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The Florida Bar
Vol. XLVI, No.2
February/March 2007

The Labor & Employment Law Section

INSIDE:

SAVE THE DATE!

Advanced Labor Topics

May 11 - 12, 2007

Don Cesar Beach Resort

For hotel reservations: 800/282-1116. Group rate of $209 expires on April 18, 2007.

Speedway Superamerica vs. Dupont

933 So.2d 75 (Fla. 5th DCA 2006)

By P. Daniel Williams

This case was heard by the entire Fifth District Court of Appeals, *en banc*, and certiorari has been granted by the Florida Supreme Court. This case has major implications for the correct standard to be applied under the Florida Civil Rights Act, Fla. Stat. 760 *et seq*. The two main issues involve: 1) The level of severity that is required to constitute actionable hostile environment harassment; and 2) The correct standard for punitive damages under the Florida Civil Rights Act?

Erma DuPont's sexual harassment claims were tried to a jury. The jury awarded her $88.80 for lost wages, $40,000.00 for mental pain and suffering, and $40,000.00 for punitive damages. The trial court then granted a judgment not withstanding the verdict, finding that the underlying conduct was not extreme enough to constitute a hostile work environment. A panel for the Fifth District Court of Appeals upheld that decision by the trial court. Then, after rehearing *en banc*, the Fifth District Court of Appeals reinstated the jury verdict, established a lower standard for the level of severity required for hostile environment harassment claims, and also found a lesser standard for an award of punitive damages. With regard to both of these issues, the Fifth District

See "Speedway" page 14

Chair's Message

Reducing the Need for Sanctions

One of my primary objectives is to improve the practice of employment law. One of the most stressful, time-consuming and costly areas from the judiciary, defense and plaintiff's perspective is that of discovery abuses and requests for sanctions. With that in mind, I have formed a specific committee to address these issues and help make our practice more collegial. The primary goal of the Chair's Special Sanctions Committee will be finding ways to reduce discovery abuses and the need for sanctions on both sides of the fence. I have contacted the chief judges for each district and have already received commitments of participation from the Northern District. We are currently looking for judges in the Middle and Southern Districts who are interested in participating. Additionally, I have appointed the following plaintiff and defense attorneys to serve with me:

Hon. Margaret Catharine Rodgers
Janet E. Wise
Richard Johnson
Stuart Rosenfeldt
Cathy Beveridge
Kenneth A. Knox

I am hopeful that we will be able to combine our experiences and brainstorm to come up with some creative ideas to improve this area of our practice. If we prove successful this year, my hope is that future chairs will carry on this committee and its mission. I hope to schedule our first meeting in December 2006 or January 2007.

See "Chair's Message" page 2

CHAIR'S MESSAGE
from page 1

Looking For Sponsorship

While attending the Leadership Conference earlier this year, I discovered that other Sections of the Florida Bar raise substantial monies to supplement their programs. The Special Projects Committee and the Long Range Planning Committee are in charge of developing a pricing plan and general rules regarding advertising and sponsorship.

Awesome Website

Marc Snow, Chair of the Website Subcommittee, has done a terrific job with our Section website. I encourage all of you to check it out. KUDOS, Marc!!!

In tandem with obtaining funds from sponsorship, I feel that our website can generate additional funds for the section by allowing advertising. By creating a *Want Ads* section and having banner ads, I think it would bring more traffic to our section, along with additional funding.

We are looking into the potential risks and benefits of posting ads on our website at a cost.

CLE Excellence

Our most recent seminar had a great turnout and we hope our next series of CLE programs does the same. At this time the following are scheduled:

February 15–16, 2007:
7th Annual Labor & Employment Law Certification Review Course in Orlando at the Rosen Centre Hotel.

May 11–12, 2007:
Advanced Labor Topics in St. Petersburg at the Don Cesar

June 21, 2007:
Section Executive Council Annual Meeting and Reception

New CLE Program!

Additionally, we are trying something new – A lunchtime telephone conference for CLE credit. In our practice the issue of taxation always comes up. By co-sponsoring this series of seminars with the Tax Section we can all finally know the answers and do it right. These conferences are scheduled for:

January 23, 2007:
Tax Issues in Employment Settlements by Cristin Conley and David Burke of Carlton Fields

March 20, 2007:
Tax Issues in Employment Agreements by Mindy Leathe of Greenburg Traurig

May 22, 2007:
Tax Issues in Incentive-Based Compensation (speaker to be announced)

These seminars are conducted during lunchtime via telephone, are low-cost and CLE approved.

More About CLE

This year we are striving to finish planning our seminars way in advance so we can advertise them on the website and send the flyers out earlier. This would also aid in getting sponsorship.

See "Chair's Message," page 16

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

February 15 & 16, 2007
"7th Annual Labor & Employment Law Certification Review"
CLE (#0396R)

(Executive Council Meeting:
Thursday, Feb. 15th, 5:00 – 6:00 p.m.)
Rosen Plaza Hotel, Orlando, FL
Hotel Reservations: 407-996-9700
Group Rate: $120
Group Rate Expires: 1/26/07

May 11 & 12, 2007
"Advanced Labor Topics" CLE (#0457R)

(Executive Council Meeting:
Friday, May 11th 5:00 – 6:00 p.m.)
Don Cesar, St. Petersburg, FL
Hotel Reservations: 800/282-1116
Group Rate: $ 209
(No resort fee and complimentary self parking)
Group Rate Expires: 4/18/07

June 21, 2007
Labor & Employment Law Executive Council ANNUAL Meeting & Reception

(Executive Council Meeting:
Thursday, June 21st, 5:00 – 6:00 p.m.)
Orlando World Center Marriott
Orlando, FL

Proposed E-Discovery Rules

By Ashwin R. Trehan

Background

E-discovery can be tremendously valuable in employment cases. For instance, in *Zubulake v. UBS Warburg LLC*, numerous deleted e-mails retrieved from the employer's restored back-up tapes proved directly relevant to the plaintiff's allegations of gender discrimination. Unfortunately, as *Zubulake* also underscores, it is relatively easy for employers to "hide the ball" with e-discovery, particularly where opposing counsel is not acutely familiar with the intricacies of the relevant computer systems.[1]

On the other hand, e-discovery is often extremely intrusive, burdensome and costly for the employer. This was highlighted in *In re Ford Motor Company*, in which the Eleventh Circuit held that, absent a finding of previous non-compliance with the discovery rules, the responding party was not required to submit to a search of its computer databases where it already had conducted a proper search and produced all relevant, non-privileged materials.[2]

The proposed amendments to the Federal Rules of Civil Procedure (FRCP) attempt to tackle these concerns, which, to date, the rules have not adequately addressed.[3] In drafting the proposed amendments, the Committee on Rules of Practice and Procedure considered that "the discovery of electronically stored information raises markedly different issues from conventional discovery of paper records."[4] For example, electronically stored information is dynamic (e.g., it changes, is overwritten and deleted regularly and saved in various locations); much electronic information is incomprehensible when separated from the system that created it; and electronic files contain exponentially greater volumes of information, much of which is not archived in any type of coherent filing system.[5]

Further, potential changes to the Federal Rules of Evidence and the Florida Rules of Professional Conduct impose additional responsibilities relating to electronically stored information.

What is Electronically Stored Information?

Despite the amendments' focus on electronically stored information (ESI), they do not provide a clear definition of what constitutes ESI. Perhaps the Rules Committee felt that the term is self-defining— i.e., ESI is information stored in electronic form.

Summary of the Proposed Discovery Rules

1. Rules 16(b) and 26(f) – Discovery Plan and Scheduling Order

Proposed rules 16(b) and 26(f) each amend two sections of the current rules. Section 26(f)(3) will require that the parties' discovery plan contain the parties' views and proposals concerning "any issues relating to disclosure or discovery of electronically stored information, including the form or forms in which it should be produced." Meanwhile, Section 16(b)(5) will allow the court to include in its scheduling order "provisions for the discovery of electronically stored information." In crafting these provisions, the court may consider the parties' views and proposals in the discovery plan.

Rule 26(f)(4) will require that the parties' discovery plan indicate the parties' views and proposals concerning "any issues relating to claims of privilege or of protection as trial-preparation material, including – if the parties agree on a procedure to assert such claims after production – whether to ask the court to include their agreement in an order[.]" Similarly, Rule 16(b)(6) will permit the court to include in its scheduling order any agreements the parties reach regarding these issues.

The proposed rules' heightened concern with privilege or protection of already-produced material arises from the unique nature of ESI. Electronic files contain a vast amount of information that is not necessarily well-organized. Thus, a party that produces ESI is more likely than a party producing paper documents to overlook, or simply be unaware of, certain information it has produced. Further complicating the issue is that while some privileged or protected data could easily be ferreted out by a disclosing party with enough time and resources to sift through all the ESI it produces, other information is invisible to the unseasoned computer user. Such information includes "embedded data" and "metadata."[6]

The Committee Notes describe "embedded data" as data in an electronic file that may not be apparent to the reader, such as "draft language, editorial comments, and other deleted matter." "Metadata", meanwhile, is described as "[i]nformation describing the history, tracking, or management of an electronic file." A producing party unfamiliar with embedded data and metadata may be sending more than that party realizes. For example, a defendant employer asked to produce Excel spreadsheets may want to think twice about sending the spreadsheets in their unadulterated original format, since the original format may contain confidential or irrelevant information such as employees' social security numbers.[7] However, a paper copy of the spreadsheets would obscure some of the data an electronic file would show. Therefore, the parties may agree that the producing party may produce a redacted version of the ESI requested. For those otherwise discoverable portions that are redacted, the producing party still must comply with 26(b)(5)(A)'s requirement that the party describe what was withheld, "in a manner that, without revealing information itself privileged or protected, will enable other parties to assess the applicability of the privilege or protection."

