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The Florida Bar
Vol. LII, No.3
May 2014

A PUBLICATION OF THE FLORIDA BAR LABOR & EMPLOYMENT LAW SECTION

IN THIS ISSUE

Adventures in Babysitting: The Supreme Court Extends Sarbanes-Oxley Protection to Certain Household Employees and Employees of Contractors

By Sacha Dyson, Tampa

After the demise of the Enron Corporation on December 2, 2001, Congress moved swiftly to enact the Sarbanes-Oxley Act on July 30, 2002, "[t]o safeguard investors in public companies and restore trust in the financial markets."[1] In signing the bill into law, President George W. Bush commented: "'The era of low standards and false profits is over. . . . No boardroom in America is above or beyond the law."[2] The Act included a new anti-retaliation provision that provides, in pertinent part:

> No [public] company . . . , or any officer, employee, contractor, subcontractor, or agent of such company, may discharge, demote, suspend, threaten, harass, or in any other manner discriminate against an employee in the terms and conditions of employment because of [whistleblowing or other protected activity].[3]

Recently, in *Lawson v. FMR LLC,*[4] — a case concerning "the definition of the protected class," in the words of Justice Ginsberg[5] —the United States Supreme Court had occasion to interpret this provision (§ 1514). In particular, the issue before the Court was whether the term "employee" in § 1514A refers only to employees of a public company or whether it extends to employees of a contractor. The resulting opinion was fractured and, in some ways, uniquely divided.

The plaintiffs were employees of FMR LLC, a private company that contracts with publicly traded mutual funds to provide advice and management for the funds. The mutual funds do not have any employees. The plaintiffs alleged that they complained to their supervisors about potential fraud or inaccurate reporting and that their employer, FMR, subsequently retaliated against them. They sued FMR in federal court alleging violations of the anti-retaliation provision in Sarbanes-Oxley (§ 1514A). FMR moved to dismiss, asserting that the anti-retaliation provision does not protect employees of private contractors. The district court denied the motion to dismiss, which was reviewed by the First Circuit Court of Appeals on an interlocutory basis. The First Circuit reversed the district court, and the United States Supreme Court granted certiorari.

Justice Ginsburg—joined by Chief Justice Roberts as well as Justices Breyer and Kagan—delivered the opinion of the Court. Justice Scalia, joined by Justice Thomas, concurred in the judgment as well as in principal parts of the opinion, but they refused to join in the entire decision, rendering part of the majority decision a plurality opinion. Justice Sotomayor authored the dissent, and she was joined by Justices Kennedy and Alito.

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Message from the Chair

"So why do you want to come to Cleveland?," the lawyer recruiting at my law school asked me. Cleveland! I didn't want to go to Cleveland as a summer law clerk. So I just zoned out during the interview. The attorney droned on about his firm and what different people in his law firm do. I really didn't care. He then paused and asked me, "Can you work with ERISA?"

I wasn't exactly sure what he had asked me. So, I leaned in, looked the attorney straight in the eyes and, in a low voice to emphasize my gravitas, said "Sir. I can work with *anyone* in your firm." He gave me a very quizzical/surprised look, and I gave him a "nailed it" smile.

I then left the interview and asked my fellow law students if they had been asked about ERISA by this lawyer. They all had, of course. I then asked in exasperation, "WHO IS SHE?" My classmates never let me forget that question. Of course, ERISA was not who I thought she was (in my defense, ERISA was enacted only two years before I was interviewed).

Fast forward. In March, I moderated our Section's webcast on "ERISA for the Employment Practitioner" presented by Ivelisse Berio LeBeau of Sugarman & Susskind. I wished I had listened to this webcast before that interview many years ago. Now I really know who ERISA is! Without fail, every time I attend one of our Section CLE events, I learn something new.

You have the same opportunity. This year our CLE programs and other educational efforts, including articles in *the Checkoff* and *The Bar Journal*, e-blasts, and toolkits have been first rate. I hope you have taken a moment to read them. In south Florida, our Section recently hosted Margaret Diaz, the NLRB Regional Director for Region 12 and Pam Scott, the NLRB's Resident Officer for the Miami Office. The turnout was large—not surprising based on the NLRB's recent rulings and the press regarding Margaret's Chicago counterpart's ruling that the scholarship football players at Northwestern are employees.

So what's up next for the Section—*N'awlins*! I encourage every Section member to come to New Orleans for our Advanced Labor Topics Seminar on Friday, May 16 and Saturday, May 17. On Friday night we will have dinner with the speakers at Mr. B's—a phenomenal restaurant. The price of the meal for attendees is included in the registration.

Richard Johnson, Esq., from Tallahassee and Arlene Kline, Esq., from West Palm Beach, are the co-chairs for this seminar, and they have put together a great list of presenters. Among the highlights: Craig Bell, from Austin, Texas—the best speaker I have ever heard (and I have heard him three times)—will be speaking on E-Discovery. Trust me; you will learn more from his presentation than you know today about this topic. Other presenters include: Malcolm Medley, EEOC Regional Director, Miami; Richard Seymour and Matthew Wessler, Washington, D.C.; Monique Gougisha, New Orleans; and Karen Buesing, Tampa. And, of course, ERISA will be there. We will have one of the best attorneys in the country on the topic: Howard Shapiro. So come to New Orleans and learn who she is!

Robert S. Turk, Chair
Stearns Weaver, Miami

the CHECKOFF

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U. S. Supreme Court to Consider Whether Security Screening Time is Compensable Under the FLSA

By Allison M. Gluvna, Miami

In *Busk v. Integrity Staffing Solutions, Inc.*,[1] the Ninth Circuit held that time spent by employees in security screenings after their work shifts is potentially compensable time under the Fair Labor Standards Act ("FLSA"), as amended by the Portal-to-Portal Act of 1947. On March 3, 2014, the United States Supreme Court granted the Petition for Writ of Certiorari filed by Integrity Staffing Solutions, Inc. ("Integrity Staffing") seeking review of the Ninth Circuit's decision.[2] The Supreme Court, it is hoped, will provide clear guidance on the issue of compensability of security screening time, so that lower courts—and employers—can follow a more uniform approach.

Busk and Castro were Integrity Staffing employees with temporary assignments at warehouses in Nevada, where they filled orders placed by Amazon.com customers.[3] In their amended complaint, filed in December 2010, Busk and Castro alleged that they and other similarly situated employees were required to wait up to 25 minutes at the end of their shifts to go through a theft-deterrent security clearance system, where they had to remove wallets, keys, and belts and pass through metal detectors.[4] They claimed that Integrity Staffing violated the FLSA and Nevada state law by failing to compensate employees for this security screening time.[5]

Integrity Staffing moved to dismiss the amended complaint for failure to state a claim, arguing that the security screenings are "preliminary" or "postliminary" activities that are not compensable under the FLSA, as amended by the Portal-to-Portal Act. The district court agreed with this analysis and, relying on out-of-circuit cases, held that the time employees spent passing through security screenings was noncompensable.[6]

On appeal, the Ninth Circuit reversed the district court's order.[7] To reach this conclusion, the Ninth Circuit first recognized that the FLSA, as amended by the Portal-to-Portal Act, generally provides that employees are not required to be compensated for activities that are "preliminary" or "postliminary" to the "principal activities" that employees are "employed to perform."[8] The court noted that the Supreme Court has found that preliminary and postliminary activities are compensable if they are "integral and indispensable" to an employee's principal activities.[9] "Integral and indispensable" has been interpreted to mean that the activity must be "necessary to the principal work performed" and "done for the benefit of the employer."[10]

The Ninth Circuit then examined, and deemed plausible, the plaintiffs' allegations that the purpose of the screenings was to prevent employee theft.[11] The court found that as alleged, the security clearances were necessary to the plaintiffs' primary work as warehouse employees and done for the benefit of Integrity Staffing.[12] Accordingly, taking plaintiffs' factual allegations as true for the purposes of the motion to dismiss, the Ninth Circuit held that the plaintiffs stated a claim for relief.[13] In doing so, the Ninth Circuit rejected the notion of a "blanket rule" regarding the compensability of security clearances and found instead that compensability should be analyzed under the "integral and indispensable" test based on the specific facts in each case.[14]

