www.laboremploymentlaw.org

the Checkoff

The Florida Bar
Vol. LVI No. 2
November 2016

A PUBLICATION OF THE FLORIDA BAR LABOR & EMPLOYMENT LAW SECTION

IN THIS ISSUE

The U.S. Supreme Court Docket: A Look Back and Forward

By M. Kristen Allman, Tampa

In the October 2015 Term, the U.S. Supreme Court considered a number of divergent issues impacting labor and employment law practitioners although, in the final analysis, its renderings were relatively limited and cautious with minimal immediate impact. In *Tyson Foods Inc. v. Bouaphakeo*,[1] yet another Fair Labor Standards Act ("FLSA") don-and-doff case, the Court was to address whether the differences between FLSA collective action members (i.e., those with injuries and those without) prohibited class treatment of such claims. However, the *Tyson* Court focused its attention on a second issue—whether damages could be averaged and aggregated across the collective class by statistical formula—and determined that they could be. In short, the Court found that *Tyson* employees could use averages and other statistical evidence to prove the class claims just as would be done to prove an individual member's class claim. The Court declined to address as premature the company's argument that the statistical sampling method used at trial caused damages to be awarded to collective action members without any actual injuries and instead indicated that the district court below had not yet determined how to allocate the $5.8 million judgment.

On the labor front, in *Friedrichs v. California Teachers Association*,[2] the Court wrestled

See "A Look Back and Foward," page 9

Dreadlocks and Race-Neutral Grooming Policies Under Title VII

By Carlo D. Marichal, Fort Lauderdale

In *Equal Employment Opportunity Commission v. Catastrophe Management Solutions*,[1] the plaintiff applied for a customer service position that did not have in-person contact with the public. The human resources manager advised the plaintiff she had been hired, but in a private meeting, she told the plaintiff that the company could not hire her with dreadlocks because "they tend to get messy."[2] The plaintiff refused to cut her hair, so the company rescinded the job offer. The company cited its race-neutral grooming policy, which read: "All personnel are expected to be dressed and groomed in a manner that projects a professional and businesslike image while adhering to company and industry standards and/or guidelines. . . . [H]airstyle should reflect a business/professional image. No excessive hairstyles or unusual colors are acceptable[.]"[3] The EEOC filed a complaint against the company, which the trial court dismissed pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure. The Amended Complaint contained the following allegations:

- Dreadlocks are "a manner of wearing hair that is common for black people and suitable for black hair texture. Dreadlocks

See "Grooming Policies," page 11

Message From the Chair

Recently I received an email from a long-time colleague who wished to be considered as a speaker for an upcoming seminar. Ahh, a perfect opening to climb back on my soapbox and extol the importance of Section involvement and Board Certification.

Our Section consists of many types of practitioners. Some are partners in large law firms; some are associates who draft the pleadings and do the footwork for senior partners. Others are government lawyers, or the only labor and employment attorney in a firm that practices another specialty. And, then there are small firm and sole practitioners who typically have many one-time clients. The common trait among all these lawyers? They know labor and employment law inside and out. The one thing many lack? Statewide recognition for their expertise among peers.

Granted, geography plays a part in this. If you practice in Bradenton, will others in Miami know who you are? Recently I had to select Section members to serve as co-chairs of our committees. I reviewed the entire Section roster, name by name, to identify lawyers whom I thought would lend diversify to our leadership or whom I recognized as contributing members of our Section—not an easy task with over 2000 members. I realized two things. First, due to geography, I know many fewer Section members personally than I thought I did. Second, Section members rarely take time to fill in or update their profiles on our Section website—a free resource to expand your name recognition.

So returning to the question at hand. How does the Section know that you would be the perfect speaker on a particular topic? Very simply, come introduce yourself at a Section activity or seminar, become involved, and/or obtain Board Certification! Only seven percent of eligible Florida Bar members are Board Certified in their practice areas. To get started on the road to Board Certification, see the information on page 3 and plan on attending the L & E Annual Update and Board Certification Review at the Gaylord Palms in Orlando on January 26-27, 2017. It's your Section. Let the Section help you get the recognition you deserve.

Leslie W. Langbein
2016-17 Chair

Visit our website:

www.laboremploymentlaw.org

the CHECKOFF

The Checkoff is prepared and published by The Florida Bar Labor and Employment Law Section.

Join A Network of Specialists: Become Board Certified In

Labor & Employment Law

The Florida Bar's certification program is consistently recognized as a national leader among other state programs.

Board certified lawyers are: "Evaluated for professionalism and tested for expertise."

Florida Bar board certification can benefit you in the following ways:

- ★ *Certification provides an objective measure that a potential client can rely upon when selecting a lawyer.*
- ★ *By becoming board certified, you join an existing network – and a directory of lawyers at **FloridaBar.org/certification** – of specialists who frequently refer others to specialists in their fields of practice.*
- ★ *Certification may enhance the stature of your law firm and can result in lower malpractice insurance rates. Florida Lawyers Mutual Insurance Co. offers a 10 percent discount to board certified lawyers.*

Minimum standards for labor and employment law certification, provided in Rule 6-23.3, include:

- **Practice of law for at least 5 years, or 4 years with an LL.M. in labor and employment law;**
- **Substantial involvement in the specialty of labor and employment law- 50% or more- in the 5 years immediately preceding application;**
- **60 hours of approved labor and employment law certification continuing legal education in the 3 years immediately preceding application;**
- **Peer review; and,**
- **A written examination.**

If you're considering board certification in labor and employment law, applications must be postmarked by August 31 for the following year's exam. Standards, policies, applications and staff contacts are available online at

FloridaBar.org/certification.

Fifteen Years is Too Long and Too Late Says the Eleventh Circuit in *Coffey*

By James C. Cunningham, Jr., Miami

Fifteen years after the defendant ceased complying with a consent decree is too late to seek enforcement. So said the Eleventh Circuit in *Coffey v. Braddy*.[1]

The lawsuit, which was brought in 1971 on behalf of past, present and future African American employees and job applicants to the fire department of the City of Jacksonville, alleged that the fire department's hiring practices violated the class members' civil rights. The same year, the parties stipulated to the entry of a consent decree requiring the city to "take whatever action is necessary to hire fifty (50%) percent black and fifty (50%) percent white individuals to fill funded positions of Fire Private from the appropriate eligible list until the ratio in the Fire Department of black firemen to white firemen equals the ratio of black citizens to white citizens in the City of Jacksonville."[2] Eleven years later, in 1982, the consent decree was amended to require the fire department to "hire an equal number of blacks and whites until the ratio of black fire fighters to white fire fighters reflects the ratio of black citizens to white citizens in the City of Jacksonville."[3] The city complied with the consent decree until 1992 when it unilaterally determined that it had met the requirements of the consent decree and ended its compliance.

Fifteen years later, in 2007, the plaintiffs filed a motion to show cause, contending that the city had been in contempt of the consent decree since 1992 when it admittedly stopped obeying its terms. In response, the city argued that once the ratio of African Americans to whites in the fire department matched the city's population ratios nothing more was required of it and that the motion was barred by laches. The city also requested that the consent decree be dissolved. Over the next six years, the parties engaged in settlement negotiations but were unsuccessful.

Following the failed settlement negotiations, in 2013 the district court conducted a multi-day evidentiary hearing. Based on that record, the district court said that a number of important questions were unresolved: first, how or why the city decided to stop complying with the consent decree; second, who made the decision to cease complying without court approval; third, whether in 1992 the black-to-white firefighter ratio reflected the black-to-white citizenry of the City of Jacksonville in 1992; fourth, whether the consent decree applied to the "City of Jacksonville" (as stated in the consent decree and which in 1990 was 25.99% African American and 74.02% white) or to the "Consolidated City of Jacksonville" (as stated in the parties' stipulation and which in 1990 was 25.08% African-American and 74.92% white) which was comprised of the city and Duval County; and, fifth, whether the figures used by the city in 1992 accurately reflected the black-to-white ratios, given that the records had been destroyed. The district court said that if the plaintiffs had moved in 1992 "the City would have had a lot of explaining to do."[4] But, as memories were incomplete, some city employees were dead, records were spotty and incomplete, and the city had a new hiring procedure since 1999, it was "simply too prejudicial to the City."[5] Consequently, the district court denied the motion based on laches and granted the city's motion to dissolve the consent decree.

On appeal, the Eleventh Circuit reviewed both orders for an abuse of discretion. The court determined that the district court had not abuse its discretion in applying the doctrine of laches because "the plaintiffs' fifteen-year delay in bringing their motion to show cause was not excusable and unduly preju-

The Section seeks 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@theflawfirm.com*) or Carlo D. Marichal (*cmarichal@BankerLopez.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.

REWARD: $150*

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

diced the City's ability to defend itself,"[6] and "unclear memories and incomplete documents made it impossible to determine whether the City was, in fact, in contempt when it ended compliance in 1992."[7] The appellate court noted the evidence demonstrated that the plaintiffs had known since at least 1993 that the city had ceased complying with the consent decree, and the plaintiffs knew that African Americans were unrepresented among new hires since that time. Thus, the court concluded that the plaintiffs had enough information in 1993 to have raised the issue in court.

The appellate court also observed, as had the district court, that the parties' stipulation required the black-to-white ratios to "equal" that of the general population but the consent decree ordered that they only "reflect" the ratio, leaving it unclear what standard to use on the motion. Next, the parties' stipulation required the hiring of fire department "employees" but the consent decree required hiring "fire fighters," once again leaving it unclear who fell within the terms of the consent decree. Finally, the Eleven Circuit noted it was unclear whether "city" referred to the City of Jacksonville or to the Consolidated City of Jacksonville which included all of Duval County. The plaintiffs did not provide testimonial or documentary evidence that clarified this ambiguity. The court concluded that the district court did not abuse its discretion in denying the show cause motion.

The Eleventh Circuit then turned its attention to whether discretion was abused when the district court dissolved the consent decree; none was found because constitutional law had changed since the consent decree was initially entered in 1971. Relying on *City of Richmond v. J.A. Croson Co.*,[8] the court said that "quota-based hiring required by the decree would not likely pass strict scrutiny."[9]

In the end, the Eleventh Circuit affirmed the district court's determination that an attempt to enforce a consent decree made fifteen years after the alleged violation was too long, too late.

J. CUNNINGHAM

James C. Cunningham, Jr. *is a partner with Berger Singerman in Miami and a member of its dispute resolution team. He received his undergraduate and law degrees from the University of Florida. He has represented municipal governments, media, individuals and businesses in significant First Amendment, equal protection and employment discrimination cases. Mr. Cunningham has also represented employees in vindicating their rights against domestic and foreign business entities for breaching employment and consulting contracts; invasions of privacy and conspiracies to invade privacy, and defamation and conspiracies to defame. He has defended businesses against claims of violating the Fair Labor Standards Act. He is a former member of the executive council of the General Practice Section of The Florida Bar and a former member of the Access to Civil Justice Advisory Group (mandated by Congress in the Civil Justice Reform Act of 1990 for each of the nation's federal district courts). He has been twice appointed as a member of the Federal Magistrate Judge Selection Committee for the Southern District of Florida.*

Endnotes

1 Case No. 15-1112, 2016 WL 4435614 (11th Cir. 2016).
2 *Id.* at *1.
3 *Id.*
4 *Id.* at *3.
5 *Id.*
6 *Id.* at *4.
7 *Id.* at *5.
8 488 U.S. 469, 507 (1989).
9 *Id.* at *7.

