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the Checkoff

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The Labor & Employment Law Section

INSIDE:

Employer §1981 Hostile Work Environment Liability May Extend to Independent Contractors

by Mark Addington

In *Martinez v. Pavex,* 2006 WL 723482 (M.D. Fla. 2006), the District Court for the Middle District of Florida recently denied an employer's summary judgment motion on a hostile environment claim brought by an independent contractor under 42 U.S.C. §1981. The Defendant, Pavex Corporation ("Pavex"), produces asphalt in their Bartow, Florida facility. To get the aggregate (rock and sand) needed to produce the asphalt, Pavex hired outside trucking companies. Manuel "Manny" Estrada owned a trucking company used by Pavex to deliver aggregate. Manny received delivery requests from Pavex and would then contract with truck owners as independent contractors to make aggregate deliveries to Pavex.

Alejandro Vazquez-Falero, Dioisdado Perez, Isbel Perez, Narciso Perez, and Raphael Perez (collectively "Plaintiffs") were truck owners that Manny contracted with to make deliveries for Pavex as independent contractors. All but one are also members of the same family, Vazquez-Falero is not related to the Perez family. Each only delivered to Pavex when they chose to take an assignment from Manny.

Tony Hill, was a plant operator at Pavex when Vazquez-Falero and the Perez family were making deliveries to Pavex. Mr. Hill was responsible for monitoring and con-

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Chair's Message

In my last Chair's Message, I reported about two issues our Section was addressing with respect to its CLE programs. The first issue concerned our discovery that the Bar was selling our CLE programs on-line without providing us with a share of the revenues generated from those on-line sales. The second issue pertained to the Young Lawyers Division ("YLD") conducting practice area-based basic skills CLE programs in competition with our Section's CLE programs. Both issues have now been addressed by the Bar with mixed results.

The good news is that the Bar has agreed to retroactively conduct an accounting of profits generated by the sale of CLE programs on-line and provide each Section a share of the profits obtained. For profits derived from the sales of all on-line Section CLE programs occurring prior to the June 2006 implementation of the new BOG budget guidelines, each Section will receive 15% of the profits cleared by the Bar for the sale of that Section's CLE programs on-line. Unfortunately, that 15% share is based upon the net profits, as opposed to the gross profits, derived by the Bar. Prior to performing an allocation, the Bar will subtract the cost of making the CLE programs available on-line. Thus far, the Bar has outsourced the

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CHAIR'S MESSAGE
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job of making Section CLE programs available on-line at a considerable cost. Currently, 40% of the gross profits derived from the sale of Section CLE programs is expended to pay for outsourcing the task of making these programs available on-line. Thus, the 15% profit each Section receives is derived from the remaining 60% net profit the Bar retains after paying to have these programs made available on-line. Thus, the true percentage each Section receives is actually only 9% of the gross profits derived from all on-line Section CLE sales. However, 9% is better than nothing, which is what the Sections had been receiving.

The bad news is that the Bar does not intend to take any action to forestall the YLD from conducting future basic level practice area-based substantive CLE programs in competition with the Sections. This news is both disappointing and alarming given the fact that pursuant to the new BOG budget guidelines, each Section, as of June of 2006, will bear 90% of the loss of any unprofitable CLE programs. Although the YLD has made a commitment to coordinate their basic skills Labor and Employment Law CLE programs in future years to avoid the head-to-head competition we encountered with our Public Employees Labor Relations Forum CLE Program this past October, only time will tell if that promise will be upheld. Certainly, previous guarantees made to our Section by the YLD about this issue in past years were not honored.

On a positive note, the Section previously conducted a profitable Certification Review Course CLE Program in February and has an exciting lineup of speakers and topics for its Advanced labor Topics Program slated for May 5 and 6, 2006. Congratulations are in order for Steve Meck, Alan Forst and all of the program chairs who have thus far provided our Section with first rate, profitable CLE programs during this Bar year.

I also want to express my appreciation to Frank Brown, Ray Poole and Scott Fischer for the timely and top quality Florida Bar Journal articles and editions of the Check-Off that they have provided to our membership. Having previously performed the function of Publications Chair for the Section, I can assure you that they have each done a superb job in their respective posts. Similarly, I applaud all of the hard work Marc Snow has put into overhauling the Section's website. Although the unveiling of our website has taken longer than planned, I promise that you will not be disappointed with the final product. Hopefully, by the time you read this Chair's Message, the website will be up and running.

In closing, I believe our Section's membership has a great deal to be proud of. We are one of a handful of Sections that continues to grow and remain profitable. If you are not actively involved in the Section, I invite you to do so. Our Section will only continue to thrive if members step up and volunteer their time and efforts. As I have said before, this Section belongs to you.

— F. Damon Kitchen, 2005 - 06 Chair

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

September 8, 2006
"Employment Law At Its Best!" CLE (#0392R)

(Executive Council Meeting:
Friday, Sept. 8th, 5:00 – 6:00 p.m.)

Renaissance Plantation Hotel, Plantation, FL

Hotel Reservations: 954-472-2252
Group Rate: $ 125
Group Rate Expires: 8/17/06

September 9, 2006
"Employment Arbitration: From Deciding to Arbitrate Through Challenging the Award" CLE (#0492R)

Renaissance Plantation Hotel, Plantation, FL

Hotel Reservations: 954-472-2252
Group Rate: $ 125
Group Rate Expires: 8/17/06

October 19 & 20, 2006
"31st Annual Public Employment Labor Relations" CLE (#0404R)

(Executive Council Meeting:
Thursday, Oct. 19th, 5:00 – 6:00 p.m.)

Rosen Centre Hotel, Orlando, FL

Hotel Reservations: 407/996-9840
Group Rate: $137
Group Rate Expires: 9/28/06

February 15 & 16, 2007
"7th Annual Labor & Employment Law Certification Review" CLE (#0396R)

(Executive Council Meeting:
Thursday, Feb. 15th, 5:00 – 6:00 p.m.)
Rosen Plaza Hotel, Orlando, FL

Hotel Reservations: 407-996-9700
Group Rate: $120
Group Rate Expires: 1/26/07

May 11 & 12, 2007
"Advanced Labor Topics" CLE (#0457R)

(Executive Council Meeting:
Friday, May 11th 5:00 – 6:00 p.m.)

Don Cesar, St. Petersburg, FL

Hotel Reservations: 866-728-2206
Group Rate: $ 209
(No resort fee and complimentary self parking)
Group Rate Expires: 4/18/07

June 21, 2007
Labor & Employment Law Executive Council ANNUAL Meeting & Reception

(Executive Council Meeting:
Thursday, June 21st, 5:00 – 6:00 p.m.)

Orlando World Center Marriott Orlando, FL

Florida Has New Minimum Wage Implementing Legislation

by Robin Midulla

Florida has new minimum wage implementing legislation for the Florida Minimum Wage Amendment. Florida Lawmakers passed Senate Bill 18-B, the Florida Minimum Wage Act, 440.110 Florida Statutes (2006) in early December 2005 during a special session of the Florida legislature. The Act became effective immediately upon signature by Govenor Jeb Bush on December 12, 2005.

Lawmakers must have missed my October 2005 article published in the Florida Bar Journal, "Florida New Minimum Wage Provision: An Overview of the Amendment to The Florida Constitution." My article advised that creating implementing legislation with different standards than those of the Fair Labor Standards Act ("FLSA") would effectively result in creating more confusion and litigation than it would provide clarity to the Admendment. No implementing legislation was necessary as the answers to the questions raised by the Amendment could be found in the language of the constitutional amendment. The Amendment states: "It is intended that case law, administrative interpretations, and other guiding standards developed under the federal FLSA shall guide the construction of this amendment and any implementing statutes or regulations." This language specifies that when there are questions as to the plain language of the statute or in effectuating the Amendment, decisionmakers are to look to the case law, administrative interpretations, and other guiding standards developed under the federal FLSA. In other words, why create confusion by passing another law.