In its Petition for Writ of Certiorari, Integrity Staffing argues that the Ninth Circuit misconstrued the Portal-to-Portal Act by disregarding that an employee's "principal activities" for purposes of the "integral and indispensable" analysis includes "work of consequence performed for an employer" and activities "indispensable to the performance of productive work."[15] Integrity Staffing argues that pre-shift or post-shift security screenings do not meet these criteria because they were not indispensable to the productive work (filling online orders) and occurred after the productive work had been completed.[16]

Integrity Staffing further contends that the Ninth Circuit's decision conflicts with decisions from the Second Circuit and the Eleventh Circuit.[17] The Second Circuit held in *Gorman v. Consolidated Edison Corp.*[18] that security screening procedures—including those at bar there that were required for each person entering a nuclear power plant—were "modern paradigms of the [noncompensable] preliminary and postliminary activities described in the Portal-to-Portal Act" and that they were "not integral to principal work activities."[19] Similarly, in *Bonilla v. Baker Concrete Construction Co.*,[20] the Eleventh Circuit held that construction workers on an airport construction project were not entitled to compensation under the FLSA for time spent passing through security clearance.[21] According to the Eleventh Circuit, if "mere causal necessity was sufficient to constitute a compensable activity, all commuting would be compensable because it is a practical necessity for all workers to travel from their homes to their jobs."[22]

Integrity Staffing further points out in its Petition for Writ of Certiorari that the Ninth Circuit's decision has already prompted new class action suits against major employers seeking back pay for time spent in security screenings, which could result in "massive retroactive liability for employers."[23]

It remains to be seen whether the Supreme Court's decision in *Busk* will result in a bright line rule for whether

continued, next page

security screenings fall within the scope of preliminary and postliminary activities that are integral and indispensable to an employee's principal activities or, on the other hand, will result in an approach that looks at the specific facts regarding the screenings on a case-by-case basis.


A. GLUVNA

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Endnotes:

1 713 F.3d 525 (9th Cir. 2013).

2 *Integrity Staffing Solutions, Inc. v. Busk, et al.*, 188 L. Ed. 2d 374 (Mar. 3, 2014).

3 713 F.3d at 527.

4 *Id.*

5 *Id.*

6 *Id.*

7 *Id.* at 531.

8 *Id.* at 530 (citing 29 U.S.C. § 254(a)).

9 *Busk*, 713 F.3d at 530 (citing *Steiner v. Mitchell*, 350 U.S. 247 (1956)).

10 *Busk*, 713 F.3d at 530 (citing *Alvarez v. IBP, Inc.*, 339 F.3d 894, 902-03 (9th Cir. 2003), *aff'd on other grounds*, 546 U.S. 21 (2005)).

11 *Busk*, 713 F.3d at 530-31.

12 *Id.* at 531.

13 *Id.*

14 *Id.*

15 Petition for Writ of Certiorari at 13.

16 *Id.* at 14.

17 *Id.* at 4.

18 488 F.3d 586 (2d Cir. 2007).

19 Petition for Writ of Certiorari at 18 (citing 488 F.3d at 593).

20 487 F.3d 1340 (11th Cir. 2007).

21 Petition for Writ of Certiorari at 21 (citing 487 F.3d at 1345).

22 *Id.* (citing 487 F.3d at 1344).

23 Petition for Writ of Certiorari at 2.

Specifically, the Court concluded, based on the plain language of the statute, that § 1514A provides protection for employees of a public company's contractors and subcontractors. Indeed, the Court explained that "boiling [this statute] down to its relevant syntactic elements, it provides that 'no . . . contractor . . . may discharge . . . an employee.'"[6] As a result, the Court found that the ordinary meaning of the term "employee" refers here to the contractor's own employees, not the employees of a public company.

The Court also based this conclusion on a review of the Act as a whole. While the Act imposes numerous requirements on the employees of a public company's contractors, such as accountants and lawyers, the Court noted that § 1514A is the only provision that protects these employees from retaliation for complying with the Act or for reporting issues to their supervisors. According to the Court, the context of the statute also shows that Congress presumed there would be an employment relationship between the individual reporting the concern and the entity taking the prohibited action. Further, the Court observed that this is the only interpretation that gives meaning to all of the words in the statute, as contractors rarely, if ever, have authority to demote, discharge, or suspend an employee of a public company; nor do they have the ability to reinstate an employee of a public company. Finally, the Court noted that this interpretation also prevents an absurd result whereby a private company would be precluded from retaliating against an employee of a public company, but not its own employees.

The Court readily acknowledged that its interpretation provides protection to a broad class of employees. This broad class protection, coupled with the breadth of activities protected by the Act (activities extending well beyond the reporting of securities fraud to the reporting of mail fraud, wire fraud, or bank fraud) gave the dissent pause with regard to the potential for litigation. The Solicitor General suggested that the protected activity was limited to complaints about or relating to the contractor's services to the public company. Although Justice Ginsburg found it unnecessary to reach this issue, the dissent and concurrence (a majority of the Court) rejected the Solicitor General's argument, finding that the Act does not contain any language limiting the protected activity in this way.[7]

The Court rejected the argument that—by affording protection to household employees such as gardeners, housekeepers, and babysitters of employees and officers of public companies—its interpretation created an absurd result. In fact, that this interpretation provides very broad protection was of no import to the Court, as it was merely interpreting the words used by Congress.[8] Although the plaintiffs and Solicitor General argued that the term "employee" should refer to an employee of a public company when applied to the officers and employees, all of the justices agreed that the term "employee" must have a consistent meaning regardless of which entity or person is taking action.[9] While the Court acknowledged the result was curious, based on the unambiguous statutory text, it held that the term "employee" was properly interpreted as referring to employees of the public company's contractors, subcontractors, officers,

employees, and agents, which would include household employees. If Congress did not intend this result, noted the majority, it was free to amend the statute.

The dissent found this an absurd interpretation, unsupported by any evidence of congressional intent. The dissent contended its own interpretation—that "employee" refers only to employees of public companies—avoids the absurdity and honors Congress's intent. For its part, the dissent argued that Congress could amend the statute if it intended the Act to apply to employees of private companies and other individuals and entities. However, there is nothing in the text, context, or purpose of the statute to indicate Congress's intent to create such a broad-reaching cause of action. In coming to this conclusion, the dissent pointed to several examples of the type of claims sanctioned by the majority's interpretation, including a babysitter who works for a part-time clerk at Walmart and is terminated after reporting that the clerk's son participated in a fraudulent Internet purchase. Another example involved an employee of a private cleaning company that provides services to Starbucks who is demoted after complaining that another client (a private company) mailed the cleaning company a fraudulent invoice.[10]

The dissent also noted several odd distinctions created by the majority's interpretation, including that a babysitter can bring a federal claim if his or her employer is a clerk at PetSmart (a public company), but not if the employer is employed by PetCo (a private company).[11] Similarly, the dissent explained, a day laborer who is employed by a construction company would have a claim if the company contracted to remodel a Dick's Sporting Goods store (a public company), but not a Sports Authority store (a private company).[12] The dissent observed that none of these claims serves the purpose of protecting investors and the financial markets, and, further, employers should not be subjected to a new front of litigation merely because they have a connection (even a tenuous one) to a public company.

The dissent also suggested that the Court's interpretation would leave employees of public companies unprotected against harassment and threats from a contractor. In response to this criticism, the majority noted that the dissent's interpretation would leave a larger gap in protection, as an entire industry would be unprotected because publicly traded mutual funds typically have no employees.[13] The dissent responded by suggesting that a narrower interpretation that left some areas unprotected was better than an overbroad, absurd interpretation that covered the teenage babysitter for a part-time Walmart clerk and involved federal courts in the resolution of unrelated, mundane labor disputes.

