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the Checkoff

The Florida Bar
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June 2007

The Labor & Employment Law Section

Eleventh Circuit Provides Guidance for Employers Conducting Sexual Harassment Investigations

By Lori Mans

In *Baldwin v. Blue Cross/Blue Shield of Alabama*, 2007 WL 805528 (11th Cir. 2007), the Eleventh Circuit Court of Appeals provided an in-depth analysis of an employer's obligations under the *Faragher-Ellerth* affirmative defense. The court's opinion is specifically instructive for employers who, after conducting a harassment investigation, are unable to determine whether the alleged harassment occurred.

Factual Background

The Plaintiff, Susan Baldwin, began working for Blue Cross Blue Shield of Alabama in 1989 and became a marketing representative in the company's Huntsville, Alabama office in 1998. In November, 2000, Scott Head became Baldwin's boss when he was promoted from a marketing representative to the position of district manager in Huntsville. Baldwin was the only female marketing representative under Head's supervision. Over the next twelve months, Baldwin was subjected to multiple incidents of sexual harassment – beginning on the day that Head was promoted.

On the day that Head was promoted to district manager, Baldwin stopped by his office to congratulate him. He invited her to

See "Sexual Harassment" page 16

Chair's Message

This year our Section focused on solutions to discovery abuses and requests for sanctions in the practice of employment law, along with sponsorship issues to increase revenue to the Section, through joint seminars, the website and, of course, recruiting new members. I am proud to announce that we have taken great steps in accomplishing our goals.

The Chair's Sanctions Committee is an ongoing project and its members include: Judge Miles Davis, Judge Margaret Catharine Rodgers, Judge Mary S. Scriven, Cathy Beveridge, Richard E. Johnson, Kenneth A. Knox, Stuart Rosenfeldt, and Janet E. Wise. Our conferences have been informative and productive.

Regarding increased sponsorship, Michael Spellman, Robert Sniffen and Leslie Stein, of the Special Projects Committee, along with Damon Kitchen and Cary Singletary of the Long Range Planning Committee, have done a great job researching this issue and working on setting up a program for advertising and sponsorship using all the Section tools, especially the website.

Regarding the Section website, Marc Snow has done a wonderful job! It is both user friendly and informative. I encourage everyone to log on and tour the Labor & Employment Law Section website.

We have had a great turn out at our seminars this year, including the new telephone CLE lunchtime conferences we co-sponsored with the Tax Law Section. Kudos to Eric Holshouser, Chair of the Continuing Legal Education Subcommittee and Alan Forst,

See "Chair's Message" page 2

INSIDE:

SAVE THE DATE!

Annual Meeting and Reception

Thursday
June 28, 2007

Orlando World Center Marriott

Orlando, FL

For hotel reservations: 800/228-9290

Group rate of $171 [Expires June 6, 2007]

Group Code: FLOFLOA

CHAIR'S MESSAGE
from page 1

Chair of the Legal Education Committee in making these seminars such a success.

Our New Membership/Outreach Committee has done an outstanding job and our current membership is at 2,156.

The February/March 2007 issue of the *Checkoff* was excellent thanks to Co-Chairs Sherril Colombo and Ray Poole, Frank Brown, Lowell Walters, Eric Jones, Melissa Horwitz, Scott Behren, Leslie Schultz and Roderick Ford. Keep up the good work! Also, a big thanks to authors, the articles were impressive and informative. Last, but not least, thanks to all of the Executive Council members, Committee Chairs, Subcommittee Chairs, and Committee members for their participation. We made significant strides toward our goals of enhancing benefits for the membership and opportunities for participation. I look forward to helping next year's Chair-Elect Steve Meck continue our progress.

—Cynthia N. Sass,
2006 - 2007 Chair

Section Bulletin Board

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

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

JUNE 28, 2007

Labor & Employment Law Executive Council ANNUAL Meeting & Reception
Orlando World Center Marriott, Orlando, FL
Hotel reservations: 800/228-9290
(group code: FLOFLOA),
Group rate of $171 expires 6/6/07

Executive Council Meeting:
Thursday, June 28th, 5:00 p.m. – 6:00 p.m.

JUNE 27-30, 2007

CLE - 25th Annual Multi-State Labor & Employment Law Seminar
The Williamsburg Lodge & Conference Center
Colonial Williamsburg, Virginia
Hotel reservations: 800/447-8679 (ask for Tulane Multistate seminar),
Group rate: $209 expires 5/30/07

SEPTEMBER 28, 2007

CLE - "Employment Discrimination / Litigation Seminar" (0541R)
Parrot Jungle, Miami [tentative]

Executive Council Meeting:
Thursday, September 27, 5:00 p.m. – 6:00 p.m.

OCTOBER 18 & 19, 2007

CLE - "33rd Annual Public Employment Labor Relations" (0584R)
J.W. Marriott Grand Lakes, Orlando
Group Rate: $189

Executive Council Meeting:
Thursday, October 18, 5:00 p.m. – 6:00 p.m.

FEBRUARY 28 & 29, 2008 (TENTATIVE)

CLE - "8th Annual Labor & Employment Law Certification Review" (0584R)
Orlando, FL

Executive Council Meeting:
Thursday, February 28, 5:00 p.m. – 6:00 p.m.

MAY 2 & 3, 2008 (TENTATIVE)

CLE - "Advanced Labor Topics" (0616R)"
[Location: TBD]

Executive Council Meeting:
Friday, May 2, 5:00 p.m. – 6:00 p.m.

JUNE 19, 2008

Labor & Employment Law Executive Council ANNUAL Meeting & Reception
Boca Raton Resort & Club, Boca Raton, FL

Executive Council Meeting:
Thursday, June 19, 5:00 p.m. – 6:00 p.m.

JUNE 18-21, 2008

CLE - 26th Annual Multi-State Labor & Employment Law Seminar
Keystone, Colorado

Employment Lawyer's HIPAA Guide

By Lowell Walters*

Most of you have probably been affected by the privacy requirements of the Health Insurance Portability and Accountability Act of 1996 ("HIPAA"), whether it was your need to submit a "HIPAA waiver" prior to receipt of certain medical information relating to your representation of a client, or your receipt of a Notice of Privacy Practices from the group health plan in which you participate. HIPAA should be a particular concern to attorneys practicing in the employment law field because you are often called upon to review or draft employee handbooks and employment policies, and HIPAA requires that certain employers with access to "protected health information" ("PHI") maintain and implement a policy to protect the privacy of certain employees ("Policy"). This article is intended to assist you in recognizing which of the employers you represent are required to establish and maintain a Policy. Of course, this is only a general overview and should not be used as a substitute for consulting with an employee benefits attorney.

What Information Is Protected

One must determine whether an employer has access to PHI in order to identify whether that employer must establish a Policy. The simplest way to define PHI is by example. Individual A goes on a job interview with Company A. At or before the interview, Individual A provides his resume which contains the following information: Individual A's name, home address and date of birth. Upon hire, Individual A provides a W-4 that contains his social security number, indicates that he is married and has a number of "allowances" (probably related to dependents) for withholding purposes. Since all of this information was obtained due to the employer-employee relationship, and none of it was obtained in relation to the provision or payment for certain healthcare, none of this information constitutes PHI.

Individual A begins participating in Company A's group health plan ("Plan A"). Plan A has two parts: one part provides group health insurance coverage, and a monthly amount is deducted from Individual A's salary to pay the premium for this coverage; the second part of Plan A is a flexible spending account which allows Individual A to elect to contribute a certain amount of his salary into that account, and then he can be reimbursed for certain medical expenses on a pre-tax basis. Company A uses a commercial insurance company to provide benefits under the group health insurance policy, and has hired a third party to administer claims under the flexible spending account.

Individual A goes to the doctor, who charges $100 for that visit. The doctor submits a claim to the insurance company after charging Individual A a $20 co-pay. The insurance company pays the doctor $80 for the visit without any input from Company A. Individual A takes his receipt for the $20 payment, and submits it, along with a form, to the third party hired by Company A to process those amounts through the flexible spending account.

Both, the claim from the doctor to the insurance company and from Individual A to the third party administrator contain PHI because they contain, or one can derive from those claims, certain health information applicable specifically to Individual A. The insurance company resolves its claim without any involvement by Company A, and thus, satisfies the exception and Company A is not required to establish a Policy with respect to its group health insurance plan, even though it generates PHI. The insurance company, itself, is obligated under HIPAA to establish the appropriate Policy. If Company A only provided group health insurance coverage without providing a flexible spending account, then it would not need to establish a Policy for itself.

