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the Checkoff

The Florida Bar
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A PUBLICATION OF THE FLORIDA BAR LABOR & EMPLOYMENT LAW SECTION

IN THIS ISSUE:

SAVE THE DATE!

12th Annual Labor and Employment Law Certification Review
(1323R)

Feb. 16-17, 2012
Hilton Bonnet Creek, Orlando

Stays in Special Magistrate Impasse Resolution Proceedings—Follow the Dots

By Steven Meck, Tallahassee

When a party to negotiations declares an impasse, the Public Employees Relations Commission ("PERC" or "Commission") has the ministerial function of appointing a special magistrate to conduct a proceeding pursuant to Section 447.403, Florida Statutes. Conceptually, a special magistrate is essentially an arbitrator who has only advisory authority. If the parties are unable to reach an agreement during the special magistrate proceeding, the impasse is ultimately resolved in a public hearing before the legislative body. Normally, PERC has no further role in impasse resolutions.

Occasionally, one of the parties involved in the negotiations will file an unfair labor practice charge alleging a premature declaration of impasse and/or bad faith bargaining in the negotiations and requesting immediate relief in

See "Impasse Resolution," page 7

Understanding the Qualified Domestic Relations Order

(and Similar Orders Used to Divide Retirement Accounts)

By Matthew L. Lundy, Tampa


M. LUNDY

The Qualified Domestic Relations Order ("QDRO") is the bridge between family law and labor and employment law. The QDRO is a legal mechanism that can be used to order a retirement plan administrator to make payments directly from the plan to the spouse, former spouse, child or other dependent of an employee/plan participant.[1] As a practical matter, these orders are difficult for most family law and employment law attorneys because they require an understanding of two vastly distinct areas of law. This article will provide a description of some of the law and policy related to these orders, and it is hoped that the reader will thereby gain a clearer understanding of QDROs as a powerful tool created by the Employee Retirement Income Security Act of 1974 ("ERISA").

QDROs were created as part of the Retirement Equity Act of 1984 ("REAct").[2] Prior to

See "QDRO," page 12

Message from the Chair

G. HEARING

I am very pleased to report that we have started off the new Bar year by accomplishing some great work for the Section. First, **Cathleen Scott** led the way in developing an advertising policy for the Section. As chair of the Communications Committee, Cathleen spearheaded the effort to draft and obtain the Executive Council's approval of a policy regarding advertising in *the Checkoff.* The Section has long debated whether to allow advertising in *the Checkoff* and/or on our website. Thanks to Cathleen's and others' hard work, we are now able to run advertisements in *the Checkoff.* Revenue from such advertising will help offset the Bar's increase in its retention of Section dues from $12.50 to $17.50.

Despite the Bar's increase in retention of Section dues, the Executive Council voted to maintain Section dues at $40.00 through the 2012-2013 Section budget year. Even so, I am pleased to report that the Section fund balance is very robust. Because of our strong fund balance, as well as the continued economic conditions that we all face, your Executive Council felt strongly that the Section should maintain dues at the current level.

I am also excited to report that the Website Subcommittee, headed by **Judge Stephanie Ray** and **Brian Lerner,** has been working hard to post our continuing legal education materials on the Section website (www.laboremploymentlaw.org). Moreover, they have added a blog feature to the website and are also considering the feasibility of posting advertisements. More information regarding that possibility will be available in the near future.

Shane Muñoz has been doing an outstanding job of formulating and planning a very active continuing legal education slate for the Section this year, setting up five webinars from November to June. The details are included in this issue. Also, since my last report, we have selected the hotel and the dates for the Advanced Labor Topics seminar in San Juan, Puerto Rico. The seminar will be held at the El San Juan on April 13-15, 2012. I strongly encourage you to consider attending as the program co-chairs, **Jim Craig** and **Tony Cabassa**, are working hard to put together an outstanding program. Moreover, the location is actually easier and more cost effective to get to than in many prior years. Remember, you don't need a passport to travel to Puerto Rico!

Finally, I am pleased to inform you that your Executive Council has created a Section Hall of Fame. The Hall of Fame will be used as a posthumous form of recognition to honor outstanding individuals associated with the Section and to promote the achievements of those individuals through the awarding of scholarships, in the name of the Section members, to students attending Florida law schools. **Debbie Brown,** a former chair of the Section, and **Jonathan Oliff** lead the Law School Liaison Subcommittee and originated the Hall concept. They also developed the criteria and eligibility for nomination, and the nomination and selection processes. Nominations for inductees into the inaugural Hall of Fame class are currently being solicited. I encourage you to nominate those individuals who have made great contributions to the Section and/or the practice of labor and employment law in Florida.

—Greg Hearing, Section Chair

SAVE THE DATE & DON'T MISS THIS EVENT!

