



FIRE, EMS & SAFETY NEWSLETTER

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[File: Chapter 13]

OHIO: CONFIDENTIAL MEDICAL RECORDS – OHIO SUPREME COURT SENDS “STRONG MESSAGE” THAT THOSE WHO IMPROPERLY DISCLOSE RECORDS CAN BE SUED FOR DAMAGES - ATTORNEY IN DIVORCE ACTION SUBPOENAED HUSBAND’S PSYCHIATRIC RECORDS, BUT THEN WITHOUT HIS PERMISSION GAVE THEM TO PROSECUTOR IN PENDING ASSAULT CASE

On July 9, 2008, the Ohio Supreme Court in Hageman v. Southwest General Health Ctr., 119 Ohio St.3d 185, 2008-Ohio-3343, held that release of a patient's medical records, obtained through litigation, could result in personal liability for the attorney. This case should send a message to fire & EMS organizations regarding patient records – there is not only an obligation under HIPAA, but also under state law to protect patient medical information. Subpoenaed

Chief Justice Moyer wrote the opinion of the majority opinion (5 to 2). Kenneth Hageman began seeking psychiatric treatment in January, 2003, including homicidal thoughts about his wife. He was treated for bipolar disorder through July 2003. His wife filed for divorce in February, 2003 and was represented by attorney Barbara Belovich, Esq. Mr. Hageman filed a counterclaim in the divorce action, seeking custody of the couple's minor child.

Mr. Hageman allegedly assaulted his wife at their home, and criminal charges were filed against him. His wife also received a domestic violence protective order against him, suspending all contact by him with his wife or child until a full hearing could be scheduled.

Barbara Belovich, Esq. issued a subpoena to Mr. Hageman's psychiatrist, in preparation for the protective order hearing, seeking all of his medical treatment records. The psychiatrist's office, without any release from Mr. Hageman, faxed the records to Ms. Belovich, Esq.

On the day of the hearing on the protective order, the prosecutor in the criminal assault case attended the hearing as an observer. Prior to the start of the hearing, Ms. Belovich, Esq. gave the prosecutor a copy of the psychiatric treatment records.

The hearing did not proceed since Mr. & Mrs. Hagerman entered into a separation agreement that was ultimately incorporated into a divorce decree entered by the trial court.

Chief Justice Moyer confirmed in his opinion that the medical records were entered into evidence never used in the divorce or the criminal case:

“Hagerman’s medical records were therefore never admitted into evidence in the divorce / protective-order case. Likewise, they were not admitted in the criminal matter, and Hagerman was ultimately acquitted.”

Shortly after the divorce decree was entered, Mr. Hagerman then sued for disclosure of his medical records without his authorization: Barbara Belovich, Esq., Hagerman’s ex-wife, Dr. Thysseril (psychiatrist), Oak Tree Physicians (Sr. Thysseril’s employer), and Southwest General Center (the hospital housing Oak Tree). The trial judge granted summary judgment for all defendants; he appealed. The Ohio Court of Appeals for Cuyahoga County affirmed the dismissal of all defendants, except the attorney, Barbara Belovich, Esq. The Ohio Supreme Court agreed to hear her discretionary appeal.

The Ohio Supreme Court majority held that the lawsuit against Ms. Belovich, Esq. should be reinstated. Chief Justice Moyer reviewed numerous state and federal laws which protect the confidentiality of medical records, including the medical exception in the Ohio Public Records Act [Ohio Rev. Code 149.43(A)(1)(a)] and the federal Health Information Portability and Accountability Act of 1966 [“HIPAA” and federal HIPAA regulations; 45 CFR 164.502]. The majority held:

“By giving the psychological records she obtained in the divorce case to the prosecutor in the criminal case against Hagerman, Belovich violated Hagerman’s rights to keep that information confidential. Allowing attorneys with such information obtained through discovery to treat the information as public would violate the policy of maintaining the confidentiality of medical records. We therefore recognize that waiver of medical confidentiality for litigation purposes is limited to the specific case for which the records are sought and that an attorney who violates this limited waiver by disclosing the records to a third party unconnected to the litigation may be held liable for these actions.”

