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the Checkoff

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IN THIS ISSUE

A New Frontier: Accommodating Employees' Temporary Disabilities

By Aaron W. Tandy, Miami

More and more employers are confronting—and seeking guidance in responding to—requests from employees for accommodations to address temporary health conditions. Recent appellate decisions, a broad interpretation by the Equal Employment Opportunity Commission ("EEOC") of its regulations, and an expansive view by the Job Accommodation Network ("JAN")[1] of the requirement to provide such accommodations, signal that employers faced with such a request from employees who have suffered a temporary injury or illness should not reject it out of hand but should find a way to allow the employee to keep working during the duration of the transitory recovery period. Employers who take a more draconian approach run the risk of failing to accommodate an actual disability, albeit a temporary one,[2] or finding themselves facing a retaliation claim, even if the employee is adjudged not to have a disability requiring the accommodation sought.[3]

In 2008, Congress amended the Americans with Disabilities Act ("ADA") in response to a

See "A New Frontier," page 7

Wage Theft Ordinances: There's a New Sheriff in Town

By Christopher Shulman, Tampa

Most employment counsel, whether employee-side or management-side, are aware of the surge in claims under the Fair Labor Standards Act ("FLSA") in Florida over the past several years. Traditionally, these claims were either investigated and conciliated/litigated by the U.S. Department of Labor's Wage and Hour Division ("WHD") or by private counsel bringing suit in state or federal courts (or in private arbitration). Increasingly, however, there is a new sheriff in town: local governments that adopt so-called "wage theft" ordinances.

According to a study by Florida International University in 2012, WHD investigated and recovered money for Florida employees in over 9,100 complaints of wage theft between September 2008 and January 2011.[1] The study indicated that, all told, more than $28,000,000 was recovered (approximately $3,103, on average, per employee).[2] However, as you likely know, WHD investigates complaints only within the Department's jurisdiction (by dollar volume of sales or otherwise). To address this gap regarding FLSA and other wage non-payment claims, several Florida counties—and at

See "Wage Theft Ordinances," page 10

Message from the Chair

One of the responsibilities of the Section Chair is to develop special projects for the year. For example, Sherril Colombo, chair during the 2012-13 bar year, oversaw the preparation of the survey of Section members regarding Labor and Employment Law Certification. Bob Turk, 2013-14 chair, increased our networking with the NLRB by organizing meetings with regional office personnel. Shane Muñoz, 2014-15 chair, started a project designed to gather information from the U.S. district judges in the three federal districts on standard practices in FLSA cases, with the goal of developing useful resources for practitioners, including potentially a set of model forms.

This year I selected two major projects. The first will come to fruition on **April 1, 2016,** when the Section hosts a one-time CLE seminar in Tallahassee, ***Practicing Before State Labor and Employment Agencies***. This seminar presents a unique opportunity to meet and hear from the Commissioners and key staff of PERC, FCHR, DEO, and RAAC, as well as judges from DOAH and the First District Court of Appeal. The seminar is designed to be informative to both the practitioner with little experience in front of these agencies, as well as the veteran attorney looking for "pro tips" from the agencies' leadership on enhancing advocacy. This seminar will also be a rare opportunity for our members living in the Panhandle and North Central Florida to attend a nearby Section-sponsored CLE seminar. At the conclusion of the CLE, we're hosting a reception to introduce and recognize the newly appointed PERC Commissioners: new Chair Donna Poole, and new Commissioners Jim Bax and Curtis Kiser.

The second major project ties in with The Florida Bar's Vision 2016 technology initiatives. In May of this year, the Section leadership will meet to consider ways of improving our electronic delivery of services to the Section membership. This will include rethinking the ways we use our website and social media, and how we deliver CLE, publications, and electronic news to the Section membership. In conjunction with that planning retreat, we expect to circulate a survey to Section membership by April. It's our goal to make your Section dues one of the best professional investments you can make as a lawyer. To do that we need your input to design tools and resources to better serve your needs as a member. So when you see that email about the survey, please take a few minutes to give us your feedback. We'll do our best to make it worth your time.

Honorable Frank E. Brown, Chair

the CHECKOFF

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Early Settlement of Employment Cases

By Guy Farmer, Jacksonville

As employers are aware, claims by applicants, employees and former employees are on the rise. The federal government is also increasing its enforcement activities. This article discusses a strategy that many employers and their counsel should consider in addressing this growing trend.

The Basics

There are some basic facts about employment litigation that are worth reviewing.

All cases are resolved in one of three ways: dismissed on a motion; tried, usually before a jury; or settled. Fewer than 5% of employment-related cases go to trial. Approximately 20 to 25% of the cases are decided by the court granting the employer's motion to dismiss or motion for summary judgment. The remaining cases, approximately 70%, are settled.

Plaintiffs rarely win employment cases but when they receive a favorable jury verdict, the damages can be significant. It is also clear that employers cannot "win" because even in the best case—when a motion to dismiss or for summary judgment is granted or a jury verdict is entered in favor of the employer—the employer is unlikely to be able to recover from the plaintiff more than a small fraction of the money spent to defend the case.

Most settlements occur only after the parties have completed discovery and motions have been filed. A significant number of cases are settled only after an employer's motion for summary judgment has been denied, making it clear that if the employer does not settle, the case will go to trial.

Employment litigation is expensive. It is slow, lengthy and inefficient. Most employment cases in federal court take two years or more to get to trial. Defense costs prior to trial can be over $100,000 and double that or more if the case goes to trial. Employers also incur litigation-related costs in addition to attorneys' fees and expenses, including—potentially—lost productivity and bad publicity.

Based on these facts, it is clear that an employer facing employment claims should at least consider early settlement as a means of reducing legal fees and costs as well as eliminating the risks of a jury trial.

Risk and Cost Analysis

The first step towards early settlement is to conduct a thorough review of the facts of the case and the applicable law and, on the basis of that information, produce a risk and cost analysis. A thorough, objective risk and cost analysis can be expensive to prepare but has the advantage of providing the employer with a realistic appraisal of the likelihood of success if the case is not settled, the cost of defending the case and the potential monetary liability if the case is lost. In addition to enabling the employer to determine how much it is worth to settle the case early, this analysis will be useful in defending the case if it is not settled.

In addition to the primary question of whether the plaintiff will be likely to prevail on the issue of whether his/her rights were violated under the applicable law, some of the questions to be addressed in the settlement analysis include:

- What are the projected defense fees and costs by stage (investigation, discovery, motions, trial and appeal)?
- Are there viable procedural defenses (e.g., Title VII claimant failed to file a timely EEOC charge) that are likely to allow the employer to prevail on a motion early in the litigation?
- Is the plaintiff likely to be sympathetic to a judge or a jury?
- Is the plaintiff's attorney experienced in employment law and able to evaluate the case properly? What is his/her reputation with regard to willingness to settle on a reasonable basis; propensity to engage in significant discovery; ability to respond adequately to a motion for summary judgment; and ability and willingness to try the case if it is not ended on a motion and does not settle?
- Is the case subject to being dismissed on a motion for summary judgment?
- Is the judge assigned to the case likely to grant a meritorious summary judgment motion? Is the judge likely to limit discovery and be generally unsympathetic to the plaintiff's claims?
- What is the possible range of damages (actual, compensatory, punitive and attorneys' fees) should the plaintiff obtain a verdict on liability?
- Are experts going to be needed to defend against the claims properly?
- Is there a "smoking gun" in the case, making it more difficult to defend (for example, emails expressing bias or inappropriate statements directed at the plaintiff based on a prohibited characteristic)?
- Is there a business reason that makes settlement undesirable from the employer's prospective?

