

the Checkoff

The Florida Bar
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The Labor & Employment Law Section

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SAVE THE DATE!

Advanced Labor Topics

(#0616R)

May 9-10, 2008
Marriott Marco Island

D.C. Circuit Court of Appeals Reverses Opinion That Encouraged Settlement of Employment Law Claims

By Marvin Kirsner, Ashwin Trehan and Shane Muñoz Greenberg Traurig, P.A.

For a few months beginning in August 2006, both employers and plaintiffs in cases against employers appeared to benefit from a blow to the IRS. In August 2006, the D.C. Circuit had declared a provision of the Internal Revenue Code unconstitutional. As a result, plaintiffs who prevailed in certain employment cases in the D.C. Circuit could retain more of the compensation they received from their claims, and certain employment claims could be settled with less money going to the IRS. But the honeymoon did not last long. In December 2006, the D.C. Circuit vacated its August 2006 opinion and in July 2007 it restored the status quo.

In August 2006, the D.C. Circuit Court of Appeals decided *Murphy v. IRS*, 460 F.3d 79 (D.C. Cir. 2006) ("*Murphy I*"). In *Murphy I*, the Court considered whether a damages award for emotional distress and injury to professional reputation is taxable as income. MARRITA MURPHY had filed a complaint with the Department of Labor alleging that her former employer had "blacklisted" her and provided unfavorable references to potential employers after she had complained to state authorities about environmental hazards in the workplace. *Id.* at 81. After the Secretary of Labor ruled against Murphy's

See "D.C. Circuit Court" page 13

Chair's Message

Greetings labor and employment lawyers and interested readers. I'm writing to provide you with an update on my administration and projections for the remainder of my term. Thus far, we experienced a very smooth transition from Cynthia Sass's term, which is normal for this section. Due to the hard efforts of prior Executive Council member Jeff Mandel and his co-chair, Michael Grogan, the Public Employment Labor Relations Forum held in Orlando during October was a grand success. The program focused on shortfall in funding and impacts on governmental entities and their employees. This was very insightful and timely given the passage of the new constitutional amendment on January 22, 2008. If you did not attend the conference and have

public sector unions or employers as clients or potential clients, I strongly recommend that you procure the audio tapes for current information on this subject from the most renowned speakers.

On January 30, 2008, the Executive Council had a well-attended teleconference to consider the proposed budget for the section, which had to be passed and presented to the Bar by the following day. Our Program Administrator from the Bar, Angela Froelich, did an excellent job of scheduling the conference, passing out the proposed budget and answering numerous technical questions, many of which were raised by Chair-Elect Alan Forst. With a minor technical adjustment, the budget was passed by

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CHAIR'S MESSAGE

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unanimous vote. You may soon access it on our website. To summarize, the spreadsheet shows a very healthy upward trend with no anticipated problems. In fact, due to our consistently successful conferences, the Bar is charging this section \$5.00 less per member than that paid by other sections. I attribute this achievement to the hard work of Program Chairs and Legal Education Chairs coordinating these conferences.

Another exciting section achievement is that we were asked to submit

a proposed mini-conference program for attendees of the Bar's annual conference, entitled the Presidential Showcase. This was somewhat of a competition between the sections to see which one could develop a short program that would be of interest to all sections of the Bar. After much input, Don Ryce, Alan Forst, and others, developed a very attractive program based upon employment issues within law firms, including FMLA, Title VII, ADA, and other interesting issues. Based upon their creativity and hard work, our section was awarded the conference. I would like to personally thank all of you who created concepts, developed the program, and made presentations. It brings great honor

to this section.

On a final note, the conferences for the remainder of this year are the Annual Labor & Employment Law Certification Review in Orlando on February 28 and 29, and the Advanced Labor Topics in Marco Island on May 9 and 10. There is also a future planning workshop to be held on March 1st, before the Executive Council meeting after the Certification Review Conference, which I invite all of you to attend. Please check our web site for more information. I'm looking forward to seeing you at these section events.

— Stephen A. Meck, Tallahassee
2007-08 Chair



Section Bulletin Board

Mark your calendars for these important
Section meetings & CLE dates:

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

MAY 9 - 10, 2008

CLE - "Advanced Labor Topics" (#0616R)

Marriott Marco Island, Marco Island, FL

Executive Council Meeting

Friday, May 9, 5:00 p.m. - 6:00 p.m.

Group Rate: \$200 / Cut-off date: 4/17/08

Reservation Number: 239/394-2511

JUNE 18 - 21, 2008

CLE - "26th Annual Multi-State Labor & Employment Law Seminar"

Keystone, Colorado

JUNE 19, 2008

THE FLORIDA BAR ANNUAL MEETING

Boca Raton Resort & Club, Boca Raton, FL

CLE - "What Every Law Firm & Law Practice Needs to Know About Federal & Florida Employment Laws"

2:15 p.m. - 5:00 p.m. (Presidential Showcase Seminar)

Executive Council Meeting

5:00 p.m. - 6:00 p.m.

Labor & Employment Law Section Reception

6:00 p.m. - 8:00 p.m.

Group Rate Ranges From: \$136 - \$212 / Cut-off date: May 21, 2008. Reservation Number: 800/327-0101

SEPTEMBER 12, 2008

CLE - Employment Discrimination / Litigation

Seminole Hard Rock Cafe & Casino, Hollywood, FL

Executive Council Meeting

Thursday, September 11, 5:00 p.m. - 6:00 p.m.

OCTOBER 16 - 17, 2008

CLE - "34th Annual Public Employment Labor Relations"

The Peabody Hotel, Orlando, FL

Executive Council Meeting

Thursday, October 16, 5:00 p.m. - 6:00 p.m.

Group Rate: \$189.00 rate + \$10.00 resort fee / Cut-off date:

9/24/08. Reservation Number: 407/345-4488

FEBRUARY 26 - 27, 2009

CLE- "9th Annual Labor & Employment Law Certification Review"

Orlando, FL (Facility: TBD)

Executive Council Meeting

Thursday, February 26, 5:00 p.m. - 6:00 p.m.

MAY 1 - 2, 2009

CLE - "Advanced Labor Topics 2009"

Washington, D.C.

Executive Council Meeting: Friday, May 1, 5:00 - 6:00 p.m.

JUNE 25, 2009

THE FLORIDA BAR ANNUAL MEETING

Orlando World Center Marriott, Orlando, FL

CLE: 2:15 p.m. - 5:00 p.m.

Executive Council Meeting

5:00 p.m. - 6:00 p.m.

Labor & Employment Law Section Reception

6:00 p.m. - 8:00 p.m.

New Florida Law Requires Employers To Provide Domestic Violence Leave

By Jay Lechner and Shane Muñoz,
Greenberg Traurig, P.A.

Effective July 1, 2007, a new Florida law requires many Florida employers to allow employees to take up to three working days of leave within a 12-month period if the employee or a family or household member is the victim of domestic violence and the leave is sought for specific reasons related to the domestic violence.

Under the new law, Section 741.313, *Florida Statutes*, an employer must provide leave to an employee to:

- Seek an injunction for protection against domestic violence, repeat violence, dating violence, or sexual violence;
- Obtain medical care or mental health counseling for the employee or a family or household member to address physical or psychological injuries resulting from the domestic violence;
- Obtain services from a victim-services organization;
- Make the employee's home secure from the domestic violence perpetrator or to seek new housing to escape the perpetrator; or
- Seek legal assistance to address issues arising from the domestic violence and to attend and prepare for court-related proceedings arising from the domestic violence.

This leave may be with or without pay, at the employer's discretion.

Roughly patterned on the Family Medical and Leave Act, the new law applies only to Florida employers with 50 or more employees and to employees who have been employed by the employer for at least three months. The law covers both public and private employers.

If the employer has a policy requiring advance notice of the need for leave, employees will be required to follow that policy, except in cases of imminent danger to the employee or the employee's family or household member. The employer is also authorized to require the employee requesting leave to provide sufficient

documentation of the domestic violence.

Additionally, the employee must use all available annual or vacation leave, personal leave, and sick leave before using the leave provided for in the law, unless the employer waives this requirement.

The employer must keep all information relating to the leave confidential. A governmental employee's request for leave, supporting documentation submitted by the employee, and any agency time sheet reflecting the request for leave are exempt from state public records disclosure requirements until one year after the leave is taken.

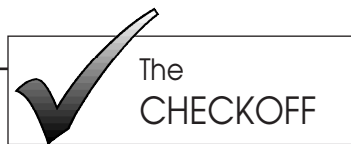
The new law contains an anti-retaliation provision that prohibits the employer from taking any disciplinary action "or in any other manner discriminat[ing]" against the employee for exercising rights under the law. Similar language in other employment statutes has been construed as encompassing retaliatory harassment.