Legal Lessons Learned: Fire & EMS Departments should have a clear SOG or policy on release of patient EMS records when a subpoena is served on the department. Suggestion – notify the patient that a subpoena has been served and give the patient an opportunity to file a motion to quash the subpoena. If there is a motion filed, your FD attorney can provide the records to the judge for an “in camera” inspection.

[File: Chapter 17]

OHIO: PROMOTION - TRIAL COURT IMPROPERLY ORDERED PROMOTION OF “ACTING” POLICE SERGEANT TO PERMANENT POSITION - UNDER CBA THE ARBITRATOR HAD ALREADY RULED THAT THE CITY MUST APPOINT “ACTING” OFFICERS TO FILL VACANCIES, BUT THESE WERE ONLY

TEMPORARY POSITIONS - ARBITRATOR'S RULING IS FINAL UNLESS EVIDENCE OF FRAUD

On May 15, 2009, in Joseph C. DiPietrantonio v. City of Norwood, OHIO et al., 2009 Ohio 2260, 2009 Ohio App. LEXIS 1893 (Ohio Court of Appeals for the 1st District, Hamilton County) the court held (3 to 0) that the trial judge did not have subject-matter jurisdiction over the lawsuit filed by Officer DiPietrantonio seeking a promotion to Sergeant based on his time as an “acting Sergeant” and therefore the trial judge’s order of promotion is reversed.

The Norwood police union entered into a 3-year CBA, 2003- 2005, which provided for one position of Police Captain for the 28-member PD. Upon retirement of the incumbent Police Captain in April, 2004, the union filed a grievance requesting that an “acting” Captain be appointed while the city’s Civil Service Commission conduct a promotion exam. The union also sought “acting” Lieutenant and Sergeant positions be authorized, with appropriate increases in their pay. The city refused; the Court of Appeals explained:

“Because that appointment [for Captain] would trigger a vacancy in the lieutenant position, the union requested that those positions also be filled on an acting basis. The city refused to make the requested appointments, citing a temporary restraining order that had enjoined the filing of vacancies in the lieutenant and sergeant ranks.”

The grievance could not be informally resolved through the steps of the grievance process, and went on to an arbitration hearing. On Dec. 7, 2004, the arbitrator sustained the union’s grievance, finding that the city in the past had filled vacancies on an “acting” basis and is bound by that past practice. The arbitrator ordered the city to appoint an “acting” Captain, an “acting” Lieutenant and an “acting” Sergeant. The arbitrator ordered that these acting officers remain in their acting positions until permanent promotions were made by the city’ Civil Service Commission. The arbitrator further confirmed that these were **temporary** appointments, and the union agreed that those receiving these acting appointments would not be establishing any “tenure” from such appointments.

Police Officer John Brown was appointed “acting” Sergeant. The city filed a motion in Court of Common Pleas to modify or vacate this arbitration order. However, the city and the union reached a settlement agreement on Nov. 16, 2005, and the city agreed to appoint Officer John Brown as “acting” Sergeant, and would also proceed to appoint an “acting” Lieutenant and an “acting” Captain.

In March, 2007, “acting” Sergeant John Brown retired. Officer DiPietrantonio was appointed to replace him. Under the arbitrator’s decision, the “acting” officers would receive the pay of the “acting” position back to January 1, 2005. [THIS NOT A TYPO – JAN. 1, 2005.] This unusual back pay provision led to the litigation filed in this case.

When the city’s Civil Service Commission posted in June, 2007 a Notice Of Examination for the Sergeant position, DiPietrantonio filed a lawsuit in Hamilton County Court of Common Pleas to enjoin the Commission from holding the exam until after the Commission had “provisionally” appointing him as Sergeant. He sought this “provisional” appointment because it would give him two (2) advantages over all others applying for promotion to Sergeant. As explained by the Court of Appeals, DiPietrantonio was seeking promotion based on two Ohio Revised Code provisions that have since been replaced:

“[T]he provisional employee could pass a noncompetitive civil service examination [under former Ohio Rev. Code 124.26(B)], or he could get the permanent appointment automatically if he had served in the position for a two-year period in which no competitive examination had been held [under former Ohio Rev. Code 124.271.]”