In most employment cases, a thorough initial evaluation by defense counsel—consisting of witness interviews, document review and legal analysis—will reveal almost all of the relevant facts that will be disclosed during the case. From an employer's standpoint, discovery will yield very little that cannot be learned in the initial evaluation. Accordingly, at the end of this initial review the employer will be in a good position to foresee the outcome and cost of the case, to make a decision about whether to attempt early settlement before becoming involved in discovery and motion practice, and, if so, for how much.

Mediators

Once the employer has decided that it is in its best interest to pursue early

continued, next page

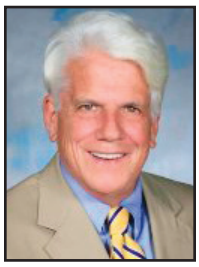
settlement, counsel for the employer should contact plaintiff's counsel and propose early mediation. Most plaintiffs' counsel in employment litigation are working on a contingent fee basis. As a result, they are often willing to consider settling before they have spent significant time on a case. Additionally, experienced plaintiffs' lawyers are aware that the odds do not favor the plaintiff in employment cases and that losing the case on a motion is a distinct possibility. These facts ordinarily mean that plaintiffs' counsel are willing to move their clients towards accepting a relatively low monetary offer in order to get the case settled early.

Assuming that the plaintiff's counsel responds favorably to the invitation to discuss early settlement, then it is almost always advisable to engage in mediation before an experienced mediator as a method to help settle the case. Mediation has the advantage of giving the plaintiff an opportunity to have his or her case heard by a third party and to "vent." Additionally, the mediator, while expressing sympathy for the plaintiff, can point out the weaknesses in the plaintiff's case and the "bird in the hand" benefits of settlement.

Even if the case cannot be settled early because the plaintiff's demands are unacceptable, there are other times during the proceeding when "settlement" is a reasonable alternative. These occur immediately after the plaintiff has been deposed and realizes how difficult the litigation process will be; at the conclusion of discovery and prior to the employer filing a motion for summary judgment; after the employer has filed a motion for summary judgment but before the plaintiff has responded; after all motions have been filed and briefed but not ruled on by the court; and after the employer's motion for summary judgment has been denied by the court. At any of these points in the progress of the case, a plaintiff who was earlier reluctant to accept a reasonable monetary offer may change his/her position.

Conclusion

Though not all employment cases should be or can be settled early in the litigation, it is clear that most employment cases are eventually settled. Therefore, it is often in the employer's interest to attempt to settle for a reasonable monetary payment early in the process because settling can save the employer a significant amount of attorneys' fees and costs and avoid the stress and risk involved in litigation.



G. FARMER

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Section Bulletin Board

2016 SEMINARS & MEETINGS

March 8, 2016

Policy and Handbook Update – Data Ownership, Phones, LinkedIn and Facebook – Practical Tips for Evolving Issues 2009R)
(audio webcast by Lindsey Wagner)

April 1, 2016

Practicing Before State Agencies (2042R)
University Center Club, Tallahassee

May 6-7, 2016

Advanced Labor Topics 2016 (2047R)
Ritz Carlton Amelia Island
4750 Amelia Island Parkway
Amelia Island, Florida 32034
Group Rate: $239 / Expires: April 14, 2016
Reservation Number: (888) 239-1217

May 6, 2016

Labor Executive Council Meeting, 5:30 p.m.

May 14-15, 2016

2016 Long Range Planning Retreat
Ritz Carlton Grande Lakes, Orlando

June 16, 2016

Labor Executive Council Annual Meeting, 5:00 p.m.

Reception
6:30 p.m. – 8:30 p.m.
Honoring the Chief Justice of the Florida Supreme Court, hosted by the Labor and Employment Law Section and the Florida Lawyer Chapters of the Federalist Society.

The Florida Bar Annual Convention
Hilton Bonnet Creek, Orlando

ADA Case Note: *Hurtt v. Int'l Servs., Inc.*

By Aaron W. Tandy, Miami

Employer who terminated salesperson who sought accommodation to address symptoms of temporary disability that impaired his ability to sleep violated ADA by retaliating against employee who sought accommodation in good faith.

Hurtt v. Int'l Servs., Inc., No. 14-1924 (6th Cir. Sept. 14, 2015).

Hurtt was a salesperson for International Services, Inc. ("ISI"). His work as a senior business analyst required him to travel extensively to various locations to provide consulting services for ISI customers. As a result of extensive traveling, Hurtt developed an upper respiratory infection as well as hypertension, depression, dizziness and a chronic cough, all of which was documented in notes from his doctors. To no avail, Hurtt sought an accommodation to lengthen the time between assignments and limit their duration so as to allow him to recuperate. Ultimately, following a request for leave under the Family and Medical Leave Act ("FMLA") that was processed by ISI, ISI downgraded Hurtt's employment profile and, he argued, constructively discharged him. Hurtt alleged, in part, that ISI had retaliated against him for seeking an accommodation under the Americans with Disabilities Act ("ADA"), but ISI succeeded on summary judgment. On appeal, the Sixth Circuit determined that Hurtt was entitled to pursue a retaliation claim, even though the court did not reach the question of whether his temporary condition would have qualified him as disabled so as to obtain protection under the ADA. Instead, the appellate court explained that the good faith request for an accommodation, even for albeit a temporary condition, was a protected act and that the employee had adduced sufficient evidence that he was retaliated against for making the request so as to withstand summary judgment. The Sixth Circuit noted that the correct inquiry was not whether the temporary conditions identified by Hurtt were sufficient to classify him as disabled under the ADA but whether Hurtt demonstrated that he made his accommodation request in good faith, that the requested accommodation was reasonable and that his employer had retaliated against him for engaging in such a protected act. Further, the appellate court found that ISI might also be liable for interfering with Hurtt's attempt to use his FMLA leave and reversed the grant of summary judgment on this claim as well.

A. TANDY

***Aaron Tandy** is a partner with Pathman Lewis, LLP and a member of its commercial litigation department. He focuses on resolution of business torts, regulatory and administrative hearings, employment and HR litigation, and ecommerce and intellectual property disputes. In addition, Tandy provides counsel to entities looking to comply with federal and state antitrust laws, including the establishment of domestic and international distribution agreements and joint ventures. He earned his law degree, cum laude, from New York University and his bachelor of arts degree from Haverford College.*

Can an Employer's Counterclaim be the Basis of a Retaliation Claim in an Employment Dispute?

By Carlo D. Marichal, Ft. Lauderdale

After being sued by a former employee, employers sometimes consider filing a counterclaim. However, upon being advised of the possible repercussions, employers often choose to forego that course of action because many—if it not all—federal and state employment laws contain anti-retaliation provisions. Thus, an employee's claim for damages may increase by alleging a violation of an employment statute's anti-retaliation provision. For example, if an employee files suit for unpaid wages under the Fair Labor Standards Act ("FLSA"), his or her damages would be limited to the unpaid wages, liquidated damages, and reasonable attorneys' fees and costs.[1] Although punitive damages are not available under the FLSA,[2] an employee may still request compensatory damages for violations of the FLSA's anti-retaliation provision, in addition to the unpaid wages, liquidated damages, and attorneys' fees and costs.[3]

Prior to last year's decision in *Smith v. Miami-Dade County*,[4] the Eleventh Circuit had never addressed whether an employer's counterclaim constitutes an adverse employment action. In *Smith*, the plaintiff filed suit under the Florida Civil Rights Act ("FCRA") and the Americans with Disabilities Act ("ADA"). The defendant-employer filed a counterclaim alleging that the plaintiff's suit violated the terms of a prior workers' compensation settlement agreement. Thereafter, the plaintiff amended her complaint to allege that the counterclaim amounted to unlawful retaliation under the ADA. She did not allege retaliation under the FCRA. The plaintiff appealed the district court's order dismissing the anti-retaliation claim on grounds that she did not allege the counterclaim lacked a reasonable basis in fact or law. In affirming the dismissal, the Eleventh Circuit held that an employer's counterclaim *may* amount to unlawful retaliation if the counterclaim (1) was filed with a retaliatory motive, and (2) was lacking a reasonable basis in law or fact.

