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the Checkoff

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INSIDE:

Is Complaining About the Boss on a Social Media Site Protected Speech?

By Elizabeth P. Kuhn, Tampa


E. KUHN

Labor and employment lawyers and HR professionals have likely faced this question at least once: Can we discipline an employee for comments he or she made about the boss on *Facebook* or other social media sites? While it is nothing new for co-workers to commiserate about their supervisor, it is not clear whether statements made in social media should be treated the same as conversations around the water cooler.

As a threshold matter, this issue is relevant for union and non-union employers alike. Many aspects of the National Labor Relations Act (NLRA) apply to both unionized and

See "Protected Speech," page 3

Chair's Message

"Individually, we are one drop. Together, we are an ocean."

. . . Japanese proverb.


J. SCHWARTZ

The New Year gives us an opportunity to assess the past and plan the future. The involvement in our Section activities has been excellent. We have had record attendance at our on-site programs, as well as our webinars. Special thanks to Sherril Colombo, Cathleen Scott and Leslie Langbein for the recent outstanding litigation seminar, "Double or Nothing: Litigating Employment Claims," and to Bob Turk for organizing our webinar programs. Please plan on participating in some or all of the webinars planned for 2011. Please refer to our website (www.laboremploymentlaw.org) for more specific information on upcoming CLE programs.

We greatly appreciate the efforts of Stephanie Ray on updating our website. Additionally, Executive Council members Deborah Brown and Cary Singletary recently completed a membership survey so that we can better serve your needs. Your involvement in our Section is vitally important to our success.

Finally, congratulations to Stetson University College of Law student Hans Haina, recipient of the 2010 Florida Bar Labor and Employment Law Section Dean W. Gary Vause Award. We are continuing to develop our partnerships with the local law schools to encourage future Section membership.

If you would like to become active in our Section, please contact me. I welcome your comments and suggestions.

Warmest wishes for a Happy and Healthy New Year.

— Jill S. Schwartz, Chair

USERRA 2010 Amendments Overrule 11th Circuit Decision on Successor Liability

By Kathryn S. Piscitelli, Lakeland


K. PISCITELLI

The Veterans' Benefits Act of 2010 (Pub. L. 111-275) (VBA), which President Obama signed into law on October 13, 2010, includes important amendments to USERRA that will benefit employees who are servicemembers or veterans. The amendments clarify that: (1) a multi-factor test applies in all cases in which a successor employer's coverage under USERRA is disputed; and (2) USERRA prohibits wage discrimination. The VBA further provides for creation of a temporary program under which the Office of Special Counsel will investigate some USERRA complaints against federal executive agencies.

Successor employer coverage. The VBA codifies and mandates use of a multi-factor test approved in USERRA's legislative history for determining whether an employer qualifies as a "successor in interest" to a prior employer and thus is subject to the prior employer's obligations or liability under USERRA . The factors to be considered are substantial continuity of operations; use of the same or similar facilities; continuity of work force; similarity of jobs and working conditions; similarity of supervisory personnel; similarity of machinery, equipment and production methods; and similarity of products or services. Notably, a successor's lack of awareness of a potential or pending USERRA claim is expressly excluded as a factor in determining successor-in-interest status.

The VBA's requirement that the multi-factor test be used in determining whether an entity is a successor in interest effectively overrules a decision of the Eleventh Circuit that narrowly defined the circumstances under which successor-in-interest status could be found. In *Coffman v. Chugach Support Services, Inc.*,[1] the Eleventh Circuit held that successor-in-interest liability could not be imposed under USERRA in the absence of a merger or transfer of assets between an employer and its predecessor, and that the multi-factor test approved in the Act's legislative history thus would be improper and unnecessary when there has been no merger or transfer of assets. By omitting a merger or transfer of assets from the list of factors that must be considered in determining successor-in-interest status, the VBA clarifies that neither a merger nor transfer of assets is a precondition for successor liability under USERRA.

The VBA's successor-in-interest test is codified at 38 U.S.C. § 4303(4)(D). Essentially the same test appears in the Department of Labor's USERRA regulations, which were adopted in 2005.[2]

Wage dscrimination. Regarding protection from wage discrimination, the VBA amends USERRA's definition of "benefit of employment" expressly to include "wages or salary for work performed."[3] As originally drafted, USERRA excepted "wages or salary for work performed" from that definition. This exception created an ambiguity and made the statute susceptible to interpretation as authorizing wage discrimination against veterans and servicemembers. In fact, citing the exception, the Eighth Circuit had held that USERRA did not afford a cause of action to an employee who claimed that his employer discriminated against him by paying him a lower starting salary because of his military background.[4] By amending § 4303(2) specifically to include wages and salary as examples of USERRA-protected benefits, the VBA clarifies that USERRA bans compensation discrimination, and effectively overrules the Eighth Circuit case on this issue.

Immediate and retroactive effective dates. The successorship and wage discrimination amendments, each of which the VBA treats as clarifications of existing law, are effective immediately and apply retroactively. The VBA expressly states that these amendments "shall apply" to any violation of USERRA "that occurs before, on, or after the date of the enactment of this Act," and to all USERRA actions "that are pending on or after the date of the enactment of this Act."

Federal employee complaints. The VBA also requires establishment of a 36-month "demonstration project" under which certain USERRA claims against federal executive agencies will be investigated by the Office of Special Counsel (OSC), rather than the Department of Labor. During the project, the OSC will receive and investigate all USERRA administrative complaints, filed against federal executive agencies, that are related to "prohibited personnel practice" claims over which the OSC has jurisdiction under 5 U.S.C. § 1212. Moreover, the Department of Labor will refer to the OSC all USERRA administrative complaints filed against federal executive agencies by claimants having a social security number ending with an odd digit. The project is expected to start in April 2011. A similar program was in place from February 2005 to December 2007.

Kathryn S. Piscitelli *specializes in labor and employment law at Harris & Helwig, P.A., in Lakeland, Florida. She is Board Certified in Labor and Employment Law and is a member of The Florida Bar Labor and Employment Law Certification Committee. Ms. Piscitelli is also USERRA Leader of the National Employment Lawyers Association's Legislative & Public Policy Committee. She frequently lectures on and writes about USERRA and advises members of Congress on USERRA issues. Ms. Piscitelli is the co-author (with Edward Still) of a treatise on USERRA, The USERRA Manual (West 2010). She helped draft the USERRA amendments discussed in this article.*

Endnotes:

1 411 F.3d 1231, 1237 (11th Cir. 2005).