12th Annual Labor and Employment Law Certification Review

(1323R)

February 16-17, 2012 • Hilton Bonnet Creek, Orlando

The Labor and Employment Law Section is pleased to anounce its 12th Annual Labor and Employment Law Certification Review at the Hilton Bonnet Creek, 14100 Bonnet Creek Resort Lane, Orlando, FL 32821, (407) 597-3600, www.hiltonbonnetcreek.com.

A block of rooms has been reserved at the Hilton Bonnet Creek at the rate of $179 single/double occupancy. To make reservations, please call the Hilton Bonnet Creek at 1-888-353-2013. The group code is ZLAW. Reservations must be made by January 25, 2012, to assure the group rate and availability. After that date, the group rate will be granted on a "space available" basis.

A detailed brochure will be available shortly.

Section's 2011-12 Webinar Series Kicks Off

The Labor and Employment Section is pleased to offer a convenient opportunity to earn CLE credit from your home or office with a series of five one-hour webinars. The series kicked off with an NLRA and PERA update on November 17, 2011. Each webinar begins at noon. You may attend any combination of webinars, and we are offering a discount if you attend all five. You may enroll by using the form on page 14 & 15.

Here is a list of the remaining webinars:

Tuesday, January 24, 2012

12:00 noon - 1:00 p.m.

Whistleblower & Retaliation Update: A Review of the Expanding Employee Protections and Employer Obligations, Including Best Practices

Kimberly P. Walker, Williams Parker Harrison Dietz & Getzen, Sarasota

Tuesday, March 20, 2012

12:00 noon - 1:00 p.m.

FLSA Update; *Dionne (Floormasters)* and its Progeny; Calculating Back Pay in Failed Exemption Cases; Recent Decisions Applying *Lynn's Food Stores;* Disclosure Obligations and Other Emerging Issues in Wage and Hour Law

Phyllis J. Towzey, Law Office of Phyllis J Towzey, P.A., Saint Petersburg

Tuesday, May 15, 2012

12:00 noon - 1:00 p.m.

Ethical Dilemmas Facing the Employment Law Practitioner

Leslie Langbein, Langbein & Langbein, P.A., Miami Lakes

Tuesday, June 12, 2012

12:00 noon - 1:00 p.m.

The ADA, FMLA, and Workers' Compensation: Analysis of the Interaction Among the Three Statutes and Practical Information on Maintaining Compliance in Administering Employer Leave Policies

Michael Malfitano, Constangy Brooks & Smith L.L.C., Tampa

Nominations Sought for New LEL Section Hall of Fame

At its October 20 meeting, the Executive Council approved creating a new Labor and Employment Law Section Hall of Fame, and nominations are now being sought. Proposed by the Law School Liaison Committee as part of its scholarship administration role, the new Hall of Fame is designed to provide sustaining recognition to deceased colleagues who made substantial contributions to the field of labor and employment law. In proposing the Hall of Fame, committee co-chair Debbie Brown explained that the goal, in part, was to preserve the long-term viability of using law school scholarships as a form of recognition. It was anticipated that over time, the number of deceased worthy colleagues would exceed the number of Florida law schools. In addition, the Committee wanted to recommend a method of recognizing deceased colleagues of merit through scholarships even when the deceased colleague had no definitive link to a specific Florida law school.

Under the new Hall of Fame system, all Section scholarships will be granted in memory of Hall of Fame inductees. If the number of Hall of Fame inductees exceeds the number of annual scholarships awarded, the naming of specific awards will be done on a rotating basis so that all inductees are honored in turn. Scholarship award letters to the school will include a brief biographical sketch of the individual in whose memory the scholarship was granted, and the plaque provided will include the designation "in memory of" with the name of the individual honored.

In other action, the Executive Council approved maintaining the name of the Stetson Law School scholarship for W. Gary Vause based on his unique affiliation with that particular institution as its former Director of the Center for Labor-Management Dispute Resolution, Professor of Law, and Dean. Vause is expected to be one of the nominees for induction into the Hall of Fame in early 2012.

Nominations for the inaugural group of Hall of Fame inductees are now being accepted for consideration at the next Executive Council meeting. The deadline for nominations is two weeks prior to the meeting. For this initial group of inductees, that means the deadline is **February 10, 2012**. A nomination form along with the criteria for inclusion in the Hall of Fame is included in this issue of *the Checkoff*, or can be obtained online at the Section website under "Membership." Remember that only current Labor and Employment Law Section members may nominate someone for this honor.

SAVE THE DATE!

Advanced Labor Topics 2012

April 13-15, 2012

El San Juan Resort & Casino • San Juan, Puerto Rico

The Labor & Employment Law Section is pleased to announce **Advanced Labor Topics 2012 in San Juan, Puerto Rico!** Advanced Labor Topics 2012 will offer CLE programs and social activities. Don't miss the opportunity to attend this seminar and enjoy time with colleagues and friends.