Speaking for the plurality, Justice Ginsburg made repeated references to the fact that the majority's interpretation is consistent with the purpose of the Act. To divine Congress's intent in and rationale for passing this Act, she conducted an in-depth examination of the Act's legislative history, the congressional investigation of Enron, and other reports and information available regarding the Act. She also looked to the act upon which this provision was modeled, even though Congress had deviated from the language of the prior act.[14] This is where the plurality parted ways with Justices Scalia and Thomas,[15] as those two justices rejected any explanation for this judgment "beyond the interpretative terra firma of text and context."[16]

As a result of this decision, it is now settled that employees of contractors are covered by § 1514A based on the Court's interpretation of the term "employee." This is an expansive decision that covers not only the gardeners, babysitters, and other household staff of employees of a public company, but also has implications for any law firm that contracts with a public company to provide legal services, as the law firm's employees are now part of the protected class under § 1514A.

The *Lawson* decision creates more questions than it answers. Indeed, the Court specifically recognized that it was not resolving certain issues. For example, the Court refused to reach the bounds of § 1514A.[17] Thus, the questions of who is a contractor under § 1514A and what constitutes protected activity under this statute remain unanswered.[18] In addition, because the Court specifically declined to decide "whether § 1514A also prohibits a contractor from retaliating against an employee of one

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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 Jay P. Lechner (*jay.lechner@jacksonlewis.com*) or Zascha Blanco Abbott (*zabbott@fordharrison.com*). If you are interested in submitting an article for *The Florida Bar Journal,* contact Robert Eschenfelder (*robert.eschenfelder@mymanatee.org*) to confirm that your topic is available.

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of the other actors governed by the provision,"[19] this decision also raises the question of whether a claim can be asserted against a contractor by a public company's employee. Thus, if a public company's employee claims that a contractor is harassing him or her after reporting the contractor's fraud to a supervisor, it is unclear whether the public company's employee would have a claim against the contractor.[20] Likewise, it is unsettled whether an officer or employee of a public company would have individual liability under the Act for actions against a public company's employee or whether a claim also could be asserted against a contractor who carried out the direction of a public company to terminate one of its employees.[21] Thus, while the Court's decision recognizes an expansive protected class, it may have, at the same time, curtailed the rights of a public company's employees.

Lawson also demonstrates that the Court is split on whether the statutory interpretations of the Act by the Administrative Review Board ("ARB") are entitled to deference, with three justices in the dissent refusing to give deference to the ARB and four justices in the majority suggesting, but not finding, that deference may be appropriate.[22] Thus, a significant question remains as to whether the ARB will be given deference in any future interpretations of the Act.

Finally, FMR argued, and the dissent agreed, that Congress's enactment of the Dodd-Frank Wall Street Reform and Consumer Protection Act ("Dodd-Frank Act") on July 21, 2010, further supports its interpretation of § 1514A. Indeed, in its brief, FMR posited that the plaintiffs' internal complaints would qualify for protection under the Dodd-Frank Act (except for the date of the enactment of the Act). However, the majority specifically noted that FMR "somewhat overstate[d]" the coverage of the Dodd-Frank Act and that "Dodd-Frank's whistleblower provision . . . focuses primarily on reporting to federal authorities."[23] Nonetheless, the Court ultimately sidestepped this issue, finding that it was not relevant to the inquiry before it. The dissent, on the other hand, suggested that such internal complaints would be protected under Dodd-Frank.[24] Prior to this decision, the courts have been split over whether an employee who makes an internal complaint, as opposed to a complaint to the SEC, qualifies for protection under Dodd-Frank.[25] This is an important point as the Dodd-Frank Act provides for double damages, requires no administrative exhaustion, and contains a significantly longer statute of limitations. Thus, the question remains whether these statements will support the interpretation that internal complaints under § 1514A are covered by Dodd-Frank.

At first glance, the issue and holding in *Lawson* appear to be discrete, involving a relatively simple interpretation of the statutory text. However, both the implications of this decision and the unanswered questions resulting from it are far-ranging. As practitioners enter this "costly new front of employment litigation,"[26] many novel issues are sure to arise.

S. DYSON

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Endnotes:

1 *Lawson v. FMR LLC*, No. 12-3, 2014 WL 813701, at *3 (Mar. 4, 2014).

2 Elisabeth Bumiller, *Bush Signs Bill Aimed at Fraud in Corporations*, N.Y. Times, July 31, 2002.

3 *Lawson*, 2014 WL 813701, at *3 (quoting 18 U.S.C. § 1514A (2006 ed.)).

4 No. 12-3, 2014 WL 813701 (Mar. 4, 2014).

5 *Id.* at *3.

6 *Id.* at *7 (internal quotation marks omitted).

7 *Id.* at **14, 17 & 23 n.9.

8 Justice Ginsburg also noted that any argument about "opening the floodgates" of litigation was hypothetical, as the Department of Labor had interpreted this provision to apply to employees of contractors, and FMR could not cite any instance where the claim was based on a report other than shareholder fraud. *Id.* at *13. The dissent, however, quickly pointed out that, while the DOL made this determination, it also suggested that a different interpretation of the term "employee" applied when the alleged retaliatory act was taken by an employee or officer of the public company. *Id.* at *24 (Sotomayor, J., dissenting).

9 *Id.* at **9, 17 & 19.

10 *Id.* at *18.

11 *Id.* at *24 (Sotomayor, J., dissenting).

12 *Id.*

13 *Id.* at **9, 12.

14 The dissent points to this departure from the model statute, which indisputedly applies to employees of contractors, as evidence that Congress did not intend to extend § 1514A beyond employees of public companies. *Id.* at *21 (Sotomayor, J., dissenting). Justices Scalia and Thomas do not agree with either the plurality or dissent on this issue. *Id.* at *17 (Scalia, J., concurring). Thus, a majority of the justices do not agree on this point.

15 Indeed, Justice Scalia's dissent is the type of exposition practitioners have come to expect when reading his opinions. While Justice Scalia cites the poetic license taken by the plurality in discussing the legislative history, his eloquent concurrence makes clear who the real poet is. *See, e.g., id.* at *17 (Scalia, J., concurring) ("Because we are a government of laws, not of men, and are governed by what Congress enacted rather than by what it intended, the sole object of the interpretive enterprise is to determine what a law says.").

16 *Id.*

17 *Id.* at *14.

18 The Solicitor General, citing a Seventh Circuit decision, argued that the term "contractor" should not apply to every fleeting business relationship with a public company and that the protected activity must relate to the private company's role as a contractor for a public company. *Id.* at **13-14, 17.

19 *See id.* at *7 n.7.

20 *Id.* at *22 & n.6 (Sotomayor, J., dissenting).

21 *Id.* at **9, 22 n.6.

22 *Id.* at **6 n.6 & 26-27.

23 *Id.* at *15.

24 *Id.* at *25 & n.10 (Sotomayor, J., dissenting).

25 *Compare Asadi v. G.E. Energy (USA), L.L.C.*, 720 F.3d 620, 629 (5th Cir. 2013) (requiring a report to the SEC in order to state a whistleblower claim under the Dodd-Frank Act) *with Ellington v. Giacoumakis*, Civil Action No. 13-11791-RGS, 2013 WL 5631046, *3 (D. Mass. Oct. 16, 2013) (finding that an internal complaint is protected by the Dodd-Frank anti-retaliation provisions and citing other district court opinions reaching the same conclusion) and *Khazin v. TD Ameritrade Holding Corp.*, CIV.A. 13-4149 SDW, 2014 WL 940703 **5-6 (D.N.J. Mar. 11, 2014) (noting the split of authority on the issue and collecting cases on both sides of the issue).

26 *Lawson*, 2014 WL 813701, at *24 (Sotomayor, J., dissenting).

"Modernizing" White Collar Exemptions Under the FLSA

By Dee Anna D. Hays, Tampa

On March 13, 2014, President Obama signed a Memorandum for the Secretary of Labor regarding "Updating and Modernizing Overtime." At the signing ceremony, the President stated, "Overtime is a pretty simple idea. . . . If you have to work more, you should get paid more." The President further commented, "It's not right when business owners who treat their employees fairly can be undercut by competitors who aren't treating their employees right. If you're working hard, [if] you're barely making ends meet, you should be paid overtime. Period." Many business owners, trying to balance the high cost of doing business with the desire to keep employees content, will undoubtedly take issue with this perspective.