2 20 C.F.R. §§ 1002.35 - 1002.36.

3 38 U.S.C. § 4303(2).

4 *Gagnon v. Sprint Corp.*, 284 F.3d 839, 852-53 (8th Cir. 2002).

non-unionized settings. Section 7 of the NLRA provides that all employees "shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection." Generally speaking, "concerted activity" includes discussions among co-workers about the terms and conditions of their employment. This includes topics such as pay and benefits, working conditions, satisfaction with the workplace and management, and unionization. It is unlawful for an employer to retaliate against an employee because the employee has engaged in protected concerted activity, or to maintain policies that would "reasonably tend to chill" employees in their exercise of their rights under the NLRA. [1]

However, an employee's right to criticize his or her employer is not unbounded. In various cases, the National Labor Relations Board (NLRB) and courts have found that employee criticisms are not protected where, for example, they cause unjustifiable harm to vital interests of the employer,[2] disclose confidential information,[3] are deliberately false,[4] or are excessively vulgar, offensive or derogatory.[5] Further, while appeals to a third party to engage that person's assistance in interactions with the employer may be protected in some circumstances, that is not always the case.[6]

Against this backdrop, the NLRB recently filed a complaint against an employer because the employer had disciplined an employee for a *Facebook* posting critical of a supervisor. The case, *In re American Medical Response of Connecticut, Inc.*, began with a meeting between an employee of a Connecticut ambulance service company and her supervisor regarding a customer complaint about the employee's work.[7] Outside work hours, from her home computer, this employee posted disparaging comments on her personal *Facebook* page about her supervisor, including "love how the company allows a 17 to become a supervisor."[8] Emergency Medical Technicians commonly use "17" as code for a psychiatric patient.[9] According to the NLRB, the initial *Facebook* posting "drew supportive responses from her co-workers" and resulted in more disparaging comments regarding the supervisor.[10] The company subsequently terminated this employee.

In its complaint, the NLRB asserts that the employee was engaging in concerted activity when she criticized her supervisor on her *Facebook* page, that the decision to discharge the employee was motivated by the *Facebook* posting, and that the discharge therefore violated the NLRA.[11] Also at issue is the company's "Blogging and Internet Posting Policy," which, among other things, prohibits employees from "making disparaging, discriminatory or defamatory comments when discussing the Company or the employee's superiors, co-workers and/or competitors" without approval from the appropriate Vice President.[12] The company has denied the allegations, stating that the employee's "offensive statements made against the co-workers were not concerted activity protected under federal law."[13]

Interestingly, in December 2009, the NLRB's Office of General Counsel issued an Advice Memorandum approving an employer's social media policy, which included non-disparagement language.[14] Also, a posting on the NLRB's own *Facebook* page asks, "[w]hen do *Facebook* comments lose protected concerted activity status under the National Labor Relations Act?" In answer, the NLRB adopts a four point test that it has applied in the past when determining whether an employee's conduct has crossed the line between protected and unprotected activity. The test considers: "(1) the place of the discussion; (2) the subject matter of the discussion; (3) the nature of the employee's outburst; and (4) whether the outburst was, in any way, provoked by an employer's unfair labor practice."[15]

The analysis of the "place of the discussion" prong of the NLRB's four-part test is certain to be thought-provoking. It is readily evident that the sometimes public nature of social media postings

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The CHECKOFF

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may bear on whether an employee's communication causes unjustifiable harm, discloses confidences, etc. Cases may turn on whether the employee's *Facebook* page was publicly available or could be viewed only by the employee's *Facebook* "friends," whether the employee's "friends" were limited to co-workers or also included competitors, and other similar factors.

If the list of those who could view the post is limited to co-workers, then there will be a close analogy to water cooler conversations—the position the NLRB is taking in the *American Medical Response* case[16]— or to comments made at a gathering of co-workers outside of the office. Alternatively, if the *Facebook* page is public, the NLRB's analogy that the comments were similar to those made at the water cooler seems tenuous, as water cooler conversations are not usually publicly available on the internet. Such distinctions may make it difficult for the NLRB and courts to establish any bright line test, thereby complicating employers' efforts in crafting social media policies.

For public sector employees, First Amendment concerns add another layer of complexity for an employer hoping to establish an appropriate social media policy. Public employees' speech may be protected by the First Amendment, depending on whether the speech was made in the capacity of a citizen speaking on a matter of public concern (as opposed to speech made in the performance of an employee's job duties) and depending on whether it caused disruption to the workplace. Indeed, the Manatee Education Association recently filed suit challenging the district's *proposed* social media policy on First Amendment grounds, asserting that the proposed policy prohibits speech on matters of public concern. Further complicating this issue, as the attorney representing the district in this lawsuit filed by the Manatee Education Association stated, educators are bound by a code of ethics based upon the principles of the teaching profession, regardless of where their communications are made.[17]

An NLRB administrative law judge is scheduled to hear *American Medical Response* this month. However, it seems a near certainty that the issues presented by concerted activity with a social media backdrop will be disputed for years to come. At least until this line of precedent is well developed, the conservative approach for employers implementing social media policies is to use language that recognizes employees' right to engage in concerted activity, while reserving the right to discipline employees who post information about the employer that is false or unduly disruptive. The greater difficulty for employers may be in applying such policies in the absence of a body of case law affording clear guidance. Employers will be well-advised to revisit social media policies frequently, as case law develops. Employees should understand that these are uncharted waters, and that conduct that is protected in the workplace will not necessarily be protected in social media.

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Endnotes:

1 *See Lafayette Park Hotel*, 326 N.L.R.B. 824, 825, 159 L.R.R.M. 1243 (N.L.R.B. 1998).

2 *See NLRB v. Electrical Workers (IBEW) Local 1229 (Jefferson Standard Broadcasting Co.)*, 346 U.S. 464 (1953).

3 *See Int'l Bus. Machines Corp.*, 265 N.L.R.B. 638, 111 L.R.R.M. 1665 (N.L.R.B. 1982).