When USERRA, the FAA, and State Law Collide

By Greg K. Demers, Tampa

In *Bodine v. Cooks Pest Control, Inc.*, the Eleventh Circuit analyzed the intersection of the Uniformed Services Employment and Reemployment Rights Act of 1994 (USERRA), the Federal Arbitration Act (FAA), and state arbitration laws.[1] This case could prove valuable to employers seeking to enforce arbitration agreements against their service member employees.

Bodine involves a retaliation claim against a former employer. The plaintiff was a member of the United States Army Reserve and claimed that his employer repeatedly discriminated against him due to his military service. The defendant moved to dismiss the lawsuit, arguing that the arbitration provision in their employment agreement controlled. The plaintiff asserted that the arbitration agreement was unenforceable because two portions of the contract ran afoul of USERRA: (1) a limitation on the employee's arbitration costs, and (2) a six-month statute of limitations term. The defendant acknowledged that the terms violated USERRA but contended that the agreement's severability clause could be used to remove the offending terms from the arbitration agreement while retaining and enforcing the remainder according to the FAA. The plaintiff responded that, notwithstanding the FAA, USERRA's non-waiver provision precluded enforcement of the arbitration agreement in its entirety.

The district court applied the FAA's liberal policy favoring arbitration agreements and Alabama state law favoring severability.[2] The trial court dismissed the case, ordered the offending provisions of the agreement removed and ordered the plaintiff to submit his claims to arbitration.[3]

The FAA provides for contractually-based compulsory and binding arbitration in employment contracts of non-transportation workers.[4] The FAA obliges courts to "rigorously enforce arbitration agreements according to their terms, including . . . claims that allege a violation of a federal statute, unless the FAA's mandate has been overridden by a contrary congressional command."[5]

USERRA outlaws discrimination against members of the military for their military service.[6] USERRA also contains a non-waiver provision that prohibits contracting parties from circumventing USERRA by reducing, limiting or eliminating rights protected under the Act.[7] The relevant provision provides:

> This chapter supersedes any State law (including any local law or ordinance), contract, agreement, policy, plan, practice, or other matter that reduces, limits, or eliminates in any manner any right or benefit provided by this chapter, including the establishment of additional prerequisites to the exercise of any such right or the receipt of any such benefit.[8]

On appeal, the plaintiff took the position that the term "supersedes" means "invalidates" and that any arbitration agreement is void in its entirety if it offends USERRA's non-waiver provision. The Eleventh Circuit found this interpretation of USERRA's language unpersuasive. The court examined the dictionary definition of "supersedes" and found that the general meaning of the word is not "automatically invalidates." The court also found that construing USERRA's non-waiver provision to replace conflicting terms, while retaining the terms more beneficial than USERRA, provided "the greatest benefit to our servicemen and women."

It is important to note that where an arbitration agreement contains invalid terms, but the overarching contract has a severability clause, the FAA requires an examination of state law to determine whether the severability clause "may be used to remove the offending terms in the arbitration agreement."[9] The Eleventh Circuit determined that the district court did not err in analyzing the contract under Alabama law to determine whether the arbitration agreement could be enforced with the invalid terms removed. Alabama law "gives full force and effect to severability clauses."[10] A case arising under Florida contract law would likely be decided similarly to the instant case as Florida also views severability clauses favorably.[11]

The Eleventh Circuit held that USERRA's non-waiver provision does not automatically void or invalidate an entire arbitration agreement that contains terms that violate USERRA. The court also held that the district court exceeded its role by removing the USERRA-offending terms. The arbitrator, not the district court, must determine the legitimacy of the terms of the arbitration agreement.

G. DEMERS

***Greg K. Demers** is an associate attorney at The Bleakley Bavol Law Firm in Tampa. Mr. Demers practices in the areas of labor and employment, product liability, and commercial litigation. He received his undergraduate degree from the University of Central Florida and his law degree from the University of Florida Levin College of Law.*

Endnotes

1 *Bodine v. Cook's Pest Control Inc.*, -- F.3d --, 2016 WL 4056031 (11th Cir. 2016).

2 *Bodine v. Cook's Pest Control, Inc.*, No. 2:15-cv-00413-RDP, 2015 WL 3796493 (N.D. Ala. June 18, 2015)

3 *Id.* at *4.

4 9 U.S.C. ch. 1.

5 *Bodine*, 2016 WL 4056031 at *3 (quoting *American Express Co. v. Italian Colors Rest.*, 133 S. Ct. 2304, 2309 (2013) (internal quotation marks omitted).

6 38 U.S.C. § 4301(a)(3).

7 *Id.* § 4302(b).

8 *Id.*

9 *Jackson v. Cintas Corp.*, 425 F.3d 1313, 1317 (11th Cir. 2005).

10 *Bodine*, 2016 WL 4056031 at 5 (citing *Sloan Southern Homes, LLC v. McQueen*, 955 So. 2d 401, 404 (Ala. 2006)).

11 *Penberthy v. AT & T Wireless Servs., Inc.*, 354 F. Supp. 2d 1323, 1329 (M.D. Fla. 2005) ("Florida courts support giving credence to a contract's severability clause if a portion of the arbitration provision is invalid and if the contract is capable of enforcement absent the invalid provision."); s*ee also Pilato v. Edge Inv'rs, L.P.*, 609 F. Supp. 2d 1301, 1309 (S.D. Fla. 2009) (citing *Fonte v. AT & T Wireless Servs., Inc.*, 903 So. 2d 1019, 1024 (Fla. 4th DCA 2005), which wrote, "Severability clauses are recognized and enforceable under Florida law.").

Department of Labor Pays $7,000,000 for Alleged Violations of the FLSA

By Erin G. Jackson and Ashley Tinsley, Tampa

A ten-year battle is finally over between the Department of Labor ("DOL") and the American Federation of Government Employees Local 12 ("AFGE"), AFL-CIO, a union that represents workers, including non-supervisory Department of Labor employees, in the Washington D.C. area.

In 2006, the AFGE filed a collective action grievance on behalf of the entire bargaining unit, alleging that the Department of Labor violated the Fair Labor Standards Act ("FLSA") by failing to compensate thousands of its employees for overtime and "off-the-clock" work. The grievance also included claims that the DOL misclassified workers as overtime exempt pursuant to the FLSA's administrative exemption. According to AFGE Local 12 Union President Alex Bastini, several years after the initial grievance was filed the DOL reclassified employees as nonexempt and eligible for time-and-a-half when working more than forty hours per week.

After a decade of litigation, the DOL ultimately settled the suit for $7,000,000, with payouts expected to be made by the end of the year. The settlement will cover both current and former members of the AFGE Local 12 bargaining unit who were employed in the national office from 2006 to the present. The union's attorney, Keith Kauffman of Snider and Associates, estimates there will be 2000 to 3000 employees receiving back wages. In an August 12th press release issued by Kauffman, Bastini states "how difficult it was to challenge and then fight the Department of Labor for ten years over its own failure to adhere to these rules and failure to properly compensate its own employees." The press release also notes the settlement's non-monetary value of "ensuring that the Agency follows the same law it enforces."

Of course, as the federal agency that promulgates and enforces overtime rules, the DOL's $7,000,000 loss is ironic. However, more important than the irony is the warning this settlement serves to all employers. Employers must continue to take precautions as overtime and wage regulations continue to change. If nothing else, this settlement suggests that all employers—even those who regulate—are susceptible to confusion, mistakes and violations when it comes to the administration of these rules.

E. JACKSON

***Erin G. Jackson** is a shareholder at Thompson, Sizemore, Gonzalez & Hearing, P.A. in Tampa and is Board Certified by The Florida Bar in Labor and Employment Law. She represents both public sector and private sector employers in all matters related to labor and employment law. Ms. Jackson served as the 2013-2014 co-chair for the Labor and Employment Certification Review Course for The Florida Bar. In law school, she was a member of the Florida State University Law Review and was associate editor for notes and comments. She was also a member of the mock trial team and served as a law clerk/intern to Justice R. Fred Lewis, Florida Supreme Court. Ms. Jackson has been recognized as one of Florida's "Legal Elite Up and Coming" by Florida Trend magazine, as a "Rising Star" and a "Super Lawyer" by Super Lawyers and has been named as a member of Florida's "Legal Elite" by Florida Trend.*

A. TINSLEY

***Ashley Tinsley** is an associate at Thompson, Sizemore, Gonzalez & Hearing, P.A. in Tampa. She practices management-side labor and employment law representing both public and private sector employers. She graduated magna cum laude from the University of South Carolina and received her J.D., magna cum laude, from the Florida State University College of Law. While in law school, Ms. Tinsley served as an article editor for Law Review and was a member of the moot court team. She also served as a judicial extern for the Honorable Judge Mark E. Walker of the United States District Court for the Northern District of Florida.*

A LOOK BACK AND FORWARD,

continued from page 1

with California teachers' challenge to the public employers' requirement that non-union employees in the bargaining unit be required to pay agency fees so long as such monies are not used to fund the union's political or ideological activities. The case, which was decided after Justice Scalia's passing, resulted in a 4-4 per curiam opinion that allows unions to require the payment of such fees by non-union employees in the teachers' bargaining unit.

In *Green v. Brennan*,[3] the Court considered whether the statute of limitations on a constructive discharge claim began at the time of the last discriminatory act (i.e., the earlier event) or at the time of the employee's resignation (i.e., the later event). In *Green*, a black postal service employee, who had risen to the level of postmaster in a Denver suburb but was passed over for promotion and was under an internal investigation, entered into an agreement in December 2009 to retire at the end of March 2010. Pursuant to this deal, if Green did not retire in March 2010, he would be demoted to a lesser paying position hundreds of miles away in a small Wyoming town of less than 500 people. In February 2010, Mr. Green decided he was not going to retire or be demoted and told the postal service he would resign instead. Thereafter, Green claimed he was forced to resign in retaliation for his earlier discrimination claims. The lower courts said the employee's time to file an EEOC Charge of Discrimination, at the latest, ran from the December 2009 deal. Justice Sotomayor rejected this assertion and noted that practical sense dictated that Green's time to act did not begin to run until he resigned.