Specifically, the Memorandum addresses "white collar exemptions," which include the exemptions from the Fair Labor Standards Act's overtime requirement for executive, administrative, and professional employees. President Obama remarked that these exemptions "have not kept up with our modern economy." Accordingly, he has directed the Secretary of Labor to propose revisions to "modernize and streamline" the existing overtime regulations. Specifically, the President asked the Secretary to: "consider how the regulations could be revised to update existing protections consistent with the intent of the Act; address the changing nature of the workplace; and simplify the regulations to make them easier for both workers and businesses to understand and apply."

Currently the minimum salary requirement for these white collar exemptions is $455 per week. The administration has indicated that approximately 3.1 million people would be entitled to overtime if the threshold had kept up with inflation (estimated at approximately $1,000 per week). Accordingly, the administration is expected to order changes that would increase the minimum salary for the salary basis requirement and make it more difficult to meet the job duties tests to qualify for the exemptions. Progressive think tanks such as the Center on Budget and Policy Priorities are fully on board and have already argued that the salary level should be increased to $984 a week.

Indisputably, the Department of Labor will have to implement any changes to Part 541 of the overtime regulations through the regulatory process of the Administrative Procedures Act. Consequently, these changes will not be made overnight. The Department of Labor must first provide notice by issuing proposed regulations to be followed by a comment period, which is likely to be lengthy and hotly contested. These comments must be considered prior to issuing a final rule. Expect a big battle as the proposals are further developed.

D. A. HAYS

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First Circuit Takes Extraordinary Steps to Revive Retaliation Lawsuit

By Thomas A. Burns, Tampa

In *Travers v. Flight Services & Systems, Inc.*,[1] the First Circuit took extraordinary steps to vacate the entry of summary judgment against the plaintiff in a retaliation lawsuit. *Travers* illustrates how appellate courts can resuscitate factually feeble lawsuits by strict application of civil procedure rules—here, Federal Rule of Civil Procedure 56. *Travers* is a helpful case for the plaintiff bar and a correspondingly problematic case for the defense bar.

Travers was a skycap for Flight Services, Inc. While so employed, Travers was the first named plaintiff and "acted as the leader among the plaintiffs" in a Fair Labor Standards Act ("FLSA") class action suit against Flight Services and an airline alleging failure to pay the minimum wage.[2]

After Travers sued Flight Services, the company's CEO repeatedly yelled at Travers' supervisor "to 'get rid of [Travers]' and 'talk [Travers] into dropping the lawsuit.'"[3] The CEO made the same comments to the company's president in telephone conferences. The supervisor told Travers "to 'be careful' because 'the company would be coming after' him."[4] Flight Services later fired the supervisor for unrelated reasons.

While the FLSA lawsuit was pending, a passenger complained that Travers solicited a tip. Flight Services' employee handbook prohibited tip solicitation and classified it as grounds for termination. On a general manager's recommendation and with a human resources director's approval, Flight Services fired Travers for tip solicitation. No direct evidence showed that the manager and director knew the CEO's views toward Travers.[5]

Travers sued Flight Services for retaliation, arguing he was fired because of his FLSA lawsuit. The district court granted summary judgment to Flight Services. The First Circuit vacated and remanded, rejecting both of Flight Services' appellate arguments.

First, the First Circuit disagreed with Flight Services' argument that no reasonable jury could find a causal connection between the CEO's retaliatory animus and Travers' firing absent direct evidence that the manager and director were aware of the CEO's views toward Travers. While noting that the absence of such evidence often creates a "fatal gap in proof," here—opined the court—"the retaliatory animus resided at the apex of the organizational hierarchy," and "such strongly held and repeatedly voiced wishes of the king, so to speak, likely became well known to those courtiers who might rid him of a bothersome underling."[6]

Distinguishing other cases, the First Circuit found that the remarks by Flight Services' CEO "hone[d] in on a specific employee, direct[ed] the precise action taken, and flow[ed] from a source with the formal authority to enforce compliance."[7] Thus, the CEO's remarks were neither "stray," nor "ambiguous," nor "stale," and a reasonable jury could find that his "directive spread to other managers, themselves likely reluctant to frustrate the CEO's objective."[8] Concluded the court: "On the facts viewed favorably to Travers, it remains plausible that the pre-existing retaliatory motive tipped the scales when the company decided whether Travers had violated company policy in a way that required his termination."[9]

The First Circuit also disagreed with Flight Services' argument that since Travers committed an offense for which he could be automatically fired, no reasonable jury could find a causal connection between retaliatory animus (however widespread) and Travers' firing. Second-guessing how Flight Services should interpret its own employee handbook regarding tip solicitation, the First Circuit found that "Travers's conduct, while perhaps edging beyond what was expressly permitted, did not indisputably cross into what was clearly prohibited."[10] Additionally, because Flight Services generally did not make firing decisions before evaluating customers' complaints and employees' explanations, Travers' firing was not "essentially assured"; rather, the company's "evaluation of accusations left room for judgment and discretion" and, therefore, room for retaliatory animus.[11] Finally, the record made clear that Flight Services did not actually fire every employee accused of tip solicitation.[12]

In vacating the entry of summary judgment, the First Circuit cautioned it was not suggesting that the evidence painted "a sufficiently clear picture of disparate treatment among employees [accused of tip solicitation] to provide support for an inference of retaliation."[13] Rather, continued the First Circuit, "We hold only that the evidence is not so clear as to place beyond reasonable challenge the assertion that Flight Services would have fired Travers even had its CEO not been intent on doing so because of Travers's FLSA lawsuit."[14]

The relevance of *Travers* should be plain to members of the employment law bar. Plaintiffs may rely on *Travers* to transport factually feeble lawsuits beyond the summary judgment stage and perhaps extract settlements as the prospect of a jury trial draws near. Defendants, on the other hand, can try to distinguish *Travers* as a uniquely fact-bound decision in which a CEO's retaliatory animus was so widespread in the company that it was a plausible explanation for a firing decision. Either way, employment lawyers should take note that appellate courts' strict application of Rule 56's scope of review

may or may not make summary judgment an appropriate vehicle to resolve a particular case.


T. BURNS

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Endnotes:

1 737 F.3d 144 (1st Cir. 2013).
2 *Id.* at 145.
3 *Id.*
4 *Id.*
5 *Id.* at 146.
6 *Id.* at 147.
7 *Id.*
8 *Id.*
9 *Id.* at 148.
10 *Id.*
11 *Id.*
12 *Id.* at 148-49.
13 *Id.* at 149.
14 *Id.* at 149-50.

Section Bulletin Board

For more information, contact Angie Froelich:
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2014

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Third DCA Decision Should Embolden Employers to Craft Confidentiality Clauses With "Bite"

By Mendy Halberstam, Miami

It's no secret that as employment litigation continues to increase, so does the rate of settlement. Regardless of the merits of claims asserted by their employees, employers often find it expedient to resolve cases at the pretrial stage for a variety of reasons. For its part, the plaintiff's bar has an obvious incentive to resolve cases as early as possible: As these matters are taken on virtually a contingency basis, the effective hourly rate for such work greatly increases if a case is resolved before significant time and expense is invested.

In working towards settlement, the employee's objective is usually straightforward: obtain the greatest financial benefit possible from the defendant employer. For an employer, however, there are pressing concerns quite apart from simply ensuring a case settles for the lowest sum possible. For example, many employers are hesitant to settle a case for fear that it will inspire a wave of similar—and in their minds, meritless—lawsuits from other employees who want to share in an employer's apparent largesse.

Employers often address this concern by insisting that a detailed confidentiality clause be included in any settlement agreement. While a well-drafted confidentiality clause is helpful, it brings its own set of concerns. Chief among these concerns is how to enforce the confidentiality requirement. Many employees, certainly those holding less sophisticated positions, fail to understand the import of the confidentiality clause. Other employees may, for one reason or another, choose to disregard the confidentiality clause, reasoning that a prohibited disclosure will not be uncovered and further reasoning that few employers will actually seek to enforce such a clause.

