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the Checkoff

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IN THIS ISSUE

Sexual Orientation Discrimination: No Cause of Action in the Eleventh Circuit and Florida Courts; Other Circuits Take a Different Approach

By Aaron W. Tandy, Miami

The Eleventh Circuit and Florida federal district courts continue to draw a line between employee discrimination and retaliation claims on the basis of sexual orientation (which are not covered under Title VII) and claims on the basis of gender non-conformity (which are covered).[1] At least one circuit court, the Seventh Circuit in *Hively v. Ivy Tech Community College*, has criticized the reasoning behind the Eleventh Circuit's recent decision in *Evans v. Georgia Regional Hospital*,[2] finding in an en banc decision that "a person who alleges that she experienced employment discrimination on the basis of her sexual orientation has put forth a case of sex discrimination for Title VII purposes."[3] Moreover, the Second Circuit recently determined to hold an en banc panel in *Zarda v. Altitude Express, Inc.*,[4] for the purpose of addressing whether Title VII prohibits "discrimination on the basis of sexual orientation through its prohibition on discrimination 'because of . . . sex[.]'"[5]

All three decisions—*Evans, Hively and Zarda*—recognized the current tension in Title VII case law: gender stereotyping is actionable but a discrimination claim based

See "Sexual Orientation Discrimination," page 15

Florida's Impact Rule and Negligent Hiring/Retention Cases

By Carlo D. Marichal, Fort Lauderdale

Often, facts giving rise to violations of labor and employment statutes may also give rise to a negligent hiring or retention case.[1] In assessing the viability of negligent hiring or retention cases, however, one must take into consideration Florida's "impact rule" to determine whether or not to bring such a case. Prior to *G4S Secure Solutions USA, Inc. v. Golzar*,[2] no Florida appellate court had addressed whether the impact rule applies in negligent hiring or retention cases. Generally, in negligence cases, to recover for emotional damages, such damages must flow from a physical impact to the plaintiff. The impact rule, therefore, requires some physical contact "or, in certain instances, the manifestation of severe emotional distress such as physical injuries or illness."[3]

In *Golzar*, the plaintiff sued a security guard and his employer when the security guard videotaped the plaintiff while the plaintiff was naked. The security guard had a prior conviction for prowling and peeking into an empty

See "Negligent Hiring/Retention Cases," page 16

A Bird's-Eye View

Dear Colleagues,

At the Bar's Annual Convention in June, I concluded my year as Chair of the Section. As other Chairs before me, I write my final column for *the Checkoff* and reflect on what goals were accomplished this year.

I hope it was evident that I had two major initiatives during my year as Chair. One was to diversify the Section by encouraging all members, no matter their background, role, location or experience level, to step up and participate in committees and activities. ("Oh, Mrs. Langbein, so that explains why you were constantly goading us in each of your prior Chair messages!") The second was to mentor less experienced Section members in the mechanics, logistics and planning of seminars; to serve as editors; to co-chair committees; and to engage in other Section and Bar work. I personally believe these goals were accomplished but, ultimately, you are the arbiters of the Section's progress.

This year our Section continued to build its national reputation. ARC, a national organization that supports disabled persons, contacted our Section and asked us to provide a speaker for its national convention in Orlando. The ABA Committee on Disability Rights also reached out to us to request assistance in planning a seminar devoted to ADA topics. That was accomplished at our Advanced Labor Topics seminar in Key West. The bond we forged with the ABA hopefully will lead to future joint conferences. Our statewide reputation, already well established, was cemented by the seminars for circuit court judges that took place (or are yet to take place) around the state.

Additionally, the Section fostered the Bar's initiative to boost the use of technology. Our website became ADA compliant. We utilized e-blasts for Section announcements, our Listserv to expand intra-communications, and our webinars to offer interesting topics for CLEs.

It is from the bird's-eye view as Section Chair that I came to fully comprehend the sheer amount of time and effort that our leaders and members devote to the promotion and operation of our Section. Our Section is great only as a result of their good work. I salute and congratulate all of you who stood tall and volunteered this year despite the rigors of professional and personal lives. And, of course, we love and appreciate our Section Administrator, Angie Froelich, who never says "no" when we seek her help. Thanks to you all for making my year as Chair a memorable one.

Leslie W. Langbein
Immediate Past Chair

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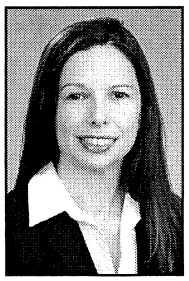
the CHECKOFF

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

The Year Ahead: Building on Success and Forging New Connections



I hope you are enjoying the summer and found time to relax with family and friends during this time of the year.

As we begin a new bar year, we look forward to your continued involvement with the Section. If you're not already involved, we hope that you'll find a Section program or committee that interests you and leads to more interaction with the Section. Please feel welcome to attend our Executive Council meetings, and share your thoughts and ideas. You will see that the Section offers many opportunities to connect with opposing counsel, judges and administrative agency officials with not only similar practice areas, but similar interests as well.

We have lots to look forward to this coming year.

Several high-quality seminars and webcasts are in the process of being planned. Our first seminar, "Effectively Litigating Employment Cases From Inception Through Trial," will take place on August 18, 2017, at The Breakers in Palm Beach. Some of the speakers for this outstanding program include the EEOC's District Director, Michael Farrell; the Director of the Palm Beach County Office of Equal Opportunity, Pamela Guerrier; and Sean Flynn, Deputy Chief for the United States Attorney's Office for the Middle District of Florida. You can still register for this seminar at www.member.floridabar.org. On-site registration will also be available. The Palm Beach seminar is the first of four live seminars we'll be hosting this year. The next seminar, the Public Employment Labor Relations Forum, is scheduled for October 19-20, 2017, at the Rosen Shingle Creek in Orlando.

This year, the Judicial Outreach Committee will continue its seminars for judges throughout the State of Florida. In addition, we have started the Corporate Counsel Committee, which will be chaired by Chelsie Flynn of Lockheed Martin. The goal of the Corporate Counsel Committee is to serve as a resource center for corporate counsel while allowing the opportunity for a collaborative environment in which outside counsel and in-house counsel can communicate on matters impacting their business.

We have also started the Workplace Health and Safety Committee, which will be chaired by our 2009-2010 Section Chair, Eric Holshouser. The goal of this Committee is to enhance the education of attorneys concerning issues related to workplace health and safety laws and matters before the Occupational Safety and Health Administration.

We have a number of other active committees in our Section that will be holding meetings in the next couple of weeks. If you are interested in participating in any of our committees but have not signed up yet, please contact me at zabbott@siolilaw.com, and we'll hook you up.

We hope to see you at our meetings, programs and receptions and look forward to a great year.

Zascha Blanco Abbott
Chair

Eleventh Circuit Clarifies Start Time for Temporal Proximity in FMLA Retaliation Cases

By Viktoryia Johnson, Tampa

The Eleventh Circuit recently clarified the start time for temporal proximity causation in FMLA retaliation cases in *Jones v. Gulf Coast Health Care of Delaware, LLC*.[1] Noting its own conflicting unpublished decisions, the court—in its first published decision on the issue—held that temporal proximity under the causation prong of a prima facie case should be measured from the end date of the employee's FMLA leave to the date of the adverse employment action. The holding has far-reaching implications for both employees and employers. *Jones* will very likely enhance the ability to establish a prima facie case in FMLA cases—especially where causation is based on temporal proximity "without more." At the same time, employers will have to more carefully weigh their reasons for taking an adverse employment action because, after *Jones*, cases may very well turn on the strengths or weaknesses of such reasons. While the court clarified the start time for temporal proximity, it may have left open the question of whether *Jones* should apply to all FMLA retaliation cases or be limited to situations where, as in *Jones*, the plaintiff has suffered an adverse action after taking the maximum continuous leave under the law.