The new Minimum Wage Act is essentially identical to proposed House Bill 1709 and Senate Bill 2638 that died during the regular session without passage. The October 2005 Florida Bar Journal article contains an extensive, detailed article about the Minimum Wage Amendment and describes House Bill 1709 and Senate Bill 2638. That article may be consulted for a thorough understanding of the Minimum Wage Amendment and what is now Florida Statute Section 440.110 (2006). Here is an excerpt from the article specifically describing House Bill 1709 and Senate Bill 2638:

Proposed Implementing Legislation

The failed legislation provided that only those who were entitled to receive a minimum wage under the FLSA and its implementing regulations would be eligible to receive the Florida minimum wage. The bills specifically incorporated Sections 213 and 214 of the FLSA, as interpreted by the applicable regulations and as interpreted by the Secretary of Labor, into the Act. Without such additional implementation language, arguably all employees, regardless of the white collar exemptions they meet under the FLSA or the manner in which they are compensated, must be paid at least a minimum wage of $6.15 per hour for all hours worked.

Both bills added that enforcement actions were subject to Offers of Judgment, Florida Statute 768.79 (2004), and that punitive damages and other economic damages not expressly authorized by the bills could not be awarded to a prevailing plaintiff.

Both the House and Senate versions of the failed implementing legislation also extended the affirmative defense of "good faith" to employers who could prove by the preponderance of the evidence that they had not paid minimum wages, in fact owed, in good faith. According to the failed legislation, a finding of good faith would have given a court the discretion to deny or limit liquidated damages. The proposed legislation provided the specific point at which the statute of limitations begins to run. Like the FLSA, the legislation established the statute of limitations a beginning from the date of the alleged violation.

In addition, under the constitutional amendment, every September 30 of each year the Agency for Workforce Innovations must calculate the new minimum wage by increasing the minimum wage by the rate of inflation for the 12 months prior to September 1, using the Consumer Price Index for urban wage earners and clerical workers ("CPI-W"). The failed legislation noted that the CPI was not to be seasonally adjusted.

Another important provision of the failed legislation would have required aggrieved individuals to give employers 15 days written notice of the violation of the Amendment and an intent to file a lawsuit there under. The notice would also have required the individual to assert the minimum wage to which the individual claims he was entitled, with the approximate work dates and hours, and the alleged amount of the minimum wage owed through the date of the notice. During the notice period, the statute of limitations period was tolled. However, no such notice was required when an aggrieved individual complained only of retaliation.

In summary, there are two important notable prvisions that are new to that Act and different from the FLSA. Aggrieved employees must give employers 15 days written notice to enable them to avoid suite and employees have a 4 or 5 year statute of limitation.

Only time will tell what confusion the new statute will breed.

Misclassified Employees: Don't Forget the Fringe Benefits!

by Lowell Walters

An issue that arises all-too-frequently is the misclassification of employees. This issue can arise on all types of misclassifications, but usually arises when an individual that an employer treats as an independent contractor is later reclassified as an employee by the IRS, DOL or a court. The most commonly-known problem with mischaracterizing employees is that it results in employers having underwithheld employment taxes (income taxes, Social Security, unemployment and Medicare) because those taxes are not withheld from payments to independent contractors. Unfortunately, even after resolving those tax issues, issues arising from misclassified employees extend to the fringe benefits arena. This article discusses the affects of misclassified employees on two types of fringe benefits programs: employer-sponsored retirement and group health plans.

(In)Eligibility

Retirement and group health plans sponsored by employers often have specific eligibility restrictions based on employee-classification. Retirement plans and group health plans often limit eligibility to employees (excluding independent contractors) who have provided a certain amount of service, and often provide for varying employer contributions depending on employee classification. Problems can arise where an individual is improperly classified or where an individual is classified in a position that is not addressed by the employee benefit plan.

Misclassified employees will often be denied the opportunity to defer salary into retirement plans or receive employer contributions to their retirement accounts. In general, the IRS has said that the proper way to correct a circumstance in which individuals are denied opportunities to defer salary into retirement plans is to have the employer contribute amounts from the employer's general funds to represent the amount the employees *could have contributed* to the plan if they were interested in deferring the *maximum amount possible on a pro rata basis*. Of course, any other employer contributions to which the individuals should have been entitled will need to be contributed by the employer, too.

Group health plans typically allow employees to enroll at a specific time, such as (i) upon their initial hire, (ii) after 30 days of service or (iii) after 90 days of service. Normally, if the individual does not enroll on time, the insurance company will not provide coverage until the next plan year. When individuals who were treated as independent contractors are reclassified as employees retroactive to their hire dates, those employees may have been denied the opportunity to enter the group health plan on the appropriate date. The problem becomes even more complex if the employer pays all or a portion of the applicable premiums. In this instance, the individual may be entitled to retroactive coverage, and if the plan is commercially-insured and the insurance company will not insure that person until the next open enrollment, the employer could be required to pay medical benefits out of the employer's general assets.

Case Law

This issue was raised in a lawsuit for retirement benefits brought against Microsoft by independent contractors who were reclassified as employees. *Verizon v. Microsoft,* 97 F.3d 1187 (9th Cir. 1996). In *Verizon*, individuals were reclassified as employees after providing several years of service. These "reclassified employees" then brought suit against Microsoft for Microsoft's failure to allow these "employees" into their retirement plans. In this landmark case, the court determined that Microsoft needed to pay, from its general fund, amounts into the plan to make up for the contributions these individuals would have received if they were properly classified as employees from their initial date of hire.

Group health plan benefits were at issue in another 1996 case. In *Epright v. Environmental Resources Management, Inc. Health and Welfare Plan*, full-time employees were eligible to participate in the group health plan, while part-time employees were excluded. 19 EBC 2936 (3d Cir. 1996). Mr. Epright was classified as a "temporary employee," which was not referenced in the group health plan. Mr. Epright brought suit after he was denied benefits and the court determined that Mr. Epright's service was similar to that of a full time employee and that the company's treatment of Mr. Epright as being ineligible to

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 Ray Poole (904/356-8900) (*rpoole@ constangy.com*) or Sherril Colombo (305/704-5940) (*scolombo@cozen.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 next *Checkoff* is September 15, 2006.

participate in the group health plan was improper. Thus, the employer was required to provide group health plan benefits to Mr. Epright.

It is not clear as to whether the insurance provider in *Epright* was bound to provide coverage. If the insurance provider was not required to provide coverage in accordance with the decision, then the employer would have been required to self-insure Mr. Epright until the next open enrollment period, which means that all of Mr. Epright's health expenses would have been payable from the general assets of the employer.

Quick Fix

The employee benefits community is attempting to resolve this potential liability by incorporating specific provisions to exclude misclassified employees from being eligible to participate in retirement or group health plans. In 2006, the Northern District of California ruled that a provision excluding misclassified employees properly prevented such individuals from being entitled to benefits. *See Curry v. CTB McGraw-Hill*, 2006 WL 228951 (NDCA 2006). Unfortunately, this issue has not been heard in a court that binds Florida. Thus, while no one can be certain that this tactic will be successful, all employers should review their group health plans and retirement plans to determine whether it excludes misclassified employees and, if not, should strongly consider incorporating such an eligibility restriction.

Lowell Walters *is an attorney at GrayRobinson who helps business owners receive beneficial tax treatment for their retirement and health plans by working with plan administrators, the IRS and DOL to ensure employee benefit plans are drafted and operated correctly, including correcting plans when an earlier error is discovered.*

Endnote:

1 $15,000 for 2006. The IRS has unofficially indicated their intent to revise that rule to allow for an employer contribution of 50% of that maximum.