4 *See Walls Mfg. Co.*, 137 N.L.R.B. 1317, 50 L.R.R.M. 1376 (1962), *enf'd*, 321 F.2d 753 (D.C. Cir.), *cert. denied*, 375 U.S. 923 (1963).

5 *See Media Gen. Operations, Inc. v. NLRB*, 394 F.3d 207 (4th Cir. 2005).

Comments Sought Regarding Board Certification in Labor and Employment Law

Florida lawyers who meet a rigorous set of qualification standards can become certified by The Florida Bar as experts in Labor and Employment Law. We are nearing the 10th anniversary of certification for labor and employment lawyers. Over the past decade Section members have, collectively, developed a substantial body of experience with—and opinions concerning—the various aspects of certification. Recently, Section members were asked to complete a membership survey. Responses indicate that certification is an area of particular interest.

As part of its ongoing effort to be responsive to interests of Section members, the Section's Executive Council hopes to learn more from members about their opinions concerning certification and to receive suggestions for improving it. The Council therefore encourages members to express their opinions concerning any and all aspects of the certification process. Those who wish to comment may want first to review section 6-23 of the Rules Regulating The Florida Bar, which sets forth the standards for board certification of labor and employment lawyers. Comments may be submitted to any Executive Council Member.

6 *See Allied Aviation Serv. Co. of N.J.*, 248 N.L.R.B. 229, 103 L.R.R.M. 1454 (N.L.R.B. 1980), *enf'd*, 636 F.2d 1210 (3d Cir. 1980).

7 *In re Am. Med. Response of Conn., Inc.*, Case No. 34-CA-12576.

8 Steven Greenhouse, *Company Accused of Firing over Facebook Post*, N.Y. TIMES, (Nov. 9, 2010), *available at* http://www.nytimes.com/2010/11/09/business/09facebook.html?_r=1.

9 *Id.*

10 *Id.*

11 *In re Am. Med. Response of Conn., Inc.*, Case No. 34-CA-12576.

12 Greenhouse, *supra* note 8.

13 *Id.*

14 *Sears Holdings*, 18-CA-19801 (Dec. 4, 2009).

15 *See Atlantic Steel Co.*, 245 N.L.R.B. 814 (N.L.R.B. 1979).

16 Greenhouse, *supra* note 8.

17 Richard Dymond, *Manatee teachers sue schools over social site policy*, BRADENTON HERALD, (Nov. 13, 2010), *available at* http://www.bradenton.com/2010/11/13/2735268/manatee-teachers-sue-schools-over.html.

Section Bulletin Board

Mark your calendars for these important Section meetings & CLE dates!

For more information, contact Angela Froelich: 850-561-5633 / afroelic@flabar.org

EXECUTIVE COUNCIL MEETINGS

Saturday & Sunday, February 12-13, 2011
Leadership Retreat
Ritz Carlton Grande Lakes, Orlando

Thursday, February 24, 2011
5:00 p.m. – 6:00 p.m.
Executive Council Meeting
Hilton Bonnet Creek, Orlando
[Reception immediately following the meeting]

Friday, June 10, 2011
5:00 p.m. – 6:00 p.m.
Executive Council Meeting
Ritz Carlton Beach Resort, Naples
[Reception immediately following the meeting]

Thursday, June 23, 2011
5:00 p.m. – 6:00 p.m.
Executive Council Meeting
Gaylord Palms Resort, Orlando
The Florida Bar Annual Convention
[Reception immediately following the meeting]

UPCOMING CLE PROGRAMS

Feb. 10 — **Webinar – Employee Leasing 101** (1251R)
Speaker: Michael R. Miller

Feb. 24-25 — **11th Labor & Employment Law Certification and Review** (1168R)
Hilton Bonnet Creek, Orlando
Group Rate: $159 (Expires 2/3/11) / Reservation Number (407) 597-3600

Mar. 8 — **Webinar – An Endangered Species: The Independent Contractor?** (1252R)
Speaker: Tammy D. McCutchen

Apr. 12 — **Webinar – Trial Techniques from the World of Commercial Litigation** (1253R)
Speaker: Ervin A. Gonzalez

June 10 - 11 — **Advanced Labor Topics 2011** (1198R)
Ritz Carlton Beach Resort, Naples
Group Rate: $199 (Expires 5/19/11)
Reservations: (888) 856-4380

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E-Verify Enrollment: A Potential Marketing Tool for Florida Employers?

By Elizabeth Ricci, Tallahassee

Governor Scott's Platform

Immigration was one of Governor Rick Scott's key campaign issues. On his first day in office, he issued an Executive Order[1] requiring state agencies to use the E-Verify system to verify employment eligibility of state employees and contractors.

What is E-Verify?

E-Verify is the internet-based companion to Form I-9 Employment Eligibility Verification that allows an employer, in three to five seconds, to determine a worker's employment authorization status by comparing information listed on Form I-9 with some 455 million Social Security records and 80 million Homeland Security, visa, citizenship and U.S. passport records.[2]

Voluntary vs. Mandatory Enrollment

The Department of Homeland Security strongly encourages, but does not currently require, states to mandate employers' enrollment in E-Verify. At this time, however, four states require that all employers be enrolled in the system while nine have some form of E-Verify requirement. There are seven states, including Florida[3] with pending legislation that would require enrollment. To date, only the State of Illinois bars employers from E-Verify enrollment.[4] Also, as of September 8, 2009, certain federal contractors must enroll new and existing employees in the system.[5]

Positions

E-Verify was hailed by President George W. Bush as "the best means available to confirm the work authorization of the workforce."[6] Likewise, other advocates of enrollment claim "[t]he statistics show E-Verify works . . . Even for employees who receive initial mismatches and are later confirmed as work authorized, E-Verify informs them of possible errors with their government records. By clearing up mismatches sooner rather than later, E-Verify can save these employees significant time and frustration."[7]