The fact that the plaintiff did not allege retaliation under the FCRA is significant for practitioners. Florida's litigation privilege provides absolute immunity relating to any act occurring during the course of a judicial proceeding if the act is related to the proceeding.[5] The Eleventh Circuit previously acknowledged Florida's litigation privilege when it affirmed the dismissal of certain state law claims.[6] Thus, an employer may seek dismissal of a state law retaliation claim, e.g., under the FCRA, even if the employee alleges that the employer filed a lawsuit or counterclaim with a retaliatory motive and that the suit lacked a reasonable basis in law or fact.[7] The federal litigation privilege has not been applied to the same facts addressed in *Smith*, but the Seventh Circuit voiced reluctance in finding a federal litigation privilege in employment suits, noting that "recognition of the litigation privilege . . . could interfere with the policies underlying the anti-retaliation provisions of Title VII and the ADA. Retaliatory acts come in infinite variety . . . and even actions taken in the course of litigation could constitute retaliation in appropriate circumstances."[8]

With the guidance provided by the Eleventh Circuit in *Smith*, attorneys can now advise their clients of the legal standard for retaliation claims based on employer suits or counterclaims. Moreover, employer-side attorneys can request dismissal of state law retaliation claims based on Florida's litigation privilege, and employee-side attorneys may choose to allege retaliation claims solely under federal laws to avoid dismissal based on the litigation privilege.

C. MARICHAL

***Carlo D. Marichal** is an associate in Banker Lopez Gassler P.A.'s Ft. Lauderdale office. His practice includes the representation of employers in labor and employment disputes.*

Endnotes

1 29 U.S.C. § 216(b).

2 *Snapp v. Unlimited Concepts, Inc.*, 208 F.3d 928 (11th Cir. 2000).

3 *Bogacki v. Buccaneers Ltd. P'ship*, 370 F. Supp. 2d 1201 (M.D. Fla. 2005). The Eleventh Circuit has not addressed whether compensatory damages are recoverable in FLSA retaliation cases. *See Hassinger v. Sun Way Enters., Inc.*, No. 6:12-cv-1052-Orl-28GJK, 2014 WL 5438026, at *15 (M.D. Fla. May 29, 2014).

4 621 Fed. App'x 955 (11th Cir. 2015).

5 *Levin, Middlebrooks, Mabie, Thomas, Mayes & Mitchell, P.A. v. U.S. Fire Ins. Co.,* 639 So.2d 606, 608 (Fla. 1994).

6 *Jackson v. Bellsouth Telecomm.*, 372 F.3d 1250 (11th Cir. 2004).

7 *See, e.g., Hill v. Lazarou Enters., Inc.*, No. 10-61479-CIV, 2011 WL 860526, at *6 (S.D. Fla. Feb. 18, 2011) (dismissing retaliation claim brought under the FCRA where employer filed a counterclaim).

8 *Steffes v. Stepan Co.*, 144 F.3d 1070, 1075 (7th Cir. 1998).

series of Supreme Court decisions that had narrowly interpreted the reach of ADA provisions. In particular, the ADA Amendments Act of 2008 ("ADAAA") was intended to address the *Toyota Motors* decision,[4] in which the Supreme Court inferred that a temporary condition might not be covered as a disability under the ADA. The EEOC's subsequent expansion of the definition of "disability to include severe temporary impairments . . . advances [the] goal" of putting people back to work.[5]

As a result of the ADAAA, the EEOC revised its regulations, including the term "disability," and determined that "effects of an impairment lasting or expected to last fewer than six months can be substantially limiting" to qualify for coverage as an actual disability "if sufficiently severe."[6] At the same time, the ADAAA indicated that under the "regarded as" prong, an employee with a "transitory and minor" condition who nevertheless was regarded as disabled still might not come under the protection of the ADA.[7] Following the amendments, questions remained for employers as employees sought, more so than in years past, to return to work earlier following surgery or other health conditions and requested temporary accommodations.

Last year, the first appellate court to address the expanded definition of disability determined that employers are required to provide accommodations to workers suffering a temporary impairment, even those caused by an injury or illness.[8] In that case, *Summers v. Altarum*, the Fourth Circuit found that "nothing about the ADAAA or its regulations suggests a distinction between impairments caused by temporary injuries and impairments caused by permanent conditions."[9] Both are to be treated as a disability to the extent that a temporary or permanent condition substantially limits a major life activity, and both situations are deserving of an accommodation. In *Summers*, the long-term rehabilitation resulting from an employee fracturing both legs required the employer to make a reasonable accommodation, and its failure to do so left it vulnerable to a wrongful discharge claim.

While the *Summers* case may be an extreme example of a temporary condition severe enough to interfere with a major life activity, one could see other, more subtle, examples as requiring employers to offer temporary arrangements. For example, an employee recovering from surgery who is required to take medication at certain intervals and is thereby prevented from driving, may be entitled under the appropriate circumstances to an accommodation. Or, an employee who is recovering from back surgery may be put on modified duty to avoid lifting. Or, an employee undergoing medical treatments might request a change in work schedule to accommodate such treatments. Of course, the person requesting the accommodation must still be "a qualified individual," and the employer is entitled to make clear that an interim accommodation is itself transitory and not intended to be permanent.[10]

Moreover, even if an employer believes that the employee's temporary condition is not severe enough to warrant an accommodation, the failure to make a temporary arrangement while investigating the request or engaging in a constructive dialogue may expose the employer to liability. Recently the Sixth Circuit, in *Hurtt v. International Services, Inc.*, determined that a former employee was entitled to pursue a retaliation claim even though the court did not reach the question as to whether his temporary condition would have qualified him as being disabled so as to obtain protection under the ADA.[11] In *Hurtt*, the employee provided his employer with a doctor's note detailing, among other things, hypertension, chronic cough and dizziness, with a recommendation for additional sleep

continued, next page

WANTED: ARTICLES

The Section needs articles for *the Checkoff* and *The Florida Bar Journal*. If you are interested in submitting an article for *the Checkoff,* contact Jay P. Lechner (*lechnerj@thefllawfirm.com*). If you are interested in submitting an article for *The Florida Bar Journal,* contact Robert Eschenfelder (*robert.eschenfelder@mymanatee.org*) to confirm that your topic is available.

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Article deadline for the next *Checkoff* is May 2, 2016.

and modification of travel schedule, which the employee requested.[12] The employer rejected the request, apparently deeming the condition not severe, and ultimately terminated the employee. In reversing the grant of summary judgment, the Sixth Circuit explained that the good faith request for an accommodation, even for a temporary condition, was a protected act and that the employee had adduced sufficient evidence, so as to withstand summary judgment, that he was retaliated against for making the request.[13]

An employer who receives a request from an employee alleging the need for an accommodation to address a temporary condition would be wise to take reasonable steps to research the request and provide an interim accommodation while undergoing an interactive evaluation process, rather than reject the request out of hand. In doing so, the employer may just save itself from having a court determine that its actions were unreasonable. At the same time, the employee should be informed that any accommodation is itself temporary.[14]

A. TANDY

***Aaron Tandy** is a partner with Pathman Lewis, LLP and a member of its commercial litigation department. He focuses on resolution of business torts, regulatory and administrative hearings, employment and HR litigation, and ecommerce and intellectual property disputes. In addition, Tandy provides counsel to entities looking to comply with federal and state antitrust laws, including the establishment of domestic and international distribution agreements and joint ventures. He earned his law degree, cum laude, from New York University and his bachelor of arts degree from Haverford College.*

Endnotes

1 JAN is a service provided by the U.S. Department of Labor's Office of Disability Employment Policy.

2 *See Summers v. Altarum Inst., Corp.*, 740 F.3d 325 (4th Cir. 2014) (reversing motion to dismiss finding that temporary condition qualified as a covered disability).

