

Litigation Unveiled

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Overview of Topics



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Lawyers Wear Many Hats



- ◆ J.D. Degree: “Attorney and Counselor at Law”
- ◆ “A lawyer, as a member of the legal profession, is a representative of clients, an officer of the legal system, and a public citizen having special responsibility for the quality of justice.”

As a representative of clients, a lawyer performs various functions.

As an adviser, a lawyer provides a client with an informed understanding of the client's legal rights and obligations and explains their practical implications.

As an advocate, a lawyer zealously asserts the client's position under the rules of the adversary system.

As a negotiator, a lawyer seeks a result advantageous to the client but consistent with requirements of honest dealing with others.

As an evaluator, a lawyer acts by examining a client's legal affairs and reporting about them to the client or to others.”

-Rules Regulating the Florida Bar – Preamble, Rule 4

President Abraham Lincoln

“Discourage litigation. Persuade your neighbors to compromise whenever you can. As a peacemaker the lawyer has superior opportunity of being a good man. There will still be business enough.”



Trial Court Proceedings

- ◆ **Initiation**
- ◆ **Motion Practice**
- ◆ **Discovery**
- ◆ **Pre-Trial Motions**
- ◆ **Trial**
- ◆ **Post-Trial Motions and Appeals**

Initiation: Complaint & Filing Fee

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

NANCY RUDNER LUGO,

Plaintiff,

CASE NO.: 6:10-cv-1674-Orl-35KRS

v.

UNIVERSITY OF CENTRAL
FLORIDA BOARD OF TRUSTEES
d/b/a UNIVERSITY OF CENTRAL
FLORIDA,

Defendant.

COMPLAINT AND DEMAND FOR JURY TRIAL

Plaintiff, Dr. NANCY RUDNER LUGO (“Dr. Rudner Lugo”), by and through her undersigned counsel, hereby sues the Defendant, UNIVERSITY OF CENTRAL FLORIDA BOARD OF TRUSTEES d/b/a UNIVERSITY OF CENTRAL FLORIDA (“UCF”), and in furtherance states as follows:

1. This is an action for damages arising out of illegal retaliation under Title VII and the Florida Civil Rights Act that occurred in Orange County, Florida.
2. The Defendant, UCF, by and through its Dean and Associate Deans in UCF’s College of Nursing retaliated against Dr. Rudner Lugo because she expressed opposition to the Dean and the Associated Deans about UCF’s use of a textbook titled Guide to Culturally Competent Health Care, by Purnell and Paulanka (the “book”).

WACHOVIA, N.A.		P.O. BOX 555 ORLANDO, FLORIDA 32802 407-555-5555	Date: January 30, 2012	69-751 631
Pay: Three Hundred Fifty Dollars and 00/100				\$ **350.00**
PAY TO THE ORDER OF	Clerk, U.S. District Court U.S. Courthouse 401 West Central Boulevard Suite 1200 Orlando, Florida 32801-0120	SCHMOE'S OFFICE ACCOUNT		<i>Joe Schmo</i> VOID AFTER 90 DAYS
SECURITY FEATURES INCLUDED. DETAILS ON BACK.				
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Initiation: Pleading Standard



Federal Rule of Civil Procedure 8 – *General Rules of Pleading*

A pleading that states a claim for relief must contain:

- (1) short and plain statement of Court's jurisdictional grounds;
- (2) short and plain statement of the claim showing that the pleader is entitled to relief; and
- (3) demand for the relief sought, which may include relief in the alternative or different types of relief.

Federal Rule of Civil Procedure 9(b) – *Fraud or Mistake*

In alleging fraud or mistake, a party must state with particularity the circumstances constituting fraud or mistake. Malice, intent, knowledge, and other conditions of a person's mind may be alleged generally.

Initiation: Defamatory Pleadings?



“The doctrine is well settled that defamatory words when used by parties, counsel, or witnesses in the due course of judicial procedure, and when relevant to the matter in hand, and pertinent to the subject of inquiry, are privileged and cannot be made the basis of a proceeding for libel or defamation, no matter how false or malicious such statements may in fact be.

