



## FIRE, EMS & SAFETY NEWSLETTER

[NEWSLETTER IS NOT PROVIDING LEGAL ADVICE].

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### ONE HOUR FREE CE / SIMULCAST JUNE 27, 2011 - HOMELAND SECURITY & HIGHER EDUCATION

You can watch it live on your computer, June 27, 2011, 9:30 am – 10:30 am: <http://www.uc.edu/ucvision/>. See lineup of speakers: [www.uc.edu/cas/firescience](http://www.uc.edu/cas/firescience): HOMELAND SECURITY 6/27.

**Speakers include new Cincinnati Fire Chief Richard Braun: Educational Prerequisites For Promotion / Tuition Reimbursement at Columbus FD.** He was appointed Chief of Cincinnati FD on 1/18/2011, upon retirement as Assistant Chief of Columbus, Ohio FD.

Note: Columbus FD's collective bargaining agreement (Dec. 13, 2009 – May 31, 2012), provides in Article 23:

(F) Educational prerequisites to apply for certain promotional exams and positions will be as follows:

- (1) For Battalion Chief and Deputy Chief exams in the year 2007 or later, the requirement will be a baccalaureate degree.
- (2) In order to be eligible to apply for the position of Assistant Chief in the year 2007 or later, the requirement will be a baccalaureate degree.

Tuition reimbursement is covered in Article 17 of the CBA.

<http://www.serb.ohio.gov/sections/research/web%20contracts/09-CON-08-0758.pdf>.

## **U.S. SUPREME COURT – SEXUAL DISCRIMINATION - COURT THROWS OUT PROPOSED NATIONWIDE CLASS ACTION LAWSUIT BY 1.5 MILLION FEMALE EMPLOYEES OF WAL-MART**

On June 20, 2011, in WAL-MART STORES, INC. v. DUKES, et al, the Court held (5 to 4) that a U.S. District Judge in California improperly certified this class action, and the 9<sup>th</sup> Circuit Court of Appeals (San Francisco) improperly affirmed that certification. Female employees in particular stores may file lawsuits claiming discrimination by particular store managers, and Wal-Mart can then defend those lawsuits. <http://www.supremecourt.gov/opinions/10pdf/10-277.pdf>.

The Court described pay raises and promotions:

*“In all, Wal-Mart operates approximately 3,400 stores and employs more than one million people.*

*Pay and promotion decisions at Wal-Mart are generally committed to local managers’ broad discretion, which is exercised ‘in a largely subjective manner.’ 222 F. R. D. 137, 145 (ND Cal. 2004). Local store managers may increase the wages of hourly employees (within limits) with only limited corporate oversight. As for salaried employees, such as store managers and their deputies, higher corporate authorities have discretion to set their pay within preestablished ranges.*

*Promotions work in a similar fashion. Wal-Mart permits store managers to apply their own subjective criteria when selecting candidates as ‘support managers,’ which is the first step on the path to management. Admission to Wal-Mart’s management training program, however, does require that a candidate meet certain objective criteria, including an above-average performance rating, at least one year’s tenure in the applicant’s current position, and a willingness to relocate. But except for those requirements, regional and district managers have discretion to use their own judgment when selecting candidates for management training. Promotion to higher office—e.g., assistant manager, co-manager, or store manager—is similarly at the discretion of the employee’s superiors after prescribed objective factors are satisfied.”*

The lead plaintiff, Betty Dukes, had been disciplined and demoted in a California Wal-Mart.

*“Betty Dukes began working at a Pittsburg, California, Wal-Mart in 1994. She started as a cashier, but later sought and received a promotion to customer service manager. After a series of disciplinary violations, however, Dukes was demoted back to cashier and then to greeter. Dukes concedes she violated company policy, but contends that the disciplinary actions were in fact retaliation for invoking internal complaint procedures and that male employees have not been disciplined for similar infractions. Dukes also claims two male greeters in the Pittsburg store are paid more than she is.”*

Claim of a “corporate culture” against females.

*“Importantly for our purposes, respondents claim that the discrimination to which they have been subjected is common to all Wal-Mart’s female employees. The basic theory of their case is that a strong and uniform “corporate culture” permits bias against women to infect, perhaps subconsciously, the discretionary decision making of each one of Wal-Mart’s thousands of managers—thereby making every woman at the company the victim of one common discriminatory practice. Respondents therefore wish to litigate the Title VII claims of all female employees at Wal-Mart’s stores in a nationwide class action.*

Class action rejected.

