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April 23 - 24
South Seas Island Resort
Captiva Island, FL

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Eleventh Circuit Addresses Florida Restrictive Covenant Agreements

By Terry J. Harmon, Tallahassee

T. HARMON

Introduction

The United States Court of Appeals for the Eleventh Circuit recently issued a decision that includes a careful and detailed analysis of important aspects of Florida law concerning restrictive covenants. *Proudfoot Consulting Co. v. Gordon*.[1] The enforceability of restrictive covenant agreements in Florida is a frequent source of litigation. Some might argue that the resulting court decisions are not always consistent, and the reasons for different outcomes in different cases are sometimes difficult to discern. Although *Proudfoot* was decided by a federal court applying Florida law, because its analysis was careful and detailed, it is likely to be cited often in the future.

This article will first review the statutory authority for restrictive covenant agreements in Florida and then address the *Proudfoot* decision.

Statutory Framework

Florida has comprehensive statutory framework regulating enforcement of noncompete agreements and other restrictive covenants.[2] Specifically, after first providing that contracts restraining trade are

See "Restrictive Covenant Agreements," page 12

Eleventh Circuit Revisits "Severe or Pervasive" Standard

By Jill S. Schwartz, Winter Park

J. SCHWARTZ

On December 4, 2009, the Eleventh Circuit Court of Appeals vacated its original opinion and issued a revised opinion in *Corbitt & Raya v. Home Depot U.S.A., Inc.*[1] The purpose of the revision was to clarify the prior explanation of the manner in which the "severe or pervasive" standard is to be applied in sexual harassment cases.

Specifically, the court departed from its earlier opinion and assumed *arguendo* that the bulk of the conduct alleged by the plaintiffs could be considered sexual in nature. The court concluded, however, that even if the conduct excluded from the analysis in the original opinion was considered, that conduct consisted of "innocent compliments" that "do not weigh heavily in favor of finding that [the] conduct, as a whole, constituted sexual harassment."[2] The revised opinion also concluded that the conduct alleged was not sufficiently pervasive. That quantitative portion of the analysis, however, remains intertwined with the court's qualitative evaluation of the relative severity of the alleged acts of harassment.

By failing to distinguish clearly the analyses of

See "Severe or Pervasive," page 13

Need for Individualized Assessment Cited as Basis for Rejecting Class Certification in Two New Cases

By Shane T. Muñoz, Tampa


S. MUÑOZ

Citing the need for individualized inquiry into the facts pertaining to putative class members, in a case involving the Americans with Disabilities Act (ADA) and in a case alleging failure to pay for time worked, two federal courts of appeal recently rejected efforts to certify class actions under FED.R.CIV.P. 23.

In *Babineau v. Federal Express Corp.*, the plaintiffs claimed that FedEx breached a contract by failing to pay for all time worked.[1] FedEx required that employees "track their time by entering various codes corresponding to different work activities into a hand-held computerized tracking device (a 'tracker')."[2] In addition, FedEx required that employees punch a time clock before and after their shifts, and at the beginning and end of a required daily break period.[3] "FedEx paid its employees only for the time between the scheduled start and end times as entered into the trackers, which did not necessarily coincide with employees' manual punch in and punch out times."[4]

The plaintiffs claimed that they worked during the time between punching in and their scheduled start times and between their scheduled end times and punching out ("gap time"), and during scheduled breaks ("break time").[5] They claimed that FedEx was contractually obligated to pay for all time worked pursuant to an agreement signed during the application process and under policies reflected in certain employment manuals, and that FedEx breached the alleged contract by not paying for gap time and break time.[6]

The plaintiffs sued for breach of contract and for quantum meruit, and sought certification of a class defined as, "All employees of [FedEx] paid on an hourly basis as non-exempt employees, who were employed in the state of Florida, from the maximum time period preceding the filing of this complaint, as permitted by the statute of limitation, until such time as the Class period closes."[7] The district court denied the motion for certification, and the plaintiffs appealed.

The Eleventh Circuit first noted that to obtain class certification under Rule 23, the plaintiffs must meet each of the requirements of Rule 23(a), and the requirements of at least one of the three subsections of Rule 23(b).[8] The court assumed that the plaintiffs could meet the requirements of Rule 23(a), and focused on analysis of Rule 23(b). The plaintiffs sought certification under Rule 23(b)(3), which requires that plaintiffs "demonstrate (1) that questions of law or fact common to class members predominate over any questions affecting only individual members ('predominance'); and (2) that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy ('superiority')."[9] Alternatively, the plaintiffs sought certification under Rule 23(b)(1)(A), which requires that plaintiffs "show that 'prosecuting separate actions . . . would create a risk of inconsistent or varying adjudications . . . that would establish incompatible standards of conduct for the party opposing the class.'"[10]

Addressing Rule 23(b)(3) first, the court held that:

> To obtain Rule 23(b)(3) class certification "the issues in the class action that are subject to generalized proof and thus applicable to the class as a whole, must predominate over those issues that are subject only to individualized proof." . . . [C]ommon issues will not predominate over individual questions if, "as a practical matter, the resolution of [an] overarching common issue breaks down into an unmanageable variety of individual legal and factual issues."[11]

The Eleventh Circuit pointed out that although the plaintiffs presented some evidence that work was performed during gap times, other evidence, including statements and testimony of "a number of employees," provided "plausible" evidence that employees may have been engaged in non-work related activities during gap times, such as "socializing, checking e-mail, beating traffic, etc."[12] "[I]n light of employee testimony regarding the various non-work-related activities that took place during the gap periods and the various personal reasons that employees listed for coming in early and staying late," the court held that "the district court reasonably concluded that punch clock records do not provide common proof of any uncompensated work during gap periods."[13]

Regarding break times, the plaintiffs argued that the tracker records established that employees performed work during break periods, and also cited testimony of employees who claimed to have worked during break periods.[14] The Eleventh Circuit noted that because some employees entered their break times at the end of the day, based on memory, the overlap between records of break times and tracker records did not necessarily establish that employees worked during break times.[15] Further, there was evidence that scanning a package could take anywhere from two to 20 seconds depending on the transaction.[16] The tracker records showed only the number of scans, and therefore could not provide an accurate measure of time worked.[17] Accordingly, an individualized inquiry would be necessary to determine whether each employee worked during break times and, if so, how much time each worked.[18]

Further, because the policies that the plaintiffs pointed to as purported contracts also prohibited employees from working off the clock, FedEx had a potential defense -- specific to each individual employee -- that the employee had breached the contract by working off the clock, assuming such a contract existed.[19]

Addressing the plaintiffs' argument that the purported contract incorporated the provisions of the Fair Labor Standards Act (FLSA), the court pointed out that even under the FLSA an employer is not required to pay an employee who voluntarily arrives before or stays after scheduled work time, as long as the employee does not engage in any work; accordingly, individualized inquiries would be required into whether each

employee voluntarily arrived early, stayed late or performed work during gap times.[20] Also, even if the plaintiffs could prove a policy of establishing unrealistic expectations which required employees to work outside their scheduled shifts to complete assigned tasks, this would be insufficient to establish FedEx's liability to individual plaintiffs.[21]

As to the quantum meruit claim, the court pointed out that one element of such a claim is that the plaintiff expected compensation, and proof of this element would require a "highly individualized" inquiry.[22]

Because the plaintiffs could not establish liability toward members of the putative class without individualized inquiry into each employee's specific circumstances, the Eleventh Circuit held that the district court had not abused its discretion by denying certification under Rule 23(b)(3) based on its finding that common issues did not predominate over issues that are subject only to individualized proof.[23]

Turning to Rule 23(b)(1)(A), the court first noted that "[b]ecause the risk that judicial action will create incompatible standards of conduct is low when a party seeks compensatory damages, only actions seeking declaratory or injunctive relief can be certified under Rule 23(b)(1)(A)."[24] While that basic premise does not preclude class certification in every case where compensatory damages are sought, according to the Eleventh Circuit, the *Babineau* plaintiffs sought only "limited injunctive relief in the form of a 'permanent injunction restraining defendant from continuing to require and accept labor from hourly employees without pay. . . ,'" and "the primary remedy sought [was] unquestionably monetary relief for past failure to compensate employees."[25] Accordingly, the court also affirmed the denial of certification under Rule 23(b)(1)(A).[26]