In contrast, opponents such as the American Immigration Lawyers Association (AILA) claim that "E-Verify does not effectively root out all undocumented workers. Some undocumented workers will be erroneously confirmed as authorized to work. E-Verify cannot identify counterfeit, stolen, or borrowed identity documents. A worker may present 'good' documents that check out through E-Verify, but E-Verify cannot confirm that the document belongs to the person presenting them."[8] Similarly, AILA notes: "Due to errors in the Social Security Administration and DHS databases, some citizens and legal workers will receive tentative nonconfirmations, or even final nonconfirmations, and will not be able to resolve the discrepancy or may not even know about the problem. They will be denied employment and paychecks."[9]

Unintended Consequence of Voluntary Enrollment

Regardless of the legal requirement, I-9 compliance and E-Verify enrollment might be used as a way to market to consumers desirous of assurances that businesses with whom they deal hire only authorized workers. According to Tallahassee-based employment law attorney Robert J. Sniffen, "The I-9 is a deceptively simple form for which the consequences of non-compliance can mean civil and criminal penalties. If the system continues to be free, if legal workers are not harmed by its use and if Florida businesses can benefit by increasing competitiveness, Florida employers should consider voluntary enrollment."[10]

Likewise, governmental consultant and lobbyist Paige Carter-Smith, with Governance, Inc., believes that "the importance of E-Verify enrollment cannot be overstated. The potential windfall to Florida businesses contracting with the federal government is well worth enrollment."[11]

Conclusion

As an online counterpart to the I-9, E-Verify may provide a means of quickly verifying workers' employment eligibility. Although some are concerned about federal database errors, all state agencies must now use E-Verify and all Sunshine State employers may soon be required to be E-Verify enrolled, either due to market conditions or state law.

E. RICCI

***Elizabeth Ricci** is the managing partner of Rambana & Ricci, PLLC in Tallahassee where she concentrates on employment-based immigration and counsels employers on I-9 compliance, strategy and audit defense. She received her B.S. in International Business from Barry University and her J.D. from Nova Southeastern University where she argued on the First Amendment Moot Court team.*

Endnotes:

1 Fla. Exec. Order No. 11-02 (Jan. 4, 2011).

2 *Uscis.gov/everify* (accessed Dec. 1, 2010).

3 H.B. 219, 112th Leg. Sess. (Fla. 2010) would have required state contractors to use E-Verify but was not sponsored in the Senate.

4 *http://www.numbersusa.com/content/learn/enforcement/state/local-policies/map-states-mandatory-e-verify-laws.html* (accessed Dec. 1, 2010).

5 73 Fed. Reg. 221 (Nov. 14, 2008).

6 Exec. Order No. 13,465, 73 Fed. Reg. 113 (2008).

7 *Uscis.gov/everify* (accessed Dec. 1, 2010).

8 AILA InfoNet Doc. No. 09070868 (posted Jul. 8, 2009).

9 *Id.*

10 Interview with Robert Sniffen, Managing Partner of Sniffen & Spellman, P.A., in Tallahassee, Fla. (Dec. 3, 2010).

11 Interview with Paige Carter-Smith, President of Governance, Inc., in Tallahassee, Fla. (Dec. 1, 2010).

State Courts

By Dee Anna Drennan, Tampa


D.A. DRENNAN

Supreme Court of Florida

Workers' Compensation; Presuit Notice

Bifulco v. Patient Bus. & Fin. Servs., Inc., 39 So. 2d 1255 (Fla. 2010).

The Florida Supreme Court, resolving a conflict among Florida's District Courts of Appeal, held that workers' compensation retaliation claims brought against the State pursuant to section 440.205, Florida Statutes, are not subject to the presuit notice requirements of section 768.28(6).

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* * *

District Courts of Appeal

By Dee Anna Drennan, Tampa, and Lindsay Hanson, Jupiter

First DCA

Unemployment Compensation

Arensen v. Fla. Unempl. App. Comm'n, --- So.3d ---, 2010 WL 4829962 (Fla. 1st DCA 2010).


L. HANSON

After being terminated on June 13, 2008, Arensen applied for unemployment benefits and was interviewed by an Agency for Workforce Innovation employee regarding her claim. The interviewer told Arensen that he would contact her previous employer before deciding whether to award benefits. Two weeks later, Arensen received a Wage and Transcript Determination that approved her unemployment benefits. The Agency then paid regular unemployment benefits to Arensen for the following 10 months, which totaled almost $9,000. Further, the Agency later sent Arensen two formal notices, increasing her benefits due to the Emergency Unemployment Compensation Extension Act of 2008. However, on April 29, 2009, the Agency issued Arensen a non-monetary Notice of Determination, stating she was ineligible for benefits because she was terminated for misconduct and that she had to pay back all of the benefits received. Approximately two weeks later, on May 13, 2009, the Agency sent Arensen a non-monetary notice that listed the amount of overpayment and an appeal date of "06/02/2009." On May 26, 2009, Arensen sent a letter appealing the determination of overpayment. Subsequently, the Agency sent two additional overpayment notices, listing increasing amounts owed by Arensen; each provided that Arensen had 20 days to appeal the decision. On July 1, 2009, the Agency conducted a telephonic appeal hearing. The appeal referee found that Arensen's appeal was untimely because it was mailed more than 20 days after the Agency's original April 29, 2009, decision. The court found that Arensen was justifiably confused by the multiple notices and multiple appeal deadlines. Although Arensen's appeal was mailed more than 20 days after the April 29, 2009, decision, it was timely according to the March 13, 2009, non-monetary notice that specifically listed an appeal deadline of June 2, 2009. The court also held that Arensen's due process rights were violated when the Agency moved so slowly in determining that she was terminated for misconduct. The Agency allowed Arensen to collect nearly $9,000 in benefits, which operated as a "*de facto* determination of eligibility," and then terminated her benefits abruptly without a hearing. The court reversed the Agency's decision and remanded the case, allowing Arensen to appeal both the determination of eligibility and the amount of overpayment.

Workers' Compensation

Morton's of Chicago, Inc. & Broadspire v. Lira, 2010 WL 3984775 (Fla. 1st DCA Oct. 13, 2010).

