging a woman out of a fire, which resulted in ‘deglov[ing] her.’ *** We reverse. Prior to the enactment of Workers' Compensation Law § 10 (3) (b) in April 2017 (see L 2017, ch 59, part NNN, subpart I, § 1), a claimant seeking to recover for a psychological injury was required to ‘demonstrate that the stress that caused the claimed mental injury was greater than that which other similarly situated workers experienced in the normal work environment’ … The statutory amendment, however, effectively removed that hurdle for certain first responders by providing, as relevant here, that where a firefighter ‘files a claim for mental injury premised upon extraordinary work-related stress incurred in a work-related emergency, the [B]oard may not disallow the claim, upon a factual finding that the stress was not greater than that which usually occurs in the normal work environment’ (Workers' Compensation Law § 10 [3] [b]; see Matter of McMillan v Town of New Castle, 162 A.D.3d 1425, 1426 [2018]).” https://law.justia.com/cases/new-york/appellate-division-third-department/2021/532779.html

Legal Lesson Learned: Great decision, and helpful statute, recognizing that PTSD can arise from multiple incidents.

> Note: The Workers Comp. Board wisely recognized the 2017 statutory amendment applied to multiple incidents, not just a singular event.
>
> > Footnote 1: “The Board initially ruled - citing the singular form of the phrase ‘in a work-related emergency’ - that the statutory amendment did not apply where the injury sustained was the product of stress-inducing events incurred over a period of time. Upon reconsideration, the Board effectively reversed course, ruling that the amendment could apply where, as here, a claimant ‘alleges multiple incidents of exposure rather than one singular event’ (citing Employer: Town of New Castle, 2018 WL 6132752, *4, 2018 NY Wrk Comp LEXIS 11628, *10 [WCB No. G140 4105, Nov. 16, 2018]).”

In Ohio, Governor DeWine on Jan. 9, 2021 signed into law House Bill 308, which created a fund for first responders who become disabled from PTSD, without any need to also have physical injury. See statutory language: https://search-prod.lis.state.oh.us/solarapi/v1/general_assembly_133/bills/hb308/EN/06?format=pdf

> Sec. 126.65. (A) The state post-traumatic stress fund is created in the state treasury. The director of budget and management shall be the trustee of the fund.

(B) The state post-traumatic stress fund shall be used for the following purposes: (1) Payment of compensation for lost wages that result from a public safety officer being disabled by post-traumatic stress disorder received in the course of, and arising out of, employment as a public safety officer but without an accompanying physical injury."

15-12

PA: PET THERAPY DOG – IN COURT TO COMFORT 13-YEAR-OLD AUSTIC CHILD – WITNESS TO A MURDER

On September 22, 2021, in Commonwealth of Pennsylvania v. Sheron Jalen Purnell, the Supreme Court of Pennsylvania (Middle District) held (7 to 0) that judge properly allowed the comfort dog in the courtroom, and upheld jury verdict of guilty of third-degree murder and sentence of 20.5 to 47 years of imprisonment.

> "We granted allowance of appeal in this matter to consider the appropriate test to apply to a trial court's determination concerning whether a witness in a criminal case may utilize a 'comfort dog' for support during his or her trial testimony. We hold that a trial court should balance the degree to which the accommodation will assist the witness in testifying in a truthful manner against any possible prejudice to the defendant's right to a fair trial. Here, the trial court allowed a witness to testify with the assistance of a comfort dog, and the Superior Court concluded that the trial court did not abuse its discretion in this regard. For the reasons stated below, we agree with the Superior Court and, therefore, affirm that court's judgment.
>
> ***
>
> The court noted that: (1) its legal reasoning for allowing the dog to be present could be found on the record; (2) the dog was situated under the witness box prior to the jury entering the courtroom and could not be seen by the jury, and (3) it provided instructions to the jury concerning the presence of the dog."
> https://casetext.com/case/commonwealth-v-purnell-10

Legal Lesson Learned: Great decision! Dogs can also comfort emergency responders.