In *Hohider v. United Parcel Serv.*, the plaintiffs alleged a pattern or practice of unlawful failure to accommodate disabilities, in violation of the Americans with Disabilities Act.[27] Plaintiffs sought injunctive and declaratory relief, back pay, compensatory damages and punitive damages. They sought to certify a nationwide class under FED.R.CIV.P. 23(b).[28]

Because the ADA incorporates Title VII's remedial provisions, the district court in *Hohider* determined it should analyze the motion to certify under the framework for adjudicating pattern-or-practice claims of discrimination under Title VII, established by the Supreme Court in *International Brotherhood of Teamsters v. United States*.[29] *Teamsters* established "a two-stage framework for analyzing Title VII pattern-or-practice suits."[30] At the first stage, the plaintiff must establish liability, and the second stage addresses remedies.[31]

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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

SEMINARS

February 25 & 26, 2010
10th Annual Labor & Employment Law Certification Review (0992R)
Hilton Orlando, Orlando
Group Rate: $189 / Cut-off date: February 3, 2010
Reservations: (800) 445-8667

April 23 & 24, 2010
Advanced Labor Topics 2010 (1020R)
South Seas Island Resort, Captiva Island, FL
Group Rate: $179 ($12.50 resort fee is waived) / Cutoff date: April 2, 2010
Reservations: (866) 565-5089

May 20 & 22, 2010
28th Annual Multi-State Labor & Employment Law Seminar
Don CeSar Beach Resort, St. Petersburg
For More Information: www.law.tulane.edu/cle

June 24, 2010
Annual Seminar
Boca Raton Resort & Club, Boca Raton

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EXECUTIVE COUNCIL MEETINGS

Conference Call Number: 1-866-411-5140 • Conference Code: 56723233

* * *

Thursday, February 25, 2010 • 5:00 p.m. – 6:00 p.m.
Executive Council Meeting • Hilton Orlando, Orlando
Group Rate: $189 / Cut-off date: February 3, 2010
Reservations: (800) 445-8667
[Reception immediately following the meeting]

Friday, April 23, 2010 • 5:00 p.m. – 6:00 p.m.
Executive Council Meeting • South Seas Island Resort, Captiva Island, FL
Group Rate: $179 ($12.50 resort fee is waived) / Cut-off date: April 2, 2010
Reservations: (866) 565-5089
[Reception immediately following the meeting]

Thursday, June 24, 2010 • 5:00 p.m. – 6:00 p.m.
Annual Executive Council Meeting • Boca Raton Resort & Club, Boca Raton
[Reception immediately following the meeting]

For more information on these events, log on to the Labor & Employment Law Section website at http://www.laboremploymentlaw.org

CLASS CERTIFICATION

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> At the initial, liability stage . . . the [plaintiff] is not required to offer evidence that each person for whom it will ultimately seek relief was a victim of the employer's discriminatory policy. Its burden is to establish a prima facie case that such a policy existed. . . . If an employer fails to rebut the inference that arises from the [plaintiff's] prima facie case, a trial court may then conclude that a violation has occurred and determine the appropriate remedy. Without any further evidence . . . a court's finding of a pattern or practice justifies an award of prospective relief [such as] an injunctive order . . . or any other order necessary to ensure the full enjoyment of the rights protected by Title VII.[32]

Therefore, at the first stage of a pattern-or-practice trial "the focus often will not be on individual hiring decisions, but on a pattern of discriminatory decisionmaking."[33] "The second, 'remedial' stage of the *Teamsters* framework pertains to individual relief, and is reached only after liability is established in the first stage of analysis . . . ."[34]

Applying *Teamsters*, the district court in *Hohider* held that the plaintiffs could pursue claims for class-wide injunctive and declaratory relief without proving that each member of the class was a qualified individual with a disability, or individually entitled to a reasonable accommodation.[35] Additionally, the district court held that the plaintiffs "may be able to seek back pay or other equitable relief for individual class members if there is a protocol for identifying those monetary damages which sets forth the objective standards to be utilized in determining the amount of those damages in a way that does not require additional hearings on individualized circumstances."[36]

The Third Circuit disagreed. The appellate court pointed out that the ADA requires accommodation only if the individual can perform the essential functions of the job with or without an accommodation that is reasonable and does not impose an undue hardship on the employer.[37] Therefore, unlike Title VII, the ADA requires an individualized inquiry to determine whether a putative plaintiff is within the class of employees entitled to the statute's protections.[38] Therefore, the plaintiffs' theories of recovery "all require inquiry into whether class members are 'qualified' -- which includes whether they can or need to be reasonably accommodated -- before a classwide determination of unlawful discrimination, as contemplated at the first *Teamsters* stage, can be reached."[39] Because those determinations require individualized inquiry not suitable for class action treatment,[40] the Third Circuit held that the district court had erred in granting limited class certification.[41]

These decisions highlight the difficulties in obtaining certification under Rule 23 in employment cases. Similar difficulties often exist in opt-in collective actions under the FLSA and the Age Discrimination in Employment Act (ADEA). Because many aspects of the employment relationship are particular to individual employees, employment cases often do not provide opportunities for the increased efficiencies that may be realized by handling claims on a class-wide basis. Plaintiffs' counsel may be more successful in obtaining class certification where claims can be framed in a manner that minimizes the relevance of the circumstances of individual putative class members, while defense counsel may benefit from highlighting areas where individualized inquiry is necessary to determining liability.

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Endnotes:

1 576 F.3d 1183, 1186 (11th Cir. 2009).
2 *Id.* at 1187.
3 *Id.*
4 *Id.*
5 *Id.*
6 *Id.* at 1186.
7 *Id.* at 1185-86.
8 *Id.* at 1189-90. "Rule 23(a) requires plaintiffs to demonstrate that the proposed class satisfies the prerequisites of 'numerosity, commonality, typicality, and adequacy of representation.'" *Id.* at 1190 (citations omitted).
9 *Id.* at 1190 (citations omitted).
10 *Id.* (citations omitted).
11 *Id.* at 1191 (citations omitted).
12 *Id.* (citations omitted).
13 *Id.* at 1192 (footnote omitted).
14 *Id.* at 1188-89.
15 *Id.* at 1194.
16 *Id.*
17 *Id.*
18 *Id.*
19 *Id.* at 1192, 1194 (citation omitted).
20 *Id.* at 1193 (citing 29 C.F.R. § 785.48(a)).
21 576 F.3d at 1193.
22 *Id.* at 1194-95.
23 *Id.* at 1193-94, 1195.
24 *Id.* at 1195.
25 *Id.*
26 *Id.*
27 574 F.3d 169 (3d Cir. 2009).
28 *Id.* at 198-99.
29 *Id.* at 176, 180 and n.12 (citing *Teamsters*, 431 U.S. 324 (1977)).
30 *Id.* at 178.
31 *Id.* at 178-79.
32 *Id.* at 178 (quoting *Teamsters*, 431 U.S. at 360-61 (citation and internal quote marks omitted)).
33 574 F.3d at 178 (quoting *Teamsters*, 431 U.S. at 360-61 and n. 46).
34 574 F.3d at 178-79 (citing *Teamsters*, 431 U.S. at 360-61).
35 574 F.3d at 181.
36 *Id.* at 182.
37 *Id.* at 192.
38 *Id.* But note that there is some authority for the proposition that certain provisions of the ADA extend to all applicants and employees, not just those who are "disabled." *See, e.g.*, *Roberts v. Rayonier, Inc.*, 2005 U.S. Dist. LEXIS 37714 (M. D. Fla. Dec. 21, 2005) (even though the plaintiff may be found not to be disabled, he was still entitled to protection under 42 U.S.C. § 12112(d)(4) of the ADA, which limits the circumstances under which employers may make medical inquiries or require medical examinations).
39 574 F.3d at 192.
40 *Id.* at 185-86, 195-98.
41 *Id.* at 198.(Special Assistant to the Administrator of the Wage and Hour Division of the U.S. Department of Labor, 1992).