The claim under the flexible spending account also contains health information that can be attributed directly to Individual A, and this information constitutes PHI. In addition, because the flexible spending account is funded solely with employee contributions, and not with a commercial insurance policy, Company A is not absolved from HIPAA's privacy requirements. That Company A hired a third party to address claims does not exempt Company A from HIPAA's requirements. Not only is Company A obligated to establish and maintain a Policy with respect to the PHI it or its third party administrator receives through the administration of its flexible spending account, but it is also obligated to ensure that the third party administrator agrees to comply with HIPAA, and must do so through its contract with that third party administrator.

Privacy Policies

In this situation, the Policy can be relatively simple. Employer A must appoint a single individual as its Privacy Officer, in charge of receiving and overseeing the receipt and maintenance of all PHI. It must then take measures to ensure that PHI is not provided to or able to be accessed by individuals who are not entitled to that information. For example, the Privacy Officer's computer may need to be protected from the other computers in the same network to prevent hacking by individuals outside Company A and even individuals within Company A who are not the Privacy Officer or appointed by the Privacy Officer. Similarly, depending on how information is handled, Company A may need to establish rules regarding how that information is transferred, such as email encryption, or storing paper files in a locked cabinet.

The depth and complexity of the Policy will vary significantly depending on the employer's access to the information, and even the type of business operated by the employer. Clients of yours who work in the healthcare industry are subject to greater regulation under HIPAA, but those entities probably are already aware of the requirements imposed. At the very least, employment lawyers should be aware that any of

continued, next page

your clients who sponsor a plan that provides healthcare or pays for or reimburses healthcare expenses must establish a policy unless the arrangement is commercially insured.

**Lowell Walters helps business owners receive beneficial tax treatment for their retirement and welfare plans (such as 401(k) plans and group health plans) by working with plan administrators, the IRS and/or DOL to ensure employee benefit plans are drafted and operated in compliance with the Internal Revenue Code and ERISA.*

Federal Labor & Employment Law Cases

ADA – REASONABLE ACCOMMODATIONS

***Novella v. Wal-Mart Stores, Inc.*, No. 06-12919 , 2007 U.S. App. LEXIS 6446 (11th Cir. Mar. 19, 2007)**

The Eleventh Circuit affirmed summary judgment for the employer on plaintiff's ADA claim. The court rejected the argument of plaintiff, a deaf employee, that as a reasonable accommodation he was entitled to have an interpreter present at his termination meeting. The court reasoned that "communication at a termination meeting, the purpose of which is to give the employee notice of his termination, is not an 'essential function' of an employee's job." Therefore, the employer was not required to provide the requested accommodation. A petition for rehearing was filed.

***Richards v. Publix Supermarket, Inc.* - 2007 WL 570090 (M.D. Fla. Feb. 20, 2007)**

Plaintiff brought an action against her employer for violations of the ADA and FCRA, alleging that Publix forced her to work in a job in which she was unable to perform due to a disability and by refusing to provide a reasonable accommodation. Publix moved for summary judgment, contending plaintiff could not establish a claim under the ADA because she did not suffer from a disability. Plaintiff maintained that fibromyalgia and sciatica affected her ability to push, pull or lift more than 15 pounds. The court recognized that the Eleventh Circuit has never decided the question of whether a lifting restriction fails as a matter of law to establish a disability under the ADA. However, other circuits have determined that it does, particularly where the impairment (lifting restriction) is temporary and not permanent. Here, the court found that plaintiff's impairment was temporary and thus, she was not disabled under the ADA.

ADEA / OWBPA - RELEASE

***Burlison v. McDonald's Corp.*, 455 F.3d 1242 (11th Cir. 2006)**

The Eleventh Circuit reversed summary judgment for plaintiffs on their ADEA claims. When terminated as part of a nationwide "restructuring," plaintiffs signed a general release in exchange for severance benefits. The district court granted summary judgment to plaintiffs, finding that the release was void because the company failed to satisfy the OWBPA's informational requirements. The Eleventh Circuit disagreed and held that the company had met the OWBPA's informational requirements by giving each employee a pre-waiver list of the job titles and ages of all *regional* workers who were subject to the reorganization and identifying who had been selected for discharge and who had not. The court concluded that the district court's requirement that the company provide job titles and ages for *all* terminated employees *nationwide* was erroneous, as it would require employers to provide uncalled for and unhelpful information to departing employees.

FLSA – INDIVIDUAL COVERAGE

***Thorne v. All Restoration Servs. Inc.*, 448 F.3d 1264 (11th Cir. 2006)**

The Eleventh Circuit affirmed a Rule 50 dismissal of plaintiff's FLSA overtime claims because the evidence at trial did not show entitlement to coverage under the FLSA. Plaintiff primarily performed mold and water damage restoration work for residential and commercial properties, and argued that he regularly used defendant's credit cards to purchase gas and materials from a national home improvement store. The court concluded that, even assuming credit card transactions alone could constitute an instrumentality of interstate commerce, plaintiff did not produce evidence that he corresponded with merchants outside of Florida using the mail, phone or fax, nor did he produce evidence that he made purchases from out-of-state vendors. Additionally, the evidence showed that defendant was primarily a local service provider, whose services had little effect on commercial establishments, let alone the production of goods for commerce.

***Pessoa v. Countrywide Home Loans, Inc.* - 2007 WL 1017577 (S.D. Fla. April 2, 2007)**

Plaintiff filed a complaint against her employer for failure to pay overtime wages in violation of the FLSA, and two others joined the action as plaintiffs. The parties filed a "Joint Motion for In Camera Review of Confidential Settlement, or in the Alternative, to Set Hearing." At the hearing, the parties asked the court if they could file their settlement agreements under seal. The court determined that sealing FLSA settlements from public scrutiny would thwart the public's independent interest in assuring that employees' wages are fair and do not endanger "the national health and well-being." (citations omitted). The court said that absent a compelling reason, it could not seal such records.

FIRST AMENDMENT - RETALIATION

***Crawford v. City of Fairburn, Georgia*, No. 06-13073, 2007 U.S. App. LEXIS 7245 (11th Cir. Mar. 29, 2007)**

The Eleventh Circuit affirmed summary judgment for defendant employer where plaintiff, a former police major, claimed he suffered retaliation for conducting an investigation of a female police officer's complaints of sexual harassment. In an earlier opinion, the Eleventh Circuit had concluded that plaintiff did not engage in protected activity because his investigation occurred solely during the "informal conciliation" period after the EEOC issued its letter of de-

continued, next page

CASE NOTES

termination, reasoning that informal conciliation by the EEOC is not an EEOC "investigation, proceeding or hearing" for purposes of the participation clause. The court vacated that opinion, assuming, without deciding, that plaintiff established a *prima facie* case. Nonetheless, the court affirmed on the alternative ground that plaintiff failed to rebut each of defendant's five legitimate, nondiscriminatory reasons for terminating plaintiff.

***Mitchell v. Hillsborough County*, 468 F.3d 1276 (11th Cir. 2006)**

The Eleventh Circuit affirmed judgment for defendant employer where a county employee alleged his employment was terminated in retaliation for exercising his First Amendment rights. The court concluded that the distasteful comments plaintiff made about a county commissioner during a public county commission meeting did not touch on a matter of public concern and, even if they did, the county was justified in terminating plaintiff's employment.

FMLA

***Cooper v. Fulton County*, 458 F.3d 1282 (11th Cir. 2006)**

The Eleventh Circuit affirmed summary judgment in favor of plaintiff on his FMLA claims. The court rejected defendant's argument that plaintiff failed to notify defendant that his absence was due to a potentially FMLA-qualifying reason, reasoning that plaintiff was "not required to mention the FMLA or expressly assert rights under the statute in order to invoke it." The court also found that defendant's oral request for certification was insufficient. Finally, the court concluded that the district court properly awarded liquidated damages where, although defendant acted in good faith, it did not have a reasonable basis for believing its conduct was lawful.

TITLE VII – BANKRUPTCY / JUDICIAL ESTOPPEL

***Casanova v. Pre Solutions, Inc.*, No. 06-12417, 2007 U.S. App. LEXIS 7496 (11th Cir. Mar. 28, 2007)**

The Eleventh Circuit affirmed summary judgment for defendant employer because plaintiff did not disclose his EEOC complaints in his subsequently-filed bankruptcy petition, and therefore plaintiff's claims for damages under Title VII were barred under the doctrine of judicial estoppel. Although plaintiff voluntarily dismissed the bankruptcy case, this did not alter the court's analysis because the relevant inquiry is plaintiff's intent at the time of nondisclosure. However, the court concluded that the doctrine of judicial estoppel did not bar plaintiff's claims for injunctive relief in the form of reinstatement.