> See article: "Comfort Dogs Allowed For Some During Criminal Trials, PA Supreme Court Rules (9/22/2021)." **https://dailyvoice.com/pennsylvania/chester/news/comfort-dogs-allowed-for-some-during-criminal-trials-pa-supreme-court-rules/816798/**

15-11

WV: FF WITH PTSD – 20 YRS ON THE JOB – DENIED WORKERS COMP – STATE LAW REQUIRES THERE BE PHYSICAL INJURY

On Dec. 11, 2020, in John Angle v. City of Huntington, the State of West Virginia Supreme Court of Appeals, held (5 to 0) that under state statute he was not entitled to workers comp for his PTSD.

> "All of Mr. Angle's symptoms, and the requested diagnoses, were caused by nonphysical means and did not result in any physical injury or disease. Pursuant to West Virginia Code § 23-4-1F, the claim was properly denied.
>
> ***
>
> West Virginia Code § 23-4-1F provides that:
>
> > no alleged injury or disease shall be recognized as a compensable injury or disease which was solely caused by nonphysical means and which did not result in any physical injury or disease to the person claiming benefits. It is the purpose of this section to clarify that so-called mental-mental claims are not compensable under this chapter." https://law.justia.com/cases/west-virginia/supreme-court/2020/19-0970.html

Legal Lesson Learned: Some states have now enacted statutes allowing PTSD coverage without physical injury.

> Note: Feb. 13, 2020: "Ohio House passes bill expanding first responders workers' compensation for PTSD. The legislation would allow first responders to seek workers' compensation even if they don't have a physical condition that led to PTSD." https://www.firerescue1.com/ptsd/articles/ohio-house-passes-bill-expanding-first-responders-workers-compensation-for-ptsd-QXXQPU6H47rb9Z8o/
>
> See also: "Nine states (California, Connecticut, Idaho, Louisiana, Nevada, New Hampshire, New Mexico, Oregon, and Texas) have passed legislation addressing benefits for first responders with PTSD in 2019. In 2018, 2 states (Florida and Washington) passed legislation expanding benefits for first responders with PTSD." https://www.gerberholderlaw.com/workers-comp-ptsd-by-state/

TX: PARAMEDIC WITH PTSD – **DENIED "ON-DUTY"** DISABILITY PENSION – 75% Of SALARY - CONFLICING PSYCHOLOGISTS

On Nov. 17, 2020, in Gregory Green v. Houston Firefighters' Relief And Retirement Fund, the State of Texas in the Fourteenth Court of Appeals, held (3 to 0) that trial court correctly upheld the Board to deny on-duty disability pension for paramedic with 17-years of experience, given conflicting opinions of two mental health professionals. Plaintiff may be eligible for a non-duty disability pension; on-duty disability pensions are 75% of average salary if not capable of any gainful future employment; or 50% if can't perform firefighter duties.

"The evidence before the Board and subsequently before the trial court was in direct conflict. [Dr. Ashley] Woolbert opined that Green experienced disability to the degree that he could not perform any full-time work. [Dr. Edwin] Johnstone, on the other hand, opined that Green's only limitation in performing full-time work was the physical limitation of his shoulder. In a substantial evidence review the agency's action will be sustained if the evidence is such that reasonable minds could have reached the conclusion that the agency must have reached to justify its actions. *Texas Health Facilities Com'n*, 665 S.W.2d at 453. Because the evidence was conflicting, the Board could have determined after reviewing Johnstone's reports that Green did not qualify under the Act for on-duty disability. *See id*. (If there is evidence to support either affirmative or negative findings on a specific matter, the decision of the agency must be upheld)."
https://public.fastcase.com/Wl%2B2t%2BeVuI35%2FN70vAMFZlfrbL2Iv9t8X190JkA%2BKSgGR212V5tgaR0%2FcTyilOxc

Legal Lesson Learned: Given the conflicting experts' reports, Courts will uphold decisions of Boards.