The employee is not granted any greater rights to continued employ-

ment or other benefits than if he or she was not entitled to leave under the law. Thus, the law does not bar an employer from disciplining an employee for reasons other than the employee's exercise of his or her rights under the law.

The sole remedies under the law are damages or equitable relief in circuit court. Damages may include all wages and benefits that would have been due the employee, but the employee is not relieved from the obligation to mitigate damages. The law does not provide for attorneys' fees to a prevailing party.

Covered employers should review and revise their leave policies to ensure compliance with the new law, educate their managers and human resources personnel on the new leave requirements and take steps to ensure that information relating to domestic violence leave is maintained confidentially. Employers also should emphasize, in their written policies and through training, that retaliation against employees who exercise their rights under the new law is unlawful and will not be tolerated.



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

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Waiver of the Psychotherapist-Patient Privilege: The “Garden Variety” Damages Conundrum

By Jeffrey A. Cramer, Esquire

Plaintiffs in federal Title VII actions often are torn between a desire to seek compensatory damages for mental anguish and the desire to keep their prior psychological history private. One solution for walking the narrow plank between these competing desires has been to request only “garden variety” emotional distress damages¹. This article will discuss the pros and cons of that approach.

In cases brought in federal court for violations of Title VII of the Civil Rights Act of 1964, the federal common law of privileges governs the privilege issue, pursuant to Federal Rule of Evidence 501. A federal common-law psychotherapist-patient privilege was recognized by the U.S. Supreme Court in *Jaffee v Redmond*, 518 U.S. 1,14 (1996)². This privilege not only covers licensed psychiatrists and psychologists, but also licensed social workers who provide therapy. *Id.* at 15. However, that privilege protects only **communications** between the therapist and patient. The names of mental health providers, including psychiatrists, psychologists, counselors, therapists, and dates of treatment, are not subject to the privilege. *Merrill v Waffle House, Inc.*, 227 F.R.D. 467, 471 (M.D. Tex. 2005). Along with facts showing the occurrence of psychotherapy, any information which does not reveal the substance of a client’s confidential communications with a therapist, falls outside the scope of the privilege. *Vinson v Humana, Inc.*, 190 F.R.D. 624, 626, (M.D. Fla. 1999).

As with other testimonial privileges, the psychotherapist-patient privilege can be waived. *Jaffee v Redmond*, 518 U.S. at 15. The privilege may be waived when a party places his or her mental condition in issue. *Stevenson v Stanley Bostitch, Inc.*, 201 F.R.D. 551, 556 (N.D. Ga. 2001). Courts have taken differing positions as to when a party has placed his or her mental condition in issue such that waiver occurs. Some courts have adopted a broad view, while others believe that privilege is waived in only

a very narrow set of circumstances. Other courts have tried to articulate a middle view.

The Broad View³

The broad view is that if a plaintiff, by seeking damages for emotional distress, places his or her psychological state in issue, he waives the psychotherapist-patient privilege, and the defendant is entitled to discover any records of that state. *Doe v Oberweis Dairy*, 456 F.3d 704, 718 (7th Cir. 2006); *Schoffstall v Henderson*, 223 F.3d 818, 823 (8th Cir. 2000). The privilege is waived regardless of whether a plaintiff intends to introduce his medical records into evidence or offer medical testimony to prove his alleged emotional distress. *Moore v Chertoff*, 2006 U.S. Dist. LEXIS 31391 at *8-10, (D.D.C. May 22, 2006); *Walker v Northwest Airlines Corp.*, 2002 U.S. Dist. LEXIS 27592 at *13-14 (D. Minn. Oct. 28, 2002). The reasoning for this view is that a defendant is entitled to explore and determine whether plaintiff’s relevant medical history indicates that his alleged emotional distress was caused in whole or in part by events and circumstances unrelated to the alleged wrong. *Sidor v Reno*, 1998 U.S. Dist. LEXIS 4593 at *4 (S.D.N.Y. Apr. 7, 1998); *Lanning v Southeastern Pennsylvania Transportation Authority*, 1997 U.S. Dist. LEXIS 14510 at *5-7 (E.D. Pa. Sept. 17, 1997).

Accordingly, courts which follow the broad view have held that the fact that a plaintiff alleges only “garden variety” emotional distress damages, standing alone, is insufficient to deny defendant discovery concerning a plaintiff’s psychological history. See, for example, *EEOC v Consolidated Realty, Inc.*, 2007 U.S. Dist. LEXIS 36384 (D. Nev. May 17, 2007); *Owens v Sprint/United Management Co.*, 221 F.R.D. 657, 659-660 (D. Kan. 2004); *Montgomery v New York State Office of Mental Health*, 2002 U.S. Dist. LEXIS 5607 (S.D. N.Y. April 2, 2002).

The Narrow View⁴

The narrow view of waiver is illustrated by *Vanderbilt v Town of Chilmark*, 174 F.R.D. 225 (D. Mass. 1997). There, the court held that plaintiff, by merely putting his emotional state at issue, did not waive the privilege. The court held that plaintiff must use the privileged communication as evidence herself before she waives the privilege. *Id.* at 228. The court reasoned that if plaintiff took the affirmative act of calling her psychotherapist as a witness, or if she testified to the substance of communications with the psychotherapist herself, then she would waive the privilege. *Id.* at 230. Thus, courts adopting the narrow view have held that when a plaintiff merely alleges “garden variety” emotional distress, without more, such an allegation is insufficient to constitute waiver of the privilege. See, for example, *Morrisette v Kennebec County*, 2001 U.S. Dist. LEXIS 13309 (D. Me. Aug. 21, 2001).

The Middle View⁵

A middle view has held that plaintiffs do not place their mental condition in controversy merely by claiming damages for “garden variety” emotional distress, but will find waiver of the patient’s psychotherapist privilege if one or more of the following factors are present: a plaintiff alleges 1) a separate tort for intentional or negligent infliction of emotional distress; 2) a specific psychiatric injury or disorder; 3) unusually severe distress; 4) plaintiff intends to offer expert testimony in support of the claim for emotional distress damages; or 5) plaintiff concedes that her mental condition is in controversy within the meaning of Rule 35. See, for example, *Stevenson v Stanley Bostitch, Inc.*, 201 F.R.D. 551, 554 (N.D. Ga. 2001); *Adams v Ardcor, Div. of Am-Roll Tooling, Inc.*, 196 F.R.D., 339 (E.D. Wis. 2000).

There is no Eleventh Circuit or U.S. Supreme Court precedent reconciling these competing views concerning

See “Garden Variety Damages,” page 15

Unfair Labor Practices:

Unfair Labor Practices Committed When Duty of Fair Representation Breached in Representation and Refusal to Arbitrate, and Additional Unfair Labor Practice Committed When Union Attempted to Cause Employer to Discriminate Against Employee Because of Union Unlawful Animus

By Jack E. Ruby, Hearing Officer

The Commission has adopted the private sector labor law tenet imposing a duty upon certified bargaining agents to represent members of the units they are certified to represent when acting in their exclusive capacity. *Gow v. AFSCME*, 4 FPER ¶ 4168 (1978), citing *Vaca v. Sipes*, 386 U.S. 171 (1967). A union breaches its duty of fair representation in violation of Section 447.501(2)(a), Florida Statutes (2007), when its representation and grievance processing are arbitrary, discriminatory, or conducted in bad faith. See *Kallon v. United Faculty of Florida*, 14 FPER ¶ 19262 (1988), 15 FPER ¶ 20047 (1988), *recon. denied*, 15 FPER ¶ 20079 (1989), *aff'd*, 555 So. 2d 859 (Fla. 1st DCA 1989).

Section 447.501(2)(b), Florida Statutes (2007), prohibits a union from causing or attempting to cause management to discriminate against an employee because of that employee's union membership or non-membership, or attempting to cause management to violate any provision of Part II of Chapter 447, Florida Statutes (2007). When a union causes or attempts to cause a public employer to adversely affect an employee's terms and conditions of employment because of concerns relating to union membership, rather than for legitimate causes for disciplinary action, it violates this provision. See *LIUNA, Local No. 666 v. Board of County Commissioners of Brevard County*, 9 FPER ¶ 14026 (1982).

On March 5, 2007, William Miron filed an amended unfair labor practice charge alleging that the Amalgamated Transit Union, Local 1593 (Local 1593) violated Section 447.501(2)(a) and (b), Florida Statutes (2007), by failing to represent him fairly when processing a grievance over his dis-

missal by his employer, Hillsborough Area Regional Transit Authority (HARTline) and by attempting to or causing HARTline to discriminate against him.