2. Rule 26(b) – Discovery Scope and Limits

Proposed Rule 26(b) adds several new provisions on ESI. Proposed Rule 26(b)(2) has been split into three parts, with subsection (B) adding new language. Subsection (B) will provide an important limitation on discovery

See "E-Discovery," page 16

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

7th Annual Labor & Employment Law Certification Review

COURSE CLASSIFICATION: ADVANCED LEVEL

One Location: February 15-16, 2007
The Rosen Plaza Hotel • 9700 International Drive • Orlando, FL 32819
407/996-9700

Course No. 0396R

This seminar is intended to assist those who have applied to take the certification exam in preparing for the exam or who are thinking about taking the test in the future. It is developed and conducted without any endorsement by the BLSE and/or Certification committees. Those who have developed the program, however, have no information regarding the examination content other than the information contained in the exam specifications which are also provided to each examinee. Candidates for certification who take this course should not assume that the course material will cover all topics on the examination or that the examination will cover all topics in the course material.

Thursday, February 15, 2007

8:00 a.m. – 8:30 a.m.
Late Registration

8:30 a.m. – 8:45 a.m.
Opening Remarks
Susan L. Dolin, Ft. Lauderdale
Alan M. Gerlach, Winter Park

8:45 a.m. – 9:45 a.m.
FMLA
David E. Block, Miami

9:45 a.m. – 10:00 a.m.
Break

10:00 a.m. – 11:00 a.m.
NLRA and Collective Bargaining
Vasilis C. Katsafanas, Orlando

11:00 a.m. – 12:00 noon
OSHA
Gordon D. Rogers, Ft. Lauderdale

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

1:00 p.m. – 2:00 p.m.
PERA
Deborah C. Brown, Gulfport

2:00 p.m. – 2:30 p.m.
WARN
Kevin D. Johnson, Tampa

2:30 p.m. – 2:45 p.m.
Break

2:45 p.m. – 3:30 p.m.
Whistleblower Acts and Worker's Compensation Retaliation
Robert J. Sniffen, Tallahassee

3:30 p.m. – 4:00 p.m.
Polygraph/Fair Credit
Donald J. Spero, Palm Beach Garden

4:15 p.m. – 5:00 p.m.
Statutory and Common Law Protection of Business Interests
Jill S. Schwartz, Winter Park

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

6:00 p.m. – 7:30 p.m.
Reception (included in registration)

Friday, February 16, 2007

8:15 a.m. – 8:30 a.m.
Opening Remarks
Susan L. Dolin, Ft. Lauderdale
Alan M. Gerlach, Winter Park

8:30 a.m. – 9:30 a.m.
Public Employee Claims – §1983, §1985, First Amendment
William R. Radford, Miami

9:30 a.m. – 10:00 a.m.
Drug Testing Statutes
Christopher C. Sharp, Fort Lauderdale

10:00 a.m. – 10:15 a.m.
Break

10:15 a.m. – 11:00 a.m.
Common Law Employment Claims
Daniel R. Levine, Boca Raton

11:00 a.m. – 12:15 p.m.
Discrimination Claims – Administrative Procedures
F. Damon Kitchen, Jacksonville

12:15 p.m. – 1:15 p.m.
Lunch (included in registration)

1:15 p.m. – 2:00 p.m.
ERISA/COBRA
Marcus A. Castillo, Clearwater

2:00 p.m. – 3:00 p.m.
Discrimination Claims – Claims and Defenses
Peter F. Helwig, Lakeland

3:00 p.m. – 4:00 p.m.
FLSA and Florida Statutory Claims for Wages
David H. Spalter, Winter Park

CLE CREDITS

CLER PROGRAM
(Max. Credit: 15.5 hours)

General: 15.5 hours
Ethics: 0.0 hours

CERTIFICATION PROGRAM
(Max. Credit: 15.5 hours)

Labor & Employment Law: 15.5 hours

Seminar credit may be applied to satisfy both CLER and Board Certification requirements in the amounts specified above, not to exceed the maximum credit. Refer to Chapter 6, Rules Regulating The Florida Bar, for more information about the CLER and Certification Requirements.

Prior to your CLER reporting date (located on the mailing label of your Florida Bar News) you will be sent a Reporting Affidavit or a Notice of Compliance. The Reporting Affidavit must be returned by your CLER reporting date. The Notice of Compliance confirms your completion of the requirement according to Bar records and therefore does not need to be returned. You are encouraged to maintain records of your CLE hours.

How to register:	ON-LINE: www.FLORIDABAR.org * NEW * SECURE * FASTER *	MAIL: Completed form w/check.	FAX: 850/561-5816 Form with credit card information.

REFUND POLICY: Requests for refund or credit toward the purchase of the audio/CD or course books of this program **must be in writing and postmarked** no later than two business days following the course presentation. Registration fees are non-transferrable, unless transferred to a colleague registering at the same price paid. A $25 service fee applies to refund requests. Registrants who do not notify The Florida Bar by 5:00 p.m., February 8, 2007 that they will be unable to attend the seminar, will have an additional $130 retained. Persons attending under the policy of fee waivers will be required to pay $130.

HOTEL RESERVATIONS: A block of rooms has been reserved at the Rosen Plaza Hotel, at the rate of $120 single/double occupancy. To make reservations, call the Rosen Plaza Hotel directly at (407) 996-9700. Reservations must be made by 01/26/07 to assure the group rate and availability. After that date, the group rate will be granted on a "space available" basis.

Register me for the "7th Annual Labor & Employment Law Certification Review"

ONE LOCATION: (259) ROSEN PLAZA HOTEL, ORLANDO, FLORIDA (FEBRUARY 15 - 16, 2007)

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

Name _____ Florida Bar # _____

Address _____

City/State/Zip _____ Phone # _____

ABF: Course No. 0396R

REGISTRATION FEE (CHECK ONE):

- ❑ Member of the Labor & Employment Law Section: $390
- ❑ Non-section member: $415
- ❑ Full-time law college faculty or full-time law student: $272.50
- ❑ Persons attending under the policy of fee waivers: $130
  Includes Supreme Court, DCA, Circuit and County Judges, Magistrates, Judges of Compensation Claims, Administrative Law Judges, and full-time legal aid attorneys if directly related to their client practice. (We reserve the right to verify employment.)

METHOD OF PAYMENT (CHECK ONE):

- ❑ Check enclosed made payable to The Florida Bar
- ❑ Credit Card (Advance registration only. Fax to 850/561-5816.) ☐ MASTERCARD ☐ VISA

Signature: _____ Exp. Date: _____/_____ (MO./YR.)

Name on Card: _____ Card No. _____

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

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Private taping of this program is not permitted. **Delivery time is 2 to 3 weeks after 02/19/07. TO ORDER AUDIO/CD OR COURSE BOOKS,** fill out the order form above, including a street address for delivery. **Please add sales tax to the price of tapes or books. Tax exempt entities must pay the non-section member price.**

Please include sales tax unless ordering party is tax-exempt or a nonresident of Florida. If this order is to be purchased by a tax-exempt organization, the course book/tapes must be mailed to that organization and not to a person. Include tax-exempt number beside organization's name on the order form.

❑ **COURSE BOOK ONLY**	❑ **AUDIOTAPES**	❑ **AUDIO CD**
Cost $45 plus tax (Certification/CLER credit is not awarded for the purchase of the course book only.)	(includes course book) $390 plus tax (section member) $415 plus tax (non-section member)	(includes course book) $390 plus tax (section member) $415 plus tax (non-section member)
TOTAL $ _____	**TOTAL $** _____	**TOTAL $** _____

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General Releases in Severance Agreements and the Settlement of Employment Claims – *A Potential Trap Cloaked in a Hobson's Choice*[1]

By John V. Tucker

The general release has become a very common part of severance agreements, as well as employment and worker's compensation disputes. Employers typically require that an employee to whom they are offering severance or with whom they are settling execute a general release. Of course, this can be a wise move on the employer's part, as it forces the employee to give up potential claims. On the other hand, the employee is confronted with a true Hobson's choice: execute the release and waive potential valuable claims versus giving up a valuable severance or settlement with the employer. This article seeks to introduce counsel to how the use of general releases impacts insurance, pension, and other employee benefit claims which are subject to the Employee Retirement Income Security Act ("ERISA"), 29 U.S.C. §1001, et seq.

Often, employees are willing to execute a general release because they are aware that no other claims exist or any other claims are speculative or less valuable than the cash payment or settlement at hand. However, many employees simply do not realize what other claims may be out there for them to pursue, such as health insurance continuation under COBRA, a long term disability claim, or some type of pension benefit. For example, severance agreements commonly reference ERISA claims, yet employees are not aware of the meaning of the general reference to ERISA or references to welfare benefit plans or pension plans. Counsel for employees all too often recommend executing general releases without properly investigating what potential claims may exist, or worse, they are simply unaware that other claims (which are often very valuable) do indeed exist. Worse, employees rarely retain counsel to review severance agreement documents in advance of executing them, and often unknowingly waive valuable rights.

Practitioners and employees should be made aware that ERISA applies to any insurance (welfare benefits) or pension benefit offered through a group plan, unless the employer is a governmental entity or a church. 29 U.S.C. §1003(b). It is well-settled that "[a] waiver or release of claims is permissible under ERISA". *Lockheed Corp. v. Spink*, 517 U.S. 882, 894-95, 116 S.Ct. 1783, 135 L.Ed.2d 153 (1996). Generally, an ERISA participant or beneficiary can release an ERISA fiduciary from liability if the potential claims are knowingly and voluntarily released. *Leavitt v. Northwestern Bell Telephone Co.*, 921 F.2d 160, 162 (8th Cir.1990). This can occur through what is commonly called a "general release." "[A] general release is valid as to all claims of which a signing party has actual knowledge or that he could have discovered upon reasonable inquiry." *Fair v. Int'l Flavors & Fragrances, Inc.*, 905 F.2d 1114, 1116 (7th Cir.1990); *Franz v. Iolab, Inc.*, 801 F.Supp. 1537, 1543 (E.D.La.1992) (same). "A general release of "any and all" claims applies to all possible causes of action, unless a statute specifically and expressly requires a release to mention the statute for the release to bar a cause of action under the statute. ERISA contains no such requirements." *Chaplin v. NationsCredit Corp.*, 307 F.3d 368, 373 (5th Cir.2002); *Smart v. Gillette Co. Long-Term Disability Plan*, 887 F.Supp. 383, 386 (D.Mass.1995), aff'd, 70 F.3d 173, (1st Cir.1995) (employee knowingly, intentionally, and voluntarily agreed to a severance plan that included a general release which precluded her ERISA claim).