El San Juan Resort & Casino is a legendary beachfront oasis situated on San Juan's longest stretch of white sand beach. The resort offers an Olympic-sized swimming pool as well as a lagoon-style pool with waterfall and swim-up bar, private outdoor massage areas and the Edouard de Paris Day Spa. El San Juan Resort and Casino offers lively hotel hospitality at nine restaurants, 15 bars, lounges and nightclubs, a shopping arcade offering designer jewelry and clothing boutiques, a cigar store, candy shop and beauty salon. El San Juan Resort & Casino is just 15 minutes from the shopping, entertainment and history of charming Old San Juan.

PLEASE SAVE THE DATE & DON'T MISS THIS EVENT!

A detailed brochure will be available in the coming months.

Hall of Fame Guidelines

Purpose

The Labor and Employment Law Section Hall of Fame will be used as a posthumous form of Section recognition to honor outstanding individuals associated with the Section and to promote the achievements of those individuals through the awarding of scholarships to students in Florida law schools.

Criteria

To be selected for the Hall of Fame, a candidate must meet the following criteria:

- The candidate must have excelled in the field of labor and employment law and/or must have had a profound positive influence on the field during his or her professional career.
- The candidate's professional success and significant contributions must be recognized by his or her peers as having reached and remained at the pinnacle of his or her field.
- Evidence that the articulated criteria have been met may come from detailed information about the candidate's credentials, achievements, the impact and implications of those accomplishments, public awards and honors, leadership roles within the Section, published articles, speaking engagements, and reported litigation.

Eligibility

Hall of Fame recognition is a posthumous honor, granted only after death. Ordinarily, individuals nominated will have had significant involvement in both the Section and the active practice of labor and employment law in Florida for a substantial portion of his and her career. An individual who has a clear affinity with or connection to the Section but who was not a member may be considered if, on the whole, the individual is otherwise recognized as having had a profound and positive impact on the profession and the field of labor and employment law.

Nomination Procedures

Nominations may be made by any Section member at any time by submission of a written nomination to the Executive Council. The nomination should include the information necessary to determine whether the nominee meets the criteria stated above.

Selection Process

The Executive Council will evaluate all nominations and, by majority vote, select those to be inducted into the Hall of Fame.

Recognition

Individuals inducted into the Hall of Fame will be honored in the following ways:

- Inductees will be honored on the Section website with a detailed description of their professional accomplishments and achievements. In addition, a plaque will be provided to the inductee's family and/or firm.
- All scholarships awarded by the Section will be granted in memory of Hall of Fame inductees. If the number of Hall of Fame inductees exceeds the number of annual scholarships awarded, the naming of specific awards will be done on a rotating basis so that all inductees are honored in turn. Scholarship award letters to the school will include a brief biographical sketch of the individual in whose memory the scholarship was granted, and the plaque provided will include the designation "in memory of" with the name of the individual honored.
- The Executive Council, by majority vote, may approve the designation of any one particular law school scholarship to be named after a single Hall of Fame member when that member had a special affinity to a particular school such that individualized recognition is warranted.

Approved by the Executive Council on October 20, 2011.

Labor and Employment Law Section Hall of Fame

Nomination Form

Eligibility Guidelines for Nominating a Candidate: Hall of Fame recognition is a posthumous honor, granted only after death. Ordinarily, individuals nominated will have had significant involvement in both the Section and the active practice of labor and employment law in Florida for a substantial portion of his or her career. An individual who had a clear affinity with or connection to the Section but who was not a member may be considered if, on the whole, the individual is otherwise recognized as having had a profound and positive impact on the profession and the field of labor and employment law. **Send form to: Angela Froelich, Section Administrator, The Florida Bar, 651 East Jefferson St., Tallahassee, FL 32399-2300.**

About the Nominee (please print)

Name: _____

Year Nominee Passed Away: _____

Was nominee an attorney? ❑ Yes ❑ No Was nominee a Section member? ❑ Yes ❑ No

Last Known Employment Affiliation Before Death (i.e., firm name, employer, etc.): _____

_____

Other Honors, Awards, or Affiliations: _____

_____

_____ _

Criteria for Admission

To be selected for the Hall of Fame, a candidate must meet the following criteria:

- The candidate must have excelled in the field of labor and employment law and/or must have had a profound positive influence on the field during his or her professional career.
- The candidate's professional success and significant contributions must be recognized by his or her peers as having reached and remained at the pinnacle of his or her field.
- Evidence that the articulated criteria have been met may come from detailed information about the candidate's credentials, achievements, the impact and implications of those accomplishments, public awards and honors, leadership roles within the Section, published articles, speaking engagements, and reported litigation.

A description of the manner in which the nominee met the criteria for inclusion (i.e., why the nominee should be honored) must be attached to this application.