After an evidentiary hearing, the Commission-appointed hearing officer determined that Local 1593's representation of Miron during the processing of his grievance was both arbitrary and discriminatory and, thus, in violation of its duty of fair representation. This conclusion was based upon Local 1593's ineffective handling of his grievance at step three of the process, effecting the grievance's denial; its improper consideration of Miron's grievance before its executive board vote and subsequent membership vote on whether Miron's grievance should be arbitrated; and its failure to establish a reasonable basis for its decision to not take Miron's grievance to arbitration. The hearing officer also found that Miron would have prevailed in his grievance at arbitration. Therefore, the hearing officer concluded that, by breaching its duty of fair representation, Local 1593 violated Section 447.501(2)(a) and was liable for Miron's back pay until he obtained comparable employment.

The hearing officer also found that Local 1593 had engaged in a pattern of conduct in attempting to obtain disciplinary action by HARTline against Miron through malicious and false statements because of Miron's internal union complaints and as an attempt to assist in obtaining reinstatement for a favored union member and officer, Ivanhoe Brown, by making Miron look like he had provoked Brown. Accordingly, the hearing officer determined that Local 1593 had also violated Section 447.501(2)(b). The hearing officer con-

cluded that Miron should receive an award of attorney's fees and costs.

Local 1593 filed exceptions to the recommended order objecting to the substitution of a replacement hearing officer during the hearing necessitated by the retirement of the initial hearing officer and to the substitute hearing officer's findings, conclusions, and recommendations. On November 5, the Commission issued a final order denying the exceptions.

Concerning the change in hearing officers, the Commission noted that no objection was made to the substitution prior to the issuance of the recommended order and that the Administrative Procedure Act provides for such a substitution. The Commission concluded that the hearing officer's findings and credibility resolutions were supported by the record. The Commission also concluded that the hearing officer correctly analyzed the case and considered events that occurred more than six months prior to the filing of the charge as background evidence. Finally, the Commission agreed with the hearing officer's recommended remedy, especially the "make-whole" remedy of back pay effective solely against Local 1593 without the joinder of HARTline, as consistent with the precedent of *Williams v. AFSCME, Florida Council 79*, 27 FPER ¶ 32124 (2001), when a union has failed in its duty of fair representation resulting in the non-arbitration of an employee's discharge.

Local 1593 has appealed the Commission's final order to the Second District Court of Appeal. See *Miron v. ATU, Local 1593*, 33 FPER ¶ 260 (2007), appeal filed Case No. 2D07-5704 (Fla. 2d DCA Dec. 5, 2007).

CASE NOTES

Eleventh Circuit Case Notes

By Sherril M. Colombo,
Cozen O'Connor

FMLA

***Nichols v. CSG Sys. Inc.*, 245 Fed. App. 937 (11th Cir. 2007)**

The Court affirmed summary judgment for the employer in concluding that an employee could not prove that her employer retaliated for her adverse testimony by requiring her to take unpaid Family and Medical Leave Act leave during her pregnancy because ten months elapsed between her testimony and the leave decision.

FLSA

***Abdullah v. Equity Group No. 06-15612* (11th Cir. Nov. 30, 2007) (unpublished)**

Poultry workers agreed to join a collective action that was subsequently dismissed. The consent was not effective for the workers to join subsequent lawsuits making substantially identical complaints. The Court concluded that under the Fair Labor Standards Act, one consent cannot "carryover" as consent for future litigation. Section 216(b) of the FLSA requires would-be plaintiffs affirmatively to opt in and to do so in writing and that the writing be filed in court before they can be included in the lawsuit.

Title VII

***Morrisette-Brown v. Mobile Infirmary Medical Ctr.*, 506 F. 3d 1317 (11th Cir. 2007)**

Court upheld final judgment for employer on religious discrimination claim. Former employee, who worked as a unit secretary, claimed that she was terminated due to her "deep religious convictions" as a Seventh-Day Adventist, which prevented her from working any scheduled Friday or Saturday shift. The Court held that she was not so terminated and that the hospital reasonably accommodated

her religious beliefs and observances. The hospital used a rotating shift system where unit secretaries worked three or four days during the week, and they alternated weekends. The Court concluded this was a neutral system, and the former employee was scheduled for fewer Friday shifts immediately after the hospital learned of her religious beliefs. The hospital also approved all of her requests for shift swaps and instructed her to find employees to swap her Friday shifts (the hospital was not required to assist in finding employees to swap with the plaintiff). Further, the hospital did not discipline the former employee for three months even though she did not work her Friday shifts and it encouraged her to transfer to another position. Finally, the Employee Relations Director volunteered to help her apply for other positions.

***Thomas v. Cooper Lighting, Inc.*, 506 F. 3d 1361 (11th Cir. 2007)**

Court affirmed summary judgment for employer in Title VII hostile environment sexual harassment and retaliation action. Former employee failed to produce evidence from which a reasonable jury could find a causal connection between her April 2005 complaints of sexual harassment and her July 2005 termination. The court concluded there was no temporal proximity between the statutorily protected activity and the adverse employment action.

* * *

Northern District of Florida

June 1, 2007 – Sept. 1, 2007

By Stephanie M. Marchman

Covenants Non-Compete

***MQ Associates v. North Bay Imaging, LLC*, 2007 WL 2566022 (N.D. Fla. August 31, 2007)**

This diversity action involved the enforceability of a covenant not to compete clause in an employment contract. The Agreement at issue

provided that the Defendant would not, for a period of 24 months following the termination of his employment, solicit Plaintiff's employees or compete with Plaintiff within 25 miles of his former work locations. Applying Delaware law, the Court determined that summary judgment should be denied with respect to the enforceability of the Agreement because, while it was supported by adequate consideration (retention of an employee at will in exchange for a covenant not to compete with the employer), a genuine issue of fact remained as to whether the Defendant was fraudulently induced to enter the Agreement and whether the Plaintiff's failure to allow the Defendant to exercise his stock options under the Agreement constituted a material breach of the Agreement. The Court further held that the 24-month limitation on competition and 25-mile limitation on geographical scope was reasonable, and that the balancing of equities favored the Plaintiff, thus supporting enforcement of the Agreement.

Jurisdiction

***Davis v. Vinnell Corp.*, 2007 WL 2462010 (N.D. Fla. August 27, 2007)**

The Court granted dismissal for lack of personal jurisdiction and improper venue of the Plaintiff's complaint for employment discrimination and overtime pay violations. On December 2, 2004, the Plaintiff, a Florida resident, saw an advertisement placed by Defendant Vinnell Corporation, a Virginia-based subsidiary of a multinational corporation that did business in Florida, in the *Air Force Times*, a publication with national circulation. After communicating with the Defendants by phone, fax, and mail, the Plaintiff signed an agreement in Florida under which he agreed to work for Vinnell in Qatar, and Vinnell then signed the agreement at its offices in Virginia. Several telephone calls occurred between the Plaintiff in Florida and Defendant Michael Sharp, who happened to be in Florida to sell his prior residence.

CASE NOTES

In addition, Vinnell had obtained a certificate of authority to conduct business in Florida that was in effect until October 1, 2004, after which it was revoked; Vinnell had done no business in Florida since January 1, 2006. On January 19, 2005, the Plaintiff began to work for Vinnell in Qatar, where the alleged employment discrimination and overtime pay violations occurred. Based on the foregoing facts, the Court concluded that the Due Process Clause did not permit the exercise of jurisdiction over the Defendant.

***Crowe v. Paragon Relocation Resources, Inc.*, 506 F. Supp. 2d 1113 (N.D. Fla. August 16, 2007)**

A Florida job applicant sued a Delaware employer with its primary place of business in California, alleging age discrimination under the Age Discrimination in Employment Act and Florida Civil Rights Act of 1992. The employer filed a motion to dismiss based on lack of personal jurisdiction. In granting the employer's motion, the Court concluded that it could not exercise specific jurisdiction over the Delaware employer under Florida's long-arm statute where the applicant's employment discrimination claim did not arise from any of the employer's business activities in Florida, but from allegedly unlawfully denying applicant a position that would have been located in or around Washington, D.C., and where the alleged tortious conduct occurred outside of Florida and in California. In addition, the Court held that Delaware employer's solicitations in Florida were insignificant and fell far short of showing a continual and sustained effort to procure business within the state, as was required to exercise general jurisdiction under Florida's long-arm statute. In lieu of dismissal for lack of personal jurisdiction, the Court transferred the job applicant's age discrimination action to the United States District Court for the Central District of California, since dismissal would likely result in the applicant being barred from later re-filing his action in a court of proper

jurisdiction due to the statutory 90-day filing period under Title VII.