To further discourage employees from breaching a confidentiality clause, employers generally will insist on a remedies provision entitling them to injunctive relief. In some instances, employers will also include a liquidated damages provision. Such a provision can be both legally limited (if it is too overbearing, the provision will be deemed a penalty and may not be enforceable) and of little practical value (most employees are not "collectible," and, even if they are, the amount of damages at issue may not justify the cost of enforcement).

What can an employer do to bargain for a more robust confidentiality stipulation?

According to a recent opinion issued by the Third District Court of Appeal—a lot. In *Snay v. Gulliver Schools, Inc.*,[1] the former headmaster of Gulliver sued the school for age discrimination and retaliation under the Florida Civil Rights Act.[2] The parties eventually settled the claims for a gross sum of $150,000, divided into checks of $10,000, $80,000, and $60,000.[3] As part of the settlement, Gulliver required that the plaintiff agree to a confidentiality clause. Wanting to give this confidentiality clause "teeth," Gulliver included a disgorgement provision under which the plaintiff would forfeit $80,000 from the gross settlement funds in the event that either the fact of settlement, or the settlement sum, was disclosed by either plaintiff or his wife.[4]

Four days after the agreement was signed, Gulliver notified the plaintiff that it was withholding the $80,000 settlement check, as it had uncovered a Facebook posting by plaintiff's daughter disclosing the settlement.[5] Although the plaintiff still had time to revoke the agreement or challenge Gulliver's position, he did not do so.[6] Instead, he signed the stipulation of dismissal and moved to enforce the agreement.

The trial court allowed Gulliver to depose the plaintiff prior to hearing the motion to enforce. At his deposition, the plaintiff testified that he told his daughter of the existence of the settlement (although not the sum) and provided various reasons for having done so.[7] The plaintiff's daughter posted her comment about the settlement after this single conversation with her father regarding the fact of settlement. The trial court held that the plaintiff's disclosure to his daughter and her subsequent Facebook post did not amount to a breach and thus enforced the settlement.[8] Gulliver appealed this ruling, and the Third DCA summarily reversed.

Writing for the court, Judge Wells explained that settlement agreements are interpreted as simple contracts.[9] In this particular contract, "the plain, unambiguous meaning of [the confidentiality clause] . . . is that neither Snay nor his wife would 'either directly or indirectly' disclose to anyone . . . 'any information' regarding the existence or the terms of the parties' agreement."[10] Because Snay told his daughter about the settlement, the Third DCA ruled that the trial court should not have enforced the settlement.[11]

Notably, the court's decision did not rest on the fact that the plaintiff's daughter indirectly caused the plaintiff to breach the confidentiality clause through the Facebook posting. Rather, the court emphasized that Snay's deposition testimony regarding his conversation with his daughter "establishe[d] a breach of this [confidentiality] provision, [and] the court below should have denied [plaintiff's] motion for enforcement of the agreement."[12] The Facebook posting highlighted why the plaintiff was prohibited from telling his daughter of the settlement in the first

instance, but it was the initial disclosure that was grounds for disgorgement of $80,000 in settlement proceeds.[13] The court did point out that if the plaintiff felt he had to disclose the settlement to his daughter he should have negotiated such an exception as part of the settlement. However, the plaintiff could not lawfully agree to a restrictive confidentiality clause and then violate its plain terms by claiming the violation was not material.[14]

Snay is significant not only because it very strictly construed a confidentiality provision—leading to an $80,000 loss for the plaintiff—but also because it did not leave much room for the plaintiff to excuse his behavior. The trial court apparently enforced the settlement, notwithstanding the admitted breach, because it felt that disclosure to one's *own family member of the fact of settlement* only (but not the sum) is immaterial. The Third DCA disagreed and ruled that parties to a settlement have the right to expect that confidentiality will be protected according to its precise terms. The place to ensure less restrictive terms is when the settlement is negotiated, not after the agreement is signed.

Snay's emphatic endorsement of strictly enforcing settlement terms provides another tool for an employer—through the incorporation of disgorgement provisions similar to the one approved by the court here—to insulate itself from disclosure of its settlement tendencies. The decision also serves as a warning to the plaintiff's bar to scrutinize such clauses diligently and negotiate appropriate exceptions. Failing to do so and simply adopting broad restrictive clauses included in settlement agreements drafted by defense counsel can lead to dire—and expensive—consequences for the client.


M. HALBERSTAM

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Endnotes:

1 No. 3D13-1942 (Fla. 3d DCA Feb. 26, 2014).
2 *Id.* at *2.
3 *Id.*
4 *Id.* at *2-3.
5 *Id.* at *3.
6 The opinion does not explain why plaintiff did not revoke the agreement or use the remaining revocation period to negotiate a less restrictive confidentiality provision.
7 *Id.* at *4, *6.
8 *Id.* at *4.
9 *Id.*
10 *Id.* at *5
11 *Id.* at *5, *7.
12 *Id.* at *6.
13 *Id.*
14 *Id.* at *6-7.

CASE NOTES

FEDERAL COURTS

Eleventh Circuit

By Dee Anna Hays

Court refuses to enforce arbitration agreement that was obtained from specifically targeted potential class members during a critical juncture in the case.

Billingsley v. Citi Trends, Inc., 13-12561, 2014 WL 1199501 (11th Cir. Mar. 25, 2014).

A store manager filed a putative collective action against Citi Trends, a retail clothing store. The complaint alleged that Citi Trends violated the Fair Labor Standards Act by improperly designating its store managers as exempt and failing to compensate them for overtime hours worked. After the suit was filed and before plaintiff's deadline to move for conditional certification, Citi Trends initiated company-wide, in-person meetings with its store managers, who were potential collective class members. During these meetings, Citi Trends directed almost every store manager to complete a fill-in-the-blank declaration about his/her job duties and sign an arbitration agreement that bound the store manager to arbitrate any claims against Citi Trends. The Eleventh Circuit agreed with the federal district court's finding that the meetings coerced the putative class members into signing away their rights, barring Citi Trends from compelling arbitration of the claims.

Diabetic disqualification in Federal Motor Carrier Safety Administration regulation does not apply to diabetic mechanic who test drives employer's trucks only short distances.

Samson v. Fed. Exp. Corp., 2014 WL 1226847 (11th Cir. Mar. 26, 2014).

A job applicant brought an action against FedEx, alleging he was denied a mechanic position in violation of the Americans with Disabilities Act and Florida Civil Rights Act because he was an insulin-dependent diabetic. The federal district court granted summary judgment to FedEx due to its defense that the Federal Motor Carrier Safety Administration regulations—specifically, the automatic diabetic disqualification outlined in 49 C.F.R. § 391.41(b)(3)—require applicants to pass a medical examination to be hired as a truck mechanic. The Eleventh Circuit disagreed, finding that the regulations apply only to employees transporting passengers or cargo in interstate commerce. FedEx's requirement that truck mechanics occasionally test drive empty FedEx trucks locally did not constitute transporting property or passengers in interstate commerce. Therefore, the court reversed and remanded the case to the district court.

An arbitration agreement that waives an employee's ability to bring a collective action under the Fair Labor Standards Act is enforceable under the Federal Arbitration Act.

Walthour v. Chipio Windshield Repair, LLC, 2014 WL 1099286 (11th Cir. Mar. 21, 2014).

Employees of a windshield repair company brought a collective action alleging overtime violations of the Fair Labor Standards Act. However, the employees each signed arbitration agreements shortly after being hired. The agreements specifically provided that all claims must be arbitrated individually, not as a class or collective action. Accordingly, the employer moved to compel arbitration. The Eleventh Circuit, upholding the federal district court's decision, found the waiver provision enforceable under the Federal Arbitration Act.

Employee's request for eleven weeks of vacation, as opposed to a request for leave for a period of incapacity, does not qualify for FMLA protection.

Hurley v. Kent of Naples, Inc., 2014 WL 1088293 (11th Cir. Mar. 20, 2014).