The Supreme Court's Decision in *Ash v. Tyson Foods*

By Robert J. Sniffen

In a short, but important, per curiam decision, the U.S. Supreme Court recently altered the standard applied by the Eleventh Circuit Court of Appeals in failure to promote cases arising under Title VII of the Civil Rights Act of 1964. In *Ash v. Tyson Foods, Inc.,* 546 U.S. ___ (2006), 2006 U.S. LEXIS 1816 (February 21, 2006), two employees of Tyson Foods sought promotions to fill two open shift manager positions. White males were selected for both positions. The plaintiffs sued under Title VII and 42 U.S.C. §1981.

A jury awarded the plaintiffs compensatory and punitive damages to the plaintiffs. Tyson Foods moved for judgment as a matter of law, and then renewed its motion for judgment under Rule 50(b) after the trial. The district court granted the Rule 50(b) motion and, in the alternative, ordered a new trial with respect to both plaintiffs pursuant to Rule 50(c).

The Eleventh Circuit affirmed in part and reversed in part. With respect to plaintiff Ash, the Eleventh Circuit affirmed the District Court's Rule 50(b) motion, finding that there was insufficient evidence to show pretext. With respect to plaintiff Hithon, the Eleventh Circuit reversed the Rule 50(b) ruling, concluding that there was sufficient evidence to go to the jury. However, the Eleventh Circuit also affirmed the District Court's alternative remedy of a new trial pursuant to Rule 50(c), holding that the evidence did not support the granting of punitive damages or the amount of compensatory damages that were awarded, which justified the District Court's ordering of a new trial.

The Supreme Court, while acknowledging that the Eleventh Circuit rulings below may "be correct in the final analysis," found that the Eleventh Circuit "erred in two respects, requiring that its judgment now be vacated and the case remanded for further consideration." The Court first found that evidence that the employer's plant manager (who was the decision-maker with respect to the disputed promotions) had referred to the employees as "boy" was not, as the Eleventh Circuit suggested, "always benign." In so finding, the Court noted that the Eleventh Circuit's holding "that modifiers or qualifications are necessary in all instances to render the disputed term probative of bias" was erroneous.

Second, and perhaps more importantly for practitioners in the Eleventh Circuit, the Court gutted the Eleventh Circuit's well known standard for evaluating pretext in promotional decisions. The Eleventh Circuit had reaffirmed in several cases that pretext can be established when relative qualifications are at issue only when "the disparity in qualifications is so apparent as virtually to jump off the page and slap you in the face." The Court criticized the Eleventh Circuit's application of this standard and, instead, cited standards announced in other cases as more appropriate to evaluate pretext in failure to promote cases. While the Court sidestepped the opportunity to announce a definitive standard in evaluating the issue of pretext when qualifications are compared, it noted that the "jump off the page and slap you in the face" standard was not the appropriate standard to use.

Robert J. Sniffen *is the founder of Sniffen Law Firm, P.A .The firm represents employers in labor and employment law matters.*

CASE NOTES

***Arbaugh v. Y & H Corporation,* 126 S. Ct. 1235 (2006)**

The plaintiff filed a claim against the defendant for sexual harassment under Title VII. After a jury awarded damages to the plaintiff the defendant argued that it did not have 15 employees, and therefore, was not subject to Title VII liability. The plaintiff claimed that the defendant waived its right to assert this defense by not raising the issue until after trial. The Supreme Court held that the threshold number of employees under Title VII is not jurisdictional, but rather is an element of the plaintiff's claim and could not be challenged under Fed.R.Civ.P. 12(h).

***Ash v. Tyson Foods, Inc.,* 126 S. Ct. 1195 (2006)**

The Court rejected the Eleventh Circuit's standard for establishing pretext based on relative qualifications, that "pretext could be established through comparing qualifications only when the disparity in qualifications was so apparent as virtually to jump off the page and slap you in the face." The Court explained that this standard was "unhelpful and imprecise," but did not establish a specific alternative standard. The Court also rejected the finding that a manager's reference to each of the plaintiffs as "boy" was benign, and noted that modifiers and qualifiers are not necessary to determine whether a word is probative of bias.

***Ass'n for Disabled Americans, Inc. v. Key Largo Bay Beach, LLC*, 2005 U.S. Dist. LEXIS 38702 (M.D. Fla. 2005)**

Plaintiffs did not obtain any change in legal relationship between the parties and therefore, were not a "prevailing party" entitled to an award of fees, in the following circumstances. Defendants were already subject to two binding orders to bring their property into compliance with the ADA's accessibility requirements, and plaintiffs sought essentially the same modifications in this, the third lawsuit concerning accessibility. The fact that defendant did not meet all deadlines for compliance set forth in prior orders did not make the plaintiffs prevailing parties in the third case. Even if court ordered defendants to complete the modifications, the order would only require them to do what they were already required to do under prior orders.

***Beck v. Boce Group, L.C.*, 391 F. Supp. 2d 1183 (S.D. Fla. 2005)**

The plaintiffs brought a claim against the defendant-leasing company and defendant- restaurant under the FLSA. The court granted summary judgment in favor of the defendant-leasing company finding that the plaintiffs failed to show that the defendant-leasing company exercised any control over them while they worked for the defendant-restaurant. Similarly, the court held that the evidence did not support the plaintiffs' claims that the defendant-leasing company was a joint employer under the economic realties test, even though the defendant-leasing company performed certain human resources functions and extended certain rights and duties to the defendant-restaurant.

***Borland v. Unemployment Appeals Commission*, 910 So. 2d 320 (Fla. 2d DCA 2005).**

Claimant appealed the Unemployment Appeals Commission's final order affirming the appeals referee's findings that Claimant did not qualify for unemployment benefits because she engaged in "misconduct" associated with her employment. Claimant was terminated from her position as a bank teller because she admittedly failed to secure her cash drawer at the close of business on three occasions. However, Claimant testified that her failure to secure the cash drawer was not intentional. She explained that her mistake was partially due to the bank's policy prohibiting overtime, which resulted in tellers hurrying through closing procedures.

The appellate court reversed the Unemployment Appeals Commission's Order denying Claimant benefits and found that Claimant did not engage in "misconduct" warranting a denial of benefits under the Unemployment Compensation Statute. The appellate court reasoned that Claimant's mistakes did not demonstrate a "willful or wanton disregard of the bank's interests nor negligence to a degree or recurrence that manifests culpability, wrongful intent, or evil design," as required by the definition of "misconduct" in the Unemployment Compensation Statute.

***Camara v. Brinker Int'l*, 2006 U.S. App. LEXIS 527 (11th Cir. 2006)**

Plaintiff was terminated after customers and plaintiff's co-workers complained about her offensive behavior. The plaintiff argued that the trial court erred in denying her motion to compel discovery of the personnel files of three alleged comparators. The appellate court upheld the lower court's order on the motion to compel because the plaintiff had the chance to depose the alleged comparators yet failed to get any information from them to prove that they were similarly situated but treated differently. Moreover, the legitimate, nondiscriminatory reason given by plaintiff's employer for terminating her (that she refused to improve her employee relations skills after previous warnings) could not have been rebutted by the information in the personnel files. Lastly, the court found that the individual that plaintiff offered as a comparator actually displayed different behavior problems than the plaintiff.

***Carr v. Publix Super Mkts., Inc.*, 2006 U.S. App. LEXIS 2845 (11th Cir. 2006)**

Even though the plaintiff's right arm bone was replaced by a cadaver bone supported by a metal rod and pins, his condition was not an "impairment" under the ADA because there was not enough evidence to establish that his condition substantially limited one or more of his major life activities. Despite lifting restrictions and his inability to perform certain tasks with his right arm, plaintiff was able to care for himself with little

assistance and had "pretty good" use of his hand.