The Supreme Court, in *Montanile v. Board of Trustees of the National Elevator Industry Health Benefit Plan*,[4] considered when ERISA plan fiduciaries could equitably recover overpayments to an employee/plan participant when it could not identify sufficient funds within the individual's possession and control at the time the overpayment claim was asserted. In *Montanile*, the employee/plan participant was in his vehicle when he was hit by a drunk driver. The plan paid just over $121,000 for Montanile's medical expenses. Subsequently, Montanile settled his claims against the drunk driver for $500,000, of which nearly $264,000 went to his legal counsel. Following the settlement, the plan's trustees sought to recoup the monies paid for Montanile's medical expenses from him, but he did not have sufficient monies for the plan to recoup the more than $121,000, nor could the plan identify any such funds within his possession or control. In an 8-1 opinion, Justice Thomas held that when a plan participant completely dissipates third-party settlement monies on non-traceable items, plan fiduciaries cannot equitably sue to recover expense payments from the individual's general assets. The Court additionally noted that the plan had sufficient notice of Montanile's settlement with the drunk driver and could have acted more quickly to preserve the settlement funds. The plan waited more than six months to pursue the settlement monies following the breakdown of negotiations with Montanile and failed to object when Montanile's attorney informed it that the remaining settlement funds would be disbursed unless the plan timely objected, which it did not do.

Arbitration agreements were again the focus in *DIRECTV Inc. v. Imburgia*,[5] which involved a consumer class action dispute over early termination fees. The underlying appellate decision in *DIRECTV* was contrary to the U.S. Supreme Court's 2011 decision in *AT&T Mobility LLC v. Concepcion*[6] favoring arbitration agreements as written. The appellate court in *DIRECTV* applied state law to an arbitration agreement that contained a class waiver, finding that such waiver was unenforceable. In doing so, the court gave no relief to employers looking to avert FLSA collective actions which have been prolific in California with arbitration agreements. In a 6-3 decision, the Supreme Court in *DIRECTV* found that the California appellate court had improperly ignored the *Concepcion* decision, reiterating that the Federal Arbitration Act controls despite state law preferences to the contrary. In the employment law context, *DIRECTV* provides employers with a solid basis for continuing to seek class and collective waivers in individual arbitration agreements.

The Supreme Court in *Campbell-Ewald Co. v. Gomez*[7] was given the opportunity to revisit what it did not directly decide in *Genesis Healthcare v. Symczyk*[8] and put to rest—at least temporarily—whether an offer of complete relief moots a lawsuit. An added wrinkle in *Campbell-Ewald* was whether an alleged class claim, where no class had yet been certified, altered the outcome of a full relief claim. Although *Campbell-Ewald* was not a Fair Labor Standards Act case, its outcome is informative for such lawsuits. In *Campbell-Ewald*, a Navy subcontractor offered Mr. Gomez the maximum he could individually recover under the Telephone Consumer Protection Act for its alleged unsolicited recruiting message. Mr. Gomez did not accept the offer. Thereafter, the advertising agency moved to dismiss Gomez's claim for lack of subject matter jurisdiction and asserted that his claim was made moot by the full relief offer of judgment which extinguished any case or controversy. In a 6-3 decision authored by Justice Ginsburg, the Court upheld the Ninth Circuit's decision on the basis that, under contract law, an unaccepted settlement offer has no force or effect and creates no lasting rights or obligations.[9] Rather, as pointed out by Justice Ginsburg, "With the offer off the table, and the defendant's continuing denial of liability, adversity between the parties persists."[10] The Court saw no distinction between the plaintiff's individual claims and that of the putative class in finding that these claims were not mooted by the unaccepted full relief offer of judgment. The Supreme Court, however, did hint, without deciding, that the outcome might have been different had the advertising company deposited the full amount of Gomez's claim in an account payable to him and had a judgment been entered for him in that amount.

Last term, the Supreme Court had the opportunity to address, again, in an epic eight-year battle, the continued viability of affirmative action in *Fisher v. University of Texas at Austin*.[11] The Court had previously overturned a favorable affirmative action decision

continued, next page

for the university in 2013 when it told the Fifth Circuit Court of Appeals to decide with "exacting scrutiny" when affirmative action policies are "narrowly tailored" to achieve a diverse student body with a "broad array of qualifications and characteristics."[12] In *Fisher*, an unsuccessful female applicant sued the University of Texas at Austin ("UT") claiming she had a better academic record than certain admitted minority students. The Supreme Court upheld the Fifth Circuit's second decision denying her admittance. Writing for the majority, Justice Kennedy held that UT's two-component admission program, which began in 2004, did not violate the equal protection clause. Seventy-five percent of incoming freshmen were accepted on the basis that they graduated from a Texas high school in the top ten percent of their class. The remaining quarter of the incoming freshman class was selected on a "holistic" basis of various factors including SAT scores, high school academic achievement, personal achievements, extracurricular activities, work experience, leadership, essays, socio-economic status, language spoken at home and race. It was this second component that was challenged here. The Court in *Fisher* noted that despite substantial university studies and review, race-neutral programs had not achieved UT's diversity goals. In holding that UT's affirmative action program was constitutional, the Court noted that UT has an ongoing obligation to constantly and deliberately reflect on its admissions policies; that it has to ensure that race plays no greater role than necessary to meet a compelling interest; and that a compelling interest is not to enroll a certain number of minority students, but rather, to provide the educational benefits of a diverse student body. In light of the *Fisher* decision, employers can expect that voluntary diversity programs and government vendors' affirmative action programs will continue to be favored for the foreseeable future as providing tangible and intangible societal benefits.

Another noteworthy Supreme Court decision from the last term is *Encino Motorcars LLC v. Navarro*[13] where the Court, in essence, reprimanded the Department of Labor ("DOL") for failing to adequately explain why it abandoned in 2011 its long-held position that service advisors at automotive dealerships were exempt from overtime compensation under the FLSA. While the *Encino Motorcars* decision did not determine the overtime eligibility of such service advisors, the Court insisted that DOL regulations should have provided a more thorough explanation of the agency's complete change in position with regard to the service advisors' exemption status. Practically, this decision may prove useful for negotiating with government agencies that, without adequate insight, completely alter positions on which employers have long relied.

Likewise, employment law practitioners will want to take note of the Supreme Court's ruling in *CRST Van Expedited Inc. v. EEOC*[14] where the Court ruled that the trucking company employer did not need to procure a favorable judgment on the merits in a multi-plaintiff Title VII sexual harassment case in order to be a prevailing party for attorneys' fee purposes. In *CRST*, the lower courts had taken issue with the EEOC's failure to fully meet its pre-suit investigation, reasonable cause determination and conciliation obligations as to all of the involved individual employees.

Looking ahead to the coming U.S. Supreme Court Term, the Court has already rejected review of the *O'Bannon* student athlete compensation case from the Ninth Circuit Court of Appeals where it was determined that student athletes need not be paid beyond the cost of attending college. However, the Court is set to address in *McLane Co. Inc. v. EEOC*, Case No. 15-1248, whether EEOC subpoenas are entitled to deference or whether they should be subject to heightened court review where the employer disputes a subpoena's scope with regard to employees' personally identifiable information. The NLRB has also asked the Supreme Court to once again address whether class action waivers in arbitration are enforceable in light of the Fifth Circuit's recent decision in *Murphy Oil*, Case No. 16-307, given its earlier *D.R. Horton* decision. In the employment arena, there are also petitions for certiorari pending in cases seeking to protect obese individuals under the Americans with Disabilities Act; to find that the use/misuse of a noose in the workplace for harassment purposes is sufficiently severe to be actionable for race discrimination under Title VII; and to limit the DOL's ability to restrict employers' use of tip pooling under the FLSA. It should be an interesting new term considering the vacant justice seat and the recent tendency toward split decisions.


K. ALLMAN

***Kristen Allman** is formerly Florida Bar Certified in Labor and Employment Law. She graduated from Florida State University College of Law with honors and interned for then-Florida Supreme Court Justice Rosemary Barkett, now a judge on the Eleventh Circuit Court of Appeals. She is also a graduate of the University of Florida where she received her Bachelor of Science, was inducted into Florida Blue Key and was chosen for the U.F. Hall of Fame. In April 2015, Ms. Allman joined Bleakley Bavol in Tampa to head up the firm's expanding employment law practice. She is a former partner/shareholder with two national employment law firms, previously worked as senior corporate counsel for a Fortune 100 subsidiary where she oversaw employment law matters for more than twenty-six companies and, most recently, was Of Counsel with another national employment law firm.*

Endnotes

1 136 S. Ct. 1036 (2016).
2 135 S. Ct. 2933 (2015).
3 136 S. Ct. 386 (2015).
4 136 S. Ct. 561 (2016).
5 136 S. Ct. 463 (2015).
6 563 U.S. 333 (2011).
7 136 S. Ct. 663 (2016).
8 133 S. Ct. 1523 (2013).
9 *Id.* at 666.
10 *Id.*
11 136 S. Ct. 2198 (2016).
12 *Fisher v. Univ. of Tx. at Austin*, 133 S. Ct. 2411 (2013).
13 136 S. Ct. 2117 (2016).
14 136 S. Ct. 1642 (2016).

GROOMING POLICIES,
continued from page 1

are formed in a black person's hair naturally, without any manipulation, or by manual manipulation of hair into larger coils."

- "During the forced transportation of Africans across the ocean, their hair became matted with blood, feces, urine, sweat, tears, and dirt. Upon observing them, some slave traders referred to the slaves' hair as 'dreadful,'" and dreadlock became a "commonly used word to refer to the locks that had formed during the slaves' long trips across the ocean."
- Race "is a social construct and has no biological definition."
- "[T]he concept of race is not limited to or defined by immutable physical characteristics."
- According to the EEOC Compliance Manual, the "concept of race encompasses cultural characteristics related to race or ethnicity," including "grooming practices."
- Although some non-black persons "have a hair texture that would allow the hair to lock, dreadlocks are nonetheless a racial characteristic, just as skin color is a racial characteristic."
- The hair of black persons grows "in very tight coarse coils."
- "Historically, the texture of hair has been used as a substantial determiner of race," and "dreadlocks are a method of hair styling suitable for the texture of black hair and [are] culturally associated" with black persons.
- When black persons "choose to wear and display their hair in its natural texture in the workplace, rather than straightening it or hiding it, they are often stereotyped as not being 'teamplayers,' 'radicals,' 'troublemakers,' or not sufficiently assimilated into the corporate and professional world of employment."
- A "prohibition of dreadlocks in the workplace constitutes race discrimination because dreadlocks are a manner of wearing the hair that is physiologically and culturally associated with people of African descent."
- The company's decision to "interpret its race-neutral written grooming policy to ban the wearing of dreadlocks constitutes an employment practice that discriminates on the basis of race."[4]

The EEOC argued that "dreadlocks are a natural outgrowth of the immutable trait of black hair texture; that the dreadlocks hairstyle is directly associated with the immutable trait of race; that dreadlocks can be a symbolic expression of racial pride; and that targeting dreadlocks as a basis for employment can be a form of racial stereotyping."[5]

On appeal, the Eleventh Circuit opined that, "Title VII protects persons in covered categories with respect to their immutable characteristics, but not their cultural practices," and it reinforced the distinction between immutable and mutable characteristics.[6] The court gave examples of discrimination based on immutable versus mutable characteristics. It wrote that discrimination based on black hair texture is unlawful discrimination whereas discrimination based on black hairstyle is not.[7]

The court then wrestled with the term "race" and acknowledged the term's several theories and definitions. It noted that even legal scholars could not uniformly define "race" in the Title VII context and foresaw problems courts would face if "culture" was encompassed by the term "race"; examples of problems would include "whether cultural characteristics or traits associated with one racial group can be absorbed by or transferred to members of a different racial group."[8] It noted that accepting the "race as culture" argument would leave courts with more questions than answers.[9] In concluding, the Eleventh Circuit simply wrote that Congress should amend Title VII to include a definition of "race."