***Smith v. Hundur, Ltd.*, 2007 WL 2083641 (N.D. Fla. July 19, 2007)**

The Plaintiff, an inmate of the Bay County Jail Annex proceeding pro se, claimed that his employer terminated his employment on the ground that he had filed a workers' compensation claim and sued the Defendants for breach of contract, bad faith, negligence, and discrimination in violation of the Equal Protection Clause. The Court dismissed the Plaintiff's claims for lack of federal jurisdiction.

***Thompson v. Shoreline Transportations*, 2007 WL 2083632 (N.D. Fla. July 16, 2007)**

Plaintiff, who was employed by the Defendant to make cargo deliveries and unload cargo at an agreed rate, claimed that he made deliveries and unloaded cargo, but the Defendant refused to pay him for his services. Instead, the Plaintiff alleged that the Defendant deducted \$519.00 from his pay in violation of "RCW 49.48.010 ... [and] federal employment laws and Florida RCW 49.48 wages/payment/collection and chapter 558 national labor laws and Florida 49.48.010." The Court dismissed the Plaintiff's claims for lack of federal jurisdiction.

FLSA

***Ellison v. Jameson*, 2007 WL 2376076 (N.D. Fla. August 14, 2007)**

The Plaintiff filed a complaint pursuant to 42 U.S.C. §1983, alleging that the Defendants violated his civil rights by forcing him to work without compensation for Aramark Correctional Services while incarcerated. In dismissing the Plaintiff's claim, the Court reasoned that since Aramark Correctional Services provided for the internal needs of the prison community, it was regarded as an instrumentality of the State of Florida, and was not a Prison Industry Enhancement program or governed by the Fair Labor Standards Act. Because the Plaintiff was assigned to the food services

station, he had no entitlement under state or federal law to wages for his labor and therefore could not show that he was treated differently from other similarly situated prisoners.

FMLA

***Moore v. Sears Roebuck & Co.*, 2007 WL 1950405 (N.D. Fla. July 02, 2007)**

The Plaintiff, a Customer Service Advisor for Sears, claimed that Sears interfered with and/or denied her substantive rights under the Family and Medical Leave Act (FMLA); that Sears retaliated against her for requesting leave under the FMLA; and that she was retaliated against for exercising her rights under Florida worker's compensation law, in violation of Fla. Stat. §440.205 (2005). The Court granted summary judgment in favor of Sears because it was undisputed that the Plaintiff did not work 1,250 hours in the preceding year; therefore, she was not entitled to any substantive right under the FMLA. In addition, the Plaintiff's retaliation claim was dismissed because she was neither eligible for FMLA leave at the time she requested leave nor at the time such leave was scheduled to begin. The Court declined to exercise supplemental jurisdiction over the Plaintiff's remaining state law claim and dismissed it without prejudice.

Sovereign Immunity

***Oriental Healing Clinic, Inc. v. Principi*, 2007 WL 2033357 (N.D. Fla. July 10, 2007)**

This case arose from a contractual relationship between the Plaintiff and the Defendant, in which the Plaintiff, as an independent contractor, provided on-site acupuncture services, through Plaintiff's principal agent and director, Bi Tao Lian, at the Veteran's Affairs (VA) medical center. The Defendant claimed that Lian's behavior became increasingly erratic, disruptive, and threatening, and she was thus removed and prohibited from the property, whereas the Plaintiff alleged that this removal and prohibition of Lian, a Chinese woman,

continued, next page

CASE NOTES

was based on racial discrimination. The Plaintiff's complaint against the Defendant was based on 42 U.S.C §1981, which provides persons equal rights in making and enforcing contracts. The Court granted the Defendant's motion to dismiss because the United States' government had not waived sovereign immunity for claims based on §1981, and the Court did not grant the Plaintiff's motion to amend because such an amendment would be futile since the Plaintiff's claim could not be pursued in the alternative under the Administrative Procedures Act, as argued by the Plaintiff.

Title VII

***Henley v. England*, 2007 WL 2565976 (N.D. Fla. August 31, 2007)**

Plaintiff, a white male employed as a barber, filed a complaint against his employer under Title VII for race discrimination, gender discrimination, and retaliation. In denying the Defendant's motion for summary judgment, the Court concluded that the facts presented in the case supported an inference of improper motive and pretext. In particular, the Court recounted that while the Plaintiff was allegedly fired for violating work rules, including giving poor haircuts and not using hair strips, the record contradicted that and indicated that the Plaintiff generally did a good job and gave good haircuts. Additionally, and most importantly to the Court, several black and/or female barbers were charged with similar or more serious infractions, and yet they were not disciplined as severely as the Plaintiff or, in some cases, were not disciplined at all.

***Strobes v. Town of Micanopy*, 2007 WL 2376071 (N.D. Fla. August 14, 2007)**

The Plaintiff, an African-American female who was employed as the Town Clerk/Administrator, alleged that she was discriminated against based upon her race and sex. The Court granted the Defendant's motion for summary judgment because the Defendant articulated a legiti-

mate, nondiscriminatory reason for terminating the Plaintiff's employment – that she failed to carry out her job duties as stated in the Town's Policy and Procedural Manual, particularly her financial responsibilities to the Town – and the Plaintiff failed to meet her burden of demonstrating that this reason was a mere pretext for racial or sexual discrimination.

Title VII and Equal Pay Act
***Schultz v. Board of Trustees of University of West Florida*, 2007 WL 2066183 (N.D. Fla. July 13, 2007)**

The Plaintiff, an associate professor at the University of West Florida, sued her employer, the Board of Trustees of the University of West Florida, for employment discrimination on the basis of sex. The Plaintiff claimed that the University wrongfully rejected her application for promotion to the position of full professor and paid her a lower salary than her male counterparts in violation of Title VII, the Florida Civil Rights Act, Title IX, the Florida Educational Equity Act, and the Equal Pay Act. In granting summary judgment in favor of the University with respect to the Plaintiff's failure to promote claim, the Court concluded that the Plaintiff failed to establish a prima facie case for discrimination by demonstrating that she was qualified for the position of full professor, which required that she show "external recognition outside the University" in her academic field, or by demonstrating that a similarly-situated, non-class member was promoted. In addition to failing to establish a prima facie case of discrimination, the Court held that the Plaintiff failed to show that the University's legitimate, nondiscriminatory reasons for denying the Plaintiff the promotion were mere pretext for discrimination. In granting summary judgment in favor of the University with respect to the Plaintiff's discriminatory pay claim, the Court concluded that the comparators identified by the Plaintiff held a Ph.D. or a doctorate in business administration and were qualified to

teach in the more specialized areas of business than the Plaintiff; thus, the comparators were not employed in positions which required equal skill, effort, and responsibility, and which were performed under similar working conditions as Plaintiff's position. In addition, the Court concluded that the University justified the difference in pay by factors other than sex, including field of expertise and degree, market rate and inversion, and rank and promotion.

* * *

Middle District of Florida

**March 30, 2007 through
November 30, 2007**

**By Cory J. Person, Esq.
Trenam, Kemker, Scharf, Barkin,
Frye, O'Neill & Mullis, P.A.
and
Adria Lynn Silva, Esq.
The Law Offices of Adria Lynn Silva**

ADA

***Chesak v. Orange County Government*, 2007 WL 4162942 (M.D. Fla. Nov. 20, 2007).**

In ADA case, Court denied summary judgment for Defendant where Plaintiff, a lieutenant in the Planning and Research department of the Orange County Fire Department, proffered sufficient evidence that firefighting duties were not an essential function of Plaintiff's position. Specifically, the Court noted that the job description contained in Defendant's vacancy announcement did not include firefighting duties, and Plaintiff's predecessor was never required to perform such duties throughout his five years in the same position. Moreover, the Court held that Plaintiff presented sufficient evidence from which a jury could find that he could perform the essential functions of his position without any accommodation, and was therefore not required to request a reasonable accommodation from Defendant.

CASE NOTES

ADEA

***Mock v. Bell Helicopter Textron, Inc.*, 2007 WL 2964175 (M.D. Fla. September 24, 2007).**

In an ADEA case, the Court held that while the injured victim has a duty to mitigate damages by being “reasonably diligent in seeking substantially equivalent employment, the burden of proving lack of diligence is on the employer.”