***Chase v. Jowdy Industries, Inc.*, 913 So.2d 1173 (Fla. 4th DCA 2005).**

Employee filed an action in the Circuit Court for Broward County alleging violations of Florida's Private Whistleblower's Act. In his complaint, employee asserted that venue was proper in Broward County because he resided in Broward County. Later at deposition, employee testified that he had been living in Broward at the time of the filing of his complaint. Later still, he filed an affidavit stating that after the deposition he realized that he had actually relocated to Palm Beach County ten days before filing suit. Defendant moved for summary judgment arguing that the case should be dismissed because venue was improper in Broward County and the applicable statue of limitations now barred the claim. The trial court concluded that venue should have been laid in Palm Beach County, but declined to transfer the case because employee had only first requested the transfer orally at the hearing on defendant's motion for summary judgment. As a result, the trial dismissed employee's complaint.

On appeal, the Fourth District Court of Appeals determined that the Whistleblower's Act provides for proper venue in the county where the plaintiff resides and that such statutory provision is reasonably understood as including the time when the conduct allegedly violating the Act is said to have occurred. Therefore, a plaintiff's relocation to another county at the time of filing suit would not defeat venue that was proper when the cause of action accrued.
In addition, even if venue is improper, dismissal of the action is not the appropriate remedy when the correct venue is elsewhere in the state. Instead, the trial court should make an affirmative finding as to the proper venue and then transfer the cause to that venue.

***Clemmer v. Florida*, 2005 U.S. Dist. LEXIS 35187 (N.D. Fla. 2005)**

The State of Florida, and DCFS, are immune from lawsuits brought under the ADEA. DCFS did not waive immunity by removing the case to federal court.

***Cotton v. Cracker Barrel Old Country Store, Inc.*, 434 F.3d 1227 (11th Cir. 2006)**

The employee filed a claim against her employer for sexual harassment and retaliation when her hours were reduced after she reported an incident of sexual harassment by her general manager. The evidence showed that the employee knew prior to making her complaint that her hours would be cut after the holidays, that she was responsible for the decrease in hours because she took time off, and that the manager who cut her hours was not the manager involved in the harassment. The court held that the employee failed to establish her claim because she could not show a sufficient causal connection between the harassment or complaint of harassment and the decrease in her hours.

***Cruz v. Publix Super Mkts., Inc.*, 428 F.3d 1379 (11th Cir. 2005)**

Plaintiff's request for leave to care for her pregnant daughter was not sufficient to put employer on notice that requested leave was potentially covered by FMLA. Normal pregnancy is not a serious health condition under the FMLA, and the plaintiff did not tell her employer that she needed FMLA leave because her daughter was incapacitated due to pregnancy complications. The employer was not required to inquire into the plaintiff's request merely because the plaintiff revealed to her employer that her daughter needed help because her husband was injured.

***Egued v. Postmaster Gen. of United States Postal Serv.*, 155 Fed. Appx. 439 (11th Cir. 2005)**

A plaintiff cannot avoid summary judgment by comparing his own discipline to that of a coworker, where plaintiff was disciplined for engaging in ongoing harassment but the coworker had been the subject of only one complaint of unwanted touching.

***Escobar v. Orlando Brewing Partners, Inc.*, 2005 U.S. Dist. LEXIS 30709 (M.D. Fla. 2005)**

The plaintiff brought a claim under the FLSA against his employer-company and the officers of the company. The court found that the individual listed as the company's vice president on various corporate documents actually had no authority to hire, fire, pay or in any way direct the company's employees, and that she had no control over the daily activities of the business. The court concluded that her only contact with the business was writing checks drawn on the company account, and thus, she was really an officer of the company in name only. Based on this evidence, the court held that this individual did not assume a large enough role in the business to be held personally liable for any violations under the FLSA.

***Gamba v. City of Sunrise*, 2005 U.S. App. LEXIS 25150 (11th Cir. 2005)**

Temporal proximity between request for FMLA leave and termination of employment insufficient to avoid summary judgment where, before request for leave, plaintiff had been given several written notices by the defendant specifying his poor job performance.

***Gray v. Prime Management Group, Inc.*, 912 So. 2d 711 (Fla. 4th DCA 2005).**

Employer sued its former president, vice president, and the company they established to compete alleging breach of contract, tortious interference with a business relationship, misappropriation of trade secrets, and conspiracy. Employer also moved for injunctive relief to enforce the former president's non-competition agreement. The trial court granted Employer a temporary injunction, even though the former president's employment contract containing the

continued, next page

non-competition provision had expired. The trial court relied on case law providing that where an employment contract expires, and the parties continue to perform as they did under the previous contract, an inference arises that they have mutually assented to a new contract including the same provisions as the old contract.

The appellate court reversed the trial court's decision and held that the Statute of Frauds required that the renewal of the former president's employment agreement be in writing, and that an oral extension of the former president's written employment contract did not extend the non-competition provision.

***Hurlbert v. St. Mary's Health Care Sys., Inc.*, 2006 U.S. App. LEXIS 3733 (11th Cir. 2006)**

An employee is considered incapacitated for purposes of the FMLA if unable to perform her current job, even if that is the only job she is unable to perform. The trial court erred when it analyzed the issue of incapacity under the FMLA under the "substantially limited" standard used under the ADA to determine whether an employee is disabled.

***Keeton v. Flying J, Inc.*, 429 F.3d 259 (6th Cir. 2005)**

Keeton served as an assistant restaurant manager for Flying J. After he rejected his female supervisor's sexual advances, she terminated him, but Keeton's district manager converted the termination to a transfer that same day. Keeton accepted the transfer, which required him to maintain two households for a period of time until he left for another job. After a jury returned a verdict in his favor, finding the sexual harassment resulted in a tangible employment action, the trial court denied the employer's post-trial motions. The Sixth Circuit affirmed, concluding that a reasonable jury could have concluded the transfer to a distant location constituted a tangible employment action, rejecting the employer's contention that Keeton's stated willingness on his application to relocate precluded such a finding.

***Kerr v. McDonald's Corp.*, 427 F.3d 947 (11th Cir. 2005)**

The plaintiffs had actual knowledge that the EEOC's investigation of their claim had concluded and they requested issuance of right-to-sue letters. The right-to-sue letters were dated December 31, 2002, and despite a dispute about the actual date of mailing, the only reasonable conclusion was that letters had been mailed no later than January 9, 2003. The plaintiffs claimed that they did not receive the letters until February 15, 2003. The court held that because plaintiffs failed to inquire about their missing right to sue letters, they failed to assume the minimal responsibility to try and resolve their claims. Therefore, since the claims were not filed until May 15, 2003, more than 90 days after plaintiffs should have received the letters or made further inquiry, the claims were untimely and summary judgment was properly entered for the employer.

***Kolczynski v. United Space Alliance, LLC*, 2005 U.S. Dist. LEXIS 20508 (M.D. Fla. 2005)**

A parent company that hires individuals for senior management positions at a subsidiary are not liable under Title VII for actions of those managers affecting the subsidiary's employees, where the parent company did not take part in employment decisions affecting the employees.

***Kreamer v. Henry's Towing*, 150 Fed.Appx. 378 (5th Cir. 2005)**

Kreamer worked on a tugboat that serviced an off-shore oil rig. During one of his assignments a crew member on another tugboat assigned to the rig began harassing him on a daily basis. Although Kreamer complained to his Captain, who brought the matter to the other employee supervisor's attention, the co-worker continued to harass him over a period of six days, ignoring multiple instruction of counseling from the two tugboat Captains. When the last incident of harassment happened in front of the Captains, they called ashore and asked for a co-worker to be transferred mid-assignment. The District Court granted the employer's Motion for Summary Judgment on Kreamer's sexual harassment claim, concluding that the employer took reasonable steps to stop the harassment with a series of warnings and counseling, and ultimately a mid-assignment transfer which required the employer to pick up the offending employee from an off-shore rig. The Appellate court affirmed, noting its prior holdings that remedial action is not in effect merely because it was not immediately stopped the harassing behavior and that the sanction of termination was not the only appropriate discipline for a pattern of harassing behavior.