TITLE VII – GENDER DISCRIMINATION

***Champ v. Calhoun County Emergency Mgmt. Agy.*, No. 06-14364, 2007 U.S. App. LEXIS 7034 (11th Cir. Mar. 26, 2007)**

The Eleventh Circuit affirmed summary judgment for defendant employer, concluding that plaintiff failed to show that the employer's stated reason for not promoting her was a pretext for gender discrimination under Title VII. The court rejected plaintiff's argument that her perceived superior qualifications demonstrated pretext because the disparity between the qualifications of the respective candidates was not "of such weight and significance that no reasonable person, in the exercise of impartial judgment, could have chosen the candidate selected over the plaintiff." However, the Eleventh Circuit disagreed with the district court to the extent that it had found that plaintiff failed to establish a *prima facie* case of gender discrimination. The court reasoned that the district court should not have considered the relative qualifications of the candidates at the *prima facie* stage because "proof of relative qualifications is not part of the *prima facie* analysis."

TITLE VII – HOSTILE WORK ENVIRONMENT – *FARAGHER* DEFENSE

***Baldwin v. Blue Cross/Blue Shield of Ala.*, No. 05-15619, 2007 U.S. App. LEXIS 6298 (11th Cir. Mar. 19, 2007)**

The Eleventh Circuit affirmed summary judgment for the employer, agreeing with the district court that plaintiff unreasonably failed to take advantage of opportunities the company provided to correct alleged frequent profanity and other sexual harassment by her male supervisor. The court concluded that, once plaintiff finally did complain about her

The CHECKOFF

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

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Lynn Brady, Tallahassee ..... Layout

supervisor's conduct, the company made an adequate investigation and offered reasonable remedial measures, including transferring her to another facility or having an industrial psychologist counsel her and her supervisor about their relationship, both of which she rejected. The court explained, "[t]his is not a case where the employer's first remedy proved inadequate, and it failed to take further action to correct the problem. It is instead a case where the complainant refused to cooperate with the first step." As to the merits of the harassment claim, the court, referring to the so-called "Vince Lombardi Rule," gave little weight to the supervisor's alleged frequent vulgarity because the "curse words" he used were "relatively gender-neutral" and were "used indiscriminately in front of, and towards, males and females alike." Additionally, the court rejected plaintiff's retaliation claim because she was discharged for refusing to cooperate with the employer's reasonable remedial measures, not because she complained about harassment.

TITLE VII – HOSTILE WORK ENVIRONMENT - TIMELINESS

***Chambless v. Louisiana-Pacific Corp.*, No. 06-11419, 2007 U.S. App. LEXIS 6792 (11th Cir. Mar. 23, 2007)**

The Eleventh Circuit affirmed dismissal of plaintiff's hostile work environment claim as untimely. The alleged hostile work environment consisted of: (1) discrete acts of failure to promote and retaliation, which were timely alleged; and (2) non-discrete acts of harassment, such as "discriminatory intimidation, ridicule and insult," which fell outside the limitations period. Plaintiff argued that, based on *National Railroad Passenger Corp. v. Morgan*, 536 U.S. 101 (2002), the entire time period of the hostile environment should be considered because the discrete acts forming part of that claim occurred within the filing period. The Eleventh Circuit disagreed, reasoning that the discrete acts were not "sufficiently related to the hostile work environment claim" to be fairly considered part of the same claim. Therefore, the discrete acts could not "save the earlier, untimely acts that comprise that claim."

TITLE VII – RACE DISCRIMINATION

***Tucker v. Housing Auth. of the Birmingham Dist.*, No. 06-14441, 2007 U.S. App. LEXIS 8143 (11th Cir. Apr. 5, 2007)**

The Eleventh Circuit affirmed denial of defendant agency's motion for judgment as a matter of law after a jury verdict in favor of plaintiff, a former assistant general counsel of defendant agency. The court concluded that a reasonable jury could have found that plaintiff, who was white, was discriminated against based on race where his black supervisor discharged him for purportedly budgetary reasons, but retained a black employee in an identical position, never conducted a financial analysis of the budget proposal and the director who approved the budget proposal could not explain how the budget proposal saved the agency money. The agency argued that the director, not the supervisor, made the ultimate termination decision, therefore plaintiff had to prove that the director had his own "racial discriminatory animus." The court rejected this argument, finding that the jury reasonably could have concluded that the director was a "conduit" by which the supervisor made her discriminatory employment decision.

TITLE VII - RELEASE OF CLAIMS

***Myricks v. Federal Reserve Bank of Atlanta*, No. 06-11624, 2007 U.S. App. LEXIS 5241 (11th Cir. Mar. 7, 2007)**

The Eleventh Circuit affirmed summary judgment for defendant employer on the ground that plaintiff knowingly and voluntarily waived his pending Title VII race discrimination claim by signing a severance agreement, which included a general release in exchange for enhanced retirement benefits. The court reasoned that plaintiff was well educated, represented by an attorney, had been given 60 days to consider the agreement, and the employer expressly informed plaintiff's attorney that the agreement would release plaintiff's pending claim. Further, the court concluded that, not only was plaintiff not entitled to attorneys' fees, but the employer was entitled to recover its litigation costs because it prevailed on its affirmative defense of release.

TITLE VII – RETALIATION

***Hunt v. Gonzales*, No. 06-10375,**

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WANTED: ARTICLES

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

REWARD: $150*

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

Article deadline for next *Checkoff* is June15, 2007.

2007 U.S. App. LEXIS 1962 (11th Cir. Jan. 30, 2007)

The Eleventh Circuit affirmed summary judgment for defendant on plaintiff's retaliation claim where plaintiff's protected activity occurred almost three months *after* the alleged adverse employment action. The court concluded that "it is simply not possible" for the events to be causally related. Further, the court rejected plaintiff's argument that two letters he wrote earlier were protected activity where each letter merely inquired into the status of his application and requested that he be placed in a training class. The court reasoned that "[i]n neither letter did [plaintiff] complain that he was being treated differently than other applicants on the basis of his race."

TITLE VII – TIMELINESS

***Miller v. Georgia Dept. of Corrections*, 06-14138, 2007 U.S. App. LEXIS 6218 (11th Cir. Mar. 15, 2007)**

The Eleventh Circuit affirmed summary judgment for the employer because plaintiff failed to timely file her complaint within 90 days from receipt of her notice of right to sue. In 2004, plaintiff had timely filed a complaint, but it was dismissed without prejudice for failure to perfect service. Plaintiff filed a second complaint in 2006, well beyond the 90-day limitations period. The court concluded that the filing of the first complaint did not toll the limitations period for the future complaint.

USERRA

***Long v. Ellis Envtl. Group*, No. 3:05cv227, 2007 U.S. Dist. LEXIS 23784 (N.D. Fla. Mar. 30, 2007)**

The Northern District granted summary judgment for defendant employer on plaintiff's claims for reemployment and discrimination under USERRA. Before taking military leave, plaintiff was the company's vice president of construction. Despite the availability of the vice president of construction position after his return from leave, plaintiff was offered a different vice president position. The court accepted defendant's argument that, while plaintiff was on leave, the duties of the vice president of construction position had changed significantly as a result of a reorganization such that the new vice president position was actually more similar in terms of status, duties and opportunity to plaintiff's old position than was the current vice president of construction position. The court concluded that, not only could plaintiff not satisfy his burden under USERRA, but also defendant established an affirmative defense because, due to the reorganization, it would have taken the same employment action regardless of plaintiff's military status.

Other Federal Court Circuit Cases

AGE DISCRIMINATION

EEOC v. City of Independence, Missouri, 471 F.3d 891 (8th Cir. 2006)

The City of Independence, Missouri established a leave bank for its employees, permitting qualified employees to receive up to 1,040 hours of donated leave. One of the specific qualifications for employees to receive leave from the bank was that the employee "not be eligible for regular retirement." Under the City's personnel policies, an employee who had reached 60 years of age and was vested in the City's pension plan would be deemed "eligible for regular retirement." After plaintiff exhausted his own leave during an extended medical absence, he applied for donated leave but was told that he was not eligible because his age qualified him for regular retirement. The district court granted summary judgment to the City on its argument that the combination of minimum age and vesting in the pension plan collectively determined eligibility, and that retirement eligibility was not itself a proxy for age. The Eighth Circuit concluded that to avoid ADEA liability, the factors must be "wholly unrelated to age," *i.e.*, that none of the factors directly relate to a certain age. The retirement eligibility provision at issue here specifically referred to age 60 as one of its components, and thus the leave policy was discriminatory.