3 *See Hurtt v. Int'l Servs., Inc.*, No. 14-1924 (6th Cir. Sept. 14, 2015) (reversing grant of summary judgment to employer on former employee's claim of retaliation for seeking an accommodation to address a temporary condition). For a more detailed discussion of *Hurtt*, see the author's Case Note *supra* page 5.

4 *Toyota, Inc. v. Williams*, 534 U.S. 184, 199 (2002).

5 *Summers*, 740 F.3d at 333. The *Summers* court, like other courts addressing issues of accommodation, appears to take note of advancements in workplace technology that allow employees to work remotely.

6 29 C.F.R. § 630.2(j)(1)(i)(2013).

7 42 U.S.C. § 12102(3)(B). *See also Summers*, 740 F.3d at 330 n.1 (noting that a "temporary injury" is not a disability under the "regarded as" prong of the ADA).

8 *Summers*, 740 F.3d at 330.

9 *Id.* at 333.

10 *Id.* at 329 (recognizing that ADA covers only "qualified individuals"), 332 ("Temporary disabilities require only temporary accommodations.").

11 *Hurtt v. Int'l Servs., Inc.*, No. 14-1924 (6th Cir. Sep. 14, 2015) at slip. op. 13 (recognizing that the inquiry was "whether Hurtt showed a good-faith request for reasonable accommodation" not whether his condition had escalated to that of a "disability").

12 *Id.* at slip. op. 4.

13 *Id.* at slip. op. 14.

14 *See generally Employers' Practical Guide to Reasonable Accommodation Under the Americans with Disabilities Act (ADA)*, http://askjan.org/Erguide/Three.htm.

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least one municipality—have enacted ordinances creating new administrative fora in which to address such claims.[3]

While the particulars of the ordinances differ, they all share a broad definition of wage theft.[4] For example, the Miami-Dade ordinance defines wage theft as the "fail[ure] to pay any portion of wages due to an employee, according to the wage rate applicable to that employee, within a reasonable time from the date on which that employee performed the work for which those wages were compensation." The ordinance also provides that, whether pay is "daily, hourly, or by piece[,] in all cases [such wages] shall be equal to no less than the highest applicable rate established by operation of any federal, state or local law."[5] The City of St. Petersburg, whose ordinance is specifically patterned after Miami-Dade's, goes even further and expressly imports FLSA standards into the mix:

> *Wage rate* shall mean any form of monetary compensation which the employee agreed to accept in exchange for performing work for the employer, whether a salary, daily or hourly wage, or by piece, *and whether exempt or non-exempt from the Fair Labor Standards Act and other federal, state or local overtime laws.* In all cases the wage rate shall be no less than the highest applicable rate established by operation of any federal, state or local law.[6]

The ordinances also share a very low dollar threshold. Most provide that any complaint must allege wage theft of at least $60.00; Alachua County's ordinance appears to have no minimum requirement.

The ordinances provide a two-step process for addressing complaints of wage theft. They all start with an offer of mediation or a conciliation conference among the employee, the employer, and either (a) a mediator, usually a certified circuit civil or county mediator, or (b) another agency official, who serves as the conciliation "neutral," if conciliation is the process articulated by ordinance. If a deal is reached, that settles the matter. If no deal is reached (or if mediation/conciliation is rejected by the employer), the matter goes before a hearing examiner.[7] Some ordinances expressly provide for pre-hearing discovery while others do not.

The hearing examiner conducts a quasi-judicial hearing and makes a finding as to whether the employer has failed to pay the employee all that the employee is due (i.e., whether the employer committed wage theft). At the hearing, the employee bears the initial burden of proving that he or she earned wages within the relevant geographical limits and that the wages were not timely paid. The cases can include claims for work off the clock (with minimum wage or overtime implications), failure to pay overtime, improper deductions from pay, improper tip-pooling arrangements (e.g., where the employer included within the pool persons who are not customarily tipped or where the employer makes improper deductions from such tips), as well as a claim that an employer simply did not meet payroll. Most of the ordinances apply the FLSA's evidentiary consequences when an employer has not kept required time records; some import that "burden of imprecision" into the proceeding, regardless of whether the case involves an FLSA claim.

If there is a finding of wage theft, then the hearing examiner enters an order requiring the employer to pay the unpaid wages, plus double that amount as liquidated damages, plus attorneys' fees and costs, plus reimbursement

to the agency for its administrative costs incurred in convening the matter. Note that none of these ordinances requires proof of intent on the part of the employer and, for some, there is no requirement that the employee show a "willful" violation as a prerequisite for the liquidated damages. At least one, the St. Petersburg ordinance, mandates an award of liquidated damages: "Upon a finding by a hearing officer that an employer failed to pay wages, or a portion of wages, such violation shall entitle an employee to receive back wages in addition to liquidated damages and reasonable costs and attorney's fees from that employer as stated in the hearing officer's order."[8]

The hearing examiner's order is then enforceable in a court of competent jurisdiction. None of the ordinances appears to provide for appellate review or standards.[9] All, however, make it a violation to retaliate against someone for filing a complaint or otherwise participating in the wage theft administrative process.

So, if you represent employees or employers in connection with work performed within these local jurisdictions, you not only need to be mindful of WHD and the courts, but you should also remember the new sheriff in town: wage theft ordinances.

Christopher Shulman *is an attorney, mediator and arbitrator based out of Tampa who has conducted 2500+ mediations and 1400+ arbitrations (or similar decision-making processes)—a majority of which involved labor or employment issues. He is also a City of St. Petersburg wage theft ordinance hearing examiner.*

C. SHULMAN

Endnotes

1 *See Wage Theft: How Millions of Dollars are Stolen from Florida's Workforce*, https://risep.fiu.edu/research-publications/workers-rights-econ-justice/wage-theft/2012/wage-theft-how-millions-of-dollars-are-stolen-from-floridas-workforce.

2 *Id*. These cases were found in the following industries: accommodation and food services (18.4%); retail trade (9.9%); construction (9.6%); healthcare and social assistances (9.1%); administrative support & waste management & remediation services (8.9%); and manufacturing (5%); with other industries comprising the balance of the claims.

3 Miami-Dade County was the first to enact its ordinance, Miami-Dade County, Fla. Ordinances, ch. 22, §§ 22-1 – 22-8 (2010). As of December 2015, similar wage theft ordinances were enacted elsewhere: Broward County (Broward County, Fla. Ordinances, ch. 20½, §§ 20½-1 – 20½-9 (2013)); Alachua County (Alachua County, Fla. Ordinances, ch. 66, §§ 66.01 – 66.11 (2014)); City of St. Petersburg (St. Petersburg, Fla. Ordinances, ch. 15, §§ 15.40 – 15.46 (April 16, 2015)); Hillsborough County (Hillsborough County, Fla. Ordinance 15-25 (as yet uncodified; adopted October 21, 2015)); and, most recently, Pinellas County (Pinellas County, Fla. Ordinances, ch. 70, §§ 70-301 – 70-310 (November 10, 2015)).

4 Palm Beach County did not enact an ordinance but instead adopted a resolution funding the Legal Aid Society of Palm Beach County's Wage Recovery Program, which provides counsel to persons who claim their employers have not paid them wages owed. *See* http://www.legalaidpbc.org/press_wagetheft.php.