ERISA

***Epolito v. Prudential Ins. Co. of America*, 2007 WL 2964175 (M.D. Fla. October 10, 2007).**

An ERISA plan administrator’s decision to deny plan participant long-term disability benefits was both a wrong and an unreasonable denial as it was based on a selective review of opinions of two physicians who were paid directly or indirectly by administrator and made without careful consideration of contrary medical opinions of specialists in treating condition of participant. As a result, the Court granted Plaintiff’s Motion for Summary Judgment as to Plaintiff’s entitlement to LTD benefits.

Section 1981

***Perez v. Pavex Corporation*, 2007 WL 4105833 (M.D. Fla. Nov. 15, 2007).**

Court granted, in part, and denied, in part, Defendant’s Motion for Summary Judgment on Plaintiff’s claims of hostile work environment and discharge based on race as part of a pattern or practice of discrimination in violation of 42 U.S.C. §1981. Specifically, the Court granted Defendant’s Motion as to Plaintiff’s hostile work environment and intentional infliction of emotional distress claims, and denied its Motion as to Plaintiff’s discriminatory discharge claim. In granting Defendant’s Motion as to the hostile work environment claim, the Court held that Plaintiff did not present evidence that Defendant’s cursing and racial comments were sufficiently severe or pervasive to alter the terms and conditions of Plaintiff’s employment. Moreover, the Court

held that Plaintiff failed to show that he subjectively perceived the Defendant’s conduct as hostile, and further, under the factors outlined by the Supreme Court in *Oncale v. Sun-downer Offshore Servs., Inc.*, 523 U.S. 75 (1998), the Plaintiff failed to show that an objective person would perceive Plaintiff’s employer’s conduct as hostile considering the totality of the circumstances. In denying, in part, Defendant’s Motion as to Plaintiff’s discriminatory discharge claim, the Court, applying the McDonnell-Douglas framework, held that Plaintiff presented sufficient circumstantial evidence to satisfy a prima facie case of discrimination. Specifically, the Court held that the temporal proximity of Plaintiff’s supervisor’s discriminating remarks and Plaintiff’s subsequent termination were persuasive circumstantial evidence from which a jury could infer that Plaintiff’s termination was motivated by discriminatory animus.

Title VII

***Selby v. Tyco Healthcare Group, L.P.*, 2007 WL 3378552 (M.D. Fla. Nov. 13, 2007).**

Plaintiff’s claim of retaliation under Title VII, 42 U.S.C. §2000e-3(a) failed where, although Plaintiff satisfied prima facie case of retaliation, her employer presented a legitimate, non-discriminatory basis for Plaintiff’s termination by a preponderance of evidence, and Plaintiff failed to

meet her burden of establishing that Defendant’s reasons for her termination were pre-textual, or in retaliation for filing a complaint with the Florida Commission on Human Relations approximately one month prior to Plaintiff’s termination.

***Lewis v. Michaels Stores, Inc.*, 2007 WL 3333498 (M.D. Fla. Nov. 7, 2007).**

Court granted Summary Judgment for Defendant on Plaintiff’s claims of discrimination under Title VII, 42 U.S.C. 2000e, the Florida Civil Rights Act, §760.10, and the ADEA, 29 U.S.C. §623, and denied summary judgment for Defendant on Plaintiff’s retaliation claim. In finding for Defendant as to Plaintiff’s discrimination claims, the Court held that job performance memoranda did not constitute a discriminatory adverse employment action. Moreover, the Court held that stray remarks, being assigned tasks Plaintiff had volunteered for in the past and which were commonly shared among all employees, and other workplace acrimony, was insufficient to present a jury question as to whether the conditions were objectively intolerable. With regard to Plaintiff’s retaliation claim, the Court held that the temporal proximity between Defendant’s knowledge of Plaintiff’s complaints to Defendant’s human resources department and Defendant’s employee’s subsequent harassment and warning memoranda

continued, next page

WANTED: ARTICLES

The Section needs articles for the *Checkoff* and *The Florida Bar Journal*. If you are interested in submitting an article for the *Checkoff*, contact Ray Poole (904/356-8900) (rpoole@constangy.com) or Sherril Colombo (305/704-5940) (scolombo@cozen.com). If you are interested in submitting an article for *The Florida Bar Journal*, contact Frank Brown (813/273-4381) (feb@macfar.com) to confirm that your topic is available.

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Article deadline for next *Checkoff* is April 30, 2008.

CASE NOTES

to Plaintiff was sufficient to permit the inference that Plaintiff's reprimand was not wholly unrelated to retaliatory purposes.

***Rose v. Commercial Truck Terminal, Inc., et al.*, No.8:06-cv-901-T-17TGW (M.D.Fla. March 30, 2007).**

In response to Defendant's Motion to Dismiss a state law claim for pregnancy discrimination, the Plaintiff argued the FCRA of 1992 is modeled after Title VII as it existed in 1992. In 1992, Title VII had already been amended by the Pregnancy Discrimination Act (PDA) of 1978, which expanded the definition of "sex discrimination" to include discrimination because of pregnancy. "Rather than introducing new substantive provisions protecting the rights of pregnant women, the PDA brought discrimination on the basis of pregnancy within the existing statutory framework prohibiting sex-based discrimination." *Armstrong v. Flowers Hospital*, 33 F.3d 1308, 1312 (11th Cir. 1994). The Court held that the Florida Civil Rights Act (FCRA) covers pregnancy discrimination claims and denied the Motion to Dismiss.

* * *

Southern District of Florida

July 1, 2007 through
November 30, 2007

By **Brian D. Buckstein, Esq.**
Dobin & Jenks, LLP

Computer Fraud and Abuse

***Cohen v. Gulfstream Training Acad., Inc.*, 2007 U.S. Dist. LEXIS 73967 (S.D. Fla. Oct. 3, 2007).**

Employer's motion for leave to assert a counterclaim under the Computer Fraud and Abuse Act ("CFAA") granted. After rejecting employee's abstention argument – given parallel state court proceeding concerning employee's misappropriation – the court ruled that a claim under the CFAA could be asserted based on

former employee's access, in excess of given authorization, to employer's computers while employed. The court distinguished cases merely alleging access (as opposed to excessive access) to employer computers while employed and authorized to access computers.

Constructive Discharge

***Aguirre v. City of Miami*, 2007 U.S. Dist. LEXIS 67328 (S.D. Fla. Sept. 12, 2007).**

Citing 11th Circuit case law concerning the constructive discharge doctrine and then granting renewed motion for judgment as a matter of law because employee failed to adduce any evidence to substantiate constructive discharge claim and resignation occurred one year after the alleged retaliatory conduct.

Equitable Tolling

***De Luca v. Chertoff*, 2007 U.S. Dist. LEXIS 51850 (S.D. Fla. July 18, 2007).**

Equitable tolling doctrine permitted otherwise untimely filing of Title VII case where employee was repeatedly assured by employer that she would be reinstated during the 90-day window within which to file.

FMLA

***Holtzman v. B/E Aero., Inc.*, 2007 U.S. Dist. LEXIS 84318 (S.D. Fla. Nov. 14, 2007).**

In litigation between treasurer and his former employer, after case was removed to federal court, Court denied employee's motion to remand state law claims while retaining jurisdiction over FMLA retaliation claim. Court ruled that all of the claims would require proof of the same facts, so they were not found to be "separate and independent" claims justifying remand to the Florida trial court. Moreover, the Court found it would be a waste of judicial resources to litigate the FMLA retaliation case in federal court while litigating breach of contract, negligent supervision, negligent retention, defamation and intentional infliction of emotional

distress claims in state court.

***Harley v. Health Ctr. of Coconut Creek, Inc.*, 2007 U.S. Dist. LEXIS 79722 (S.D. Fla. September 27, 2007).**

In this FMLA litigation, the Court ruled on several oft-litigated motions in limine. First, the Court granted a motion in limine to exclude reference to an Unemployment Compensation determination under F.R.E. 403. Then, the Court barred the employee from introducing any evidence of non-pecuniary damages given the available damages under the FMLA (pecuniary only). Finally, the Court rejected the employee's attempt to limit "similarly situated" employees to only those with the identical leave request (pregnancy). The Court ruled that any FMLA leave requests of other employees could be relevant for purposes of undermining plaintiffs' assertions.

FLSA

***Lopez v. Top Chef Inv., Inc.*, 2007 U.S. Dist. LEXIS 88120 (S.D. Fla. Nov. 30, 2007).**

FLSA case brought by a former chef in a Florida restaurant was dismissed where there was no "enterprise" or "individual" coverage under the Act. The record, on summary judgment, established that there was no individual coverage under the FLSA because the plaintiff was not engaged in interstate commerce as a cook in a restaurant in Florida. Additionally, the record established, for purposes of enterprise coverage, that the employer only had gross income of \$98,919 in 2006. Plaintiff's conclusory allegations that the restaurant made more than \$500,000 annually was summarily rejected as unsubstantiated and insufficient to create a triable issue of fact.