***Langford v. Paravant, Inc.*, 912 So.2d 359 (Fla. 5th DCA 2005)**

In this case, a former employee brought claims for breach of contract, quantum meruit, promissory estoppel, fraudulent misrepresentation, equitable accounting, and declaratory decree against his former employer. The trial court granted summary judgment to the former employer, and the appellate court reversed the summary judgment as to the breach of contract claim.

The facts are that the former employee had been actively recruited by his former employer, which offered him a base salary of $80,000 with a commission of 1% on sales of 2,000,001 to 5,000,000, and a 2 1/2% commission on sales of $5,000,001 and higher. The contract did not define the term "sales." The former employee accepted the offer and worked for seventeen months exclusively on the former employer's proposal to a third party company. Ultimately, the former employer was awarded a $300,000,000 subcontract with that third party company.

Shortly thereafter, the former employee was terminated because his former employer was disappointed with his sales forecast for the upcoming year. The former employee

brought suit.
The appellate court reversed the award of summary judgment, finding that a genuine issue of material fact existed as to the meaning of the term "sales." The case was remanded for a jury trial on the breach of contract claim.

***Masters Freight, Inc. v. Servco, Inc.*, 915 So.2d 666 (Fla. 2d DCA 2005)**

In this case, the lower court entered a temporary restraining order against a group of former employees to prevent them from competing against their former employer, pursuant to a non-compete agreement. The appellate court reversed, finding that the trial court did not make specific findings sufficient to support injunctive relief.

Specifically, a temporary injunction may only be granted if the movant
establishes: (1) a likelihood of irreparable harm; (2) unavailability of an adequate legal remedy; (3) a substantial likelihood of succeeding on the merits; (4) considerations of the public interest support the entry of the injunction. The order entered by the trial court only addressed the first of these four elements. Therefore, the appellate court reversed the order and remanded the case to the trial court to review the record and make a determination regarding whether the record supports all four elements.

***McQueen v. Airtran Airways, Inc.*, 2005 U.S. Dist. LEXIS 37461 (N.D. Fla. 2005)**

The employee's job description required the ability to lift up to 70 pounds. However, during employee's pregnancy, she received a note from her doctor that she should not lift more than 30 pounds. The employer put the employee on unpaid leave under the FMLA until she was able to again lift the required weight. The employee filed a claim of gender discrimination. In holding that the employee failed to establish a prima facie case of discrimination, the court found that the employee was no longer qualified for her job when she notified her employer that she should not lift more than 30 pounds. Furthermore, the court held that she was not entitled to a modified work assignment merely due to the fact that she was pregnant. There was no evidence that the employer treated her differently from any other non-pregnant employee.

***Morse v. Simley Corp.*, 2005 U.S. Dist. LEXIS 38012 (M.D. Fla. 2005)**

Time for filing lawsuit ran from receipt by charging party of faxed copy of right to sue letter. Section 2000e-5 did not require the EEOC to use the U.S. mail or any other mode of communication to give notice of the right to sue. The charging party was not misled by the EEOC faxing and then mailing the right to sue letter, and the time for filing lawsuit would not be tolled to permit filing 96 days after receipt of fax copy of right to sue letter.

***1 Nation Technology Corp. v. A1 Teletronics, Inc.*, 2005 WL 2654787 (Fla. App. 2 Dist.).**

Former employer filed complaint seeking monetary and injunctive relief against new employer and its president alleging tortuous interference with an employment contract and with its business relationships. Prior to trial, defendants served the plaintiff with an offer of judgment pursuant to Florida Statutes section 768.79. The offer of judgment was made to "resolve all claims" and stated that defendants would be "jointly and severally liable for a single payment of $50,000.00." Following a jury verdict of no liability, the defendants sought to recover the attorney's fees and costs incurred since the date of their offer of judgment. The trial court found that the offer properly stated the amount attributable to each defendant since the liability between defendants was premised on a theory of vicarious liability and the defendants would be jointly and severally responsible for the settlement payment. Nonetheless, the trial court denied the request for fees and costs, finding that the offer did not state with particularity all nonmonetary terms because it failed to mention the plaintiff's request for injunctive relief.

On appeal, the court found that the offer was sufficiently particular with respect to the nonmonetary terms. Specifically, the offer stated that the proposal intended to "resolve all claims" raised in the complaint. Therefore, the court concluded that the offer clearly encompassed the resolution of the injunction claim because it sought to settle all claims.
Nonetheless, the court determined that Rule 1.442(c)(3), Florida Rules of Civil Procedure, expressly requires that a joint offer differentiate the amount attributable to each offeror regardless of the theory of liability. Therefore, the offer at issue was legally insufficient, as it did not state the amount for which each defendant would be responsible.

***Polley v. Mohawk Indus.*, 151 Fed. Appx. 858 (11th Cir. 2005)**

Decision maker's statement that 68-year old was terminated to "make way for the future" was not evidence of discriminatory intent and did not establish pretext.

***Ray v. N.Y. Times Mgmt. Servs.*, 2005 U.S. Dist. LEXIS 22692 (M.D. Fla. 2005)**

The plaintiff, who contracted Hepatitis C, was terminated after his long-term disability benefits were withdrawn. The court found that the plaintiff was not a qualified individual with a disability under the ADA because his illness caused him to be too weak to perform the essential requirements of his job as a press machinist. Furthermore, the employer did not have to accommodate the plaintiff by changing the requirements of his job. The court held that even though the plaintiff's supervisor disclosed plaintiff's illness to plaintiff's co-workers, this disclosure did not create a hostile work environment because the co-workers' fears of

continued, next page

contracting Hepatitis were not severe and pervasive as to unreasonably interfere with the plaintiff's work performance. Lastly, the court held that the employer did not retaliate against the plaintiff by terminating him because the employer had a policy of termination after an employee's long term benefits were depleted.

***Raybon v. Continental Tire No. Am., Inc.*, 2005 U.S. App. LEXIS 28747 (11th Cir. 2005)**

The court found that the written release the employee signed in exchange for an early retirement package complied with the Older Workers Benefit Protection Act, and therefore barred his ADEA claim. The plaintiff claimed that his employer fraudulently induced him to enter into the release by telling him that his current position was being eliminated, but then replaced him with someone younger. The court rejected this claim because the employee was given a job description of the new position before he agreed to the release. Therefore, the employee could not establish reasonable reliance, an essential element of the fraud claim.

***Rigby v. Springs Indus.*, 2005 U.S. App. LEXIS 24911 (11th Cir. 2005)**

Manufacturing is a class or broad range of jobs for purposes of determining whether an employee is disabled under the ADA. However, the inability to obtain a commercial driver's license due to status as an insulin-dependent diabetic does not render an employee "disabled" for purposes of the ADA.

***Rivera v. Torfino Enterprises, Inc.*, 914 So.2d 1087 (Fla. 4th DCA 2005).**

Former employee filed a complaint under Florida's Private Whistleblower's Act alleging that she had been discharged in retaliation for reporting and objecting to sexual harassment in the workplace. The trial court dismissed the complaint for failure to state a cause of action after finding that the Florida Civil Rights Act ("FCRA") is the exclusive remedy for retaliatory discharges based on underlying discrimination complaints.

In reversing the trial court, the appellate court found that the Whistleblower's Act and FCRA were intended to provide dual remedies. Also, even though both statues protect against retaliation, the Whistleblower's Act has retaliatory firing as its central purpose whereas the anti-retaliation provision of FCRA is auxiliary to its anti-discrimination provisions. Therefore, FCRA is not the exclusive remedy for retaliation claims arising from complaints of discrimination.