A former employee alleged that his employer, its parent, and the parent company's chief executive officer violated the Family Medical Leave Act ("FMLA") by denying his request for eleven weeks of vacation time and then terminating his employment. The employee alleged that he suffered from depression and anxiety, and a vacation would have been medically beneficial for his condition. The employee also asserted that he "intended to plan treatments" during this leave. However, the Eleventh Circuit ruled that the employee did not qualify for protection under the FMLA because he failed to show that he suffered from a period of incapacity as required by 29 U.S.C. § 2612(a)(1)(D). The employee further asserted that he only needed to "potentially qualify" for leave in order to establish an interference claim. The court also found this argument unconvincing, holding that an employee must first *actually*, not potentially, qualify for FMLA leave in order to assert an interference or retaliation claim. Accordingly, the court reversed the federal district court's decision and awarded summary judgment to the employer on all claims.

Breach of fiduciary duty claims brought by retirement plan participant are barred by six-year statute of limitations where challenged investment decisions occurred more than six years before complaint was filed.

Fuller v. Suntrust Banks, Inc., 12-16217, 2014 WL 718309 (11th Cir. Feb. 26, 2014).

A participant in an employee retirement plan brought a putative class action under the Employee Retirement Income Security Act. The plaintiff alleged that the plan fiduciaries breached their duties of loyalty and prudence in selecting under-performing proprietary funds. The Eleventh Circuit followed the Fourth and Ninth Circuits in holding that the claim was time-barred because it

challenged the selection of the investment funds rather than the subsequent failure to remove them. Specifically, because the plaintiff did not assert a change in circumstances that caused the funds to become imprudent after they were initially chosen, the claim stemmed from the initial selection of the funds and was time-barred by the six-year limitations period.

Where employee plaintiff had presented no evidence that cast doubt on his employer's good-faith belief that he had falsified his time sheets, district court did not err in declining to find that employer's proffered reason for firing him constituted pretext.

Perry v. Batesville Casket Co., Inc., 2014 WL 53063 (11th Cir. Jan. 8, 2014).

The Eleventh Circuit found that the federal district court did not err in granting summary judgment to the employer, finding no pretext for age discrimination. The employer's proffered reason for terminating the plaintiff from his truck-driving job was that he falsified his time sheets. The employer discovered that plaintiff's time entries did not match the GPS records for his company vehicle. Plaintiff claimed that the employer ignored its own policies that would explain these time sheet discrepancies. He also argued that the employer's good-faith belief was also drawn into question by a matter of suspicious timing: he was fired shortly after a younger employee requested more work hours. However, to meet his burden of showing pretext, the employee was required to rebut all legitimate non-discriminatory reasons that the employer offered for firing him. Ultimately, the court agreed with the federal district court that the employee presented no evidence to cast doubt on the employer's good-faith belief that he had falsified his time sheets.

D. A. HAYS

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District Courts

Middle District of Florida

By Jay P. Lechner

Plaintiffs who file suit directly under the Minimum Wage Amendment to Article X, Section 24 of the Florida Constitution must comply with the pre-suit notice requirements subsequently set forth in the Florida Minimum Wage Act.

Nichols v. Lab. Corp. of Am., 2014 U.S. Dist. LEXIS 26780 (M.D. Fla. Mar. 1, 2014).

The Middle District held that plaintiffs who file suit directly under Article X, Section 24 of the Florida Constitution must comply with the pre-suit notice requirements set forth in the Florida Minimum Wage Act ("FMWA"). The court, acknowledging that Florida courts are split on the issue, concluded that because the FMWA was enacted as implementing legislation for Section 24, and did not frustrate the intent of the constitutional scheme, any person alleging a violation of Section 24 "must do so through the lens of the FMWA because the Florida Constitution does not create an independent constitutional right to bring suit to recover unpaid minimum wages."

Congress has not expressly waived sovereign immunity for contractual challenges to settlement agreements resolving Title VII claims so court lacks subject-matter jurisdiction to consider such challenges.

Cosner v. Sec'y, 2014 U.S. Dist. LEXIS 17055 (M.D. Fla. Feb. 11, 2014).

A former federal employee filed suit against the Department of Veterans Affairs, alleging the agency breached a settlement agreement arising out of his previous discrimination suit against the agency. The Middle District dis-

missed the breach of settlement suit, finding that it lacked subject-matter jurisdiction because Congress had not expressly waived sovereign immunity for contractual challenges to settlement agreements resolving Title VII claims. The court explained that, "[a]lthough Title VII expressly waives sovereign immunity for federal employees' claims of unlawful employment discrimination or retaliation, that waiver does not extend to contractual challenges to a Title VII settlement agreement." The court observed, however, that employees are not entirely without remedy for a government agency's breach of a Title VII settlement agreement because Title VII's implementing regulations permit employees to appeal "an agency's alleged noncompliance with a settlement agreement" to the EEOC, although they are limited to two exclusive remedies: specific performance of the settlement agreement or reinstatement of the underlying discrimination complaints.

Where nurse's attendance at work is an essential job function, leave is not a reasonable accommodation under the ADA.

Mecca v. Fla. Health Servs. Ctr., Inc., 2014 U.S. Dist. LEXIS 13065 (M.D. Fla. Feb. 3, 2014).

A nurse who performed intravenous catheter insertions suffered from panic attacks and anxiety and sought accommodation for his disability in the form of leave. The Middle District, granting summary judgment to defendant hospital, found that the nurse was not a qualified person with a disability under the Americans with Disabilities Act because he failed to show that his requested accommodation was reasonable or that it would allow him to perform the job's essential functions. The nurse's regular attendance at work was an essential job function. The court found that leave was not a reasonable accommodation because, in the past, the nurse had received leave whenever he requested it, yet the leave had not improved his ability to have regular attendance, nor was there any indication that it would do so at any point in the near future.

Southern District of Florida

By Jay P. Lechner

Plaintiff cannot recover overtime compensation under FLSA where only one factor of the economic reality test weighs in favor of "employee" status.

Yilmaz v. Mann, 2014 U.S. Dist. LEXIS 34420 (S.D. Fla. Mar. 17, 2014).

The Southern District held that a former president of an online marketing and graphic design firm could not recover overtime compensation under the FLSA because he was an independent contractor under the Eleventh Circuit's six-factor "economic reality" test, as only one of the six factors weighed towards the president's status as an employee. The president's job was to use his "own business and Internet knowledge" to build the company "from the ground up" and lead the company "based on best practices" from the defendant's online books. The president determined his own hours, and the company never supervised or monitored his compliance. He had broad discretion to bill as many hours, for whatever service, at whatever price, he chose. The only specification was that he would split the proceeds with the company. When he performed work for clients, he issued invoices to them that were payable to the company, and then he issued invoices to the company for his services, payable to a separate company he owned. The service listed on those invoices was: "Independent Contractor: President, ConstantCreative.com LLC."

Waiver of jury trial provision in physician employment agreement is enforceable where provision is "highly conspicuous" and agreement is signed by "amply sophisticated" physician.

Hamilton v. Sheridan Healthcorp, Inc., 2014 U.S. Dist. LEXIS 16987 (S.D. Fla. Feb. 11, 2014).

Finding that an anesthesiologist waived his right to a jury trial on his race discrimination action when he signed his Physician Employment Agreement, the Southern District granted the Defendant's Motion to Strike Jury Demand. The court reasoned that the waiver provision was "highly conspicuous" because it appeared immediately above the signature portion of the agreement, was in capital letters, and contained a single, concise sentence clearly setting forth the waiver. Specifically, the provision stated "EACH PARTY WAIVES ALL RIGHTS TO ANY TRIAL BY JURY IN ALL LITIGATION RELATING TO OR ARISING OUT OF THIS AGREEMENT." The court also found that, as an anesthesiologist, the plaintiff was "amply sophisticated" to comprehend and waive his right to a jury trial.

Conditional class certification in FLSA action is warranted where plaintiffs demonstrated that they are similar not only in pay provisions and job duties, but also in that they all were subjected to employer's requirements to work off-the-clock.