About the Nominator (please print) NOTE: Nominator must be Section member

Name: _____ Phone: _____

Institution/Affiliation: _____

Address: _____

City/State/Zip: _____

Your Relationship to Nominee: _ _____

the form of a stay of the special magistrate proceeding. The Commission has the authority to grant a stay and has traditionally done so if the unfair labor practice charge is deemed sufficient by the Commission's general counsel.[1] This is based upon a policy that the impasse resolution may be necessary if the unfair labor practice charge is proven and additional bargaining is ordered as a remedy.[2]

The majority of the Commission declined stays in *Manatee County School Board v. Manatee County Education Association, FEA, AFT, Local 3821, AFL-CIO*[3] and *Escambia County School Board v. Escambia Education Association*.[4] In *Manatee County School Board*, the impasse involved rescheduling teachers and classes to provide reading remediation, which were matters of importance and legislative emphasis. The majority's denial was based upon the conclusion that the issue was time sensitive, and delay could prejudice the parties and the public.[5] The *Escambia County School Board* case involved an impasse in negotiations over a performance pay plan for which the school board would lose two million dollars in state funding if it were unable to meet legislatively imposed deadlines. Thus, this issue was also time sensitive. The majority also noted in these cases that the impasse resolution proceeding is a second contemporaneous path to assist the parties in achieving the ultimate goal of reaching agreement on a contract.

In *Miami-Dade County Board of County Commissioners v. Miami-Dade Water & Sewer Authority Employees, Local 121, AFSCME, AFL-CIO*[6] and *Miami-Dade Board of County Commissioners v. Transport Workers Union of America, Local 291, AFL-CIO*,[7] the majority of the Commission stayed special magistrate proceedings in which the union claimed that the employer had engaged in bad faith bargaining. The dissent referred to—as militating against the stay—the potential for layoffs due to economic shortfalls caused by the employer operating under the status quo of an expired contract. The employer in the *Transport Workers Union* case moved to vacate the stay. Granting the stay, the Third District Court of Appeal reasoned: "The record shows that maintaining wages at the level of the current contract provisions is grossly detrimental to the County's fiscal well being. The need to resolve the impasse is critical. Negotiations, though on-going for quite some time, have been unsuccessful."[8]

Subsequently, the Commission has further denied motions to stay in cases in which the union alleged a course of conduct of bad faith bargaining where negotiations have transpired for extensive periods of time, and the parties are in status quo periods under expired contracts. *University of West Florida, Board of Trustees v. United Faculty of Florida*[9]; *City of Port Orange v. Coastal Florida Police Benevolent Association*.[10] In the *Port Orange* case, the Commission clarified its role in special magistrate cases in order to define the pleading practice before the Commission:

> Once the General Counsel deems an unfair labor practice charge is sufficient, that case is assigned to a hearing officer who has jurisdiction of the case. The Commission will not evaluate the unfair labor practice charge at that juncture in determining whether to grant a motion to stay a related Special Magistrate case. Thus, in a motion to stay a Special Magistrate case, the movant must clearly and concisely state the alleged facts upon which it is relying to impose the stay. As demonstrated by the decision of the Third District Court of Appeal in *Miami-Dade County*,[11] the mere filing of an unfair labor practice charge alleging bad faith bargaining will not, by itself, be sufficient to stay a related Special Magistrate case. Similarly, a response must also clearly and concisely state the alleged facts in opposition to a stay for the Commission to consider.

The Commission has recently been called upon to define a policy regarding stays in cases of alleged financial urgency in which an impasse is statutorily imposed after 14 days of negotiations. In *City of Lake Worth v. Public Employees Union, et. al.*,[12] the union filed a sufficient unfair labor practice charge alleging a premature declaration of impasse. The charge alleged that the employer had twice declared a financial urgency but had not engaged in the 14-day period of negotiations before initiating the special magistrate proceeding. The Commission stayed the case to allow for up to 14 days of negotiations

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but declined to stay the case further. The Commission reasoned that it could not render meaningless the expedited statutory mechanism for resolving a financial urgency by indefinitely staying those cases.

***Steven Meck** is PERC's general counsel.*

Endnotes:

1 *Citrus County v. Citrus County Professional Paramedics/EMT Association, Local 3521*, 642 So. 2d 44 (Fla. 5th DCA 1994).

2 *See, e.g., School District of Polk County v. Polk Education Association, Inc.*, 34 FPER ¶ 208 (2005).

3 32 FPER ¶ 240 (2006).

4 33 FPER ¶ 11 (2007).

5 32 FPER ¶ 240 at 659.

6 35 FPER ¶ 333 (2009).

7 35 FPER ¶ 340 (2009), *rev'd*, 22 So. 3d 785 (Fla. 3d DCA 2009).

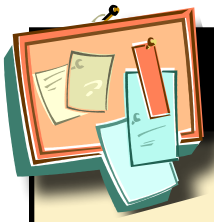
8 22 So. 3d at 786.

9 36 FPER ¶ 48 (2010).

10 36 FPER ¶ 133 (2010).

11 22 So. 3d 785 (Fla.3d DCA 2009).

12 36 FPER ¶ 376 (2010).