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Primer on the 2009 Amendments to the Federal Rules of Civil Procedure

By Scott T. Silverman and Sarah M. DeFranco , Tampa and New York


S. SILVERMAN


S. DEFRANCO

Unless you have been avoiding reading your e-mails, you are probably already aware that the recent amendments to the Federal Rules of Civil Procedure (the "Rules") went into effect on December 1, 2009. If you simply filed away the notifications from the district court regarding the amendments without taking the time to scour the Rules to determine precisely how they have changed, then you may find the short time you spend reading this article to be quite worthwhile. This article provides a brief summary of the amendments to the Rules, and the next five to ten minutes just might prevent you from missing a deadline or presenting an erroneous argument based on your reliance on the former Rules.

Rule 6: Time Computation

The amendments to Rule 6 are designed to make time computation clear and simple. The most significant change is that intermediate Saturdays, Sundays and legal holidays are now counted in computing all time periods. Previously, intermediate weekend days and legal holidays were sometimes counted and sometimes excluded, depending on the length of the period to be computed. However, determination of the last day of the period continues to be computed in the same manner as under the former Rules. If the last day of the period falls on a Saturday, Sunday or legal holiday, then the period continues until the end of the next day that is not a Saturday, Sunday or legal holiday. Amended Rule 6 clarifies that the "next day" is determined by counting forward when the period is measured after an event and counting backward when the period is measured before an event. Rule 6 also now explains how to calculate a period that is stated in hours.

Amended Rule 6 clarifies that the last day of a period for electronic filing ends at midnight in the court's time zone, while the last day for a paper filing ends when the clerk's office is scheduled to close. Further, if the clerk's office is inaccessible, then the time for filing is extended to the first accessible day that is not a weekend day or legal holiday. The meaning of "inaccessible" may vary depending on whether a filing is electronic or paper; thus the interpretation has been left to the local rules and case law.

Including intermediate weekend days and legal holidays in calculating time periods shortens deadlines. The amended Rules have extended virtually all short deadlines to adjust for the effect of including intermediate weekends and legal holidays in time periods. Most time periods shorter than 30 days have been changed to multiples of 7 days so that deadlines will usually fall on weekdays.

There are two other significant changes to Rule 6. First, a written motion and notice of a hearing must be served at least 14 days before the time specified for the hearing. This is a substantial change from the prior requirement of 5 days' notice. Second, opposing affidavits must be served at least 7 days before the hearing, unless the court permits service at another time. The only other exception to the 7-day rule for opposing affidavits is if the affidavit is in opposition to a new trial motion under Rule 59(c). In that circumstance, an opposing affidavit must be served 14 days after service of the affidavit supporting the motion.

Rule 12: Defenses and Objections

Consistent with the amendment of all time periods to multiples of 7 days, a defendant now has 21 days (instead of 20 days) to serve an answer after being served with the summons and complaint. An answer to a counterclaim or crossclaim must be served within 21 days after service of the pleading asserting the counterclaim or crossclaim. A reply to an answer must also be filed within 21 days after being served with an order to reply. Likewise, a motion to strike now must be made within 21 days (instead of 20 days) after being served with the pleading that contains an insufficient defense or a redundant, immaterial, impertinent or scandalous matter. Notably, a defendant still has 60 days to answer a complaint if it has timely waived service, or 90 days to answer following a request for waiver if the defendant is outside any judicial district of the United States.

Previously, a Rule 12 motion would alter the period for serving a responsive pleading to 10 days after notice of the court's action on the motion. Now, if the court denies a Rule 12 motion or postpones disposition of the motion until trial, a responsive pleading must be served within 14 days after the court's action on the motion. Further, if the court grants a motion for more definite statement, the more definite statement must be served within 14 days after the court's order, and the responsive pleading must be served within 14 days after service of the more definite statement.

Rule 13(f): Omitted Counterclaim

Rule 13(f) has been abrogated in the amended Rules. Rule 13(f) previously set out the standard for amending a pleading to add a counterclaim. The rule was struck as redundant of Rule 15, which sets out the general standard for amending pleadings.

Rule 14: Third-Party Practice

Amended Rule 14(a)(1) provides that a defendant party must serve a third-party complaint within 14 days (instead of 10 days) after serving its original answer.

Rule 15: Amended and Supplemental Pleadings

Rule 15(a) has been amended to eliminate the distinction drawn by the former rule, under which a responsive pleading immediately cut off the right to amend once as a matter of course whereas a Rule 12 motion prolonged the time to amend a pleading until the motion is resolved. A party now may file an amended pleading once as a matter of course without leave of court within 21

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days after service of a responsive pleading or 21 days after service of a Rule 12 motion, whichever is earlier. The deadline to respond to an amended pleading has been extended to the later of either the time remaining to respond to the original pleading or within 14 days after service of the amended pleading.

Rule 23: Class Actions

Amended Rule 23(f) provides that a party may file a petition for permission to appeal an order granting or denying class-action certification with the clerk of the court of appeals within 14 days (instead of 10 days) after the order is entered.

Rule 27: Depositions to Perpetuate Testimony

Amended Rule 27(a) provides that a petition to take a deposition to perpetuate testimony must be served on each adverse party at least 21 days (instead of 20 days) before the hearing on the petition.

Rule 32: Using Depositions in Court Proceedings

Amended Rule 32(a)(5) also changes the time period indicated in the rule to a multiple of 7 days. Rule 32(a)(5) now provides that a deposition cannot be used against a party, who, having received less than 14 days' notice of the deposition (instead of 11 days' notice as provided in the former rule), promptly moved for a protective order requesting that the deposition not be taken or be taken at a different time and place, and the motion was still pending when the deposition was taken.

Local Rule 3.02 of the U.S. District Court in and for the Middle District of Florida was also recently amended to require a party to provide every other party and the deponent at least 14 days' written notice of a deposition upon oral examination. Therefore, in accordance with Local Rule 3.02, practitioners in the Middle District should make certain to provide the requisite 14 days' notice of a deposition (instead of the 10 days' notice that was formerly required).

Rule 38: Right to a Jury Trial

A party may demand a jury trial by serving the other parties with a written demand, which may be included in a pleading, no later than 14 days (instead of 10 days under the former rule) after service of the last pleading directed to the issue. Further, if a party has demanded a jury trial on only some issues, any other party may serve a demand for a jury trial on any other or all factual issues triable by jury within 14 days (instead of 10 days) after being served with the demand.

Rule 48: Polling

Amended Rule 48 adds a provision requiring the court to poll the jury upon a party's request. The rule on polling now parallels the Federal Rule of Criminal Procedure on the issue.

Rule 50: Judgment As a Matter of Law

Amended Rule 50(b) extends the time period in which to file a renewed motion for judgment as a matter of law from 10 days to 28 days. In particular, Rule 50(b) provides that a party has 28 days after entry of judgment, or no later than 28 days after the jury has been discharged if the motion addresses a jury issue not decided by a verdict, to file a renewed motion for judgment as a matter of law. The renewed motion may also include an alternative or joint request for a new trial under Rule 59. Further, the amended rule requires a party against whom judgment as a matter of law is rendered to file a motion for a new trial under Rule 59 within 28 days after entry of judgment.

Rule 52: Findings and Conclusions by the Court

Rule 52(b) now provides that, no later than 28 days (instead of 10 days) after entry of judgment, a party may file a motion requesting the court to amend its findings, make additional findings, and amend the judgment accordingly.

Rule 53: Masters

Rule 53 has only slightly changed. Instead of 20 days after service of a copy, a party now has 21 days to file objections or a motion to adopt or modify a master's order, report or recommendations.