Summary of the Case and Holding

Rodney Jones worked as an activities director at Accentia Health and Rehabilitation Center of Tampa Bay ("Accentia"). As activities director, Jones primarily had desk duties but also organized and carried out programs, events, and outings for residents.[2] Jones was required to be able to perform physical tasks, such as unloading vehicles, decorating for parties, shopping, traveling, and assisting residents.[3] Although Jones had five assistants, he liked to be "hands-on" and physically involved in the execution of his duties.[4]

In 2014, Jones applied for FMLA leave for a surgical repair of his torn rotator cuff, and Accentia approved his request for September 26, 2014, to December 18, 2014.[5] On December 18, Jones's physician recommended that Jones not work or engage in physical activities until February 1, 2015, and prescribed physical therapy for his shoulder.[6] According to Jones's understanding, his physician did not entirely prohibit him from returning to work but simply recommended continued physical therapy.[7] Therefore, Jones asked his supervisor for permission to return to light duty desk/computer work and to use the staff's assistance with physical aspects of his job.[8] The supervisor refused to reinstate Jones until he could submit a fitness-for-duty certification.[9] Allegedly, Jones felt "pressured" to apply for additional leave and was ultimately approved for thirty days of non-FMLA leave to finish his therapy.[10] While on this non-FMLA leave, Jones visited a theme park, went to the beach, and went on a mountain trip. He posted pictures on Facebook of these outings.[11]

After Jones's physician released him to full duty on January 19, 2015, Jones returned to Accentia.[12] Jones's supervisor confronted Jones with the photos from Facebook, stating they proved Jones was physically fit to return before January 19.[13] Jones was suspended pending investigation, and his employment ended several days later.[14] Jones sued, alleging that his employer interfered with, and retaliated for, Jones's exercise of his FMLA rights when it suspended and discharged him from employment.[15] The defendant moved for summary judgment on both claims, and the U.S. District Court for the Middle District of Florida granted summary judgment for the employer.[16]

On appeal, the Eleventh Circuit affirmed judgment on Jones's FMLA interference claim based on Accentia's refusal to allow Jones to return to work on light duty.[17] The court found that Jones likely waived his right to reinstatement by taking additional non-FMLA leave,[18] by failing to submit a fitness-for-duty certification at the end of his FMLA leave,[19] and by not challenging the employer's argument that it uniformly applied its fitness-for-duty certification policy.[20] The Eleventh Circuit reversed the summary judgment on Jones's FMLA retaliation claim, finding that Jones established a causal link between his request for leave and his suspension and subsequent termination.[21]

The employer and Jones agreed that close temporal proximity between protected activity and an adverse employment action generally suffice to create a genuine issue of material fact regarding causation and that such temporal proximity must—without other supporting evidence—be "very close."[22] The parties disagreed, however, on how to measure proximity.[23] The employer argued that temporal proximity should be measured from the beginning date of Jones's FMLA leave (September 26, 2014) to the date of Jones's termination (January 23, 2015).[24] The district court agreed, concluding that the nearly four-month gap between those two events was too long to establish causation.[25] Jones argued that proximity should be measured from the end date of his FMLA leave (December 18, 2014) to the date of his suspension and/or termination (January 19 and 23, 2015, respectively).[26] Accordingly, Jones argued a one-month interval was sufficiently close to show causation.[27] The Eleventh Circuit adopted Jones's view.

The court noted that it had not yet addressed the issue of measurement in a published decision, although unpublished decisions went "both ways," so "[t]he time [was] . . . ripe to clarify the law on this issue."[28] Thus, wrote the court:

> We now hold that temporal proximity, for the purpose of establishing the causation prong of a prima facie case of FMLA retaliation, should be measured from the last day of an employee's FMLA leave until the adverse employment action at issue occurs. We have previously indicated that, in the context of an FMLA interference claim, temporal proximity is measured in this way.[29]

The Eleventh Circuit reasoned that policy considerations supported its holding: "To hold otherwise would undermine the remedial purposes of the FMLA" and would disadvantage those employees who take FMLA leave for the full twelve weeks.[30] The court explained that, because three to four months between the protected conduct and the adverse action may be too long as a matter of law to establish causation under the court's precedent,[31] employees like Jones "would never be able to establish a prima facie case for FMLA retaliation."[32] After looking to other federal circuits for guidance and finding a lack of consensus,[33] the Eleventh Circuit reiterated that "both the [case law] within our circuit and fundamental policy concerns favor the proposition that temporal proximity, for the purpose of establishing the causation prong of a prima facie case of FMLA retaliation, should be measured from the last day of an employee's FMLA leave."[34] The court reversed the district court's judgment for the employer, finding that Jones had met his burden of raising a genuine dispute as to the causal connection between his taking FMLA leave and his termination.[35]

FMLA Retaliation Litigation After Jones

The court's holding that causation in FMLA retaliation cases should be measured from the end date of a plaintiff's FMLA leave to the date of the adverse employment action has far-reaching implications. *Jones* will likely enhance an FMLA plaintiff's ability to establish a prima facie case of retaliation using the *McDonald Douglas* framework in those situations where, under prior decisions, the lapse of time between the two events might very well have severed causation. This will be especially true for those plaintiffs who purport to establish causation by temporal proximity "without more." On the other hand, employers likely will have to weigh more carefully their reasoning for any contemplated adverse employment action where it would occur soon after the employee's return from leave under FMLA. With employees' increased chances of establishing a prima facie case, the ultimate outcome of cases after *Jones* may very well turn on the strengths or weaknesses of the employer's purportedly legitimate, non-retaliatory reasons.

The *Jones* holding may have left open the question of its scope. In the opinion, the court emphasizes that "measuring temporal proximity from the date that an employee first began FMLA leave would disadvantage those employees, *such as Jones*, who need to take the full [twelve] weeks of FMLA leave at one time."[36] *Jones* therefore could be reasonably interpreted as applying only to cases where plaintiffs "such as Jones" could not, under the circuit's existing precedent, prove causation after twelve or more weeks (3 or more months) of maximum continuous leave. However, the court's holding that "temporal proximity, for the purpose of establishing the causation prong of a prima facie case of FMLA retaliation, should be measured from the last day of an employee's FMLA leave," is written in unrestricted terms and appears to extend to all cases, regardless of length or intermittency of plaintiffs' leave. One could imagine a situation where the latter interpretation of *Jones* would lead to seemingly odd results. For example, where an employee takes intermittent FMLA leave, one could argue that under *Jones* the start time for temporal proximity causation "resets" each time the employee returns from the intermittent leave. Under this reading of *Jones*, the employee could conceivably establish a prima facie case of retaliation months after first beginning his or her FMLA leave.

In conclusion, while the Eleventh Circuit in *Jones* clarified the start time for temporal proximity, this issue is probably not completely settled. It will

continued, next page

be interesting to see how courts apply *Jones* to future FMLA cases where an adverse employment action follows something other than twelve weeks of continuous FMLA.


V. JOHNSON

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Endnotes

1 854 F.3d 1261 (11th Cir. 2017).

2 *Id.* at 1265.

3 *Id.*

4 *Id.*

5 *Id.*

6 *Id.* at 1265–66.

7 *Id.* at 1266.

8 *Id.*

9 *Id.* On summary judgment, Jones maintained that had his supervisor allowed him to return on light duty, he would have requested the light duty certification from his physician. *Id.*

10 *Id.*

11 *Id.*

12 *Id.*

13 *Id.*

14 *Id.*

15 *Id.*

16 *Id.* at 1266–67.

17 *Id.* at 1270.

18 *Id.* The FMLA provides only twelve weeks of leave, which cannot be extended. *Id.* at 1267. The Eleventh Circuit concluded that the defendant did not interfere with Jones's FMLA rights because the additional thirty days of non-FMLA leave was not an extension of Jones's FMLA leave, and Jones could not yet physically resume his job duties after the FMLA leave expired. *Id.* 1268 (citing *Armbrust v. SA–ENC Operator Holdings, LLC*, No. 2:14-CV-55-FTM-38CM, 2015 WL 3465760, at *5 (M.D. Fla. June 1, 2015)); *Bender v. City of Clearwater*, No. 8:04-CV-1929-T23EAJ, 2006 WL 1046944, at *11 (M.D. Fla. Apr. 19, 2006).

19 *Id.* at 1268–69. An employer does not interfere with the exercise of an employee's FMLA rights by requiring a fitness-for-duty certification. *Id.* at 1269 (citing *Drago v. Jenne*, 453 F.3d 1301, 1306–07 (11th Cir. 2006) and 29 C.F.R. § 825.313(d)).

20 *Id.* at 1268–69. "[T]he employer may have a *uniformly applied* practice or policy that requires each . . . employee to receive certification from the health care provider of the employee that the employee is able to resume work." 29 U.S.C. § 2614(a)(4) (emphasis added).

21 *Id.* at 1276. Under *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), Jones had to establish that he engaged in statutorily protected activity, suffered an adverse employment decision, and the employment decision was causally related to the protected activity. *Id.* at 1271. To establish the third prong, Jones had to prove the decision-maker knew of the protected conduct, and the protected conduct and the adverse actions were related. *Id.*

22 *Id.* at 1271–72.

23 *Id.* at 1272.

24 *Id.*

25 *Id.*

26 *Id.*

27 *Id.* (citing *Higdon v. Jackson*, 393 F.3d 1211, 1220 (11th Cir. 2004) (one month was sufficient to establish causation)).

28 *Id. Compare Penaloza v. Target Corp.*, 549 F. App'x 844, 848 (11th Cir. 2013) (measuring temporal proximity as the time between the plaintiff's request for leave and termination), *with Diamond v. Hospice of Florida Keys, Inc.*, No. 15-15716, 2017 WL 382310, at *7 (11th Cir. Jan. 27, 2017) (measuring temporal proximity from the time of leave's termination); *Lamar v. Pilgrim's Pride Corp.*, No. 3:13-CV-1101-J-34JBT, 2015 WL 5440342, at *11 (M.D. Fla. Sept. 15, 2015) (measuring temporal proximity from the time of the last approved day of FMLA leave).

29 *Id.* (citing *Evans v. Books–A–Million*, 762 F.3d 1288, 1297 n.6 (11th Cir. 2014) (noting that, because a decision to reassign the plaintiff was made almost immediately upon her return from leave, "[a] reasonable fact finder could conclude that [the plaintiff's] reassignment constituted an unlawful act of interference with her FMLA right to be reinstated to her former position")).

30 *Id.* at 1272–73.