Section Bulletin Board

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

UPCOMING CLE PROGRAMS

January 24 [WEBINAR]:
Whistleblower & Retaliation Update: A Review of the Expanding Employee Protections and Employer Obligations, Including Best Practices (1416R)

February 16-17
12th Annual Labor & Employment Law Certification Review Course (1323R)
Hilton Bonnet Creek, Orlando

March 20 [WEBINAR]:
FLSA Update: *Dionne (Floormasters)* and its Progeny; Calculating Back Pay in Failed Exemption Cases; Recent Decisions Applying *Lynn's Food Stores*; Disclosure Obligations and Other Emerging Issues in Wage and Hour Law (1417R)

April 13-15
Advanced Labor Topics 2012 (1347R)
El San Juan Resort & Casino, San Juan, Puerto Rico

May 15 [WEBINAR]:
Ethical Dilemmas Facing the Employment Law Practitioner (1418R)

June 12 [WEBINAR]:
The ADA, FMLA, and Workers' Compensation: Analysis of the Interaction Among the Three Statutes and Practical Information on Maintaining Compliance in Administering Employer Leave Policies (1419R)

June 21
Annual Florida Bar Convention Seminar
Gaylord Palms Resort and Convention Center, Orlando/Kissimmee
Annual Florida Bar Convention

EXECUTIVE COUNCIL MEETINGS

Thursday, February 16
Hilton Bonnet Creek, Orlando
5:00 p.m. – 6:00 p.m.
Conference Call No. 1-888-376-5050 — Conference Code: 1563821345#

Friday, April 14
El San Juan Resort, San Juan, Puerto Rico
5:00 p.m. – 6:00 p.m.
Conference Call No. 1-888-376-5050 — Conference Code: 1563821345#

Thursday, June 21
Gaylord Palms Resort, Orlando
Annual Florida Bar Convention
5:00 p.m. – 6:00 p.m.
Conference Call No. 1-888-376-5050 — Conference Code: 1563821345#

Find CLE COURSE BROCHURES at *www.laboremploymentlaw.org*.

FEDERAL CASE NOTES

Middle District of Florida

By Lindsay Hanson*, Jupiter

Defendant's Motion in Limine to Exclude Plaintiff's Prior Charges of Disability Discrimination

Hodgetts v. City of Venice, 2011 WL 2183709 (M.D. Fla. 2011).

Plaintiff Hodgetts brought several claims—including hostile work environment/harassment, discrimination, failure to make accommodations, and retaliation—against the City of Venice, Florida, under the Americans with Disabilities Act and the Florida Civil Rights Act,. The court dismissed plaintiff's hostile work environment/harassment claim on summary judgment. Thereafter, defendant moved in limine to exclude two EEOC charges plaintiff had previously filed against the defendant based on his alleged disability. One previous charge resulted in money damages to Hodgetts, while the other was resolved without money payment. The city argued these prior charges would serve only to inflame the jury, cloud the issue, and mire the proceedings. Hodgetts argued that these prior charges went to the heart of his retaliation claims. The court agreed in part with the defendant, holding that the substance, merits, and outcome of the previous charges would not be admitted; however, Hodgetts could mention the existence of the prior claims to form the basis for his retaliation claims.

FLSA -- Restaurant Agrees to Consent Judgment Resulting in $934,000 in Back Wages and Liquidated Damages to 30 Employees

Solis v. La Nopalera Mexican Restaurant No. 10 Inc. (3:11-CV-583-J7MCR) (M.D. Fla. 2011).

The U.S. Department of Labor brought suit against two *La Nopalera* restaurants and their owners for minimum wage, overtime, and record-keeping violations. DOL investigators found that kitchen employees were improperly classified as exempt and paid salaries. The kitchen employees were not paid any compensation for hours worked over 40. Tipped employees were paid tips plus a paycheck, which together equaled the minimum wage for each hour worked. However, the tipped employees were required to sign the paychecks and then return them to the owners who would cash the checks and keep the money. The defendants also did not maintain accurate records of the hours worked by employees. The defendants will pay $584,425 in back wages and $350,000 in liquidated damages in installment payments to the Wage and Hour Division over a 13-month period.

***Mediation Fees not Recoverable as Costs to Prevailing Plaintiffs in FLSA Class Action**

Villaneuva-Gonzalez v. Grainger Farms, Inc., 2011 WL 5834629 (M.D. Fla. 2011).

Plaintiffs, Mexican nationals working for defendant through the H–2A guest worker visa program, brought suit for violations of the Fair Labor Standards Act. The parties filed a Joint Motion for Approval of Settlement Agreement, with plaintiffs reserving the right to seek their attorneys' fees and costs. The plaintiffs sought $172,005.50 in fees and $30,567.56 in costs. The magistrate recommended attorneys' fees in the amount of $68,987.50 and costs in the amount of $10,978.46. Plaintiffs objected to the magistrate's recommendation, arguing that the magistrate erred in finding that the mediator fee was not recoverable. The district court judge adopted the magistrate's findings, which cited to a Southern District case and an 11th Circuit case that held that mediation costs are not recoverable in FLSA cases.

***Motions to Dismiss for Lack of Venue or to Transfer Venue Denied Due to Inconvenience and Burden to Plaintiff**

Kampwerth v. Southwest Airlines Co., 2011 WL 5597322 (M.D. Fla. 2011).