Rule 54: Costs

A significant change in timing has been made to Rule 54 regarding notifying the clerk to tax costs. Instead of one day's notice, the clerk may tax costs on 14 days' notice. Further, the court may review the clerk's action upon a motion served within 7 days (instead of 5 days) after the clerk's action.

Rule 55: Default Judgment

Amended Rule 55(b)(2) provides that if a party against whom a default judgment is sought has appeared personally or through a representative, then the party or its representative must be served with a written notice of the application for default judgment at least 7 days (instead of 3 days) before the hearing on the application for default.

Rule 56: Summary Judgment

Considerable changes were made to Rule 56. A claiming party may now move for summary judgment without waiting for 20 days to pass after commencement of the action or waiting until the opposing party moves for summary judgment. The prior rule did not set any deadline by which a party had to serve a motion for summary judgment; however, most courts supplied a deadline in their scheduling orders. Now, a party may move for summary judgment at any time until 30 days after the close of all discovery, unless the local rules provide otherwise or the court orders a different time. The prior rule did not specifically address whether a party could file a response in opposition to the motion or a reply in further support of the motion. Instead, the local rules generally addressed the availability of and deadlines for filing a response and reply. Amended Rule 56 provides that the opposing party has to file a response within 21 days after the motion for summary judgment is served or a responsive pleading is due, whichever is later, unless the local rules provide otherwise or the court orders a different time. Further, the movant may file a reply within 14 days after the response is served, unless the local rules provide otherwise or the court orders a different time.

Notably, amended Local Rule 3.01 for the U.S. District Court in and for the Middle District of Florida, which also went into effect on December 1, 2009, provides a shorter 14-day time frame in which a response brief must be filed. Local Rule 3.01 also provides that no reply memorandum may be filed unless the court grants leave. However, this rule arguably conflicts with the new provision in Rule 56 permitting a reply to be filed within 14 days after the response is served. Therefore, until the Middle District clarifies this conflict, exercise caution in the Middle District by moving for permission to file a reply in further support of a motion for summary judgment.

Rule 59: New Trial

Amended Rule 59 provides that a mo-

tion for new trial must be filed no later than 28 days after entry of judgment (instead of 10 days under the prior rule). Further, an opposing party now has 14 days (instead of 10 days) after service of the motion to file opposing affidavits. A motion to alter or amend a judgment must also be filed no later than 28 days (instead of 10 days) after entry of judgment.

Rule 62: Stay of Proceedings to Enforce a Judgment

Consistent with the amendment of most time periods to multiples of 7 days, Rule 62 provides that no execution may issue on a judgment, nor may proceedings be taken to enforce it, until 14 days (instead of 10 days) have passed after entry. The remainder of the rule remains unchanged.

Rule 62.1: Indicative Ruling on a Motion for Relief That is Barred by a Pending Appeal

Rule 62.1 is new to the Federal Rules of Civil Procedure. Pursuant to Rule 62.1, a party may request an "indicative ruling" in the district court regarding a timely motion for relief which the court lacks authority to grant because of a pending appeal. The district court may either: defer ruling; deny the motion; or indicate that the ruling raises a substantial issue or that the court would grant the motion if the appellate court remands for that purpose. The movant must notify the circuit clerk of the appellate court if the district court states it would grant the motion or that the motion raises a substantial issue. The appellate court then may remand the case for the district court to decide the motion. This situation typically arises when a party files a Rule 60(b) motion to vacate a judgment after an appeal has been filed.

Rule 65: Injunctions and Restraining Orders

Amended Rule 65 now provides that a temporary restraining order may be effective for a maximum of 14 days (instead of 10 days) unless, prior to expiration, the court extends the temporary restraining order or the adverse party consents to a longer duration.

Rule 68: Offer of Judgment

An offer of judgment must now be served at least 14 days (instead of 10 days) before the date set for trial. In a case where liability has already been determined but the extent of liability must still be determined, the liable party must serve an offer of judgment at least 14 days before the hearing to determine the extent of the offering party's liability. Further, a party now has 14 days (instead of 10 days) to accept the offer of judgment by serving written notice of acceptance.

Rule 72: Magistrate Judges: Pretrial Order

The deadline for objecting to a magistrate judge's order has also been extended from 10 days to 14 days. Objections to a magistrate judge's order regarding a non-dispositive matter must be served and filed within 14 days after service of a copy of the order. Likewise, objections to a magistrate judge's recommendation regarding a dispositive matter must be served within 14 days after service of a copy of the recommendation. A party then has 14 days after service of another party's objections to respond to the objections.

Rule 81: Removed Actions

Again, consistent with the amendment of most time periods to multiples of 7 days, the time periods in Rule 81 have been changed. Under amended Rule 81, a defendant who did not answer before removal must now answer or present other defenses or objections within the longest of these time periods: 21 days after receiving a copy of the initial pleading; 21 days after being served with the summons for the initial pleading on file at the time of service; or 7 days after the notice of removal is filed. A party also has 14 days (instead of 10 days) to demand a jury trial after filing a notice of removal or after it is served with a notice of removal filed by another party.

Forms 3 and 4: Summons

Forms 3 and 4 have also been amended to reflect the increased time period a defendant has to respond to a complaint. As previously discussed, a response to a complaint or third-party complaint must be served within 21 days after service of the summons and complaint.

Local District Court Rules

The United States District Courts for the Southern and Middle Districts of Florida recently modified their Local Rules. For the most part -- but not in all respects -- those modifications track the changes to the Federal Rules. As of the time this article was authored, the Northern District has not modified its Local Rules to conform to the new changes to the Federal Rules.

Generally speaking, as reflected in this summary, time periods that were previously 10 days have been extended to 14 days, time periods that were previously 20 days have been extended to 21 days, and time periods that were previously less than 7 days have been extended to 7 days. Further, most post-judgment deadlines have been extended from 10 days to 28 days. Of course, when an issue arises, practitioners should still review the Rules and local rules for clarification and further understanding of the amendments to the Rules.

Scott T. Silverman *is a 1990 graduate of Washington and Lee University with a B.A. in politics. He received his J.D. from the Washington University in St. Louis in 1994 where he served as Notes and Comments editor for the Law Quarterly and graduated as a member of the Order of the Coif, an honor bestowed upon the top ten students in the class. Upon graduation from law school, Scott moved back to his hometown of Tampa, Florida, to practice labor and employment law. Scott worked at the Tampa law firm of Zinober & McCrea, P.A. from 1994-2007 and the Tampa office of Greenberg Traurig from 2007-2008. He joined Akerman Senterfitt in July 2008 and is currently Of Counsel at its Tampa office.*

Sarah M. De Franco *has a B.A. from the University of Miami and is a magna cum laude graduate of Nova Southeastern University law school where she served on the Nova Law Review. Sarah focuses her practice on defending management in employment litigation and on counseling employers regarding complying with federal and state employment laws, developing workplace policies and practices, drafting employment agreements, and properly classifying workers as independent contractors. She has significant experience in defending Charges of Discrimination before the U.S. Equal Employment Opportunity Commission and related state agencies and in litigating claims to enforce restrictive covenants in employment contracts. She is admitted to practice law in Florida and Illinois and is currently an associate in Akerman Senterfitt's New York office.*

CASE NOTES

District Courts of Appeal

By Scott E. Atwood, Atlanta

S. ATWOOD

First DCA

Employment Relationships

Bolanos v. Workforce Alliance, 2009 Fla. App. LEXIS 15999 (1st DCA Oct. 27, 2009).

NOTICE: NOT FINAL UNTIL DISPOSITION OF TIMELY FILED MOTION FOR REHEARING.

The claimant called a non-profit job assistance center, was referred to an individual wanting a tree trimmer and was injured on the job later that same day. The claimant conceded during his workers' compensation hearing that he did not have a traditional employer/employee relationship with the job assistance center. Rather, the employee argued that the job center was a "similar agent" under Florida's workers' compensation statute, which defines "employer" to include "employment agencies, employee leasing companies, and similar agents who provide employees to other persons." The First DCA affirmed the dismissal of the claimant's petition for benefits, finding that the job assistance center failed to meet the definition of employer as a "similar agent." The court held that the job assistance center did not qualify as it was not paid for its services by employees or employers and did not have any control over the terms and conditions of the ultimate employment relationship.