Claimant introduced 95 pages of bills and costs allegedly incurred as the result of his workplace accident and injuries. However, claimant produced evidence linking only two of the bills to his medical treatment for compensable injuries. The employer/carrier did not introduce any countervailing evidence in this regard. The JCC awarded medical expenses for all of the medical bills. In some prior cases where medical bills were not introduced into evidence, the First DCA has reversed and remanded the cases for further proceedings, instead of reversing the award of medical expenses outright. The court noted, however, that the cases are silent "concerning the circumstances which justify remanding the case to the JCC to allow a party a second opportunity" to link medical bills to compensable injuries. In this case, the First DCA upheld the JCC's award of medical expenses for the two supported bills. The court then clarified its intent to handle future cases by simply reversing the JCC's award of medical expenses where the party with the burden of proof fails to establish a sufficient evidentiary basis for the damages awarded at trial. Reversal and remand for further proceedings will be granted only in exceptional circumstances. The court reasoned that a blanket rule allowing a claimant a second chance to prove its case would be inconsistent with general law and public policy. Nonetheless, due to the lack of clarity in the court's prior rulings,

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the court "reluctantly" remanded this case to the JCC for further proceedings concerning the award.

Second DCA

Jurisdiction/Service of Process

TID Servs., Inc. v. Dass, 2010 WL 4628571 (Fla. 2d DCA Nov. 17, 2010).

TID maintained a private mailbox at a UPS store; TID provided the private mailbox as the address of record for its principal office, officers, directors and registered agent. A sheriff's deputy served a summons and complaint upon the owner of the UPS store where TID's private mailbox was located. Substitute service was not proper on TID because TID's private mailbox was not the *only* address discoverable for TID through the public records.

Third DCA

Workers' Compensation Immunity – Intentional Tort Exception

Barnett v. Bank of America Corp., 45 So. 3d 948 (Fla. 3d DCA 2010).

Plaintiff was a former manager at Bank of America's (BOA) Bay Harbor Island branch. In May 2002, BOA agreed to construct a new bank facility as part of the building's renovation. BOA created a temporary facility so the branch could remain open. Plaintiff argued that a one-hour fire wall, which separated the temporary bank facility from the construction area, was built incorrectly and did not completely separate the spaces. Numerous depositions were taken in which employees reported being continually exposed to dust, odors and fumes. Additionally, there was no functioning air conditioning system. Allegedly as a result of the exposure, plaintiff and all but four of the 12 total employees became sick with respiratory illnesses, headaches and/or dermatitis. Plaintiff requested that the employees be moved to a different site. BOA refused to relocate the employees. In response to employee complaints and workers' compensation claims, BOA hired a cleaning crew, installed fans and brought in air purifiers for the temporary facility. The employees continued to get sick. The temporary bank facility was shut down in January 2003. BOA argued that workers' compensation provided the exclusive remedy for injuries sustained within the course and scope of plaintiff's employment. Plaintiff countered that the intentional tort exception applies because BOA engaged in conduct substantially certain to cause injury or death. Viewing the facts in the light most favorable to plaintiff, the Third DCA reversed summary judgment due to disputed issues of material fact regarding the substantial certainty test.

Fourth DCA

Attorneys' Fees

Ultimate Makeover Salon & Spa, Inc. & Zalinger v. Difrancesco, 41 So. 3d 335 (Fla. 4th DCA 2010).

Defendants appealed the trial court's denial of their claim for attorneys' fees under Section 448.08, Florida Statutes (unpaid wages). Defendants argued that the trial court employed the wrong standard, denying their claim because they prevailed on a statute of limitations defense rather than on the merits. The Fourth DCA noted that the trial court has broad discretion in awarding attorneys' fees under section 448.08, and that existing case law on awarding attorneys' fees to prevailing employers is "scant." However, under *Carpenter v. Metro. Dade County*, 472 So. 2d 795, 796 (Fla. 3d DCA 1985), an award of attorneys' fees may be made to a defendant who prevails in an unpaid wage case based on a section 95.11(4)(c) statute of limitations defense. Because the trial court incorrectly believed section 448.08 attorneys' fees could not be awarded to defendants, the order was reversed and the case was remanded for further consideration.

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* * *

Federal Case Notes

Eleventh Circuit

By Lindsay Hanson, Jupiter, and Devona Reynolds, Miami

Attorneys' Fees -- Request for Rehearing En Banc Denied

D. REYNOLDS

Gray v. Bostic, --- F.3d ---, 2010 WL 4226522 (11th Cir. 2010).

In its initial opinion, the court had vacated an award of attorneys' fees to a prevailing plaintiff because the district court committed an error of law by basing its award, in part, on the fact that 64 cases had cited earlier appellate decisions in the case, even though only two of those 64 cases related to the legal issue on which the plaintiff prevailed. See *Checkoff*, Vol. L., No. 2 (Oct. 2010) at 10. In an opinion by Judge Carnes, the court denied plaintiff's request for rehearing en banc. In a strongly-worded dissent, Judge Wilson disagreed with the majority's decision that the district court abused its discretion and opined that the panel "stretch[ed]" Supreme Court precedent beyond its intended boundaries. Judge Wilson also warned that the court should be hesitant to make decisions, such as the one made in this case, that will likely deter attorneys from taking civil rights cases.

FLSA Enterprise Coverage; Evidence

Jones v. Freedom Rain, TLC et al., Case No. 09-16134, 2010 WL 4121301 (11th Cir. Oct. 21, 2010).

Plaintiff filed a lawsuit seeking overtime pay under the Fair Labor Stan-

dards Act. Defendants moved for summary judgment, asserting that because TLC's annual gross volume of sales or business was less than $500,000, it was not an "enterprise" covered by the FLSA. In opposition, plaintiff proffered TLC's 2007 IRS Form 990 which showed that TLC had an annual gross volume of sales in 2006 exceeding the $500,000 threshold. Plaintiff also proferred her own opinion, based on defendants' discovery responses and her personal knowledge as a former employee, that 2007 income also exceeded the threshold. The trial court entered summary judgment, agreeing with defendants that the Form 990 was insufficient to defeat summary judgment because not authenticated, and that plaintiff's own opinion was also insufficient.

On appeal, the Eleventh Circuit rejected defendants' authentication argument because defendants had produced the Form 990 in response to plaintiff's discovery requests and had admitted that it was a photocopy of a TLC document. The court found plaintiff's estimate of TLC's 2007 income to be credible and held that even if her estimate was not "precise" or might not "persuade a jury," it was not "pure speculation" and therefore was sufficient to avoid summary judgment.