DiPietrantonio convinced a Common Pleas judge that since he received back pay from Jan. 1, 2005, he was deemed to be in that position for two-year period without a competitive examination being held by the Civil Service Commission, and he was therefore entitled to a permanent promotion to Sergeant effective Jan. 1, 2007.

The city, the Civil Service Commission, and the police union disagreed, and filed an appeal. The Court of Appeals reversed the trial judge:

“When parties agree to submit disputes to binding arbitration, they ‘must accept the result, even it is legally or factually wrong.’ [Ohio Revised Code] Chapter 271 provides the exclusive statutory remedy for appealing arbitration awards to the courts of common pleas.”

In this case, the court did not have subject-matter jurisdiction. The only proper means of challenging the 2004 decision of the arbitrator was through the statutory procedure prescribed by R.C. 2711. DiPietrantonio did not avail himself of that procedure in a timely manner, and his attempt to circumvent the statutory procedure through a declaratory-judgment action was invalid.”

Legal Lessons Learned: Arbitrations under collective bargaining agreements are “binding” on all members of the union. In Ohio, a court may vacate an arbitrator’s award only for the limited reasons in Ohio Rev. Code 2711.10, including “(A) The award was procured by corruption, fraud, or undue means; (B) There was evidence partiality or corruption on the part of the arbitrators, or any of them.”

[File: Chapter 4]

OHIO: CIVIL IMMUNITY - POLICE OFFICER DISMISSED FROM LAWSUIT – TRIAL COURT SHOULD HAVE PROMPTLY DISMISSED HIM SINCE EVIDENCE WAS CLEAR THAT OFFICER DID NOT ACT IN “PERVERSE DISREGARD OF A KNOWN RISK” - OFFICER REPEATEDLY FIRED HIS SERVICE WEAPON AT A SUSPECT WHO POINTED A SHOTGUN AT HIM; UNFORTUNATELY A BYSTANDER WAS ALSO SHOT IN HER LEG

On May 4, 2009, the Ohio State Bar Association published Scott v. Longworth, 180 Ohio App.3d 73, 2008-Ohio-6508 (Ohio Court of Appeals for First District, Hamilton County, Dec. 12, 2008). Two police officers were on bike-patrol, at 2 am in a high-crime area in Cincinnati, when they observed a fight between two men in a hair salon on May 26, 2005. One of the men, Donte Williams, had a 12-gauge shotgun hung over his shoulder on a sling. Officer Mark Longworth ordered Williams to drop the shotgun, but instead he turned towards the officer. Officer Longworth fired multiple shots, firing until Williams hit the ground. Williams was hit

in his right flank and left shoulder. Three other civilians were also in the salon, including Tiffanie Scott, owner of the hair salon; she was hit in the leg by one of the officer's shots.

She sued Officer Longworth and the City of Cincinnati, claiming he acted with "gross negligence" and that the city negligently retained and supervised the officer. The city filed a motion for summary judgment, asking the trial judge to dismiss both the city and Officer Longworth from the case. The trial court dismissed the city, but refused to dismiss the officer and would let a jury decide his liability. The city's attorneys filed an immediate appeal on behalf of the officer.

The Court of Appeals (3 to 0) reversed and ordered Officer Longworth dismissed from the case. The Court cited the Ohio Supreme Court's 2008 decision in O'Toole v. Denihan, 118 Ohio St.3d 374, 008-Ohio-2574, involving a lawsuit against a county employee, holding that "recklessness is a perverse disregard of a known risk. Recklessness, therefore, necessarily requires something more than mere negligence. The actor must be conscious that his conduct will in all probability result in injury."