Plaintiff, a former employee of Southwest Airlines ("SWA"), brought suit against SWA for breach of collective bargaining agreement and against the Southwest Airlines Pilots' Association ("SWAPA") for breach of duty of fair representation, seeking back pay, reinstatement or front pay, and other damages. SWA and SWAPA filed motions to dismiss for lack of venue or, in the alternative, to transfer venue, seeking to have the case heard in the Northern District of Texas. The district court denied SWAPA's motion to dismiss for lack of venue. The court found that all the parties reside in the Middle District of Florida as SWA is deemed to reside in the district where it is subject to personal jurisdiction (a point SWA did not contest), and SWAPA has a "domicile" in Orlando, where a representative is available to union members, and therefore continuously and systematically does business in the Middle District. The district court also denied defendants' motion to transfer venue. The court found that the plaintiff's choice of forum, the convenience of parties and witnesses, and the plaintiff's financial inability to bear the costs of a venue change weighed against the transfer of the case to Texas. Although both parties cited hardships pertaining to these factors, the court, based on the totality of the circumstances, held that the plaintiff's "choice of forum should not be disturbed." The court found the following to be neutral factors: relative ease of access to sources of proof; availability of compulsory process for witnesses; location of relevant documents; and familiarity with governing law.

***Plaintiff's Race Discrimination Claims Subject to Arbitration; Ar-**

continued, next page

bitrator to Decide Whether Res Judicata Applies to Plaintiff's Claims

Nelson v. City of Live Oak, 2011 WL 5006472 (M.D. Fla. 2011).

Plaintiff was terminated by defendant, City of Live Oak, and filed a grievance, arguing wrongful termination. After losing in arbitration, plaintiff filed suit against the city and the union for race discrimination pursuant to Title VII and the Florida Civil Rights Act. Defendants filed a Motion to Dismiss and/or Motion to Compel Arbitration, asserting that plaintiff's claims were barred by the doctrine of res judicata or, in the alternative, were required to be heard in arbitration pursuant to the collective bargaining agreement. The district court, in holding that plaintiff's claims are subject to arbitration, rejected plaintiff's argument that the CBA violated his statutory right to file suit in federal court. The court also rejected plaintiff's claim that he did not individually agree to the arbitration clause in the CBA, finding that the language of the CBA met the Supreme Court's requirement that an agreement to arbitrate anti-discrimination claims be explicitly stated. The court rejected plaintiff's argument that arbitration would be cost-prohibitive to plaintiff, finding that plaintiff set forth no evidence that he was likely to bear the costs of the arbitration. Finally, the court held that the issue of res judicata was for the arbitrator to determine.

Summary Judgment Denied in Pregnancy and Sex Discrimination Claims – One Month is Close Temporal Proximity; FCRA Provides Cause of Action for Pregnancy Discrimination

Constable v. Agilysis, 2011 WL 2446605 (M.D. Fla. 2011).

Plaintiff Constable brought claims against defendant Agilysis for pregnancy discrimination and retaliation under Title VII, as well as sex discrimination and retaliation under the FCRA. Constable was hired in June 2008 as a junior sales executive with defendant, was promoted to an account executive in January 2009, given a positive performance review, and commended by her supervisor. In April 2009, Ms. Constable's sales were low, and she was told by her supervisor to increase her sales numbers; however, Constable was not disciplined. In July 2009, she notified her supervisor of her need for medical leave due to a complication with her pregnancy. One month later, Constable was placed on a Performance Improvement Plan ("PIP") with four goals to be completed within 60 days. Her PIP was extended when parts remained incomplete after 60 days. Thereafter, with the goals still not achieved, Constable was terminated. Agilysis moved for summary judgment on all claims. Constable conceded she could not sustain her retaliation claims. On Constable's claim of pregnancy discrimination under Title VII, the court found that Constable could make a prima facie case. In focusing on whether Constable could show that Agilysis treated similarly-situated non-pregnant employees more favorably, the court looked at "whether the quantity and quality of the comparator's misconduct is nearly identical." The court found the facts could support a jury finding in Constable's favor on this issue since Constable and another male account executive were both placed on PIPs, and both failed, yet only Constable was terminated. Agilysis pointed to Constable's failure to meet her PIP goals as its legitimate, non-discriminatory reason for Constable's termination. Shifting the burden back to Constable, the court analyzed whether the closer temporal proximity between becoming pregnant and the adverse

Florida's Minimum Wage Increases on January 1, 2012

The Florida Department of Economic Opportunity recently announced that effective January 1, 2012, Florida's minimum wage will increase to $7.67 per hour. Florida's current minimum wage, in effect since June 1, 2011, is $7.31 per hour.

Similarly, the direct wage that employers pay employees receiving tips will also increase. This direct hourly wage increases to $4.65 per hour effective January 1, 2012. The direct wage for such employees is equal to the minimum wage ($7.67) less the tip credit ($3.02).