31 *Id.* at 1273. While there is no precise cutoff for when the temporal relationship becomes too attenuated to support a finding of causation, generally three or more months between the employee's protected activity and the adverse action defeats causation. *Compare, e.g., Robinson v. LaFarge N. Am., Inc.*, 240 F. App'x 824, 829 (11th Cir. 2007) (per curiam) (two months sufficiently proximate); *Embry v. Callahan Eye Found. Hosp.*, 147 F. App'x 819, 831 (11th Cir. 2005) (per curiam) (same), *with Thomas v. Cooper Lighting, Inc.*, 506 F.3d 1361, 1364 (11th Cir. 2007) (per curiam) (observing that, in the absence of other evidence of a causal link, three- or four-month lapses in time are not sufficiently proximate to demonstrate causation).

32 *Id.*

33 *Id.* (citing *Judge v. Landscape Forms, Inc.*, 592 F. App'x 403, 410 (6th Cir. 2014) ("[W]e have measured temporal proximity from the date FMLA leave expired, not just when the employee first requested it, for the purposes of measuring temporal proximity.")); *Amsel v. Texas Water Dev. Bd.*, 464 F. App'x 395, 401–02 (5th Cir. 2012) (measuring temporal proximity, for the purpose of establishing the causation prong of a prima facie case of FMLA retaliation, from an employee's return from FMLA leave); *but see Sisk v. Picture People, Inc.*, 669 F.3d 896, 900 (8th Cir. 2012) (holding that "this court looks to the date an employer knew of an employee's use (or planned use) of FMLA leave, not the date it ended" for the purpose of determining prima facie causation in an FMLA retaliation case).

34 *Id.*

35 *Id.*

36 *Id.* at 1272–73 (emphasis added).

WANTED: ARTICLES

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@thefllawfirm.com*) or Carlo D. Marichal (*carlo.marichal@cna.com*). If you are interested in submitting an article for *The Florida Bar Journal,* contact Robert Eschenfelder (*rmejd@aol.com*) to confirm that your topic is available.

REWARD: $150*

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

The DOJ Reaches Settlement over FCA Whistle-blowers' Objections

By Kelly M. Peña, Miami

In *United States ex rel. Ashton v. Everglades College, Inc.*,[1] Manuel Christiansen and Brian Ashton (Relators) brought a qui tam lawsuit against Everglades College, Inc., d.b.a. Keiser University, under the False Claims Act (FCA). Relators argued that Keiser University committed FCA violations by claiming to be compliant with one of Title IV's "program participation agreement" requirements, known as the Incentive Compensation Ban (ICB). This ban prohibits a school from paying incentives to recruiters and admissions personnel based on the number of students they enroll.[2] Title IV precludes schools from applying for financial aid if they are not compliant with the ICB. Relators alleged that Keiser submitted 230,000 claims for financial aid (totaling $1.2 billion) despite the fact that its admissions personnel received incentive payments. Relators also argued that each student-submitted application for financial aid constituted its own actionable claim, and that the government's damages totaled the amount of government assistance paid to Keiser in connection with these false claims.

After a four-day bench trial, the district court rejected Relators' argument that each student-submitted application constituted its own actionable claim because Keiser could not control these requests. In addition, the district court found that Keiser knowingly submitted only two false certifications to the government. Finally, the district court rejected the argument that the government's damages totaled the amount of government assistance paid to Keiser during the relevant time period since the Department of Education would not have demanded reimbursement of the funds, even if Keiser had disclosed its violations. The district court instead held that the government was entitled only to nominal statutory penalties for the two false claims (totaling $11,000). Further, the district court gave an award of $60,000 in fees and about $27,000 in costs, despite a request for over $1 million.

Relators appealed this decision to the Eleventh Circuit, at which point the United States separately came to a resolution with Keiser: Keiser would pay $335,000, and the United States would release Keiser from any further administrative claims and allow Keiser to remain eligible for future Title IV funds. The district court then permitted the United States' intervention as the real party in interest and ruled that the proposed settlement was fair and reasonable.

After settlement was reached, Relators sought an award for attorneys' fees and costs that far exceeded their initial award, arguing that the United States was able to procure such a large settlement amount only because of Relators' efforts. However, the district court denied that request because Relators had objected to settling the case when they had several opportunities to do so.

On appeal, the Eleventh Circuit considered (1) whether the government was required to satisfy the FCA's "good cause" intervention requirement under 31 U.S.C. § 3730(c)(3); (2) whether the proposed settlement was "fair, adequate, and reasonable" under § 3730(c)(2)(B); (3) whether Relators were entitled to an evidentiary hearing and discovery to determine the government's reasons for reaching settlement; and (4) whether the district court abused its discretion in awarding a reduced amount of attorneys' fees.

Because the United States had initially declined to proceed with the qui tam action, Relators had authority to pursue it on the government's behalf.[3] Nevertheless, a court may still allow the government to intervene in the litigation if it makes a showing of good cause.[4] Relators argued that the government lacked good cause to intervene in this case. The Eleventh Circuit held, however, that the good cause requirement did not apply because the government sought only to *settle* the case, rather than litigate it.

The Eleventh Circuit then considered whether the proposed settlement was fair, adequate, and reasonable under 31 U.S.C. § 3730(c)(2)(B). In doing so, the court first considered the proper standard for evaluating FCA settlements. The Rule 23 standard was discussed and ultimately deemed improper because this case differed from suits involving private parties in two fundamental ways: first, a qui tam relator has not personally suffered an invasion of rights; second, the government's interests extend to broader public policy considerations beyond simply maximizing recovery against the defendant.

The Eleventh Circuit held that the settlement was fair, adequate, and reasonable in this instance because the government's recovery was thirty times larger than the district court's award at trial. Further, the government provided a reasonable explanation as to why it chose to settle: a potential outcome on appeal that could render schools liable for their students' financial aid requests.

Next, the Eleventh Circuit considered Relators' demand for an evidentiary hearing and discovery. Under limited circumstances, a relator may be allowed to present new evidence but only when the relator shows a substantial and particularized need for it. Here, there was no colorable or non-speculative claim that the government had failed

continued, next page

to investigate the allegations or acted with improper motives. Accordingly, the Eleventh Circuit affirmed the district court's denial in this regard.

Finally, Relators argued that the district court had abused its discretion by limiting its award of attorneys' fees and costs. Among other things, Relators looked to *Yellow Pages Photos, Inc. v. Ziplocal, LP*,[5] where a fee award was reversed after the district court reduced the lodestar amount by more than ninety percent in light of the plaintiff's limited success at trial. Yet, the fee award was reduced for a different reason in that case than the one at issue. In *Yellow Pages*, the court had taken a strictly mathematical approach, whereas here the court looked to policy considerations and the potential impact this award would have on Keiser's conduct. In light of these policy considerations, the Eleventh Circuit found that the district court did not abuse its discretion in awarding a reduced amount of fees and costs.


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.*

Endnotes

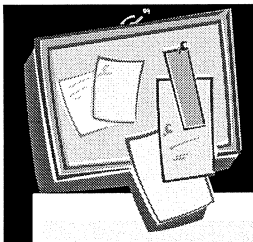
1 855 F.3d 1279 (11th Cir. 2017).

2 *See* 20 U.S.C. § 1094(a)(20); *see also* C.F.R. § 668.14(b)(22).

3 *See* 31 U.S.C. § 3730(c)(3).

4 *Id.*

5 846 F.3d 1159 (11th Cir. 2017).



2017-2018 Section Bulletin Board

Mark Your Calendars for These Important Section Meetings & CLE Dates!

For more information, contact Angie Froelich: 850-561-5633 / afroelich@floridabar.org

Thursday, August 17, 2017
5:00 p.m. – 6:00 p.m.
Labor & Employment Law Section Executive Council Meeting
The Breakers, Palm Beach

August 18, 2017
Effectively Litigating Employment Law Cases From Inception Through Trial (2645R)
The Breakers, One South County Road, Palm Beach, FL 33480
(877) 724-3188
www.thebreakers.com

Thursday, October 19, 2017
5:00 p.m. – 6:00 p.m.
Labor & Employment Law Section Executive Council Meeting
Rosen Shingle Creek, Orlando

October 19–20, 2017
43rd Public Employment Labor Relations Forum (2563R)
Rosen Shingle Creek, 9939 Universal Blvd., Orlando, FL, (407) 996-9939
www.rosenshinglecreek.com

Thursday, January 18, 2018
5:00 p.m. – 6:00 p.m.
Labor & Employment Law Section Executive Council Meeting
The Florida Bar Winter Meeting
DoubleTree by Hilton
(at the entrance of Universal Orlando)

January 18–19, 2018
18th Labor and Employment Annual Update and Certification Review (2592R)
The Florida Bar Winter Meeting
DoubleTree by Hilton
(at the entrance of Universal Orlando)

May 2018 (tentative)
5:00 p.m. – 6:00 p.m.
Labor & Employment Law Section Executive Council Meeting
Washington, D.C.

May 2018 (tentative)
Advanced Labor Topics 2018 (2630R)
Washington, D.C.