The EEOC's suit may have survived a 12(b)(6) motion to dismiss if it had alleged that the race-neutral grooming policy had a disparate impact on African Americans.[10] Alternatively, it could have alleged that dreadlocks are an immutable characteristic of African Americans.[11] Had either of the two been alleged, the appellate court may have held the EEOC stated a claim. Notwithstanding, that does not mean that it would have survived a motion for summary judgment. This opinion approves of race-neutral grooming policies that are attacked under a Title VII disparate treatment theory. In addition, it sheds light on the Eleventh Circuit's reluctance to expand the meaning of "race" without Congress first defining the term in Title VII.


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 –F.3d–, 2016 WL 4916851 (11th Cir. 2016).
2 *Id.* at *2.
3 *Id.* at *2-3.
4 *Id.*
5 *Id.* at *4.
6 *Id.* at *9.
7 *Id.*
8 *Id.* at *11.
9 *Id.*
10 *See id.* at *4 (noting that the EEOC confirmed at oral argument that it was proceeding solely under a disparate treatment claim).
11 *See id.* at *2 ("Significantly, the proposed amended complaint did not allege that dreadlocks are an immutable characteristic of black persons.").

Labor and Employment Law Section Hall of Fame

2016 Nomination Form
for Hall of Fame

***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: Angie 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: _ _____

Members of the Section

HALL OF FAME

Class of 2012 (Inaugural Class)

Granville M. Alley, Jr. (1929-1976)
Steven M. Bloom (1950-1990)
Harold A. Boire (1914-2009)
John M. Breckenridge, Jr. (1946-1999)
Charles (Charlie) H. Kossuth, Jr. (1938-2011)
Irving Miller (1940-2003)
John W. Robinson, IV (1950-2011)
Leo P. Rock, Jr. (1939-2009)
William E. Sizemore (1945-2004)
Harrison C. “Tommy” Thompson, Jr. (1925-1994)
W. Gary Vause (1943-2003)

Class of 2013

Otto R.T. Bowden Sr. (1915-2011)

Class of 2014

Richard Harlan Frank (1926-2012)
Theo Hamilton (1905-1961)

Class of 2015

David V. Kornreich (1943-2014)

CASE NOTES

FEDERAL COURTS

Eleventh Circuit

By Jeffrey D. Slanker

Physician whose contract with medical school required him to have hospital privileges could assert § 1981 claims for discrimination and retaliation after hospital suspended his privileges allegedly based on his race.

Moore v. Grady Mem'l Hosp. Corp., --F.3d--, 2016 WL 4409291 (11th Cir. 2016).

Dr. Ronald E. Moore, Jr. brought claims against Grady Memorial Hospital, some of which alleged race discrimination and retaliation in violation of 42 U.S.C. § 1981. The district court dismissed those claims under Rule 12(b)(6) of the F.R.C.P. The Eleventh Circuit affirmed in part and reversed in part. The plaintiff alleged that his hospital privileges were suspended due to his race (African American) and also due to a complaint he made that patients were being referred to other doctors who were white. The suspension of those privileges, Dr. Moore argued, inter alia, interfered with his employment contract with the Morehouse School of Medicine ("MSM"), which required that he have hospital privileges. Those privileges, in turn, arose out of an affiliation agreement between the hospital and MSM. The Eleventh Circuit affirmed the district court's dismissal of Dr. Moore's Section 1981 claim that was premised on the affiliation agreement but held that the district court improperly dismissed the retaliation and race discrimination claims that were based on his employment contract with MSM. The court reasoned that the actions of Grady interfered with Moore's contract with MSM and that this interference, if due to race discrimination or retaliation premised on race, could support a Section 1981 claim.

Plaintiff's age discrimination claim against individuals and state university board of regents failed where plaintiff did not allege that the purported discrimination was not rationally related to a legitimate state interest, and the state board was entitled to immunity.

Duva v. Bd. of Regents of the Univ. Sys. of Ga., --Fed. App'x--, 2016 WL 3454155 (11th Cir. 2016).

This case concerned Anthony Duva, a 66-year-old former employee of the Georgia University Board of Regents. He brought claims against the Board and four of its executives asserting violations of the Age Discrimination in Employment Act ("ADEA") and of 42 U.S.C. Section 1983 as a vehicle for an alleged violation of the equal protection clause premised on age discrimination. The district court dismissed the complaint. The Eleventh Circuit affirmed the decision of the district court and specifically held that because the University System Board was an arm of the State of Georgia, it was entitled to immunity from ADEA claims under the Eleventh Amendment of the Constitution. Regarding the Section 1983 claim against the individual defendants premised on an equal protection clause violation, the Eleventh Circuit noted that many courts hold that the ADEA precludes claims like Mr. Duda's from being filed under Section 1983, but the Eleventh Circuit did not affirm the dismissal of the claim on this ground. Rather, the Eleventh Circuit held that age is not a suspect classification or a classification otherwise entitled to scrutiny; therefore, the discrimination need only be rationally related to a legitimate state interest. The Eleventh Circuit upheld the district court's finding that the plaintiff failed to state a claim in this regard because he "failed to allege that the individual defendants' purported age discrimination lacked a rational relationship to a legitimate state interest."

Summary judgment against plaintiff/employee's claims of discrimination and retaliation affirmed where she failed to show that the legitimate non-discriminatory reasons proffered for her demotion were pretextual and where the unfair treatment she complained of was not an unlawful employment practice.

Schrock v. Publix Super Mkts., Inc., --Fed. App'x--, 2016 WL 3425124 (11th Cir. 2016).

The plaintiff, Schrock, filed claims of discrimination and retaliation under federal civil rights laws against Publix after she was demoted and then transferred to a different store. The Eleventh Circuit affirmed summary judgment for the employer. The court held that even though Schrock might have been qualified to perform the position (bakery manager) from which she was demoted, she could not show at the summary judgment stage that the legitimate non-discriminatory reasons proffered for the demotion were pretext to engage in impermissible discrimination. As to the retaliation claims asserted by Schrock, the Eleventh Circuit held that the plaintiff did not have an actionable claim of retaliation because her complaint was not reasonable. "The unfair treatment Ms. Schrock complained of—requiring her to manage the bakery without sufficient time to do so—is not an unlawful employment practice under Title VII." The court held that an employer's work demands, even if unjustified, without more, are not discriminatory and, therefore, the complaints regarding the same were not protected.

Summary judgment against plaintiff's claims of employment discrimination affirmed where she failed to show that the legitimate non-discriminatory reason (conflict with others in her department) proffered for the non-renewal of her contract were pretextual.

Holmes v. Jefferson Cty. Sch. Dist., --Fed. App'x--, 2016 WL 4056029 (11th Cir. 2016).

This case concerned an appeal of the district court's grant of summary judgment in favor of the school district on Ms. Holmes' complaint alleging employment discrimination. The Eleventh Circuit affirmed the decision of the district court and held that Ms. Holmes failed to show that the school district's proffered reasons for the non-renewal of her contract were a pretext for race discrimination. The decision not to renew Ms. Holmes' contract—and the decision to renew another employee's contract who was outside of Ms. Holmes' protected class—was due to conflicts within Ms. Holmes' department in which she was involved. The employee whose contract was renewed was believed not to be involved in the conflicts and had greater experience than Ms. Holmes. The Eleventh Circuit held that Ms. Holmes was unable to overcome summary judgment because she could not show that the proffered reasons presented by the school district for the non-renewal of her contract were pretextual. The Eleventh Circuit noted that Ms. Holmes did not dispute there was conflict in the department, nor that the individual retained in her department had more experience than she did. She also did not dispute that the district believed she had performance problems.

Summary judgment entered against attorney on her FLSA claim for overtime wages from former employer affirmed because lawyers are exempt from FLSA overtime provisions.

Okonkwo v. The Callins Law Firm, LLC, --Fed. App'x--, 2016 WL 4916850 (11th Cir. 2016).

The plaintiff in this case, Antonia Okonkwo, appealed a grant of summary judgment by the district court on her claims seeking to recover overtime wages under the Fair Labor Standards Act, 29 U.S.C. § 201 ("FLSA"). The Eleventh Circuit affirmed the decision of the district court. The plaintiff worked as an attorney for the defendant law firm. The Eleventh Circuit noted that while the FLSA generally provides that those who work more than forty hours per week are entitled to overtime compensation, lawyers are exempt from these overtime provisions pursuant to the FLSA and Department of Labor regulations interpreting the FLSA.

Under the rules of civil procedure, initial jury trial demand in original complaint could be withdrawn only upon consent of the parties so it was error to deny jury trial in failure-to-hire discrimination case because amended complaint omitted the demand for jury trial.

Thomas v. Home Depot USA, Inc., --Fed. App'x--, 2016 WL 4698247 (11th Cir. 2016).

This case was an appeal from a decision of the district court to deny a jury trial to the pro se plaintiff on his failure-to-hire racial discrimination claim. The Eleventh Circuit noted that the initial complaint contained a jury demand, but an amended complaint omitted that jury demand. The district court denied the right to a jury trial and held that the plaintiff's amended complaint, lacking a jury trial demand, superseded the original complaint. After a bench trial and the entry of judgment in favor of Home Depot, Thomas appealed. The Eleventh Circuit found that the denial of a jury trial was error on the district court's part and specifically held that the initial jury trial demand could be withdrawn only upon consent of the parties under the pertinent rules of civil procedure, which was not the case.

Summary judgment affirmed in favor of defendant county where plaintiff in discrimination case had worked for the district attorney's office, a legal entity distinct from the county that could not be deemed a joint employer of plaintiff.

Peppers v. Cobb Cty., Georgia, No. 15-10866, --F.3d-- (11th Cir. 2016).

This case concerned allegations arising under Title VII and the Equal Pay Act and, specifically, allegations of sex discrimination. The plaintiff in the case, Jeff Peppers, is a retired criminal investigator who had worked with the Cobb Judicial Circuit District Attorney's Office. His complaint, lodged against Cobb County, alleged that a less experienced female was earning more than he was for the same job. After the district court granted summary judgment for Cobb County, the matter was appealed. The Eleventh Circuit affirmed, reasoning that the complaint was pressed against the wrong entity—Cobb County—and that Cobb County was not the plaintiff's joint employer and could not be aggregated with the District Attorney's office as a single employer. The Eleventh Circuit found that the District Attorney and Cobb County are distinct legal entities under state law and even though the county was responsible for approving the District Attorney's budget and for paying Peppers' salary and benefits, the county did not control the fundamental aspects of the employment relationship and that ultimately the nature of the relationship between the county and the District Attorney's office was insufficient to support the assertion that the two were joint employers.

Summary judgment against African American plaintiff on failure-to-promote claim affirmed where plaintiff failed to demonstrate that employer's legitimate non-discriminatory reason for instead promoting a white employee was pretextual.