These increases result from a 2004 amendment to Florida's constitution that created Florida's minimum wage. The 2012 increase is based on the percentage change of the federal Consumer Price Index for Urban Wage Earners and Clerical Workers in the south region for the twelve-month period prior to September 1, 2011.

Federal law requires employers to pay employees the higher of the federal or state minimum wages. Accordingly, Florida's minimum wage will prevail over the federal minimum wage unless the federal minimum wage is increased above the state minimum wage.

actions against her were sufficient to preclude summary judgment. The court rejected Agilysis's argument that the timing did not constitute pretext because Constable had been warned about her sales goals prior to becoming pregnant, holding that this did not eliminate the possibility of pretext and that one month was sufficient close temporal proximity. Therefore, the court denied summary judgment on Constable's pregnancy discrimination claim under Title VII. Finally, the court rejected Agilysis's argument that the FCRA did not provide a cause of action for pregnancy discrimination, adopting the position held in *Terry v. Real Talent, Inc.*, 2009 WL 3494476 (M.D. Fla.), and denying Agilysis's motion for summary judgment on Constable's sex discrimination claim under the FCRA.


L. HANSON

***Lindsay Hanson** is an associate at the Law Offices of Cathleen Scott in Jupiter, Florida. She received her J.D. from the University of Nebraska after graduating with honors from Creighton University with her B.S. in Business Administration.*

* * *

Northern District of Florida

By Jerry Rumph, Tallahassee

Fla.'s Public Sector Whistleblower Act to Be Construed Liberally – Violation of Law Not Required.

Hussey v. City of Marianna, 5:10-CV-322/RS-CJK, 2011 WL 3294837 (N.D. Fla. 2011).*

Plaintiff was employed by the City of Marianna, Florida, and was ultimately discharged for performing unassigned duties, not following instructions, and using a cellular phone for personal reasons while not on break. Plaintiff brought a three-count amended complaint alleging, in part, a cause of action under Florida's Public Sector Whistleblower Act, Florida Statutes Section 112.3187, which prohibits public employers and their contractors from retaliating against employees for reporting violations of "any local law, rule, or regulation" or "gross mismanagement," including "a continuous pattern of managerial abuses, wrongful or arbitrary and capricious actions." In his complaint, plaintiff alleged that he was discharged because he had complained about disparate application of the disciplinary policies in the city's personnel policy manual. The city moved for summary judgment, arguing that plaintiff's whistleblower claim could not stand because plaintiff did not report a violation of law. The court disagreed. The court first held that the legislature intended that the statute would be construed liberally. According to the court, because the city's personnel policies are to guide personnel decisions, "straying from those policies may be an indication of managerial abuse." Accordingly, the court denied the city's motion for summary judgment as to the whistleblower claim.

**This is only the second opinion from the Northern District of Florida that deals with an alleged violation of Florida's Public Sector Whistleblower Act. The other case is King v. State of Florida, 650 F. Supp. 2d 1157 (N.D. Fla. 2009), which provides an excellent federal discussion of the statute and state law construing the statute.*


J. RUMPH

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

REAct, the anti-alienation[3] and preemption provisions of ERISA made it impossible for a former spouse or child of an employee to obtain money directly from an employee/participant's qualified retirement plan. In effect, employees were provided a windfall; that is to say, the employees could make themselves uncollectable as to alimony and child support by getting rid of savings and income while maintaining a stockpile of money in retirement accounts. Family law is no stranger to financial wrongdoing, and legislators created QDROs as a means to protect the interests of the dependents of employees.

These orders are the most effective tool for obtaining compliance from an obligor-spouse when it comes to alimony, child support, distribution of property and attorneys' fees. This is due to the obvious fact that the orders take the power of compliance away from the obligor-spouse, and put the onus of payment on a relatively neutral plan. This, of course, creates a unique facet to these orders: the plan itself, and not the court or opposing party, is often the primary obstacle in getting the orders administered properly. Each plan has its own unique set of guidelines for getting the orders "qualified." Thus there exists a kind of micro-jurisdiction as to each plan, wherein the attorney charged with obtaining the QDRO must understand and comply with the plan's rules. These rules deal not only with procedural burdens for qualification, but also with benefit valuation and ancillary economic benefit administration.[4]

Though by far the most commonly recognized type of order, the QDRO is only one of many types of orders that can affect direct payment from an employee's retirement plan to an employee's dependent. The military has a similar mechanism for military pensions (known as military pay orders or "MPOs").[5] For its pensions, the federal government uses a mechanism known as the Court Order Acceptable for Processing[6] ("COAP"). Because of the diverse laws and plan rules surrounding QDROs and similar orders used to divide retirement accounts, these orders have become a unique sub-practice area within family law.