Thursday, June 14, 2018
5:00 p.m. – 6:00 p.m.
Labor & Employment Law Section Executive Council Meeting
The Florida Bar Annual Convention
Hilton Orlando Bonnet Creek, Orlando

Accessibility of Places of Public Accommodation Act: An Answer To Our ADA Prayers, or Buyer Beware?

By Anastasia Protopapadakis, Miami

Effective July 1, 2017, Florida House Bill 727, also known as the Accessibility of Places of Public Accommodation Act (APPAA), was codified in Florida Statutes under the Florida Americans With Disabilities Accessibility Implementation Act at Section 553.5141 ("Certification of conformity and remediation plans").

Intent of the New Law

The intent of the bill was to address the large number of Title III ADA lawsuits, claiming alleged barriers to access to certain businesses or other places of public accommodation, filed primarily by so-called "serial plaintiffs" against private sector businesses. These lawsuits are sometimes referred to as "drive-by lawsuits" because so many of them are filed at once by the same plaintiff and plaintiff's counsel using similar (sometimes called "cookie-cutter") complaints to allege a litany of ADA violations. Ostensibly, the purpose of these ADA lawsuits is to improve accessibility for the disabled by enjoining violators and requiring them to remove the alleged barriers; but, judging by the sheer volume of cases filed (generally by the same plaintiffs and plaintiffs' counsels), critics have argued that they instead appear to be driven by the award of attorneys' fees and costs provided for in the ADA.

The APPAA was designed to provide courts with the tools necessary to reject attorneys' fees and costs awards to these professional plaintiffs. Specifically, the new law is intended to provide guidance to private sector businesses by allowing the businesses to undergo a voluntary self-evaluation by a "qualified expert" and then implement a remediation plan that is registered with the State of Florida to make the business ADA compliant. But will this new law actually have the intended effect of reducing the cost of attorneys' fees? Many ADA accessibility experts think not.

Requirements of the New Law

According to the APPAA, any nongovernmental business can voluntarily hire a qualified expert, as defined by Section 553.5141(1)(d)(1-10), Fla. Stat., to inspect its facility for ADA compliance. Once that inspection is performed, the business may then submit a certification of conformity that complies with the requirements of Section 553.5141(2)(a)(1-4), Fla. Stat., to the Department of Business and Professional Regulation (the "Department"). This certification of conformity would then be valid for a period of 3 years from the date of issuance.[1]

Oddly, however, it does not appear from the plain language of the statute that the qualified expert must first determine that the subject facility meets the requirements of Title III of the ADA in order for the certification of conformity to be filed, and there does not appear to be any requirement that the certification of conformity state that the facility actually complies with Title III of the ADA. While actual conformity with the requirements of the ADA may have in fact been the intention of lawmakers, Section 553.5141(2)(a), Fla. Stat., (particularly when read together with Section 553.5141(3), Fla. Stat.) does not make this clear which, of course, leaves this section open to interpretation. As a result, it will be interesting to see how courts ultimately interpret this section of the law.

A business can also voluntarily hire a qualified expert and then submit a remediation plan with the Department that indicates that such place of public accommodation plans to conform to Title III of the ADA within a specified time period not to exceed ten years. There also appears to be some confusion here, as well, because Section 553.5141(2)(b), Fla. Stat., specifically provides (with emphasis added) that "[a]ny remediation plan submitted to the [D]epartment *that indicates that a place of public accommodation does not conform to Title III of the Americans with Disabilities Act*, must include a remediation plan [that complies with the requirements of Section 553.5141(2)(b)(1-6), Fla. Stat.] to remedy the deficiencies within a reasonable amount of time, not to exceed 10 years, in which the plan must be completed." This begs the question: Why would a business choose to submit a remediation plan in the first place unless its facility did not meet the requirements of Title III of the ADA? It seems that the remediation option was developed for businesses that submitted to the inspection, and the inspection determined that facility did not comply with the requirements of the ADA. However, this is not clear under the plain language of the statute.

It appears, then, that any business that voluntarily submits to an ADA inspection has the choice of either filing the certificate of conformity or the remediation plan, which is meant to put the public on notice that the facility either complies with Title III of the ADA or is making reasonable efforts to comply. The Department is required to develop a publicly accessible website that will act as a public registry of certifications of conformity and remediation plans.

Finally, the new law provides:

> In any action brought in this state alleging a violation of Title III of the Americans with Disabilities Act,

continued, next page

> 42 U.S.C. s. 12182, a court ***must consider*** any remediation plan or certification of conformity filed in accordance with this section by a place of public accommodation with the department ***before the filing of the plaintiff's complaint***, when the court considers and determines if the plaintiff's complaint was filed in good faith and if the plaintiff is entitled to attorney fees and costs.[2]

To be clear, the new law is completely voluntary for businesses. This means that no Florida business is required to hire a qualified expert, submit its facility to an ADA compliance inspection, and/or file a certification of conformity and/or a remediation plan.

Practical Implications

Aside from the confusing statutory language, perhaps the biggest issue raised by the new law is enforceability. Most Title III ADA lawsuits are filed in federal court, not state court. As a result, state law—specifically, Section 553.5141(5), Fla. Stat.—is not binding in federal courts. Whether federal court judges accept the mandate of Section 553.5141(5), Fla. Stat., remains to be seen. Also, with this in mind, are businesses that voluntarily submit to this self-inspection actually putting themselves at risk of getting sued? And, will the Department's registry actually create a target database to be used by the very plaintiffs from whom businesses were intended to be protected?

Another potential pitfall of the new law is that it does not create any standards to establish what the qualified expert is supposed to be inspecting and/or testing under the ADA. It is doubtful that any qualified expert is testing every single element in the ADA standards. Indeed, for the certification of conformity, the new law contains no requirement that the qualified expert state what was inspected and the method by which the inspection was conducted. Even for the remediation plan, there is no requirement that the qualified expert identify what was inspected at the facility. All that is required is "[i]dentification of specific remedial measures that the place of public accommodation will undertake."[3] But upon what is that based?

Further, while the previous version of the law initially contemplated that the State of Florida would offer licenses to ADA compliance experts who have sufficient training, knowledge, and experience to advise places of public accommodation on general compliance issues, the new law is much broader. Under the APPAA, there is no requirement that the qualified experts be licensed as such by the state. Instead, any licensed engineer, general contractor, building contractor, building code administrator, building inspector, plans examiner, interior designer, architect, or landscape architect is automatically considered a qualified expert regardless of knowledge and experience with the ADA standards.[4] Even a person not licensed in any of those nine categories can still be considered a qualified expert if the person has "prepared a remediation plan related to a claim under Title III of the Americans with Disabilities Act, 42 U.S.C. s. 12182, that has been accepted by a federal court in a settlement agreement or court proceeding, or has been qualified as an expert in Title III of the Americans with Disabilities Act, 42 U.S.C. s. 12182, by a federal court."[5] This means that even among these who are deemed to be qualified experts, there will be many discrepancies as to which facilities conform to the requirements of the ADA.

Finally, businesses that voluntarily participate in the procedure outlined by the APPAA may be compromising their settlement positions. In reality, most of the Title III ADA cases are resolved through settlement, which typically includes a release of the defendant business owner by the plaintiff(s). Usually, the defendant hires its own expert to investigate a plaintiff's accessibility barrier allegations. During settlement discussions, the parties' experts may negotiate certain acceptable tolerances—based on interpretation of the ADA standards—that are then incorporated into the parties' settlement agreement. Moreover, many lawsuits identify only those aspects of the property that allegedly presented a barrier to that the particular plaintiff.

The voluntary self-inspection contemplated under the new law will likely cover much more ground than any individual lawsuit would, and items that may be deemed acceptable pursuant to the parties' negotiations will now be deemed non-compliant and subject to remediation under the remediation plan. Cost is also a factor to consider. Hiring the qualified expert and then implementing the remedial plan under the new law is going to cost the business money. These costs may, in some cases, exceed the cost of litigation with a quick settlement strategy and related remediation under a settlement agreement, and the business does not get the benefit of a negotiated release. Moreover, nothing prevents the filing of a lawsuit against a business that has participated in the APPAA's procedure. Businesses that are concerned about accessibility issues and want to get ahead of any litigation have always had the option (and still do) of hiring their own ADA accessibility consultant to assess their facility and provide them with a private report that identifies accessibility issues and provides defendable recommendations for remediation of these barriers, without listing the businesses' barriers on a public registry.

One thing is clear: the APPAA is not a panacea to the business community's ADA woes. It certainly does not mean that businesses are now protected from ADA lawsuits or that such lawsuits will be curtailed.

A. PROTOPAPADAKIS

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Endnotes

1 Fla. Stat. § 553.5141(2)(a).
2 Fla. Stat. § 553.5141(5) (emphasis added).
3 Fla. Stat. § 553.5141(2)(b)(3).
4 Fla. Stat. § 553.5141(1)(d)(1-9).
5 Fla. Stat. § 553.5141(1)(d)(10).