The Court of Appeals also referenced helpful Ohio Revised Code provisions:

"An employee of a political subdivision is generally not liable for personal injury in connection with the employee's performance of a governmental or proprietary function. [Footnote 4; Ohio Revised Code 2744.02(A)(1)]. But the employee is stripped of immunity if (1) his acts or omissions were manifestly outside the scope of his employment or official responsibilities, (2) his acts or omissions were with malicious purpose, in bad faith, or in a wanton or reckless manner, or (3) civil liability is expressly imposed upon him by a section of the Revised Code. [Footnote 5, Ohio Revised Code 2744.03(A)(6).]

Applying those standards the Court finds that Officer Longworth's conduct was not reckless:

"Williams had leveled a shotgun at a uniformed police officer who had ordered him to drop it. Officer Longworth's actions were reasonably calculated to defend himself and others. There was simply no evidence that Officer Longworth had consciously fired his gun with the knowledge that it was substantially certain that a bystander would be injured."

In a concurring opinion, Judge Painter [who is world-famous for courses in improved writing for attorneys, and has recently been appointed to be a judge on a United Nations' court in New York City] wrote:

"I concur, of course. What else was Officer Longworth to do? A guy points a shotgun right at you at 2:00 am. You shoot.

Unfortunately, Scott was in her salon a short distance away. If the alternatives were (a) to be shot almost point-blank with a shotgun, or (b) to shoot at the bad guy, knowing no one was very close, I know which one I would choose. In my view, Officer Longworth's actions were not even negligent, much less reckless or perverse."

Legal Lessons Learned: In the fire service, there are an increasing number of lawsuits being filed against Incident Commanders by individuals injured at fire scenes, including even

firefighters. Ohio Revised Code provisions are most helpful to protect Ohio fire and EMS officers.

[File: Chapter 1]

OHIO: SEARCH WARRANTS – EVIDENCE SEIZED DURING EXECUTION OF SEARCH WARRANT STILL ADMISSABLE AT TRIAL, EVEN IF AFFIDAVIT WAS DEFICIENT, UNDER U.S. SUPREME COURT’S “GOOD FAITH EXCEPTION”

On May 11, 2009, the Ohio State Bar Association published State of Ohio v. Nunez, 180 Ohio App.3d 189, 2008-Ohio-6806 (Ohio Court of Appeals for 6th District, Huron County, Dec. 19, 2008). Lorenzo Nunez, Jr. pled no contest to possession of cocaine, subject to his right to appeal the trial judge’s denial of his motion to suppress evidence. He was sentenced to 16 months in prison, \$500 fine, and a one-year suspension of his driver’s license. On appeal he challenged trial judge’s decision to allow the cocaine to be admitted into evidence, even though the affidavit supporting the search warrant for his residence was deficient – it was based on information from at least one informant (“Informant B”) whose veracity was not known to the police officer. The trial judge allowed the cocaine to be admitted into evidence based on the “good faith exception” and the Court of Appeals (3 to 0) affirmed.

Captain Robert McLaughlin, Huron County Sheriff’s Department obtained a search warrant for Nunez’ home in Willard, OH based on information from three informants (Informants A, B and C). According to the affidavit, Informant A purchased powdered cocaine from Ramon Garcia on three occasions outside of the Nunez residence. Garcia rented a room in the house, and each time went into the house to get the drugs. Captain McLaughlin in his affidavit said that Informant A was a “reliable, confidential informant” and had in the past made other drug purchases for the Sheriff’s office, resulting in criminal prosecutions and convictions.

Captain McLaughlin’s affidavit also said that Informant B had told Ramon Garcia that he had to suppliers of cocaine in Willard, Ohio, including Lorenzo Nunez, Jr. The affidavit “fails to provide any statement as to the basis of knowledge of reliability of Informant B with respect to the assertion that appellant was one of Garcia’s drug suppliers.”

Informant C was a confidential informant to both Captain McLaughlin and to the New London, Ohio Police Department. The police chief of New London PD told Captain McLaughlin that Informant C informed them that a kilo of cocaine would be delivered to the Nunez residence on Jan. 8, 2007. Captain McLaughlin and others set up surveillance on the residence and observed a series of individuals enter the home on Jan. 8, between 2:56 pm and 4:02 pm. Captain McLaughlin in his affidavit described his observations and also confirmed that Informant C was a reliable informant and had worked with both McLaughlin and the New London Police Department on drug investigations in the past.