ADA

EEOC v. E.I. DuPont de Nemours & Company, 480 F.3d 724 (5th Cir. 2007)

Upholding a jury verdict for the employee, the Fifth Circuit agreed with the trial court that the evidence was sufficient for the jury to reject DuPont's proffered "direct threat" defense to the complainant's ADA claim. Complainant, who was mobility impaired, was fired by DuPont when it concluded that her confinement to a wheelchair could pose a risk of harm to herself or her co-workers when and if the laboratory in which she worked had to be evacuated in an emergency.

ERISA and EMPLOYEE BENEFITS

Register v. PNC Financial Services Group, Inc., 477 F.3d 56 (3d Cir. 2007).

In the second court of appeals decision to consider the issue of whether cash balance plans violate the age discrimination provisions in ERISA, the Third Circuit joined the Seventh Circuit in concluding that they do not. The Third Circuit discussed the Seventh Circuit's decision in *Cooper v. IBM Pers. Pension Plan* and agreed with its conclusions. *Cooper* is discussed in more detail in the previous issue of the *Checkoff*.

United States v. Novak, 476 F.3d 1041 (9th Cir. 2007) (*en banc*)

In a ten to five decision, the full Ninth Circuit ruled that the Mandatory Victims Restitution Act of 1996 allows the federal government to seize

ERISA-protected retirement benefits of convicted criminals in order to provide restitution to their victims. The court held that the MVRA superseded the anti-alienation provisions of ERISA (29 U.S.C. § 1056(d)(1)), allowing federal seizure of otherwise protected retirement benefits. However, the timing of the ability of the government to access the funds would depend upon the criminal's rights to payment so the funds cannot be seized until the defendant has a right under plan terms to a distribution.

FIRST AMENDMENT

Mayer v. Monroe County Community School Corp., 474 F.3d 477 (7th Cir. 2007)

The Seventh Circuit affirmed summary judgment for the defendant school district when the plaintiff, a probationary teacher whose contract was not renewed, sued alleging that she was non-renewed because she had told her students in a civics lesson that she had honked her car horn in support when passing a demonstration against the Iraq war. The Seventh Circuit held that elementary and secondary teachers' limited First Amendment rights in their employment do not extend to departing from the established curriculum and point of view espoused in the approved materials, and thus her speech was not protected even if she was indeed non-renewed as a result of the discussion. The court did not determine whether her speech, made in the course of her duties, was excluded from any protection under the *Garcetti* doctrine.

FLSA

Sobrinio v. Medical Center Visitor's Lodge, Inc., 474 F.3d 828 (5th Cir. 2007)

The Fifth Circuit affirmed summary judgment for the employer on the grounds that plaintiff, who served as a janitor, security guard and driver for lodge guests, was not "engaged in (interstate) commerce" within the meaning of 29 U.S.C. §207(a) and thus not entitled to FLSA coverage. Although plaintiff argued that he was covered because many of the guests were from out-of-state, there was no evidence that he provided transportation to or from airports or other transportation hubs, which would be necessary in order that his transportation services might be viewed as a continuation of interstate travel.

Pontius v. Delta Financial Corp., (W.D. Pa., 3/20/07); *Oeternger v. First Residential Mortgage, Inc*. (W.D. Ky., 3/6/07).

In these two cases, federal judges rejected the use by the defendant employers of Department of Labor opinion letters requested by the Mortgage Bankers Association. In the *Oeternger* case, the district court concluded that the job descriptions of the plaintiffs in the case at bar were not sufficiently similar to the positions considered in the opinion letter. In the *Pontius* case, the court concluded that the opinion letter, requested by the trade association while the action was pending against the defendant employer, was inappropriate for consideration.

FMLA

Brotherhood of Maintenance of Way Employees v. CSX Transportation, Inc., 478 F.3d 814 (7th Cir. 2007)

The defendant railroads required their employees covered by bargaining agreements to take paid leave in certain instances when the employees requested or qualified for FMLA leave. The bargaining agreements, however, allowed the employees to determine when and if they would take paid leave provided for by the agreements. When the unions sued alleging that the FMLA rules violated their contracts, the district court granted judgment for the unions. The Seventh Circuit rejected the employer's argument that the provisions of the FMLA (29 U.S.C. § 2612(d)) allowing an employer to require paid leave superseded the contractual rights of the employees, and held that the Railway Labor Act resolution procedures applied and that the carriers would have to bargain any changes in the leave rules in the agreements.

Englehardt v. S.P. Richards Company, Inc., 472 F.3d 1 (1st Cir. 2006)

The circuit court affirmed the district court's award of summary judgment to the employer in an FMLA claim by a terminated employee. Plaintiff Englehardt was terminated for missing a day and a half of work without authorization when, for the third time, she was absent to care for her daughter who had allegedly attempted suicide. Her statutory employer, S.P. Richards, did not have fifty employees within a 75-mile radius of her worksite. She argued that her employer and its parent company should be considered an integrated enterprise within the meaning of 29 C.F.R. § 825.104(c)(2). Although noting that her employer utilized the human resources and benefits policies and forms of its parent, the appellate court agreed that the four factors under the DOL regulation should be given equal weight. The lack of common ownership and management, as well as the distinctions in the business functions performed by the subsidiary and parent, failed to establish a factual basis for integrated enterprise, thus defeating her FMLA claim.

Repa v. Roadway Express, Inc., 477 F.3d 938 (7th Cir. 2007)

The Seventh Circuit affirmed summary judgment for an employee on a FMLA claim. Plaintiff Repa took six weeks of leave for which she received short term disability benefits. Her employer required her to take leave with pay rather than unpaid leave during this absence. Repa contended that the employer's requirement violated DOL regulation 29 C.F.R. §825.207(d)(1), which states that paid disability leave for childbirth or for a workers compensation injury was not "unpaid leave" and that the employer therefore could not require the employee to substitute paid leave. The circuit held that the regulation, while not specifically mentioning non-workers compensation disability leave,

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covered all paid disability leave and thus the employer could not require paid leave. The court also refused to consider the employer's argument that the regulation was inconsistent with the FMLA because the issue was not preserved in the district court.

NLRA

Covenant Aviation Security, LLC, 349 N.L.R.B. 67 (Mar. 30, 2007)

By a two-to-one ruling, the NLRB held that an employee's petition to de-authorize a union-security provision should move forward even though the signatures gathered to support the petition were obtained prior to the execution of the CBA containing the provision. The majority concluded that the language of section 9(e)(1), together with the history of the NLRA and Board precedent, supported giving effect to the pre-agreement signatures. The dissent, citing the statutory language of section 9(e)(1), concluded that the statute contemplated a post-agreement showing of support.

Guardsmark LLC v. N.L.R.B., 475 F.3d 369 (D.C. Cir. 2007)

The Third Circuit, on review of a NLRB order finding that certain policies of the employer had a chilling impact on Section 7 rights and were unfair labor practices, held that the Board correctly determined that employer policies prohibiting "registering a complaint with a representative of a client" and precluding solicitation and distribution of literature while on duty or in uniform implicated protected bargaining activity. The court also reversed the Board's decision that the company policy prohibiting fraternization with other employees "on or off duty" was not an unfair labor practice, concluding that the language was too broad to only apply to personal relationships and could be deemed to apply to organizing activity.

TITLE VII

ASMO v. Kene, Inc., 471 F.3d 588 (6th Cir. 2006)

Reversing the district court's summary judgment for the employer, the appeals court concluded that a pregnant employee's lay-off during a reduction in force that occurred two months after her announcement that she was pregnant was sufficiently close in time to satisfy her burden to show a nexus between her pregnancy and her termination. Additionally, the court held her supervisor's failure to congratulate her when she announced her pregnancy, and his failure to discuss her pregnancy with her at all during her subsequent period of employment, could be interpreted as discriminatory animus because "pregnancies are usually met with congratulatory words, even in professional settings." Acknowledging the employer's argument that the supervisor's silence could also be explained by non-discriminatory motives, the court, interpreting the evidence in the light most favorable to the non-moving party, concluded that a jury question was presented.