Wagner v. Lee County: The Eleventh Circuit Affirms Dismissal of First Amendment Retaliation Claim but Revives Florida Public Whistle-blower Suit

By Jeffrey D. Slanker, Tallahassee

Finding that a reasonable jury could conclude that a public employee's participation in an audit that was critical of the defendant county was the reason for her termination, the Eleventh Circuit Court of Appeals reversed a federal trial court's grant of summary judgment to the government employer on the plaintiff's Florida public whistle-blower claim. The plaintiff below, Lisa Wagner, also alleged—among other claims—she was terminated for engaging in her First Amendment right to free speech.[1] The Eleventh Circuit affirmed the district court's dismissal of the First Amendment retaliation claim but held that the whistle-blower claim should go to trial.

Background

Lisa Wagner previously worked for the Lee County Board of Commissioners in the county's Economic Development Office (EDO) as an administrative specialist. Performance reviews from 2012 and 2013 indicated that Ms. Wagner's work exceeded expectations. While working at the EDO, Ms. Wagner noticed what she perceived to be potentially illegal activity. She complained several times, including to her supervisor. She also complained to the Lee County Clerk of Courts' Internal Audit Department. Ms. Wagner reported during the audit "that she was asked by EDO employees to change official records, that some records were 'stolen from [her] desk,' that EDO employees were 'throwing out materials that [the EDO] had paid thousands of dollars for," that she was asked to hide certain materials, and that the EDO was "spending money on things that just plain old [were not] done." After the audit, Ms. Wagner signed a document setting out a number of her complaints. The written complaint was not addressed to anyone in particular, but there was evidence it was submitted to the audit department.

Ultimately, the audit department released a report described by one witness as "critical" of the Economic Development Office. The director of the Economic Development Office, James Moore, called a meeting of the staff after receiving the report and demanded to know who participated in the audit. Ms. Wagner testified that she indicated she participated in the audit.

Several days later the EDO's director submitted a memorandum regarding the office's budget to the county manager. The budget contained a budget reduction goal and suggested layoffs of several staff members, including Ms. Wagner, to meet that goal.

Eventually, a new director, Glen Salyer, took over for the previous director, Mr. Moore. Mr. Salyer met with Mr. Moore around the time he took over as director, and they discussed the audit. Mr. Salyer decided to lay off Ms. Wagner as part of a reorganization requested by the county to address "workload assessment . . . what the core functions of the office were, what level of service [the EDO would] provide, [and] budgetary restraints."

Ultimately, the decision to lay off Ms. Wagner was due to several factors, according to Mr. Salyer. He felt there was insufficient workload to justify Ms. Wagner's position. Additionally, a database that Ms. Wagner worked on was no longer being used. Budgetary issues also influenced the decision.

All employees in the Economic Development Office who participated in the audit were terminated. Mr. Moore had previously recommended these employees be terminated in a memorandum. There was also testimony that the county faced no major budgetary issues and, in fact, the EDO's budget increased after Ms. Wagner was terminated. Mr. Salyer also indicated that the audit findings were of interest to him and that they played some role in the termination decision.[2]

The Case

Ms. Wagner filed a complaint against Lee County and several Lee County administrators alleging, among other things, retaliatory termination for engaging in activity protected by the First Amendment of the Constitution and by Florida's Whistle-blower's Act. The district court entered judgment on all claims for the county, and Ms. Wagner appealed.

The Eleventh Circuit affirmed the judgment of the district court in part and also reversed in part. The district court found that judgment should be entered for the county on Ms. Wagner's First Amendment retaliation claim because Ms. Wagner's alleged First Amendment protected speech—her complaints in the context of the audit—was speech as an employee, not a citizen, and therefore not entitled to protection. The district court also entered judgment on Ms. Wagner's whistle-blower claim. The Eleventh Circuit affirmed the dismissal of the First Amendment retaliation claim but revived Ms. Wagner's Whistle-blower's Act claim.[3]

continued, next page

Protected Activity Under Florida's Whistle-blower's Act

The Eleventh Circuit found, contrary to the district court, that Ms. Wagner engaged in protected activity under the Whistle-blower's Act. The Eleventh Circuit noted that in order to be protected activity, the disclosure must be: (1) protected information; (2) to a protected recipient; (3) in a protected manner.[4]

As to the first requirement, the county did not dispute that Ms. Wagner disclosed information that would be protected by the whistle-blower statute. The statute protects disclosure of violations or suspected violations of applicable laws that create and present a substantial and specific danger to the public or an act or suspected act of "gross mismanagement, malfeasance, misfeasance, gross waste of public funds, suspected or actual Medicaid fraud or abuse, or gross neglect of duty" committed by a government employee or contractor.[5] Ms. Wagner's assertions that the county paid for goods not received could support a finding that Ms. Wagner complained of "gross mismanagement, malfeasance, misfeasance, gross waste of public funds . . . or gross neglect of duty committed by an employee."[6]

Regarding the second element, the Eleventh Circuit noted that protected entities are those that have the power to correct the alleged misconduct and, for local governments, include appropriate local government officials. The Eleventh Circuit determined that a jury could find that the complaints to the Internal Audit Department met this prong, as the county's Internal Audit Department was a local government official and had "at least some authority" to address Ms. Wagner's complaints.[7]

Finally, the Eleventh Circuit held there was sufficient evidence for a jury to resolve whether Ms. Wagner complained in a protected manner. The Whistle-blower's Act protects, inter alia, employees (1) "who disclose information on their own initiative in a written and signed complaint," or (2) "who are requested to participate in an investigation, hearing, or other inquiry conducted by any agency or federal government entity." The Eleventh Circuit noted that it was disputed whether Ms. Wagner was asked to participate in the audit, or if she volunteered to, and whether Ms. Wagner submitted a written and signed complaint.[8]

Protected Speech Under the First Amendment

In affirming the district court's dismissal of the First Amendment claim, the Eleventh Circuit found that the disclosures made pursuant to the audit were made by Ms. Wagner as an employee and not as a citizen. Therefore, the disclosures were not protected by the First Amendment. While public employees do not give up their right to engage in free speech and to be free from retaliation for engaging in speech, public employers are entitled to manage their workforce just as other employers.[9] As the court noted, Ms. Wagner's speech was "in accordance with or in furtherance of the ordinary responsibilities of her employment" and in her capacity as an employee, and thus she could not prevail as a matter of law.[10]

Purposefully or not, the Eleventh Circuit is implicitly aligning itself with the decision of Florida's Third District Court of Appeals in *Igwe v. City of Miami*,[11] which held that activity or speech engaged in pursuant to one's job duties was protected under Florida's Whistle-blower's Act. *Wagner v. Lee County* makes it clear that this is so, even if that same activity would not be deemed protected activity, or protected speech, under federal First Amendment law.

J. SLANKER

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Endnotes

1 Fla. Stat. §§ 112.3187 *et seq.*

2 All facts and procedural history were derived from the court's opinion. *Wagner v. Lee Cty.*, No. 16-10576, 2017 WL 456430, at *1-*6 (11th Cir. Feb. 2, 2017).

3 The Eleventh Circuit also reversed the decision of the trial court to the extent that it entered judgment for the county on a Fair Labor Standards Act claim for unpaid overtime brought by Ms. Wagner. *Wagner*, No. 16-10576, 2017 WL 456430, at *10-*11.

4 *Id.* at *7 citing § 112.3187(5)-(7).

5 *Id.* citing § 112.3187(5).

6 *Id.*

7 *Id.* at *8

8 *Id.* at *8-*9. The Eleventh Circuit also found that there was evidence to demonstrate a causal connection between Ms. Wagner's participation in the audit and her termination; that the individual who decided to terminate her, Mr. Salyer, knew of her involvement in the audit; and that there were factual issues for a jury to resolve as to whether the reasons proffered by the county for Ms. Wagner's termination were real or were a pretext to retaliate. *Id.* at *9-*10.

9 *Garcetti v. Ceballos*, 547 U.S. 410, 418 (2006).

10 *Id.* at *11.

11 208 So. 3d 150, 154 (Fla. Dist. Ct. App. 2016), *reh'g denied* (Dec. 20, 2016), *review denied*, No. SC17-80, 2017 WL 1056173 (Fla. Mar. 21, 2017).

Arbitration of Employment Claims: How to Keep It Efficient

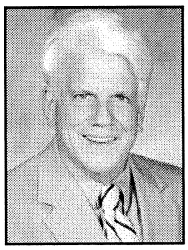
By Guy O. Farmer II, Jacksonville

In an effort to avoid jury trials and reduce the cost of litigation, employers are increasingly requiring employees to agree, as a condition of employment or continued employment, to resolve complaints (statutory or otherwise) through arbitration and not litigation. The courts, including the United States Supreme Court in *Circuit City* and subsequent cases, have generally upheld the right of employers to insist on arbitration of employment claims.

Lawyers, in attempting to prevail in arbitration cases, have increasingly introduced litigation tactics into arbitration. Unfortunately, this has resulted in arbitration becoming less efficient and more expensive. Motions, which take time and are expensive, are being filed in arbitration proceedings with greater frequency. Many of those motions involve discovery issues. Such motions are clearly counter-productive to a smooth process. In fact, the use of extensive discovery and significant motion practice has, in many cases, resulted in arbitration costs rising to the level of litigation costs. Arbitrators can control some of these time-consuming activities in an effort to maintain arbitration as a cost-efficient alternative to litigation, but the ability to keep arbitration effective rests primarily with the parties and their attorneys.