Devries v. Morgan Stanley & Co. LLC, 2014 U.S. Dist. LEXIS 15862 (S.D. Fla. Feb. 6, 2014).

The Southern District conditionally certified a nationwide class of pre-production financial adviser associates ("FAAs") as a collective action under the Fair Labor Standards Act. The FAAs were required to undergo a training period, typically four to six months, called the "pre-production" period, during which they generally studied for exams and trained to perform financial advising duties. The pre-production FAAs were subject to official policies that required them to record accurately all of their time worked, including overtime. However, the court found that, despite this policy, the FAAs presented

sufficient evidence under the "fairly lenient" standard to show that they were subjected to a nationwide policy of discouraging overtime. Specifically, the evidence showed they were instructed not to record extra work hours or were told the company's standard timekeeping system would not accept overtime entries. The judge found that the defendant's promulgation of timekeeping guidelines was not enough, but rather the company must also ensure its policies are enforced in practice.

Summary judgment granted on disparate impact claim where diabetic plaintiff failed to show that employer's sick leave requirements were being used against diabetics as opposed to chronic abusers of sick leave.

Corbin v. Town of Palm Beach, 2014 U.S. Dist. LEXIS 8315 (S.D. Fla. Jan. 23, 2014).

The Southern District granted summary judgment to the town on plaintiff paramedic's ADA disparate impact claim, reasoning that the paramedic provided no statistical evidence demonstrating that the town's policies requiring employees to be home when using sick leave unless they otherwise report their whereabouts to the town had a disparate impact on employees with diabetes. Moreover, the court found there was a business necessity for the policies because they were implemented to address prevalent sick leave abuse. The paramedic was discharged after the town conducted surveillance on his house and concluded he had violated the sick leave policies. The paramedic contended that his sick leave was related to symptoms of diabetes, and that the policies had a disparate impact by "screening out" diabetics by requiring them to be home when sick. The court found no evidence that the policies were being used against diabetics as opposed to chronic abusers of sick leave. The plaintiff also did not show the policies impacted diabetics differently. Plaintiff did not suggest that his diabetes rendered him incapable of reporting in sick, and there was no evidence that the policies prevented diabetics from using their sick leave benefits.

Despite frequency of defendant's conduct toward plaintiff, summary judgment granted to defendant on hostile work environment claim where conduct was not severe, not physically threatening or humiliating, and did not unreasonably interfere with plaintiff's job performance.

Manganiello v. Town of Jupiter Inlet Colony, 2013 U.S. Dist. LEXIS 175938 (S.D. Fla. Dec. 15, 2013).

Plaintiff, a female town administrator, asserted a Title VII hostile work environment claim based on the conduct of a male town commissioner who allegedly touched her arm, grabbed her hand, hugged her, kissed her cheek, sat too close, called her "my dear" and "lovely lady," and complimented her appearance "virtually" every time he was in the workplace. The Southern District granted summary judgment to the defendant, finding that the plaintiff failed to establish a prima facie case because the alleged conduct did not rise to the level of severity actionable under Eleventh Circuit precedent. The court observed that the commissioner never physically threatened the plaintiff, never engaged in any inappropriate sexual conversation, and never engaged in any sexually humiliating conduct. The court also noted that there was no evidence that the conduct interfered with the plaintiff's job performance.

J. LECHNER

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STATE COURTS

By Macon Jones

Unauthorized immigrants are ineligible for admission to The Florida Bar absent state law permitting such individuals to attain professional licenses.

In re Fla. Bd. of Bar Exam'rs, 2014 WL 866065 (Fla. Mar. 6, 2014).

Addressing the question of whether undocumented immigrants are eligible for admission to The Florida Bar, the Supreme Court of Florida found that under federal law, states are not authorized to provide professional licenses to individuals not legally present in the United States. An unauthorized immigrant ("Applicant") applied for admission to The Florida Bar after graduating from an ABA-accredited law school and passing The Florida Bar exam. The Florida Board of Bar Examiners ("Board") petitioned the court to decide whether the Applicant should be admitted to The Florida Bar. The court, relying on *Arizona v. United States*, 132 S.Ct. 2492 (2012), found that federal law prohibits states from granting public benefits in the form of professional licenses to unauthorized immigrants. The only exception to the federal barrier is found in 8 U.S.C. § 1621(c) (2012), which provides that a state may pass a law affirmatively conferring the public benefit on unauthorized immigrants. Because no such law exists in Florida, Applicant argued that the state law exception may be met through other means such as policy statements by members of the executive branch in the federal government. The court found that such policy statements are merely non-binding prosecutorial discretion statements and do not satisfy the state law exception. Consequently, until the Florida legislature takes action, unauthorized immigrants are ineligible for admission to The Florida Bar.

Editor's Note: This month the Florida legislature voted to allow non-citizens,

who meet certain requirements, to become lawyers.

Recipient of overpayment in reemployment benefits is entitled to a hearing on whether she should be required to repay benefits.

Dowden v. Reemployment Assistance Appeals Comm'n, 2014 WL 562934 (Fla. 2nd DCA Feb. 14, 2014).

Appellant lost her job at Publix and successfully applied for unemployment benefits. Several months later, Appellant was employed at Dunkin' Donuts for a brief time before leaving because she did not have childcare. She continued to receive unemployment compensation for approximately eight months. Appellant was notified by the Unemployment Compensation Program that she was ineligible for benefits because she had voluntarily left her job at Dunkin' Donuts for personal reasons. Appellant was also told that any payments received while she was ineligible would constitute "overpayments" and could be subject to recovery. A hearing was held before an appeals referee who found that leaving employment for lack of childcare was without good cause attributable to her employer and thus disqualified her from receiving benefits. Additionally, the referee ordered Appellant to repay any overpayment she received during the eight months she was ineligible. The Second District Court of Appeal affirmed the finding that Appellant was disqualified from receiving benefits but reversed the order of repayment because there was no hearing or fact finding on the issue. The court reviewed the circumstances surrounding the benefits received by Appellant after she became ineligible and noted that adequate facts might exist that could exempt Appellant from repayment. These facts include the unrefuted testimony that Appellant was honest throughout the process of receiving benefits and the possibility that Dunkin' Donuts might have contributed to the delay in the denial of benefits. Because the referee failed to consider these issues, any order of repayment was error as a matter of law. The case was remanded for a hearing on the repayment of benefits.

Employee's retaliation claim survives summary judgment where the employer discharged employee after employee refused employer's unauthorized request to provide medical documentation in connection with workers' compensation claim.

Hornfischer v. Manatee County Sheriff's Office, 2014 WL 538698 (Fla. 2nd DCA Feb. 12, 2014).

An employee of the Manatee County Sheriff's Office ("MCSO") sued his employer alleging he was terminated in retaliation for filing a workers' compensation claim. The trial court granted MCSO's motion for summary judgment but was reversed by the Second District Court of Appeal. After the employee established a prima facie case for retaliatory discharge, the MCSO provided two reasons for discharge: insubordination and neglect of duty. While the trial court was satisfied with the reasons provided by the MCSO, the district court questioned the stated reasons for discharge. The district court found the alleged insubordination was a result of the MCSO's unauthorized request for medical documentation from the employee, noting that under the workers' compensation statute, the employer is obligated to communicate directly with the medical provider. Additionally, the neglect of duty allegation stemmed from alleged absenteeism. However, the employee filed an affidavit claiming he was sent home on the day in question as a result of the medication he was taking for his work-related injury. Finally, the district court noted that most employers do not announce in writing that an employee is being discharged for filing a workers' compensation claim. Thus, based on facts before the court, the employee should have an opportunity to argue before a jury that the reasons for discharge were pretexual.

Correctional officers' actions in allegedly defacing inmate's religious item constitute wanton and willful disregard of rights and property and fall within the statutory exception to immunity.

Allen v. Frazier, 2014 WL 472701 (Fla. 1st DCA Feb. 7, 2014).