*“Their claims must depend upon a common contention—for example, the assertion of discriminatory bias on the part of the same supervisor. That common contention, moreover, must be of such a nature that it is capable of class wide resolution—which means that determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke. \*\*\* The second manner of bridging the gap requires ‘significant proof’ that Wal-Mart ‘operated under a general policy of discrimination.’ That is entirely absent here.”*

**Legal Lessons Learned:** Excellent decision to review with FD officers. Title VIII lawsuits continue to be filed by female firefighters alleging specific misconduct by a specific supervisor.

### **HOMELAND SECURITY – U.S. SUPREME COURT CONFIRMS ATTORNEY GENERAL, AND OTHER FEDERAL, STATE & LOCAL OFFICIALS ENJOY QUALIFIED IMMUNITY - FBI LAWFULLY ARRESTED PLAINTIFF BOARDING PLANE TO SAUDIA ARABIA ON A MATERIAL-WITNESS ARREST WARRANT**

On May 31, 2011, in ASHCROFT v. AL-KIDD, the Court (8 to 0; Justice Kagan did not participate; she had been Solicitor General when this case was pending) held that the lawsuit against the Attorney General for damages should be dismissed.

<http://www.supremecourt.gov/opinions/10pdf/10-98.pdf>

The plaintiff claimed that in response to 911 attacks, the Attorney General had developed an illegal detention policy for those of Arab decent. The U.S. Supreme Court was not persuaded.

“It is alleged that this pretextual detention policy led to the material-witness arrest of al-Kidd, a native-born United States citizen. FBI agents apprehended him in March 2003 as he checked in for a flight to Saudi Arabia. Two days earlier, federal officials had informed a Magistrate Judge that, if al-Kidd boarded his flight, they believed information ‘crucial’ to the prosecution of Sami Omar al-Hussayen would be lost. App. 64. Al-Kidd remained in federal custody for 16 days and on supervised release until al-Hussayen’s trial concluded 14 months later. Prosecutors never called him as a witness.”

Court was critical of the 9<sup>th</sup> Circuit Court of Appeals (San Francisco) for not promptly dismissing this lawsuit.

“The Court of Appeals seems to have cherry-picked the aspects of our opinions that gave colorable support to the proposition that the unconstitutionality of the action here was clearly established.” \*\*\*

“We hold that an objectively reasonable arrest and detention of a material witness pursuant to a validly obtained warrant cannot be challenged as unconstitutional on the basis of allegations that the arresting authority had an improper motive. Because Ashcroft did not violate clearly established law, we need not address the more difficult question whether he enjoys absolute immunity.”

Great precedence:

“Qualified immunity shields federal and state officials from money damages unless a plaintiff pleads facts showing (1) that the official violated a statutory or constitutional

right, and (2) that the right was ‘clearly established’ at the time of the challenged conduct. *Harlow v. Fitzgerald*, 457 U. S. 800, 818 (1982).” \*\*\*

“Qualified immunity gives government officials breathing room to make reasonable but mistaken judgments about open legal questions. When properly applied, it protects ‘all but the plainly incompetent or those who knowingly violate the law.’”

**Legal Lessons Learned:** The decision will be very helpful in getting lawsuits against federal, state and local government officials (including FD officials) promptly dismissed.

**ARSON INVESTIGATORS: U.S. SUPREME COURT – MIRANDA WARNINGS MAY BE REQUIRED FOR JUVENILES NOT YET IN CUSTODY - CHILD INTERVIEWED IN SCHOOL CONFERENCE ROOM ABOUT RECENT BURGLARIES WAS NOT IN CUSTODY, THE MIRANDA WARNING MAY NEED TO BE GIVEN**

On June 16, 2011, in the case of *J. D. B. v. NORTH CAROLINA*, the Court (5 to 4) reversed the North Carolina Supreme Court, which had held that student’s confession was admissible because he was not technically “in custody” when interviewed by a detective and a uniformed officer at his school. <http://www.supremecourt.gov/opinions/10pdf/09-11121.pdf>.

