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## SCOTUS Resolves Circuit Split on Administrative Exhaustion as Jurisdictional Requirement

By Jacqueline Prats, Tampa

On June 3, 2019, the United States Supreme Court unanimously decided in *Fort Bend County, Texas v. Davis*<sup>1</sup> that Title VII's administrative exhaustion requirement is not jurisdictional, resolving a lopsided circuit split on the issue.

Title VII's administrative exhaustion process requires a complainant to timely file a charge of discrimination with the EEOC<sup>2</sup> setting out all information required by the EEOC to conduct its investigation, including the date, place, and circumstances of each instance of alleged unlawful employment practice.<sup>3</sup> Before the

complainant may bring a Title VII claim in court, he or she is required to wait to receive a Notice of Right to Sue from the EEOC.<sup>4</sup> The First, Second, Third, Fifth, Sixth, Seventh, Tenth, and D.C. Circuit Courts agreed this administrative exhaustion requirement is a mandatory pre-condition before a plaintiff can bring a Title VII suit in court but not a jurisdictional issue affecting a court's authority to hear a Title VII case. Before the Supreme Court's *Fort Bend* decision, however, the Fourth, Ninth, and Eleventh Circuits all treated certain aspects of this requirement as jurisdictional prerequisites to

See "SCOTUS Resolves Circuit Split," page 16

## The Path to Class Action Arbitration Hits a Roadblock

By Alexander T. Harne, Miami

In a contentious 5-to-4 decision delivered by Chief Justice Roberts, the Supreme Court of the United States (SCOTUS) declared that, absent express, unequivocal contractual agreement to engage in class-wide arbitration, as governed by the Federal Arbitration Act (FAA), federal courts may not compel such arbitration.<sup>1</sup> Despite widespread criticism of the *Lamps Plus, Inc. v. Varela* decision, including via the strong dissenting opinion of Justice Kagan,<sup>2</sup> this ruling should come as no surprise. *Lamps Plus* is just the latest in a line of recent SCOTUS decisions prioritizing individual arbitration at the federal level.

### How Did We Get Here?

Two SCOTUS decisions set the stage for the ruling in *Lamps Plus*.<sup>3</sup> *Stolt-Nielsen v. Animalfeeds International Corporation*, decided on April 27, 2010, was the first decision to substantially limit the availability of class arbitration to employees.<sup>4</sup> In reversing the Second Circuit Court of Appeals, SCOTUS in *Stolt-Nielsen* found that imposing class arbitration on parties who have not agreed to authorize class arbitration is inconsistent with the FAA.<sup>5</sup> SCOTUS underscored that the FAA adopts the

See "Class Action Arbitration," page 19

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For more information,  
see page 3.

# CHAIR'S MESSAGE



David W. Adams



First, I would like to congratulate Cathleen Scott and her leadership team for concluding an excellent year for our Section. Cathleen accomplished a number of impressive objectives while, at the same time, being a good steward of the Section's funds.

As we move into the next fiscal year, the Section's primary goals will continue

to be the delivery of premiere CLE and educational programs under the leadership of Sacha Dyson, our new CLE Director. Sacha promises a full lineup of one-hour lunchtime webinars that are convenient for our members. The Section is also finalizing the 45<sup>th</sup> Annual Public Employment Labor Relations Forum, which will be held at the Rosen Plaza Hotel in Orlando on October 17-18, 2019. See page 3 for the course registration link and hotel reservation information. This Section will also host the 20<sup>th</sup> Labor & Employment Law Annual Update and Certification Review in February as part of The Florida Bar Winter Meeting at the Hyatt Regency Orlando. Please stay tuned for details on this popular program.

After a ten-year hiatus, this Section is going to hold its Advanced Labor Topics seminar in Washington, D.C. sometime in April 2020. Please mark your calendars.

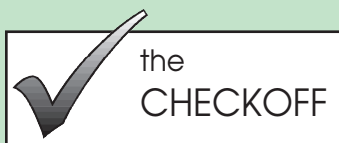
Rest assured that this will be a family-friendly event with world-class speakers from our nation's capital.

Of more immediate note, we are planning a general meeting of the Executive Council at 5:00 p.m. on August 29, 2019, at the law offices of GrayRobinson at 301 E. Pine Street, Suite 1400, Orlando, Florida 32801. The purpose of the August meeting is to plan the events for the year, evaluate our committee structure, and discuss a budget. If you have any interest in serving on one of the committees, or simply want to learn more about this Section, you are cordially invited to attend the meeting. If you would like to serve on a committee, please fill out the Committee Preference Form on page 25, and return it to our Section Administrator, Angie Froelich.

Finally, the Section's meeting at the Florida Bar Annual Convention in June was a success. The Section awarded a number of scholarships to labor and employment students from law schools throughout the state. Thanks go out to Christina Velez for her committee's efforts in evaluating the section's scholarship awards. Sadly, this year we had to say goodbye to a number of our section's greatest members, many of whom were inducted into the Section Hall of Fame (see pages 11 and 12).

On behalf of the Executive Council, we thank you for being a part of the Labor & Employment Law Section. We look forward to serving you in the coming year.

David Adams, Chair



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The Florida Bar Labor and Employment Law Section.

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# 45th Public Employment Labor Relations Forum

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This is the 45th year of the jointly sponsored Public Employment Labor Relations Forum. Topics include Federal 11th Circuit and Florida Public Sector Update; State and Federal Causes of Action for Retaliatory Conduct in Florida Public Employment; Special Considerations under FLSA for Public Employers; EEOC/FCHR Update; PERC: Year in Review; Is Florida's Workplace Still Drug-Free? Discussion of the Impact of Medical Marijuana on Drug-Free Workplace Policies; FRS & Pension Developments; Effective and Ethical Uses of Social Media in Litigation; First Amendment in Public Employment; Best Practices to Avoid Discrimination, Harassment, and Retaliation Claims. See page 27 for Course Agenda.

**HOTEL INFORMATION:** A block of rooms has been reserved at the **Rosen Plaza**, 9700 International Drive, Orlando, FL 32819 at the rate of \$149. To make your reservation, please call (800) 627-8258 or (407) 996-9700 and request "The Florida Bar PERLF and Executive Council Meeting" group. **Reservations must be made by Thursday, September 26, 2019, to ensure group rate and availability.** There is limited availability so book your room today.

*\* There are two Rosen hotels on International Drive in close proximity. One is the Rosen Plaza, and the other is the Rosen Centre. This year, we are not meeting at the Rosen Shingle Creek on Universal Drive.*



# It's High Time We Talk About Medical Marijuana Use by Employees

By Suhail Morales, Coral Gables

In June 2014, Florida Governor Rick Scott signed into law the Compassionate Medical Cannabis Act of 2014, also known as the "Charlotte's Web" bill.<sup>1</sup> The bill created Section 381.986, Florida Statutes, which legalized the use of low-THC marijuana for patients suffering from cancer or certain other conditions that cause chronic seizures or severe and persistent muscle spasms.

Then, in November 2016, Florida voters approved Constitutional Amendment 2, which created a constitutional right for individuals to use medical marijuana if they have certain "debilitating medical conditions," as determined by a licensed Florida physician. The amendment states, however, in part, that "[n]othing in this section shall require any accommodation of any on-site medical use of marijuana in any . . . place of . . . employment."<sup>2</sup>

In June 2017, Governor Scott signed into law Senate Bill 8-A, which implemented Amendment 2 and modified Section 381.986.<sup>3</sup> Most importantly, the bill expanded the kinds of "debilitating medical conditions" for which medical marijuana may be used.<sup>4</sup> The bill also added a provision to Section 381.986 that offered limited guidance for employers on the issue of medical marijuana in the workplace.<sup>5</sup> Specifically, the new provision states:

This section does not limit the ability of an employer to establish, continue, or enforce a drug-free workplace program or policy. This section does not require an employer to accommodate the medical use of marijuana in any workplace or any employee working while under the influence of marijuana. This section does not create a cause of action against an employer for wrongful discharge or discrimination. Marijuana, as defined in this section, is not reimbursable under chapter 440 [Workers' Compensation Law].<sup>6</sup>



On its face, these new provisions are fairly clear and set out some employer rights; however, they created additional uncertainty. For example, while Section 381.986 expressly precludes a private cause of action under the statute, one challenge an employer may face is how to handle an employee's medical marijuana use in light of the employer's obligations under the Americans with Disabilities Act of 1990, as amended (ADA).