5 Miami-Dade County, Fla. Ordinances, ch. 22, §§ 22-2, 22-3.

6 St. Petersburg, Fla. Ordinances, ch. 15, § 15.41 (emphasis added).

7 Or "special magistrate" or "hearing officer." The nomenclature varies among ordinances. This article employs the term "hearing examiner," which is used in at least three of the ordinances.

8 St. Petersburg, Fla. Ordinances, ch. 15, § 15.42; *see also supra* § 15.41 ("Liquidated Damages").

9 Presumably, such review would lie in the appropriate state court, on petition for a writ of certiorari, with the writ's notoriously difficult burden of proof ("departure from the essential requirements of law causing irreparable harm that cannot be remedied on appeal").

Unpaid Internships and the FLSA: The Eleventh Circuit's "Primary Beneficiary" Test

By Carlo D. Marichal, Ft. Lauderdale

Many advanced degrees require the completion of unpaid internships to graduate. For example, the University of Arizona requires students enrolled in its College of Pharmacy to complete Advanced Pharmacy Practice Experience rotations in the fourth year of the PharmD curriculum.[1] Increasingly, courts are being asked to decide whether the protections afforded "employees"[2] under the Fair Labor Standards Act ("FLSA") apply to interns at for-profit entities such as these.

The FLSA defines an "employee" as an individual employed by an employer.[3] Under the Act, "employ" means "to suffer or permit to work."[4] Moreover, the FLSA defines "employer" as any person acting in the interest of an employer with respect to an employee.[5] However, it provides that an individual is not an employee if he or she volunteers for a public agency, if other conditions are met.[6]

Walling v. Portland Terminal Co.[7] is the seminal case discussing internships and the FLSA. In *Walling*, decided in 1947, the plaintiffs were unpaid trainees who sought to work on railroads.[8] The Court ultimately held that the plaintiffs were not employees because the trainees—not the alleged employers—were the primary beneficiaries of the training.[9]

In 1967,[10] the Department of Labor ("DOL") promulgated a set of factors patterned after *Walling* to be used in assessing whether an intern is entitled to FLSA protections.[11] According to the DOL Handbook, an intern is not an employee if all of the following criteria are met:

1. The training, even though it includes actual operation of the facilities of the employer, is similar to that which would be given in a vocational school.
2. The training is for the benefit of the trainees or students.
3. The trainees or students do not displace regular employees but work under their close observation.
4. The employer that provides the training derives no immediate advantage from the activities of the trainees or students, and on occasion his/her operations may actually be impeded.
5. The trainees or students are not necessarily entitled to a job at the conclusion of the training period.
6. The employer and the trainees or students understand that the trainees or students are not entitled to wages for the time spent in training.[12]

Stated differently, if one of the aforementioned factors was not met, the individual was *per se* an employee and therefore entitled to FLSA protections. Although the DOL Handbook is not binding, courts have applied these factors to assess whether an intern was entitled to minimum wages.[13] In fact, the Eleventh Circuit cited the DOL Handbook in *Kaplan v. Code Blue Billing & Coding, Inc.*[14] when it analyzed whether unpaid externs were entitled to minimum wages under the FLSA. Thus, it may come as some surprise that the Eleventh Circuit recently rejected the DOL's intern-employee factors and adopted a new approach in *Schumann v. Collier Anesthesia, P.A.*,[15] a case involving registered nurse anesthetists. Wrote the court:

> [W]ith all due respect to the Department of Labor, it has no more expertise in construing a Supreme Court case than does the Judiciary. *Portland Terminal* is nearly seven decades old and, in our view, addresses a very different factual situation involving a seven-or-eight-day, railroad-yard-brakeman training program offered by a specific company for the purpose of creating a labor pool for its own future use. This case, however, concerns a universal clinical-placement requirement necessary to obtain a generally applicable advanced academic degree and professional certification and licensure in the field.[16]

By its ruling, the Eleventh Circuit joined the Second Circuit in "tweak[ing] the Supreme Court's considerations in evaluating the training program in *Portland Terminal* to make them applicable to modern-day internships."[17]

The revised "primary beneficiary" test "focuses on what the intern receives in exchange for his work" and allows courts to consider the entirety of the circumstances surrounding the intern-employer relationship.[18] The Eleventh and Second Circuits now use the following "non-exhaustive" factors when analyzing whether an intern is entitled to FLSA protections:

1. The extent to which the intern and the employer clearly understand that there is no expectation of compensation. Any promise of compensation, express or implied, suggests that the intern is an employee—and vice versa.
2. The extent to which the internship provides training that would be similar to that which would be given in an educational environment, including the clinical and other hands-on training provided by educational institutions.
3. The extent to which the internship is tied to the intern's formal education program by integrated coursework or the receipt of academic credit.

4. The extent to which the internship accommodates the intern's academic commitments by corresponding to the academic calendar.
5. The extent to which the internship's duration is limited to the period in which the internship provides the intern with beneficial learning.
6. The extent to which the intern's work complements, rather than displaces, the work of paid employees while providing significant educational benefits to the intern.
7. The extent to which the intern and the employer understand that the internship is conducted without entitlement to a paid job at the conclusion of the internship.[19]

No one factor is dispositive, and the court purposefully did not include as a factor whether the alleged employer receives an immediate advantage from the intern-employer relationship.[20] The circuit court went on to explain the factors that it deemed were not self-explanatory. For example, with respect to the fourth factor, the court opined that there should be no reason for the internship to occur when school is out of session if the internship is for academic credit.[21] With respect to the fifth factor, courts should "consider whether the duration of the internship is *grossly* excessive in comparison to the period of beneficial learning."[22]

For now, only the Eleventh and Second Circuits have addressed this issue. The Seventh and Ninth Circuits may be next as Notices of Appeal have been filed in district court cases dealing with this issue.[23] With some guidance now in Florida, it may be prudent for employers to review their current policies dealing with interns, externs, and "volunteers."

C. MARICHAL

Carlo D. Marichal *is an associate in Banker Lopez Gassler P.A.'s Ft. Lauderdale office. His practice includes the representation of employers in labor and employment disputes.*

Endnotes

1 The University of Arizona, College of Pharmacy, APPE, http://www.pharmacy.arizona.edu/programs/rotations/APPE (last visited Jan. 27, 2016).

2 *Freund v. Hi-Tech Satellite, Inc.*, 185 Fed. App'x 782, 782 (11th Cir. 2006).

3 29 U.S.C. § 203(e)(1).

4 § 203(g).

5 § 203(d).

6 § 203(e)(4)(A)(i)-(ii). The Eleventh Circuit has opined on volunteers and the FLSA albeit reviewing an order granting a motion to dismiss. *See generally Freeman v. Key Largo Volunteer Fire & Rescue Dept., Inc.*, 494 Fed. App'x 940 (11th Cir. 2012).

7 *Walling v. Portland Terminal Co.*, 330 U.S. 148 (1947).

8 *Id.* at 149.

9 *Id.* at 153.

10 *See Glatt v. Fox Searchlight Pictures, Inc.*, 791 F.3d 376, 382 (2d Cir. 2015). The Amended Opinion, which was published January 25, 2016, may be found at 2016 WL 284811.

11 *See* Wage & Hour Div., U.S. Dep't of Labor, *Field Operations Handbook* ch.10b11 (Oct. 20, 1993), http://www.dol.gov/whd/FOH/FOH_ch10.pdf (last visited Jan. 27, 2016).

12 *Id.*

13 *See, e.g., Griffiths v. Parker*, No. 13-61247-CIV, 2014 WL 2095205 (S.D. Fla. May 20, 2014).

14 *Kaplan v. Code Blue Billing & Coding, Inc.*, 504 Fed. App'x 831 (11th Cir. 2013).

15 *See Schumann v. Collier Anesthesia, P.A.*, 803 F.3d 1199 (11th Cir. 2015).