LMRA Preemption; Disclaimer in Collective Bargaining Agreement
Atwater v. Nat'l Football League Players Ass'n, 2010 WL 12556 (11th Cir. Nov. 23, 2010).

Plaintiffs, former National Football League (NFL) players and related entities, lost money investing with Kirk Wright and Nelson Bond who, unbeknownst to plaintiffs, were operating a Ponzi scheme. Plaintiffs sued the NFL and the National Football League Players' Association (NFLPA), asserting negligence claims and breach of fiduciary duty under Georgia law. Plaintiffs argued that they would not have invested with Wright and Bond but for defendants' failure to give them accurate information about Wright and Bond and the fact that the NFLPA listed Wright and Bond with the NFLPA's Financial Advisor's Program.

Defendants argued that § 301 of the Labor-Management Relations Act (LMRA) preempted the state law claims. According to the NFLPA, the Financial Advisor's Program was provided in order to comply with a provision in the collective bargaining agreement (CBA) requiring the NFLPA to establish a Career Planning Program and to provide information to players on handling their personal finances. Further, the CBA contained a disclaimer that "the players shall be solely responsible for their personal finances."

Citing *Lingle v. Norge Div. of Magic Chef, Inc.,* 486 U.S. 399 (1988), the court found that § 301(a) of the LMRA completely preempts state law claims, including state tort claims, that require the interpretation or application of a collective bargaining agreement. The court determined that defendants' duties arose directly from the CBA and that it was necessary to interpret the CBA disclaimer to determine whether the plaintiffs reasonably relied on the CBA. The court therefore affirmed entry of summary judgment for the defendants on the state law claims.

Motor Carrier Act Exemption
Abel v. S. Shuttle Servs., 620 F.3d 1272 (11th Cir. 2010).

Plaintiff Abel drove a shuttle for patrons traveling to and from airports in southern Florida. Persons whom Abel transported were travelers coming from or continuing to destinations outside the State of Florida. However, Abel's transportation never took him outside of Florida. The transportation provided was often part of a travel package that included airfare, hotel, and transportation to and from the airport. There was an arrangement between Southern Shuttle Services (Southern) and these travel companies to provide the transportation and later bill the travel company. Southern compensated Abel as an exempt employee and therefore did not pay him for overtime. The trial court initially entered summary judgment based on the "taxi cab exemption," but the Eleventh Circuit reversed and remanded. On remand, the trial court entered summary judgment under the Motor Carrier Act (MCA) exemption. On appeal, Abel argued that the MCA exemption did not apply because the Secretary of Transportation had not in fact exercised jurisdiction over Southern. The court disagreed, finding that

continued, next page

PERC Launches E-Filing

In an effort to better serve those who have official business with the Public Employees Relations Commission, the Commission has developed an electronic portal for parties to file certain documents in their cases and to access their active case list and associated dockets. This secure web-based application, called *ePERC*, is optional and is provided as a convenience and cost-saving measure for the state and for registered users.

For more information and to register for *ePERC*, please visit PERC's website at http://perc.myflorida.com.

as long as the Secretary has the authority to exercise jurisdiction, whether that authority has been exercised is immaterial. The court held that the MCA exemption can apply to intrastate transport of travelers in certain circumstances and found those circumstances existed in this case.

Retaliation Claims – Offer of Judgment; Attorneys' Fees

Alansari v. Tropic Star Seafood, Inc., 2010 WL 3511021 (11th Cir. Sept. 9, 2010).

Plaintiff brought retaliation claims under Title VII, the Florida Civil Rights Act (FCRA), Florida's private sector whistleblower act and Florida's Workers' Compensation Law. Defendant made an offer of judgment on the whistleblower act and workers' compensation claims, pursuant to section 768.79, Florida Statutes, which plaintiff rejected. Defendant prevailed and filed a motion for attorneys' fees, which the trial court denied based on its finding that the claims were not frivolous. On appeal, defendant argued that fee awards under section 768.79 are not limited to frivolous claims. The Eleventh Circuit affirmed, citing *Christiansburg Garment Co. v. EEOC,* 434 U.S. 412 (1978), and its earlier decision in *Jones v. United Space Alliance, LLC,* 494 F.3d 1306 (11th Cir. 2007) (defendants cannot recover attorneys' fees under Florida offer of judgment statute in FCRA case, unless the action is determined to be "frivolous, unreasonable, or without foundation"). The court pointed out that the same analysis is employed for Title VII and whistleblower retaliation claims, and that all of the claims were based on the same set of facts. The court also agreed with the district court's alternative ruling that the offer of judgment was facially invalid in that it failed "to discuss specifically plaintiff's request for injunctive relief and failed to address how much of the settlement was attributable to each plaintiff."

Devona Reynolds *is an associate with the law firm Zarco Einhorn Salkowski & Brito, P.A. in Miami, Florida. She received her J.D. from the Shepard Broad Law Center at Nova Southeastern University after graduating from the University of Miami with a B.B.A. in Business Law and Marketing.*

* * *

Northern District of Florida

By Jerry Rumph, Tallahassee

FMLA -- Liquidated Damages

J. RUMPH

Atkins v. Wayne-Dalton Corp., 2010 WL 4736880 (N.D. Fla. _____ __, 2010).

Plaintiff twice took unplanned partial-day leaves of absence to attend to medical emergencies related to his wife's pregnancy. In both cases, he provided doctors' notes. Defendant fired him because of the absences. After a jury found that the discharge violated the FMLA, the court considered whether to award liquidated damages under 29 U.S.C. § 2617(A)(iii). The court held that a prevailing plaintiff in an FMLA case is entitled to liquidated damages unless the defendant shows that it had a good faith belief that its act or omission was not a violation of the FMLA. Citing *Cooper v. Fulton County, Ga.*, 458 F.3d 1282, 1287-88 (11th Cir. 2006), the court noted that an employer must show both subjective good faith and an objectively reasonable belief. The court held that because the defendant knew that the absences were due to plaintiff's wife's pregnancy complications, and knew that pregnancy complications were covered by the FMLA, it was not objectively reasonable to believe that the discharge was lawful. The court therefore awarded liquidated damages.