Dishman v. State of Fla. Dep't of Juvenile Justice, --Fed. App'x--, 2016 WL 4575558 (11th Cir. 2016).

The plaintiff, Ms. Dishman, alleged that the Florida Department of Juvenile Justice did not promote her because she was African American. A white employee was promoted instead. The district court granted summary judgment to the Department of Juvenile Justice because Dishman failed to demonstrate

that the Department's legitimate non-discriminatory reason for promoting the white employee was pretextual. The Eleventh Circuit affirmed, finding that the reasons for the selection for the position were not pretextual. The court noted that Ms. Dishman and the selected candidate had similar qualifications and experience and that Dishman was not more qualified than the selected candidate. The court also held that Dishman's assertion that a second round of interviews, inconsistent with hiring policies, demonstrated pretext was unavailing as the second round of interviews were held for legitimate reasons, due to deficiencies in the first round of interviews. The Eleventh Circuit also held that reliance on subjective considerations for selecting a candidate does not show pretext, and such reliance on subjective considerations is supported by precedent and not demonstrative of discrimination. Finally, the court noted that there was no evidence suggesting the actual decision not to promote Dishman was discriminatory.

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.*

DISTRICT COURTS

By J. Wes Gay

Northern District of Florida

Law enforcement agency's decision to hold a male lieutenant to higher standard of conduct than a lower-ranking female employee—where both engaged in misconduct—was not necessarily evidence of discriminatory animus.

Knutson v. Fla. Fish & Wildlife Conservation Comm'n, No. 4:15-cv-00276-RH-CAS (N.D. Fla. Mar. 4, 2016).

The plaintiff, a former lieutenant with the Florida Fish and Wildlife Conservation Commission ("FWCC") who had a role in training recruits, entered into an inappropriate sexual relationship with a trainee and continued the relationship after the trainee became a line officer. In connection with the relationship, the plaintiff posed for a nude photograph while standing in his front yard within a few feet of his FWCC- marked vehicle. The line officer's spouse was also an FWCC officer with rank below that of the plaintiff. The line officer and spouse lived in a city distant from the plaintiff, but the line officer frequently travelled to the plaintiff's home for weekends. The spouse told the line officer to stop making the weekend trips. The plaintiff sent the spouse texts encouraging the spouse to allow the trips to continue. In one text, the plaintiff stated he might one day be the spouse's supervisor. The plaintiff admitted at deposition that the spouse could have perceived the text as threatening. The plaintiff claimed that because he and the line officer were opposite gender, and he was fired and she was not, he had been subjected to gender discrimination. The Florida Public Employees Relations Commission, which conducted an evidentiary hearing, upheld the firing. On appeal, the district court granted the defendant's motion for summary judgment. The court stated that a law enforcement agency might reasonably hold a lieutenant to higher standards than a trainee or line officer—especially if the misconduct involves a sexual relationship between officers of different rank. The court explained that the issue is not whether the plaintiff committed a fireable offense, nor whether the line officer also committed a fireable offense, nor whether the discipline imposed on the plaintiff and the line officer should have been the same. The issue is whether, on this record, a jury could reasonably find that gender was a motivating factor in the differential treatment of the plaintiff and the line officer. The record contained no such evidence.

Under the ADA, a six-month leave of absence may be a reasonable accommodation. The court refused to draw a "bright line" at the six-month period as it would be inconsistent with the statutory requirement for a "reasonable" accommodation.

Walker v. NF Chipola LLC, No. 4:14-cv-375-RH/CAS, 2016 WL 1714871 (N.D. Fla. Mar. 28, 2016).

The plaintiff, a former certified nursing assistant ("CNA"), prevailed at trial on her claims of disability discrimination and FMLA retaliation. The plaintiff had a shoulder injury—the result of lifting and moving patients over the years—that was a disability within the meaning of the ADA. The plaintiff needed shoulder surgery, and her doctor projected a six-month recovery. The plaintiff provided the doctor's note to her employer and requested and was granted twelve weeks of leave under the FMLA. When she was unable to return to work after twelve weeks, the employer gave her the option to resign or be terminated. The plaintiff resigned. At summary judgment, the employer asserted that an employer who has provided the maximum required leave under the FMLA never has an obligation to accommodate an employee with a disability by providing extended unpaid leave. The court rejected the argument, stating that nothing in the ADA suggests the requirement to provide a reasonable accommodation is somehow preempted by the FMLA and, also, that Eleventh Circuit precedent recognized that a leave of absence can be a reasonable accommodation. After trial, the employer asserted that under

the ADA a six-month leave of absence was not a reasonable accommodation and moved for a judgment as a matter of law. The court denied the employer's motion. The court reasoned that drawing a bright line would be inconsistent with the statutory requirement for a "reasonable" accommodation—a standard that naturally requires a case-by-case evaluation. The court noted that the employer usually experienced frequent turnover at the CNA position and that the plaintiff was an excellent employee who could have returned to work with no need for training or other accommodations after the six months.

Middle District of Florida

Binding authority in the Middle District of Florida does not permit certification of dueling classes stemming from FLSA claims brought under 29 U.S.C. § 216(b) and state wage claims under Rule 23(b)(3) of the Federal Rules of Civil Procedure.

Goers v. L.A. Entm't Group, Inc., 2:15-cv-412-Ftm-99CM, 2016 WL 4473184 (M.D. Fla. Aug. 25, 2016).

The plaintiffs, individually and on behalf of all others similarly situated, brought a wage and hour suit under the FLSA and the Florida Minimum Wage Act ("FMWA"). The plaintiffs are entertainers who worked at an adult entertainment cabaret and allege that they received tips from patrons as their sole compensation. The plaintiffs further allege that their employment statuses were deliberately misclassified, allowing the defendants to avoid minimum wage and overtime requirements, and that they were forced to share tips with co-workers such as disc jockeys, managers and bouncers. Regarding their FLSA claims, the plaintiffs sought conditional certification as a collective action pursuant to 29 U.S.C. Sec. 216(b) and requested the court to facilitate notice to potential plaintiffs who might opt-in. Regarding their FMWA claim, the plaintiffs sought certification as a class action pursuant to Rule 23(b)(3) of the Federal Rules of Civil Procedure. The court noted that Rule 23(b)(3) exists to determine the propriety of bringing a matter as a class action and requires that such an action be superior to other methods for adjudication of a controversy. It stated that other federal courts have examined this requirement and have reached conflicting conclusions in the context of bringing Rule 23 class action suits concurrently with FLSA collective actions. This conflict exists because Rule 23 provides for a class action mechanism that automatically incorporates members of the putative class, forcing unwilling participants to opt out; conversely, the FLSA does not automatically incorporate members of the putative class and requires desiring participants to opt in. Binding case law in the Middle District prohibits bringing Rule 23 class action suits concurrently with FLSA collective actions brought pursuant to 29 U.S.C. § 216(b). The plaintiffs argued that two recent district court cases in the Eleventh Circuit, as well as a U.S. Supreme Court case, provide new guidance on the issue. The court disagreed, however, explaining that the Supreme Court had limited its decision to the predominance requirement of Rule 23(b)(3). Additionally, the recent district court cases were insufficient to override the binding authority in the Middle District, which does not permit certification of dueling classes stemming from FLSA claims brought under 29 U.S.C. § 216(b) and state wage claims under Rule 23.

Jones v. Gulf Coast Health Care of Delaware, LLC, 8:15-cv-7002-T-24EAJ, 2016 WL 659308 (M.D. Fla. Feb. 18, 2016). *Ed.'s Note: this case is currently on appeal in the Eleventh Circuit.*

The plaintiff, a former activity director for a skilled nursing facility, alleged FMLA interference and retaliation. In August 2014, the plaintiff had an MRI performed on his right shoulder, and it was determined that he needed surgery. The plaintiff applied for and was granted leave under the FMLA, which began on September 26, 2014, and continued through December 18, 2014. On December 18, 2014, the plaintiff's doctor reported that the plaintiff would not be able to return to work on December 19, 2014, because he needed additional shoulder therapy. The defendant, pursuant to its policy, required the plaintiff to provide a "Fitness for Duty" certificate in order to be allowed to return to work. The defendant denied the plaintiff's request to return to work on light duty despite not having the certificate. Since the plaintiff could not provide a Fitness for Duty certificate on December 19, 2014, he did not to return work, and the defendant permitted the plaintiff to take an additional thirty days of non-FMLA medical leave to complete his physical therapy. The plaintiff's new return date was set for January 18, 2015. During the plaintiff's non-FMLA medical leave, he twice visited Busch Gardens theme park in Tampa, Florida, and also visited St. Martin Island for approximately three days. The plaintiff posted pictures of both trips on his Facebook page, which the defendant learned of through the plaintiff's co-workers. In January 2015, the plaintiff provided a Fitness for Duty certificate and returned to work on January 19. Based upon the plaintiff's photos of his trips, the defendant suspended him from employment pending an investigation. The plaintiff was allowed the opportunity to provide additional facts but did not do so. The defendant subsequently terminated the plaintiff on January 23, 2015. In support of his claims, the plaintiff alleged that two other employees had been allowed to return to work wearing medical devices, and that the employer's administrator made the statement that the plaintiff was being suspended because he had "abused his FMLA leave." The court

granted summary judgment against both of the plaintiff's claims. The court found that the plaintiff failed to establish an interference claim because the defendant provided him a twelve-week leave period, the plaintiff failed to return to work after his leave expired, and the FMLA does not require employers to extend the twelve-week entitlement. Consequently, by failing to return to work, the plaintiff forfeited his right to be reinstated under the FMLA. The plaintiff's retaliation claim failed the causation prong because there was no temporal proximity between his protected activity and his termination. The Eleventh Circuit measures temporal proximity in FMLA cases by comparing the date the leave began with the date of termination. Four months elapsed between the plaintiff beginning his leave and his termination. Additionally, the court stated that the defendant administrator's alleged statement that the plaintiff had "abused" his FMLA leave did not support a finding that the plaintiff was fired for requesting or taking FMLA leave.

Southern District of Florida

Employees–especially public employees–placed on administrative leave and suspension pending an investigation do not suffer an adverse employment action. Additionally, reporting an employee's potential misconduct to an appropriate agency is not necessarily evidence of retaliatory animus.

Litterdragt v. Miami-Dade Cty., Fla., 14-cv-24737- CIV, Torres, 2016 WL 4269962 (S.D. Fla. Aug. 15, 2016).