16 *Id.* at 1203.

17 *Id.* at 1213.

18 *Glatt*, 791 F.3d at 383-84; *Glatt*, 2016 WL 284811, at *5.

19 *Schumann*, 803 F.3d at 1211-12.

20 *Id.* at 1212-13.

21 *Id.* at 1213.

22 *Id.* (emphasis added).

23 *Benjamin v. B & H Education, Inc.*, No. 13-cv-04993-VC, 2015 WL 6164891 (N.D. Cal. Oct. 16, 2015) was appealed to the Ninth Circuit on October 28, 2015, thereby creating docket number 15-17147. *Hollins v. Regency Corporation*, No. 13-C-07686, 2015 WL 6526964 (N.D. Ill. Oct. 27, 2015), was appealed to the Seventh Circuit on November 20, 2015, thereby creating docket number 15-3607.

CASE NOTES

FEDERAL COURTS

Eleventh Circuit

By Jeffrey D. Slanker and Monna Lea Bryant

Eleventh Circuit applies *Garcetti* test to employee memorandum in holding that speech was not entitled to First Amendment protection.

Alves v. Bd. of Regents, No. 14-14149 (11th Cir. Oct. 29, 2015).

The Eleventh Circuit recently published an opinion that discussed the distinction between speech by citizens on matters of public concern and speech by employees on issues relating to their professional duties. The Eleventh Circuit applied the two-pronged inquiry established by the Supreme Court in *Garcetti v. Ceballos* to the appellants'-employees' free speech claims to determine whether the district court properly granted summary judgment to appellees on the grounds that appellants' memorandum was not subject to First Amendment protection. Following the *Garcetti* test, the Eleventh Circuit first determined the memorandum was submitted by appellants acting as employees, not private citizens. Second, the court determined that the "main thrust" of the memorandum related to appellants' professional responsibilities. Consequently, appellants' memorandum was not directed at matters of public concern. Since the speech failed both threshold prongs of *Garcetti*, it was not entitled to First Amendment protection, and the Eleventh Circuit therefore affirmed the district court's grant of summary judgment to appellees.

Administrative law judge's ruling that company did not retaliate against employees for union activities was overturned by National Labor Relations Board and Eleventh Circuit.

NLRB v. Allied Med'l Transp., Inc., case No. 14–15033 (11th Cir. Oct. 13, 2015).

Two drivers who were active in a union-organizing campaign were terminated by Allied for fare delinquencies. Instead of investigating the matter, Allied referred the matter to the local police department and eventually terminated the two employees. The National Labor Relations Board ("NLRB") filed a complaint alleging that Allied violated the NLRA and, among other things, that it illegally retaliated against the two drivers for their union activities.

An administrative law judge of the NLRB ruled that Allied did not retaliate against the drivers, but this finding was overturned by the NLRB itself which found that Allied had in fact retaliated against them and that Allied could not show it would have taken the same action had there been no protected union-organizing activity. The appellate court upheld the order of the NLRB, finding that substantial evidence supported the NLRB's finding that the employees were retaliated against when they were terminated by Allied.

Eleventh Circuit upheld finding that employee was not treated unfairly due to race, reaffirming the notion that courts will not second-guess employer's non-discriminatory business judgment.

Flowers v. Troup Cty., GA, Sch. Dist., Case No. 14-11498 (11th Cir. 2015).

The head football coach of Troup High School in Georgia was let go from the school district after an investigation revealed that he impermissibly recruited football players who resided outside of the school zone for the high school. Flowers brought suit against the school district and several individual defendants alleging that he was discriminated against on the basis of his race and that this was the reason—not the recruiting concerns—for his dismissal.

The Eleventh Circuit Court of Appeals upheld the decision of the district court dismissing the suit against the school district and, in doing so, clarified the burden that lies with a plaintiff alleging unlawful employment discrimination. Ultimately, the decision of the appeals court reaffirmed the longstanding notion in the Eleventh Circuit that courts are not to sit as super-personnel departments and that an employer's non-discriminatory business judgment should not be second-guessed. The appeals court held there was insufficient evidence to infer that the plaintiff was treated unfairly due to his race and insufficient evidence to support a finding that the summary judgment should be overturned.

Arbitrator exceeded his authority in reconsidering his original award and thereby substantively changing the result.

Local Union 824, Int'l Bhd of Elec. Workers v. Verizon Fla., LLC, No. 15-10536 (11th Cir. Oct. 7, 2015).

The district court held that an arbitrator exceeded his authority in reconsidering the original award and substituting a new award that substantively changed the result. The Eleventh Circuit affirmed the lower court's decision, putting all parties on notice that original awards designated by arbitrators are owed great deference. An arbitrator will not be able to reconsider the award; instead, the proper remedy for an award thought to be improper is through the court system.

J. SLANKER

***Jeffrey D. Slanker** is an associate at Sniffen and Spellman, P.A. in Tallahassee. He practices labor and employment law, civil rights defense, local government law and administrative law. His litigation experience includes matters involving Title VII of the Civil Rights Act, the Fair Labor Standards Act, the*

Americans with Disabilities Act and other federal and state employment statutes as well as labor law matters arising under collective bargaining agreements. He is a graduate of Emory Law School and the University of Central Florida.

M. BRYANT

***Monna Lea Bryant** is an associate at Sniffen & Spellman, P.A. Ms. Bryant practices in the areas of labor and employment law, civil rights litigation, and administrative law. Ms. Bryant earned her juris doctorate from the Emory University School of Law and received her bachelor of science in psychology from Florida State University, cum laude.*

District Courts

Northern District of Florida

By Kelly M. Peña

Florida student has a private right of action for pregnancy discrimination under Title IX.

Conley v. Nw. Fla.St. C., 2015 WL 7180504 (N.D. Fla. Nov. 12, 2015).

A state college student pursued a sex discrimination claim against her school under Title IX when she was denied the opportunity to complete her paramedic clinical rotations and exams after taking time off due to her pregnancy. The defendant moved to dismiss the plaintiff's claim, arguing that there was no private right of action for pregnancy discrimination under Title IX. The court denied the defendant's motion and concluded that although the term "sex" was not explicitly defined in the statute prohibiting discrimination "on the basis of sex," the common usage of this term should include pregnancy. The court also looked to the legislative history of Title IX and found that Congress intended for the prohibition of sex discrimination to encompass pregnancy discrimination. The court also looked to the Department of Education's interpretation of sex discrimination, which found that sex discrimination includes pregnancy discrimination. Finally, the court deferred to recent Florida jurisprudence that drew the same conclusion under the FCRA in 2014.

§ 1981 jury instructions need not include "malicious or reckless indifference" standard in order to allow an award for punitive damages.

*Jones v. Cap. Transp., Inc.,*2015 WL 6126832 (N.D. Fla. Oct. 16, 2015).

Plaintiff filed an action against defendant asserting race discrimination under 42 U.S.C. § 1981. The jury returned a verdict finding that race was the motivating factor in the defendant's treatment of plaintiff and that his rights were violated under § 1981. Defendant challenged the punitive damage award claiming that the standards under § 1981 were not met. Under this statute, a plaintiff may recover punitive damages against a corporate defendant "when (1) an official 'high up in the corporate hierarchy' (2) intentionally discriminates against the plaintiff based on race (3) in a way that clearly and undeniably violates the law—that is maliciously or with reckless indifference to the plaintiff's federal rights." The jury instructions included only the first two elements of this standard. The court held that the third element was a question of law, however, and that the jury instructions were therefore proper. The jury was simply to resolve the factual dispute as to whether or not a corporate official intentionally discriminated against plaintiff, which it did.

Middle District of Florida

Plaintiff was not deemed disabled by virtue of having an HIV diagnosis alone.