Jerry Rumph *is employed as an associate with the law firm of Hayward & Grant, P.A., in Tallahassee. He completed a joint JD/MBA at Florida State University after graduating from the University of South Florida with a B.A. in English.*

* * *

Middle District of Florida

By Lindsay Hanson, Jupiter

Arbitration; Bases for Modification of Award

Peyovich v. World Mortgage Co., 2010 WL 3516721 (M.D. Fla. July 29, 2010).

Plaintiff brought a claim for unpaid overtime. Defendant moved to compel arbitration. Plaintiff opposed the motion, arguing that the arbitration agreement was unconscionable because it made attorneys' fees on her FLSA claim discretionary rather than mandatory. At the motion hearing, defendant's counsel represented to the court that should plaintiff prevail on her FLSA claim, their position would be that plaintiff would be entitled to attorneys' fees under the FLSA. The motion to compel arbitration was granted. At arbitration, the arbitrator found that plaintiff had proven her overtime claim for one period of her employment but not the other. The arbitrator awarded plaintiff damages on her overtime claim and ordered that each side was to bear its own attorneys' fees and costs. After plaintiff's request to the arbitrator to modify the award and the denial of attorneys' fees was effectively denied, plaintiff filed a motion to vacate or modify the arbitrator's award. Adopting a magistrate's report and recommendation, the court found that the arbitrator was within her power to order each side to bear its own attorneys' fees since the arbitration agreement expressly provided for this. Plaintiff argued that the attorneys' fee determination should be rejected because made in manifest disregard for the law, and that judicial estoppel should prevent defendant from arguing a position inconsistent with its representation to the court that plaintiff

should be entitled to attorneys' fees should she prevail. The court rejected both of these as legally insufficient bases to vacate or modify an arbitrator's decision. The court also rejected plaintiff's challenge of the amount awarded as overtime pay because, although the award was the "lowest supportable figure," plaintiff had conceded that it was not a miscalculation

* * *

Southern District of Florida

By Eric Ostroff, Miami

Scope of Charge; Pendant Jurisdiction


E. OSTROFF

Root v. Miami-Dade County, slip op., No. 09-21041 (S.D. Fla. Aug. 6, 2010).

Plaintiff, an administrative secretary to the Captain for the Miami-Dade Corrections and Rehabilitation Department, brought claims against the department for retaliation under Title VII, along with state law claims including unjust enrichment and negligent performance evaluation. The plaintiff based her retaliation claims on a 30-day suspension imposed five months after she filed an EEOC charge; on a failure to give plaintiff an appeal hearing concerning the suspension; and on plaintiff's discharge, which occurred two years after her first EEOC charge and one year after her second EEOC charge.

The defendant, citing *Buzzi v. Gomez*, 62 F. Supp. 2d 1244, 1351-2 (S.D. Fla. 1999), argued that the failure to afford an appeal hearing could not be considered because it was not mentioned in the charge of discrimination. The court rejected this argument based on an exception recognized by *Buzzi* for allegations that are "reasonably related" to those in the administrative charge. While holding that retaliation claims arising from the filing of an EEOC charge fall under this exception, the court went on to reject the retaliation claims in the instant case because plaintiff failed to demonstrate a causal connection between her EEOC charges and the suspension or termination, and failed to establish that the department's proffered reasons for its actions were pretextual. Having dismissed all of the plaintiff's federal claims, the court declined to exercise supplemental jurisdiction and dismissed the plaintiff's state law claims without prejudice.

FLSA Collective Action – Claim Splitting

Greene v. H&R Block Eastern Enterprises, Inc., 2010 WL 3001187 (S.D. Fla. July 26, 2010).

Greene was the second of two collective actions brought under the FLSA. In the first action, *Illano v. H&R Block Enterprises*, No. 09-22531-CIV-King (S.D. Fla. filed Aug. 27, 2009), the court rejected a motion for conditional certification of a nationwide class and later granted conditional certification of a class limited to Miami-Dade County. Eight months after filing the *Illano* case, and after the court's conditional certification of the Miami-Dade class, the same attorney filed *Greene* as a putative nationwide collective action under the FLSA, arising out of the same series of transactions as *Illano*. Defendant moved to dismiss *Greene* on the grounds that it constituted inappropriate claim splitting and attempted to circumvent the conditional certification order in *Illano*. In response, plaintiffs sought consolidation of the two cases. The court dismissed *Greene* with prejudice, noting that it involved the same parties and arose out of the same series of transactions as *Illano,* thus meeting the test for claimsplitting. The court also noted that consolidating the case with *Illano* "would have the unacceptable consequence of allowing additional conditional plaintiffs to join *Illano* beyond this court's mandated deadline for doing so. This court will not permit such back-door entry into a conditional class that has been closed after an appropriate notice period."

***Eric Ostroff** is an associate at Meland Russin & Budwick, P.A. in Miami, where he practices commercial and employment litigation. He received a J.D. from the University of Miami School of Law and a B.A. from Emory University.*

WANTED: ARTICLES

The Section needs articles for *the Checkoff* and The Florida Bar *Journal*. If you are interested in submitting an article for *the Checkoff,* contact Shane Muñoz (813/261-7800.) (*smunoz@fordharrison.com*). If you are interested in submitting an article for The Florida Bar *Journal,* contact Frank Brown (813/273-4381) (*feb@macfar.com*) to confirm that your topic is available.

REWARD: $150*

[*For each published article, a $150 scholarship to any section CLE will be awarded.]

Article deadline for the next *Checkoff* is February 24, 2011.

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The Florida Bar Continuing Legal Education Committee and the Labor and Employment Law Section present

Employee Leasing 101

COURSE CLASSIFICATION: INTERMEDIATE LEVEL

Webinar: Thursday, February 10, 2011

12:00 noon – 1:00 p.m. Eastern Standard Time

Webinar: Audio by Phone with Slides over the Internet

Course No. 1251R

12:00 noon – 1:00 p.m. Eastern Standard Time
Employee Leasing 101
What is a PEO? Who is the employer? How does it work? What are the L&E issues involved? Mike Miller, who has 25 years experience serving as General Counsel to the Florida Association of Professional Employer Organizations, will share his insights.
Michael R. Miller, Kunkel, Miller & Hament, Tampa – Program Chair

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CLE SECTION

11th Annual Labor and Employment Law Certification Review Course

COURSE CLASSIFICATION: ADVANCED LEVEL

One Location: Thursday & Friday, February 24-25, 2011
Hilton Bonnet Creek • 14100 Bonnet Creek Resort Lane • Orlando, FL 32821
(407) 597-3600 • www.hiltonbonnetcreek.com

Course No. 1168R

Those who have applied to take the certification exam may find this course a useful tool in preparing for the exam. It is developed and conducted without any involvement or endorsement by the BLSE and/or Certification committees. Those who have developed the program, however, have significant experience in their field and have tried to include topics the exam may cover. Candidates for certification who take this course should not assume that the course material will cover all topics on the examination.