For example, where an employee was terminated as part of reduction in force and she knowingly and intentionally released her rights under Employee Retirement Income Security Act (ERISA) by the plain text of a severance agreement which she signed that contained a general release of all of her claims against the employer, a District Court held that the employee knowingly released a Long Term Disability claim. *Smart v. Gillette Co. Long-Term Disability Plan*, 887 F.Supp. 383, 386 (D.Mass.1995). The court found that the employee was well-educated, had a career spanning over ten years of experience as a trained professional, was actively involved in determining the terms of her severance with the benefit of counsel, and she received more severance pay than an employee in her position would normally receive. *Id.*; *see also Halvorson v. Boy Scouts of America*, 215 F.3d 1326 (6th Cir. 2000)(unpublished decision).

"Because individuals waiving pension benefits claims "are relinquishing [rights] that ERISA indicates a strong congressional purpose of preserving," [citation omitted], we have required close inspection of the totality of circumstances surrounding a waiver of ERISA benefits. [citation omitted] Thus, we cannot conclude that merely because a pension benefit waiver is embedded within a larger agreement concluded after employment has ceased, we should review its validity under a standard that is any less strict." *Finz v. Schlesinger*, 957 F.2d 78, 81-2 (2d Cir. 1992). In the Supreme Court's 1996 decision in *Lockheed Corp. v. Spink*, the use of "early retirement incentives conditioned upon the release of claims" was sanctioned, and the Court found that conditioning additional benefits on the voluntary waiver of claims against an employer was not prohibited by § 406(a)(1)(D) of ERISA. *Lockheed,* 517

See "Hobson's Choice," page 19

Federal Labor and Employment Law Cases

Affirmative Action

***Lomack v. City of Newark,* 463 F.3d 303 (3rd Cir. 2006)**

Reversing judgment for the City of Newark, the Third Circuit concluded that the city's program of involuntary transfers designed to achieve racial balance among the city's fire-fighting companies violated equal protection because the policy could not be justified by a compelling governmental interest under the facts of the case. First, the court held that the program could not be justified as a remedy for past discrimination when it was conceded that the imbalance in the companies was a result of fire-fighters working in stations near their homes in areas that were not residentially integrated, rather than any intentional discrimination on the part of the city, and the court further concluded that "de facto segregation" resulting from societal forces does not justify coercive governmental action. Second, the court rejected the argument that the interest of diversity recognized in educational environments in Grutter v. Bollinger applied to the employment environment. Finally, the court rejected the argument that an older consent decree justified the transfers, where the mandates of the decree dealt with hiring and promotion goals, and spoke to assignments only to the issue of prohibiting "discriminatory assignments."

Age Discrimination

***Cooper v. IBM Personal Pension Plan*, 457 F.3d 636 (7th Cir. 2006)**

In one of the more important ERISA cases to be decided in the last several years, the Seventh Circuit reversed the trial court's decision in the closely-watched IBM cash-balance pension plan litigation, holding that the plan did not violate the age discrimination rules in ERISA. Noting that cash balance plans are defined benefit plans that look and act like defined contribution plans, the court rejected the employees' arguments that different language in 29 U.S.C. §§1054(b)(1)(H)(i) & 1054(b)(2)(A) regarding age-compliance indicates an intent to make operation of a defined benefit plan illegal under the same circumstances in which a defined contribution plan would clearly be legal. Instead, the court concluded that while traditional pension plans favored older employees in a variety of ways, a cash balance plan actually was age-neutral. The court emphasized the importance of finding that age was a direct factor in the plan's formulation in order to hold a plan unlawful, an intent that was absent here.

***Meacham v. Knolls Atomic Power*, 461 F.3d 134 (2nd Cir. 2006)**

In one of the first decisions on an ADEA disparate impact case since the Supreme Court's decision in *Smith v. City of Jackson*, the Second Circuit, on remand from the Supreme Court for reconsideration in light of *Smith*, reversed its original decision in favor of the plaintiff group and instructed the lower court to enter judgment in favor of the employer. At issue was the structure of a reduction in force which had been determined to have an age-biased effect in the selection process. Although the possibility of a RIF structure that would have been more objective in the selection criteria had originally led the court to hold that the employer had failed to show business necessity in the structure of its reduction, the new standard of "reasonableness" in Smith required no such showing.

Comparative Qualifications

***Ash v. Tyson Foods, Inc.,* 2006 U.S. App. LEXIS 19750 (11th Cir. 2006)**

The Supreme Court vacated the Eleventh Circuit's judgment finding fault with the court's partial reliance on the articulation of the comparative qualifications standard as one where pretext is shown only when the disparity in qualifications is so apparent as to virtually "jump off the page and slap you in the face." The Supreme Court held that this standard was unhelpful and imprecise as an elaboration of the standard for inferring pretext from superior qualifications and cited by way of contrast the standard used in *Cooper v. Southern Co*., 390 F.3d 695, 732 (11th Cir. 2004), *cert. denied*, 126 S. Ct. 478 (2005) – "disparities in qualifications must be of such weight and significance that no reasonable person, in the exercise of impartial judgment, could have chosen the candidate selected over the plaintiff for the job in question." Applying this standard on remand, the Eleventh Circuit concluded that the plaintiffs did not meet their burden.

***Higgins v. Tyson Foods,* 2006 U.S. App. LEXIS 21962 (11th Cir. 2006)**

After affirming the employer's summary judgment in the plaintiff's failure to promote claim, the Supreme Court vacated the judgment for reconsideration in light of its decision in *Ash v. Tyson Foods, Inc*. On remand, the Eleventh Circuit adopted the *Cooper v. Southern Co.*, 390 F.3d 695 (11th Cir. 2004) test in determining plaintiff's race and age discrimination claims based upon a failure to promote - whether the disparities in qualifications are of such weight and significance that no reasonable person, in the exercise of impartial judgment, could have chosen the candidate selected over the plaintiff for the job in question. The Eleventh Circuit then reaffirmed the district court's entry of summary judgment for the employer as the district court had applied the correct test as articulated in *Cooper* for plaintiff's failure to promote claims.

Coverage Issues

***Modica v. Taylor,* 465 F.3d 174 (5th Cir. 2006)**

In a suit by a public employee alleging that she was denied reinstatement after FMLA leave, the Fifth Circuit held that a public supervisor

continued, next page

could be held individually liable as an "employer" under the FMLA. The Fifth Circuit thus joins the Eighth Circuit in disagreeing with the Sixth and Eleventh circuits, both of which rejected individual liability (*see Wascura v. Carver*, 169 F.3d 683, 687 (11th Cir. 1999). However, because the Fifth Circuit had not previously determined the liability of individual public employees, the Fifth Circuit held that the supervisor in this case was entitled to qualified immunity.

Faragher Defense

***Armstrong v. Standard Furniture*, 2006 U.S. App. LEXIS 22421 (11th Cir. 2006)**

Plaintiffs failed to prevail on their Title VII claims for hostile work environment against their employer. Following the rule set forth in the United States Supreme Court case *Faragher v. City of Boca Raton*, the Eleventh Circuit held that when a plaintiff has established a hostile work environment based upon a supervisor's actions, the employer can put forth an affirmative defense to avoid liability. To prevail on its affirmative defense, the employer must demonstrate (a) that it took reasonable steps both to prevent sexual harassment and to remedy the sexual harassing conduct promptly once it was brought to the employer's attention, and (b) that the victimized employee unreasonably failed to avoid harm or utilize any remedial opportunities made available by the employer. The Eleventh Circuit noted that the employer satisfies the first prong of the test by having an established ant-harassment policy and by showing that its policy was effectively published, that it contained reasonable complaint procedures, that the policy permits employees to bypass harassing supervisors and that there is no other fatal defect. The employees admitted that they had received copies of the employer's anti-harassment policy and knew how to report harassment, as well as had taken anti-harassment classes on more than one occasion. The court held that the employees' failure to avail themselves of the anti-harassment policy, as well as the fact that the harassment ceased when the employees did report it, entitled the employer to judgment on the hostile work environment claims.

First Amendment/Equal Protection

***Eggleston v. Bieluch*, 2006 U.S. App. LEXIS 24799 (11th Cir. 2006)**

The Eleventh Circuit affirmed summary judgment granted by the district court after remand from an Eleventh Circuit decision reversing dismissal of an employee's complaint as to his First Amendment and Equal Protection claims. The employee had been dismissed after publicly disagreeing with certain decisions and policies of the sheriff. The appellate court held that, as the employee voiced all of his criticisms at staff meetings, only challenged general employment policies and internal decisions, and spoke in his professional role rather than as a concerned citizen, there was no sign that he was trying to initiate public debate. Thus, the First Amendment claim failed. As to the equal protection claim, the employee only offered as comparators six officers who engaged in political conduct and one officer who criticized department policies and the sheriff, but not that did both. The employee could not cobble together a comparator using multiple officers, but had to show a single, similarly situated individual who was treated differently. The Eleventh Circuit panel went so far as to question the prior panel's decision to reverse the initial dismissal of the complaint.

FLSA

***Garcia v. Port Royale Trading Company*, 2006 U.S. App. LEXIS 22837 (11th Cir. 2006)**

In an unpublished opinion, the Eleventh Circuit affirmed summary judgment for the employer on an FLSA overtime claim. The employee contended that defendants violated the FLSA by failing to pay him time-and-one-half overtime wages for each hour worked in excess of 40 hours. The district court correctly found that the employee met the requirements for the fluctuating workweek (FWW) method allowed under 29 C.F.R. § 778.114. Moreover, the record demonstrated that the employee was properly paid half-time overtime under the FWW method. Accordingly, the district court correctly granted summary judgment in defendants' favor.