The majority decision held: “The question remains whether J. D. B. was in custody when police interrogated him. We remand for the state courts to address that question, this time taking account of all of the relevant circumstances of the interrogation, including J. D. B.’s age at the time.”

The court described the facts:

“Petitioner J. D. B. was a 13-year-old, seventh-grade student attending class at Smith Middle School in Chapel Hill, North Carolina when he was removed from his classroom by a uniformed police officer, escorted to a closed door conference room, and questioned by police for at least half an hour.

This was the second time that police questioned J. D. B. in the span of a week. Five days earlier, two home break-ins occurred, and various items were stolen. Police stopped and questioned J. D. B. after he was seen behind a residence in the neighborhood where the crimes occurred. That same day, police also spoke to J. D. B.’s grandmother—his legal guardian—as well as his aunt.

Police later learned that a digital camera matching the description of one of the stolen items had been found at J. D. B.’s middle school and seen in J. D. B.’s possession. Investigator DiCostanzo, the juvenile investigator with the local police force who had been assigned to the case, went to the school to question J. D. B. Upon arrival, DiCostanzo informed the uniformed police officer on detail to the school (a so-called school resource officer), the assistant principal, and an administrative intern that he was there to question J. D. B. about the break-ins.

Although DiCostanzo asked the school administrators to verify J. D. B.’s date of birth, address, and parent contact information from school records, neither the police officers nor the school administrators contacted J. D. B.’s grandmother.

The uniformed officer interrupted J. D. B.’s afternoon social studies class, removed J. D. B. from the classroom, and escorted him to a school conference room. There,

J. D. B. was met by DiCostanzo, the assistant principal, and the administrative intern. The door to the conference room was closed. With the two police officers and the two administrators present, J. D. B. was questioned for the next 30 to 45 minutes. Prior to the commencement of questioning, J. D. B. was given neither *Miranda* warnings nor the opportunity to speak to his grandmother. Nor was he informed that he was free to leave the room. \*\*\*

After learning of the prospect of juvenile detention, J. D. B. confessed that he and a friend were responsible for the break-ins. DiCostanzo only then informed J. D. B. that he could refuse to answer the investigator's questions and that he was free to leave.

Asked whether he understood J. D. B. nodded and provided further detail, including information about the location of the stolen items. Eventually J. D. B. wrote a statement, at DiCostanzo's request. When the bell rang indicating the end of the school day, J. D. B. was allowed to leave to catch the bus home." [Footnotes deleted.]

**Legal Lessons Learned:** This decision will undoubtedly lead to more motions to suppress confessions. Arson investigators, when interviewing juveniles, even in a school, should consider giving *Miranda* warnings early in the interview process.

### **U.S. SUPREME COURT – EXCLUSIONARY RULE DOES NOT APPLY WHEN SEARCH OF DEFENDANT'S AUTO WAS LAWFUL BASED ON CASE PRECEDENT AT TIME OF SEARCH**

On June 16, 2011 in DAVIS v. UNITED STATES, the Court (7 to 2) upheld the conviction of a felon in possession of a firearm. <http://www.supremecourt.gov/opinions/10pdf/09-11328.pdf>.

Davis was a passenger in a vehicle stopped by police for a routine traffic violation. Davis was arrested when he told the police a false name. He was handcuffed and put into a police cruiser. Officers search the passenger side of the vehicle and found Davis' revolver. Since this search was lawful at that time, the motion to exclude the revolver from evidence was properly denied. The Court refused to exclude evidence based on a later decision of the Court in *Arizona v. Grant*, 556 U.S. \_\_\_\_ (2009), which held that when arresting a passenger, police can only search the passenger side of the car if it is reasonable to believe that the arrestee might access the vehicle at the time of the search or that the vehicle contains evidence of the offense of arrest.

A technical violation of 4<sup>th</sup> Amendment does NOT mean evidence must be excluded in all cases. The majority decision referenced following:

“It is one thing for the criminal ‘to go free because the constable has blundered.’ *People v. Defore*, 242 N. Y. 13, 21, 150 N. E. 585, 587 (1926) (Cardozo, J.). It is quite another to set the criminal free because the constable has scrupulously adhered to governing law. Excluding evidence in such cases deters no police misconduct and imposes substantial social costs.”