The plaintiff, a female police officer, was temporarily relieved of duty pursuant to an investigation that took place following allegations that she was missing evidence and open case files. She alleged her temporary suspension was motivated by gender discrimination. She also alleged that the county retaliated against her for filing an EEOC charge by referring her investigation to the State Attorney's office for possible criminal conduct. The plaintiff was a detective in the General Investigative Unit ("GIU") and on uniform patrol. On February 27, 2012, the plaintiff transferred out of the GIU to work solely on uniform patrol. In response to a drive-by shooting at a funeral home in April 2012, the defendant ordered detectives to gather all of the open shooting cases that were being investigated. The plaintiff's former supervisor, however, could not locate any of the plaintiff's open/pending case files. The defendant asked the plaintiff to produce all open files still in her possession, but she failed to do so and admitted to missing a box of files. A department-wide audit revealed that not only was the plaintiff the only detective/former detective missing case files, but she was also missing physical evidence associated with ten of those case files. The defendant put the plaintiff on "relieved of duty" status and began investigating her missing files. While the plaintiff was relieved of duty, she continued to receive her full salary and continued enrollment in her employer healthcare and dental benefits. However, the plaintiff contended that as a result of being relieved of duty she missed out on overtime; was deprived of working off-duty assignments; was unable to work the night shift; did not have the opportunity to earn a promotion; and lost the use of a squad car for personal use. On or around May 16, 2012, a sergeant with the defendant notified the State Attorney that the plaintiff was being investigated regarding the missing files and physical evidence. The plaintiff had previously filed an EEOC Charge, but the defendant did not receive the complaint until June 11, 2012. The plaintiff was reinstated on November 18, 2013, after an internal investigation found that she had not violated department policy. The court granted summary judgment against both of the plaintiff's claims. Notwithstanding her allegations that she lost overtime opportunities and other benefits, it is well-established that employees–especially public employees–placed on administrative leave and suspension pending an investigation do not suffer an adverse employment action. Regardless, the plaintiff had failed to identify adequate comparators, and the defendant's reason for her suspension was not pretextual. The court also found that the plaintiff was unable to prove a prima facie case for retaliation because it was undisputed that the defendant initially referred the investigation to the State Attorney before it received notice of the plaintiff's EEOC complaint. Further, the plaintiff could not raise a factual dispute that the sergeant referred her case to the State Attorney for any reason besides his duty as a police officer to refer potentially criminal matters where he believes probable cause exists.

J. WES GAY

***J. Wes Gay** is an associate in the Tallahassee office of Allen, Norton & Blue, P.A. His practice focuses on representing management in all areas of labor and employment law including counseling and litigation. Mr. Gay graduated cum laude with his B.A. from the University of Georgia and cum laude from Florida State University College of Law. During law school, Mr. Gay was the managing editor for the Florida State Law Review.*

STATE COURTS

By Kelly M. Peña

Jury instruction based on the Eleventh Circuit's "Americans with Disabilities Act: Reasonable Accommodation Claim" jury instruction was appropriate for a disability discrimination claim brought under the Florida Civil Rights Act.

City of Delray Beach v. DeSisto, -- So. 3d --, 2016 WL 3911373 (Fla. 4th DCA 2016).

Robert DeSisto was an operator at the City of Delray Beach's water treatment plant from 1981 through 2010. In 2010, all operators were required to obtain a Commercial Driver's License ("CDL"). DeSisto told his supervisors that he could not take the CDL exam because he had been suffering from post-traumatic stress disorder ("PTSD"). DeSisto asked if he could work a different shift so that he could avoid the CDL requirement. The city denied his request, and DeSisto then resigned his position. DeSisto's suit followed wherein he alleged that the city discriminated against him based on his disability in violation of the Florida Civil Rights Act ("FCRA"), Fla. Stat. § 760.10(1)(a). The matter ultimately proceeded to trial, and the jury found that the city had discriminated against DeSisto by denying him a reasonable accommodation and by constructively terminating his employment. The jury awarded DeSisto $262,250 for lost wages and benefits and $500,000 for pain and suffering. The city then moved for a new trial, which was denied, and this appeal followed. The city claimed that the trial court erred in rejecting its proposed jury instruction in favor of DeSisto's proposed jury instruction and in issuing an excessive compensatory award without a sufficient factual basis. The Fourth District Court of Appeal affirmed with respect to the jury instruction but reversed with respect to the compensatory award. DeSisto's jury instruction was based on the "Americans with Disabilities Act: Reasonable Accommodation Claim"-pattern jury instruction published by the Eleventh Circuit. Because Florida courts "construe the FCRA in conformity with the federal American[s] with Disabilities Act (ADA)," the court reasoned that the jury instruction was proper. With regard to the $500,000 pain and suffering award, however, the Fourth District Court of Appeal held that the amount was excessive because only generalized testimony was offered regarding DeSisto's stress, without any psychological evidence produced. In these circumstances, the upper threshold for an emotional distress award should be $150,000 per *City of Hollywood v. Hogan*, 986 So.2d 634 (Fla. 4th DCA 2008).

Complainant's amended complaint under the Whistle-blower's Act, filed within sixty days of the original complaint, related back to the date of the original complaint.

Johnson v. Fla. Dep't of Corr., 190 So. 3d 259 (Fla. 1st DCA 2016).

On March 9, 2015, Cedric Johnson filed a whistle-blower retaliation charge of discrimination with the Florida Commission on Human Relations ("Commission"), alleging that the most recent adverse action took place on January 15, 2015. The Commission then sent Johnson a Notice of Right to Amend because Johnson failed to submit a complaint within sixty days of the last alleged date of harm. Johnson amended the complaint which stated that the most recent adverse action actually took place on January 18, 2015. On June 11, 2015, the Commission dismissed Johnson's complaint stating that, pursuant to Rule 60Y-5.001(7) of the Florida Administrative Code, he had failed to cure the technical defects in his original complaint. On appeal, Johnson argued that because he amended his complaint within sixty days of its original filing, the Commission erred in summarily dismissing it. In response, the Commission argued that the sixty-day right-to-amend period did not extend the sixty-day filing deadline required by Fla. Stat. § 112.187. The First District Court of Appeal ruled in favor of Johnson. In doing so, it relied on the plain language of Rules 60Y-5.001(7)(a) and (b) of the Florida Administrative Code, which states that a complaint may be amended within sixty days of its original filing in order to "cure technical defects, or omissions, including verification, or to clarify and amplify allegations" and that the amendment "will relate back to the date the original complaint was filed." Therefore, Johnson's amended complaint related back to the date of the original complaint. Because the amended complaint stated that the most recent date of adverse action took place on January 18, 2015—just fifty days prior to the date of the original complaint's filing—the complaint was deemed timely.

A preliminary injunction was appropriate to preclude a former executive from providing services to the employer's competitor during the employment period set out in the original employment agreement.

Telemundo Media, LLC v. Mintz, 194 So. 3d 434 (Fla. 3d DCA 2016).

Joshua Mintz worked for Telemundo Media, LLC ("Telemundo") as a key executive. Pursuant to the parties' employment agreement, Mintz was to work for Telemundo until December 27, 2017, subject to Telemundo's irrevocable option to extend the employment term. Mintz's employment and services were to be exclusive to Telemundo. The agreement also stated that for the six months following the termination of Mintz's employment, Mintz would "not, either directly or indirectly, provide services (as an employee or in any other status or capacity) to any Spanish-language media competitor of Telemundo in the news, entertainment, new media (e.g., the internet, etc.) and telecommunications industries, within the United States." On November 23, 2015, Mintz informed Telemundo that he planned on leaving the company to accept a position with one of Telemundo's competitors, TV Azteca ("Azteca"). Telemundo filed an action against Mintz seeking to enjoin Mintz from working with Azteca. Telemundo also separately filed a motion for temporary injunctive relief, which the trial court denied. According

to the trial court, Mintz could work for Azteca in Mexico City since the non-compete clause applied only "within the United States." Telemundo's appeal followed. The Third District Court of Appeal reversed and remanded the trial court's ruling because Telemundo had met all the necessary elements for a temporary injunction: (1) there was a substantial likelihood of success on the merits; (2) there was a likelihood of irreparable harm; (3) an adequate remedy at law was unavailable; (4) the threatened injury to Telemundo outweighed the possible harm to Mintz; and (5) the issuance of the temporary injunction would not be a disservice to the public interest. Because the agreement unequivocally required Mintz to provide his "unique personal services exclusively to Telemundo" until December 27, 2017, there was a substantial likelihood of success on the merits. Further a monetary damage award would have been inadequate because Mintz's services were unique and irreplaceable. Mintz also failed to show how he would have been harmed more than Telemundo. Finally, the injunction would not have been a disservice to the public interest because "the public has a cognizable interest in the protection and enforcement of contractual rights." *Hilb Rogal & Hobbs of Fla., Inc. v. Grimmel*, 48 So. 3d 957, 962 (Fla. 4th DCA 2010).

While Department of Corrections did not "prevail" in action brought by former employee, it did not meet the statutory definition of a "nonprevailing adverse party," which precluded former employee from attorneys' fee award as a prevailing party.

Johnson v. Dep't of Corr., 191 So. 3d 965 (Fla. 1st DCA 2016).

Randall Johnson worked for the Department of Corrections until he was dismissed from his employment under the extraordinary dismissal procedure set forth by Fla. Stat. § 110.227(5)(b). Johnson appealed the dismissal to the Public Employees Relations Commission ("PERC"). The Department then attempted to amend the grounds for Johnson's termination and ultimately rescinded its dismissal action and reinstated Johnson's employment. Johnson sought an award of attorneys' fees as the prevailing party through Fla. Stat. § 120.595(1). PERC referred this request to the Division of Administrative Hearings through the administrative law judge ("ALJ"). Pursuant to § 120.595(1), "[t]he final order in a proceeding pursuant to § 120.57(1) shall award . . . a reasonable attorney's fee to the prevailing party only where the nonprevailing adverse party has been determined by the administrative law judge to have participated in the proceeding for an improper purpose." A "nonprevailing adverse party" is separately defined under § 120.595(1)(e) 3 as "a party that has failed to have substantially changed the outcome of the proposed or final agency action which is the subject of a proceeding." The ALJ looked to the foregoing authority and concluded that the Department did not qualify as a "nonprevailing adverse party." Accordingly, there was no statutory basis for an award of reasonable attorneys' fees. Johnson appealed the ALJ's ruling, stating that it contravened legislative intent and public policy. The First District Court of Appeal affirmed the ALJ's ruling, holding that the statute's definition of "nonprevailing adverse party" must be strictly construed. Although the Department did not "prevail," it was Johnson who ultimately succeeded in substantially changing the outcome of the agency action because his appeal resulted in the reinstatement of his employment.

Malevolent thoughts toward co-worker do not qualify as the type of "misconduct" that would preclude an award of temporary partial disability benefits.

Cory Fairbanks Mazda v. Minor, 192 So. 3d 596 (Fla. 1st DCA 2016).