***Roberts v. Design & Mfg. Servs.*, 2006 U.S. App. LEXIS 337 (11th Cir. 2006)**

Statements by company president that plaintiff "was getting too old for this stuff" and that if he was terminated he "would be sadly mistaken if he thought he could use age discrimination as the reason," and president's frequent inquiries as to when plaintiff would retire, were not direct evidence that age was reason for termination of employment. President never said he was going to fire plaintiff because of his age, and all proffered statements required inferential leap to get to the conclusion that the plaintiff was discharged based on his age.

***Roberts v. Rayonier, Inc.*, 2005 U.S. Dist. LEXIS 37714 (M. D. Fla. 2005)**

The court held that even though the plaintiff may be found not to be disabled, he was still entitled to protection under 42 U.S.C. § 12112(d)(4) of the Americans with Disabilities Act, which limits the circumstances under which employers may make medical inquiries or require medical examinations.

***Rosen Building Supplies, Inc. v. Krupa*, 2005 WL 2138735 (Fla. 4th DCA 2005).**

In this case, a former employee brought claims for breach of contract, wrongful termination, and unpaid wages against his former employer. The employer counter-claimed for breach of the employment agreement between the parties. The jury found that the former employee had not been wrongfully terminated, but that the employer owed unpaid salary and commission. As to the employer's counter-claim, the jury found that the former employee breach his employment agreement.

The former employer moved to tax costs and fees, as did the former employee. The trial court found that the employee had prevailed on his claim for past wages and bonuses, but that he failed on his claim for breach of contract. The trial court further found that the employer prevailed on its breach of contact claim, but failed on its claim for past wages and bonuses. Finally, the trial court found that the issues were inextricably intertwined and awarded the employee costs and fees.

On appeal, the appellate court held that the issues in the case were not inextricably intertwined and that the employee's unpaid wage claim was entirely independent of and distinct from the employer's breach of contract claim. Accordingly, the appellate court held that the employee was the prevailing party on the unpaid wage claim and as such, was entitled to his fees and costs in prosecuting that claim. At the same time, the appellate court found that the employee did not prevail on his breach of contract claim. The appellate court thus reversed the order awarding fees and remanded for the trial court to conduct an evidentiary hearing or to determine form the record the fees and costs incurred by the employees in pursuing the claim on which he was not the prevailing party, and deduct that amount from the fee award.

***Rowell v. BellSouth Corp.*, 433 F.3d 794 (11th Cir. 2005)**

Plaintiff given a choice between retiring and accepting severance benefits or waiting to see whether he would remain employed following reduction in force was not constructively discharged. There was no evidence that the reductions resulted in age discrimination, or that the plaintiff

was singled out. Plaintiff's own belief, and the opinion of a manager who was not involved in decision making, regarding plaintiff's qualifications were not evidence of discriminatory intent. Use of criteria in RIF that differed from criteria used in performance review was not evidence of discriminatory intent.

***Sunshine Chevrolet Oldsmobile v. Unemployment Appeals Commission*, 910 So. 2d 948 (Fla. 2d DCA 2005).**

In this case, Employer terminated Claimant because he allegedly made racist and sexually inappropriate comments. In the proceeding before the appeals referee, Employer submitted numerous documents as evidence of Claimant's misconduct. The appeals referee awarded Claimant unemployment benefits and found that Employer failed to demonstrate that Claimant's termination was due to misconduct associated with his employment. The appeals referee based this finding on the fact that Employer relied primarily on hearsay evidence. Ultimately, Employer failed to establish that its proffered documents met the requirements of the business record exception to the hearsay rule.

The Unemployment Appeals Commission ("UAC") affirmed the referee's decision and stated that the referee properly excluded the documents as hearsay evidence. The Second District Court of Appeal then affirmed the findings of the appeals referee and the UAC. The Second District explained that, in an administrative action, hearsay evidence can be used to explain other evidence, but hearsay evidence alone is not adequate to support a determination unless there is a valid exception to the hearsay rule. The Second District also held that a party's failure to object to the introduction of hearsay evidence does not preclude the party from asserting an objection on appeal before the UAC.

***Vaughan v. Morgan Stanley DW Inc.*, 2005 U.S. App. LEXIS 26408 (11th Cir. 2005)**

Plaintiff's own statistical analysis, admittedly based on his own research and without complete analysis, is insufficient to establish age discrimination.

***Waters v. Home Depot U.S.A.*, 2005 U.S. App. LEXIS 28296 (11th Cir. 2005)**

No tangible adverse effect on employee's employment was found where the employee claimed that after terminating her employment, the employer retaliated against her by terminating a contract with a company in which she owned an interest. The court held that the employee could not show that the termination of this contract caused her to suffer a serious and material change in the terms or conditions of her current or prospective employment even if all of the allegations in her complaint were true.

***Wernsign v. Illinois Department of Human Services*, 427 F.3d 466 (7th Cir. 2005)**

The Seventh Circuit rejected the requirement that, in order to use prior salary history as a "factor other than sex" justifying different pay levels under the Equal Pay Act, an employer must show that it had an "acceptable business reason" for using prior salary. The Seventh Circuit noted that several other circuits, including the Eleventh Circuit in Glen v. General Motors Corp., 841 F.2d 1567 (11th Cir. 1988), require the employer to show some business justification for relying on salary history. The Seventh Circuit provided an interesting criticism of the Eleventh Circuit's rational stated in Glen as well the Ninth Circuit's rational in Kouba v. Allstate Insurance Company, 621 F.2d 873 (9th Cir. 1982).

***Weston-Brown v. Bank of Am. Corp.*, 2006 U.S. App. LEXIS 318 (11th Cir. 2006)**

Plaintiff sued for discriminatory failure to promote and retaliation. The court held that the plaintiff failed to prove a prima facie case as to either claim. Since there was no dispute that the individual hired for the position plaintiff sought was merely promoted to the same level as the plaintiff's existing position, the court held that the plaintiff did not suffer serious and material change in the terms, conditions or privileges of her employment. Moreover, the plaintiff's assertion that if she was selected, she would have been moved to a higher level was only speculation. As for her retaliation claim, the court held that where the plaintiff's supervisor was previously dissatisfied with her performance at her current position, the plaintiff failed to show a causal connection between her complaint of discrimination and her removal from that position.

The CHECKOFF

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Commission Orders Rerun Election Based on Unlawful Pre-Election Conduct

By John Showalter, Hearing Officer.

In *International Association of EMT's and Paramedics, SEIU/NAGE, AFL-CIO v. Emergency Medical Services Alliance*, RC-2004-066 (April 12, 2005), the Commission defined a bargaining unit of EMTs and paramedics and directed that an election be conducted. On May 24 and 25, 2005, an on-site election was held, and the Association prevailed 65-52.

EMSA filed a post-election petition objecting to an advertisement for a scholarship drawing contained in an Association campaign newsletter. After receiving a response from the Association, the case was remanded to the hearing officer to resolve disputed issues of fact and to make a recommendation regarding the alleged unlawful pre-election conduct. After a hearing, the hearing officer concluded that the Association's advertisement for a scholarship lottery was not improper and that the Association should be certified as the exclusive bargaining agent.

The hearing officer found that two weeks before the election the Association mailed a newsletter to all eligible voters and also distributed it in the workplace. This newsletter was prepared specifically for the EMSA election, and its purpose was to inform the unit members of the benefits they would receive by voting for the Association as their exclusive bargaining agent. In the newsletter was an advertisement titled "WIN … a $500 scholarship from SEIU/NAGE." In the text of the ad, the employees were informed that SEIU/NAGE Local 5000 would award fifty $500 scholarships to members in five affiliated unions, including the Association, through a lottery drawing. This was the second year the scholarships had been awarded through a drawing, and there is no evidence the scholarship award was discussed by the Association in the informational meetings prior to the election or that employees were told the scholarship offer was contingent upon them voting for the Association or the Association prevailing in the election. However, the Association's constitution provides that an individual can not become a member of the Association unless the Association is first certified as the bargaining agent.