***Pinillia v. Northwings Accessories Corp.*, 2007 U.S. Dist. LEXIS 83842 (S.D. Fla. Nov. 13, 2007).**

Court granted summary judgment to Defendant aircraft component repair company on former mechanical engineer/machine shop manager's FLSA claim. Court cited 29 C.F.R.

CASE NOTES

§541.708 the “combination exemption” under the FLSA - for the proposition that the employee was either performing executive or professional work and, as such, was exempt from the overtime requirements of the FLSA. Court acknowledged that no advanced degree is required to satisfy the professional exemption under the FLSA.

***Murray v. Playmaker Servs., LLC*, 2007 U.S. Dist. LEXIS 73260 (S.D. Fla. Sept. 24, 2007).**

Commissioned salesperson filed a lawsuit alleging violations of the FLSA and breach of a commission contract. FLSA claims were dismissed because plaintiff was found to be an independent contractor. The record evidence established that plaintiff worked out of her home, set her own hours, had a second job, was functioning as president of a company providing services to the employer and controlled her schedule. Additionally, plaintiff's claim for breach of contract was dismissed because the plaintiff could not establish the material terms of any agreement nor could she establish a definitive offer and acceptance of any modification.

***Lyalls v. Kauffs, Inc.*, 2007 U.S. Dist. LEXIS 58536 (S.D. Fla. Aug. 9, 2007).**

FLSA claims were subject to non-binding arbitration agreement.

* * *

Supreme Court of Florida

By James Craig

TORTS - IMPACT RULE - EXCEPTION FOR NEGLIGENT BREACH OF CONFIDENTIALITY OF HIV TEST

***Fla. Dep't of Corrections v. Abril*, 2007 Fla. LEXIS 1902, 32 FLW S635, 26 Ind. Empl. R. Cas. (BNA) 1343 (2007)**

Plaintiff Abril, a former LPN employed at Hendry County Corrections Institution (“HCCI”), was tested for

HIV infection following mouth-to-mouth resuscitation of a potentially HIV-positive inmate. HCCI's chief medical officer sent a blood sample taken from plaintiff to a contract laboratory, Continental Laboratory, for testing for HIV. Continental in turn transmitted a positive HIV test result to an unsecured fax machine at both HCCI and at the Department of Corrections (“DOC”) offices in Tallahassee. A subsequent HIV test showed that Abril's initial test results were a false positive. Abril's complaint alleged that a number of DOC employees unauthorized to receive such information became aware of the test results. Abril sued both Florida DOC and Continental claiming mental anguish and emotional distress damages arising from Continental's and DOC's alleged negligence in causing the improper dissemination of Abril's HIV test results. The trial court dismissed the complaint based upon the application of the impact rule. The Second DCA reversed the trial court and certified the issue to the Supreme Court. In considering the issue, the

Supreme Court first acknowledged the Second DCA's finding that the source of defendants' duty towards Abril arose from §381.004(3)(f), *Fla. Stat.* (2007), which requires that the identity of an individual tested for HIV and the results of such testing be maintained confidential. The Court further held that the alleged violation of §381.004(3)(f) could be utilized as evidence of negligence. As to the impact rule itself, Court then noted a number of exceptions to the rule “[n]arrowly created and defined in a certain very narrow class of cases in which the foreseeability and gravity of the emotional injury involved, and lack of countervailing policy concerns, have surmounted the policy rationale undergirding the application of the impact rule.” The Court discussed its precedent in finding such an exception to the rule in allowing a suit for damages arising from the breach by a psychotherapist of a statutory duty of privacy and confidentiality in *Gracey v. Eaker*, 837 So. 2d 348 (Fla. 2002). Following *Gracey*, the Court found that the impact rule would

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CASE NOTES

not bar Abril's claim for emotional distress damages based upon the alleged breach by defendants of § 381.004(3)(f) as to Abril's HIV test results.

* * *

Second DCA

By James Craig

UNEMPLOYMENT COMPENSATION – VOLUNTARY RESIGNATION – DISABILITY -- CAUSE ATTRIBUTABLE TO EMPLOYER

Humble v. Unemployment Appeals Commission, 963 So. 2d 956 (Fla. 2d DCA 2007)

The claimant attended two days of training as a cable installer and resigned because the job was too strenuous due to his physical condition. The appeals referee rejected and the UAC affirmed, the claim for benefits as a "personal reason" not attributable to the employer. The Second DCA reversed the UAC and explained that the "statutory definition of good cause does not require that the cause be attributable to the employer when an employee voluntarily leaves because of illness or disability that renders them unable to perform the work."

* * *

Third DCA

By James Craig

PUBLIC EMPLOYEES – FRS RETIREMENT ELIGIBILITY OF LEASED EMPLOYEES

The Children's Trust of Miami-Dade County v. Dep't of Mgt. Svcs., Div. of Retirement, 962 So. 2d 1009 (Fla. 3d DCA 2007)

A special taxing district, The Children's Trust, attempted to purchase past service credit in the Florida Retirement System ("FRS") for a period of time when its employees were leased employees through a private PEO, ADP TotalSource Services, Inc.

("TotalSource"). The Third DCA affirmed an agency order finding that the employees were not eligible for FRS past service credit. The court cited to § 468.529(1) of Florida's employee leasing statute which provides that a leasing company is deemed to be the employer of leased employees. Since TotalSource was a private company, the court held the employees were not eligible to participate in the FRS while employed by TotalSource.

TORTS – DEFAMATION – EMPLOYEE INVESTIGATION – PRIVILEGE

American Airlines, Inc. v. Geddes, 960 So. 2d 830 (Fla. 3d DCA 2007)

Plaintiff Geddes, a maintenance worker, sued his employer, American Airlines, and its human resources manager, Meenan, claiming defamation. Geddes claimed as defamatory some statements made during the course of his employer's investigation of a workplace dispute involving Geddes that resulted in Geddes' suspension. The court first determined that any statements regarding Geddes made by management personnel amongst themselves were considered to be the "corporation talking to itself . . .," and could not constitute defamation as there was no publication to a third party. The court further found that any statements made to non-managerial employees were either to witnesses identified during the investigation or to co-workers in Geddes' department who wanted to know why Geddes had been suspended. The court held that these statements were conditionally privileged under the interest/investigatory privilege doctrine in *Nodar v. Galbreath*, 462 So. 2d 803 (Fla. 1984). The court explained as to the non-managerial employees, the statements "[w]ere either directed to coworkers identified . . . as witnesses to the alleged threat, or other employees of the maintenance

department who sought an explanation for Geddes' suspension. The former were an integral part of the investigation and the latter all had an interest in the disciplinary practices of their employer and in the safety and security of their workplace." The statements were thus privileged, and a jury verdict in Geddes' favor was reversed.

PUBLIC EMPLOYMENT – IMPROPER TERMINATION WHERE NO CLEAR RULE VIOLATED

Williams v. Miami-Dade County, 2007 Fla. App. LEXIS 11434, 32 FLW D1764 (Fla. 3dDCA 2007)

In a rare second-level certiorari appeal, Williams, a 16-year Miami-Dade County corrections officer, was living with her boyfriend, a paroled convicted felon. The County automatically terminated her employment based upon rules prohibiting association "with persons engaged in illegal activities" and the development of close relationships with inmates or ex-inmates "if [the ex-inmates] are, or appear to be, involved in criminal activity on a full time, part time, or an occasional basis." The court considered whether the circuit court (sitting in its appellate jurisdiction) departed from the essential requirement of the law in upholding the termination. The Third DCA found, *inter alia*, that there was no evidence that Williams' boyfriend had engaged in unlawful activities. The court further held that the rules cited by the County did not address mere relationships between employees and ex-inmates. Specifically, the court found that none of the rules relied upon by the County in terminating Williams would have put Williams on notice that merely living with her ex-inmate boyfriend would subject her to automatic termination. Accordingly, the Third DCA reversed the circuit court and ordered Williams' reinstatement.