Dukes v. Wal-Mart, Inc., 474 F.3d 1214 (9th Cir. 2007)

The Ninth Circuit affirmed a decision certifying a class of female employees of Wal-Mart estimated to number as many as 1.5 million prospective members, the largest employment class action in U.S. history. Among a number of rulings, the circuit court concluded that expert testimony supporting a certification motion need not pass the "full" *Daubert* test, and that individual damages hearings would not be required at the remedy stage for either economic or punitive damages, a major departure from traditional Title VII class action procedures.

Jencks v. Modern Woodmen of America, 479 F.3d 1261 (10th Cir. 2007)

The appellate court affirmed summary judgment for defendant, an insurance company, in a Title VII retaliation claim by a former employee. Jencks had successfully sued Modern Woodmen under Title VII for demoting her from a district manager to a district representative. After a trial verdict in her favor, the parties reached a settlement agreement while the case was pending on appeal. Jencks agreed to waive re-employment or reinstatement with Modern Woodmen. A few years later, Modern Woodmen sent out blanket letters to all licensed insurance agents in the area encouraging them to seek employment with Modern Woodmen. Jencks received such a letter, and applied for the position. She was ultimately denied employment in part because of her waiver of right to employment in the settlement agreement. The appellate court affirmed the district court's conclusion that the provision of the settlement agreement was a legitimate, non-retaliatory justification for refusing to hire Jencks.

Scheidemantle v. Slippery Rock University State System of Higher Education, 470 F.3d 535 (3rd Cir. 2006)

The appellate court reversed summary judgment for the employer, concluding that the district court had erroneously determined that Scheidemantle could not establish a *prima facie* case. Although it was undisputed that Scheidemantle lacked the two years of job experience required on the job qualifications, the position was ultimately given to another individual who had some locksmithing experience, but less than the two years required. The appellate court concluded that when a plaintiff who does not meet the stated qualifications for a position can demonstrate that the successful candidate also did not, the plaintiff can satisfy her burden of establishing a triable issue of fact as to the *prima facie* case by presenting her relevant qualifications.

In re Union Pacific Railroad Employment Practices Litigation, 479 F.3d 936 (8th Cir. 2007)

In the first reported decision of a circuit court addressing the issue, the Eighth Circuit, reversing the district

court's summary judgment, held that the employer did not violate the Pregnancy Discrimination Act and Title VII when it precluded coverage for prescription contraceptives in its employee health plans. The court noted that Union Pacific's plans precluded a variety of preventative treatments as well as all coverage for contraceptive and fertility treatments. The Court concluded that the PDA language covering conditions "related to pregnancy" did not mean that Congress intended the PDA to cover contraception, and that fertility was not a "medical condition related to pregnancy. The court also concluded that the district court erred, in its Title VII analysis, by comparing coverage under the plan of "medicines or medical services [that] prevent employees from developing diseases or condition that pose an equal or lesser threat to employees' health than does pregnancy" rather than comparing coverage for contraception. The plan excluded benefits for all forms of prescription, non-prescription and surgical contraception for women and man. While prescription contraceptives currently exist only for women, the other forms do not, and both genders were denied benefits. The court discounted the EEOC policy statement on contraceptive coverage and also found unpersuasive an unusual *amicus* brief filed on behalf of several members of the current Congress stating that their intent was that the PDA should cover contraception, finding it not helpful in addressing the issue of Congressional intent in 1978.

USERRA

Tully v. Department of Justice, --- F.3rd ---, No. 2007-3004 (Fed. Cir. March 21, 2007)

The appellate court affirmed the decision of the Merit Systems Protection Board holding that Tully's employer, the Federal Bureau of Prisons, did not owe him payment for 27 holidays that occurred while he was on extended unpaid leave for military duty. Tully was called up for active duty for two and a half years and required to leave his full-time position with the Bureau of Prisons. Because he was on leave of absence, he did not receive holiday pay for the federal holidays that occurred while he was on leave. By contrast, his co-workers who were on short paid leaves of absence to testify in court cases or as jurors, received paid holidays. Tully contended that the Bureau of Prison violated the equal benefits provisions of USERRA, 38 U.S.C. § 4316(b)(1). The court concluded that the payment for holidays while an individual is out on a short paid leave of absence for governmental duty was dissimilar to extended unpaid leave of absence for military service, and the Bureau of Prisons decision not to pay Tully for vacations during that time was not discriminatory.

Velazquez-Garcia v. Horizon Lines of Puerto Rico, Inc., 473 F.3d 11 (1st Cir. 2007)

In a case of first impression in the First Circuit, the court reversed a grant of summary judgment to the employer, finding genuine issues of fact existed as to whether the employer discharged the plaintiff due to his military service. The plaintiff produced evidence that some of his supervisors had complained to him that his military service was making it difficult for them to staff some shifts. After returning from leave, plaintiff was terminated for operating a business in which he cashed his co-workers' checks for a small fee. The employer contended that his conduct had violated its Business Code of Ethics, but the employer had never distributed the code to the employee, the Code language was general in nature and would not necessarily have precluded the employee's business, and the employee was terminated with any prior warning and without any prior discipline whatsoever. The circuit court concluded that the language of USERRA creates a two-part standard of proof, and that the *McDonnell Douglas* test does not apply.

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Florida State Cases

COVENANTS NON-COMPETE

***Lewis v. Sunbelt Rentals, Inc.*, 2007 Fla. App. LEXIS 1987; 32 Fla. L. Weekly D – 474 (2nd DCA 2007)**

Former employer filed suit based on violation of a non-compete contract. On the same day it filed the complaint, the company also filed a motion for a temporary injunction and requesting an emergency hearing. There was no hearing, and the Trial Court simply issued an order granting the temporary injunction, without providing notice to former employee, Robert K. Lewis. The Appeals Court held that this was error since neither the motion nor the court's order complied with the requirements of Florida Rule of Civil Procedure 1.610(a)(1). The motion did not even request that the temporary injunction be granted without notice, did not allege immediate and irreparable harm, did not specify that such harm would result before a hearing could be held, and the company's attorney did not certify in writing any efforts made to give notice or any reasons why notice should not be required. Furthermore, the Trial Court's order failed to endorse the order with the hour of entry and failed to state why the order was granted without notice. The appellate court reversed and remanded the case, and declined to comment on the merits of the case.

***H&M Hearing Associates, LLC v. Nobile and Leasure*, 2007 Fla. App. LEXIS 3063 (Fla. 2d DCA 2007)**

Former employer filed suit against Nobile, a former employee, alleging that he had violated a covenant not to compete. When Nobile remained employed by the plaintiff company, he had lent money to Leasure for the purpose of enabling her to open up a new and competing business involving hearing aids. Nobile also granted Leasure a guaranty. It was undisputed that the new competing business could not have been created without the actions of Nobile. After Nobile was terminated by the employer, he then went to work for this new competitor. The Trial Court denied the temporary injunction because Nobile had ceased his employment with the competing business after suit was filed and before the ruling on the temporary injunction motion. The Trial Court found, and the appellate court agreed, that there was no danger of future violations since Nobile had ceased his employment with the competitor company and he did not have a prior history of violations.

However, there was another arguable basis for granting an injunction that the Trial Court erroneously failed to consider. The employer had argued that Nobile continued to have a continued interest in the success of the competitor company based on his lending money and receiving a guaranty. Since the Trial Court did not address the matter of whether this constituted an ongoing violation of the restrictive covenant, the denial of the injunctive relief was reversed and remanded for the Trial Court to consider.

***Gould & Lamb, LLC v. D'Alusio*, 2007 Fla. App. LEXIS 3442 (Fla. 2d DCA 2007)**

A former employer sued D'Alusio to enforce a non-compete agreement that had been entered into toward the beginning of his employment. The employer terminated D'Alusio without any evidence indicating that the company was dissatisfied with his performance or that his position was being eliminated. After some negotiation, the parties entered into a severance agreement. The Trial Court ruled, and the appellate court agreed, that the severance agreement superseded the non-compete agreement and it would not be appropriate to incorporate the non-compete provision of the earlier contract into the severance agreement. The Trial Court had also found that the general statements of concern offered by the employer were not sufficient to establish the existence of enforceable legitimate business interests or trade secrets pursuant to Fla. Stat. 542.335(1)(b) or Fla. Stat. 588.002(4) respectively. This too was sustained by the appellate court. Finally, the Trial Court had found a breach of the severance agreement and ordered the former employer to pay the final installment payment under that agreement, which was also upheld on appeal.