Under the ADA, an employer generally must provide a "reasonable accommodation" to a "qualified individual" with a disability.<sup>7</sup> However, with regard to the use of medical marijuana in the workplace, Section 381.986 explicitly does not impose a legal duty on employers to grant any such accommodation. Moreover, the ADA expressly excludes protection for any employee or job applicant "who is currently engaging in the illegal use of drugs, when the [employer] acts on the basis of such use."<sup>8</sup> Since marijuana is illegal under federal law, employees who use medical marijuana would not be considered "qualified individuals with a disability" under the ADA.<sup>9</sup> Further, the ADA states that an employer may prohibit the illegal use of drugs in the workplace.<sup>10</sup>

Since medical marijuana issues are relatively new to Florida, we look to other states with similar constitutional provisions and laws for guidance. In

other states, courts have consistently upheld an employer's right to enforce zero-tolerance, drug-free workplace policies against applicants and employees and have ruled that employers have no obligation to accommodate medical marijuana at the workplace.<sup>11</sup>

Even though courts have routinely found that employers are not required to permit an employee to medically use marijuana at the workplace, the issue of whether an employer is required to provide an accommodation for medical marijuana use *outside* of the workplace is less clear. Although Section 381.986 is silent as to this issue, courts have recognized off-site medical use of marijuana as a permissible accommodation. In *Barbuto v. Advantage Sales and Marketing, LLC*,<sup>12</sup> for example, the Supreme Judicial Court of Massachusetts noted that the language in the state statute that prohibited qualified patients from being denied "any right or privilege" on the basis of marijuana use but prohibited the use while on-site, implied that "off-site medical use of marijuana might be a permissible accommodation."<sup>13</sup> Still, a number of courts have noted that "a state law decriminalizing marijuana use does not create an affirmative requirement for employers to accommodate medical marijuana use."<sup>14</sup> For example, in *Roe v. TeleTech Customer Care Management (Colorado), LLC*,<sup>15</sup> the Washington Supreme Court found that the "statute's explicit statement against an obligation to accommodate on-site use [did] not require reading into [the law] an implicit obligation to accommodate off-site medical marijuana use."<sup>16</sup> Similarly, in *Coats v. Dish Network, LLC*,<sup>17</sup> the Colorado Supreme Court held that the termination of an employee for off-duty medical marijuana use was lawful.<sup>18</sup>

Since the Washington statute at issue in *Roe* has language comparable



to Section 381.986, Florida Statutes, Florida courts should similarly decline to find that an employer must accommodate medical marijuana use outside of the workplace, especially given the additional express language in Section 381.986 stating that the “section does not create a cause of action against an employer for wrongful discharge or discrimination.”<sup>19</sup>

Further, courts seem to support employers’ abilities to enforce their drug-free policies and have found that employers do not have to waive their drug-testing requirements as an accommodation for an employee who used medical marijuana.<sup>20</sup> Therefore, if an employer disciplines, terminates, or refuses to hire an employee because of medical marijuana use, employers should document that the decision was based solely on the use of medical marijuana and not on any other criteria. As a result, any ADA discrimination or failure-to-accommodate claims ostensibly should be dismissed.

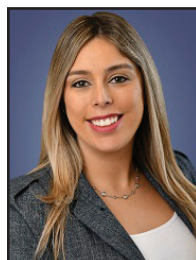
Similarly, employers must keep in mind that, while the use of medical marijuana is not protected under the ADA, the underlying medical condition may still trigger obligations under the ADA and the Florida Civil Rights Act of 1992 (FCRA),<sup>21</sup> including an obligation to engage in the interactive process with the employee and explore accommodations.<sup>22</sup>

Employers need not allow any sort of medical marijuana use as a reasonable accommodation, and the employer has the right to determine if an accommodation other than medical marijuana use could facilitate the performance of essential functions. Employers who choose to continue to maintain zero-tolerance drug policies should enforce them consistently and communicate to their employees that any marijuana use can subject them to discipline, including termination. If, however, an employer decides to grant an accommodation for the use of medical marijuana outside of the workplace, the employer should also ensure that the employee has the appropriate medical certification and will refrain from workplace use. Additionally, the employee’s underlying condition may be considered a “serious health condition” under the Family

Medical Leave Act of 1993 (FMLA), which may allow the employee to take protected leave from work.

Finally, employers should consider safety-related issues and laws. For example, the Occupational Safety and Health Administration Act (OSHA) requires that employers maintain a workplace “free from recognized hazards.”<sup>23</sup> This is especially important given that workers’ compensation laws and some employer policies require drug testing after a work-related accident. The Department of Transportation (DOT) and other federal agencies also explicitly prohibit any marijuana use by safety-sensitive employees.<sup>24</sup> Additionally, the Drug-Free Workplace Act, which applies to some federal contractors, requires good-faith efforts to maintain a drug-free workplace.

As detailed above, Section 381.986 provided some answers for employers but created additional questions and concerns. While the vast majority of decisions from other jurisdictions seem favorable to employers, some cases have protected employee rights and safeguarded against disciplinary action for medical marijuana use. Given the lack of Florida precedent, employers should periodically review their policies to ensure compliance with the law and to consider safety concerns in light of emerging legal trends in the area of medical marijuana in the workplace.



S. MORALES

**Suhail Morales is a shareholder in the Miami office of Allen Norton & Blue and devotes her practice to labor and employment law.**

## Endnotes

<sup>1</sup> SB 1030 (2014), available at <https://www.flsenate.gov/Session/Bill/2014/1030/BillText/er/PDF>.

<sup>2</sup> Fla. Const. amend. II, Art. X, § 29(C)(6).

<sup>3</sup> SB 8-A (2017), available at <https://flsenate.gov/Session/Bill/2017A/8A/BillText/er/PDF>.

<sup>4</sup> In addition to those qualifying medical conditions set forth in the state constitution, the bill added “chronic nonmalignant pain,” which “means pain that is caused by a qualifying medical condition or that originates from a qualifying

medical condition and persists beyond the usual course of the qualifying medical condition,” and added “a terminal condition.” S.B. 8-A.

<sup>5</sup> According to the National Safety Council, marijuana is the most frequently used illicit drug in the United States and the drug most often detected in workplace drug testing. *Marijuana at Work: What Employers Need to Know*, nsc.org, [https://www.nsc.org/membership/training-tools/best-practices/marijuana-at-work?fbclid=IwAR3UGjtzrPEyJTv4u-qlcCzr\\_qqQE8W7YxNEKliHnKgYzbyGcVvdpYeRRaU](https://www.nsc.org/membership/training-tools/best-practices/marijuana-at-work?fbclid=IwAR3UGjtzrPEyJTv4u-qlcCzr_qqQE8W7YxNEKliHnKgYzbyGcVvdpYeRRaU) (last visited June 21, 2019).

<sup>6</sup> Fla. Stat. § 381.986(15) (2019).

<sup>7</sup> See 42 U.S.C. § 1211(9).

<sup>8</sup> See 42 U.S.C. § 12114(a).

<sup>9</sup> The ADA defines “illegal drugs” as those that are illegal under the federal Controlled Substances Act, which includes marijuana as a Schedule I Controlled Substance. See 42 U.S.C. § 12210.

<sup>10</sup> See 42 U.S.C. § 12114(c).

<sup>11</sup> See, e.g., *Washburn v. Columbia Forest Prod., Inc.*, 134 P.3d 161, 167–68 (Or. 2006) (finding that the employer was not required to accommodate employee’s medical marijuana because the state cannot affirmatively require employers to accommodate what federal law prohibits).

<sup>12</sup> 78 N.E.3d 37, 45 (Mass. 2017) (holding that permitting employee’s off-site medical marijuana use for Crohn’s disease may be a reasonable accommodation where the employee’s physician determines that marijuana is the most effective treatment, and alternative medication allowed under the employer’s drug policy would be less effective).

<sup>13</sup> *Id.* at 46 (internal quotations marks omitted).

<sup>14</sup> *Lambdin v. Marriott Resorts Hosp. Corp.*, CIV 16-00004 HG-KJM, 2017 WL 4079718, at \*9–10 (D. Haw. Sept. 14, 2017). See also, e.g., *Garcia v. Tractor Supply Co.*, 154 F. Supp. 3d 1225, 1230 (D.N.M. 2016) (“[T]he fact that the state may exempt medical marijuana users from the reach of the state criminal law does not mean that the state can affirmatively require employers to accommodate what federal law specifically prohibits.” (quotations omitted) (quoting *Washburn*, 134 P.3d 167–68)); see also *Ross v. RagingWire Telecomm., Inc.*, 174 P.3d 200, 202–03 (Cal. 2008) (“Nothing in the text or history of the Compassionate Use Act suggests the voters intended the measure to address the respective rights and duties of employers and employees. Under California law, an employer may require preemployment drug tests and take illegal drug use into consideration in making employment decisions.”).

<sup>15</sup> 257 P.3d 586 (Wash. 2011).

<sup>16</sup> *Id.* at 591.

<sup>17</sup> 350 P.3d 849 (Colo. 2015).

<sup>18</sup> *Id.* at 852–53.

<sup>19</sup> Fla. Stat. § 318.986(15).

<sup>20</sup> See *Cotto v. Ardagh Glass Packing, Inc.*, CV18-1037 (RBK/AMD), 2018 WL 3814278, at \*8 (D.N.J. Aug. 10, 2018) (dismissing plaintiff’s claim for discriminatory discharge and finding that private employer was not required to waive drug tests for users of medical marijuana); see also *Lambdin*, 2017 WL 4079718, at \*9–10 (granting employer’s motion for summary judgment as to plaintiff’s retaliation claims under the

*continued, next page*

ADA where plaintiff was terminated for being under the influence of medical marijuana).

<sup>21</sup> Interestingly, although the FCRA is generally interpreted in the same way as the ADA, the FCRA does not contain a similar exclusion for individuals who use illegal drugs. Therefore, it is unclear how a Florida court would rule on a lawsuit brought pursuant to the FCRA.

<sup>22</sup> See, e.g., *Wild v. Carriage Funeral Holdings, Inc.*, 205 A.3d 1144 (N.J. Super. Ct. App. Div. 2019) (reversing dismissal of discrimination claims where plaintiff alleged employer's upper

management communicated with employee regarding his cancer diagnosis and his need to undergo pain management, including the use of medical marijuana, but employer failed to engage in any meaningful process to discuss his disability and accommodation).