Workers' Compensation

Schroeder v. Peoplease Corp., 18 So. 3d 1165 (1st DCA Sept. 25, 2009).

Claimant, a truck driver, suffered the onset of heart problems after being directed to move some of the load within his trailer manually. Claimant sought workers' compensation benefits after undergoing surgery. His employers controverted his entire claim and filed a notice of denial stating that claimant's condition was both a pre-existing disease and not causally connected his employment. Claimant then filed a civil action, claiming that the effect of his employers' notice of denial was to deny all compensability of his claim. Since the employers denied that an accident arose during his employment, claimant argued, they were estopped from asserting the exclusivity of the Workers' Compensation Act as a defense to his tort claim. The trial court found that estoppel did not apply because the employers' positions were not inconsistent. The First DCA reversed, finding that there remained disputed issues of material fact as to the meaning of the language employed in the notice of denial.

Second DCA

Breach of Contract / At-Will Employment

Patwary v. Evana Petroleum Corp., 18 So. 3d 1237 (2d DCA Oct. 9, 2009).

Plaintiff was employed by defendant as part of an agreement to purchase a motel that plaintiff's corporation owned. In the agreement, plaintiff would manage the motel in exchange for 50% of the motel's net profits and for 50% of the net proceeds if the parties agreed to sell. Defendant then sold the motel to a third party, fired plaintiff without notice and denied him compensation allegedly due under the agreement. Plaintiffs sued for breach of contract. The trial court granted partial summary judgment to defendants because plaintiff's breach of contract claim was brought under an agreement without definite duration. The Second DCA reversed the trial court, finding that defendant's right to terminate the management agreement, an at-will contract, did not entitle it to also renounce compensation or other benefits that vested while the contract was in force.

Declaratory Judgment Action - Parties

Reinstein v. Pediatric Gastroenterology, Hepatology & Nutrition of Fla., P.A., 2009 Fla. App. LEXIS 19301 (2d DCA Dec. 11, 2009).

NOTICE: NOT FINAL UNTIL DISPOSITION OF TIMELY FILED MOTION FOR REHEARING.

Plaintiff, a doctor, bought into the Practice of a second doctor, McClenathan, and signed an employment agreement and buy-out agreement that included non-competition covenants. Plaintiff, before leaving the Practice, brought suit against the Practice and McClenathan seeking a declaratory judgment that the non-compete covenants were unenforceable. In response, the Practice filed a separate suit seeking damages for plaintiff's alleged violations of the non-competes. McClenathan then argued that because the Practice had filed an action for damages, disjunctive wording in the non-compete that gave "the Practice *or* any Shareholder . . . the right to seek monetary damages" precluded him from bringing such an action. Accordingly, he argued, he had no interest adverse to the plaintiff and should be dismissed from the declaratory judgment action. The trial court agreed,and plaintiff appealed the dismissal, arguing that it could create issues in enforcement of the non-compete if the second doctor was not involved in the litigation. The Second DCA reversed the second doctor's dismissal from the case, finding that McClenathan's right to seek damages under the contract was not precluded simply because the Practice had acted first, and Plaintiff was entitled to try to obtain a declaratory judgment that would be binding on both the Practice and the second doctor.

Public Employment

Raven v. Manatee County Sch. Bd., 2009 Fla. App. LEXIS 18399 (2d Fla. DCA Dec. 2, 2009).

NOTICE: NOT FINAL UNTIL DISPOSITION OF TIMELY FILED MOTION FOR REHEARING.

A teacher was the subject of a criminal investigation for possible contact with a student, but no charges were filed. The School Board proceeded with its own investigation and terminated the teacher when he refused to participate in the school's investigatory interview without counsel present. The teacher's petition for an evidentiary hearing was referred to an administrative law judge (ALJ), who concluded that Florida's Administrative Procedures Act gave the teacher a right to counsel. The School Board rejected the ALJ's interpretation, finding instead that its investigative office did not constitute an "agency in an investigation." The Second DCA agreed with the ALJ's conclusion and found that the school's investigative office, which acted pursuant to detailed instructions in the School Board's Policies and Procedures Manual, had compelled the teacher to come before an "agency in an

investigation" as that phrase appears in the Administrative Procedures Act. The School Board's order was reversed.

Third DCA

Directors and Officers

Banco Indus. De Venez., C.A. v. De Saad, 2009 Fla. App. LEXIS 13761 (3d DCA Sept. 16, 2009).

NOTICE: NOT FINAL UNTIL DISPOSITION OF TIMELY FILED MOTION FOR REHEARING.

As part of a sting operation by U.S. Customs, a corporate officer allegedly deposited drug proceeds into her employer's accounts. In her criminal trial, the officer was charged with money laundering and conspiracy. The jury found her guilty, but the judge nonetheless granted her motion for judgment of acquittal. The government dropped its appeal when the officer pled guilty to a reduced charge. Following her suspension, the officer brought actions in state court against her employer for past wages under her employment contract and indemnification for fees and costs incurred in defending the criminal charges. The trial court granted summary judgment to the officer on both claims. The Third DCA affirmed, finding that under Florida law, the employee had been "successful on the merits" and prosecuted "by reason of the fact" that she was a director. Further, her employer had breached the employment contract when it suspended the officer indefinitely during the criminal proceedings. The employer's personnel manual provided for suspension until the charges were clarified. Once those charges were "clarified," however, the employer had to compensate the officer under her contract or terminate her, which it had failed to do.

Fourth DCA

Drug Testing

Laguerre v. Palm Beach Newspapers, Inc., 20 So. 3d 392 (4th DCA 2009).

The private employer had a drug-testing program and terminated an employee whose random drug test was positive. The employee brought suit against her former employer for wrongful discharge, arguing that the program constituted a *de facto* drug-free work policy as defined by Florida statutes and that her employer had failed to conduct its random testing in accordance with its terms. The trial court, however, found that participation under the statute was voluntary and granted summary judgment to the employer. The Fourth DCA affirmed, finding that because the employer had not adopted its drug-free work policy under the statute, the employee had no cause of action for wrongful discharge for a violation of the statute.

Evidence

Byrd v. BT Foods, Inc., 2009 Fla. App. LEXIS 18431 (4th DCA Dec. 2, 2009).

NOTICE: NOT FINAL UNTIL DISPOSITION OF TIMELY FILED MOTION FOR REHEARING.

Plaintiff filed a claim with the EEOC for disability discrimination. The EEOC investigated her charge and concluded in its Notice of Determination Letter that there was no reasonable cause to believe that a violation occurred. The employee then brought suit against her former employer for claims under the Florida Omnibus AIDS Act, the Florida Civil Rights Act and for intentional infliction of emotional distress. After a jury verdict in favor of defendant, plaintiff argued that the court had abused its discretion by admitting the EEOC's "no reasonable cause" determination letter. The Fourth DCA reversed the jury verdict and ordered a new trial, agreeing with plaintiff that the conclusory nature of the letter left it with little probative value when compared to the prejudicial effect it could have on the jury's ultimate assessment of her case.

Restrictive Covenants

Bauer v. Dilib, Inc., 16 So. 3d 318 (4th DCA Sept. 16, 2009).

The employer's confidentiality agreements with two employees contained a restrictive covenant prohibiting competition for two years. The employer later brought suit against the third-party competitor that had hired away the two former employees. The trial court granted a temporary injunction and ordered that the third-party competitor pay attorneys' fees. The Fourth DCA reversed as to the fees, finding first that attorneys' fees may not be awarded in the absence of a contract or statute providing for recovery of fees and, second, that Florida's statute on agreements in restraint of trade, Fla. Stat. § 542.335, authorizes recovery of fees only against a party who has

continued, next page

signed the underlying restrictive covenants agreement.