***E. I. Dupont Day Nemours & Company v. Bassett*, 2007 Fla. App. LEXIS 692, 32 Fla. L. Weekly D 287 (Fla. 4th DCA 2007).**

The Appeals Court upheld the non-final order of the Trial Court denying a motion for temporary injunction in a case involving a non-compete agreement. The Appeals Court explained that there is a hybrid standard of review with regard to temporary injunctions. If the Trial Court's order is based upon factual findings, then it will be reviewed for abuse of discretion. However, if it is based upon legal conclusions, it is then subject to de novo review. In the instant case, the Trial Court had simply been unconvinced by the factual allegations and testimony and it was therefore upheld on appeal.

***Whitby v. Infinity Radio, Inc.*, 2007 Fla. App. LEXIS 733, 32 Fla. L. Weekly D 276 (Fla. 4th DCA 2007)**

A broadcasting company was seeking to enforce a non-compete against a radio personality. On a previous appeal, the court ruled that the non-compete was enforceable, despite the company having been sold to a new company since the agreement was appropriately assigned. After remand, the trial court erroneously determined as a matter of law that the non-compete was enforceable due to the law of the case doctrine, and rejected defenses based on duration in time and geographic scope accordingly. The Appeals Court then held that the law of the case doctrine did

not apply since the only issue addressed on the previous appeal was whether the non-compete contract was appropriately assigned. Moreover, the question of duration in time, reasonableness in geographic scope, and whether the plaintiff is seeking to enforce a legitimate business interest under Fla. Stat. 542.335 are issues of fact only to be determined after a trial. The case was therefore remanded for further proceedings.

The Appeals Court also held that the Trial Court did not correctly analyze the question of compensatory damages and lost profits. The Appeals Court found that the evidence of damages was speculative and conjectural in nature as there are several factors that may influence a radio station's profits that were not considered by the expert witness. An award of compensatory damages or lost profits must be based on substantial competent evidence directly linking those damages to the breach of the non-compete contract and the amount of lost profits must be ascertained with a reasonable certainty.

Burzee v. Park Avenue Ins. Agency, 946 So. 2d 1200 (Fla. 5th DCA 2006)

Plaintiff executed a non-compete agreement during her employment with her former employer that provided for liquidated damages of $10,000 plus the entire amount of commissions "earned by the Company on the accounts sold/and/or services by Employee during the TWENTY-FOUR (24) months prior to the month in which her employment with the Company is terminated." Plaintiff subsequently began to work for a competitor. The Appeals Court held that the parties may stipulate to an amount to be paid as liquidated damages in the event of a breach, as long as the damages are not readily ascertainable and provided the sum stipulated as damages is not grossly disproportionate to any damages reasonably expected to follow from a breach of the agreement. The court held that the amount of liquidated damages in the non-compete agreement at issue constituted a penalty as the sums were grossly disproportionate to any damages that could have been anticipated by a breach of the agreement.

FLORIDA CIVIL RIGHTS ACT – ATTORNEY'S FEES

***Winn-Dixie Stores, Inc. v. Reddic and Stokes,* 2007 Fla. F. LEXIS 812, 32 Fla. L. Weekly D. 295 (Fla. 1st DCA 2007)**

Plaintiffs had won age discrimination suit under the Florida Civil Rights Act. The court awarded costs and fees, with a contingency multiplier of 2.0. The main issue on appeal was whether a contingency fee multiplier is available in cases under FCRA. The Appeals Court held that no multiplier is available. The Appeals Court emphasized a portion of the statute which states that "it is the intent of the legislature that this provision for attorneys' fees be interpreted in a manner with federal case law involving a Title VII action." Fla. Stat. 760.11(5). The Appeals Court acknowledged that "it is clear that federal circuits generally accepted the applicability of contingency fee multipliers in Title VII actions at the time the FCRA was amended" in 1992. The Appeals Court further noted, however, that shortly after FCRA was amended the U.S. Supreme Court held that multipliers could not be awarded in cases involving federal fee shifting statutes, citing *Burlington v. Dague,* 505 U.S. 557, 112 S.Ct. 2638, 120 L.Ed. 2d 449 (1992). As further noted by the Appeals Court, the Eleventh Circuit thereafter held that multipliers are not permissible under Title VII under any circumstances. *See McKenzi v. Cooper, Levins & Pastco, Inc.*, 990 F.2d 1182, 1186 (11th Circ. 1993). The issue was therefore whether the court must apply federal case law as it existed at the time FCRA was enacted, or whether it was appropriate to rely upon federal case law that subsequently came into existence. The *Winn-Dixie* Court held that it must apply the plain and unambiguous language of the statute and interpret the attorneys' fees provision in conforming with Federal Title VII case law. The Appeals Court acknowledged that there are several state court decisions holding that federal cases decided after the adoption of a statute, modeled after a federal statute, are no more than persuasive authority and in some situations could not even be considered relevant. The Appeals Court however distinguished that line of cases, noting that FCRA has a statutory provision stating that federal case law must be relied upon by the state courts.

On another issue, the Appeals Court agreed with the plaintiffs that time spent litigating the entitlement to fees is also subject to an award of attorneys fees. Since the court must look to federal case law on fees issues, and as time spent litigating fees is subject to an award of fees under federal case law, the Appeals Court held that the Trial Court also erred in refusing to grant fees for time spent litigating the entitlement to fees.

Finally, the Appeals Court held

that the Trial Court erred with regard to the costs award. The Appeals Court explained that, unlike fees, FCRA does not in any way require the application of federal law with regard to awards of costs. Under state law, taxable costs are governed by Fla. Stat. 57.041 and the statewide Uniform Guidelines for Taxation of Costs in Civil Actions. The Trial Court had simply taken the total amount of costs requested by plaintiffs and reduced it by 12.5%. This was error since the Trial Court did not itemize what costs it chose to allow, or disallow. The Trial Court should have reviewed each item to determine whether they are appropriately awarded under Florida law or not. The Trial Court also erred since it looked exclusively to the Statewide Uniform Guidelines for Taxation of Costs, but failed to consider whether any of the requested costs could be included as part of a reasonable attorney fee award pursuant to Title VII. Under federal law, an award of fees in civil rights cases should include expenses beyond normal overhead.

***Haines City HMA, Inc. v. Carter*, 2007 Fla. @ LEXIS 1585, 32 Fla. L.Weekly D. 429 (Fla. 2d DCA 2007)**

Plaintiff had successfully pursued a retaliatory termination claim under the Florida Civil Rights Act. Plaintiff's counsel had been awarded a contingency multiplier of 1.5 with regard to the award of fees. The main issue on appeal was whether a multiplier is available under FCRA. The Appeals Court held that a multiplier is not available, relying upon Fla. Stat. 760.11(5) which states in pertinent part "it is the intent of the Legislature that this provision for attorney's fees be interpreted in a manner consistent with federal case law involving a Title VII action." The Appeals Court held that the legislative intent behind the FCRA was clear based upon the language of the statute. The Appeals Court noted that since the enactment of the FCRA, the federal courts have ruled that no multiplier is available under federal fee shifting statutes. This includes that U.S. Supreme Court case of *Burlington v. Dague*, 505 U.S. 557, 112 S.Ct. 2638, 120 L.Ed.2d 449 (1992). Since the FCRA mandates that determinations by federal court shall govern the Florida courts, *Dague* and its progeny must be applied and there is no multiplier available under FCRA.

FLORIDA CIVIL RIGHTS ACT – HIV

***Byrd v. BT Foods, Inc.*, 2007 Fla. App. LEXIS 1791, 32 Fla. L. Weekly D 463 (Fla. 4th DCA 2007)**

The Appeals Court reversed a summary judgment entered in favor of the employer in a case involving discrimination based upon HIV under both the Florida Civil Rights Act, Fla. Stat. 760 *et. seq.* and the Florida Omnibus AIDS Act, Fla. Stat. 760.50. Initially, the Appeals Court drew a sharp distinction between the federal summary judgment standard and the state summary judgment standard. The court explained that federal summary judgment cases decided pursuant to the *Celotex* standard have only "limited precedential value" in Florida state cases. Florida places a higher burden on parties seeking summary judgment as they are required to show conclusively that no material issue remains for trial. All doubts and inferences must be resolved against the moving party, and if there is the slightest doubt or conflict, then summary judgment is not appropriate.