NLRA

***Endicott Interconnect Techs., Inc. v. Nat'l Labor Relations Bd.*, 453 F.3d 532 (D.C. Cir. 2006)**

Reversing the NLRB's 2-1 decision in the employee's favor, the D.C. Cir-

The CHECKOFF

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cuit held that an employee who had made public statements critical of a recent layoff and of management's competence was not protected by Section 7 of the NLRA because his statements constituted "disloyalty" within the meaning of the Supreme Court's *Jefferson Standard* test. The employee had been quoted in a newspaper article criticizing a recent layoff and stating that the layoff had left "gaping holes" in the workforce and that individuals within "specific knowledge of unique processes" had been let go. After being warned about such statements by the owner, the employee subsequently made a posting on the same newspaper's public bulletin board advocating union organization for the plant and included the assertions that "[t]his business is being tanked by a group of people that have no good ability to manage it. They will put it into the dirt just like the companies of the past that were 'saved' by [the owners]. . ." The court noted that immediately after the newspaper article, customers of the supplier had called regarding the employee's comments and asking about the company's ability to support its products. The court found that although the NLRB had applied the correct test, they had applied it incorrectly.

***Long Island Head Start Child Development Servs., Inc. v. National Labor Relations Bd.,* 460 F.3d 254 (2d Cir. 2006)**

Granting a petition for review of an NLRB decision, the Second Circuit found that the Board had failed to develop an adequately reasoned basis for its conclusion that the commencement of negotiations towards a new contract automatically terminated the effectiveness of an evergreen clause despite the lack of specific or timely notice by either party of intent not to renew per the clause. In October 2003, the parties had commenced negotiations over both a modification of the prior 1999 CBA (which had rolled over until May 2004 by operation of the evergreen clause) and towards a successor agreement. During the negotiations, neither side gave notice of intent not to rely on the evergreen clause. While negotiations were ongoing, the employer changed its health care insurer, resulting in different benefits being provided. The NLRB concluded that (1) the commencement of negotiations eliminated the effectiveness of the evergreen clause, and thus the prior CBA's grant to management of the unilateral right to change carriers expired in May 2004; (2) the change in carriers was a mandatory subject of bargaining; and (3) the employer breached its duty to bargain by failing to bargain the change. The Second Circuit affirmed on the second issue, but reversed the Board's decision with regard to the effect of bargaining on the evergreen clause.

Prima Facie Case

***Roland v. United States Postal Serv.*, 2006 U.S. App. LEXIS 25415, 99 FEP Cases 242 (11th Cir. 2006)**

In a Title VII race discrimination case based on disparate discipline, the Eleventh Circuit affirmed summary judgment for the employer. The Postal Service had demoted plaintiff because she violated USPS policies by soliciting sales of products from her side business as a Mary Kay distributor during working hours. The circuit court agreed with the district court that the plaintiff had failed to show an appropriate comparator who had been less harshly disciplined for similarly situated conduct. Her proffered comparator, an employee in another unit who allegedly delivered his wife's Avon products using his UPSA vehicle, was not a supervisor, while plaintiff was. He did not involve customers or other employees in his activities. He also worked in a different unit with different managers than those involved in plaintiff's demotion. Thus, the court concluded that a prima facie case had not been established. It also concluded that the plaintiff had not shown pretext.

Reasons for Termination

***Mock v. Bell Helicopter Textron, Inc.*, 2006 U.S. App. LEXIS 21660 (11th Cir. 2006)**

The Eleventh Circuit reversed summary judgment for the employer finding an issue of material fact on the former employee's age-discrimination claim. At the time the employer informed the employee that he was being terminated, he insisted that the employer provide him the reason for its decision. The employer refused to give a reason. It was not until later, in a letter, that the employer told the employee that he had been terminated for unacceptable performance. The Eleventh Circuit held that in light of the employer's refusal to tell the employee– at the time it fired him– why his employment had come to an end, a trier of fact reasonably could find that

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the letter constituted a pretext for discrimination. Summary judgment was therefore inappropriate.

Retaliation

***Zelnik v. Fashion Inst. of Tech.*, 464 F.3d 217 (2d Cir. 2006)**

Affirming the grant of summary judgment below, the Second Circuit held that the denial of professor *emeritus* status to a professor recently retired from the Fashion Institute of Technology was not a sufficient adverse action to establish a claim for First Amendment retaliation. Noting that *emeritus* status did not involve additional pay, employment benefits, or support; that it allowed little, if any, greater access to facilities than retired professors normally received; and that the intangible benefits of prestige were not shown to be of sufficient significance; the court concluded the denial was *de minimus* and not an adverse action. Although the case arose under 42 U.S.C. § 1983, the Second Circuit discussed the test recently established by the Supreme Court in *Burlington Northern & Santa Fe Ry. v. White* (126 S.Ct. 2405 (2006), and concluded that its own standard for First Amendment claims was equivalent.

Sexual Harassment

***Freitag v. Ayers*, 463 F.3d 838 (9th Cir. 2006)**

The Ninth Circuit, affirming a jury verdict for a female correctional officer, held that the California Department of Corrections violated Title VII by failing to take appropriate action to prevent male inmates from sexually harassing female correctional officers by both verbal and visual acts, including exhibitionist masturbation. While the court noted that the prison setting involved an inherently difficult environment, and that individuals working in the prison would reasonably expect to be exposed to behavior that would be unknown in a typical work environment, the Department retained its responsibility to make reasonable, good faith efforts to counteract such behavior, and the record at trial showed a near-complete failure to rely on the normal inmate disciplinary process to punish or deter inappropriate behavior.

***Patton v. Keystone RV Co.*, 455 F.3d 812 (7th Cir. 2006)**

Reversing a summary judgment for the employer, the Seventh Circuit concluded that the employee had shown sufficient acts of hostile environment harassment to establish jury issues as to whether the harassment was severe and pervasive and constituted a constructive discharge. The court noted four separate instances where the offending supervisor placing his hand on the plaintiff, including one instance on her inner thigh under her shorts, combined with a number of suggestive comments and inordinate close supervision. The court summarized some of its prior cases, attempting to determine where on the continuum of behavior the facts of this case fell, and set some benchmarks for evaluating conduct in other cases.

Title VII Coverage

***Petruska v. Gannon Univ.* 462 F.3d 294 (3rd Cir. 2006)**

Affirming the dismissal of Title VII gender discrimination and retaliation claims brought by a former female university chaplain of a Catholic university, the Third Circuit joined seven other circuits – including the Eleventh Circuit (*see Gellington v. Christian Methodist Episcopal Church*, 203 F.3d 1299 (11th Cir. 2000) – in concluding that the case-law created "ministerial exception" barred Title VII claims which involve a religious employer's selection of individuals to perform functions of a religious nature. Although Title VII specifically exempts religious employers from religious discrimination claims, the "ministerial exemption," based on the First Amendment's Free Exercise Clause, applies to other forms of discrimination as well.

***Smith v. Castaways Family Diner*, 453 F.3d 971 (7th Cir. 2006)**

Reversing a summary judgment for the employer, the Seventh Circuit found that the district court erroneously excluded two restaurant managers from the count of employees for Title VII coverage purposes. The restaurant was owned as a sole proprietorship by a woman whose husband and mother actively ran the restaurant on a day-to-day basis, while she had little involvement. Concluding that the test established in *Clackamas Gastroenterology Assocs v. Wells* for determining whether working owners should be counted was inapposite where the managers were not owners, the Seventh Circuit concentrated on the nature of the managers' authority, and concluded that where the authority had been delegated them, and was not their inherent authority, the managers should be counted as "employees" rather than as "employers." Based on the test established by the Seventh Circuit, it remains to be seen under what circumstances, if any, a non-owner manager of a business would not be counted as an employee.

Title VII – Hostile Work Environment – Racial Remarks

***Nije v. Regions Bank*, 2006 U.S. App. LEXIS 24076 (11th Cir. 2006)**

The Eleventh Circuit ruled in a Title VII race discrimination case that a bank's branch manager did not suffer an adverse employment action in the form of a *de facto* demotion when she received a directive not to discipline an employee while the employee's actions were being investigated by the employer's Human Resources department. The Court also concluded that the manager's transfer from one branch location to another did not constitute an adverse employment action where the transfer did not result in a loss of pay or benefits, and where the manager's duties and responsibilities remained unchanged. Finally, the Court ruled that a subordinate's references to the manager as a "token" and "quota" were not frequent or severe enough to create a racially hostile work environment.

***Tomczyk v. Jocks & Jills Restaurants*, 2006 U.S. App. LEXIS 20375 (11th Cir. 2006)**

The Eleventh Circuit ruled that inappropriate comments concerning an employee's interracial relationship supported an employee's claim under Title VII of a racially hostile work environment, but that such comments did not constitute direct evidence to support the employee's claim that her discharge was the result of racially discriminatory animus. The Court also ruled that the employee presented sufficient evidence of pretext with respect to the termination of her employment, where the termination was based upon violation of the employer's policy and where the employee presented evidence of the employer's inconsistent pronouncements and enforcement of that policy.

Title VII – Retaliation

***Taylor v. Roche*, 2006 U.S. App. LEXIS 23380 (11th Cir. 2006)**

The Eleventh Circuit ruled that an employee had established a prima facie case of retaliation based on the denial of his shift change request. Where the employee had requested a shift change for over one year in order to avoid tension with a supervisor, the employer's repeated refusal constituted an adverse employment action. Moreover, the employee demonstrated a causal connection where the supervisor commented that the employee should have thought about the consequences of his EEO complaint before filing the complaint. However, the employee failed to show that the employer's proffered legitimate, nondiscriminatory reasons for failing to promote him were pretextual, where the employee failed to demonstrate that the disparities between his qualifications and those of the selected candidate were so significant that no reasonable person could have chosen the other individual.