The best way to control the cost of arbitration is to establish rules in the arbitration agreement that reasonably limit discovery and motion practice. For example, the parties can agree to exchange documents without any need for discovery. Depositions can be limited to three for each party without materially affecting the ability of the parties to make their cases. The American Arbitration Association has standard rules for arbitration proceedings that can be incorporated into the arbitration agreement. The arbitration agreement also should make it clear that the arbitrator has the authority to limit discovery and motions. By not hesitating to award fees and costs against parties that are dilatory in the course of arbitration, arbitrators can exercise additional control over the proceedings

In sum, employers should include reasonable limitations on discovery and motion practice in their arbitration agreements. Attorneys in arbitration proceedings should attempt to avoid being overly litigious, thus allowing the proceeding to move forward efficiently. Arbitrators should be aggressive and should not hesitate to make rulings that control and limit the ability of attorneys to delay the proceedings by excessive discovery and motions. Taking these steps will allow arbitration to serve as a cost-efficient, reasonable alternative to litigation.



G. FARMER

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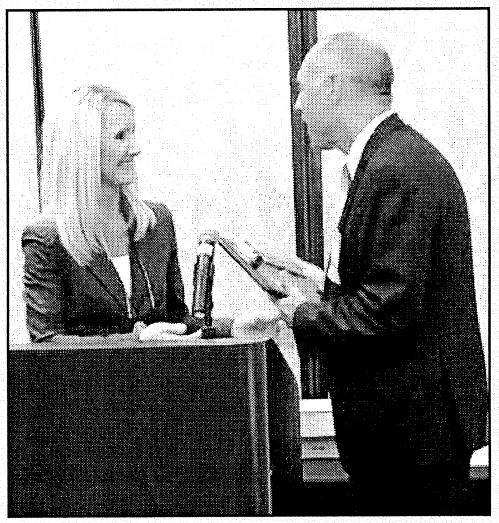


Fifth DCA Judge Wendy Berger introducing former Fifth DCA Chief Judge (and new Florida Supreme Court Justice) Alan Lawson during a reception held by the Florida Lawyers' Chapters of the Federalist Society at The Florida Bar Annual Convention in June.

SEXUAL ORIENTATION DISCRIMINATION,
continued from page 1

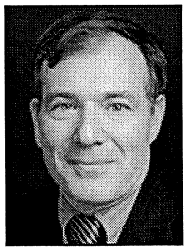
on sexual orientation is not.[6] Both the Florida Civil Rights Act[7] ("FCRA") and Title VII of the Civil Rights Act of 1964[8] ("Title VII") prohibit discrimination by employers on the basis of the sex of their employees; i.e., the employee's gender as male or female. However, unlike some state laws that specifically prohibit discrimination on the basis of sexual orientation,[9] neither the FCRA nor Title VII includes such specific language. Despite this lack of textual support, the Equal Employment Opportunity Commission has taken the position that discrimination based on sexual orientation constitutes sex discrimination in violation of Title VII[10] and has obtained consent decrees and fines from Florida employers whom it believed retaliated against employees who complained about sexual orientation discrimination.[11]

Moreover, Florida state and federal courts have allowed employees to proceed on gender non-conformity claims under the FCRA and Title VII pursuant to the Supreme Court's *Price Waterhouse* decision. However, Florida courts have not allowed employees to "repackage" a claim for sexual orientation discrimination into one for gender non-conformity.[12]

In her *Evans* dissent, Judge Rosenbaum argued that a gender non-conformity claim necessarily includes claims that an employer discriminated on the basis of the employee's sexual orientation,[13] a position also recognized by the majority in *Hively*; however, the *Evans* majority claimed that any change in Title VII or FCRA to provide such coverage was properly left to the legislature and not the court.[14] Ironically, this was the same position reached by the original *Hively* panel until that decision was replaced with the en banc decision.[15]

While several parties have urged the Eleventh Circuit to review the *Evans* case en banc, to date the court has declined the invitation. Lower courts continue to dismiss Title VII discrimination and retaliation claims based on sexual orientation as well as companion claims under the Florida Civil Rights Act.[16] It remains to be seen after the September en banc arguments whether the Second Circuit will side with the Eleventh Circuit or the Seventh Circuit.[17]

Regardless of the Second Circuit's decision in *Zarda*, it is likely that the issue will reach the Supreme Court in the next few years as more district courts complain about being forced to adhere to circuit precedent that they believe perpetuates an outmoded distinction between gender non-conformity claims and sexual orientation discrimination.[18]


A. TANDY

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Endnotes

1 *Evans v. Ga. Reg'l Hosp.*, 850 F.3d 1248, 1255 (11th Cir. 2017) (vacating trial court dismissal of plaintiff's gender non-conformity claims but confirming dismissal of claims for discrimination and retaliation based on sexual orientation). For a more thorough discussion of the court's decision, see the March 2017 *E-Update* from The Florida Bar Labor and Employment Law Section ("Eleventh Circuit Finds No Cause of Action Under Title VII for Sexual Orientation Discrimination").

2 *See Hively v. Ivy Tech Cmty. Coll.*, 853 F.3d 339, 342 (7th Cir. 2017).

3 *Id.* at 351-52.

4 Case No. 15-3775 (2d Cir. May 25, 2017).

5 The underlying decision in *Zarda* can be found at 855 F.3d 76 (2d Cir. 2017) (finding that current Second Circuit precedent does not recognize a Title VII discrimination claim on the basis of sexual orientation).

6 A gender non-conformity claim was first recognized by the Supreme Court in *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989). The Supreme Court reasoned that pursuant to Title VII, employers were forbidden from discriminating against their employees "because of . . . sex" on the basis that an employee failed to conform to the "sex stereotype" held by their employer or supervisor; e.g., female employee did not wear dresses or did not "appear to be feminine enough." *Id.* at 251.

7 Fla. Stat. §§ 760.01, *et seq.*

8 42 U.S.C. §§ 2000e, *et seq.*

9 *See, e.g.*, N.Y. Exec. Law § 296(1)(a).

10 *See Baldwin v. FOXX*, E.E.O.C. Decision No. 0120133080, 2015 EEOPUB LEXIS 1905 (July 16, 2015).

11 *See, e.g., EEOC v. Lakeland Eye Clinic.* (M.D. Fla. Civ. No. 8: 14-cv-2421-T35 AEP) (settled April 9, 2015). For a description of the case and settlement, see *EEOC Fact Sheet on Recent EEOC Litigation Regarding Title VII & LGBT Related Discrimination*, which can be found at https://www.eeoc.gov/eeoc/litigation/selected/lgbt_facts.cfm.

12 *See, e.g., Burrows v. Coll. of Cent. Fla.*, 2015 U.S. DIST. LEXIS 90576 (M.D. Fla. July 13, 2015) (finding that a claim rooted in sexual orientation discrimination may not be pursued under gender stereotyping discrimination). *But see Evans*, 850 F.3d at 1255 (vacating dismissal of plaintiff's gender non-conformity claims, recognizing that certain sexual orientation evidence may be applicable to actionable claim for gender non-conformity discrimination).

13 *Evans*, 850 F.3d at 1261.

14 *Id.* at 1258.

15 *See Hively*, 853 F.3d at 340.

16 *See, e.g., Pacheco v. Public Health Trust*, 2017 U.S. Dist. LEXIS 76630, at *31 (S.D. Fla. May 18, 2017) (report and recommendation granting summary judgment for employer because "sexual orientation [discrimination and retaliation] claims are not cognizable under Title VII"), *judgment entered* 2017 U.S. Dist. LEXIS 92355 (S.D. Fla. June 13, 2017).

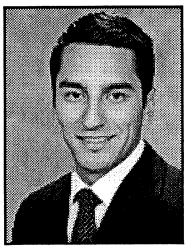
17 For now the Seventh Circuit *Hively* decision will remain intact as the defendant in that action has declined to appeal the ruling to the United States Supreme Court.

18 *See, e.g., Coleman v. Amerihealth Caritas*, 2017 U.S. Dist. LEXIS 85319 (E.D. Pa. June 2, 2017) (dismissing sexual orientation discrimination claims but granting leave to amend to bring gender stereotyping claim).

building. Thus, the plaintiff argued that the security company knew or should have known of the guard's propensity for voyeurism. After a trial, the plaintiff was awarded over a million dollars. The security guard company argued throughout the case that the impact rule precluded any recovery because the security guard never physically touched the plaintiff. On appeal, the Third DCA, in a two-to-one decision, agreed with the security guard company.

The plaintiff argued that the court should create a limited exception to the impact rule under the facts as other courts have done in the past. For example, in *Florida Department of Corrections v. Abril* the Florida Supreme Court held that the impact rule did not apply to a party seeking emotional damages for a violation of Florida's HIV confidentiality statute where there was no physical impact.[4] The dissent in *Golzar*, citing several other instances where the Florida Supreme Court created exceptions to the impact rule, noted the rule did not apply in a legal malpractice case where the public defender did not seek immediate release of a defendant; a case between a psychotherapist and client alleging breach of the fiduciary relationship and statutory duty of confidentiality; a case where contaminated food or beverage was ingested; a case involving a negligent stillbirth; a case alleging negligent handling of a corpse; and a case of wrongful birth.[5] The majority, however, refused to create the exception because emotional damages are not the *only* reasonably foreseeable damages in negligent hiring or retention cases.