Rodriguez v. HSBC Bank, 2015 WL 7429273 (M.D. Fla. Nov. 23, 2015).

Plaintiff claimed that he suffered workplace harassment and discrimination after disclosing to management that he was HIV positive. Plaintiff alleged disparate treatment and hostile work environment under the ADA and FCRA and constructive discharge under the ADA. The defendant moved for summary judgment on all counts, each of which required plaintiff to prove that he had a disability under the ADA (a "physical or mental impairment that substantially limits one or more life activities"). For guidance, the court looked to the EEOC regulations which state that HIV should "easily be concluded" as substantially limiting immune function. Here, plaintiff testified that he did not consider his HIV a disability, however, and that it did not limit any of his major life activities while employed by defendant. Accordingly, the court concluded that plaintiff did not, as a matter of law, have a disability. That finding alone defeated all of plaintiff's claims.

Retirement community was not required to provide sign language interpreters as a reasonable accommodation.

Schwarz v. The Villages Charter Sch., Inc., 2015 WL 5830821 (M.D. Fla. Oct. 2, 2015).

Thirty-two deaf residents filed an action against their residential retirement community (two public entities) under Title II of the ADA, alleging that they failed to provide sign language interpreters for meetings and activities conducted on-site by recreational clubs. Defendants moved for summary judgment on the basis that they had no legal obligation to provide interpreters for these activities. The clubs' relationship with defendants was akin to a licensee, as the clubs were simply permitted to use defendants' facilities. Defendants were not involved in the programming of the clubs' activities, and defendants' involvement was strictly limited to

lending out physical space. Further, because the individuals running the clubs were private parties (volunteer residents), they were not deemed instrumentalities of defendants. For these reasons, the court held that the defendants had no legal obligation to provide sign language interpreters at the clubs' events.

Southern District of Florida

Professor failed to timely file a Charge of Discrimination with EEOC and exhaust her administrative remedies when she relied on a letter extending her termination date as the operative date for her adverse employment action.

Wen Liu v. U. of Miami, 2015 WL 5997069 (S.D. Fla. Aug. 28, 2015).

A female Asian assistant professor pursued an action against her employer under the FCRA, Title VII, and § 1981, alleging discrimination on the basis of race, national origin, and gender, and also alleging retaliation in violation of the FMLA. Plaintiff's employer had given plaintiff a notice on October 7, 2011, advising that her employment would be terminated effective October 12, 2012. In September 2012,plaintiff submitted a formal request for FMLA leave. On March 7, 2013, plaintiff's employer sent a letter regarding her FMLA leave and also notified her that it would be extending the effective date of her termination to April 9, 2013. Plaintiff then filed her Charge of Discrimination with the EEOC on March 23, 2013. Plaintiff claimed that the operative date of the adverse employment action was the March 7th letter; however, the court disagreed. The court held that the date of the original termination notice served as the operative date for the adverse employment action because that was when the employer made the decision to terminate plaintiff's employment and when it communicated this decision to the plaintiff. Accordingly, plaintiff failed to timely file her Charge of Discrimination with the EEOC.

EEOC was permitted to bring pattern-or-practice claim under the ADEA.

EEOC v. Darden Restaurants, Inc., 2015 WL 6865735 (S.D. Fla. Nov. 9, 2015).

The EEOC pursued an action of age discrimination under the ADEA alleging that defendant engaged in unlawful employment practices when it repeatedly denied jobs to applicants due to their age. The EEOC alleged that defendants maintained a "standard operating procedure" of denying employment to applicants over 40 years of age through a centralized hiring process. Defendants moved to dismiss the EEOC's claim, stating that the statutory language under the ADEA does not authorize pattern-or-practice claims, as it does in Title VII claims. Defendants also claimed that through the *Gross* decision in 2009, the U.S. Supreme Court further distinguished causes of action under the ADEA relative to Title VII such that claims allowable under Title VII would not necessarily apply in ADEA cases. The court rejected these arguments, holding that the EEOC could proceed with a pattern-or-practice claim under the ADEA, regardless of any distinctions in statutory language.

K. Peña

***Kelly M. Peña** is an associate in the Miami office of Ogletree, Deakins, Nash, Smoak & Stewart, P.C. Ms. Peña's practice focuses primarily on labor and employment litigation. She received her undergraduate degree from the University of California at Berkeley and her law degree from Northeastern University College of Law.*

STATE COURTS

By Allison Gluvna

Former employee's failure to sign letter disclosing supervisor's alleged misconduct and vague allegations about investigation at issue precluded former employee's claim under Florida's public sector Whistle-blower's Act.

Shaw v. Town of Lake Clarke Shores, 174 So. 3d 444 (Fla. 4th DCA Aug. 5, 2015).

A former employee (appellant) brought suit against the town, alleging violations of Florida's public sector Whistle-blower's Act, § 112.3187, Fla. Stat., when he was terminated from his employment as a police officer. Specifically, appellant claimed that the termination violated his rights under the statute because it occurred after he sent an anonymous letter to a neighboring village council and mayor alleging misconduct by a village employee. The Fourth DCA affirmed dismissal of the Whistle-blower's Act claim, finding that the disclosures in the letter and during the investigation failed to meet the standards for protection under the Act. The letter failed as a protected disclosure because it was anonymous, creating issues of proof as to the identity of the whistleblower at the time the disclosure was made. Further, appellant's vague allegations about participating in the town's internal investigation to determine who authored the letter did not rise to the level of disclosure concerning a violation of law or an act of gross management or other disclosure required by the statute.

In suit brought by employee for unpaid commissions, four-year limitation for breach of contract action under § 95.11(3)(k), Fla. Stat., began to run when each commission was received by the employer.

Access Ins. Planners, Inc. v. Gee, 175 So. 2d 921 (Fla. 4th DCA Sept. 30, 2015).

Former employee sued employer and its insurance company (appellants) for breach of contract, seeking damages for past due and unpaid commissions. The former employer raised several affirmative defenses, including the statute of limitations. Pursuant to the parties' employment agreement, the employer agreed to pay commissions to the employee each time the employer received a commission from the insurance company. The court held that the contract was divisible, so that the statute of limitations for each commission began to run when the appellants received each commission. Thus, the failure to pay each commission was a separate breach, subject to its own four-year statute of limitations.

Order granting temporary injunction based on non-compete agreement reversed because of insufficient evidence of substantial business relationship warranting protection.

Evans v. Generic Solution Eng'g, LLC, 2015 Fla. App. LEXIS 16175 (Fla. 5th DCA Oct. 30, 2015).

Two former independent contractors for Tech Guys left to form their own company which provided similar services to similar customers. One of the former contractors (Chinn) had a non-compete contract with Tech Guys; the other did not. At an evidentiary hearing, the lower court held that Chinn's work for two former Tech Guys' clients violated the terms of his restrictive covenant. The appellate court reversed, holding that Tech Guys failed to present competent, substantial evidence that the enforcement of the non-compete agreement was necessary to protect its business interests with regard to either client. Tech guys never had an exclusive contract with one of the companies nor any reasonable expectations it would continue to request services, and there was insufficient evidence regarding the other company to meaningfully address its relationship with Tech Guys.

Referral sources are a protectable legitimate business interest under § 542.335, Fla. Stat.; Fourth DCA recognizes conflict with Fifth DCA on this issue.

Infinity Home Care, LLC v. Amedisys Holding, LLC, 2015 Fla. App. LEXIS 17321 (Nov. 18, 2015).