The search warrant was executed on Jan. 10, 2007, resulting in the seizure of cocaine and the arrest of Lorenzo Nunez for 4th degree-felony. The Court of Appeals held that the affidavit was deficient:

“We conclude that absent the result from the surveillance, the affidavit lacked any indicia of reliability or information concerning the basis of the claimed knowledge of Informant B to support a conclusion that appellant supplied drugs to Garcia.”

The Court of Appeals held, however, that the trial judge properly held that cocaine may still be introduced in evidence against Nunez because Captain McLaughlin acted in good faith. “The United States Supreme Court adopted the good-faith exception to the exclusionary rule in United States v. Leon [468 U.S. 897 (1984)].” The Ohio Supreme Court applied the rule in State v. Wilmoth, 22 Ohio St.3d 251 (1986), holding “The exclusionary rule should not be applied to suppress evidence obtained by police officers acting in objectively reasonable, good faith reliance on a search warrant issued by a detached and neutral magistrate, but ultimately found invalid.”

The Court of Appeals affirmed the good faith of the Huron County Sheriff’s Department:

‘We conclude that there is competent, credible evidence in the record supporting the trial court’s finding that the sheriff’s department acted in good faith in proceeding with the search warrant under the circumstances. Given the results of the surveillance, there was an objectively reasonable basis for the sheriff’s department to conclude that probable cause existed for the search, despite the fact that the warrant was subsequently determined to be invalid.’

Legal Lessons Learned: In arson and other investigations where the fire service is dealing with a confidential informant, carefully describe in your search warrant affidavit the basis for your assertion that the informant has been reliable in the past. If this is a first time use of the informant, develop other confirmation of his reliability through surveillance or other activities to establish your “good faith” belief in his reliability.

[File: Chapter 1]

OHIO: 911 DISPATCH OPERATED BY SHERIFF - CAN NOT CHARGE A SERVICE FEE FOR DISPATCHING AMBULANCES FOR THE COUNTY EMS - OHIO ATTORNEY GENERAL OPINION

On Jan. 29, 2009, Ohio AG Richard Cordray issued Opinion No. 2009-04 to the Coshocton County Prosecuting Attorney, advising that the county sheriff may not charge the Board of County Commissioners a fee for dispatching EMS runs for the county operated emergency medical service organization; <http://www.ag.state.ohio.us>.

The sheriff wanted to charge a fee for dispatching the ambulances; this fixed fee “would reflect an estimate of the actual expenses his office incurs in providing these dispatch services.”

The AG held that “Although many statutes authorize county sheriffs to charge fees or receive reimbursement for the performance of a variety of services, we are unaware of any statute that authorizes a county sheriff who operates a PSAP [Public Safety Answering Point] to charge the county a fee to dispatch ambulances or to seek an allowance from the county for the expenses his office incurs in operating the PSAP.” [Opinion, page 3.]

Legal Lessons Learned: In these tough economic times Sheriff was looking for sources of income.

[File: Chapter 6]

U.S. SUPREME COURT: ARBITRATIONS – COLLECTIVE BARGAINING AGREEMENT WHICH REQUIRED ALL CLAIMS OF DISCRIMINATION GO TO

ARBITRATION IS CONSTITUTION - BUILDING GUARDS WHO WERE DISPLACED BY LICENSED SECURITY PERSONNEL CANNOT FILE LAWSUITS CLAIMING AGE DISCRIMINATION

On April 1, 2009, in 14 Penn Plaza LLC v. Pyett, the U.S. Supreme Court held (5 to 4), <http://www.supremecourtus.gov>., that if an employer and union enter into a Collective Bargaining Agreement (CBA) that clearly and unmistakably require all union members to arbitrate claims of discrimination, including claims of age discrimination arising under the ADEA [Age Discrimination in Employment Act of 1967], then these employees may not file age lawsuits in federal court.