The Third DCA's decision is now binding in all Florida courts because it is the only appellate court to have addressed the issue.[6] Practitioners should now inquire into whether there was any physical contact between the wrongdoer and the plaintiff. If no physical contact was alleged in the complaint, the defense may seek an early dismissal on a motion to dismiss.[7] If alleged, however, the defense may move for summary judgment.



C. MARICHAL

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Endnotes

1 *See, e.g., Resley v. Ritz-Carlton Hotel Co.*, 989 F. Supp. 1442 (M.D. Fla. 1997) (bringing a sexual harassment claim with a negligent retention claim).

2 208 So. 3d 204 (Fla. 3d DCA 2016).

3 *Id.* at 208.

4 *See id.* at 208-09 (citing *Fla. Dep't of Corr. v. Abril*, 969 So. 2d 201 (Fla. 2007)).

5 *See id.* at 211 (Shepherd, J., dissenting).

6 *See Winn-Dixie Stores, Inc. v. Dolgencorp, LLC*, 746 F.3d 1008, 1021 (11th Cir. 2014) (discussing the binding effect of state appellate cases in federal courts); *see also Pardo v. State*, 596 So. 2d 665, 666 (noting that if only one district court of appeal has addressed the issue, all trial courts are bound by the ruling).

7 *See, e.g., Weld v. S.E. Cos., Inc.*, 10 F. Supp. 2d 1318, 1323 (M.D. Fla. 1998) (granting motion to dismiss based on the impact rule in a negligent supervision case where a claim for discrimination was also brought).

Fourth District Court of Appeal Judge (and former L&E Section Chair) Alan O. Forst with law clerks and interns at a reception held by the Florida Lawyers' Chapters of the Federalist Society at The Florida Bar Annual Convention in June.

FEDERAL COURTS

Eleventh Circuit

By Greg K. Demers

"Tipped employees" failed to state a claim under the FLSA where they alleged only that their employer withheld their tips but failed to allege that their employer did not pay minimum wage or overtime.

Malivuk v. Ameripark, No. 16-16310, 2017 WL 2491498 (11th Cir. June 9, 2017).

A valet driver and others similarly situated brought suit under the Fair Labor Standards Act (FLSA) alleging that their employer appropriated a share of their tips in violation of the Department of Labor's 29 C.F.R. § 531.52 regulation. Section 531.52 prohibits employers from taking employees' tips for any reason other than as a credit against minimum wage obligations or in furtherance of a valid tip pool. The Eleventh Circuit concluded that an employee may bring a FLSA claim against an employer only when the FLSA authorizes such an action. Regardless of whether Section 531.52 is entitled to *Chevron* deference, in order to bring a claim under the FLSA, the employee must allege a violation of Section 206 (minimum wage) or Section 207 (overtime). Further, the Eleventh Circuit found that the district court did not abuse its discretion in denying the plaintiff's leave to amend because (1) her request in a footnote in a Response in Opposition to the Motion to Dismiss was not a proper manner to seek leave to amend, and (2) the plaintiff did not provide any indication that she could make a proper FLSA claim.

Rodriguez v. Gold Star, Inc., No. 16-11508, 2017 WL 2456975 (11th Cir. June 7, 2017).

Cars parked by valets constituted "goods," rather than "materials," under the handling clause of the enterprise prong of the FLSA, precluding the valets from coverage.

Valet parking employees filed FLSA claims against their former employer for unpaid overtime compensation. An employee may be covered by the FLSA under the enterprise clause where, among other things, the enterprise "has employees handling, selling, or otherwise working on **goods or materials** that have been moved in or produced for commerce by any person." 29 U.S.C. § 203(s)(1)(A) (emphasis added). Under the FLSA ultimate consumer exception, if the cars are goods, they would not trigger enterprise coverage. The issue on appeal was whether the cars were materials, rather than goods. The Eleventh Circuit relied on its decision in *Polycarpe v. E&S, Landscaping Service, Inc.*, where it found that an item is a material if: (1) it fits the ordinary definition of materials in the context of its use, and (2) it has a significant connection with the employer's business. 616 F.3d 1217 (11th Cir. 2010). *Polycarpe* also defined materials as the tools necessary to do a job. In parsing the meaning of materials, the court contrasted the valet cars to Congress's example of soap used in a commercial laundry. The court found that unlike the soap, which is a tool to wash the customer's clothes, the valet cars are goods serviced by the employees and, therefore, the ultimate consumer exception applied.

The Eleventh Circuit affirmed summary judgment of an employee's claims of Title VII retaliatory failure to promote, of retaliatory termination, and of COBRA violations, where employee reported sexual harassment and was passed over for promotion and later fired, but the employee was not qualified for the position, the reason for firing was not pretextual, and there was sufficient, undisputed evidence that the employer notified the employee of his COBRA rights.

Debene v. Baycare Health Sys., Inc., No. 16-12679, 2017 WL 2350208 (11th Cir. May 31, 2017).

The plaintiff, a contract manager at a hospital network, filed a report that a former co-worker was sexually harassed by her department manager. As a result of an investigation, the department manager was terminated. The plaintiff later applied for a promotion but was rejected because he did not have the requisite college degree. The Eleventh Circuit found that the plaintiff did not demonstrate that the employer's stated reason was pretextual because he failed to prove that no reasonable person, in the exercise of impartial judgment, could have chosen the promoted employee over the plaintiff. The plaintiff was later fired after the plaintiff's managers became aware that the plaintiff failed to disclose his secondary employment, in violation of their conflicts-of-interest policy. The plaintiff again alleged that the firing was pretextual, given that another employee was not fired for a similar reason and that another manager, who was friends with the terminated manager, had "bullied" coworkers in protest of the manager's termination. The court found the employees' violations distinguishable, as the plaintiff had his secondary employment for years while the coworker who was not fired had secondary employment for only a few months. Further, there was no causal connection between the manager's alleged bullying and the plaintiff's firing. Finally, the plaintiff alleged that his employer failed to notify him of his COBRA rights in a good faith manner reasonably calculated to reach the plaintiff. As the employer presented undisputed evidence—a report from its agent that the letter was sent, records demonstrating that other notice recipients received their notice on the same day, and testimony that the company followed its notice procedures—that it mailed the plaintiff a COBRA letter, the district court held, and the Eleventh

Circuit affirmed, that the employer met its obligations under COBRA.

An employer contributing to a multi-employer pension plan in "critical status" did not have a cause of action under ERISA to challenge the plan administrator's amendment to the rehabilitation plan.

WestRock RKT Co. v. Pace Indus. Union-Mgmt. Pension Fund, 856 F.3d 1320 (11th Cir. 2017).

In a matter of first impression, an employer contributing to a multi-employer retirement fund brought a claim under the Pension Protection Act (PPA) amendment to ERISA, 29 U.S.C. §§ 1132(a)(10) and 1451(a), alleging that the defendant fund's board of trustees violated ERISA by amending the fund's rehabilitation plan to include a provision requiring an employer that withdraws from the fund to pay a portion of the fund's accumulated funding deficiency. The PPA amended ERISA to create special funding rules for funds at risk of not reaching their distribution commitments. The Eleventh Circuit rejected the plaintiff's argument that a plan sponsor cannot put in place a system for charging withdrawing employers for their share of the accumulated funding deficiency, finding that § 1082 relieves employers from automatic payments but does not prohibit charges based on accumulated funding deficiencies in all scenarios. The court also rejected the employer's claim under 19 U.S.C. 1451(a), finding that Congress did not intend for withdrawal liability to be the only payments a withdrawing employer could face. Payments toward the funding deficiency are separate and distinct from any withdrawal liability under the statute.

Under the multi-employer worksite doctrine ("exposing-employer doctrine"), OSHA safety regulations applied to a concrete formwork subcontractor even though it was not directly responsible for concrete operations at the time a parking garage collapsed.

S. Pan Services v. U.S. Dep't of Labor, 2017 O.S.H.D. (CCH) P 33585 (11th Cir. 2017).

The defendant subcontractor was hired to construct a parking garage and was tasked with the shoring (supporting structure) and reshoring drawings and with building and installing the shoring and reshoring framework supporting the wet concrete loads. The parking garage collapsed during construction, causing the death of one employee and several other injuries. The defendant disputed its citations for willful violations of OSHA, arguing it was not—pursuant to the preamble to OSHA's final rule regarding concrete and masonry construction safety standards—the employer "directly responsible" for the concrete operations at the time of the collapse. However, under OSHA's exposing-employer doctrine, an employer must comply with a particular standard (here, complying with the shoring and reshoring drawings) where its own employees are exposed to a hazard or violative condition, even if the employer did not create or control the hazard. The defendant could have easily taken measures under the circumstances to protect its employees. Substantial evidence supported finding that the concrete formwork subcontractor willfully violated safety regulations governing construction loads when it knowingly removed shoring and reshoring from the first three levels of the garage and knowingly failed to provide inspectors with accurate drawings in order to determine if the structure could handle the additional load of wet concrete.