Connie Minor worked in a car dealership where she sustained compensable workplace injuries on two separate occasions. Minor claimed that both incidents were the result of being struck by a door by the same co-worker. Minor was given medical care for her physical injuries along with workplace accommodations. Minor separately filed petitions for benefits seeking authorization for a neurologist and psychiatrist. According to Minor's own attorney at a hearing, Minor had expressed thoughts of homicide and suicide and was exhibiting increasing anger and hostility toward her co-worker. Based on these representations, the car dealership terminated Minor's employment. The employer/carrier then amended its defenses to state that Minor was ineligible for temporary partial disability ("TPD") benefits because she was terminated for misconduct. See Fla. Stat. § 440.15(4)(e). Minor underwent psychiatric examinations and although she admitted to wanting to "punch" her co-worker, the psychiatrists concluded that Minor did not present evidence of imminent threat to herself or others. It amounted, instead, to "blowing off steam." There were no other facts to show that Minor ever actually threatened anyone. The JCC therefore rejected the employer/carrier's misconduct defense and ordered payment of the TPD benefits from the date of Minor's termination. The employer appealed, and the First District Court of Appeal affirmed. In particular, the First DCA looked to the statutory definition of misconduct under Fla. Stat. § 440.15(4)(e), which includes either (a) "conduct evincing such willful or wanton disregard of an employer's interests as is found in deliberate violation or disregard of standards of behavior which the employer has the right to expect of the employee;" or (b) "carelessness or negligence of such a degree or recurrence as to manifest culpability, wrongful intent, or evil design, or to show an intentional and substantial disregard

of an employer's interests or of the employee's duties and obligations to the employer." In this case, the claims made by Minor's attorney did not qualify as "misconduct" because there was no evidence that Minor ever intended for her employer to learn of these statements. Such expressed thoughts do not meet the statutory definition unless there is evidence showing an actual intent to harm.

Dismissal of unfair labor practice charge against a union was warranted because the former employee failed to provide a clear and concise statement of the facts in the charge and amended charge.

del Pino Allen v. United Faculty of Miami-Dade Coll., -- So. 3d --, 2016 WL 3421245 (Fla. 3d DCA 2016).

Allen worked for Miami-Dade College as a professor and was a member of the union, the United Faculty of Miami-Dade College, FEA, AFL-CIO, AFT, Local 4253 ("the Union"). Allen's employment was terminated on April 23, 2015. Thereafter, Allen filed an unfair labor practice charge against the union, alleging violations of Fla. Stat. §§ 447.501(2)(a), (b) and (d). The general counsel summarily dismissed Allen's charge because she failed to provide a clear and concise statement of the facts that constituted the alleged unfair labor practice. Allen amended her charge, adding a separate allegation about the union president's purported violation of Florida's Sunshine Law, Fla. Stat. § 286.011. The amended charge was summarily dismissed because Allen again had failed to provide a "clear and concise statement of the facts," as required by Fla. Stat. § 447.503(1). The general counsel likewise dismissed the Sunshine Law allegations because § 286.011 is not enforceable by the Public Employees Relations Commission ("PERC"). Allen appealed the second dismissal to PERC, which affirmed the general counsel's decision, stating that Allen's argument on appeal was "similarly disjointed and reads as a narrative . . . making it unlikely that [the union] could file a cogent response." PERC also agreed that the Sunshine Law allegations should have been dismissed because such allegations are outside of PERC's jurisdiction. Allen then appealed to the Third District Court of Appeal, which affirmed PERC's decision after finding no error. The Third District Court of Appeal was bound to defer to PERC's statutory interpretation, which was not erroneous or contrary to the plain and ordinary meaning of the applicable statutes.

A temporary injunction was appropriate when a former employee breached his noncompete agreement by working for a competitor three months after his employment ended and for soliciting his former employer's clients.

Smart Pharmacy, Inc. v. Viccari, -- So. 3d --, 2016 WL 3057379 (Fla. 1st DCA 2016).

Damian Viccari worked for a compounding pharmacy, Smart Pharmacy, Inc., as a sales representative, and his job entailed marketing Smart Pharmacy's products and services to physicians within the Jacksonville-area market. In connection with his employment, Viccari signed a noncompete agreement that prohibited him from competing against Smart Pharmacy in the Jacksonville-area market for two years after the termination of his employment. Vicarri subsequently resigned and three months later started working as a sales representative for another compounding pharmacy, Pensacola Apothecary, performing the same type of work he performed for Smart Pharmacy. He also solicited business from some of the same physicians previously solicited by Smart Pharmacy. Smart Pharmacy filed suit against Vicarri and Pensacola Apothecary, seeking damages and injunctive relief for Vicarri's alleged breach of his noncompete agreement and for Pensacola's alleged misuse of Smart Pharmacy's trade secrets. Smart Pharmacy also sought a temporary injunction. The trial court denied the temporary injunction after an evidentiary hearing, stating that Smart Pharmacy had an adequate remedy at law because the alleged damages were "quantifiable," but that it did not have a substantial likelihood of success on the merits because some of the alleged damages were speculative. Smart Pharmacy appealed the denial of its motion for a temporary injunction, and the First District Court of Appeal reversed the trial court's decision and remanded. The appellate court reasoned that the "right to prohibit direct solicitation of existing customers is a legitimate business interest, and a covenant not to compete which includes a non-solicitation clause is breached when a former employee directly solicits customers of his former employer." Further, Pensacola Apothecary was complicit in Viccari's violation of the agreement and also benefited from the use of Smart Pharmacy's trade secrets. In light of the foregoing, Smart Pharmacy was entitled to a presumption of irreparable harm. Further, monetary damages were deemed inadequate to compensate for a violation of a covenant not to compete. Finally, the preliminary injunction would serve the public interest because the trial court found that Smart Pharmacy has a legitimate business interest in protecting its relationships with its referral sources.

Former employee was not entitled to front pay or back pay because he was unable to work due to on-the-job physical injuries, compensable through workers' compensation, at all times relevant to alleged retaliatory discharge.

Caterpillar Logistics Servs., Inc. v. Amaya, -- So. 3d --, 2016 WL 4399740 (Fla. 3d DCA 2016).

Rudolf Amaya suffered an on-the-job injury to his back and knee on August 22, 2008, and then filed a workers'

compensation claim. On November 11, 2008, Amaya's doctor placed him on a "no work" status, and Amaya was then placed on temporary total disability ("TTD") benefits through Caterpillar's workers' compensation carrier. On November 12, 2008, Caterpillar indefinitely suspended Amaya. Amaya was then placed on a "no work" status for his knee injury. Amaya received workers' compensation TTD benefits until mid-October 2010. The workers' compensation retaliation claim was tried in October 2012. Amaya testified that Caterpillar harassed and retaliated against him after he filed his workers' compensation claim. Amaya also provided expert testimony that he suffered from a major depressive disorder and a generalized anxiety disorder. The jury returned a verdict in Amaya's favor and awarded him $79,280 for lost back pay and benefits and $537,847 for future lost wages and benefits. The jury awarded no damages for emotional distress and mental anguish. Caterpillar filed post-trial motions, challenging the outcome of the action and the amounts awarded in damages. The trial court then awarded a final judgment in favor of Amaya in the amount of $571,883.64. On appeal, Caterpillar contended that, as a matter of law, Amaya was not entitled to back pay or front pay because he was physically unable to work at all relevant times prior to and subsequent to his alleged retaliatory discharge; accordingly, his claim that he was psychologically unable to work due to Caterpillar's retaliation could not be the "but for" cause of his lost wages and benefits. The Third District Court of Appeal agreed, reasoning that "the purpose of awarding lost wages to a wrongfully discharged employee is to make the employee whole by restoring him to the economic position he would have occupied but for the wrongful discharge." In short, the jury award of back pay and front pay were not sustainable because Amaya was unable to work as a result of on-the-job physical injuries, which were compensable through workers' compensation.

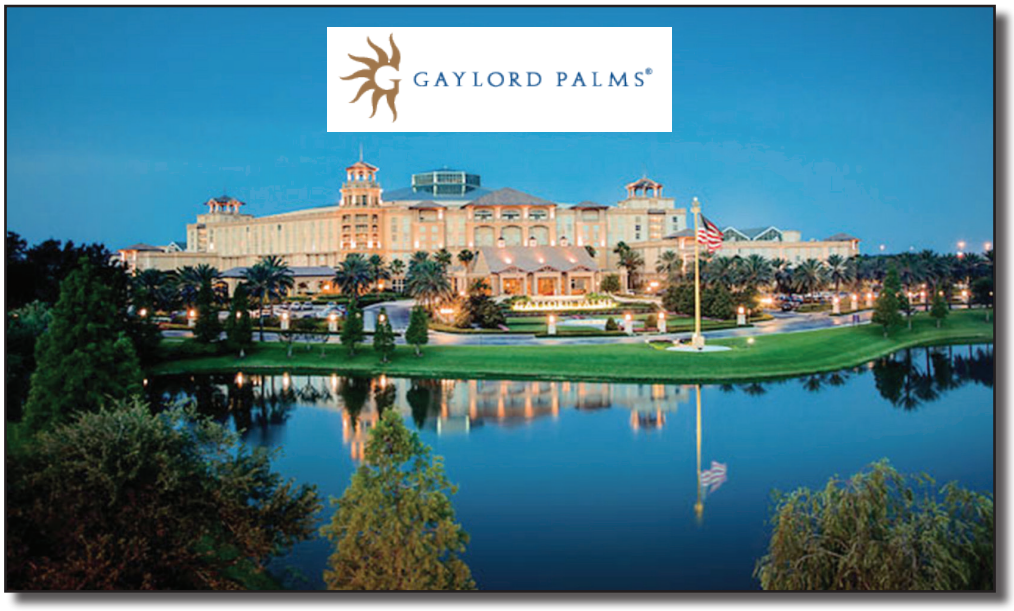
K. PEÑA

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.*

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

17th Labor and Employment Law Annual Update and Certification Review

COURSE CLASSIFICATION: ADVANCED LEVEL



January 26 - 27, 2017

Gaylord Palms Resort & Convention Center
6000 W. Osceola Parkway
Kissimmee, FL 34746
(407) 586-0000

http://www.marriott.com/hotels/travel/mcogp-gaylord-palms-resort-and-convention-center/

Course No. 2275R

17th Labor and Employment Law Annual Update and Certification Review (2275R)

Thursday, January 26, 2017

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

8:20 a.m. – 8:30 a.m.
Opening Remarks
Robyn S. Hankins, Program Co-Chair, Robyn S. Hankins, P.L., Jupiter
Marlene Quintana, Program Co-Chair, GrayRobinson, P.A., Miami

8:30 a.m. – 9:30 a.m.
Constitutional Employment Claims
Robert Eschenfelder, Manatee County Attorney's Office, Bradenton

9:30 a.m. – 10:20 a.m.
Public Employee Relations Act
James D. Stokes, Arbitration and Mediation Office of James D. Stokes, Melbourne

10:20 a.m. – 10:30 a.m.
Break

10:30 a.m. – 11:45 a.m.
Family and Medical Leave Act
Lisa K. Berg, Stearns Weaver, Miami

11:45 a.m. – 12:30 p.m.
Common Law Employment Claims
Elizabeth F. Blanco, Sessions Fishman Nathan & Israel, Tampa

12:30 p.m. – 2:00 p.m.
Lunch (included in registration fee)
BONUS CONTENT: Affordable Care Act
Cathleen Scott, Scott Wagner & Associates, P.A., Jupiter

2:00 p.m. – 2:45 p.m.
National Labor Relations Act
Arturo Ross, Greenberg Traurig, P.A., Miami

2:45 p.m. – 3:30 p.m.
Whistleblower Statutes/Workers' Compensation Retaliation
Thomas H. Loffredo, GrayRobinson, P.A., Fort Lauderdale

3:30 p.m. – 3:40 p.m.
Break

3:40 p.m. – 4:30 p.m.
Fair Labor Standards Act
Ellen M. Leibovitch, Assouline & Berlowe, P.A., Boca Raton