The Commission majority reversed the hearing officer and concluded that the advertisement for a scholarship drawing was improper. The Commission has held that the award of a prize through a raffle or lottery is improper if it is contingent upon an employee's vote or the outcome of the election. *See SEIU, Local 1991 v. Hillsborough County Hospital Authority*, 20 FPER ¶ 25059 (1994); *Local 218, Textile Processors, Service Trades, Healthcare, Professional and Technical Employees International Union v. Gadsden County*, 7 FPER ¶ 12472 (1981). The Commission majority reasoned that EMSA employees could not become Association members and participate in the scholarship lottery unless the Association first won the election. Thus, access to the benefits was dependent upon the outcome of the election; the Association had to win the election. While the scholarship lottery would occur regardless of the election results, EMSA employees were not able to participate in the drawing unless they first voted in favor of the Association. Therefore, since the employees' ability to participate in the scholarship lottery was contingent upon the Association prevailing in the election, the lottery was an improper inducement to persuade EMSA employees to vote for the Association.

The Commission majority also determined that the scholarship offer significantly interfered with the employees' freedom of choice and had a substantial tendency to influence the outcome of the election. The advertisement for the lottery was contained in the campaign newsletter prepared specifically for the EMSA election and it was mailed to the home of every voter and distributed at various worksites. Thus, the Association intended for each voter to receive the newsletter prior to voting in the election. Moreover, the purpose of the newsletter was to convince the voters to vote in favor of the Association and the scholarship offer was the only benefit in the newsletter that mentioned a specific dollar amount. Therefore, the Commission majority directed that a rerun election be conducted. *International Association of EMT's and Paramedics, SEIU/NAGE, AFL-CIO v. Emergency Medical Services Alliance*, Case No. EL-2005-008 (Dec. 14, 2005).

Commissioner Kossuth dissented. He agreed with the hearing officer's reasoning that a new election was not warranted.

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(0392R)

Friday, September 8, 2006

8:30 a.m. – 8:55 a.m.
Late Registration

8:55 a.m. – 9:00 a.m.
Opening Remarks
Patrick Martin, Program Co-Chair, Littler Mendelson, PC, Miami, Florida
Marguerite M. Longoria, Program Co-Chair, Burr & Smith, LLP, Tampa, Florida

9:00 a.m. – 9:55 a.m.
Litigating Over Non-Competition Agreements
Cathleen Scott, Cathleen Scott, P.A., Jupiter, Florida

9:55 a.m. – 10:50 a.m.
"You Can't Make Me Come to Work": Untangling the Complex Web of Leaves of Absence
Peter Susser, Littler Mendelson, P.C., Washington, D.C.

10:50 a.m. – 11:05 a.m.
Break

11:05 a.m. – 12:00 noon
New Developments in Florida Statutory Offers of Settlements
Jeffrey B. Crockett, Jorden Burt, LLP, Miami, Florida

12:00 noon – 1:30 p.m.
Lunch (included in registration)
Lexis Presentation

1:30 p.m. – 2:20 p.m.
Motions for Sanctions in Federal Court
Janet E. Wise, Law Offices of Cynthia N. Sass, Tampa, Florida

2:20 p.m. – 2:35 p.m.
Break

2:35 p.m. – 3:35 p.m.
Battling Over Service Members' Job Rights: Nuts & Bolts of USERRA Litigation
Kathryn S. Piscitelli, Egan Lev & Siwica, P.A., Orlando, Florida

3:35 p.m. – 4:30 p.m.
Discovery Issues & Disputes: A Current Case Law Analysis
Scott Fisher, Fowler White Boggs Banker, Tampa, Florida

4:30 p.m. – 5:00 p.m.
Question and Answer Panel with Speakers

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

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

CLER PROGRAM

(Maximum Credit: 8.0 hours)
General: 8.0 hours Ethics: 0.0 hours

CERTIFICATION PROGRAM

(Maximum Credit: 6.0 hours)
Labor & Employment Law: 6.0 hours

Employment Arbitration: From Deciding to Arbitrate Through Challenging the Award
(0492R)

Saturday, September 9, 2006

8:55 a.m. – 9:00 a.m.
Opening Remarks
Cary R. Singletary, Program Chair, Tampa

9:00 a.m. – 9:45 a.m.
Arbitration Statutes, Rules & Case Law
Donald J. Spero, Palm Beach Gardens

9:45 a.m. – 10:00 a.m.
Break

10:00 a.m. – 10:45 a.m.
Initiating the Process and Selecting the Arbitrator
Walter Aye, Aye Law Firm, Tampa

10:45 a.m. – 11:15 a.m.
Arbitrator's Pre-Hearing Functions and Duties
Cary R. Singletary, Tampa

11:15 a.m. – 12:00 noon
Presenting the Case
Leslie Langbein, Langbein & Langbein P.A., Miami

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

1:00 p.m. – 1:45 p.m.
Damages and Other Remedies
Donald T. Ryce, Jr., Donald T. Ryce Law Arbitration Offices, Vero Beach

1:45 p.m. – 2:30 p.m.
Post Hearing Briefs & Awards
Susan N. Eisenberg, Akerman Senterfitt, Miami

2:30 p.m. – 2:45 p.m.
Break

2:45 p.m. – 3:15 p.m.
Attorney Fees And Costs
Tom Young, Port Charlotte

3:15 p.m. – 4:00 p.m.
Post Award Actions
Jill Schwartz, Jill S. Schwartz & Associates, Winter Park

4:00 p.m. – 4:50 p.m.
How Arbitrators Decide Cases
(Panel Discussion by Speakers)

4:50 p.m. – 5:00 p.m.
Closing Remarks
Cary R. Singletary, Tampa

CLER PROGRAM

(Maximum Credit: 7.5 hours)
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CERTIFICATION PROGRAM

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Labor & Employment Law: 5.5 hours

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trolling the delivery process at the facility. His responsibilities included weighing the aggregate and deciding which drivers could dump their loads right away and which drivers had to wait to have their loads weighed. He was also responsible for signing the drivers' tickets either before or after they dumped the materials.

Vazquez-Falero and the Perez family claimed Mr. Hill, among others, frequently directed racial slurs such as "m____f_____ Cubans," "Cuban son-of-a-b____," and "f_____ Cuban hens" at them while they were performing their job. They also claimed that these or similar racial slurs were made in front of Plant Manager, Frank Andre, and that Mr. Andre did nothing about it. Additionally, they claimed Mr. Hill, among others, delayed their deliveries by making them wait to have their tickets signed, telling them to dump their loads in different locations, or requiring them to weigh their loads more frequently. It typically took no more than 20 minutes to dump the aggregate and get their tickets signed. However, they claimed that because they were often delayed they very seldom got out promptly.

Vazquez-Falero and the Perez family allegedly complained to Manny, who advised them to take their complaints up with Mr. Andre at Pavex. They never made any complaints directly to Mr. Andre, or any other Pavex supervisor. Eventually, the situation escalated into a physical altercation in which Mr. Hill punched N. Perez in the right eye. Mr. Andre did not witness the fight, but he was immediately informed and promptly and personally took N. Perez to receive medical treatment. Mr. Andre also called on N. Perez a few times thereafter to make sure he was alright. Pavex suspended Mr. Hill for three days without pay as a result of the altercation.

Plaintiffs then filed a complaint in the Middle District of Florida alleging that Pavex had discriminated against them because of their race (Hispanic) by subjecting them to a hostile work environment in violation of 42 U.S.C. §1981. They also claimed damages for intentionally inflicted emotional distress and tortious interference with their business relationships. Further, N. Perez claimed Pavex negligently retained and supervised Mr. Hill, and should be held vicariously liable for an assault and battery Hill allegedly committed at the asphalt production facility.