Home health care service company (Amedisys) sued a former employee and her new employer (Infinity) to enforce non-compete and non-solicitation provisions of employment contract when former employee began soliciting referral sources that had previously referred business to Amedisys. Infinity moved to dismiss the complaint, arguing the court should follow the Fifth DCA's opinion in *Florida Hematology & Oncology v. Tummmala*, 927 So. 2d 135 (Fla. 5th DCA 2006), which held that referring physicians are not a legitimate business interest because § 542.335, Fla. Stat., requires that prospective patients be specific and identifiable. The court granted Amedisys a temporary injunction for one year. The Fourth DCA affirmed on appeal, recognizing that the statute does not expressly exclude referral relationship and certified conflict with the Fifth DCA.

A. GLUVNA

Allison Gluvna *is an associate in Jackson Lewis' Miami office. She represents management clients in all types of employment litigation, including claims of discrimination, harassment, retaliation, and wage and hour disputes. Ms. Gluvna received her B.A. from Duke University and graduated magna cum laude from the University of Florida Levin College of Law. During law school, Ms. Gluvna was an editor for the Florida Law Review.*

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Join this April 1st conference hosted by The Florida Bar Labor and Employment Law Section involving the Florida Commission on Human Relations (FCHR), Florida Ethics Commission, Division of Administrative Hearings (DOAH), Florida Public Employees Relations Commission (PERC), Florida Department of Economic Opportunity (DEO), the Reemployment Assistance Appeals Commission (RAAC), and the First District Court of Appeal.

8:30 a.m. – 8:50 a.m.
Late Registration

8:50 a.m. – 9:00 a.m.
Welcome and Introductions
Robert J. Sniffen, Program Co-Chair, Sniffen & Spellman P.A., Tallahassee
Amanda Neff, Program Co-Chair, Reemployment Assistance Appeals Commission, Tallahassee

9:00 a.m. – 9:50 a.m.
FCHR – The Investigative Process
Moderator: *Robert J. Sniffen, Program Co-Chair, Sniffen & Spellman P.A., Tallahassee*
FCHR Panelists:
Cheyanne Costilla, General Counsel, Florida Commission on Human Relations, Tallahassee
David Organes, Assistant General Counsel, Florida Commission on Human Relations, Tallahassee
Emily Davis, Employment Investigations Manager, Florida Commission on Human Relations, Tallahassee
Brooke Yurgel, Employment Investigations Manager, Florida Commission on Human Relations, Tallahassee

9:50 a.m. – 10:20 a.m.
FCHR – Review of Recommended Orders
Moderator: *Robert J. Sniffen, Program Co-Chair, Sniffen & Spellman P.A., Tallahassee*
FCHR Panelists:
James H. Mallue, Senior Attorney, Florida Commission on Human Relations, Tallahassee
Commissioners TBD

10:20 a.m. – 10:30 a.m. **Break**

10:30 a.m. – 12:00 noon
Trying Employment Cases Before DOAH
Moderator: *Richard E. Johnson, Tallahassee*
DOAH Panelists:
Chief Judge Robert Cohen, Division of Administrative Hearings, Tallahassee
Judge Mary Li Creasy, Division of Administrative Hearings, Tallahassee
Judge John Newton, Division of Administrative Hearings, Tallahassee
Judge Suzanne Van Wyk, Division of Administrative Hearings, Tallahassee

12:00 noon – 1:00 p.m.
Lunch (Included in registration fee)
Virlindia Doss, Executive Director of the Florida Ethics Commission, Tallahassee

1:00 p.m. – 1:30 p.m.
PERC – Jurisdiction & Pre-hearing Process
Moderator: *Robert Edward Larkin, III, Allen, Norton & Blue P.A., Tallahassee*
PERC Panelists:
Gregg Morton, Hearing Officer, Public Employees Relations Commission, Tallahassee
Bill Salmon, Hearing Officer Public Employees Relations Commission, Tallahassee
Cameron Leslie, Deputy Clerk, Public Employees Relations Commission, Tallahassee

1:30 p.m. – 2:30 p.m.
PERC – Evidentiary Hearing & Appeals to the Commission
Moderator: *Robert Edward Larkin, III, Allen, Norton & Blue P.A., Tallahassee*
PERC Panelists:
Donna M. Poole, Chairwoman, Public Employees Relations Commission, Tallahassee
Gregg Morton, Hearing Officer, Public Employees Relations Commission, Tallahassee
Bill Salmon, Hearing Officer Public Employees Relations Commission, Tallahassee
Cameron Leslie, Deputy Clerk, Public Employees Relations Commission, Tallahassee

2:30 p.m. – 3:30 p.m.
DEO – Trying the Reemployment Assistance Case
Moderator: *Eric J. Holshouser, Buchanan Ingersoll & Rooney, Jacksonville*
RAAC Panelists:
Magnus D. Hines, III, Deputy Director for RA Services, Tallahassee
Emily Eineman, Chief of RA Appeals, Tallahassee
Sondra Timpson, OMC Manager, Tallahassee
Monica Jackson, Administrator, RA Appeals Office, Tallahassee

3:30 p.m. – 3:45 p.m. **Break**

3:45 p.m. – 4:15 p.m.
RAAC – Review of Referee Decisions
Moderator: *Eric J. Holshouser, Buchanan Ingersoll & Rooney, Jacksonville*
RAAC Panelists:
Frank E. Brown, Chairman, Reemployment Assistance Appeals Commission, Tallahassee
John W. Kunberger, Deputy General Counsel, Reemployment Assistance Appeals Commission, Tallahassee
Amanda Hunter, Clerk, Reemployment Assistance Appeals Commission, Tallahassee

4:15 p.m. – 5:00 p.m.
DCA Appeals of Agency Final Orders in Employment & Labor Cases
Michael P. Spellman, Sniffen & Spellman P.A., Tallahassee
Panelists:
Hon. Joseph Lewis, Jr., First District Court of Appeal, Tallahassee
Hon. Stephanie W. Ray, First District Court of Appeal, Tallahassee
Hon. T. Kent Wetherell, II, First District Court of Appeal, Tallahassee

5:00 p.m. – 6:00 p.m.
Reception Honoring New PERC Commissioners (included in registration fee)

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ONE LOCATION: (003) UNIVERSITY CENTER CLUB, TALLAHASSEE, FL (FRIDAY, April 1, 2016)

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- ❑ Member of the Labor and Employment Law, Administrative Law or Government Lawyer Sections: $255
- ❑ Non-section member: $295
- ❑ Full-time law college faculty or full-time law student: $198
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The Florida Bar Continuing Legal Education Committee and the Labor and Employment Law Section present

Labor & Employment Law Section Audio Webcast Series 2015-2016 (2005R)

COURSE CLASSIFICATION: INTERMEDIATE LEVEL

AUDIO WEBCAST PRESENTATION DATES:

December 1, 2015; January 26, 2016; February 9, 2016; March 8, 2016; April 5, 2016

12:00 noon - 12:50 p.m.

Audio Webcast

Course No. 2005R

December 1, 2015

12:00 noon – 12:50 p.m.
Effective Mediation of Employment Cases (2007R)
Karen Evans, Litigation Resolution Inc., Miami

January 26, 2016

12:00 noon – 12:50 p.m.
White Collar Exemptions Update (2008R)
David H. Spalter, Jill S Schwartz & Associates, P.A., Winter Park

February 9, 2016

12:00 noon – 12:50 p.m.
Attorney's Obligations in the Techno Age (2009R)
Robert S. Turk, Stearns Weaver Miller Weissler Alhadeff & Sitterson, P.A., Miami

March 8, 2016

12:00 noon – 12:50 p.m.
Policy and Handbook Update – Data Ownership, Phones, LinkedIn and Facebook – Practical Tips for Evolving Issues (2060R)
Lindsey B. Wagner, Cathleen Scott & Associates, P.A., Jupiter

April 5, 2016

12:00 noon – 12:50 p.m.
When Associates Leave: Ethical and Legal Considerations (2010R)
Speaker TBA

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March 8, 2016

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April 5, 2016

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