Florida State Cases

Arbitration

***Silverman Wender Koonin Epstein Garcia & Rosencwaig, A.P. v. Dennis, M.D.*, 2006 Fla. App. LEXIS 15502 (Fla. 3rd DCA 2006)**

The arbitration clause of an employment contract was no longer enforceable since the employment contract was no longer in effect. Where the employee continued to work on an at will basis after the expiration of the employment contract, the Court rejected the argument that the parties continued to govern themselves according to the same contractual terms, and held that it was appropriate for the lower court to deny the motion to compel arbitration.

Covenant Non-Compete

***Zbigniew-Jocob Litwinczuk, M.D. v. Palm Beach Cardiovascular Clinic*, 2006 Fla. App. LEXIS 17252 (4th DCA 2006)**

The Court considered a case involving a covenant not to compete under Fla. Stat. 542.335 *et seq*. A doctor of cardiology left the Palm Beach Cardiovascular Clinic, and opened his own cardiology practice less than four blocks away. He began seeing several patients that he had seen when he worked for the previous employer and he practiced cardiology in the same hospital as the plaintiff corporation. Before hiring the defendant doctor, the plaintiff corporation had paid $22,000 to a recruiter to find a new doctor. The plaintiff corporation also paid $40,000 to purchase an already existing practice in order to provide the newly hired defendant doctor with a client base. Under these circumstances, the appeals court upheld the trial court, finding that the plaintiff corporation sought to enforce a legitimate business interest and that it was entitled to a presumption of irreparable harm. This presumption had not been rebutted by the previous employee, despite the fact that there was some testimony that the corporation would be able to reconstruct a historical basis for how much money it had lost. The evidence in this regard was disputed. The preliminary injunction order entered by the trial court, which held that two years was reasonable but slightly reduced the geographic scope, was appropriate.

Covenant Not-to-Compete

***Walsh v. Paw Trucking, Inc.*, 2006 Fla. App. LEXIS 19582 (2d DCA 2006)**

The appeals court considered a case involving a covenant not to compete under Fla. App. 542.335 *et seq*. Although the trial court entered a preliminary injunction, the case was reversed and remanded since the trial court did not include in its order the necessary findings of fact. The trial court must find that the plaintiff established: 1- a likelihood of irreparable harm; 2– unavailability of an adequate legal remedy; 3– a substantial likelihood of success on the merits; and 4– that considerations of public interest support the entry of the injunction. The court further noted that the party seeking to enforce a covenant not to compete must show that the covenant protects a legitimate business interest as defined by the statute, and that the covenant was violated. Proof of a "legitimate business interest" is the threshold for a presumption of irreparable harm, and it is also an important factor with regard to public interest considerations.

Injunctive Relief

***Broward County v. Meiklejohn*, 2006 Fla. App. LEXIS 14044 (Fla. 4th DCA 2006)**

Employee brought suit under the Florida Civil Rights Act and the Florida Whistle Blowers Act, and sought a preliminary injunction. The trial court granted the preliminary injunction, after applying the minority view in federal case law that there is a presumption of irreparable harm in cases involving discrimination

continued, next page

and retaliation. The Appeals Court reversed, explaining that there is no such presumption under Florida law. The trial court erred since it had imposed a presumption of irreparable harm, since it failed to make the requisite findings of fact, and since it failed to impose a bond.

PERC and Unfair Labor Practices

***Cagl v. St. Johns County School District,* 2006 Fla. App. LEXIS (Fla. 5th DCA 2006)**

Former school teacher, whose husband was a disabled veteran, pursued claims with PERC under Fla. Stat. 447.501(1)(d) and 447.501(1)(a). The Appeals Court upheld the Commission's decision to dismiss her claims summarily and to not allow an evidentiary hearing. Administrative agencies are afforded wide discretion in the interpretation of statutes and the power to administer them, and the Appeals Court recognized that PERC had developed special expertise with regard to the statute. The Appeals Court affirmed the Commission's decision since the employee had not provided evidence to support a prima facie violation of the unfair labor practice alleged. Further, a claimant is only entitled to an evidentiary hearing when claimant can show a nexus between the protected activity and the alleged adverse action.

***Florida Public Employees Council 79, AFSCME, AFL-CIO v. State of Florida,* 2006 Fla. App. LEXIS 14005 (Fla. 1st DCA 2006)**

Union filed an unfair labor practice charge against the state of Florida, since the state refused to arbitrate a grievance concerning the layoff of certain employees at the Department of Children and Families pursuant to procedures established in the collective bargaining agreement. PERC summarily dismissed the unfair labor practice charge, which was upheld by the Appeals Court. The collective bargaining agreement incorporated the provisions of the Florida Administrative Code governing layoffs based on a "bumping" procedure, but the law had changed in that regard. It had been revised by "Service First" legislation, which became effective before the layoffs in question. Such a contingency was contemplated by the parties in the collective bargaining agreement which stated that provisions of the contract would no longer apply if they contravene any laws of the state, including subsequently enacted legislation.

Public Records

***City of Miami Beach v. Public Employee Relations Commission*, 2006 Fla. App. LEXIS 14710 (Fla. 3rd DCA 2006)**

The Appeals Court considered whether a labor union must pay the pre-paid cost stipulated in the Florida Public Records Act for copies of documents requested by it from a public employer for bargaining purposes with the employer. The Court stated that a labor union seeking information from the employer with whom it is bargaining is not exempt from the Florida Public Records Act. The public employer's obligation to provide information under Fla. Stat. §447.203(17)(d) and the statutory obligation to pay for copies under Fla. Stat. §119.07(4) can be harmonized with each other.

Sexual Harassment

***Maldonado v. Publix Supermarkets*, 2006 Fla. App. LEXIS 17271 (4th DCA 2006)**

In a case involving alleged sexual harassment, the Court determined that four isolated incidents that occurred over a period of two and a half years was not sufficiently pervasive or severe to constitute sexual harassment. Even if it were, the Court determined that the corrective action taken by the employer was immediate, appropriate, and likely to stop the harassment, which precluded a finding of liability.

With regard to the first incident of alleged harassment, the male employee had "passed his hand" along the plaintiff's side. About a year later, he had grabbed plaintiff's buttocks and told her that she "was going to be his." There were two other occasions in which the alleged harasser "bit his lip." Plaintiff had interpreted this to mean "you're really hot." With regard to remedial action, the employer had verbally counseled the male employee, instructing him to keep his hands to himself and to treat the plaintiff with respect. The employer also gave him a written reprimand, attempted to schedule his shift so that it would not overlap with the plaintiff's shift, and eventually transferred him to another store.

The Court held that the severity of the harassment did not cross the line set by the Eleventh Circuit in the cases of *Mendoza v. Borden, Inc.,* 195 F.3d 1238 (11th Cir. 1999) and *Gupta v. Florida Bd. of Regions,* 212 F.3d 571, 583 (11th Cir. 2000). Nor had the level of severity crossed the line set by the Supreme Court in the case of *Harris v. Fork Lift Sys., Inc.,* 510 U.S. 17, 114 S.Ct. 367, 126 L.Ed. 2d 295 (1993).

Unemployment Benefits

***Bogardus v. Justice Administrative Commission and Florida Unemployment Appeals Commission*, 2006 Fla. App. LEXIS 19089 (Fla. 3rd DCA 2006)**

Although unemployment claimant claimed that he was no longer medically capable of performing his job, he was not entitled to benefits. The employee did not provide a doctor's note for his employer. The employer testified that, if given the chance, it would have found appropriate work for the employee to perform. Under these circumstances, employee was considered to have voluntarily quit and he did not meet his burden of demonstrating that he had good cause to quit.

***Lake v. State of Florida, Unemployment Appeals Commission,* 931 So.2d 1065 (Fla. 4th DCA 2006)**

Employee was denied unemployment benefits, after having settled

his worker's compensation claim for terms including a lump sum and an agreement that he would not return to work for the employer. When employee agreed to the settlement that terminated her employment, she was deemed to have left her employment voluntarily.

Unemployment Compensation

***De La Torre v. New Century Mortgage Corporation,* 2006 Fla. App. LEXIS 14059 (Fla. 3rd DCA 2006)**

The Appeals Court affirmed the decision disqualifying employee from receipt of unemployment benefits, since excessive tardiness falls within the definition of misconduct. The Claimant was terminated only after the employer changed her schedule in an attempt to accommodate her attendance issues, and after the employee received written warnings for absenteeism.

***Gibson v. Florida Unemployment Appeals Commission,* 2006 Fla. App. LEXIS 14708 (Fla. 3rd DCA 2006)**

Appeals Court reversed an order of the Unemployment Appeals Commission that had disqualified a pregnant employee from receiving unemployment compensation. The pregnant employee had requested a transfer to a less stressful previous position, due to her pregnancy. The employer suspended her since it could not accommodate the request, but later offered her a new position located six miles further away. She declined this offer since it would have necessitated her taking three public buses, and her doctor advised against such means of transportation during her third trimester of pregnancy. The Appeals Court held that the pregnant employee's concern for her health was sufficient reason to deny the offer, and claimant was therefore entitled to benefits.

Worker's Compensation

***Footstar Corporation v. Doe*, 932 So.2d 1272 (Fla. 2nd DCA 2006)**

Employee claimed that she was assaulted, sexually battered and raped by her boss. She sued employer for common law torts, but had no statutory claim for sexual harassment. The employer moved for summary judgment on the basis of worker's compensation immunity. The trial court denied the motion for summary judgment, relying upon *Byrd v. Richardson-Greenshields Securities, Inc.*, 552 So.2d 1099 (Fla. 1989).