<sup>23</sup> The General Duty Clause, Section 5(a)(1) of OSHA, provides: "Each employer . . . shall furnish to each of [its] employees employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm to [its] employees." 29 U.S.C. § 654(a)(1).

<sup>24</sup> DOT rules state that medical review officers will not verify a drug test as negative based upon information that a physician recommended that the employee use medical marijuana. Under those rules, "[i]t remains unacceptable for any safety-sensitive employee subject to drug testing under the Department of Transportation's drug testing regulations to use marijuana." *DOT Office of Drug and Alcohol Policy and Compliance Notice* (updated Apr. 7, 2016), <https://transit-safety.fta.dot.gov/DrugAndAlcohol/Regulations/Interpretations/RecreationalMarijuana/Default.aspx>.

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## Between the Rock and the Hard Place: The Lessons of *Security Walls, Inc. v. NLRB*

By Leslie W. Langbein, Miami

The Eleventh Circuit Court of Appeals decision in *Security Walls, Inc. v. NLRB*<sup>1</sup> analyzes the National Labor Relations Board's (NLRB) exercise of discretion in denying an employer's request to reopen an unfair labor practice (ULP) hearing. However, it is difficult to remain focused on this narrow issue when the factual scenario presented to the court is worthy of the final exam in a labor law class! The importance of this decision to practitioners is not the standard of appellate review applied by the Eleventh Circuit (undecided), but in the lessons it offers government contractors with unionized workforces regarding the perils of failing to abide their employees' NLRA rights. So, readers, please open your exam booklets, and write an essay on five principles of labor relations that are applicable to the following fact pattern.

On March 1, 2014, after entering into a contract with the Internal Revenue Service (IRS) to provide security services, Security Walls, Inc. (employer), a governmental security contractor, became the successor employer of a unionized workforce.<sup>2</sup> Security Walls decided not to adopt the existing collective bargaining agreement (CBA) but to bargain for a new one.<sup>3</sup> Once Security Walls began to provide services,

it posted a section of its contract with the IRS—known as the Performance Work Statement (PWS)—for its new employees to review.<sup>4</sup>

The PWS stated generally that the employer was responsible for maintaining satisfactory standards of employee competency, conduct, appearance, and integrity, and "shall be responsible for taking disciplinary action."<sup>5</sup> Importantly, the IRS reserved its right to

request the Contractor to immediately remove any employee . . . should it be determined that the employee has been disqualified for either employment suitability, performance suitability, or security reasons, or who is found to be unfit for performing security duties during his/her tour of duty. The Contractor must comply with these requests in a timely manner.<sup>6</sup>

"Neglecting duties" was enumerated in the PWS as one type of conduct infraction that would result in discipline.<sup>7</sup>

The following month, the employer unilaterally adopted a Disciplinary Action/Policy Statement (Policy Statement) that expressly "supersede[d] all other policies concerning this subject."<sup>8</sup> The Policy Statement specified conduct infractions that would result in immediate termination and provided a system of progressive discipline for

other breaches.<sup>9</sup> For first-time offenders, the Policy Statement generally prescribed verbal counseling and a memorandum for placement in the personnel file; second-time offenders would receive a letter of reprimand; third-time offenders would be placed on a two-day suspension; and fourth-time offenders would be terminated.<sup>10</sup> Significantly, for a security officer's first infraction for any conduct that caused a breach of security, the Policy Statement accelerated the discipline for first-time offenders to a two-day suspension and for second-time offenders to termination.<sup>11</sup> In August 2014, the employer and the union tentatively signed off on CBA provisions governing grievance and arbitration procedures, discipline, and discharge but continued their negotiations on other terms and conditions.<sup>12</sup>

On April 15, 2015, a security officer (who was also the union's president) was being relieved of duty by another officer when a visitor slipped by their station without detection.<sup>13</sup> Both officers were placed on suspension while an investigation took place.<sup>14</sup> Four days later, the employee/union president sent an email to his site supervisor stating, "As Local Union President, I have some issues I need[] . . . to address regarding my and [the other officer's] sus-

pension.”<sup>15</sup> The issues listed were that neither officer had received anything in writing explaining the reason for the suspension; neither had been told the duration of the suspension; both were suspended rather than counseled, even though they had clean disciplinary records; and, in any event, the penalty of suspension violated company policy.<sup>16</sup> A third officer was suspended on April 22, 2015, when he, too, failed to stop a visitor from entering the facility.<sup>17</sup>

The following day two events occurred. The union grieved all three suspensions, and the IRS’s contract compliance officer admonished the employer to ensure that “guards are paying greater attention to details.”<sup>18</sup> On April 28, 2015, the site supervisor informed all three officers they were being terminated.<sup>19</sup>

On May 1, 2015, the employer’s attorney notified the union that the site supervisor lacked authority to terminate the security officers and that instead all three had been placed on indefinite suspension pending the final decision of the employer’s chief contract manager.<sup>20</sup> The notification ended with the statement: “This is not an offer to bargain. Nor is it an offer to invoke the grievance procedure contained in the agreements tentatively agreed to in August 2014.”<sup>21</sup> On May 3, 2015, the union emailed the employer’s attorney and demanded that all three officers be reinstated immediately or it would file a charge against the employer.<sup>22</sup> The employer neither responded to the union nor notified the union of a final decision.<sup>23</sup>

On May 14, 2015, the union filed a ULP charge with the NLRB.<sup>24</sup> The employer answered the charge, admitting that its decision not to reinstate the officers was based on the exercise of its own discretion rather than an IRS directive.<sup>25</sup> The matter was set for hearing before an administrative law judge (ALJ). Subsequently, the employer changed its legal position and argued it was compelled by the PWS to terminate the officers.<sup>26</sup>

On January 21, 2016, the ALJ issued a decision finding that the employer committed ULPs when it unilaterally changed the Policy Statement, applied the new standards to the guards, and

failed to bargain with the union over the discipline to be imposed.<sup>27</sup> The ALJ rejected the employer’s argument that it was compelled to follow the PWS because the record showed the IRS had not ordered the officers’ termination, the employer’s answer to the ULP charge admitted its decision was not based on the PWS, and, further, the employer’s adoption of the Policy Statement expressly superseded the PWS and was therefore the document that governed the disciplinary action taken.<sup>28</sup> The ALJ found that, in any event, the Policy Statement did not mandate automatic termination for the officers’ conduct infractions.<sup>29</sup> Finally, the ALJ found that the union president’s first email and the subsequent communications with the union were demands to bargain over the discipline to be imposed.<sup>30</sup>

Following the ALJ’s decision, the employer opened negotiations with the union regarding the officers’ reinstatement.<sup>31</sup> However, two months later the employer moved to reopen the hearing record to add an affidavit by its contract manager and to withdraw the admission in its answer to the ULP charge that it had exercised its own discretion in terminating the officers’ employment.<sup>32</sup> The affidavit averred that the employer recently was noti-

fied by the IRS that it was exercising its right under the PWS to request that the three security officers be removed from performing contract services.<sup>33</sup> The employer argued the IRS’s directive constituted “newly discovered evidence” that established its decision to terminate the officers was justified by the PWS.<sup>34</sup> The ALJ held the affidavit was not newly discovered evidence (because the events had not occurred before the hearing) and denied the employer’s motion to withdraw its admission.<sup>35</sup> The NLRB fully adopted the ALJ’s findings and conclusions in an order cited at 365 N.L.R.B. 99 (2017).

The Eleventh Circuit’s opinion, authored by Judge Tjoflat, skirted the issue of which standard of review (de novo or deference to an agency’s interpretation of a matter within its expertise) should be applied on appeal because in either case the court’s interpretation of the employer’s contract with the IRS mirrored that of the NLRB and ALJ: the PWS did not mandate termination and therefore could not be used by the employer as a “get-out-of-jail-free card.”<sup>36</sup> Judge Tjoflat noted that the employer was subject to “two masters”—its contractual obligations to the IRS and its duties under the NLRA to its employees.<sup>37</sup> He squarely found that

*continued, next page*

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the only thing that placed the employer “between a rock and a hard place” was its own choice to disregard both.<sup>38</sup>

So, pencils down and turn in your booklets up at the front. Who listed any of the following principles? First, a government contract only determines an employer’s obligations to the government. It does not bind a union representing the employer’s workforce *unless and until* the contract’s terms are recognized, negotiated, and incorporated into a ratified collective bargaining agreement or a Memorandum of Understanding. Here, the parties had not concluded their negotiations.

Second, generally it is never a good idea for an employer to shut down every opportunity to resolve a labor dispute with a union. Whether communications are labeled “discussions” or “bargaining” is a distinction without a difference; either may lead to industrial peace.

An ancillary to the second principle is not to use “shorthand” to explain

what you actually mean. Here, the employer’s broad, imprecise use of the word “supersede” created ambiguity regarding whether the Policy Statement took precedence over the disciplinary standards of the prior employer or the PWS. This ambiguity allowed the ALJ and NLRB to conclude that the employer waived reliance on the PWS as a basis for future disciplinary action and would depend instead on the exercise of its own discretion.

Fourth, once an employer limits the exercise of its own discretion by enacting and publishing progressive discipline, it cannot simply abandon those standards and impose harsher punishment. This is a particularly bad idea when the person who is to be disciplined is the union’s president.