The First District Court of Appeal reversed an order of dismissal by the trial court on the Appellees' motion for summary judgment based on immunity. Appellees were correctional officers who allegedly destroyed and defaced personal items of Appellant, who is an inmate at Florida State Prison. Appellant and other inmates were accused by Appellees of intentionally flooding a prison wing when the inmate toilets overflowed. Appellees conducted a search of the cells, allegedly in retaliation, and were accused by Appellant of destroying $1000 worth of legal transcripts and throwing three of Appellant's "Muslim kufi caps" in a toilet and urinating on them. In the inmate's case for damages, Appellees claimed immunity for their actions under § 768.28(9)(a), Fla. Stat., and the trial court ruled in their favor. The district court found that the trial court erred and that the facts attested to by Appellant were sufficient to withstand an immunity-based motion to dismiss. The court held that Appellees' conduct as alleged, particularly defacing religious items, constitutes wanton and willful disregard of human rights, safety, or property, and falls within the exception to immunity under § 768.28(9)(a).

When a job candidate eligible for a veteran's preference challenges the employer's hiring of a non-veteran, whether the hired non-veteran is more qualified is a question of fact for the hearing officer, the determination of which is not to be rejected

by PERC unless unsupported by competent, substantial evidence.

School Dist. of Collier County v. Fuqua, 2014 WL 444034 (Fla. 2nd DCA Feb. 5, 2014).

The Collier County School District ("CCSD") appealed the final order of the Public Employees Relations Commission ("PERC"), which had reversed the findings of the hearing officer. A retired Marine ("Complainant") applied for a position with the CCSD, seeking a veteran's preference. However, the CCSD hired another candidate who was not a military veteran. Complainant filed a complaint with PERC, and a hearing officer determined that while Complainant had an impressive educational background, the candidate hired by the CCSD was more qualified for the position based on her extensive teaching experience. PERC overturned the hearing officer's findings and held that Complainant was more qualified and thus entitled to a similar position and back pay from the CCSD. The CCSD argued that PERC improperly reweighed the evidence and substituted its own findings in place of the hearing officer's. The Second District Court of Appeal agreed, holding that because the qualifications of the Complainant and the hired candidate are different in nature, the question of who is better qualified is a question of fact. The court found that the determination by the hearing officer was supported by competent substantial evidence and could not be reversed by PERC.

Before a public entity may unilaterally alter the conditions of a CBA due to a "financial urgency," the Fourth DCA found that the entity must demonstrate both a compelling state interest and (in conflict with the First DCA) that no other possible reasonable source of funding was available.

Hollywood Fire Fighters, Local 1375, IAFF, Inc. v. City of Hollywood, 2014 WL 51693 (Fla. 4th DCA Jan. 8, 2014).

Hollywood Fire Fighters Local 1375 ("the Union") appealed an order from the Public Employees Relations Commission ("PERC") that allowed the City of Hollywood ("City") to unilaterally alter the terms and condition of the collective bargaining agreement ("CBA") after the City declared a "financial urgency." Halfway through the period governed by the CBA, the City experienced a budget shortfall of approximately $33 million, causing City officials to declare a state of "financial urgency" pursuant to § 447.4095 (2013), Fla. Stat. The City met with the Union to address changes to the CBA to accommodate the financial urgency, but the Union and City were unable to agree to changes. As a result, the City declared an impasse. Following the impasse, the City unilaterally adjusted wages and length of the workweek, and the Union filed unfair labor practice charges. As part of the alleged unfair labor practices committed by the City, the Union argued that § 447.4095 was unconstitutional as applied to the instant case because it infringed on the Union's rights to collectively bargain and to contract. PERC adopted the recommendations of the hearing officer, holding that the City established a compelling governmental interest by demonstrating a financial urgency existed and that the City need not resolve an impasse prior to making unilateral changes. The Fourth District Court of Appeal reversed PERC's ruling and, relying on *Chiles v. United Faculty of Florida*, 615 So.2d 671 (Fla.1993), held the City must not only show a compelling state interest to alter the terms of the CBA but must also demonstrate that funds were available from no other possible reasonable source. The court recognized and certified that its holding conflicted with the decision by the First District Court of Appeal in *Headley v. City of Miami*, 118 So.3d 885 (Fla. 1st DCA 2013), which required a compelling state interest and only a showing that potential alternatives for funding were unreasonable. The Fourth DCA held that in the instant case PERC did not apply the second prong of the constitutional analysis outlined in *Chiles*. The court reversed and remanded so it could be determined whether any other possible reasonable source of funding was available.

Third DCA declines to decide whether to adopt "convincing mosaic" test where plaintiff met neither the *McDonnell Douglas* nor the convincing mosaic standard of proof.

Johnson v. Great Expressions Dental Centers of Florida, P.A., 2014 WL 55043 (Fla. 3rd DCA Jan. 8, 2014).

After an African-American employee ("Plaintiff") was discharged by her employer, she filed a wrongful termination claim under the Florida Civil Rights Act of 1992, alleging she was discharged because of her race. The trial court granted the employer's motion for summary judgment, and the employee appealed. The issue before the Third District Court of Appeal was whether Plaintiff satisfied the fourth prong of *McDonnell Douglas*, which requires a plaintiff to demonstrate that the employer treated similarly situated employees outside the protected class more favorably. Unable to meet this requirement, Plaintiff—relying on *Smith v. Lockheed–Martin Corp.*, 644 F.3d 1321 (11th Cir. 2011)—argued for the "convincing mosaic" test, which allows one to defeat summary judgment by presenting a convincing mosaic of circumstantial evidence that would allow a jury to infer intentional discrimination by the decision maker. Finding that Plaintiff's claim failed under both the *McDonnell Douglas* framework and the "convincing mosaic" standard—and noting that the latter has never even been mentioned by a Florida court—the Third DCA declined to decide whether to adopt the "convincing mosaic" test.

***Macon Jones** is an assistant state attorney in the Eighth Judicial Circuit. While he currently practices criminal law, he enjoys keeping a close eye on recent developments in labor and employment law.*

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12:00 p.m. – 12:25 p.m. **Late Registration**

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Welcome and Introductory Remarks
Richard E. Johnson, Tallahassee, Program Co-Chair
Arlene K. Kline, Akerman LLP, West Palm Beach, Program Co-Chair

12:30 p.m. – 1:45 p.m.
Advanced Labor Law: Hot Topics
Malcolm S. Medley, District Director, U.S. Equal Employment Opportunity Commission, Miami District (Florida, Puerto Rico U.S. Virgin Islands)
Karen Buesing, Akerman LLP, Tampa
Richard T. Seymour, Law Office of Richard T. Seymour, P.L.L.C., Washington D.C.

1:45 p.m. – 2:55 p.m.
Status of the Law on Electronic Discovery
Craig Ball, Attorney and Forensic Technologist, Certified Computer Forensic Examiner, Austin, TX

2:55 p.m. – 3:15 p.m. **Break**

3:15 p.m. – 4:30 p.m.
The Future of Arbitration
Matthew W.H. Wessler, Staff Attorney, Public Justice, P.C., Washington D.C.

5:00 p.m. – 6:00 p.m.
Labor and Employment Law Section Executive Council Meeting (All Invited)

6:30 p.m. – 8:30 p.m.
Dinner (included in Registration Fee)

Saturday, May 17, 2014

8:25 a.m. – 8:30 a.m.
Welcome and Introductory Remarks
Richard E. Johnson, Tallahassee, Program Co-Chair
Arlene K. Kline, Akerman LLP, West Palm Beach, Program Co-Chair

8:30 a.m. – 9:45 a.m.
Causation Standard: But-For, Sole Cause, Motivating Factor, Proximate Cause, and More
Richard T. Seymour, Law Office of Richard T. Seymour, P.L.L.C., Washington D.C.

9:45 a.m. – 10:00 a.m. **Break**

10:00 a.m. – 11:15 a.m.
Workplace Bullying as an Emerging Claim
Monique R. Gougisha, Ogletree, Deakins, Nash, Smoak & Stewart, P.C., New Orleans, LA

11:15 a.m. – 12:30 p.m.
ERISA Litigation Topics for Employment Litigators
Howard Shapiro, Proskauer, New Orleans, LA

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