Litigation over these orders generally deals with the plan's willingness or unwillingness to honor an order, or a party's failure to draft and submit an order timely.[7] This type of litigation is often sparked by the failure of the person drafting the QDRO to understand the QDRO process and the underlying domestic relations laws fully. In Florida, if the parties or the judge in a family law case do not specifically provide the alternate payee with an ancillary economic benefit in a marital settlement agreement and/or final judgment, then such benefit cannot be included in a QDRO or similar order used to divide a retirement account.[8]

These orders provide a unique enforcement mechanism in family law, an interesting compromise with ERISA's anti-alienation policy.

Matthew Lundy *is general counsel for Precision QDRO, where he is responsible for handling issues surrounding the division of retirement assets pursuant to state law, the Internal Revenue Code, the Employee Retirement Income Security Act ("ERISA"), as well as other federal laws surrounding the division of retirement plans. He works with lawyers throughout Florida to help them craft proper settlement agreements, and to obtain court and plan approval of QDROs and similar orders. He earned his B.A. in political science from Duke University and his J.D., with honors, from the University of Florida.*

Endnotes:

1 *See* ERISA § 206(d)(3), 29 U.S.C. § 1056 (2006).

2 *See id.*

3 *See* ERISA § 206(d)(1), 29 U.S.C. § 1056 (2006).

4 Such as survivor benefits, cost-of-living adjustments, effect of plan loans, and retirement subsidies.

5 *See* The Uniformed Services Former Spouse's Protection Act, 10 U.S.C § 1408 (2006).

6 *See* 5 U.S.C. §§ 8301-8351 (2006).

7 *See, e.g., Samaroo v. Samaroo*, 193 F.3d 185 (3d Cir. 1999) (holding that a former spouse forfeited survivor benefits by failing to have a QDRO entered timely to secure such benefits prior to the death of the participant).

8 *See Blaine v. Blaine*, 872 So. 2d 383 (Fla. 4th DCA 2004). S*ee also Padot v. Padot*, 891 So. 2d 1079 (Fla. 2d DCA 2005); *Jones v. Treasure*, 984 So. 2d 634 (Fla. 4th DCA 2008).

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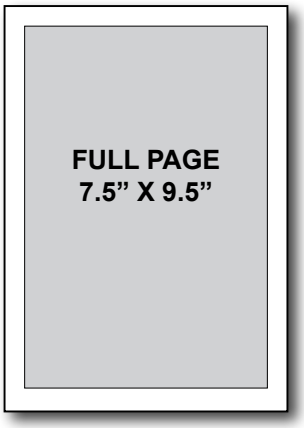

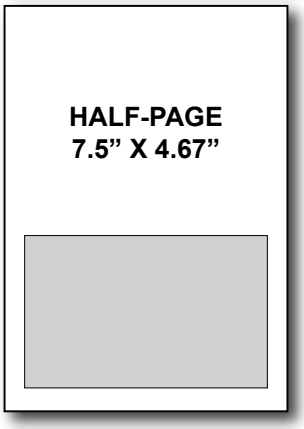

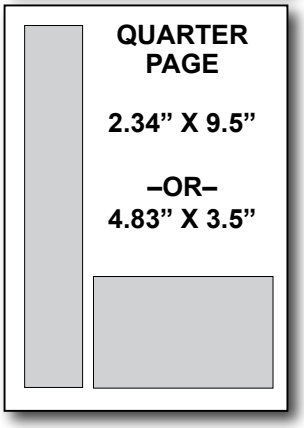

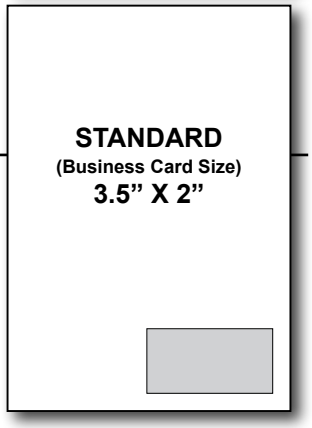

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NLRA and PERA Update: What Every Employment Lawyer Needs to Know About Recent Developments in Labor Law (1415R)
Richard P. Siwica, Egan, Lev & Siwica, P.A., Orlando
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Whistleblower & Retaliation Update: A Review of the Expanding Employee Protections and Employer Obligations, Including Best Practices (1416R)
Kimberly P. Walker, Williams Parker Harrison Dietz & Getzen, Sarasota

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FLSA Update: Dionne (Floormasters) and its Progeny, Calculating Back Pay in Failed Exemption Cases, Recent Decisions Applying Lynn's Food Stores, Disclosure Obligations and Other Emerging Issues in Wage and Hour Law (1417R)
Phyllis J. Towzey, Law Office of Phyllis J Towzey, P.A., Saint Petersburg

May 15, 2012*

12:00 noon – 1:00 p.m.
Ethical Dilemmas Facing the Employment Law Practitioner (1418R)
Leslie Langbein, Langbein & Langbein, P.A., Miami Lakes

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The ADA, FMLA, and Workers' Compensation: Analysis of the Interaction Between the Three Statutes and Practical Information on Maintaining Compliance in Administering Employer Leave Policies (1419R)
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