And, fifth, an employer’s knee-jerk reactions to union demands to bargain and ever-changing, after-the-fact, shoe-horned explanations never bode well for a positive outcome in a ULP hearing.

If your essay contained these principles, then congratulations are in order. You passed.



L. LANGBEIN

**Leslie W. Langbein** has been Board Certified by The Florida Bar in Labor and Employment Law since 2001 and has served as a neutral for nearly thirty years. She is a former chair of the Labor and Employment Law Section.

## Endnotes

- <sup>1</sup> 921 F.3d 1053 (11th Cir. 2019) (*Security Walls II*).
- <sup>2</sup> *Id.* at 1055.
- <sup>3</sup> *Id.*
- <sup>4</sup> *Id.*
- <sup>5</sup> *Sec. Walls, Inc.*, 2017 NLRB LEXIS 317, \*4 (N.L.R.B. June 15, 2017) (*Security Walls I*) (underlining and italics supplied).
- <sup>6</sup> *Id.* at \*4.
- <sup>7</sup> *Id.* at \*5.
- <sup>8</sup> *Id.* at \*6.
- <sup>9</sup> *Id.*
- <sup>10</sup> *Security Walls II*, 921 F.3d 1053, 1059 n.9 (11th Cir. 2019).
- <sup>11</sup> *Id.*; *Security Walls I*, 2017 NLRB LEXIS 317, \*6.
- <sup>12</sup> *Security Walls I*, 2017 NLRB LEXIS 317, \*3.
- <sup>13</sup> *Id.* at \*7.
- <sup>14</sup> *Id.*
- <sup>15</sup> *Id.*
- <sup>16</sup> *Id.* at \*7–8.
- <sup>17</sup> *Id.* at \*7.
- <sup>18</sup> *Id.* at \*8–9.
- <sup>19</sup> *Id.* at \*9–10.
- <sup>20</sup> *Id.* at \*10.
- <sup>21</sup> *Id.* (internal quotation marks omitted).
- <sup>22</sup> *Id.* at \*10–11.
- <sup>23</sup> *Id.* at \*11.
- <sup>24</sup> *Security Walls II*, 921 F.3d 1053, 1057 (11th Cir. 2019).
- <sup>25</sup> *Id.*
- <sup>26</sup> *Security Walls I*, 2017 NLRB LEXIS 317, \*28–29 (N.L.R.B. June 15, 2017).
- <sup>27</sup> *Id.* at \*1.
- <sup>28</sup> *Id.* at \*11–12.
- <sup>29</sup> *Id.* at \*11.
- <sup>30</sup> *Id.* at \*12.
- <sup>31</sup> *Id.* at \*28.
- <sup>32</sup> *Id.*
- <sup>33</sup> *Id.*
- <sup>34</sup> *Id.* at \*29 & n.16.
- <sup>35</sup> *Id.* at \*28–30.
- <sup>36</sup> *Security Walls II*, 921 F.3d 1053, 1060 (11th Cir. 2019).
- <sup>37</sup> *Id.* at 1059.
- <sup>38</sup> *Id.*

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# Ready or Not, EEOC Moves Forward with Collection of EEO-1 Component 2 Data for 2017 and 2018 Pay Periods

Ashley A. Tinsley, Tampa

After several years of indecision among government agencies, advocacy groups seeking to enforce the collection of EEO-1 Component 2 data through employer information reports (EEO-1) have finally won the battle to reinstate this collection—at least for now.

Until recently, the EEO-1 process required only covered employers—i.e., private employers with 100 or more employees, in addition to federal contractors with 50 or more employees—to report information regarding the number of employees they employed by job category, race, ethnicity, and sex. This collection of data is known as “Component 1” data.

In early 2016, the Equal Employment Opportunity Commission (EEOC) published a *Federal Register* notice announcing its intent to seek a three-year approval from the Office of Management and Budget (OMB) of a revised EEO-1 data collection. This revised data collection would continue to include Component 1 data but would also add a second component regarding employees’ W-2 earnings and hours worked sorted by race, sex, and ethnicity, by job category.<sup>1</sup> This second collection of data is known as “Component 2” data. During the proposed three-year period, employers would be required to submit data on two separate occasions—one to cover the 2017 calendar year and another to cover the 2018 calendar year.

In accordance with the Paperwork Reduction Act of 1995 (PRA),<sup>2</sup> the OMB subsequently reviewed the EEOC’s proposal to determine “whether the collection of information by the agency is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility.”<sup>3</sup>

Upon completion of such a review, the PRA requires the OMB, through the Office of Information and Regula-

tory Affairs (OIRA), to: (1) approve the collection, (2) disapprove the collection, or (3) instruct the agency to make substantive and material changes to the collection.<sup>4</sup> Notably, though, even if the collection is initially approved, the PRA grants the OMB authority to reinstate a review of the collection of information if “relevant circumstances have changed or the burden estimates provided by the agency at the time of initial submission were materially in error.”<sup>5</sup> After consultation with the agency and for good cause, the OMB may also stay the effectiveness of its prior approval of any collection of information.<sup>6</sup>

On September 29, 2016, the OMB approved the EEOC’s proposed collection.<sup>7</sup> However, just under a year later, the OMB ordered the EEOC to stay its collection of Component 2 data, asserting that the circumstances and burden estimates regarding the collection of this data had changed because the EEOC published data file specifications not previously included in the *Federal Register* notices.<sup>8</sup> As good cause for its decision to stay, the OMB stated its belief that collection of this information is contrary to PRA standards and noted its concern that some aspects of the revised collection of information lack practical utility, are unnecessarily burdensome, and do not adequately address privacy and confidentiality issues.<sup>9</sup>

On November 15, 2017, two advocacy groups, the National Women’s Law Center (NWLC) and the Labor Council for Latin American Advancement (LCLAA), filed a lawsuit in the U.S. District Court for the District of Columbia against the OMB, OMB officials, the EEOC, and EEOC officials, challenging the OMB’s stay and seeking to reinstate the collection of Component 2 data.<sup>10</sup> Both the plaintiffs and defendants moved for summary judgment.<sup>11</sup>

On March 4, 2019, the Honorable Judge Tanya S. Chutkan of the U.S.

District Court for the District of Columbia denied Defendants’ Motion for Summary Judgment, granted Plaintiffs’ Motion for Summary Judgment, and vacated the OMB’s stay.<sup>12</sup> Specifically, the court found that the OMB failed to show that relevant circumstances changed, that the burden estimate provided was materially in error, or that good cause existed to justify the OMB’s decision to stay.<sup>13</sup>

Though the court’s order resolved the question of *whether* the EEOC would move forward with its collection of Component 2 data, many questions remained as to *how* the EEOC would do so. For example, the question of what information would be collected was unresolved, as the EEOC’s initial collection of Component 2 data was only meant to occur over a three-year period with two collections—one for 2017 and one for 2018. Questions also remained as to how this data would be collected given the uncertainty of whether the EEOC was even capable of collecting and processing it.

Judge Chutkan asked the defendants for answers regarding these issues during a March 19, 2019, status conference. On April 3, 2019, the defendants filed a response, proposing a plan to move forward with the collection of Component 2 data.<sup>14</sup> Citing several reasons, including the fact that employers were not legally obligated to collect 2017 data due to the stay and the “serious risk” that expedited data collection may yield poor quality data, the proposed plan required covered employers to submit *only* 2018 Component 2 data by September 30, 2019. Relying on the declaration of the EEOC’s Chief Data Officer, Samuel C. Haffer, Ph.D, the defendants additionally advised the court that the data processes used to collect EEO-1 demographic data are not capable of collecting employers’ 2018 Component

*continued, next page*

2 data. According to Dr. Haffer, it would take nine months to modify the EEOC's current processes to support the collection of large amounts of sensitive Component 2 data from 2018. The utilization of a data and analytics contractor, costing in excess of \$3 million, would be necessary.

On April 25, 2019, Judge Chutkan approved the EEOC's proposed September 30, 2019, deadline for the submission of 2018 data but also ordered the EEOC to collect a *second* year of pay data, giving the EEOC the choice to collect data from calendar years 2017 or 2019.<sup>15</sup>

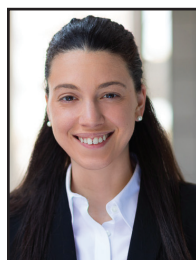
On May 2, 2019, the EEOC announced that all covered employers must file for calendar years 2017 and 2018 by September 30, 2019. Consistent with the initial 2016 proposal, the revised EEO-1 form will require covered employers to report wage information from box 1 of W-2 forms and total hours worked for all employees from one single payroll period of their choosing that occurred between October 1 and December 31 of the 2017 and 2018 reporting years. This information must be reported by race, ethnicity, and sex within twelve proposed pay bands for the ten EEO-1 categories.<sup>16</sup> The reported hours worked should show actual hours worked by nonexempt employees and an estimated twenty hours per week for part-time exempt employees and forty hours per week for full-time exempt employees.