Thursday, February 24, 2011

8:00 a.m. – 8:20 a.m. **Late Registration**

8:20 a.m. – 8:30 a.m.
Opening Remarks
Robert S. Turk, Stearns Weaver Miller Weissler Alhadeff et al., Miami – Legal Education Director, Labor and Employment Law Section
Shane T. Muñoz, Ford & Harrison, Tampa – Program Co-Chair
Susan L. Dolin, Susan L. Dolin, P.A., Pembroke Pines – Program Co-Chair

8:30 a.m. – 9:20 a.m.
Family and Medical Leave Act
David E. Block, Jackson Lewis LLP, Miami

9:20 a.m. – 10:20 a.m.
Employee Retirement Income Security Act of 1974 / COBRA
Frank E. Brown, MacFarlane Ferguson, Tampa

10:20 a.m. – 10:30 a.m. **Break**

10:30 a.m. – 12:00 noon
National Labor Relations Act
Susan L. Dolin, Susan L. Dolin, P.A., Pembroke Pines

12:00 noon – 1:00 p.m.
Lunch (included in registration fee)

1:00 p.m. – 2:00 p.m.
Public Employees Relations Act
Deborah C. Brown, Stetson University College of Law, Gulfport

2:00 p.m. – 3:10 p.m.
Common Law Employment Claims
Jill S. Schwartz, Jill S. Schwartz & Associates, P.A., Winter Park

3:10 p.m. – 3:20 p.m. **Break**

3:20 p.m. – 4:00 p.m.
Worker Adjustment and Retraining Notification Act
Kevin D. Johnson, Thompson Sizemore Gonzalez & Hearing, P.A., Tampa

4:00 p.m. – 5:00 p.m.
Constitutional Employment Claims
Robert J. Sniffen, Sniffen & Spellman, P.A., Tallahassee

5:00 p.m. – 6:00 p.m.
Labor & Employment Law Section Executive Council Meeting (all invited)

6:00 p.m. – 7:30 p.m.
Reception (included in registration fee)

Friday, February 25, 2011

8:25 a.m. – 8:30 a.m.
Opening Remarks
Shane T. Muñoz, Ford & Harrison, Tampa – Program Co-Chair
Susan L. Dolin, Susan L. Dolin, P.A., Pembroke Pines – Program Co-Chair

8:30 a.m. – 9:45 a.m.
EEO Substantive Law
Mary Ruth Houston, Shutts & Bowen LLP, Orlando

9:45 a.m. – 10:30 a.m.
EEO Laws: Administrative Procedures
F. Damon Kitchen, Constangy Brooks & Smith LLC, Jacksonville

10:30 a.m. – 10:40 a.m. **Break**

10:40 a.m. – 11:30 a.m.
Statutory and Common Law Protection of Business Interests
Karen M. Buesing, Akerman Senterfitt, Tampa

11:30 a.m. – 12:00 noon
Unemployment Appeals
Hon. Alan Orantes Forst, Unemployment Appeals Commission, Palm City

12:00 noon – 1:00 p.m.
Lunch (included in registration fee)

1:00 p.m. – 1:50 p.m.
Workplace Privacy: Polygraph Protection Act; Fair Credit Reporting Act; Invasion of Privacy; Employer Regulation of Private Employee Conduct
James M. Craig, Thompson Sizemore Gonzalez & Hearing, P.A., Tampa

1:50 p.m. – 2:45 p.m.
Whistleblower Statutes and Workers' Compensation Retaliation Claims
Shane T. Muñoz, Ford & Harrison, Tampa

2:45 p.m. – 3:35 p.m.
Fair Labor Standards Act
David Spalter, Jill S. Schwartz & Associates, P.A., Winter Park

3:35 p.m. – 3:45 p.m. **Break**

3:45 p.m. – 4:15 p.m.
OSHA
Eric J. Holshouser, Fowler White Boggs, P.A., Jacksonville

4:15 p.m. – 4:45 p.m.
Drug Testing Statutes
Christopher C. Sharp, Sharp Law Firm, P.A., Plantation

4:45 p.m. – 5:15 p.m.
USERRA
Adam S. Chotiner, Shapiro Blasi Wasserman & Gora, P.A., Boca Raton

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The Florida Bar Continuing Legal Education Committee and the Labor and Employment Law Section present

CLE SECTION

An Endangered Species: The Independent Contractor?

COURSE CLASSIFICATION: INTERMEDIATE LEVEL

Webinar: Tuesday, March 8, 2011

12:00 noon – 1:00 p.m. Eastern Standard Time

WEBINAR

Webinar: Audio by Phone with Slides over the Internet

Course No. 1252R

12:00 noon – 1:00 p.m. Eastern Standard Time
An Endangered Species: The Independent Contractor?
Tammy McCutchen, Littler, Washington, D.C.
Program Chair
What is an independent contractor? How does the FLSA's economic realities test affect the employer/independent contractor relationship? Is the independent contractor slated for extinction? Join Tammy McCutchen, former Administrator of the Wage and Hour Division of the U.S. Department of Labor, who will provide the latest on this topic.

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COURSE CLASSIFICATION: INTERMEDIATE LEVEL

Webinar: Tuesday, April 12, 2011

12:00 noon – 1:00 p.m. Eastern Standard Time

WEBINAR

Webinar: Audio by Phone with Slides over the Internet

Course No. 1253R

12:00 noon – 1:00 p.m. Eastern Standard Time
Trial Techniques from the World of Commercial Litigation
Ervin A. Gonzalez, Colson Hicks Eidson, Miami Program Chair
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