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DC CIRCUIT COURT

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employer, the case was remanded to an Administrative Law Judge, who recommended compensatory damages totaling \$70,000: \$45,000 for “emotional distress or mental anguish”; and \$25,000 for “injury to professional reputation” due to Murphy being blacklisted. *Id.* Murphy claimed this award as income in her tax return, and as a result paid \$20,665 in additional taxes. *Id.*

Murphy then learned of Internal Revenue Code (IRC) section 104(a)(2) and amended her return, seeking a refund of the \$20,665. *Id.* Section 104(a)(2) provides that “gross income does not include... damages... received on account of personal physical injuries or physical sickness.” IRC §104(a)(2) (2007). In support of her refund claim, Murphy submitted to the IRS copies of her medical and dental records, which reflected anxiety attacks, shortness of breath, and other physical manifestations that Murphy alleged were a result of her employer’s actions. *Murphy I*, 460 F.3d at 81. The IRS found that Murphy had failed to demonstrate that the compensatory damages she received were attributable to “physical injury” or “physical sickness”, and therefore denied her request for a refund. *Id.* at 82. Undeterred, Murphy sued the IRS

and the United States in the United States District Court for the District of Columbia. *Id.* The District Court granted summary judgment for the Government and the IRS, and Murphy appealed. *Id.*

Murphy made two arguments in the Court of Appeals: 1) that her compensatory damages award was in fact for “personal physical injuries” and therefore excluded from gross income under IRC Section 104(a)(2); and 2) alternatively, that Section 104(a)(2) as applied to her award was unconstitutional because the award was not “income” within the meaning of the Sixteenth Amendment, which permits Congress to tax income. *Id.* at 83-86.

Addressing Murphy’s first argument, the Court of Appeals found that Section 104(a)(2) was not intended to exclude from taxation compensation for non-physical injuries, even if those injuries had physical effects. The Court’s ruling with respect to Section 104 was unsurprising, because of a 1996 amendment to that section. Prior to 1996, Section 104 excluded from gross income monies received in compensation for “personal injuries or sickness.” 26 U.S.C. §104(a)(2) (1995). Based on that language, there was a viable argument that a portion of an employment discrimination damage award or settlement was excluded from income if it compensated the plaintiff for non-physical but nonetheless personal in-

juries, such as defamation and damage to reputation. *See, e.g., Roemer v. Comm’r of Internal Revenue*, 716 F.2d 693 (9th Cir. 1983) (finding compensatory damages award for defamation excludable under pre-1996 Section 104(a)(2); *see also Threlkeld v. Comm’r of Internal Revenue*, 848 F.2d 81 (6th Cir. 1988) (finding portion of settlement attributable to damage to personal reputation excludable under pre-1996 Section 104(a)(2)).

The 1996 amendment qualified the nature of tax exempt personal injury awards by limiting the exclusion to damages received “on account of personal physical injuries or physical sickness.” 26 U.S.C. §104(a)(2) (2006) (emphasis added). Accordingly, after the 1996 amendment, compensation is excluded from taxable income only if it is “on account of” physical injury or physical sickness -- for example, if the award or settlement is to compensate for damages resulting from a physical assault of the employee. *See Murphy v. I.R.S.*, 362 F. Supp. 2d 206 (D.D.C. 2005); *see also Lindsey v. Comm’r of Internal Revenue*, 422 F.3d 684, 687 (8th Cir. 2005).

Despite denying Murphy’s first argument, the D.C. Circuit then surprised practically everyone by accepting Murphy’s alternative argument, and holding Section 104(a)(2) unconstitutional. The Court first found that when the Sixteenth Amendment was adopted, Congress did not consider

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DC CIRCUIT COURT

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compensation for physical injuries to be income; therefore, Congress did not intend for such compensation to be taxable under the Sixteenth Amendment. *Murphy I*, 460 F.3d at 90. Moreover, the court noted that at the time the Sixteenth Amendment was enacted, Congress did not distinguish between compensation for physical injuries and compensation for non-physical injuries. *Id.* at 91. Consequently, the Court concluded that Congress also must not have intended for compensation for non-physical injuries to be income taxable under the Sixteenth Amendment. *Id.* at 92. Because Section 104(a)(2) authorized taxation of compensation for non-physical injuries, the Court held that Congress had exceeded the authority to tax under the Sixteenth Amendment and held Section 104(a)(2) unconstitutional. *Id.* at 92.

In part, the Court based its ruling on the answer to the question, "In lieu of what were the damages awarded?" *Id.* at 88. The Court found that because the award Murphy received was in lieu of something normally untaxed -- namely, the reputation and emotional well-being she enjoyed prior to her employer's actions -- the award was neither a gain nor an accession to wealth, and therefore was not taxable as income under the Sixteenth Amendment. *Id.*

Murphy I caused an uproar among tax scholars, some of whom noted that the decision overlooked Congress' power to tax under Article I, Section 8 of the Constitution. See e.g. Chris Atkins, TaxPolicyBlog, The Murphy Case: Interpretive and Constitutional Issues, <http://www.taxfoundation.org/blog/show/1806.html>. Perhaps

in response to the uproar, the Court vacated its August 2006 opinion and agreed to rehear oral arguments. *Murphy v. IRS*, No. 05-5139, 2006 U.S. App. LEXIS 32293 (D.C. Cir. Dec. 22, 2006).

In July of 2007, the Court found for the Government, holding that even if money received on account of a claim for damages is not income within the scope of the Sixteenth Amendment, it is nonetheless taxable under Congress' Article I, Section 8 power to tax and spend for the general welfare. *Murphy v. IRS*, 493 F.3d 170, 180-86 (D.C. Cir. 2007) ("*Murphy II*"). Thus, in *Murphy II*, the Court held that Section 104(a)(2) of the Internal Revenue Code is constitutional, and money received in compensation for a claim for damages based on non-physical injuries is subject to taxation. *Id.* at 186.¹

After *Murphy I*, a plaintiff in the D.C. Circuit who received compensation for damages for non-physical injuries could not be taxed on this compensation. Accordingly, a plaintiff seeking to net a given amount in settlement of such a claim did not need to demand an additional sum to cover tax liability. But after *Murphy II*, a plaintiff who settles a claim for non-physical injuries will be taxed on the full amount received as damages; thus, a larger payment from the defendant will be required in order for the plaintiff to net the same amount. Therefore, under *Murphy II*, either the defendant will have to pay more in settlement or the plaintiff will net less. Hence, the reversal in *Murphy II* will likely result in fewer settlements.

Employment lawyers should be mindful, however, that the ruling in *Murphy II* does not appear to affect the deductibility from taxable income of costs and attorney's fees incurred in litigation of discrimination claims.

On October 22, 2004, the American Jobs Creation Act (AJCA), was signed into law. Prior to the enactment of the AJCA, a plaintiff in an employment discrimination case was required to report the entire gross amount of the damage award, including attorney's fees, as gross income. The amount paid to the attorney could then be deducted as an itemized deduction. This itemized deduction, however, would often trigger the Alternative Minimum Tax, thereby eliminating all or part of the deduction for attorney's fees paid.

The AJCA altered this framework. The AJCA applies to claims of unlawful discrimination (including, for example, Title VII, the Americans with Disabilities Act, the Age Discrimination in Employment Act, and retaliation for bringing an action pursuant to any of these statutes), and provides in part that attorney's fees and court costs paid by or on behalf of a taxpayer in connection with such claims are deductible from income as an "above the line deduction," and therefore are fully deductible. 26 U.S.C. §62(a)(20) (2007). The statute is not retroactive, however, so it does not affect tax obligations on attorney's fees or court costs paid prior to the date it was enacted. Nonetheless, it does at least ensure that a discrimination plaintiff will be able to take an above the line deduction from taxable income for money paid to legal counsel and the court, including amounts paid to a plaintiff's legal counsel incident to a settlement agreement.

In summary, the D.C. Circuit's about-face restored the status quo. Now, as before, a plaintiff who recovers damages or settles a claim for personal injury must pay taxes on any compensation received for non-physical injuries. However, a discrimination plaintiff may fully deduct attorney's fees and court costs, meaning that a discrimination plaintiff who negotiates a settlement with an employer will not be compelled to raise his settlement demand to compensate for taxation on costs and fees.

Endnotes:

¹ Murphy filed a petition for rehearing en banc, which the Court denied. *Murphy v. IRS*, 493 F.3d 170 (D.C. Cir. 2007) *reh'g denied en banc*, (No. 05-5139).

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“GARDEN VARIETY” DAMAGES

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waiver of the psychotherapist-patient privilege. Historically, the majority of courts followed the broad view, although the majority of recent cases now appear to adopt some aspect of the “middle view” reasoning.

Practical Aspects of Discovery

In the discovery context, it appears clear that a defense interrogatory requesting a plaintiff to list the names of mental health providers, including psychiatrists, psychologists, counselors, and therapists, and the dates of treatment, would not be subject to the privilege. However, plaintiffs still may argue that such an interrogatory should not be answered because the names of mental health providers and the dates of treatment are not **relevant** to a proceeding where plaintiff is seeking only “garden variety” emotional distress damages.