Wasting no time, the Department of Justice (DOJ) filed a Notice of Appeal the next day—May 3, 2019.<sup>17</sup> Despite this, the EEOC announced on its website that the filing of the appeal does not stay, impact, or otherwise alter the requirement that EEO-1 filers submit Component 2 data for calendar years 2017 and 2018 by the September 30, 2019, deadline.<sup>18</sup>

On May 3, 2019, the EEOC also filed a status report regarding implementation of the collection of Component 2 data.<sup>19</sup> The EEOC announced that NORC at the University of Chicago<sup>20</sup> had been awarded the contract to collect EEO-1 Component 2 data for calendar year 2018 and that the EEOC would begin preparations to execute

a modification to that contract to include collection of 2017 Component 2 data. The EEOC further indicated that NORC would begin to develop a Project Management Plan for executing the contract. The EEOC expressed its intent to begin planning for the launch of the NORC email and phone help desk to assist filers with questions and concerns about the collection of Component 2 data for 2017 and 2018 and its intent to begin assisting NORC in drafting Component 2 data training materials for data collection contractor staff. The EEOC also announced that it was on track to open the Component 2 data collections for calendar years 2017 and 2018 from July 15, 2019, through September 30, 2019.

In July 2019, the EEOC opened the filing portal and the Component 2 help desk. The EEOC also posted additional guidance for employers, including "Frequently Asked Questions," a sample EEO-1 form, a "User's Guide," an "Instruction Booklet for Filers," and "Upload File Specifications."<sup>21</sup> Though helpful, the guidance addresses the broad and obvious questions—not the particular ones that inevitably arise among employers. Even with the publication of additional guidance—and given the frequency with which updates have been posted—it is likely that the EEOC is still sorting through the details of the filing system. It is therefore imperative that attorneys and their clients continue to monitor the EEOC's website.



A. TINSLEY

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## Endnotes

<sup>1</sup> EEOC, AGENCY INFORMATION COLLECTION ACTIVITIES: REVISION OF THE EMPLOYER INFORMATION REPORT (EEO-1) AND COMMENT REQUEST (2016), available at <https://www.govinfo.gov/content/pkg/FR-2016-02-01/pdf/2016-01544.pdf>.

<sup>2</sup> See 44 U.S.C. § 3501, et seq.

<sup>3</sup> 44 U.S.C. § 3508.

<sup>4</sup> 44 U.S.C. § 3507(c)(1), (e)(1).

<sup>5</sup> 5 C.F.R. § 1320.10(f).

<sup>6</sup> 5 C.F.R. § 1320.10(g).

<sup>7</sup> *Nat'l Women's Law Ctr. v. Office of Mgmt. and Budget*, 358 F. Supp. 3d 66, 74 (D.D.C. 2019).

<sup>8</sup> MEMORANDUM, EEO-1 FORM; REVIEW AND STAY (Aug. 29, 2017), available at [https://www.reginfo.gov/public/jsp/Utilities/Review\\_and\\_Stay\\_Memo\\_for\\_EEOC.pdf](https://www.reginfo.gov/public/jsp/Utilities/Review_and_Stay_Memo_for_EEOC.pdf).

<sup>9</sup> *Id.*

<sup>10</sup> See *Nat'l Women's Law Ctr.*, 358 F. Supp. 3d 66.

<sup>11</sup> *Id.* at 76. The defendants also moved to dismiss the plaintiffs' complaint on the grounds that the plaintiffs lacked standing and had not challenged a final agency action. *Id.* The court denied the defendants' motion. *Id.* at 71.

<sup>12</sup> *Id.*

<sup>13</sup> *Id.* at 87.

<sup>14</sup> Notice of Defendants' Submission in Response to the Court's Questions Raised During the March 19, 2019 Status Conference, *Nat'l Women's Law Ctr. v. Office of Mgmt. and Budget*, et al., Case No. 1:17-cv-02548-TSC, ECF No. 54.

<sup>15</sup> Order, *Nat'l Women's Law Ctr. v. Office of Mgmt. and Budget*, et al., Case No. 1:17-cv-02548-TSC, ECF No. 71.

<sup>16</sup> These ten job categories are: (1) Executive/Senior Level Officials and Managers, (2) First/Mid-Level Officials and Managers, (3) Professionals, (4) Technicians, (5) Sales Workers, (6) Administrative Support Workers, (7) Craft Workers, (8) Operatives, (9) Laborers and Helpers, and (10) Service Workers. EEO-1 JOB CLASSIFICATION GUIDE 2010, <https://www.eeoc.gov/employers/eeo1survey/jobclassguide.cfm> (last visited July 9, 2019).

<sup>17</sup> Notice of Appeal, *Nat'l Women's Law Ctr. v. Office of Mgmt. and Budget*, et al., Case No. 1:17-cv-02548-TSC, ECF No. 72.

<sup>18</sup> NOTICE OF IMMEDIATE REINSTATEMENT OF REVISED EEO-1: PAY DATA COLLECTION FOR CALENDAR YEARS 2017 AND 2018, <https://www.eeoc.gov/employers/eeo1survey/index.cfm> (last visited July 9, 2019).

<sup>19</sup> Defendant EEOC's Report of Steps to Implement the EEO-1 Component 2 Data Collection: Submitted May 3, 2019, *Nat'l Women's Law Ctr. v. Office of Mgmt. and Budget*, et al., Case No. 1:17-cv-02548-TSC, ECF No. 73-1.

<sup>20</sup> The University of Chicago website describes NORC as "an objective non-partisan research institution that delivers reliable and rigorous analysis to guide critical programmatic, business, and policy decisions." NORC, <https://www.norc.org/About/Pages/default.aspx> (last visited July 9, 2019).

<sup>21</sup> COMPONENT 2 EEO-1 ONLINE FILING SYSTEM, <https://eeocomp2.norc.org/Index> (last visited August 10, 2019).



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## MARGARET L. "MARGIE" COOPER (1950 - 2019)

Board Certified by The Florida Bar in both Civil Trial Law and Business Litigation, Margaret L. "Margie" Cooper practiced law at Jones Foster P.A. for forty-two years. She was a Fellow in the American Bar Foundation, a former Chair of The Florida Bar Grievance Committee for the 15th Judicial Circuit, and a former member of The Florida Bar Judicial Nominating Procedures Committee. Consistently a top-rated lawyer in her field, Margie was named "West Palm Beach 2014 Employment Lawyer of the Year" by *Best Lawyers*. Margie graduated with a B.A. from Rollins College and obtained her J.D. from Mercer University.



## ALAN M. GERLACH, JR. (1949 - 2019)

Alan M. Gerlach, Jr. graduated with honors from Harvard College and received his law degree from the University of Florida College of Law, where he was executive editor of the *Law Review*. He also received a degree from Southern Methodist University School of Law, with a concentration in labor and employment law. Board Certified by The Florida Bar in Labor and Employment Law, Alan was a PERC hearing officer and was in private practice with local and national law firms representing management. Prior to his retirement, he served as Chief Legal Officer for AdventHealth.



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## **WILLIAM RUSSELL “RUSS” HAMILTON, III (1946 - 2018)**

In a career spanning four decades, William Russell “Russ” Hamilton III represented companies large and small in all types of labor and employment law matters. Russ was routinely top-rated in his field, including by *The American Lawyer* as part of the “Litigation Department of the Year—Labor and Employment Law Winner 2006.” He also helped create the Academy of Florida Management Attorneys (AFMA) and served as its president. Russ was a graduate of Stetson University and of the Walter F. George School of Law at Mercer University. He finished his career as Of Counsel to FordHarrison LLP.



## **WILLIAM RAYMOND “BILL” RADFORD (1936 - 2018)**

William Raymond “Bill” Radford was a graduate of Wittenberg University and the University of Michigan Law School. Board Certified by The Florida Bar in Labor and Employment Law, Bill represented employers for more than forty years in both the public and private sectors. He was elected a Fellow in the College of Labor and Employment Lawyers and was named “Lawyer of the Year” for Labor and Employment in 2014 by *Best Lawyers*. Throughout his career, practicing with Morgan Lewis, FordHarrison, and Ogletree Deakins, Bill was involved in cases that broke new legal ground.

## **THOMAS T. STEELE (1946 - 2018)**

A member of Phi Beta Kappa while an undergraduate at Tulane University, Thomas T. Steele graduated from Tulane University Law School with honors and served on the *Tulane Law Review*. An intellectual property and business litigation attorney for over forty years, he concentrated his practice on litigating restrictive covenants, trade secrets, and anti-trust and other unfair competition claims. A recognized and oft-cited expert in those fields, he was nationally known as the principle drafter of Florida’s restrictive covenant statute. Before founding his own firm in Tampa, he was a member of Fowler White and of Stearns Weaver.