4:30 p.m. – 5:00 p.m.
OSHA
Ken Knox, Fisher & Phillips, Fort Lauderdale

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

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

Friday, January 27, 2017

8:20 a.m. – 8:30 a.m.
Opening Remarks
Robyn S. Hankins, Program Co-Chair, Robyn S. Hankins, P.L., Jupiter
Marlene Quintana, Program Co-Chair, GrayRobinson, P.A., Miami

8:30 a.m. – 8:55 a.m.
Unemployment Appeals
Hon. Frank E. Brown, Chair, Florida Reemployment Assistance Appeals Commission, Tallahassee

8:55 a.m. – 9:20 a.m.
Drug Testing
Christopher C. Sharp, Sharp Law Firm, P.A., Plantation

9:20 a.m. – 10:00 a.m.
Worker Adjustment and Retraining Notification Act
Ryan D. Barack, Kwall Showers Barack & Chilson, P.A., Clearwater

10:00 a.m. – 10:10 a.m.
Break

10:10 a.m. – 12:00 p.m.
EEO – Substantive
Kevin D. Johnson, Thompson Sizemore Gonzalez & Hearing, P.A., Tampa
Erin G. Jackson, Thompson Sizemore Gonzalez & Hearing, P.A., Tampa

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

1:00 p.m. – 1:45 p.m.
EEO – Procedural
Cynthia Sass, Law Offices of Cynthia N. Sass, Tampa

1:45 p.m. – 2:45 p.m.
Statutory and Common Law Protection of Business Interests
Thomas (Tad) Delegal, III, Delegal Law Offices, Jacksonville

2:45 p.m. – 2:55 p.m.
Break

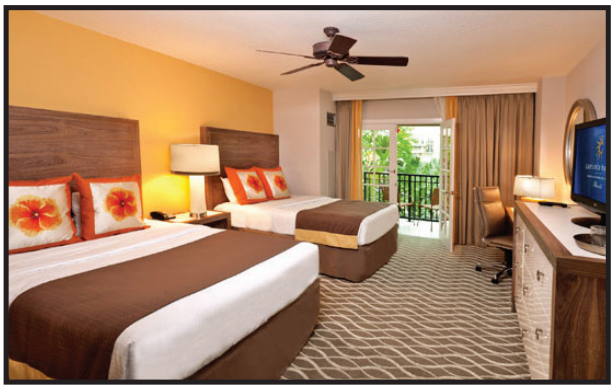
2:55 p.m. – 3:30 p.m.
USERRA
Kevin E. Vance, Duane Morris, L.L.P., Miami

3:30 p.m. – 4:15 p.m.
ERISA
Sherril Colombo, Littler Mendelson, P.C., Miami

4:15 p.m. – 4:45 p.m.
Workplace Privacy/FCRA
Gregory A. Hearing, Thompson Sizemore Gonzalez & Hearing, P.A., Tampa

HOTEL RESERVATION INFORMATION

A block of rooms has been reserved at the **Gaylord Palms Resort & Convention Center**, at the rate of **$204** single/double occupancy. To make reservations, call the Gaylord Palms Resort & Convention Center at **(877) 382-7299.** Reservations must be made by **01/03/2017** to ensure the group rate and availability. After that date, the group rate will be granted on a "space available basis."



LABOR & EMPLOYMENT LAW SECTION

Leslie W. Langbein, Miami Lakes – Chair
Zascha Blanco Abbott, Miami – Chair-Elect
J. Ray Poole, Jacksonville – Legal Education Director

CLE COMMITTEE

Evett Louise Simmons, Port Saint Lucie, Chair
Terry L. Hill, Director – Programs Division

FACULTY & STEERING COMMITTEE

Robyn S. Hankins, Jupiter – Program Co-Chair
Marlene Quintana, Miami – Program Co-Chair

Ryan D. Barack, Clearwater
Lisa K. Berg, Miami
Elizabeth F. Blanco, Tampa
Hon. Frank E. Brown, Tallahassee
Sherril Colombo, Miami
Thomas (Tad) Delegal, III, Jacksonville
Robert Eschenfelder, Bradenton
Gregory A. Hearing, Tampa
Erin G. Jackson, Tampa
Kevin D. Johnson, Tampa
Ken Knox, Fort Lauderdale
Ellen M. Leibovitch, Boca Raton
Thomas H. Loffredo, Fort Lauderdale
Arturo Ross, Miami
Cynthia Sass, Tampa
Cathleen Scott, Jupiter
Christopher C. Sharp, Plantation
James D. Stokes, Melbourne
Kevin E. Vance, Miami

REFUND POLICY

A $25 service fee applies to all requests for refunds. Requests must be in writing and postmarked no later than two business days following the live course presentation or receipt of product. Registration fees are non-transferrable, unless transferred to a colleague registering at the same price paid. Registrants who do not notify The Florida Bar by 5:00 p.m., January 19, 2017 that they will be unable to attend the seminar, will have an additional $190 retained. Persons attending under the policy of fee waivers will be required to pay $190.

CLE CREDITS

CLER PROGRAM
(Maximum Credit: 18.5 hours)

General: 18.5 hours
Ethics: 0.0 hours

CERTIFICATION PROGRAM
(Maximum Credit: 18.5 hours)

Labor & Employment Law: 18.5 hours

TO REGISTER	ON-LINE: www.floridabar.org/CLE	MAIL: Completed form with check	FAX: Completed form to 850/561-9413

Register me for the "17th Labor and Employment Law Annual Update and Certification Review" Seminar

ONE LOCATION: (055) GAYLORD PALMS RESORT & CONVENTION CENTER, KISSIMMEE, FL (JANUARY 26 - 27, 2017)

TO REGISTER OR ORDER COURSE BOOKS OR AUDIO CD BY MAIL, SEND THIS FORM TO: The Florida Bar, Order Entry Department, 651 E. Jefferson Street, Tallahassee, FL 32399-2300 with a check in the appropriate amount payable to The Florida Bar or credit card information filled in below. If you have questions, call 850/561-5831. ON-SITE REGISTRATION, ADD $25.00. **On-site registration is by check only.**

Name _____ Florida Bar # _____

Address _____

City/State/Zip _____ Phone: ( ) _____

E-mail* _____

E-mail address required to transmit electronic course materials and is only used for this order.

ABF: Course No. 2275R

ELECTRONIC COURSE MATERIAL NOTICE: Florida Bar CLE Courses feature electronic course materials for all live presentations, live webcasts, webinars, teleseminars, audio CDs and video DVDs. This searchable electronic material can be downloaded and printed and is available via e-mail several days in advance of the live presentation or thereafter for purchased products. The Course Book can be purchased separately. Effective July 1, 2010.

❑ Please check here if you have a disability that may require special attention or services. To ensure availability of appropriate accommodations, attach a general description of your needs. We will contact you for further coordination.

Register Now! **17th Labor and Employment Law Annual Update and Certification Review**

The Florida Bar
651 E. Jefferson Street
Tallahassee, FL 32399-2300

PRSRT-STD
U.S. POSTAGE
PAID
TALLAHASSEE, FL
Permit No. 43

REGISTRATION FEE (CHECK ONE):

- ❑ Member of the Labor & Employment Law Section: $525
- ❑ Non-section member: $565
- ❑ Full-time law college faculty or full-time law student: $378
- ❑ Persons attending under the policy of fee waivers: $190

Members of The Florida Bar who are Supreme Court, Federal, DCA, circuit judges, county judges, magistrates, judges of compensation claims, full-time administrative law judges, and court appointed hearing officers, or full-time legal aid attorneys for programs directly related to their client practice are eligible upon written request and personal use only, complimentary admission to any live CLE Committee sponsored course. Not applicable to webcast. (We reserve the right to verify employment.)

METHOD OF PAYMENT (CHECK ONE):

- ❑ Check enclosed made payable to The Florida Bar
- ❑ Credit Card (Fax to 850/561-9413; Email to registrations@flabar.org)

☐ MASTERCARD ☐ VISA ☐ DISCOVER ☐ AMEX

Exp. Date: ___/___ (MO./YR.)

Signature: _____

Name on Card: _____

Billing Zip Code: _____

Card No. _____

COURSE BOOK – AUDIO CD – ON-LINE – PUBLICATIONS

Private recordng of this program is not permitted. **Delivery time is 4 to 6 weeks after 01/27/17. TO ORDER AUDIO CD OR COURSE BOOKS,** fill out the order form above, including a street address for delivery. **Please add sales tax.** Those eligible for the above mentioned fee waiver may order a complimentary audio CD in lieu of live attendance upon written request and for personal use only.

Please include sales tax unless ordering party is tax-exempt or a nonresident of Florida. If tax exempt, include documentation with the order form.

❑ **COURSE BOOK ONLY(2275M)**

Cost $75 plus tax

(Certification/CLER credit is not awarded for the purchase of the course book only.)

+ TAX $_____ = TOTAL $ _____

❑ **AUDIO CD (2275C)**

(includes electronic course material)

$525 plus tax (section member)

$565 plus tax (non-section member)

+ TAX $_____ = TOTAL $ _____

Student loan refinancing for Florida Bar members

SoFi saves attorney borrowers an average of $431 a month[1]

Apply through **SoFi.com/FloridaBar** to get a **$300 welcome bonus**[2] when you refinance your student loans.

Terms and Conditions Apply. SOFI RESERVES THE RIGHT TO MODIFY OR DISCONTINUE PRODUCTS AND BENEFITS AT ANY TIME WITHOUT NOTICE. See sofi.com/legal for a complete list of terms and conditions. SoFi loans are originated by SoFi Lending Corp (dba SoFi) California Finance Lender #6054612. NMLS #1121636. [1]Monthly savings calculation is based on all SoFi members with a pharmacist degree who refinanced their student loans between 7/1/15 and 6/30/16. The calculation is derived by averaging the monthly savings of SoFi members with a pharmacist degree, which is calculated by taking the monthly student loan payments prior to refinancing minus the monthly student loan payments after refinancing with SoFi. SoFi's monthly savings methodology for student loan refinancing assumes 1) members' interest rates do not change over time (projections for variable rates are static at the time of the refinancing and do not reflect actual movement of rates in the future) 2) members make all payments on time. SoFi's monthly savings methodology for student loan refinancing excludes refinancings in which 1) members elect a SoFi loan with a shorter term than their prior student loan term(s) 2) the term length of the SoFi member's prior student loan(s) was shorter than 5 years or longer than 25 years 3) the SoFi member did not provide correct or complete information regarding his or her outstanding balance, loan type, APR, or current monthly payment. SoFi excludes the above refinancings in an effort to maximize transparency on how we calculate our monthly savings amount and to minimize the risk of member data error skewing the monthly savings amount. [2]Payment will be issued electronically once you become a SoFi borrower; you have submitted a completed application with documents and your loan has been disbursed. Offer good for new customers only.

The Florida Bar
651 E. Jefferson Street
Tallahassee, FL 32399-2300

PRESORTED
FIRST CLASS
U.S. POSTAGE
PAID
TALLAHASSEE, FL
Permit No. 43