15-9

SC: PARAMEDIC ON BAD MVA RUN – PTSD / PANIC ATTACKS – TOLD HOSP. CAN NO LONGER DO JOB, TERMINATED

On June 25, 2020, in Stephen E. Sanders v. McLeod Health Claredon, U.S. District Court Judge David C. Norton, U.S. District Court of South Carolina, Charleston Division, granted the hospital's motion for summary judgment; on August 10, 2017, he responded MVA involving logging truck and an SUV, where SUV driver was trapped by logs and died. Court wrote: "[T]here is evidence in the record that Sanders could not perform the essential functions of his job at the time of his August 18, 2017 discharge. Sanders testified in his deposition that shortly after the August 10th accident, he began experiencing 'severe . . . emotional problems',

including "anxiety, depression [and] panic attacks …. As a result, Sanders noted that he 'couldn't stay around' his place of work… As the first element of a prima facie case of disability discrimination, Sanders must show that he was a qualified individual with a disability at the time of his firing. There is no dispute that Sanders suffered from PTSD, a disability under the ADA, at the time of his discharge. The court's inquiry thus focuses on whether Sanders was a "qualified individual." Under the ADA, "the term 'qualified individual' means an individual who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires." 42 U.S.C. § 12111(8). The court agrees with the R&R that summary judgment is warranted on this basis because there is no evidence in the record that Sanders could perform the essential functions of his job at the time of his firing. https://public.fastcase.com/Wl%2B2t%2BeVuI35%2FN70vAMFZkQk422sTW9%2BWIlpk%2BnE1B7e7DrNn16tDd9SfmLDmtL4

Legal Lessons Learned: If the paramedic had asked the hospital for a leave of absence or other reasonable accommodation, and the hospital refused, this lawsuit might not have been dismissed.

15-8

NJ: FF FAILED PSYCHOLOGICAL EXAM FOR CAREER POSITION – FORMER MARINE – MEDICAL DISCHARGE WITH PTSD – APPEAL DENIED

On June 12, 2020, in Frank Rivera v. Township of Cranford, the Superior Court of New Jersey, Appellate Division, held (unpublished opinion) that the jury's decision in favor of the Township is affirmed. The Court wrote: "Plaintiff's superiors denied ever hearing about any issues stemming from plaintiff's military service or any medical diagnoses or treatment. There is no evidence to support the conclusion that the persons responsible for deciding whether to appoint plaintiff as a career firefighter–Dolan and the Township Committee–had either engaged in making or had heard the negative comments."
https://images.law.com/contrib/content/uploads/documents/399/44956/psych.pdf

Legal Lessons Learned: PTSD is a difficult burden. Question: Would you allow the firefighter in this case to later take another psychological exam?

> Note: See this article: Tips on how to pass your Firefighter Psychological Test (June 24, 2019): First, consider answering the questions briefly and honestly with the best of your ability. Secondly, before you answer any questions from the interviewer, take time to think and come up with the correct answer. Thirdly, don't rush with your answers, be calm consider the questions for some time, take a deep breath and offer your solutions. http://www.firefighters-exam.com/2019/06/24/tips-on-how-to-pass-your-firefighter-psychological-test/

15-7

NY: FORMER FDNY EMT WITH PTSD – U.S. SOCIAL SECURITY DENIED BECAUSE SHE CAN PERFORM OTHER JOBS – COURT ORDERS SOCIAL SECURITY TO MAKE FUTHER REVIEW

On May 18, 2020, in Eileen Dechberry v. Nancy A. Berryhill, Acting Commissioner of Social Security, Chief U.S. District Court Judge Roslynn R. Mauskopf, Eastern District of New York (Brooklyn) granted the EMT's motion to remand to Social Security for further review. https://public.fastcase.com/Wl%2B2t%2BeVuI35%2FN70vAMFZhAr68AdbratCNmy2dcHSKg4lqOPhLPvbyL5oFysv%2FPr

Legal Lessons Learned: Mental health for emergency responders is thankfully now an item of great attention in the Fire, EMS and Law Enforcement, including Peer Support Teams.