On appeal, the Second DCA considered the Florida Rules of Appellate Procedure 9.130(a)(3)(C)(v) which provides appellate jurisdiction for orders determining that, as a matter of law, a party is not entitled to workers' compensation immunity. Appeals Court ruled that it did not have jurisdiction over the matter, since the trial court's order was simply a denial of summary judgment, and since trial court did not specifically state that the defense is unavailable as a matter of law. The Order must conclusively and finally determine that a party is not entitled to workers' compensation immunity in order for there to be appellate jurisdiction, and it would not have been appropriate for the Appellate Court to supply the jurisdictional language by inference.

Judge Casanueva wrote separately, concurring in the majority's opinion that the Appeals Court lacked jurisdiction. Judge Casanueva however opined that the plaintiff had not stated a claim for which relief could be granted, since plaintiff had only pleaded non-statutory torts. In Florida, there is no common law tort for sexual harassment. Judge Casanueva therefore opined in his concurring opinion that *Byrd* would be inapplicable and that the tort claims are barred by 440.11.

***Pendergrass v. R.D. Michaels, Inc.*, 2006 Fla. App. LEXIS 12840 (Fla. 4th DCA 2006)**

Employee had the position of Mason Tender, was required to work on a day that was particularly windy, and two walls on a construction site fell and killed employee due to a wind gust. Despite OSHA having cited the employer for a willful violation, the employer and individual defendants were protected by the worker's compensation immunity of Fla. Stat. 440.11. The employer did not deliberately intend to injure employee or engage in conduct that was substantially certain to cause injury or death.

Court of Appeals liberally construed the Florida Civil Rights Act and deviated from federal case law under Title VII of the Civil Rights Act.

The Underlying Conduct

Erma DuPont worked for the defendant Speedway convenience store as a cashier/store clerk. *DuPont, Supra.* She would work a couple of times a week during the same shift as Joe Coryell, who was also a cashier/store clerk and Ms. DuPont's co-worker. *Id*. Mr. Coryell would compliment DuPont's appearance, but did it in a offensive manner and made ugly gestures. *Id.* Although she tried to ignore him and move to other areas of the store, he would follow her. *Id.* Mr. Coryell would sneak up behind her while she was standing at the register and put his hands on her. *Id.* He would try to engage her in conversations about his sex life. *Id.* He would state that he could not sleep, that he needed a girlfriend, and that he needed a sex life. *Id*. Ms. DuPont would try to discourage Mr. Coryell by giving him dirty looks and trying to ignore him. *Id*. This made Mr. Coryell angry and he would start raging and screaming. *Id.* Mr. Coryell would also throw and slam things such as pencils, cartons of cigarettes, clothes pins, keys, etc. *Id.* These items would often fall at her feet, and she would have to jump out of the way. *Id.* Mr. Coryell would use foul language, would call customers "stupid", a "bitch", a "dumb bastard", etc. *Id.* He would call Ms. DuPont a "stupid bitch" and "dumb blonde." *Id.* He would tell her dumb blonde jokes and said other things that made her feel humiliated. *Id.* Mr. Coryell told Ms. DuPont that she would look good as a "biker chick," and that she looked "hot" in her speedway outfit. *Id.* Mr. Coryell would also make sexual remarks about female customers, including, "I wish I could get some of that" and would make sexual body motions. *Id.* Mr. Coryell rubbed Ms. DuPont's buttocks once and smacked her buttocks once. *Id.* He rubbed her neck and shoulders and asked if it felt good. *Id.* When Ms. DuPont was counting the safe, Mr. Coryell would stand over her, and she felt intimidated and scared and found it hard to concentrate. *Id.* Mr. Coryell would laugh at Ms. DuPont, call her a "dumb blonde," and remarked that women can't do anything. *Id.*

DuPont claimed that she was subjected to Mr. Coryell's behavior every time she worked with him on a typical eight hour shift, for a span of nine weeks before she left her job. *Id.* She claimed that the harassment continued despite her complaints. *Id.*

Severity of the Harassment

The Court approvingly acknowledged that federal courts require that the harassment be more than merely insulting, rude or boorish behavior. *Id.* Indeed, the statutes were not intended to be "general civility codes". *Id.* The Court also stated that the harassment must be so severe or pervasive that it adversely affects the terms or conditions of the plaintiff's employment. *Id*. The Court stated there is an objective and subjective component to this. *Id.* Not only must the employee suffer from the harassment, but it is also required that a reasonable person would have suffered from such conduct, and this is primarily a jury issue so long as a minimum of bad conduct has been established. *Id.*

The Court then explained that it must consider "the totality of the course of conduct and not microbites of behavior in isolation." *Id.* The Court stated that DuPont had clearly established that she was subjectively damaged by Coryell's conduct since she testified that she was unable to competently perform her work, could not sleep, was nervous and upset, and eventually sought medical help. *Id*. The Court noted however that the harassment need not affect an employee's psychological well being or cause injury in order to be actionable. *Id.* The Court then stated that whether a reasonable person would have been so affected by Coryell's behavior was a fact issue that had been resolved in plaintiff's favor by the jury. *Id.*

The Court rejected the Defendant's argument that the behavior was merely violent and directed towards both genders. *Id.* The Court stated that not all of the offensive conduct is required to include sexual overtures, so long as the behavior is motivated by hostility towards woman because of their gender. *Id.* The Court further noted that another female employee had been harassed by the same person. *Id.*

Most significantly, the Court acknowledged that to find the conduct extreme enough to constitute a hostile environment would not be consistent with certain federal cases, but nevertheless held that the conduct was indeed extreme enough. *Id.* The Court agreed with the employer that there are federal cases with similar or worse facts in which it was held that the conduct was insufficient to constitute a hostile environment. *Id.* In this regard, the Court cited to the Eleventh Circuit cases of *Gupta v. Florida Board of Regents,* 212 F.3d 571(11th Cir. 2000*)* and *Mendoza v. Borden, Inc.,* 195 F.3d 1238 at 1256 (11th Cir. 1989). The DuPont Court then noted, by contrast, that there were other federal cases containing less severe facts in which the courts held that it was indeed severe enough to constitute a hostile environment. *DuPont, Supra.* In this regard, the DuPont Court cited to older Eleventh Circuit case law, cases from other federal circuits, and the United States Supreme Court case of *Harris v. Forklift Systems, Inc.,* 510 U.S. 17, 114 S.Ct. 367, 126 L.Ed.2d 295 (1993). The DuPont Court apparently concluded that the most recent Eleventh Circuit authority is not consistent with the authority of the U.S. Supreme Court.

The DuPont Court then stated that Florida has opted for a strong policy against sexual harassment in the workplace, and that the Florida Civil Rights Act is a remedial statute that must be liberally, not strictly, construed. *DuPont Supra.* The Court held that DuPont did indeed state a case for hostile environment sexual harassment, and that to hold otherwise "would weaken and demean" the purpose of the Florida Civil Rights Act. *Id.*

Interestingly, a concurring opinion was written by Judge Orfinger, who had sided with the majority in the previous panel decision. Judge Orfinger stated that he acknowledges the error of the panel's decision. He explained in pertinent part "I focused on the trees and lost the forest."

Sufficiency of the Remedial Action

Although the employer changed Ms. DuPont's shift so that she did

not have to come into contact with the harasser, the Court found that the jury could determine that the remedial action was insufficient, when the facts were viewed in the like most favorable to DuPont. *Id.* The Court noted that plaintiff's shift did not change until long after she had complained to a "supervisor", and that this complaint should have been sufficient pursuant to the employer's sexual harassment policy. *Id.* The Court rejected the employer's argument that the nature of the complaint was not specific enough and did not indicate that the behavior constituted sexual harassment, noting that the evidence was in dispute and that this was a question for the jury. *Id.* The Court also noted that another female employee had previously complained about harassing conduct about this same person. *Id.*

In addition to the remedial action not being prompt, the Court also held that a reasonable jury could find that the remedial action was not sufficient. *Id.* Although Ms. DuPont's scheduled was changed to another shift, she still had to come into contact with the harasser who would on occasion be called in unexpectedly, and the employer did not always adhere to the separation of the work shifts. *Id.*

Finally, the Court noted that the harasser was not disciplined, nor given any type of a verbal or written reprimand. *Id*. Nor did the employer investigate DuPont's complaints at any time. *Id.* Nobody took DuPont's written statement or talked with her or any other employees in detail about the matter. *Id.*

Punitive Damages

First, the Court rejected the employer's argument that DuPont should not be permitted to keep more than $74,999 since it would be beyond the limit for diversity of citizenship jurisdiction in federal court. *Id.* Although DuPont pleaded in her Complaint that the amount in controversy was below $50,000 and successfully moved to have the case remanded from federal court back to state court, this did not prohibit DuPont from ultimately recovering in excess of $75,000. *Id.* The Court noted that employers have the burden of proving that the amount in controversy exceeds $75,000 when responded to a motion to remand, and in order to avoid remand must establish to legal certainty that plaintiff's counsel pled in bad faith and that the claim clearly exceeds the jurisdictional amount. *Id.* The fact that a plaintiff may ultimately recover more than the jurisdictional amount after removal is not sufficient to support federal jurisdiction. *Id.*

The Court did distinguish DuPont's case from other cases in which Plaintiffs had pleaded specific dollar amounts which were less than $75,000. *Id.* The Court further distinguished DuPont's situation from other cases in which plaintiffs had specifically stipulated that they would not accept an award in excess of the jurisdictional amount. *Id.*

The Court noted that the more difficult issue was the substitive standard for an award of punitive damages. *Id.* The trial court had directed the jury that in order to award punitive damages it had to determine that Speedway acted willfully, intentionally, or with callous and wreckless indifference to the plaintiff's rights. *Id.* The jury made that determination in DuPont's favor. *Id.* The Appeals Court noted that it is not clear what the standard for punitive damages under the Florida Civil Rights Act is. *Id.* It contains no express requirement that the discrimination must be willful, malicious or constitute wanton conduct, although Title VII of federal statute does indeed contain such a provision. The Court then noted that state law governs state statutes, and relied upon the Florida Supreme Court precedent as *Mercury Motors Express, Inc. v. Smith,* 393 So.2d 545 (Fla. 1981). The DuPont Court noted that under the Supreme Court precedent ordinary negligence on the part of the employer is sufficient. *DuPont Supra.* An employer may be held vicariously liable for acts of its employees for punitive damages if the acts of the employee are willful and wanton, and if there is some basis to find fault on the part of the employer itself. *Id.* However, the action or non action of the employer need not be willful or wanton. *Id.*