Justice Thomas wrote the majority opinion. He wrote that the New York City union for the building-services industry, Service Employees International Union, Local 32BJ, includes building cleaners, porters and door persons. Since the 1930s, they have negotiated industry-wide CBAs with the Realty Advisory Board on Labor Relations. The CBA requires all claims of discrimination be submitted to the CBA's grievance and arbitration provisions.

14 Penn Plaza LLC is a member of the Realty Advisory Board. In August 2003, with Local 32BJ's concurrence, Penn Plaza retained Spartan Security Company to supply licensed security guards for the lobbies of their many office buildings. The former unlicensed night guards were reassigned as night porters and light duty cleaners – and they claim this led to a loss of income and caused them emotional distress. Local 32BJ filed grievances on their behalf, and when the grievances were denied, Local 32BJ initially asked for binding arbitrations. The Local then withdrew these requests:

“Because it had consented to the contract for the new security personnel at 14 Penn Plaza, the Union believed it could not legitimately object to [the unlicensed night guards'] reassignments as discriminatory.”

Arbitrations did proceed on claims of breach of seniority rights and overtime, but these claims were denied after several arbitrations. In May, 2004, these non-licensed security personnel then filed a claim with the federal Equal Employment Opportunity Commission (EEOC). The EEOC found no violate of the ADEA and issued them a 90-day right to sue letter. A lawsuit was then filed in U.S. District Court in New York. Penn Plaza filed a motion to dismiss the lawsuit and compel arbitration. The trial court refused to do this, and the Board filed an appeal to the U.S. Court of Appeals in New York, which confirmed it could not compel arbitration since the ADEA provides all the right to sue in federal court. Penn Plaza then sought an appeal to the U.S. Supreme Court, which agreed to hear the case.

The majority held that these non-licensed night guards were bound by the CBA – there sole remedy was through the CBA grievance / arbitration process. The employees claimed that the arbitration clause in the CBA is unenforceable and should not have been in the CBA because it affects the employees' “individual, non-economic statutory rights.”

Justice Thomas, writing for the majority, flatly rejected that argument:

“We disagree. Parties generally favor arbitration precisely because of the economics of dispute resolution.... As in any contractual negotiation, a union may agree to the inclusion of an arbitration provision in a collective-bargaining agreement in return for other concessions from the employer.”

Legal Lessons Learned: In the Fire Service, unions must be very careful about language in a CBA regarding arbitration as the sole remedy for claims of discrimination.

[File: Chapter 6]

U. S. SUPREME COURT: IDAHO CAN LAWFULLY ENACT A STATUTE PROHIBITING PUBLIC EMPLOYEES FROM AUTHORIZING PAYROLL DEDUCTIONS FOR UNION POLITICAL ACTIVITIES

On Feb. 24, 2009, in Ysursa, Secretary of State Of Idaho v. Pocatello Education Association, the U.S. Supreme Court held (6 to 3), <http://www.supremecourtus.gov>, that Idaho's "Right To Work Act" which permits public employees to authorize payroll deductions for general union dues, but prohibit such deductions for union political activities, does not violate the unions' First Amendment rights.

The Idaho "Right To Work" statute was amended in 2003. Prior to 2003, employees could authorize a payroll deduction for both general union dues and for union political activities. Violations of the 2003 statute were punishable by a fine of up to \$1000 or up to 90 days in imprisonment, or both.

The federal district judge upheld the ban at the Idaho state-level of government for state employees, but held it was unconstitutional regarding local-level of government employees. The U.S. Court of Appeals agreed. The U.S. Supreme Court reversed, and upheld the Idaho statute at all levels of public employees.

Chief Justice Roberts wrote the majority opinion, holding:

"The First Amendment prohibits government from 'abridging the freedom of speech'; it does not confer an affirmative right to use government payroll mechanisms for the purpose of obtaining funds for expression. Idaho's law does not restrict political speech, but rather declines to promote the speech by allowing employee checkoffs for political activities. Such a decision is reasonable in light of the State's interest in avoiding the appearance that carrying out the public's business is tainted by partisan political activity."

Legal Lessons Learned: This decision may encourage other states to enact similar legislation.