Ordinarily, under Fed. R. Civ. P. 26 (b)(i), parties may obtain discovery regarding, “any matter, not privileged, which is relevant to the subject matter involved in the pending action”. The Rule’s relevancy requirement is to be considered broadly and material is relevant if it bears on, or reasonably could bear on, an issue that is, or may be, involved in the litigation. *Oppenheimer Fund, Inc., v Sanders*, 437 U.S. 340, 350 (1978). A request for discovery should be considered relevant if there is, “any possibility”, that the information sought may be relevant to the claim or defense of any party. *Merrill*, 227 F.R.D. at 470.

However, in *Miles v Century Twenty One Real Estate, LLC*, 2006 U.S. Dist. LEXIS 67974, at *9 (E.D. Ark. Sept. 21, 2006), the court considered plaintiffs’ representations that they were not offering medical records, counseling records, or expert testimony to prove their emotional distress claims and found, therefore, that plaintiffs met their burden to show that the information requested [by Interrogatory No. 10] was not relevant, or of such marginal relevance that the ordinary presumption in favor of disclosure was outweighed by potential harm. Accordingly, the

court denied defendant’s motion to compel.

In *Miles*, 2006 U.S. Dist. LEXIS 67974 at *19-20, the court also denied defendant’s Motion to Compel a response to a Request to Produce plaintiffs’ mental health records based upon the same reasoning. Thus, if plaintiffs are willing to stipulate not to offer expert testimony or refer to psychological treatment at trial, discovery of prior psychiatric records possibly can be avoided, even if a court finds the privilege inapplicable.

Even in cases where records are required to be produced, courts have limited discovery. For example, in *EEOC v Consolidated Realty*, 2007 U.S. Dist. LEXIS 36384 at *5, the court held that defendant was not entitled to information regarding **every** medical treatment plaintiff ever received. Rather, discovery was had of only those treatments that related to her emotional or mental condition and that may reveal other conditions or stressors that may cause the emotional distress or illness allegedly resulting from defendant’s wrongful conduct.

Practical Aspects of Trial Testimony

Assuming that plaintiff successfully fends off what could be a lengthy and costly discovery motion seeking to compel production of psychotherapist records, what is the practical effect of this “victory”? The effect appears to be that plaintiff not only has limited the type of evidence that can be presented in support of an emotional distress claim, but also may have limited the total amount of emotional distress damages which can be awarded.

In *Santelli v Electro-Motive*, 188 F.R.D. 306 (E. D. Ill. 1999), plaintiff stipulated that her emotional damages claim was limited to compensation for humiliation, embarrassment, and other similar emotions that she experienced essentially as the intrinsic result of the defendant’s alleged conduct (i.e., “garden variety” damages). As a result, the court, precluded her from introducing evidence about emotional distress that necessitated care or treatment by a physician and she was barred from introducing evidence of any resulting symptoms or conditions that she might have suffered.

While it is obvious that a stipulation seeking to protect discovery of prior psychological records because a plaintiff is seeking only “garden variety” emotional distress damages bars that plaintiff from using therapists as witnesses or presenting the substance of any communication with a mental health professional, the *Santelli* court also barred plaintiff from introducing evidence of any resulting symptoms or conditions that she might have suffered. This holding would appear to rule out plaintiff testifying to any specific symptoms, such as sleeplessness, or offering any corroborative lay testimony that such symptoms were observed. This reduces plaintiff’s emotional distress damages case to presenting his or her own testimony concerning the reaction to the defendant’s alleged misconduct.

Damages

Although plaintiff’s own testimony may suffice to show emotional distress damages, *Bernstein v Sephora*, 182 F.Supp. 2d 1214, 1227 (S.D. Fla. 2002), such testimony of humiliation or disgust, may prevent a plaintiff from fully recovering from her alleged emotional distress, *Santelli*, 188 F.R.D. at 309.

An award of damages for emotional distress must be supported by competent evidence of genuine injury. *Carey v Phiphus*, 435 U.S. 247, 264 (1978). By narrowing the scope of permissible testimony in support of a claim for emotional distress damages, in order to protect discovery of prior records, plaintiffs risk reversal of an award of emotional damages for lack of proof of a “genuine injury”. See, for example, *Akouri v FL Dept. of Transportation*, 408 F. 3d 1338, 1345 (11th Cir. 2005), which reversed a \$552,000 compensatory damage award and held that a plaintiff’s conclusory statements were insufficient to support the award; the distress must be sufficiently articulated.

Several courts also have ordered remitters of excessive jury awards in “garden variety” emotional distress damages claims. In *Shannon v Fireman’s Fund Insurance Co.*, 156 F. Supp. 2d 279, 298 (S.D.N.Y. 2001), the court remitted an \$80,000 emotional suffering award to \$40,000. That court looked at reviews of jury verdicts and discrimination cases

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which noted that “garden variety” mental anguish awards hovered in the range of \$5,000 - \$30,000. See also, *Bick v City of New York*, 1998 U.S. Dist. LEXIS 5543 (S.D. N.Y. Apr. 21, 1998).

Conclusion

With a thorough understanding of the pros and cons of seeking damages only for “garden variety” emotional distress, the parties may be able to avoid expensive and protracted discovery disputes. See, for example, *Sassak v City of Park Ridge*, 2006 U.S. Dist. LEXIS 63399 at *2 (N.D. Ill. July 20, 2006), where defendants agreed not to continue to seek information regarding psychological records and treatment, if plaintiffs stipulated that they would adhere to the evidentiary limits imposed in *Santelli*. Creative parties may even stipulate to a modest amount of emotional distress damages and submit to a

jury only the question of whether or not emotional distress damages were sustained. Mediation resolving this aspect of the claim is always helpful. Given the issues discussed in this article, plaintiff’s counsel will want to assess at a very early stage of the litigation whether or not to maintain a claim for “garden variety” emotional distress damages.

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Endnotes

1. “Garden variety” emotional distress damages are those which seek recompense only for emotional injuries that are likely to arise as a fair consequence of the underlying violation. *Morrisette v Kennebec County*, 2001 U.S. Dist. LEXIS 13309 (D. Me. Aug. 21, 2001).
2. There is no Federal common law physician-patient privilege. *Anderson v Caterpillar, Inc.*, 70 F. 3d 503, 506 (7th Cir. 1995); *Merrill v Waffle House, Inc.*, 227 F.R.D. 467, 471 (M.D.

Tex. 2005).

3. Other cases adopting the broad view include: *Smith v Central Dauphin School District*, 2007 U.S. Dist. LEXIS 4353 (M.D. Pa. Jan. 22, 2007); *Davis v Bemiston-Carondolet Corp.* 2006 U.S. Dist. LEXIS 9951 (E.D. Mo., Mar. 13, 2006); *Sanchez v U.S. Airways, Inc.*, 202 F.R.D. 131 (E.D. Pa. 2001); *Fox v Cates Corp.*, 179 F.R.D. 303 (D. Colo. 1998); *Allen v Cook County Sheriff’s Dept.*, 1999 U.S. Dist. LEXIS 3587 (N.D. Ill. Mar. 17, 1999); *EEOC v Danka Industries, Inc.*, 990 F. Supp. 1138 (E.D. Mo. 1997); *Vann v Lone Star Steakhouse & Saloon of Springfield, Inc.*, 967 F. Supp. 346 (E.D. Ill. 1997); *Sarko v Penn-Del Directory Co.*, 170 F.R.D. 127, 130 (E.D. Pa. 1997); *Kerman v City of New York*, 1997 U.S. Dist. LEXIS 16841 (S.D.N.Y. Oct. 24, 1997); *Topol v Trustees of the Univ. of Pa.*, 160 F.R.D. 476, 477 (E.D. Pa. 1995).

4. Other cases adopting the narrow view include: *Booker v City of Boston*, 1999 U.S. Dist. LEXIS 14402 (D. Mass. Sept. 10, 1999); *Fritsch v City of Chula Vista*, 187 F.R.D. 614 (S.D. Cal. 1999); *Hucko v City of Oak Forest*, 185 F.R.D. 526 (N.D. Ill. 1998).

5. Other cases adopting the middle view include: *EEOC v Woodmen of the World Life Insurance Society*, 2007 U.S. Dist. LEXIS (D. Neb. Feb. 1, 2007); *Greenberg v Smolka*, 2006 U.S. Dist. LEXIS 24319 (S.D.N.Y. Apr. 25, 2006); *Gaines-Hanna v Farmington Public Schools*, 2006 U.S. Dist. LEXIS 21506 (E.D. Mich. Apr. 7, 2007).

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