**Legal Lessons Learned:** This decision should encourage trial judges nationwide to reject motions to exclude evidence, if the record is clear that law enforcement officers, including arson investigators, were acting in good faith and consistent with case precedent at the time of their actions.

## **WISCONSIN SUPREME COURT – THROWS OUT CHALLENGE TO NEW STATE LAW REMOVING COLLECTIVE BARGAINING RIGHTS**

On June 14, 2011, in State of Wisconsin ex rel. Ismael R. Ozanne v. Jeff Fitzgerald, Scott Fitzgerald, Michael Ellis and Scott Suder, the Wisconsin Supreme Court upheld the new statute. <http://www.wicourts.gov/sc/opinion/DisplayDocument.html?content=html&seqNo=66078>.

A concurring justice described the scene of protests:

“The proposed legislation included provisions requiring additional public employee contributions for health care and pensions, curtailing collective bargaining rights for most state and local public employees, and making appropriations.”

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“Governor Walker's proposed legislation created controversy and division. In the weeks following introduction [on Feb. 15, 2011] of the two identical ‘budget repair bills,’ the Wisconsin State Capitol was the center of demonstrations against the governor. The building was taken over by protesters. By and large, the protesters did not impede the work of state government but their presence dominated the Capitol scene and captured international attention.”

The majority opinion responded to several arguments challenging the new law.

- **Need To Set Aside Lower Court Injunction.** “This court has granted the petition for an original action because one of the courts that we are charged with supervising has usurped the legislative power which the Wisconsin Constitution grants exclusively to the legislature.”
- **Open Meetings Law.** “The doors of the senate and assembly were kept open to the press and members of the public during the enactment of the Act. The doors of the senate parlor, where the joint committee on conference met, were open to the press and members of the public. Wisconsin Eye broadcast the proceedings live. Access was not denied. There is no constitutional requirement that the legislature provide access to as many members of the public as wish to attend meetings of the legislature or meetings of legislative committees.” [Footnotes omitted.]
- **Separation Of Powers.** “The court’s decision on the matter now presented is grounded in separation of powers principles. It is not affected by the wisdom or lack thereof evidenced in the Act. Choices about what laws represent wise public policy for the State of Wisconsin are not within the constitutional purview of the courts. The court’s task in the action for original jurisdiction that we have granted is limited to determining whether the legislature employed a constitutionally violative process in the enactment of the Act. We conclude that the legislature did not violate the Wisconsin Constitution by the process it used.”

**Legal Lessons Learned:** Other states, including Ohio, have enacted similar statutes. In Ohio, there appears to be enough petitions to put the matter on the November ballot.

**IDAHO: VOLUNTEER FIREFIGHTER CONVICTED OF ARSON FOR STARTING SIX GRASS FIRES ON FEDERAL LANDS – 6 YEARS IN PRISON - 9<sup>th</sup> CIRCUIT ORDERS NEW SENTENCING HEARING - WILL GET REDUCED SENTENCE IF HE CAN PROVE GRASS FIRES DID NOT “DESTROY” ANYTHING**

On June 16, 2011, in United States v. Clyde Dewayne Holmes, Jr., 9<sup>th</sup> Circuit Court of Appeals (3 to 0), 2011 U.S. App. LEXIS 12111, ordered a volunteer Boise, Idaho firefighter to get a new sentencing hearing from federal District Judge in Boise, Idaho. He was convicted to by a jury, and then sentenced by the Federal judge to maximum of six years in prison, for six different fires (about 1000 acres, most owned by federal government and managed by the Bureau of Land Management).

The Court of Appeals ordered a new sentencing hearing, based on the firefighter’s argument that the burning of grass and sagebrush didn’t *destroy* the land. If there is no destruction of the land, then the Federal sentencing guidelines would recommend less jail time.

The Concurring judge set forth the facts in detail:

“Holmes set [six] different fires over a period of around six weeks. All were on unoccupied land, and fortunately all were put out without injury to anyone. The restitution figure is \$155,881.36, most of that for the \$132,881.36 the BLM spent on firefighting, the rest for \$10,325 for what the volunteer fire department spent and \$12,675 for what the rod and gun club had to spend to reseed its acreage. One of the fires burned private land, for which the owner did not ask for any restitution.