# The Silent Dignity of Confidential Settlements in a #MeToo Era

By Tara E. Faenza, Miami

In the last few years, media, entertainment, and celebrity led “#MeToo” to mean something significant and culturally impactful. In 2006, civil rights activist Tarana Burke coined the phrase “me too” to promote empowerment through empathy among women of color who suffered sexual abuse:

I could not find the strength to say out loud the words that were ringing in my head over and over again as [a young girl who had been sexually abused] tried to tell me what she had endured... I watched her walk away from me as she tried to recapture her secrets and tuck them back into their hiding place. I watched her put her mask back on and go back into the world like she was all alone and I couldn't even bring myself to whisper... **me too.**<sup>1</sup>

Later adopted by actress and activist Alyssa Milano, #MeToo encouraged women to come forward with their experiences of sexual abuse and assault. If Ms. Burke hoped for at least the courage to whisper, Ms. Milano wanted to “give people a sense of the magnitude of the problem.”<sup>2</sup> Following Ms. Milano’s October 2017 tweet, many women detailed publicly their experiences of sexual abuse, harassment, and discrimination. EEOC statistics reflect a spike in the number of sex-based discrimination charges after that date. To illustrate, in 2016, charging parties submitted 6,758 charges with claims of sexual harassment; by 2018, that number jumped to 7,609, an approximate 13% increase, with primarily women filing the charges.<sup>3</sup> Generally, charges of discrimination had been trending downward for the years 2013–2017.<sup>4</sup> In Florida, the largest 2018 percentages of discrimination by category outside of sex discrimination involved retaliation (42.9%) and disability (33%).<sup>5</sup> Florida ranked second only to Texas in total number of charges—6,617—filed in 2018, and nearly 32% of those involved sex discrimination.<sup>6</sup>

Confidentiality is often the most material provision to an employer in a discrimination suit. The Third District Court of Appeal’s 2014 decision in *Gulliver Schools v. Snay*<sup>7</sup> illustrates its importance. In that case, Snay sued his former employer for age discrimination and retaliation when Gulliver did not renew his contract as headmaster.<sup>8</sup> The parties reached a voluntary settlement that included a confidentiality provision, which, if violated by Snay or his wife, would result in a forfeiture of a portion (\$80,000) of the settlement proceeds.<sup>9</sup> Considering the substantial settlement amount, Gulliver, understandably, did not wish to create the impression it had discriminated against its former employee or admitted to wrongdoing, which is why the confidentiality provision was put in place.

Because Snay’s daughter was also allegedly retaliated against due to her father’s lawsuit, Snay felt he needed to share the outcome of the litigation with her. Snay told his daughter the case had settled and that he was happy with the result. Subsequently, Snay’s daughter bragged about the settlement in a now-famous Facebook post: “Mama and Papa Snay won the case against Gulliver. Gulliver is now officially paying for my vacation to Europe this summer. SUCK IT.”<sup>10</sup> After Gulliver learned about Snay’s daughter’s social media post, it sent Snay a notice of breach, refusing to pay Snay his portion of the settlement.<sup>11</sup> Snay moved to enforce the settlement, and the trial court did.<sup>12</sup> The Third DCA reversed the trial court’s order, finding that Snay violated the confidentiality provisions of the settlement agreement.<sup>13</sup> In light of *Gulliver*, employment practitioners should carefully warn clients about the seriousness of confidentiality provisions in settlement agreements with employers. Like the defendant in *Gulliver*, employers do not take those confidentiality provisions lightly and will try to enforce them.

The #MeToo movement, to great extent, seeks to combat sex discrimination by advocating for transparency and exposure. Proponents of these goals wish to remove or limit confidentiality provisions and arbitration agreements. For example, in California, State Bill 820, Assembly Bill 3109, and Senate Bill 1300 substantially restrict employers from requiring that accusers remain silent or refrain from disparaging the accused. Protections do not extend to the accused. Numerous other states are following suit to attempt to limit confidentiality agreements and provisions.<sup>14</sup>

Notwithstanding some proponents’ desire for transparency, many individuals do not want anyone to know they suffered or reported harassment. Some employees do not wish to file a lawsuit against a former employer, due to unwanted attention and publicity. Regardless, an EEOC charge of discrimination or a sexual harassment lawsuit is a far cry from a few typed characters in a Twitter post. A plaintiff needs substantial facts and evidence to prove a case. The employer will present strong defenses. For example, the employer could assert a legitimate, non-discriminatory reason for termination (e.g., poor performance) or argue that the bad actor’s alleged behavior, while possibly distasteful, was not severe or pervasive enough to create a hostile work environment. Many employers will assert a *Faragher-Ellerth* defense. A *Faragher-Ellerth* defense requires plaintiffs to complain to employers, following the employer’s anti-discrimination policies:

To successfully invoke the *Faragher-Ellerth* affirmative defense, an employer must show that (i) it “exercised reasonable care to avoid harassment and to eliminate it when it might occur,” and that (ii) the plaintiff “failed to act with like reasonable care to take advantage of the employer’s safe-

*continued, next page*

guards and otherwise prevent harm that could have been avoided.”<sup>15</sup>

A recent Third Circuit Court of Appeals’ opinion, *Minarsky v. Susquehanna County*,<sup>16</sup> alluded to the #MeToo movement and signaled a new *Faragher-Ellerth* interpretation. Overturning a summary judgment under the *Faragher-Ellerth* defense, the court

found the plaintiff desperately needed money from her job to care for a sick child, reasonably feared retaliation, and viewed her efforts to complain to be futile:

In sum, Minarsky has produced several pieces of evidence of her fear that sounding the alarm on her harasser would aggravate her work environ-

ment or result in her termination. A jury could consider this evidence and find her reaction to be objectively reasonable. We therefore cannot uphold the District Court’s conclusion that Minarsky’s behavior was unreasonable as a matter of law.<sup>17</sup>

In a footnote, the appellate court acknowledged the reality of the #MeToo era:

This appeal comes to us in the midst of national news regarding a veritable firestorm of allegations of rampant sexual misconduct that has been closeted for years, not reported by the victims. . . . While the policy underlying *Faragher-Ellerth* places the onus on the harassed employee to report her harasser, and would fault her for not calling out this conduct so as to prevent it, a jury could conclude that the employee’s non-reporting was understandable, perhaps even reasonable. . . .

. . . A 2016 Equal Employment Opportunity Commission (EEOC) Select Task Force study found that approximately 75 percent of those who experienced harassment never reported it or filed a complaint but instead would “avoid the harasser, deny or downplay the gravity of the situation, or attempt to ignore, forget, or endure the behavior.” The employees who faced harassing behavior did not report the experience “because they fear[ed] disbelief of their claim, inaction on their claim, blame, or social or professional retaliation.”<sup>18</sup>

The possibility of retaliation may be a strong deterrent for those considering whether to report unlawful actions and pursue claims. Future employers may not hire someone because of a previous lawsuit or settlement. Proving that requires showing the potential employer knew of the complaints or lawsuit, which could be very difficult. The Eleventh Circuit has noted that “awareness of protected expression may be established based on circumstantial evidence, [but] our cases have required plaintiffs to show a defendant’s awareness with more evidence than mere curious timing coupled with spec-

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ulative theories.”<sup>19</sup> It may be exceptionally difficult for a plaintiff to prove that a potential employer was aware of prior claims of harassment but, without confidentiality provisions, that information may be less difficult for a prospective employer to ascertain. Confidentiality provisions thus can prove favorable to former employees since such provisions discourage former employers from disclosing the existence of claims or the agreement to a potential new employer.

The prospect of publicity may drive many claimants to desire to remain anonymous. However, sexual harassment plaintiffs are rarely granted anonymity. One motivation for settling matters out of court is privacy. Confidentiality provides a certain level of dignity where a victim need not reasonably fear others will discover what represents a painful reminder of discrimination and harassment. In a recent case, the court noted that the plaintiff specifically referred to the #MeToo movement: “Plaintiff submits that she desires to avoid ‘unwanted media attention and scrutiny . . . [and becoming] another talking point,’ referring to ‘today’s rapid dissemination of information through social media platforms’ and the ongoing [#]MeToo movement.”<sup>20</sup>

To maintain anonymity in a case, sexual harassment plaintiffs must demonstrate greater possibility of retaliation. “Plaintiffs alleging sexual harassment generally have not been allowed to proceed anonymously. However, anonymity is justified where plaintiffs face ‘greater threats of retaliations than the typical plaintiff.’”<sup>21</sup> Unfortunately, many plaintiffs cannot predict how future employers will respond to a public sexual harassment lawsuit, which still might not rise to the level of a “greater threat” than that faced by a typical plaintiff. As a result, some women, as noted in *Minarsky*, will opt not to complain or report harassment. Knowing that plaintiffs usually cannot remain anonymous without confidentiality provisions, employers could stop settling claims in the

absence of a lawsuit. If 75% of women are afraid to merely report harassment and discrimination in the workplace, it is difficult to imagine how many women will opt not to file lawsuits in order to avoid the risk of retaliation from future employers. Forcing exposure upon those who wish to remain anonymous may have the opposite effect desired.

Confidential settlement agreements allow the employer and the employee to voluntarily and creatively decide their own meaning of justice. For many, ensuring privacy and avoiding threats of retaliation equal justice. Being in a position to negotiate a confidential settlement agreement means that an employee would have already taken steps to report discrimination, consistent with the goals of the #MeToo movement. Some employees prefer to whisper and not shout. For the average worker, even a highly compensated one, the desire often is to move forward with his or her life and have the opportunity to work again. Confidentiality can allow an employee to choose not to be overshadowed or diminished in any way by potential negativity associated with reporting harassment. Confidential settlement agreements promote a certain level of dignity and privacy—and control—to both employers and employees to encourage reporting and voluntary resolution of discrimination claims.



T. FAENZA

**Tara E. Faenza** is a labor and employment associate at Perlman, Bajandas, Yevoli & Albright, PL where she represents companies and employees in employment and labor disputes and advises clients in all aspects of employment law and general litigation matters. Prior to becoming an attorney, she worked in law firms and in-house legal departments focusing

on intellectual property prosecution, licensing, records, retention, and other legal matters. As a former Assistant State Attorney, Ms. Faenza is an experienced trial attorney with a focus on community service; she volunteers as a Guardian Ad Litem for the Dade Legal Aid Put Something Back program in her spare time.