Unemployment Benefits

Watson v. Summit Asset Mgmt., LLC, 2009 Fla. App. LEXIS 17238 (4th DCA Nov. 18, 2009)

NOTICE: NOT FINAL UNTIL DISPOSITION OF TIMELY FILED MOTION FOR REHEARIN

Claimant appealed the Unemployment Appeals Commission's findings that he had been disqualified for benefits due to his discharge for misconduct connected with his failure to call in when absent, as required by the employer's written policies. The Fourth DCA reversed the Commission's findings, holding that claimant's failure to notify his employer during his absence was mere "poor judgment" that did not rise to the level of misconduct. The court's holding was based on the facts that claimant did not have a phone, that his girlfriend and his neighbor who had phones were both away, that he had emphysema and so could not travel well, and that he called the employer when he was able to use a phone after he went to the VA hospital to get treatment for his illness.

Fifth DCA

Workers' Compensation/Mediation - Election of Remedies

Petro Stopping Ctrs., L.P. v. Gall, 2009 Fla. App. LEXIS 19296 (5th DCA Dec. 11, 2009).

Plaintiff employee was injured while operating her employer's equipment which she alleged had become inherently dangerous from having its safety guard removed. During plaintiff's ensuing tort lawsuit, the employer claimed that it had entered into a mediated settlement agreement with plaintiff regarding her workers' compensation claim. The trial court held that a mediated settlement agreement was not a conclusion on the merits and therefore could not be the basis of an election of remedies. The Fifth DCA reversed the trial court, finding that the settlement agreement had established plaintiff as permanently and totally disabled, that plaintiff was entitled to receive benefits flowing from the settlement, and that plaintiff had therefore elected her remedy.

* * *

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Federal Case Notes

By Cathleen Scott and Michele Bachoon, Jupiter

ELEVENTH CIRCUIT

C. SCOTT

42 U.S.C. §1981 Employment Discrimination - Pretext; Similarly Situated Comparators

Jackson v. Winn Dixie, Inc., 2009 WL 3792361 (11th Cir. Nov. 13, 2009).

The Eleventh Circuit held that plaintiff's failure to follow procedures was a legitimate, non-discriminatory reason for his job transfer, which would reasonably motivate an employer to transfer him to a position in which he did not exercise monetary oversight. Defendant's decision not to transfer two white employees was not evidence of disparate treatment because their misconduct was appreciably different from plaintiff's. Therefore, defendant's decision not to transfer them did not establish pretext.

Title VII of the Civil Rights Act – Equal Pay; Discrimination; Retaliation

Hester v. North Alabama Ctr. for Educ. Excellence, 2009 WL 3824779 (11th Cir. Nov. 17, 2009).

Plaintiff alleged that she was paid less than male employees engaged in substantially equal work and that she was retaliated against. On appeal plaintiff argued that the lower court erred in finding that her wage discrimination claim was untimely under the Supreme Court's decision in *Ledbetter v. Goodyear Tire and Rubber,* 550 U.S. 618 (2007). Second, plaintiff argued that the district court erred when it granted defendant's motion for summary judgment on her Equal Pay Act claim based on a finding that the pay differential was explained by a factor other than sex, specifically, relative experience levels. Finally, plaintiff argued that the district court erred when it determined she could not establish a *prima facie* case of retaliation under 42 U.S.C. § 2000e-3(a).

The court agreed with plaintiff's arguments, vacated the district court's judgment and remanded for further proceedings. The court held that because the defendant continued to pay plaintiff under the same compensation scheme through the time she filed her EEOC charge, plaintiff's claim was not untimely. The court also held that plaintiff's retaliation claim required reconsideration in light of the more relaxed standard that a plaintiff need show only that the employer's actions were "harmful to the point that they could well dissuade a reasonable worker from making or supporting a charge of discrimination."

MIDDLE DISTRICT OF FLORIDA

FLSA, Portal-To-Portal Act – Overtime

Knight v. Allstar Bldg. Material, Inc., 2009 WL 3837870 (M.D. Fla. Nov. 17, 2009); *Weaver v. Allstar Bldg. Material, Inc.*, 2009 WL 4041907 (M.D. Fla. Nov. 20, 2009).

Plaintiffs worked for a building materials company. They reported each workday to the company yard at which time they occasionally loaded materials or tools onto trucks which were then driven to a job site, with plaintiffs riding along in the trucks. Plaintiffs alleged that defendant failed to pay them overtime for the time it took to ride to job sites, in violation of the FLSA.

Defendants moved for summary judgment, arguing that the hours at issue are not work time under the Portal-to-Portal Act, and that defendant therefore was not liable for wages for that time. Defendant also argued that riding in the company vehicle before work was voluntary and that any work conducted before the truck left the yard for its destination was *de minimis* because most tools and supplies were delivered by large trucks to the job sites. The court

agreed that the time was not compensable work time and granted defendant summary judgment.

Plaintiff Knight further claimed that summary judgment in favor of defendant should not be granted because the defendant could not produce all of his time sheets. The court found the missing time sheets were irrelevant because plaintiff did not base the hours which he claimed he worked on the timesheets, and in fact stated in his deposition that the time sheets probably would not help him remember whether he always began work at 5:30 a.m. and finished at 5:30 p.m.

FMLA – Summary Judgment

Ayers v. Sembler Co., 2009 WL 3818449 (M.D. Fla. Nov. 13, 2009).

Plaintiff requested a four-week FMLA leave to visit her ailing father in the Philippines. Defendant provisionally approved the leave; however, the approval was based on an incomplete certification form which did not reveal whether her father was able to work and a "Certificate of Healthcare Provider under the FMLA" on which plaintiff's father's doctor stated that he did not know if the father was able to perform work. Upon plaintiff's return to work, a meeting was held at which defendant learned that plaintiff's father was able to work. Defendant notified plaintiff that her leave did not qualify under the FMLA and terminated her employment, citing dishonesty.

Both parties moved for summary judgment. The court denied both motions, holding that there were material issues of fact concerning whether plaintiff's father's condition qualified as a "serious health condition," and concerning whether plaintiff was discharged for dishonesty or for reasons related to her leave of absence.

SOUTHERN DISTRICT OF FLORIDA

FLSA - Tips; Credit Card Fees; Retaliation

Ash v. Sambodromo, LLC., 2009 WL 3856367 (S.D. Fla. Nov. 17, 2009).

Plaintiff worked as a hostess and restaurant server. She alleged numerous violations of the FLSA including that defendant unlawfully charged her a fee for converting credit card tips into cash. While charging such a fee is not always unlawful, plaintiff claimed that because the defendant gets reimbursed for credit card transaction fees, it was profiting from plaintiff's tips in violation of the FLSA. Plaintiff also alleged that she was terminated after she complained about unfair tip splitting.

The court refused to grant defendant summary judgment on the credit card transaction issue because there was a genuine issue of material fact as to whether the defendant was enriched by charging its employees a percentage for liquidating charged tips. However, the court entered summary judgment on the retaliation claim because plaintiff complained about the unfair tip splitting more than three years before she was terminated, and because plaintiff failed to show that the reason defendant proffered for her termination was pretextual.

Retaliation – Knowledge of Protected Activity; Delayed Promotion; Temporal Proximity

Renta v. Cigna Dental Health, Inc., 2009 WL 3618246 (S.D. Fla. Oct. 29, 2009).

Plaintiff alleged that when she was hired she was told to expect a promotion within a year. Plaintiff alleged that after she was interviewed by the EEOC during its investigation of a charge made by another employee, she was denied promotion and defendant's behavior towards her changed. Plaintiff also contended that other, less qualified co-workers were promoted ahead of her. She filed suit alleging retaliation in violation of Title VII and the FCRA.