District Courts

By Barron F. Dickinson

Plaintiff's Florida Civil Rights Act claims against a Florida university dismissed due to lack of subject matter jurisdiction based upon Eleventh Amendment immunity.

Wang v. Fla. Atl. Univ. Bd. of Trs., No. 16-80915-CIV-MARRA, 2017 WL 1155889 (S.D. Fla. Mar. 27, 2017).

Following his termination, a former tenured professor at Florida Atlantic University filed numerous claims against the university, including two causes of action based upon the Florida Civil Rights Act (FCRA). The professor had been terminated after a university investigation determined that he sent anonymous emails to the university containing discriminatory statements regarding the age and sexual orientation of certain faculty members. The court dismissed the professor's FCRA claims with prejudice due to a lack of subject matter jurisdiction, as Florida has not waived its Eleventh Amendment immunity to allow such claims to be brought in federal court and FAU, as an arm of the state, receives the same protection from suit in federal court as Florida itself.

Protected activity under Florida's private whistle-blower's act requires a showing that the employee objected to or refused to participate in conduct that constituted an actual violation of law, not simply a good faith, objective reasonable belief that the employer's policy violated the law.

Graddy v. Wal-mart Stores E., LP, 2017 WL 600094, -- F. Supp. 3d -- (M.D. Fla. Feb. 14, 2017).

A pharmacist, formerly employed by the defendant, Wal-mart, filed a retaliation claim under Florida's private whistle-blower's act (FWA), Section 448.102, Florida Statutes, after she was terminated for filling a forged prescription in cooperation with a local police department's drug enforcement sting operation. Wal-mart policy prohibits pharmacists from complying with such law enforcement requests. Wal-mart moved for summary judg-

ment, which was granted because the pharmacist failed to prove that she engaged in protected activity under the FWA. Specifically, the court held that to receive protection under the FWA, the plaintiff must show that she objected to an actual violation of law or refused to participate in an activity that would have been an actual violation of law. The court rejected the pharmacist's argument that she need only show that she had a good faith, objective reasonable belief that Wal-mart's policy violated the law.

County employee's speech was unprotected under the First Amendment but qualifies as protected activity under Florida's public sector Whistle-blower's Act.

Laird v. Bd. of Cty. Comm'rs, Walton Cty., Fla., No. 3:15-cv-394-MCR-CJK, 2017 WL 1147472 (N.D. Fla. Mar. 26, 2017).

The plaintiff, a former employee of the defendant county, filed several causes of action, including retaliation under the First Amendment and Florida's public sector Whistle-blower's Act (FWA). The plaintiff alleged he was wrongfully terminated after he found and turned in a memorandum written by another former employee in which she admitted to billing a subdivision $614.00 instead of $614,000.00. A criminal investigation ensued, in which the plaintiff participated. Several months after discovering the memo, the plaintiff was terminated for insubordination after he failed to timely submit a report regarding an improper setback he approved in a permit without following county procedure. The trial court granted the county's summary judgment motion regarding the plaintiff's First Amendment claim because his disclosure of the memo was within his ordinary duties as a public employee, and the seven-month gap between his disclosure and his termination was too great to establish causation. With regard to his FWA claim, however, the court held that the plaintiff had raised questions of material fact because the plaintiff, by participating in the criminal investigation, engaged in protected activity and only two months had passed between his participation and his termination, which was enough to establish a causal connection between the two.

Nursing home employee's race discrimination claim could not survive summary judgment because he was terminated for a legitimate nondiscriminatory reason: pleading no contest to a battery charge.

Williams v. Signature Healthcare, No. 5:16-cv-196-RH/GRJ, 2017 WL 2272078 (N.D. Fla. May 24, 2017).

A nursing home employee was terminated after being charged with felony battery, which was ultimately reduced to a misdemeanor as part of his no-contest plea. In response, the employee filed a race discrimination action against the nursing home. The court rejected the employee's claim and granted summary judgment in favor of the nursing home, finding that under the nursing home's policy, battery was an offense that could lead to an employee's termination and that racial animus did not exist because the human resources advisor who recommended his termination did not know the employee's identity or race.

State Courts

By Barron F. Dickinson and Greg K. Demers

Trial court's temporary injunction enforcing a covenant not to compete was overly broad where doctor was enjoined from practicing all dermatological services, rather than just those that include Mohs surgery.

Tarantola v. William B. Henghold, M.D, P.A., 214 So. 3d 726 (Fla. 1st DCA 2017), reh'g denied (Apr. 18, 2017).

A dermatologist entered into a noncompete agreement that restricted her from "[d]irectly or indirectly rendering medical services that include performing Mohs surgery in any capacity for Employee's own account or for others." The trial court issued a temporary injunction, interpreting "medical services" to encompass all dermatological services, including Mohs surgery. On appeal, the First DCA ordered the trial court to narrow the injunction so the dermatologist could practice general dermatology unrelated to Mohs surgery, finding that "the contractual term 'medical services' is modified by the restrictive clause 'that include performing Mohs surgery.'"

Governor has the constitutional authority to veto specific appropriations of the General Appropriations Act and, therefore, the Public Employees Relations Commission properly dismissed an unfair labor charge against the governor.

Int'l Ass'n of Firefighters Local S-20 v. State, 2017 L.R.R.M. (BNA) 189336 (Fla. 1st DCA 2017).

A bargaining unit for firefighters filed an unfair labor practice charge that claimed the governor lacked veto authority after he vetoed a $2000 raise-specific proviso passed by the Florida legislature under the General Appropriations Act (GAA) after a bargaining impasse. Under Article III § 8, Fla. Const., the governor "may veto any specific appropriation in a general appropriation bill." The First DCA held that the governor's veto did not displace the legislature's power to resolve the impasse because the legislature made the decision to accept the status quo by not overriding the veto. As the governor possessed explicit constitutional authority to veto appropriations within the GAA, the First DCA affirmed the Public Employees Relations Commission's dismissal of the plaintiff's claim.

The Fourth District Court of Appeal applies *Nassar* Title VII causation standard to Florida Civil Rights Act retaliation claim.

CASE NOTES

Palm Beach Cty. Sch. Bd. v. Wright, 217 So. 3d 163 (Fla. 4th DCA 2017).

The Fourth District Court of Appeal ordered a new trial on the plaintiff's Florida Civil Rights Act (FCRA) retaliation claim after determining that the trial court instructed the jury with the wrong causation standard. Because Florida courts apply federal Title VII case law to FCRA claims, the Fourth DCA recognized that the proper causation standard is the "but for" standard set forth by the United States Supreme Court in *University of Texas Southwestern Medical Center v. Nassar*. Therefore, a plaintiff bringing a retaliation claim under the FCRA must now establish that his or her protected activity was a "but for" cause of the adverse action by the employer. By this ruling, the Fourth DCA receded from an earlier decision that found a plaintiff must show only that the protected activity and the employer's action were not "wholly unrelated," a standard required by the Eleventh Circuit pre-*Nassar*.

Doctrine of equitable estoppel prevented the employer, a car dealership, from taking inconsistent positions regarding arbitration of similar employee claims alleging illegal wage payment practices under the Florida Minimum Wage Act and Fair Labor Standards Act.

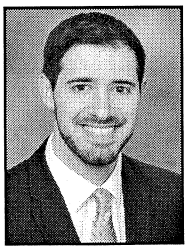
Sawgrass Ford, Inc. v. Vargas, 214 So. 3d 691 (Fla. 4th DCA 2017).

An employee filed a complaint against the defendant, a car dealership, alleging violations of the Florida Minimum Wage Act, Section 448.110, Florida Statutes. Several months later, the employee's counsel brought a federal action on behalf of a second employee against the same defendant alleging a violation of the Fair Labor Standards Act based upon the same wage payment practices. In the federal case, the dealership successfully moved to compel arbitration. Because the first employee signed the same employment agreement as the second employee, the first employee filed a motion to compel arbitration in the state case, which the trial court granted. The dealership appealed that order. The Fourth DCA affirmed the trial court's decision, holding that the doctrine of equitable estoppel prevented the dealership from taking inconsistent positions regarding arbitration of related issues.

School board exceeded its authority in rejecting ALJ's findings of fact and recommendation for a teacher's reinstatement.

Yerks v. Sch. Bd. of Broward Cty., 2017 WL 1929703 -- So. 3d -- (Fla. 4th DCA 2017).

The Broward County Superintendent of Schools filed an administrative complaint against a high school mathematics teacher recommending termination of his employment. After a three-day formal hearing, the Administrative Law Judge (ALJ) found that numerous performance evaluation datamarks used by school administrators to assess the teacher were inherently flawed, and he recommended that the teacher be reinstated. The school board rejected a number of the ALJ's factual findings and the recommendation for reinstatement. On appeal, the Fourth DCA found that the school board exceeded its authority because it failed to show that the ALJ's key factual findings addressing the reliability of the datamarks were unsupported by competent substantial evidence.



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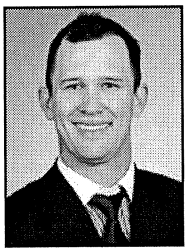

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