15-6 [Also filed, Chap. 9 & Chap. 10]

PA: FF PANIC ATTACK ON DUTY – PTSD, MEDICATION – NO LONGER QUALIFIED AS FF – TERMINATION NOT VIOL. ADA

On April 17, 2020, in Robert Carpenter v. York Area United Fire And Rescue, U.S. District Court Judge Christopher C. Conner, Chief Judge, Middle District of Pennsylvania, granted the FD's motion for summary judgment. The Court held that the firefighter was not a "qualified individual for ADA purposes because he could not perform the essential functions of his job with or without reasonable accommodation," and indefinite leave of absence was not a reasonable accommodation; "there must be some expectation that the employee could perform his essential job functions in the 'near future' following the requested leave.

> "[Fire Department] argues that Carpenter is not a qualified individual for ADA purposes because he could not perform the essential functions of his job with or without reasonable accommodation. We agree." https://public.fastcase.com/Wl%2B2t%2BeVuI35%2FN70vAMFZkkc03nKI8qkpSJ%2FzmzLggswfoR1RvbDETmM60pPGUhc

Legal Lessons Learned: FF on leave and undergoing treatment, who desires to get back to the job, needs to stay in communication with FD. FMLA also addressed (see below).

Note: Court also held that the FF was not entitle the FMLA leave. "In a letter dated October 11, 2017, YAUFR denied Carpenter's FMLA leave request…. YAUFR explained that, although it was a covered employer under the FMLA, it did not employ the requisite number of people for Carpenter to be considered an 'eligible employee' under FMLA regulations. *** To qualify as an 'eligible employee,' the employee must be 'employed at a worksite where 50 or more employees are employed by the employer within 75 miles of that worksite.' 29 C.F.R. § 825.110(a)(3); see 29 U.S.C. § 2611(2)(B)(ii). YAUFR avers, and Carpenter concedes, that YAUFR has never employed 50 or more people."

15-5

MA: **ANGER MGT, THREATS TO "GO POSTAL"** – PAID LEAVE 1-YR - **DIDN'T COMPLY RETURN**-TO-WORK REQUIREMENTS - FIRED

On April 2, 2020, in Gerald Alston v. Town of Brookline, Massachusetts, Senior U.S. District Court Judge George A. O'Toole, Jr., District of Massachusetts, granted summary judgment for the Town, finding that he failed to meet the Fire Chiefs return to work requirements, including completing an anger management course, and passing a fitness for duty evaluation, and drug test.

"Alston was evaluated both by a psychiatrist chosen by the Town and, after his request for evaluation by a different doctor, an evaluation by a psychiatrist from the Massachusetts General Hospital was arranged. Both psychiatrists recommended essentially the same return-to-work conditions for Alston, and it is undisputed that Alston never complied with those conditions. Nor did he provide any conflicting opinion from another psychiatrist." **https://jgpr.net/wp-content/uploads/2020/04/433-MSJ-Order.pdf**

Legal Lessons Learned: The Town wisely proposed a return-to-work plan and provided adequate time for completion of the plan.

15-4

NY: PTSD - CAR FIRE / MASK DISLODGED BY SNOW - **PSYCHIATRIST'S NOTES FF INTERVIEW** - ACCIDENTAL DISAB. RETIREMENT DENIED

On April 25, 2019, In The Matter of Alexander Hanon v. Thomas P. PiNapoli, State Comptroller, the New York Appellate Division, Third Department, (5 to 0), upheld the denial of his claim.

> "Leslie Citrome, the psychiatrist who conducted an independent medical examination of petitioner on behalf of the Retirement System, opined that petitioner's PTSD and depressive disorder were causally related to [his off duty] June 2010 motor vehicle accident. He stated that the February 2010 accident [car fire run, snow from garage roof] was incidental to his psychiatric assessment as petitioner only mentioned this incident briefly, indicating that he suffered cardiac problems from inhaling smoke, and focused primarily on the June 2010 motor vehicle accident in discussing his history of psychiatric problems and symptoms. https://law.justia.com/cases/new-york/appellate-division-third-department/2019/527240.html

Legal Lessons Learned: Courts rely on the expert testimony of independent medical examiners. Psychiatrist's notes from interview with firefighter become part of the "psychiatric history" of patient.