In reversing summary judgment, the Appeals Court noted that the plaintiff's HIV condition could indeed be a "handicap" within the meaning of FCRA, since there was evidence that it affected the major life activities of reproduction, breathing and working. With regard to the definition of "handicap", the Appeals Court relied on federal case law including the Supreme Court cases of *Bragdon v. Abbott*, 524 U.S. 624, 118 S.Ct. 2196, 141 L.Ed.2d 540 (1998) (non symptomatic HIV considered a disability since it substantially limited the major life activity of reproduction) and *Sutton v. United Airlines, Inc.,* 527 U.S. 471, 119 S.Ct. 2139, 144 L.Ed.2d 450 (1999)(whether an employee has a disability under ADA is an individualized inquiry that must be determined on a case by case basis).

The court further noted that under the Florida Omnibus AIDS Act, Section 760.50, the law does not require proof that the HIV condition amounts to a handicap or disability. Rather, even perceived results of a positive HIV test would be protected under this particular law. Summary judgment on plaintiff's employment discrimination claims was therefore reversed.

Finally, summary judgment was affirmed with regard to plaintiff's intentional infliction of emotional distress claim. Neither the claim of wrongful termination or the teasing of Byrd by other employees were sufficient to arise to the level of outrageous conduct required to sustain the tort.

FLORIDA CIVIL RIGHTS ACT – PUNITIVE DAMAGES

***Speedway SuperAmerica, LLC vs. DuPont*, 2007 Fla. LEXIS 572, 32 Fla. L. Weekly S 124 (Fla. 2007)**

The Florida Supreme Court initially accepted jurisdiction and agreed to review the *en banc* decision of the Fifth District Court of Appeals, in which the Appeals Court declined to apply federal case law to the question of whether punitive damages are available under the Florida Civil Rights Act. The Appeals Court had also found that a lower level of severity is required in order to find liability for hostile environment sexual harassment under the Florida Civil Rights Act and declined to follow the authority of the Eleventh Circuit, noting that FCRA must be liberally construed.

Although the Supreme Court initially accepted jurisdiction, the Supreme Court concluded, after further consideration, that jurisdiction was not proper and that the proceedings should therefore be dismissed. It was

noted in a concurring opinion by Justice Pariente that the jurors had been instructed pursuant to the heightened federal standard for awarding punitive damages anyway. Although the appeals court has certified the question of whether the heightened federal standard for punitive damages should apply as an issue of "great public importance in future like cases," the issue had not even been determinative of the outcome of the case at the trial court level.

FLORIDA CIVIL RIGHTS ACT – RETALIATION

Hinton v. Supervision International, Inc., 942 So. 2d 986 (Fla. 5th DCA 2006)

Plaintiff sued former employer for sexual harassment retaliation under the Florida Civil Rights Act. At the time of trial the only claim pending was the retaliation claim. Plaintiff complained of sexual harassment by a co-worker to human resources. The co-worker apologized but was never written-up by his supervisor as promised by human resources. Plaintiff further complained to the CEO who assured her everything would be taken care of, but minutes from the meeting reflected that the CEO believed she was exaggerating her claims. Plaintiff then told the CEO that there were other female employees that has similarly been sexually harassed by the same co-worker. Plaintiff claimed that the CEO became angry with her, threatened to terminate her employment and wrote her up for investigating sexual harassment. She refused to sign the write-up and consulted legal counsel. While at her lawyer's office, she filed a charge of discrimination, which was immediately faxed to her employer. When she returned to the office, her employer terminated her employment. Plaintiff claimed her activities were protected by the participation clause of section 760.10(7) of the FCRA and that she only needed to demonstrate, for her prima facie case (1) statutorily protected expression; 92) an adverse employment action; and (3) a causal connection between the participation in the protected expression and the adverse action. The Appeals Court held that the Trial Court, in granting the JNOV, improperly added a fourth element of requiring the Plaintiff to show that her charge of discrimination was filed in good faith.

IMMUNITY

Brown v. Jenne, 941 So. 2d 447 (Fla. 4th DCA 2006)

Plaintiff sued employees of the Broward County Fire Rescue Squad for civil rights violations brought under 1983 of the Civil Rights Act in connection with her husband's death. The Trial Court granted the defendants' motions to dismiss on the basis that they were entitled to absolute immunity under section 768.28(9)(a), Florida Statutes. The Appeals Court reversed the dismissal of the claims against the employees and held that counties and their employees cannot claim sovereign immunity to a section 1983 claim even though the state and its agencies do have such sovereign immunity.

UNEMPLOYMENT BENEFITS

***Marchese v. Unemployment Appeals Commission and Yellow Book Sales and Distribution Co., Inc.*, 946 So.2d 123 (Fla. 4th DCA 2007)**

Employee appealed from an order finding that she was not eligible for unemployment compensation benefits since she had voluntarily quit her job. Employee worked as an nanny, but quit for what she claimed was a "family emergency." The "family emergency exception" exists when an employee needs to take time off from work to care for an ill family member or because a death occurred. The majority of courts have held that leaving work for reasons not related to a medical illness or death does not constitute a family emergency. The denial of unemployment compensation was upheld.

LawnCo Services, Inc., v. Bowman, 946 So. 2d 586 (Fla. 4th DCA 2006)

Plaintiff quit his employment after his employer failed to pay him overtime. Plaintiff had worked on average an extra fifteen hours of overtime each week but was only paid his standard wage for the extra hours. Plaintiff did not advise his employer of his concern regarding not being paid overtime before he resigned. The referee held that Plaintiff voluntarily left work without good cause and disqualified him from unemployment compensation benefits. The UAC reversed concluding that Plaintiff left work with good cause for his employer's failure to pay him overtime wages in violation of the Fair Labor Standards Act. In rejecting the UAC's decision, the Appeals Court held that the UAC was precluded from reversing the referee's decision because it was supported by competent, substantial evidence. The Appeals Court further held that the UAC erred in relying on the FLSA to determine if the Plaintiff left his employment for good cause. In fact, neither the UAC, nor the referee, engaged in a legal analysis of the potential applicability of the FLSA

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to the dispute.

Bogardus v. Justice Administrative Commission, 943 So. 2d 256 (Fla. 3d DCA 2006)

Plaintiff voluntarily quit his job claiming health reasons and stress from driving to his employer's new temporary office. The Appeals Court held that Plaintiff failed to show good cause for his decision to quit his job as he never presented a doctor's note to inform his employer that he could no longer work due to his health condition and because he was aware of the drive from his home to the job site.

WHISTLEBLOWER AND BATTERY

Ruiz v. Aerorep Group Corp., 941 So. 2d 505 (Fla. 3d DCA 2006)

Plaintiff claimed her supervisor committed battery against her and that after she reported his conduct she was terminated. Plaintiff brought a private whistleblower action against her former employer. The Trial Court twice dismissed her WB claim. Plaintiff then filed a battery claim based upon respondent superior against her former employer, which was dismissed with prejudice. On appeal, the court held that Plaintiff failed to preserve her WB claim for appeal as she failed to include her previously dismissed WB claim in her subsequent complaint for battery. The Appeals Court also held that even if the WB claim was preserved for appeal, Plaintiff alleged an employee, not the employer, committed a battery upon her. The WB Act prohibits an **employer** from taking any retaliatory action against an employee for providing information to a governmental agency investigating a violation **by the employer** of a law, rule or regulation. The battery claim was also held as properly dismissed as Plaintiff did not allege any factual allegations supporting that Plaintiff's co-employee battered Plaintiff with the purpose of benefiting the interests of the employer in order to state a claim for battery based upon respondeat superior.

SEXUAL HARASSMENT

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sit down and initiated what Baldwin described as a lengthy and heated discussion with Head trying enforce the "power, authority, and respect" of his new position. Baldwin felt threatened by Head's behavior on this occasion, but did not complain to anyone about it.

The two worked together without incident over the next eight months. Yet, both Baldwin and Head used profanity in the workplace. Unlike Baldwin, Head used profanity and vulgar language on a daily basis. He referred to male marketing representatives with sexual "nicknames" and often used a derogatory term to refer to women.

On July 26, 2001, Head, Baldwin, and the other marketing representatives from the Huntsville office traveled to Birmingham for a company banquet. When Head noticed Baldwin speaking to the company president he asked her what they had spoken about. Baldwin told him that she had spoken favorably of Head, to which he replied, "Thanks Babe, you take care of me, I take care of you." At the banquet, Head later invited Baldwin back to his hotel room. Head again propositioned Baldwin on her trip home by calling her multiple times on her cell phone.