This privilege extends to the protection of the judge, parties, counsel, and witnesses, and arises immediately upon the doing of any act required or permitted by law in the due course of the judicial proceeding or as necessarily preliminary thereto.”

-Pledger v. Burnup & Sims, Inc., 432 So. 2d 1323 (Fla. 4th DCA 1983).

Initiation: Responsive Pleadings

- ◆ Answer (or Motion to Dismiss)
- ◆ Affirmative Defenses
- ◆ Compulsory Counterclaims
- ◆ Permissive Counterclaims
- ◆ Cross-Claims
- ◆ Third-Party Claims

Discovery prelude: “Parties may obtain discovery regarding any non-privileged matter that is relevant to any party's claim or defense.” Fed.R.Civ.P. 26(b)(1).

Motion Practice – Motions to Dismiss

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

NANCY RUDNER LUGO (“LUGO”)

Plaintiff,

vs.

Case No. 6:10-CV-1674-ORL-35KRS

UNIVERSITY OF CENTRAL
FLORIDA BOARD OF TRUSTEES
 (“UCF”),

Defendant.

_____ /

**DEFENDANT UCF’S MOTION TO DISMISS
AND SUPPORTING MEMORANDUM OF LAW**

Defendant UCF respectfully requests the Court to render an Order dismissing this case with prejudice for the following reasons:

I. Summary of Position

Plaintiff LUGO alleges her year-to-year teaching contract was not renewed as retaliation to her objections to the use of a single reference guide in a nursing college course. University nursing students are not university employees, and so requiring students to use a reference guide is by no means an “employment practice.” As a result, LUGO has not and cannot allege a valid and sustainable prima facie case of retaliation because she did not engage in a “protected activity” by protesting an “unlawful employment practice.” LUGO has now had more than two (2) years to think about and frame her alleged claims and has already once amended her Complaint; hence, any further amendments would be futile and her case should be dismissed with prejudice.

Motion Practice – Motions to Dismiss

- ◆ Presents pure questions of law for Court to decide
- ◆ Court accepts as true all well-pleaded factual allegations and construes them in light most favorable to plaintiff.
- ◆ Court not bound to accept as true legal conclusions couched as a factual allegations.
- ◆ Claim must contain more than “labels and conclusions” or “a formulaic recitation of the elements of a cause of action.”
- ◆ Claim must have sufficient factual assertions “to raise a right to relief above the speculative level.”

Order Granting Motion to Dismiss

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

NANCY RUDNER LUGO,

Plaintiff,

v.

Case No. 6:10-cv-1674-Orl-35KRS

UNIVERSITY OF CENTRAL FLORIDA
BOARD OF TRUSTEES, d/b/a University
of Central Florida,

Defendant.

ORDER

THIS CAUSE comes before the Court for consideration of the Motion to Dismiss (Dkt. 15) filed by Defendant University of Central Florida Board of Trustees ("Defendant UCF") and Plaintiff's Response in opposition thereto (Dkt. 16). Upon review of all relevant filings and case law and being otherwise fully advised, the Court **GRANTS** Defendant's Motion to Dismiss.

I. BACKGROUND

On December 8, 2010, Plaintiff filed an Amended Complaint in this Court pursuant to the anti-retaliation provisions of Title VII of the Civil Rights Act of 1964 ("Title VII"), 42 U.S.C § 2000e-3(a), and the Florida Civil Rights Act of 1992 ("FCRA"), Fla. Stat. § 760.10(7). (Dkt. 14.) The Amended Complaint alleges that Defendant UCF required Plaintiff, a former tenure track professor at UCF's College of Nursing, to teach from a textbook that Plaintiff found offensive because it "contains antiquated and offensive racial, ethnic and other stereotypes of

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employment practice under Title VII is objectively reasonable. As such, Plaintiff's Amended Complaint fails to state a claim for retaliation.