Applying that standard to the instant case, the DuPont Court held that the award of punitive damages is sustainable since the co-employee who harassed DuPont clearly acted willfully or wantonly, and that Speedway was at least negligent in not taking prompt remedial action. *Id.* The Court acknowledged that the effect of applying this standard to cases under the Florida Civil Rights Act "would result in allowing punitive damages in almost every case." *Id.*

Alternatively, if willful or wanton behavior on the part of an employer itself is required, the Court stated that this would be a closer question based on Speedway's reaction to the complaints of harassment. The Court noted that the jury could have concluded that Speedway Management acted with a reckless indifference to DuPont's complaints of sexual harassment. *Id*. The Court affirmed the award of punitive damages. *Id.* However, the Court certified to the Florida Supreme Court the question of whether *Mercury Motors* under which an employer could be held vicariously liable for punitive damages is appropriately applied to punitive damages under the Florida Civil Rights Act. *Id.*

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CHAIR'S MESSAGE
from page 2

In addition, we are ensuring that the seminars have plaintiff and defense co-chairs, so the programs are very balanced.

We are also working to involve members of the voluntary bar associations and the local bar associations.

Membership Outreach

Our current membership is 1,991 strong and we are still reaching out for new members and to encourage prior members to renew.

Executive Council:

The Executive Council met on October 19, 2006 and the financial statement shows that with a current fund beginning balance of $140,808, we have received revenue of $52,012 and expended only $6,111 since the beginning of the fiscal year.

Although many projects are still ongoing, I believe we have accomplished a lot so far this year and I appreciate all the support and cooperation of the Executive Council members:

Stephen A. Meck, *Chair-elect*
Jill S. Schwartz, *Secretary / Treasurer*
Eric J. Holshouser, *CLE Chair*
Honorable Alan O. Forst, *Legal Education Chair*
F. Damon Kitchen, *Immediate Past Chair*
Angela Froelich, *Section Administrator*
S. Grier Wells, *Board Liaison*
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Gregory A. Hearing
Marilyn Holifield
Jeffrey E. Mandel
Cary R. Singletary
Leslie Reicin Stein
Richard Johnson
Archie Thomas

If any of you have suggestions on how to further these goals, I'm all ears!!! And remember, it's not too late to volunteer. After all, it's your Section.

We're off to a great year!

— Cynthia N. Sass, Section Chair

E-DISCOVERY
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of ESI. This provision states that a party "need not provide discovery of [ESI] from sources that the party identifies as not reasonably accessible because of undue burden or cost." The Committee Notes stress that "the responding party must…identify, by category or type, the sources containing potentially responsive information that it is neither searching nor producing." This is likely so the requesting party can evaluate the validity of the responding party's claim.

Additionally, the Committee Notes state that "[a] party's identification of sources of electronically stored information as not reasonably accessible does not relieve the party of its common law or statutory duties to preserve evidence." The scope of these preservation duties will depend on the circumstances of each case.
Importantly, on a motion to compel or a motion to quash, the producing party bears the burden of demonstrating the inaccessibility of the ESI. However, even if the ESI is not reasonably accessible, the court may order discovery if the requesting party shows good cause.

The amendments will not alter the court's responsibility to limit any discovery it determines to be "unreasonably cumulative or duplicative, or… obtainable from some other source that is more convenient, less burdensome, or less expensive[.]" The court still must limit discovery if it determines that the "burden or expense of the discovery outweighs its likely benefit[.]" Such analysis is necessarily performed on a case-by-case basis.

Proposed Rule 26(b)(5) has been split into two parts, with subsection (B) adding new language. Subsection (B) covers claims of privilege or protection as trial-preparation material of already-discovered information. The objecting party may notify any party that received the information of the claim and the basis for it. After being notified, a party must promptly return, sequester, or destroy the specified information and any copies it has and may not use or disclose the information until the claim is resolved. A receiving party may promptly present the information to the court under seal for a determination of the claim. If the receiving party disclosed the information before being notified, it must take reasonable steps to retrieve it. The producing party must preserve the information until the claim is resolved.

Like the sections discussed in Part 1, *supra*, 26(b)(5)(B) is concerned about embedded data and metadata, since inadvertent production of privileged or protected information is increasingly likely to take one of those forms. Again, it makes the most sense for parties to address questions of privilege in the discovery plan. While the parties will probably not be able to anticipate every possible conflict, addressing in the discovery plan as many potential conflicts as possible will make future disputes less likely.

Further, the Committee Notes clarify that 26(b)(5)(B) does not address whether the objecting party has waived any privilege it asserts. Such questions will be addressed under

other applicable law.

3. **Rule 33 – Interrogatories**

Proposed Rule 33(d) has been modified to address ESI. Current subsection (d) allows the party on whom an interrogatory is served to produce business records from which the answer to an interrogatory may be obtained, if the burden of obtaining the information is the same for the serving and served parties, respectively. Proposed language makes clear that ESI is included in the term "business records."

4. **Rule 34 – Production of ESI**

Proposed Rule 34 on production requests contains several changes. Amended subsection (a) makes clear that ESI is not necessarily included in the term "documents"— the new subsection allows a party to serve on another party a request to produce both documents and ESI.

Amended subsection (b), on procedure, adds that a requesting party may specify the form or forms in which it wishes the ESI to be produced. The responding party may object, stating its reason(s) for objecting, both to the content and the form of the ESI it is requested to produce. If the responding party objects to the content of a particular request, that request will be set aside until the dispute is resolved, and inspection of the other requests will continue. If the responding party objects to the form of a request – or if no particular form was requested – "the responding party must state the form or forms it intends to use."

The final proposed amendment to Rule 34 adds baseline requirements parties must follow absent an agreement or a court order. For example, a party "need not produce ESI in more than one form." If a request does not specify the form or forms of the ESI requested, the responding party must produce it in "a form or forms in which it is ordinarily maintained or in a form or forms that are reasonably usable." This language may create problems, because it could be interpreted to permit a producing party to redact metadata or embedded data without consent of the requesting party – the remaining form would still be "reasonably usable." However, a producing party's obligation to preserve evidence probably forbids any unilateral redaction of metadata or embedded data.

5. **Rule 37 – Limitations on Sanctions**

Proposed Rule 37 adds subsection (f), which addresses sanctions on failure to provide ESI. Rule 37(f) will state that "[a]bsent exceptional circumstances, a court may not impose sanctions under these rules on a party for failing to provide [ESI] lost as a result of the routine, good-faith operation of an electronic information system." Because the language only limits sanctions "under these rules," the court may still issue sanctions through other authorized means. The Committee Notes address concerns that a party may sit idly by while potentially discoverable ESI is automatically purged from its systems, stating that a party may not "exploit the routine operation of an information system by allowing that operation to continue in order to destroy specific stored information that it is required to preserve."

6. **Rule 45 – Subpoenas**

Proposed Rule 45 makes several changes which effectively include ESI among "books, papers, documents or tangible things" which must be made available "for production, inspection, copying, testing, or sampling." Another provision on subpoenaed parties adds that a subpoenaed party may object to producing ESI "in the form or forms requested." This provision mirrors the Rule 34 provision on the party on whom a request for production is served. Proposed Rule 45 also adds provisions mirroring, respectively, the Rule 34 provisions on the accessibility of ESI and on claims that already-produced information is privileged or protected as trial-preparation material.

7. **Form 35 – The Discovery Plan Provision**

Proposed Form 35 amends the discovery plan provision to conform to the changes in the proposed Rules. Two simple additions are made. First, the Form adds a section stating, "Disclosure or discovery of electronically stored information should be handled as follows: (brief description of parties' proposals)." Second, the Form adds a section stating, "The parties have agreed to an order regarding claims of privilege or of protection as trial-preparation material asserted after production, as follows: (brief description of provisions of proposed order)."

Changes to the Federal Rules of Evidence

Federal Rule of Evidence Rule 502(b) – Waiver

Some proposed changes to the Federal Rules of Evidence (FRE) affect issues explored by the e-discovery amendments to the FRCP. For example, Proposed FRE 502(b) provides that the inadvertent disclosure of information covered by the attorney-client privilege or work product protection does not operate as a waiver "if the holder of the privilege or work product protection took reasonable precautions to prevent disclosure and took reasonably prompt measures, once the holder knew or should have known of the disclosure, to rectify the error, including (if applicable) following the procedures in [FRCP] 26(b)(5)(B)." This change suggests that a party that inadvertently produces embedded data or metadata may have waived its attorney-client privilege and work product protection if it did not take reasonable precautions to prevent the disclosure.

Changes to the Florida Rules of Professional Conduct

Florida Bar Proposed Advisory Opinion 06-2

The Florida Bar recently drafted a Proposed Advisory Opinion about information contained in electronic documents, other than those produced through discovery.[8] This opinion imposes an ethical obligation both on the attorney requesting electronic information and on the attorney producing the information. The requesting attorney should not attempt to obtain from metadata of the document it receives "any information the recipient knows or should know was not intended for the recipient." If the recipient obtains inadvertently such information, he or she must promptly notify the sender. Conversely, the producing attorney has an obligation to "take reasonable steps to safeguard the confidentiality of all communication sent by electronic means," and to

protect "all confidential information, including information contained in metadata, that may be included in such electronic communications."