Defendant moved for summary judgment, and the court denied the motion. The court rejected defendant's argument that because defendant did not have actual knowledge of the substance of plaintiff's statement, plaintiff had not engaged in protected activity. The court found that there is no requirement of actual knowledge and that the issue was more properly considered when determining whether there was sufficient evidence of a nexus between protected activity and adverse action. The court rejected defendant's argument that a mere delay in consideration for promotion cannot constitute an adverse employment action, finding that such a delay could dissuade a reasonable employee from participating in an EEOC proceeding. Defendant also argued that plaintiff could not establish a nexus between her protected activity and the alleged delayed promotion, because she could not identify a specific date when she would have been promoted in the absence of delay. The court rejected this argument based on evidence of comments concerning plaintiff's progress and concerning the dates when others were promoted, finding that evidence sufficient to permit an inference that plaintiff would have been promoted on a date in close temporal proximity to her protected activity.

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Michelle Bachoon *is an associate with Cathleen Scott, P.A.*

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The Section needs articles for *the Checkoff* and The Florida Bar *Journal*. If you are interested in submitting an article for *the Checkoff,* contact Shane Muñoz (813/318-5728) (*munozs@gtlaw.com*). If you are interested in submitting an article for The Florida Bar *Journal,* contact Frank Brown (813/273-4381) (*feb@macfar.com*) to confirm that your topic is available.

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generally unenforceable,[3] Florida statutes carve out exceptions for certain restraints of trade, including certain agreements between employers and employees.[4] Any attorney drafting or analyzing a restrictive covenant should begin by reviewing Fla. Stat. ch. 542.

Although by no means an exhaustive list, the following are various components of enforceable restrictive covenants:

- The restrictions must be reasonable in time, area, and line of business;
- The agreement must be in writing and signed by the person against whom enforcement is sought;
- The restrictions must be supported by one or more legitimate business interests (legitimate business interests include, but are not limited to, the following: trade secrets; other valuable confidential business or professional information; certain relationships with current or potential customers, patients or clients; specialized training; and goodwill associated with an ongoing business or professional practice, by way of trade name, trademark, service mark or trade dress, a specific geographic location, or a specific marketing or trade area); and
- The contractually specified restraint must be reasonably necessary to protect the legitimate business interest or interests justifying the restriction (once this is established, the individual opposing the restraint carries the burden to prove that the restraint is not reasonable).[5]

The statute expressly states that courts "shall not" consider the economic or other hardships that may result if a restrictive covenants agreement is enforced against an individual.[6] However, courts do consider other defenses including: 1) whether the entity seeking enforcement is still in the same line of business; 2) legal and equitable defenses, and 3) the "effect of enforcement upon the public health, safety, and welfare."[7]

The Eleventh Circuit's Decision in *Proudfoot*

In *Proudfoot* the defendant, Derrick Gordon, signed a restrictive covenants agreement in connection with his work for the plaintiff, Proudfoot Consulting Company (Proudfoot). "The Agreement prevent[ed] Gordon, for six months after his employment with Proudfoot end[ed], from working for a direct competitor or client of Proudfoot, contacting Proudfoot's clients and soliciting Proudfoot's employees. The Agreement also bar[red] Gordon from using or disclosing Proudfoot's confidential information and from retaining Proudfoot materials after his employment end[ed]."[8] The agreement did not define the geographical scope of the restrictions. Gordon left Proudfoot in June 2006 to work for a direct competitor.[9] The competitor then landed a substantial project in Canada for a client of Proudfoot. Gordon both solicited the client and worked on the project on behalf of his new employer. Proudfoot then brought suit for injunctive relief and damages.

Following a bench trial, the district court found that all of the restrictions were enforceable under Florida law and entered an injunction preventing Gordon from working for any direct competitor, soliciting Proudfoot's clients and employees, and using or disclosing confidential information.

As recounted by the Eleventh Circuit:

> Since the district court's decision was handed down over a year-and-a-half after Gordon began working at [the competitor], in order to grant this injunctive relief, the district court had to rely on a tolling provision in the [a]greement, which provide[d] that the six-month restrictive period [wa]s to be tolled during any period where Gordon [wa]s in breach of the non-compete and non-solicitation covenants. The district court found that Gordon's continuous work for [the competitor], which breached the [a]greement's bar against employment with a direct competitor, justified tolling the six-month restrictive period.[10]

The district court also awarded Proudfoot attorney's fees and $1,659,000 in damages.[11]

On appeal, the Eleventh Circuit stated that it had "doubts about some of the district court's factual findings and legal conclusions . . . ."[12] For example, even though training provided to Gordon "was geared to Proudfoot's own methodologies, practices and procedures," the court doubted that it was sufficiently specialized to justify the restrictions.[13] While the court agreed that restricting Gordon from contacting Proudfoot clients was necessary to prevent him from exploiting client relationships, it "[did] not see why the broad competitor non-compete covenant, which bars Gordon from working for a competitor *irrespective of which clients he is serving*, would be reasonably necessary to protect Proudfoot's interest in the relationships that Gordon developed with its clients."[14] (emphasis added) Regarding confidential information, the court stated, in *dicta*, that "a broad prohibition against work for a competitor may not be reasonably necessary to protect client-specific confidential information known to an employee if restrictions that prevent the employee from contacting, or working for, those clients would be sufficient to protect that information."[15]

However, Gordon had not contested evidence that he had access not only to information about clients but also to confidential information about Proudfoot's pricing, methodology, products, offerings and tools.[16] The Eleventh Circuit rejected Gordon's argument that Proudfoot's interest in this confidential information was insufficient to justify enforcement in the absence of evidence that Gordon had used the information on behalf of the competitor.[17] Instead, the court affirmed the district court's finding that enforcement was proper because "Gordon's employment with [the competitor] endangered the [confidential] information . . . ."[18] The court also affirmed that the breach could be used to toll the six-month restrictive period.[19]

The district court had awarded damages in "'an amount equal to the profits Gordon helped to generate for'" the competitor.[20] The Eleventh Circuit pointed out that damages for breach of a restrictive covenant are contract damages, and that Proudfoot therefore had the burden to prove that it sustained a loss and its loss was a direct result of Gordon's breach.[21] Accordingly, the district court had erred by calculating damages based on the competitor's gain, rather than Proudfoot's loss. Because Proudfoot had not presented evidence sufficient to establish that absent

Gordon's breach it would have obtained the project at issue, the Eleventh Circuit reversed the damage award.[22]

Practitioners should note that the outcome might have been different if Proudfoot had sought relief under Florida's Trade Secrets Act, which expressly authorizes an award of damages including "both the actual loss caused by misappropriation [of trade secrets] and the unjust enrichment caused by misappropriation . . . ,"[23] or for unjust enrichment or restitution.[24]

In addition to providing a detailed analysis of factual issues, the *Proudfoot* decision also includes a careful analysis of Florida case law. Its analysis will likely prove useful for practitioners both when drafting restrictive covenant agreements and in litigation.

Terry J. Harmon *practices in the areas of special education litigation, school law, labor and employment law, administrative law, commercial litigation, and property taxation issues. Mr. Harmon was selected for inclusion on Super Lawyers' Florida Rising Stars list for 2009. He received his B.S. in Communication Studies, cum laude, from the Florida State University and his J.D., cum laude, from Stetson University College of Law. While in law school, Mr. Harmon served as an Acting Assistant District Attorney General in Knoxville, Tennessee, and as a Certified Legal Intern with the Pinellas County Public Defender's Office. He was also the Magister of Phi Delta Phi's Cardozo Inn Honors chapter and the recipient of the William F. Blews Pro Bono Service Award.*

Endnotes:

1 576 F.3d 1223 (11th Cir. 2009).
2 *See* FLA.STAT. ch. 542.
3 FLA.STAT. § 542.18.
4 FLA.STAT. § 542.335. However, for agreements entered into before July 1, 1996, FLA.STAT. § 542.33 applies. *See* FLA.STAT. § 542.335(3).
5 FLA.STAT. § 542.335.
6 FLA.STAT. § 542.335(1)(g)(1).
7 FLA.STAT. § 542.335(1)(g)(2) and (3).
8 *Proudfoot*, 576 F.3d at 1226.
9 *Id.*
10 *Id.*
11 *Id.*
12 *Id.*
13 *Id.* at 1233 n.9.
14 *Id.*
15 *Id.*
16 *Id.* at 1234-35.
17 *Id.* at 1234.
18 *Id.* at 1235.
19 *Id.* at 1232.
20 *Id.* at 1242.
21 *Id.* at 1243
22 *Id.* at 1243-44
23 FLA.STAT. § 688.004(1).
24 *Proudfoot*, 576 F.3d at 1245 n.27.