15-3

IL: PTSD – COURT ORDERS DISABILITY PENSION - CHICAGO PARAMEDIC'S TRAUMATIC WORK EXPERIENCES

On Feb. 1, 2019, in Leah Siwinski v. The Retirement Board of the Fireman's Annuity and Benefit Fund of the City of Chicago, the Appellate Court of Illinois (First District) held (3 to 0),

> "In summary, because the manifest weight of the evidence showed that the plaintiff sustained PTSD arising from an act or acts of duty while working for CFD, and as a result, was disabled from performing any of her assigned duties, we reverse the decision of the Board that denied her a duty disability pension, and reverse the decision of the circuit court, which confirmed the Board's decision."
> https://law.justia.com/cases/illinois/court-of-appeals-first-appellate-district/2019/1-18-0388.html

Legal Lesson Learned: PTSD is a recognized disability issue in the emergency services.

> Note: See April 13, 2018 article: Study: More firefighters died by suicide than in the line of duty in 2017 - A study found that 103 firefighters and 140 police officers died by suicide in 2017. https://www.firerescue1.com/fallen-firefighters/articles/379994018-Study-More-firefighters-died-by-suicide-than-in-the-line-of-duty-in-2017/

15-2

MN: PTSD – NEW STATUTORY PRESUMPTION THAT PTSD IS WORKPLACE

Effective Jan. 1, 2019, the new state statute,

> "post-traumatic stress disorder was reclassified as an occupational disease for first responders. That includes police officers, firefighters, paramedics, emergency medical technicians, and nurses who provide emergency medical services outside of a medical facility." https://www.postbulletin.com/news/public_safety/ptsd-now-an-occupational-disease-for-first-responders/article_27a2353c-15d3-11e9-a864-cb74a37ce7f1.html

Legal Lessons Learned: Several states have enacted similar statutes. See "Update: Workers' Comp Coverage for Firefighters," https://www.wci360.com/update-workers-comp-coverage-for-firefighters/.

> See also this report: https://www.minnesotacomp.com/blog/2018/11/post-traumatic-stress-disorder-may-become-a-presumptive-condition-for-first-responders/

- So far in 2018, of 103 state bills dealt with workers compensation provisions for first responders and only 6 bills past passed "true occupational presumption for PTSD." Washington State, Florida, Vermont, Hawaii, New Jersey, and New Hampshire enacted inclusion of the PTSD presumption into their workers' compensation legislation.
- In 2017, Colorado passed a bill recognizing PTSD as compensable under workers compensation. Then the state passed a bill allowing the treatment of PTSD using medical marijuana.
- South Carolina created a $500,000 fund to help fund first responders out of pocket medical costs related to the treatment of PTSD.
- Texas passed an act that eases the burden for first responders filing PTSD claims, requiring the lower standard of proof: "preponderance of evidence" and without the need to declare medical impairment.
- New York included PTSD references in the 2018 budget that would allow first responders to claim personal injury based on "extraordinary work-related stress" [Hanson & Watson, "Addressing the Emergence of PTSD Presumption: Issues and Solutions" pdf].

> See also Jan. 17, 2019 article from Massachusetts: "Critical incident intervention for first responders bill signed into law." https://www.wwlp.com/news/massachusetts/critical-incident-intervention-for-first-responders-bill-signed-into-law/1706453191

15-1

NJ: PTSD – POLICE OFFICERS MUST PROVE EXPERIENCED "TERRIFYING" & "UNEXPECTED" EVENT

On June 5, 2018, in Christopher Mount v. Board of Trustees, Police and Fireman's Retirement System, the New Jersey Supreme Court (7 to 0) held in two cases (1) that police officer who observed three teenagers burned to death in MVA may have a claim; but (2) police hostage negotiator has no claim when SWAT Team killed the assailant.

> "Although the shooting was clearly devastating to Martinez -- an officer exemplary for his professionalism and compassion in highly stressful circumstances -- it was not "unexpected…."
> https://law.justia.com/cases/new-jersey/supreme-court/2018/a-9-16.html

Legal Lessons Learned: PTSD accidental disbenefit ability claims, with no physical injury, are particularly difficult to prove.