I. Hostile Work Environment Under §1981

The right to "make and enforce contracts" free of discrimination is broadly defined to include "the making, performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship." 42 U.S.C. §1981(b). Thus, a person who is not an employer may be liable under §1981 for interference with the plaintiff's contractual rights with third parties. To establish a racially hostile work environment claim under §1981, plaintiffs are required to show that: (1) they belonged to the protected group at issue; (2) they were subjected to unwelcome harassment; (3) the harassment was based upon race; (4) the harassment was sufficiently severe or pervasive to alter the terms and conditions of employment and create a discriminatory abusive working environment; and (5) the defendant is responsible for such environment under either a theory of vicarious or direct liability.

Pavex sought summary judgment, arguing the evidence was insufficient to demonstrate that the alleged harassment was pervasive and severe. Moreover, Pavex stated its position that employers are only responsible for harassment created by an employee under the doctrine of *respondeat superior* if a plaintiff can prove the employer knew or should have known of the harassment and failed to take remedial action. In this case, Pavex argued it had no knowledge of harassment until after the fists were flying, and then it took immediate and proper remedial action.

A. Pervasive and Severe Harassment

Pavex claimed no §1981 hostile work environment existed because the alleged conduct was not sufficiently severe or pervasive and there was no basis to hold Pavex liable for Hill's conduct. In determining whether harassment is sufficiently severe or pervasive, both a subjective and objective test must be met. Several factors are relevant to determining whether a work environment is hostile or abusive, including: (1) the frequency of the conduct; (2) the severity of the conduct; (3) whether the conduct is physically threatening or humiliating (as opposed to a mere offensive utterance); and, (4) whether it unreasonably interferes with the employee's job performance.

Pavex focused on the minimal amount of time Plaintiff's were required to be at the Pavex facility,

arguing that "[i]t is difficult to conceptualize how anti-discrimination statutes relating to employment may be analogized to §1981 claims where Plaintiffs occasionally visited Pavex for 20 minutes to deliver aggregate and no conceivable indicia of employment exists." Additionally, Pavex contended that the harassment was not severe enough as to be objectively offensive because such harassment is common in a blue-collar work-site.

Plaintiffs countered that there was substantial evidence that the harassment was both pervasive and severe. Plaintiffs noted that the test of "severe or pervasive" is disjunctive, and can be satisfied by showing that the harassment was *either* severe *or* pervasive. Plaintiffs maintained the harassment was sufficiently severe, and cited several cases where the "blue-collar work-site" argument had repeatedly been rejected in the Eleventh Circuit. With regard to the pervasiveness, Plaintiffs argued there is no "magic number" of incidents that conclusively determine pervasiveness and the number of incidents in this case is comparable to a number of cases where the Eleventh Circuit has found harassment to be sufficiently frequent.

The Court held Plaintiffs had established that Mr. Hill's use of racial slurs was both frequent and severe. There was sufficient testimony to establish Mr. Hill addressed plaintiff with racial epithets "many, many times . . . [a]lmost every time." The Court further stated: "If Plaintiffs' testimony is believed, Hill used racial epithets in a derogatory and intimidating manner in connection with his duties and while scolding Plaintiffs about their job performance. This fact weighs in favor of finding that the severity element is met." The Court also found that a reasonable jury could conclude Plaintiffs were humiliated by Mr. Hill's conduct.

B. Vicarious and Direct Liability

A hostile environment created by a supervisor with authority over an employee subjects an employer to vicarious liability. If the harassment is perpetrated by a co-employee of the victim, an employer may be held directly liable if it knew or should have known of the harassing conduct but failed to take prompt remedial action. Plaintiffs contend Mr. Hill was a supervisor for purposes of §1981 liability because he had either actual or apparent authority. In addition, they contend Pavex knew or should have known of the harassment and failed to take corrective action.

The Court acknowledged that "since Plaintiffs were not employees of Pavex, Hill's supervisory status with respect to Plaintiffs, if any, cannot be easily analyzed under general supervisory principles in a traditional employer-employee setting." The Court held that Mr. Hill had no control over Plaintiffs' job performance or assignments. Thus, the Court found that Mr. Hill had no supervisory authority over Plaintiffs, even though he did have the ability to indirectly control how Plaintiffs' loads were delivered when they arrived at the facility. Thus, Pavex could not be vicariously liable for Mr. Hill's alleged harassment.

However, Plaintiffs pointed to testimony of a Pavex employee which demonstrated that, if believed, a reasonable jury could conclude that Mr. Hill had used racial slurs in front of Mr. Andre, the Plant Manager, and no remedial action was taken. Thus, the Court ultimately found that summary judgment was improper on Plaintiffs' hostile environment claims because a genuine issue of material fact existed as to whether Pavex had notice of Hill's use of racial slurs and failed to take corrective action.

II.Remaining Claims

Plaintiffs failed to establish a *prima facie* case of intentional infliction of emotional distress or tortious interference with an advantageous business relationship. However, the Court denied Pavex's summary judgment regarding vicarious liability as to the assault and battery claims because a genuine issue of material fact existed as to whether Mr. Hill's motivation when he punched Mr. Perez was for personal reasons (because Mr. Perez said "f___ you"), or for the purpose of serving Pavex (namely, Pavex's interest in not receiving materials it did not order).

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Service First, Twice More

By H. Lee Cohee, II, Hearing Officer

The First District Court of Appeal affirmed the Commission, without comment, in two unfair labor practice cases that had been stayed pending judicial resolution of AFSCME's challenge to the Service First legislation enacted in 2001. The first appeal concerned the State of Florida's unilateral adoption of new personnel rules after the repeal of its existing rules, pursuant to the Service First legislation. Affirming its General Counsel's summary dismissal of AFSCME's charge, the Commission ruled that AFSCME contractually waived its right to bargain over the rule changes, and the court affirmed.

AFSCME, Public Employees Council 79 v. State of Florida, 30 FPER ¶ 291 (2005), *per curiam aff'd*, Case No. 1D04-5064 (Fla. 1st DCA Nov. 17, 2005).

The second case also addressed action taken by the State pursuant to the Service First legislation; specifically, passage of a statutory provision that exempts managerial, confidential, and supervisory personnel from the State Career Service System. Relying upon this provision, the State unilaterally removed 7,000 employees from four statewide bargaining units of career service employees, for whom AFSCME is the certified bargaining agent, by designating them as either managerial, confidential, or supervisory employees. AFSCME contended that: (1) only the Commission can remove positions from established bargaining units after the filing of an appropriate petition; (2) the State refused to negotiate over either the decision or the impact of the decision to remove employees from AFSCME bargaining units; and (3) the State unlawfully interfered with AFSCME's existence by reducing the size of its bargaining units and terminating payroll dues deductions.

In affirming its General Counsel's summary dismissal of AFSCME's charge, the Commission decided that no remedy was feasible because to return the parties to the status quo that existed prior to 2001, would interrupt the orderly operations and functions of government and the stability of collective bargaining relationships since many of the 7,000 employees have been included in the Selected Exempt Service bargaining units. The Commission further ruled that the State lawfully acted in accordance with legislative intent which the Commission was without authority to review, and that employees whose positions were moved from the Career Service System into the Selected Exempt Service had recourse to challenge their reclassification by filing an appeal with the Division of Administrative Hearings. Finally, the Commission concluded that AFSCME had the ability to file a unit clarification petition to determine the unit placement of the disputed reclassifications at the time of the State's actions and chose not to use this remedy. Commissioner Kossuth dissented and stated that it is the Commission's role, not that of the State, to decide who is a managerial, confidential, or supervisory employee whose duties create an impermissible conflict with subordinates, and that AFSCME had no duty to file a petition seeking to protect the composition of its bargaining units.

AFSCME, Public Employees Council 79 v. State of Florida, 31 FPER ¶ 76 (2005), *per curiam* aff'd, Case No. 1D05-1446 (Fla. 1st DCA Dec. 14, 2005).

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