Scope of Family and Medical Leave Act Expanded by the National Defense Authorization Act for Fiscal Year 2010

By Terry J. Harmon, Tallahassee

The National Defense Authorization Act for Fiscal Year 2010 (H.R. 2647), signed by President Barack Obama on October 28, 2009, expands the scope of the Family and Medical Leave Act (FMLA) for military families by providing additional exigency and caregiver leave benefits. Family members of active duty service personnel are now permitted to take up to 12 weeks of exigency leave. Prior to the signing of H.R. 2647, exigency leave was available only to employees whose military family members were in the Reserves or National Guard. Additionally, under H.R. 2647, family members caring for veterans undergoing medical treatment, recuperation or therapy for an injury or illness sustained in the line of duty (or a preexisting injury aggravated in the line of duty) during the five years preceding the original date of medical treatment, recuperation or therapy are now permitted to take up to 26 weeks of unpaid caregiver leave. The FMLA previously allowed for caregiver leave only for family of active duty service members and did not provide leave to care for preexisting injuries aggravated in the line of duty. The provisions of the Act expanding the FMLA became effective upon the President's signature.

SEVERE OR PERVASIVE, *from page 1*

the *nature* and the *frequency* of the alleged conduct, the court seems to conflate the concepts of severity and pervasiveness into a single inquiry. Such an approach would be inconsistent with *Harris v. Forklift Systems, Inc.,* which held that sexual harassment exists where the conduct is either severe (qualitative) or pervasive (quantitative).[3]

Ultimately, the end result of the revised opinion is essentially the same as that of the original opinion. The conduct alleged, when simultaneously passed through the "severity" and "pervasiveness" filters, was found to be insufficient. The legal definition of actionable sexual harassment in the Eleventh Circuit, however, does not appear to have been significantly clarified.

Jill S. Schwartz *is the managing partner of Jill S. Schwartz & Associates, P.A., an AV rated firm representing both employees and employers in federal and state courts. A Phi Beta Kappa graduate of Rutgers University and the University of Maryland School of Law, Ms. Schwartz is a Florida Supreme Court Certified Circuit Mediator and a Certified Arbitrator. She is the Chair-Elect for the Executive Council of the Florida Bar Labor and Employment Law Section, immediate past President of the Federal Bar Association Orlando Chapter and former Chair of the Judicial Nominating Commission for the Fifth District Court of Appeals. Ms. Schwartz is listed in Martindale-Hubbell's Register of Preeminent Lawyers as well as Florida Trend's Legal Elite for 2004-2009. She was inducted as a Fellow of The College of Labor and Employment Lawyers, Inc., in 2005, becoming the first woman in Florida to be inducted into The College.*

Endnotes:

1 2009 U.S. App. LEXIS 26416 (11th Cir. 2009).
2 Id.
3 510 U.S. 17 (1993).

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Thursday, February 25, 2010

8:00 a.m. – 8:20 a.m. **Late Registration**

8:20 a.m. – 8:30 a.m.
Opening Remarks
Sherril M. Colombo, Cozen O'Connor, Miami – Legal Education Director, Labor & Employment Law Section*
William D. Mitchell, Mitchell Law Group, Tampa – Program Co-Chair*
Commissioner Stephanie W. Ray, Public Employees Relations Commission, Tallahassee – Program Co-Chair

8:30 a.m. – 9:20 a.m.
Family & Medical Leave Act
David E. Block, Jackson Lewis LLP, Miami

9:20 a.m. – 10:20 a.m.
Constitutional Employment Claims
Robert J. Sniffen, Sniffen & Spellman, PA, Tallahassee*

10:20 a.m. – 10:50 a.m.
Worker Adjustment and Retraining Notification Act (WARN)
Kevin D. Johnson, Thompson Sizemore Gonzalez & Hearing, PA, Tampa*

10:50 a.m. – 11:00 a.m. **Break**

11:00 a.m. – 12:00 noon
Employee Retirement Income Security Act of 1974/COBRA
William D. Mitchell, Mitchell Law Group, Tampa*

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

1:00 p.m. – 2:30 p.m.
National Labor Relations Act
Susan L. Dolin, Susan L. Dolin, PA, Pembroke Pines*

2:30 p.m. – 4:00 p.m.
Public Employees Relations Act
Deborah C. Brown, Stetson University College of Law, Gulfport*

4:00 p.m. – 4:10 p.m. **Break**

4:10 p.m. – 5:00 p.m.
Common Law Employment Claims
Jill S. Schwartz, Jill S. Schwartz & Associates, PA, 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 fee)

Friday, February 26, 2010

8:25 a.m. – 8:30 a.m.
Opening Remarks
William D. Mitchell, Mitchell Law Group, Tampa – Program Co-Chair*
Commissioner Stephanie W. Ray, PERC, Tallahassee – Program Co-Chair

8:30 a.m. – 9:00 a.m.
Polygraph Protection Act/Fair Credit Reporting Act
Archibald J. Thomas, III, Thomas & Klink, Jacksonville*

9:00 a.m. – 9:30 a.m.
Unemployment Appeals
Hon. Alan Orantes Forst, Unemployment Appeals Commission, Florida

9:30 a.m. – 10:30 a.m.
Whistleblower Statutes and Workers' Compensation Retaliation Claims
Shane T. Munoz, Greenberg Traurig, PA, Tampa*

10:30 a.m. – 10:40 a.m. **Break**

10:40 a.m. – 11:15 a.m.
Statutory and Common Law Protection of Business Interests
Karen M. Buesing, Akerman & Senterfitt, Tampa*

11:15 a.m. – 12:00 noon
OSHA
Edmund J. McKenna, Ford & Harrison, Tampa*

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

1:00 p.m. – 2:00 p.m.
EEO Substantive Law
Mary Ruth Houston, Shutts & Bowen LLP, Orlando

2:00 p.m. – 3:00 p.m.
EEO Laws – Administrative Procedures
F. Damon Kitchen, Constangy Brooks & Smith LLC, Jacksonville*

3:00 p.m. – 3:30 p.m.
Drug Testing Statutes
Paul A. Donnelly, Donnelly & Gross, PA, Gainesville

3:30 p.m. – 3:40 p.m. **Break**

3:40 p.m. – 4:40 p.m.
Fair Labor Standards Act
David H. Spalter, Jill S. Schwartz & Associates, PA, Winter Park*

4:40 p.m. – 5:15 p.m.
USERRA
Kathryn S. Piscitelli, Harris & Helwig, PA, Lakeland*

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- ED = Elder Law
- EP = Wills, Trusts, & Estates
- FL = Marital & Family Law
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- IP = Intellectual Property
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- LE = Labor & Employment
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The maximum amount of credit hours for each course is indicated under the Credits/General column. To be in compliance, you must have completed the Total Minimum Requirement of thirty (30) General hours, including five (5) hours of Ethics, Professionalism, Substance Abuse or Mental Illness Awareness (any combination) during each CLER cycle. Hours can be reported/viewed on The Florida Bar web site: www.floridabar.org. Every member's Florida Bar News label reflects a CLER reporting date. To avoid suspension, return your completed CLER affidavit prior to that date (Rules Regulating The Florida Bar 6-10.5).

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0690	9th Annual Labor & Employment Law Certification Review **CD & DVD**	**17.5**	**0**	ED = 1.0 LE = 17.5 WC = 1.0	02/26/2009-08/26/2010	**S = $420.00 N = $445.00**	**S = $420.00 N = $445.00**
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