[Chapter 8]

NEW YORK: FDNY - CLASS ACTION CERTIFIED FOR ALL BLACK FIREFIGHTER APPLICANTS WHO SAT FOR WRITTEN EXAMS 7029 OR 2043 – VULCAN SOCIETY MAY SERVE AS CLASS REPRESENTATIVE

On May 11, 2009, in United States of America and The Vulcan Society, et al. v. City of New York, U.S. District Court for Eastern District of New York, 2009 U.S. Dist. LEXIS 39514 (U.S. District Court Judge Nicholas G. Garaufis), issued a 16-page Memorandum and Order allowing a lawsuit to proceed as a class action, challenging two written examinations: claiming the pass/fail exam, and rank-order processing of FDNY applicants had an adverse impact on black and Hispanic applicants.

In 2007, the U.S. Department of Justice, Civil Rights Division, filed the initial lawsuit (07-CV-2067), challenging Written Examination 7029 (pass/fail with cut off score of 84.705), and Written Examination 2043 (pass/fail with cut off score of 70.000).

The Vulcan Society and three individual applicants, Marcus Haywood, Candido Nunez and Roger Gregg filed their own lawsuit, seeking to intervene as additional plaintiffs in the case. The Vulcan Society is a social and charitable organization of roughly 250 black New York City firefighters. Captain Paul Washington filed an affidavit that describes some of the ways in which the Vulcan Society is involved in the community, including “talking about fire-fighting at public school career days” and “visit[ing] local churches to talk to the community about our organization and their neighborhood firehouses.”

The Vulcan Society also helps recruit FDNY applicants and to study for the entrance examination and prepare for the physical performance test. They tutored roughly 300 to take Written Examination 2043.

The lawsuits claim a “Pattern-Or-Practice” of discrimination, and also “Disparate Impact.” The trial judge explained in his memorandum that these cases normally require statistical evidence:

“[P]attern-or-practice disparate treatment suits are generally ‘divided into two phases: liability and remedial.’ [citing cases]. In class action cases, this division allows the court to proceed on the liability phase for the class as a whole, and thereby ‘reduc[e] the range of issues in dispute and promot[e] judicial economy.’ [cases cited]. When pattern-or-practice cases are bifurcated, ‘the liability phase is largely preoccupied with class-wide statistical evidence directed at establishing an overall pattern or practice of intentional discrimination.’ [cases cited].”

If the plaintiffs make a *prima facie* showing, the burden shifts to the defendant whose ‘basic avenues of attack’ for challenging the plaintiffs’ statistical evidence consists of ‘assault[t] on the source, accuracy, or probative force of that evidence.’”

Legal Lessons Learned: The litigation now proceeds. Fire Departments administering recruit examinations should consult with testing experts where there is concern about disparate impact on minority applicants.

[File: Chapter 1]

COLORADO: ARSONIST RAN FROM BURNING CAR, AND BYSTANDER TACKLED HIM AND KICKED HIM IN HEAD - STATEMENTS MADE TO POLICE AT SCENE AND AT HOSPITAL ARE ADMISSABLE SINCE NOT YET IN CUSTODY

On April 27, 2009, in State of Colorado v. Robert William Harper, Court of Appeals of Colorado, 2008 Colo. App. LEXIS 1399, the court (3 to 0) denied his petition for a writ of certiorari, and published its Oct. 2, 2008 decision affirming his jury conviction of first degree aggravated motor vehicle theft, second degree arson, and first degree criminal trespass. Mr. Harper was seen running from a burning stolen car. A bystander tackled him, kicked him in the face, and held him until police and the fire department arrived.

Harper made statements to the police on three occasions:

- (1) At the scene of the incident, while receiving treatment for his injuries inflicted by the bystander, he told the officer he had been “moving some items around in his car [when] the seat belt knocked the cigarette out of his mouth and started the fire.”
- (2) Harper was taken to the hospital for further treatment, and he told police “he was in the area walking, and he observed the vehicle on fire. He recognized it as his friend’s and [tried] to save some property from it.” Harper could not name his friend.
- (3) After being treated and released by the hospital, Harper was arrested and taken to the police station. He received a Miranda warning of his rights, waived his rights, and said that he encountered the burning car while walking and had entered the car to rescue its contents.