Notwithstanding the foregoing, Plaintiff does allege that she is Jewish "and bicultural, with a Hispanic family." (Dkt. 14 at 4). Even though Plaintiff's Amended Complaint does not contain any allegation that she suffered any discrimination because of her status, Plaintiff could conceivably state a claim that she was retaliated against for opposing some form of discrimination or harassment related to her race, color, religion, sex, or national origin. The Court therefore finds that dismissal with prejudice is inappropriate.

Based on the foregoing, it is hereby **ORDERED** that Defendant's Motion to Dismiss (Dkt. 15) is **GRANTED**. Plaintiff's Amended Complaint is **DISMISSED without prejudice**. Prior to seeking to amend this complaint, however, Plaintiff is admonished to consider whether pursuing the claims asserted in this action is warranted by existing law or by a non-frivolous argument for extending, modifying, or reversing existing law or for establishing new law. See FED. R. CIV. P. 11.

DONE and **ORDERED** in Orlando, Florida, this 16th day of May 2011.


MARY S. SCRIVEN
UNITED STATES DISTRICT JUDGE

Copies furnished to:
Counsel of Record

Motion for More Definite Statement

- ◆ Warranted if a “pleading to which a responsive pleading is allowed . . . is so vague or ambiguous that the party cannot reasonably prepare a response.”

Fed. R. Civ. P. 12(e).

- ◆ “The point is to give the defendant fair notice of what the claim is and the grounds upon which it rests.”

Davis v. Coca-Cola Bottling Co. Consol., 516 F.3d 955, 974 (11th Cir. 2008).

Discovery – Scope and Purpose



- ◆ “Relevant information need not be admissible at the trial if the discovery appears reasonably calculated to lead to the discovery of admissible evidence.” Fed.R.Civ.P. 26(b)(1).
- ◆ “This Court has held that the chief purpose of our discovery rules is to assist the truth-finding function of our justice system and to avoid trial by surprise or ambush. . . . The search for truth and justice can be accomplished only when all relevant facts are before the judicial tribunal. Those relevant facts should be the determining factor rather than gamesmanship, surprise, or superior trial tactics.” *Scipio v. Florida*, 928 So.2d 1138, 1144 (Fla. 2006) (internal marks and citations omitted).

Discovery Tools



- ◆ Private Investigators
- ◆ Requests for Production of Documents
- ◆ Requests for Inspection of Tangible Items
- ◆ Interrogatories
- ◆ Requests for Admissions
- ◆ Third-Party Subpoenas
- ◆ Depositions
 - Corporate Representative(s)
 - Owners, Directors, Officers and Executives
 - Employees of any level (current and former)
 - Non-party Witnesses
 - Expert Witnesses

Pre-Trial Motions



◆ Motion for Summary Final Judgment

- No need for trial given undisputed material facts
- All or some claims
- All or some affirmative defenses

◆ Motion in Limine (Keep out evidence)

“The court may exclude relevant evidence if its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence as irrelevant, unduly prejudicial.”

-Fed.R.Evid. 403

Trial – Bench or Jury Trial

- ◆ Bench trial – Judge serves as finder-of-fact
- ◆ Jury trial – Jurors serve as finders-of-fact
- ◆ Jury Selection
 - ◆ “*Voir Dire*” means “To speak the truth”
 - ◆ “The preliminary examination of prospective jurors to determine their qualifications and suitability to serve on a jury, in order to ensure the selection of fair and impartial jury.”
-www.thefreedictionary.com
- ◆ Prospective jurors fill out questionnaires

Trial – Jury Selection Overview



- ♦ **Judge and lawyers verbally question jurors to explore:**
 - ♦ Potential biases and leanings
 - ♦ Mental capacity and competence
 - ♦ Relationship with any party, counsel or witness
- ♦ **Strikes for Cause (Judge grants or denies)**
 - ♦ Unlimited in number
 - ♦ Juror bias or incompetence
 - ♦ Juror relationship with party, counsel or witness
- ♦ **Peremptory Strikes (Judge grants or denies)**
 - ♦ Limited in number
 - ♦ Any reason, except unlawful reason (e.g., race)
 - ♦ Must proffer lawful reason if challenged