Several factors added to Holmes's blameworthiness. He was a volunteer firefighter, and although no special expertise contributed to or was needed to set the fires, people expect firefighters to fight fires, not start them. And he lied when he was caught, sending the authorities down several paths that might have led to charges against innocent people. He gave truck descriptions, license plate numbers, and other identifiers that could have landed someone innocent in federal prison instead of himself. Fortunately, he literally left tracks, tire tracks, pointing to him, reported the fires anonymously from locations establishing that he was probably the person who called 911, his truck was seen by a BLM officer leaving the area where the fires had been reported only thirty seconds before a new fire was discovered, and he set the fires in locations of the fires all within a six mile circle and at times suggesting that he set them all in the afternoon after he got off work and before he got home for dinner.

The only issue before us is whether the district court erred by applying the more aggravated public arson guideline range. Holmes's crimes were all for setting public land on fire, under 18 U.S.C. § 1855. That statute provides for imprisonment for ‘not more than five years’ for willfully setting on fire timber, underbrush or other inflammable material on public lands. Since he set the six fires on six different dates, Holmes committed six separate crimes, so ‘grouping’ was applied, leading to his six-year prison sentence.

**Legal Lessons Learned:** Unfortunately, arson by firefighter is not uncommon. The fire service needs to be diligent.

## **NEVADA: PARAMEDIC MAY TESTIFY ABOUT STATEMENT OF PATIENT ABOUT SMOKING MARIJUANA PRIOR TO MOTOR VEHICLE ACCIDENT**

On June 2, 2011, in Rogers v. State, the Nevada Supreme Court confirmed the DUI conviction of the defendant. <http://www.nevadajudiciary.us/index.php/advancedopinions/1112-rogers-v-state->

The Court held:

“David M. Rogers was convicted by a jury of driving under the influence of a controlled substance (marijuana) causing substantial bodily harm, for which he was sentenced to serve 24 to 60 months in prison. Part of the evidence the jury heard came from a paramedic who took Rogers by ambulance to the hospital. The paramedic testified that Rogers confided that he had smoked marijuana before the accident. On appeal Rogers argues, as he did in the district court, that his statement to the paramedic was inadmissible because it was protected by Nevada’s doctor-patient privilege. We disagree and affirm.” [Footnote omitted.]

Rogers had been mountain biking when he injured himself, and tried to drive himself to the hospital.

“He had been mountain biking, fallen, and suffered a cut on his thigh near the femoral artery. Alone and wanting medical care, Rogers decided to drive himself to the hospital.

Upon reaching Carson City, Rogers drove into a busy intersection without braking, causing a seven-car pileup. The driver whose car Rogers hit first suffered serious injuries. When the police arrived, they found Rogers sitting on his car’s tailgate applying a compress to his cut leg. He said he could not remember the collision and thought he had blacked out. His car’s airbags had deployed.

Among the first responders was firefighter/paramedic Jeff Friedlander. After speaking to Friedlander at the scene, Rogers went on to the hospital by ambulance with Friedlander attending him. During the trip, Friedlander asked Rogers if he had used drugs or alcohol that day. Rogers said “something to the effect of . . . ‘I burned a joint on the trail, mountain biking.’ As an emergency medical technician (EMT), Friedlander routinely asks ambulance transport patients such questions. He testified that he did so in this case, not at the direction of the hospital or any doctor Rogers might see, but as normal triage for an independent EMT.

At the hospital Rogers consented to a blood test, which came back positive for marijuana. Earlier, Rogers had asked Friedlander not to tell the police about his marijuana use. Torn between his conflicting duties to Rogers and to the public, Friedlander sought advice from another EMT, who advised Friedlander to pass the information along to the Highway Patrol officer investigating the accident, which Friedlander did. Neither side argues that Friedlander sharing Rogers’ admission with the Highway Patrol prompted the blood test.” [Footnotes omitted.]

The Court held there is no doctor-patient privilege in Nevada regarding comments to EMS personnel.

“NRS 49.225 states the general rule of doctor-patient privilege, as follows:

A patient has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications among the patient, the patient’s doctor or persons who are participating in the diagnosis or treatment under the direction of the doctor, including members of the patient’s family.”

**Legal Lesson Learned:** EMS should record in their run report admissions of drug use by a patient.



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