The trial judge, after hearing testimony on Harper’s motion to suppress his first two statements, held that his first two statements, as well as the third, could be admitted in evidence for the jury to hear. The judge found that the police had maintained a conversational tone and did not draw their weapons, or try to intimidate Harper, or otherwise place him into custody until he was treated and released by the hospital.

The Court of Appeals agreed. “Harper was not in custody at the scene or in the hospital” and his statements were “voluntary.”

Legal Lessons Learned: In arson investigations, as well as other criminal offense, Miranda warnings are only required after a defendant is taken into custody. The term “custody” has been widely interpreted, so be cautious in withholding a Miranda warning if you plan to arrest the subject.

[File: Chapter 1]

ALABAMA: MOBILE HOME UNSAFE FOR OCCUPANCY AFTER FIRE – POSSIBLE USE AS METH LAB - OWNER HAS PURSUED APPEALS FOR PAST 5 YEARS

On March 9, 2009, in Barabara Mousseau v. City of Daphne Board of Zoning Adjustments, Court of Civil Appeals, 2008 Ala. Civ. App. LEXIS 643, the court authorized the publication of its Oct. 10, 2008 decision, which affirmed the decision by the Baldwin Circuit Court. The Circuit court had upheld the Board of Zoning Adjustments order prohibiting the property owner from seeking to restore a 31-year old mobile home on her property (worth only \$2000) after it was seriously damaged by an early morning fire. The fire reportedly “had resulted from a methamphetamine-lab explosion.” This case illustrates some of the multiple appeals that Fire Department and code enforcers must deal with to enforce fire and other codes.

Ms. Mousseau lives in a frame house in the City of Daphne, Alabama. On Jan. 15, 2004 there was an early morning fire in her mobile home. The fire started in the kitchen, and it burned through and busted a water line.

The City’s fire chief inspected the fire-damaged mobile home and determined it was unsafe. He asked the City’s building official to inspect the mobile home, and concluded it was uninhabitable and “could not be repaired economically and/or satisfactorily to remedy [its] unsafe conditions.”

Ms. Mousseau, her brother and other family members disregarded these orders and began repair of the kitchen and other areas of the mobile home. On July 19, 2004 the City passed a resolution declaring the mobile home a nuisance, and should be demolished. Ms. Mousseau's brother sent a letter to the building official requesting a 90-day extension; this extension request was denied. On September 9, 2005, the City building official wrote Ms. Mousseau a letter advising that the mobile home was a "nonconforming structure" since it had been damaged or destroyed to an extent "exceeding 50% of the reasonably estimated replacement cost."

Ms. Mousseau appealed to the Zoning Board. A hearing was held September 7, 2006. The City's Director of Community Development testified that the fire had resulted from a METH Lab explosion. Ms. Mousseau's attorney argued that the mobile home had been "grandfathered" because it had been moved on to the property sometime before the City's 1987 land-use-and-development ordinance had been enacted. On Sept. 14, 2006, the Zoning Board denied the appeal.

Ms. Mousseau then filed an appeal to the Baldwin Circuit Court, and the Zoning Appeal filed a motion for summary judgment. The case was tried on Oct. 23, 2007 during a "bench trial" (no jury). The court concluded that the mobile home was not "grandfathered" since it was placed on the property AFTER the 1087 ordinance became effective.

Ms. Mousseau filed an appeal to the Alabama Supreme Court, which directed it to the Alabama Court of Appeals. Held: affirmed; mobile home is not "grandfathered" and must be removed. "The circuit court was also entitled to consider the undisputed evidence – that the mobile home has been appraised on January 28, 1989, for \$2000, and that the appraisal had been done for the purpose of settling of the estate of James White, Mousseau's late ex-husband [and the mobile home was then moved on to the property, after the ordinance became effective].

Legal Lessons Learned: What a long fight over a \$2000 mobile home [must have other value] now there will probably be an appeal to the Alabama Supreme Court.



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