Trial – Flow of Proceedings



- ◆ Preliminary Jury Instructions
- ◆ Opening Statements
- ◆ Plaintiff's Case-in-Chief
 - ◆ Live witnesses (fact and expert)
 - ◆ Depositions / Documents / Discovery responses
- ◆ Defendant's Mid-Trial Motion for Directed Verdict
- ◆ Defendant's Case-in-Chief
- ◆ Plaintiff's Rebuttal Case
- ◆ Closing Arguments
- ◆ Jury Instructions and Verdict Form
- ◆ Jury Deliberations and "Verdict"

Post-Trial Motions and Appeal

♦ Post-Trial Motions

- ♦ Motion for Judgment Notwithstanding the Verdict
- ♦ Motion for Leave to Conduct Juror Interviews

♦ Appeals

- ♦ First level appeal allowed as matter of right
 - ♦ Decision in 12 to 24 months
 - ♦ Extensive briefing and sometimes oral argument
 - ♦ \$35,000 to \$50,000+
- ♦ Second level appeal typically matter of discretion
- ♦ Third level appeal typically matter of discretion

President Abraham Lincoln

“Discourage litigation. Persuade your neighbors to compromise whenever you can. As a peacemaker the lawyer has superior opportunity of being a good man. There will still be business enough.”



The Settlement Decision



- ◆ “Equally well recognized is the fact that settlements are entered into because of the very uncertainties of outcome in litigation, as well as the avoidance of wasteful litigation and expense.” *Airline Stewards v. American Airlines*, 573 F.2d 960, 963 (7th Cir. 1978).
- ◆ “[T]he owner's duty, as in other similar situations, to provide against resulting injuries is a function of three variables: (1) The probability that she will break away; (2) the gravity of the resulting injury, if she does; (3) the burden of adequate precautions.

Possibly it serves to bring this notion into relief to state it in algebraic terms: if the probability be called P; the injury, L; and the burden, B; liability depends upon whether B is less than L multiplied by P: *i.e.*, whether B is less than PL.” *U.S. v. Carroll Towing Co.*, 159 F.2d 169 (2d Cir. 1947).

The Settlement Decision - Example

Defending personal injury claim based on shooting on your premises

- ◆ Plaintiff is 19 year old student rendered quadriplegic
- ◆ Plaintiff offers to settle all claims for \$3,000,000.00 (U.S.)
- ◆ Plaintiff's probability of success on facts and law = 10 to 20%
- ◆ Reported jury verdicts:
 - ◆ 1992: \$4,443,019 (quadriplegic caused by horse riding accident)
 - ◆ 2002: \$26,917,053 (quadriplegic caused by shooting incident)
- ◆ Baseline settlement range (unadjusted for inflation):
 - ◆ \$444,301 (10% x \$4,443,019) to \$5,383,410 (20% x \$26,917,053)
- ◆ Estimated attorneys' fees, costs and expert fees through trial and appeal = \$195,000 to \$350,000
- ◆ **Baseline settlement range = \$639,301 to \$5,733,410**
 - ◆ (\$444,301 + \$195,000) to (\$5,383,410 + \$350,000)
- ◆ Question: Should you pay \$3.0M to settle the case?

The Settlement Decision - Factors

“Conservative accountants who assign zero values to many intangible benefits prefer being precisely wrong to being vaguely right.”

Key Factors

- Client Expectations –
What’s your definition of “win”?
- Master litigation strategy
 - Short-term goals
 - Long-term goals
- Litigation budget through trial and appeal
- Prevailing party attorneys’ fees available
- Client’s financial and emotional strength
- Opponent’s financial and emotional strength
- Probability of victory and loss
 - Good facts;
 - Bad facts; and
 - Law governing claims and defenses
- Prior rulings by the Judge
- History between the parties
(pre and post litigation)
- Opposing attorney
(skill, ethics, cooperation, etc.)
- Prior communications with client
- Prior communications with opposing counsel
- Time value of money
- Money value of time
- Public relations issues
- Business opportunity costs
- [Other factors?]



QUESTIONS?

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Thank you!