The Opinion imposes additional obligations beyond what is covered by the amended FRCP. While the amended FRCP discuss what a party receiving documents through discovery should do after the producing party has alleged that some information is privileged or protected, the Opinion obligates the receiving attorney to refrain from attempting to obtain from metadata any information it knows or should know was not intended to be sent. Of course, there will be room for argument as to which information the receiving attorney knows or should know was not intended to be sent. Thus, absent an objection from the producing attorney, it is unclear what will be the receiving attorney's ethical obligation to refrain from obtaining certain information.

As for the producing attorney, the Opinion imposes an ethical obligation to protect confidential information from being sent to a receiving party. Thus, in addition to potentially waiving attorney client privilege and work product protections, a producing party's attorney may violate his or her ethical obligation by failing to take reasonable precautions to remove the confidential information prior to production.

Conclusion

The proposed changes to the FRCP and FRE, respectively, along with Proposed Florida Bar Advisory Opinion 06-2, provide long-awaited guidance specific to electronic information. However, the proposed changes do not answer all of the questions raised by e-discovery. For instance, knowing that embedded data and metadata must be discussed does not guarantee that a party will know how to discuss them. Attorneys unfamiliar with these concepts either need to rapidly familiarize themselves with the concepts, or enlist assistance from persons who are more technologically savvy.

Moreover, there inevitably will be some problems with the rule changes themselves. First, the FRCP amendments are likely to prolong discovery – parties will expend additional time formulating their respective positions on embedded data and metadata, resolving any conflicts in these positions, and finding and redacting certain information. Additionally, unanticipated conflicts may arise despite the parties having reached an agreement. It remains to be seen whether the proposed changes will simplify or further complicate the discovery process.

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Endnotes:

1 *Zubulake v. UBS Warburg LLC,* 229 F.R.D. 422, 424 (S.D.N.Y. 2004).

2 *In re Ford Motor Company*, 345 F.3d 1315, 1316 (11th Cir. 2003). *See also Floeter v. City of Orlando*, 2006 U.S. Dist. LEXIS 19577, at *9 (M.D. Fla. Apr. 14, 2006) (in sexual harassment case, denying plaintiff's request to inspect computer hard drives used by alleged harassers where hard drives contained irrelevant and potentially privileged information and plaintiff made no showing that defendant failed to produce any requested information contained on the hard drives); *Byers v. Illinois State Police*, 2002 U.S. Dist. LEXIS 9861 (N.D. Ill. May 31, 2002) (denying motion to compel archived e-mails in disparate treatment case where translating archived data would impose a significant financial burden on defendants).

3 *Zubulake,* 229 F.R.D. at 440 (observing that "there was little guidance . . . as to the governing standards" regarding e-discovery).

4 Committee on Rules of Practice and Procedure, Report of the Judicial Conference, at 22 (Sept. 2005).

5 *Id.* at 23.

6 Amendments to the Federal Rules of Civil Procedure, Committee Notes to 26(f) (2006).

7 This scenario is based on a case that discusses many issues regarding data within electronic files. *Williams v. Sprint/United Management Company*, 230 F.R.D. 640 (D. Kan. 2005).

8 Professional Ethics of The Florida Bar Proposed Advisory Opinion 06-2 (June 23, 2006).

U.S. at 894. The Court explained that "if an employer can avoid litigation that might result from laying off an employee by enticing him to retire early, ... its stands to reason that the employer can also protect itself from suits arising out of that retirement by asking the employee to release any employment-related claims he may have." Id. at 894- 95. However, most courts tend to view that "[t]he validity of a waiver of pension benefits under ERISA is subject to closer scrutiny than a waiver of general contract claims." *Sharkey v. Ultramar Energy Ltd.*, 70 F.3d 226, 231 (2d Cir.1995).

A release in exchange for early retirement benefits is effective only if, in the totality of the circumstances, the employee's waiver of rights was "knowing and voluntary." *Laniok v. Advisory Comm. of Brainerd Mfg. Co. Pension Plan*, 935 F.2d 1360, 1367 (2d Cir.1991). When determining whether a waiver of ERISA claims was made knowingly and voluntarily, consideration must be given to the following factors:

1 the plaintiff's education and business experience;

2 the amount of time the plaintiff had possession of or access to the agreement before signing it;

3 the role of the plaintiff in deciding the terms of the agreement;

4 the clarity of the agreement;

5 whether the plaintiff was represented by or consulted with an attorney (and whether the employer encouraged the employee to consult with an attorney and gave him/her a fair opportunity to do so); and

6 whether the consideration given in exchange for the waiver exceeds employee benefits to which the employee was already entitled by contract or law.

Laniok, 935 F.2d at 1368.

Some cases reflect the type of facts which demonstrate knowing and voluntary release. For example, in *Hogan v. Eastern Enterprises/Boston Gas*, 165 F.Supp.2d 55 (D.Mass.2001), the court dismissed an ERISA action because the plaintiff accepted enhanced retirement benefits in exchange for a release of claims. The court noted that a) the plaintiff had 45 days to consider the retirement plan, b) the release provided for another 7 days within which to rescind his election to participate, c) the release contained language advising plaintiff to seek counsel, and d) the release stated that by signing the agreement plaintiff acknowledged that he had fully read the release and voluntarily assented to its terms and conditions. Id. at 62. In addition, though the court found that the release was drafted by the employer, there was no allegation that the terms were inequitable or that the language was unclear. Id. Finally, there was no question that the plaintiff received additional retirement benefits in exchange for signing the release. *Id.*

However, the *Laniok* factors are not exclusive or dispositive. Like any other contractual release, circumstances evincing fraudulent inducement, misrepresentation, mutual mistake, or duress would justify setting aside the release. *See*, *e.g.*, *Allen v. WestPoint-Pepperell, Inc.*, 945 F.2d 40 (2d Cir.1991) (release will be denied effect when based on misrepresentation of a material fact); *Ott v. Midland-Ross Corp.*, 600 F.2d 24 (6th Cir.1979) (misrepresentation of material fact for purpose of inducing an employee to release their employer from liability under Title VII, would be bar for employer to assert release as a defense where the employee acted in justifiable reliance upon misrepresentation); *Fonseca v. Columbia Gas Systems, Inc.*, 37 F.Supp.2d 214, 229 (W.D.N.Y.1998) ("In general, a release which has been procured through fraud, misrepresentation, or deceit is not a bar to subsequent actions by the party executing the release."). Further, where the parties are unaware of ERISA claims, a release in a non-related case will not bar an ERISA action. *Wright v. Southwestern Bell Telephone Co.*, 925 F.2d 1288, 1292 (10th Cir. 1991) (A release of Title VII discrimination claims cannot release future ERISA claims where neither party was aware of the potential ERISA claims.).

When determining the impact of a side agreement on the relinquishment of ERISA-covered rights, federal common law applies to the construction of the settlement agreement entered into by the ERISA participant or beneficiary. *Morais v. Cent. Beverage Corp. Union Employees Suppl. Ret. Plan*, 167 F.3d 709, 711 (1st Cir. 1999). It is well-established that "common sense canons of contract interpretations" apply, and those principles are derived from the law of the state in which the contract was entered. Id. at 712. As with other Circuits, the 11th Circuit focuses on the totality circumstances when determining whether a waiver was knowing and voluntary. *See Griffin v. Kraft Gen'l Foods, Inc.*, 62 F.3d 368, 373 (11th Cir. 1995).

Finally, as a general rule, "the party asserting the affirmative defense of release of ERISA claims, Defendants [plan fiduciaries] bear the burden of proving that the elements of release are satisfied." *Martino-Catt v. E.I. du-Pont Nemours and Co.*, 317 F.Supp.2d 914, 922 (S.D.Iowa 2004), citing *Chaplin v. NationsCredit Corp.*, 307 F.3d 368, 372 (5th Cir.2002); *Auslander v. Helfand*, 988 F.Supp. 576, 580 (D.Md.1997). "Plan administrators are considered fiduciaries for ERISA purposes, *see* 29 U.S.C. § 1002(21)(A); *Custer v. Sweeney*, 89 F.3d 1156, 1161-62 (4th Cir.1996), and therefore bear the burden of proving that the release at issue was not obtained by fraud, undue influence or overreaching." *Auslander v. Helfand*, 988 F.Supp.576 (D. Md. 1997). However, at least one District Court has stated exactly the opposite, that "[t]he individual contesting the enforceability of a release has the burden of proving it to be invalid." *Feret v. First Union Corp.*, 1999 WL 80374, *5 (E.D.Pa. Jan.25, 1999).

A few practical pointers:

1 Counsel should be aware that vested ERISA benefits (for example, pension and 401K) may be more difficult to release than welfare benefits that do not vest without specific language simply because of the nature of the claims and the parties' understanding of what is being released. beware of participant waiving beneficiaries' claims

2 When drafting releases or severance agreements, specifically address ERISA plans. Itemize the type of benefits that are being included or excluded from the

continued, next page

HOBSON'S CHOICE
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release. If certain types of benefits are not being included, plainly explain the carve out. Even from the employer's perspective, counsel may see value in plainly informing employees of what benefits they are relinquishing to avoid any future claim by the employee that they were not aware they were waiving certain rights. Examples of specific language to include for counsel from either the employer or employee perspective might read something like this:

"This release does not apply to any of Releasor's claims or rights to vested pension benefits under the XYZ, Inc. Pension Plan or under the XYZ, Inc. 401K Plan, but does apply to all claims related to the XYZ, Inc. Health Benefit and Life Benefit Plans." or *"This release shall not act as a bar to the Releasor filing a claim, pursuing, and if necessary, filing suit in relation to a claim for Long Term Disability benefits under the XYZ, Corp. Disability Plan."*

3 Beware of participants waiving he rights of their beneficiaries! For example, an ex-husband under an order to continue life insurance may waive his child's right to COBRA benefits without realizing it by signing a broad general release.

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Endnote:

1 The term *Hobson's choice* is said to be derived from Thomas Hobson (ca. 1544-1631), of Cambridge, England, who kept a livery stable and required every customer to take either the horse nearest the stable door or none at all.

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