A few days after the banquet in Birmingham, Head asked Baldwin to come into his office. When she did, he closed his office door and requested a sexual favor. Baldwin ignored Head, and the conversation turned to Head and his wife. At this time, Head expressed to Baldwin that during the weekend he had become upset with his wife over the weekend, and had thrown her on the floor and placed his hands around her neck. While Baldwin admitted that she was afraid of Head at this point, she did not report the conversation or her fears to anyone in management.

Despite several other "uncomfortable" situations involving Head in August and September 2001, Baldwin did not file a complaint with anyone in the company as Blue Cross's sexual harassment policy and procedures required because she was afraid of losing her job. On one occasion, when Baldwin complained to Head about the amount of her bonus check he warned her not to go over his head and threatened that she would lose her job.

Two incidents during October, 2001 finally lead Baldwin to file an internal complaint against Head. The first incident occurred on October 1, 2001, when Head assigned a prospective client to another marketing representative without hearing her side of the dispute. The final incident also involved a dispute with a prospective client, who was eventually assigned to another marketing representative. During both of these disputes, Baldwin took the opportunity to confront Head about the "circus like conditions" in the office and the use of profanity.

Baldwin finally complained to the human resources department on November 8, 2001, submitting a five page written synopsis of Head's conduct since his promotion one year earlier. A few weeks after Baldwin's complaint, Rick King, President of Human Resources led an investigation into Baldwin's allegations. King, along with two other company employees interviewed Head and three other members of the Huntsville office who they thought may have relevant information. With the exception of the use of offensive language, none of the witnesses substantiated Baldwin's complaints about Head. As for Head, during his interview, he admitted to using a derogatory "nickname" for one of the male marketing representatives, but otherwise denied Baldwin's allegations.

After the company's investigation failed to substantiate Baldwin's complaints, it suggested the assistance of an industrial psychologist to counsel Head and Baldwin regarding their behavior and monitor their interactions to prevent future problems. Baldwin rejected the company's proposed solution. Baldwin also rejected the company's offer to transfer her to the same position in the Birmingham office. After rejecting the two solutions offered by the company, Baldwin continued to refuse to work for Head. As a result, Baldwin was placed on administrative leave and eventually terminated on December 20, 2001.

Following her termination, Baldwin sued the company alleging sexual harassment and retaliation under Title VII of the Civil Rights act of

1964, 42 U.S.C. 2000e, et seq., as well as state law claims for invasion of privacy, intentional infliction of emotional distress, and negligent retention, supervision, and training. The district court concluded that the alleged incidents of harassment were not sufficiently severe or pervasive to constitute sexual harassment and that, regardless, Blue Cross had established the defense provided in *Faragher v. City of Boca Raton* and *Burlington Industries, Inc. v. Ellerth*. With respect to the retaliation claim, the district court held that Blue Cross had proffered a legitimate, non-discriminatory reason for terminating Baldwin, and that Baldwin had failed to set forth evidence to support a finding of pretext. On this basis, the district court denied Baldwin's motion for partial judgment and granted Blue Cross's motion for judgment as to each of Baldwin's claims.

The Decision

On appeal, the Eleventh Circuit affirmed the district court's judgment with respect to each claim. With respect to her tangible employment action claim, the Eleventh Circuit found that the company's offer to transfer Baldwin to another office was not a tangible employment action. The court similarly concluded that Baldwin's termination was not discriminatory, but was instead based on her refusal to cooperate in its efforts to resolve her complaints. Regarding Baldwin's hostile work environment claim, the court did not answer the question of whether the actions complained of were sufficiently severe and pervasive to alter the terms and conditions of Baldwin's employment. The court found it unnecessary to resolve this question because Blue Cross established both elements of the *Faragher-Ellerth* defense. Blue Cross exercised reasonable care to prevent and promptly correct harassing behavior and Baldwin unreasonably failed to take advantage of the preventive or corrective opportunities available.

"Reasonable" Investigation

Baldwin did not dispute that Blue Cross maintained a valid anti-discrimination policy, which was effectively communicated to employees. Similarly, Baldwin did not dispute that she was aware of the policy's reasonable reporting procedures. Instead, Baldwin contested the reasonableness of the investigative procedures used by the company. Baldwin alleged the following deficiencies in the investigation (1) the person in charge of the investigation, Rick King, failed to speak with her personally during the investigation; (2) King failed to take notes during his interview with Head; (3) the witness interviews took place in the same restaurant where Head was present (although in different areas); (4) the discussion between King and two other members of the investigative team was not thorough enough; and (5) not enough weight was given to notes from one investigator that the responses of one of the witnesses seemed "rehearsed."

At the outset, the court noted that there is nothing in the *Faragher* and *Ellerth* decisions requiring a "full-blown, due process, trial-type proceeding" in response to complaints of harassment. All that is required under the *Faragher* and *Ellerth* decisions is that an employer's investigation be reasonable under the circumstances. In evaluating the reasonableness of the investigation, the court reasoned that the process was led by King, an experienced and well qualified member of the company, and that Baldwin, Head, and other members of the office were interviewed separately. With respect to the other deficiencies claimed by Baldwin, the court refused to second guess these aspects of the company's investigation noting that its "role under *Faragher* and *Ellerth* [did] not include micromanaging internal investigations."

Adequate Remedy

Even assuming that Blue Cross's investigation was somehow defective, the court reasoned that the corrective measures offered by the company were sufficient to address her complaints and thus sufficient to establish the *Faragher-Ellerth* affirmative defense. In short, the court opined that "a reasonable result cures an unreasonable process . . . because Title VII is concerned with preventing discrimination and not with perfecting the process." According to the court,

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even if the offer to transfer Baldwin to another office was not adequate because of the hardship it would have imposed on her, the company's offer to conduct a counseling program was an adequate remedial measure. Citing several other decisions in which warnings and counseling of the harasser were held sufficient where allegations of harassment *are* substantiated, the court reasoned that the same remedy should be enough where allegations are *not* substantiated. The court made clear that where an employer sees hostility between employees but cannot determine whether there has been harassment, warning the alleged harasser, requiring counseling of both parties, and monitoring their interactions is a proper first step. The complainant is not permitted to refuse a reasonable remedy and instead demand her own remedy. Based upon Blue Cross's reasonable investigation and response, the court found that it satisfied that first element of the *Faragher-Ellerth* defense.

Unreasonable Failure to Take Advantage of Preventive or Corrective Opportunities

The court further concluded that Blue Cross established the second element of the defense because Baldwin refused to take advantage of the company's counseling option and she failed to promptly report the harassment. Either failure on the part of Baldwin was, by itself, sufficient to satisfy the second element of Blue Cross's *Farragher- Ellerth* defense. Baldwin's duty to promptly report harassment arose under both the company's policy and the rules established by the United States Supreme Court in *Farragher* and *Ellerth*. Although Baldwin argued that her more than three month delay in reporting Head's propositions to her was reasonable, the court refused to accept Baldwin's explanation as an excuse for her delay. The court reasoned that were it to find otherwise, every employee could assert that the reason he or she did not report the harassment earlier was for fear of reprisal. Citing the First Circuit's opinion in *Reed v. MBNA Mktg. Sys., Inc.*, the court reiterated that employees who are victims of harassment are presented with a difficult choice: "assist in the prevention of harassment by promptly reporting it to the employer, or lose the opportunity to successfully prosecute a Title VII claim."

Impact on Employers

The court's decision in *Baldwin* offers some guidance to employers in conducting harassment investigations. First, *Baldwin* makes clear that an investigation does not have to be a formal, court-like inquiry in order to satisfy employer obligations. Indeed, courts are reluctant to question an employer's decisions during an investigation such as which witnesses to interview, whether to take notes, and how much weight to credit various witness responses. The requirement is that the investigation be reasonable under the circumstances.

In addition, the court's holding in *Baldwin* is instructive for employers who are faced with a "he-said, she-said" situation in conducing harassment investigations. The court's opinion makes clear that employers are not required to take sides in order to satisfy their obligations under *Faragher* and *Ellerth*. Rather, employers are required to act reasonably under the circumstances. When an investigation is inconclusive, employers are well advised to respond in some fashion. In these circumstances it may be appropriate to issue a warning to the alleged harasser, require the alleged harasser to review the company's harassment and discrimination policies, mandate training or counseling.

Finally, *Baldwin* highlights the burden on employees that harassment be reported in a timely manner. Towards this end, employers should ensure that their harassment policies specifically require that concerns be promptly reported.

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