## Endnotes

<sup>1</sup> JustBeInc., *The Inception*, <https://justbeinc.wixsite.com/justbeinc/the-me-too-movement-cmmi> (last visited July 9, 2019).

<sup>2</sup> Alyssa Milano (@Alyssa\_Milano), TWITTER (Oct. 15, 2017, 1:21 PM), [https://twitter.com/alyssa\\_milano/status/919659438700670976?lang=en](https://twitter.com/alyssa_milano/status/919659438700670976?lang=en) (internal quotations omitted).

<sup>3</sup> Equal Emp’t Opportunity Comm’n, *Charges Alleging Sex-Based Harassment (Charges Filed with EEOC) FY 2010 – FY 2018*, [https://www.eeoc.gov/eeoc/statistics/enforcement/sexual\\_harassment\\_new.cfm](https://www.eeoc.gov/eeoc/statistics/enforcement/sexual_harassment_new.cfm) (last visited July 9, 2018). EEOC statistics show in 2018 the smallest percentage of men reporting harassment in nearly a decade (15.9%). *Id.*

<sup>4</sup> See *id.*

<sup>5</sup> Equal Emp’t Opportunity Comm’n, *EEOC Charges Receipts by State (includes U.S. Territories) and Basis for 2018*, [https://www1.eeoc.gov/eeoc/statistics/enforcement/state\\_18.cfm](https://www1.eeoc.gov/eeoc/statistics/enforcement/state_18.cfm) (last visited July 9, 2018).

<sup>6</sup> *Id.*

<sup>7</sup> 137 So. 3d 1045 (Fla. 3d DCA 2014).

<sup>8</sup> *Id.* at 1046.

<sup>9</sup> *Id.*

<sup>10</sup> *Id.*

<sup>11</sup> *Id.* at 1046–47.

<sup>12</sup> *Id.* at 1047.

<sup>13</sup> *Id.*

<sup>14</sup> New Jersey, New York, Vermont, and Washington have enacted similar legislation.

<sup>15</sup> *Minarsky v. Susquehanna Cnty.*, 895 F.3d 303, 306 & n.1 (3d Cir. 2018) (quoting *Faragher v. City of Boca Raton*, 524 U.S. 775, 805 (1998)).

<sup>16</sup> 895 F.3d 303.

<sup>17</sup> *Id.* at 317.

<sup>18</sup> *Id.* at 317 & n.12 (citation omitted) (quoting EEOC Select Task Force, *Harassment in the Workplace*, at v (June 2016), [https://www.eeoc.gov/eeoc/task\\_force/harassment/upload/report.pdf](https://www.eeoc.gov/eeoc/task_force/harassment/upload/report.pdf)).

<sup>19</sup> *Raney v. Vinson Guard Serv., Inc.*, 120 F.3d 1192, 1197 (11th Cir. 1997) (citation omitted).

<sup>20</sup> *Doe v. United Airlines, Inc.*, No. 2:17-cv-2825-RFB-NJK, 2018 U.S. Dist. LEXIS 141573, at \*3 (D. Nev. Aug. 21, 2018).

<sup>21</sup> *EEOC v. ABM Indus.*, 249 F.R.D. 588, 594 (E.D. Cal. 2008) (internal quotations omitted).



bringing suit in court, allowing a party to raise a subject matter jurisdiction argument based on a plaintiff's failure to exhaust his or her administrative remedies at any point in the litigation.<sup>5</sup> For defending employers within the Eleventh Circuit, the *Fort Bend* decision eliminates the ability to raise this argument late in the litigation.

### The Eleventh Circuit's Prior Position: Administrative Exhaustion Can Be a Jurisdictional Prerequisite

Consistent with the other Circuit Courts of Appeal, the Eleventh Circuit has found some aspects of Title VII's administrative exhaustion requirement (such as timely charge filing and compliance with other deadlines) to be mere procedural conditions precedent; while they are mandatory, they are subject to waiver, estoppel, or equitable tolling, and are not jurisdictional prerequisites.<sup>6</sup> However, other aspects—those tied closely to the primary purpose of the administrative process itself—have been characterized as jurisdictional.<sup>7</sup> The Eleventh Circuit has stated the primary purpose of the administrative exhaustion requirement is to ensure that the EEOC has sufficient information from the complainant to conduct its investigation.<sup>8</sup> Thus, an employee who does not furnish the EEOC with “the information necessary to evaluate the merits of his or her complaint cannot be deemed to have exhausted administrative remedies” and, therefore, cannot be said to have satisfied the *jurisdictional* requirement of administrative exhaustion under Eleventh Circuit precedent.<sup>9</sup>

A failure to satisfy the jurisdictional prerequisites of Title VII could occur, for example, when a complainant did not provide information specifically requested by the EEOC.<sup>10</sup> It could also occur when a complainant filed a charge that appeared complete but later sought judicial review of additional acts of discrimination not included in the charge and would not have been “reasonably uncovered” by the EEOC's

investigation of the allegations that were included in the charge.<sup>11</sup>

### Fort Bend: The Background

In *Fort Bend*, the plaintiff brought claims for sexual harassment, retaliation, and religious discrimination under Title VII. In 2011, the plaintiff first filled out an EEOC intake questionnaire and later a formal charge of discrimination, both pertaining to the alleged sexual harassment and retaliation. While the plaintiff's charge of sexual harassment and retaliation was pending, she experienced additional alleged instances of discrimination. Specifically, the plaintiff was directed to report to work on a Sunday during a time that conflicted with a church-related commitment, and although she offered to find coverage for the Sunday shift, the employer refused to allow a replacement employee to work the plaintiff's shift and terminated the plaintiff when she did not report to work that Sunday.<sup>12</sup>

Following her termination, the plaintiff did not formally amend her pending charge. Rather, she made handwritten changes to the intake questionnaire, writing “religion” on the document and checking the boxes for “discharge” and “reasonable accommodation.” Although the plaintiff's Notice of Right to Sue addressed the plaintiff's termination, it did not discuss the plaintiff's religious discrimination claim, focusing instead on the sexual harassment and retaliation claims.<sup>13</sup>

In 2012, the plaintiff filed her complaint in district court, alleging retaliation and religious discrimination. The employer won summary judgment on both claims, after which the plaintiff appealed. The case moved through one full round of appeals (including the petition for and denial of certiorari by the U.S. Supreme Court) before it was remanded to the Southern District of Texas in 2015. The employer did not raise the issue of administrative exhaustion in any of these proceedings.<sup>14</sup>

It was not until early 2016—more than four years after the plaintiff filed her original complaint—that the em-

ployer moved to dismiss the plaintiff's religious discrimination claim, then the only surviving claim, on the basis that the plaintiff had failed to exhaust her administrative remedies as to the religion claim. The employer argued that as a result of this failure, the district court had no subject matter jurisdiction over the case.<sup>15</sup>

The district court agreed with the employer, echoing reasoning similar to that which has been used in the Eleventh Circuit. Noting that “a primary purpose of Title VII is to trigger the investigatory and conciliatory procedures of the EEOC,”<sup>16</sup> the district court found that failure to exhaust was not merely a procedural prerequisite to suit. In distinguishing a jurisdictional requirement from a procedural prerequisite, the court compared the purpose of Title VII's filing deadlines (which, like statutes of limitations, are subject to waiver, estoppel, and equitable tolling, and which the district court acknowledged are non-jurisdictional) with Title VII's administrative exhaustion requirement. Whereas the purpose of the former is to prevent stale claims, the purpose of the latter is to facilitate the very purpose of Title VII—that is, to “trigger the investigatory and conciliatory procedures of the EEOC, in [an] attempt to achieve non-judicial resolution of employment discrimination claims.”<sup>17</sup> Because the plaintiff had failed to trigger the EEOC's investigatory and conciliatory processes as to her religious discrimination claim, the district court held that she had failed to exhaust her administrative remedies, depriving the district court of subject matter jurisdiction and warranting dismissal of her claim.<sup>18</sup>

The plaintiff appealed, initiating a second round of appeals that culminated in the Supreme Court's June decision.

### Fort Bend: The Supreme Court's Decision

Noting that “a prescription does not become jurisdictional whenever it ‘promotes important congressional objectives,’” a unanimous Supreme Court



succinctly rejected the employer's argument that the purpose of Title VII, and the administrative exhaustion requirement's facilitation of that purpose, render the administrative exhaustion requirement jurisdictional.<sup>19</sup> Rather, the Court agreed with the Fifth Circuit's second decision in this case<sup>20</sup> and held that, although the administrative exhaustion requirement is mandatory, it is ultimately a processing rule that "speak[s to] a party's procedural obligations," not a "jurisdictional prescription delineating the adjudicatory authority of courts."<sup>21</sup>

To arrive at its conclusion, the Court first examined what *is* jurisdictional, noting that "the word 'jurisdictional' is generally reserved for prescriptions delineating [(1)] the classes of cases a court may entertain (subject-matter jurisdiction) and [(2)] the persons over whom the court may exercise adjudicatory authority (personal jurisdiction)."<sup>22</sup> When Congress intends to create jurisdictional prescriptions other than these, such as the amount-in-controversy requirement for diversity jurisdiction,<sup>23</sup> it does so by incorporating them into jurisdictional provisions.<sup>24</sup>

As the Court has pointed out previously in *Arbaugh v. Y&H Corporation*<sup>25</sup> (a case relied upon by the Fifth Circuit in its second decision in the *Fort Bend* case), Congress is capable of speaking clearly on the issue of jurisdiction when it determines the authority of the courts to hear cases must be expanded or contracted:

Congress has exercised its prerogative to restrict the subject-matter jurisdiction of federal district courts based on a wide variety of factors, some of them also relevant to the merits of a case. Certain statutes confer subject-matter jurisdiction only for actions brought by specific plaintiffs, e.g., 28 U.S.C. § 1345 (United States and its agencies and officers); 49 U.S.C. § 24301(f)(2) (Amtrak), or for claims against particular defendants, e.g., 7 U.S.C. § 2707(e)(3) (persons subject to orders of the Egg Board); 28 U.S.C. § 1348 (national banking associations), or for actions in which the amount in controversy exceeds, e.g., 16 U.S.C. § 814, or falls below, e.g., 22 U.S.C. § 6713(a)(1) (B); 28 U.S.C. § 1346(a)(2), a stated amount. Other jurisdiction-conferring

provisions describe particular types of claims. See, e.g., § 1339 ("any civil action arising under any Act of Congress relating to the postal service"); § 1347 ("any civil action commenced by any tenant in common or joint tenant for the partition of lands where the United States is one of the tenants in common or joint tenants"). In a few instances, Congress has enacted a separate provision that expressly restricts application of a jurisdiction-conferring statute. See, e.g., *Weinberger v. Salfi*, 422 U.S. 749, 756–761 ... (1975) (42 U.S.C. § 405(h) bars 28 U.S.C. § 1331 jurisdiction over suits to recover Social Security benefits).<sup>26</sup>

Unlike the provisions listed above, Title VII's jurisdictional provisions do not contain a clear statement that the administrative exhaustion requirement is meant to be a delineation of courts' authority to hear Title VII cases; to the contrary, they contain no reference to the administrative exhaustion requirement at all.<sup>27</sup> Conversely, the provisions of Title VII creating the administrative exhaustion requirement make no reference to jurisdiction or a court's authority to hear a Title VII case.<sup>28</sup>

Additionally, as the Court mentioned in both its *Fort Bend* and *Arbaugh* decisions, Title VII was drafted at a time when Section 1331, which confers general federal-question jurisdiction on the district courts, had a \$10,000 amount-in-controversy requirement.<sup>29</sup> Although the district courts would have been able to hear Title VII claims with amounts in controversy exceeding that amount, they would have been unable to hear smaller claims.<sup>30</sup> Thus, Congress drafted Title VII's jurisdictional provision specifically to allow Title VII plaintiffs to bypass the general amount-in-controversy requirement then in effect. In mentioning this, the Court highlighted the fact that Congress drafted Title VII's jurisdictional provision to deliberately depart from the norm at the time, and Congress could have included the administrative exhaustion requirement in Title VII's jurisdictional provisions but chose not to.

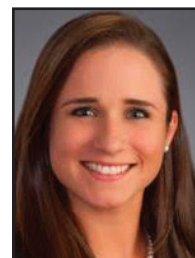
Accordingly, the Supreme Court affirmed the Fifth Circuit's decision that the administrative exhaustion requirement is non-jurisdictional, and defenses

based on the plaintiff's failure to exhaust are waivable if not timely made.

## Take-Aways for Litigants

Before this decision, the Eleventh Circuit was already treating many of the "procedural" aspects of the requirement (e.g., timeliness) as conditions precedent with no effect on the court's authority to hear a Title VII<sup>31</sup> case. But a plaintiff's failure to adhere to the more "substantive" aspects of the requirement (e.g., the date, place, and circumstances of all instances of the employer's allegedly unlawful employment practices) had the potential to divest courts of the authority to hear any of the non-exhausted claims. *Fort Bend* makes it clear that no part of the administrative exhaustion requirement is jurisdictional; in other words, a plaintiff's failure to exhaust his or her administrative remedies has no effect on a court's authority to hear his or her Title VII claims.

But this does not mean that Title VII plaintiffs are free to ignore the administrative exhaustion requirement. As the Supreme Court was quick to point out, just because the requirement is non-jurisdictional does not mean it is not a requirement.<sup>32</sup> The *Fort Bend* decision did not disturb any of the administrative exhaustion requirements themselves. The timely filing of a complete charge of discrimination and the receipt of a Notice of Right to Sue are still mandatory prerequisites to bringing a Title VII claim in court, and a plaintiff is still not permitted to sue on allegations of discrimination that the EEOC's reasonable investigation based on the charge would not have uncovered. An employee's failure to exhaust could easily spell the end of his or her Title VII claim—if the employer timely raises failure to exhaust as an affirmative defense.



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*continued, next page*

## Endnotes

<sup>1</sup> 139 S. Ct. 1843 (2019).

<sup>2</sup> In states with their own fair employment practices agency (FEPA), where the FEPA and the EEOC have a work-sharing agreement, the complainant can file his or her charge with the FEPA instead, if the charge allegations are covered by Title VII. The charge will be considered to have been dual-filed with both the federal and the state agency. *Fair Employment Practices Agencies (FEPAs) and Dual Filing*, EEOC, <https://www.eeoc.gov/employees/fepa.cfm> (last visited June 30, 2019).

<sup>3</sup> 42 U.S.C. § 2000e-5(b).

<sup>4</sup> *Id.* § 2000e-5(f)(1).

<sup>5</sup> See, e.g., *Jones v. Calvert Group, Ltd.*, 551 F.3d 297, 301 (4th Cir. 2009), *abrogated by Fort Bend*, 139 S. Ct. 1843 (sex-, age-, and race-discrimination plaintiff whose charge only alleged retaliation failed to exhaust administrative remedies and “deprived the district court of subject matter jurisdiction” over her claims); *Sommato v. United States*, 255 F.3d 704, 708 (9th Cir. 2001) (“[T]he presentment of discrimination complaints to an appropriate administrative agency is a jurisdictional prerequisite. As we have explained, the jurisdictional scope of a Title VII claimant’s court action depends upon the scope of both the EEOC charge and the EEOC investigation. The district court has jurisdiction over any charges of discrimination that are like or reasonably related to the allegations in the EEOC charge, or that fall within the EEOC investigation which can reasonably be expected to grow out [of] the charge of discrimination.” (internal citations and quotations omitted)).

<sup>6</sup> See *Baskerville v. Sec. of Dep’t of Veteran Affairs*, 2019 WL 1998408, at \*2 n.1 (M.D. Fla. May 7, 2019); *Bloodworth v. Colvin*, 17 F. Supp. 3d 1245, 1251 (N.D. Ga. 2014) (noting that timely contact with an EEO counselor, the filing of a formal complaint, and expiration of 180-day waiting period are all conditions precedent, not jurisdictional pre-requisites; collecting cases).

<sup>7</sup> See, e.g., *Crawford v. Babbitt*, 186 F.3d 1322, 1326 (11th Cir. 1999) (An employee must “exhaust her administrative remedies as a jurisdictional prerequisite to filing a Title VII action.”).

<sup>8</sup> See *id.*

<sup>9</sup> *Wade v. Sec. of the Army*, 796 F.2d 1369, 1376 (11th Cir. 1986).

<sup>10</sup> *Crawford*, 186 F.3d at 1326.

<sup>11</sup> *Gregory v. Ga. Dep’t of Human Res.*, 355 F.3d 1277, 1280 (11th Cir. 2004); *Baskerville*, 2019 WL 1998408, at \*3.

<sup>12</sup> *Fort Bend*, 139 S. Ct. at 1847.

<sup>13</sup> *Id.*; *Davis v. Fort Bend Cnty.*, 2016 WL 4479527, at \*5 (S.D. Tex. Aug. 24, 2016), *rev’d*, 893 F.3d 300 (5th Cir. 2018), *aff’d sub nom. Fort Bend Cnty., Tex. v. Davis*, 139 S. Ct. 1843 (2019) [hereinafter, *Davis I*].

<sup>14</sup> *Fort Bend*, 139 S. Ct. at 1848; *Davis v. Fort Bend Cnty.*, 893 F.3d 300, 307 (5th Cir. 2018), *cert. granted sub nom. Fort Bend Cnty., Tex. v. Davis*, 139 S. Ct. 915 (2019), and *aff’d sub nom. Fort Bend*, 139 S. Ct. 1843 [hereinafter, *Davis II*].

<sup>15</sup> *Davis I*, 2016 WL 4479527, at \*2.

<sup>16</sup> *Id.* at \*3 (citing *Pacheco v. Mineta*, 448 F.3d 783, 788–89 (5th Cir. 2006)); see also *Crawford*, 186 F.3d 1326.

<sup>17</sup> *Davis I*, 2016 WL 4479527, at \*3–4.

<sup>18</sup> *Id.* at \*7.

<sup>19</sup> *Fort Bend*, 139 S. Ct. at 1851 (quoting *Reed Elsevier, Inc. v. Muchnick*, 559 U.S. 154, 157 (2010)).

<sup>20</sup> In the second round of appeals, the Fifth Circuit reversed. Pointing to the Supreme Court’s decision in *Arbaugh v. Y&H Corp.*, 546 U.S. 500, 516 (2006), the Fifth Circuit explained that in the absence of a clear statement from Congress that a limitation is jurisdictional, the limitation should not be treated as such. In the case of Title VII, “Congress did not suggest—much less clearly state—that Title VII’s administrative exhaustion requirement is jurisdictional.” *Davis II*, 893 F.3d

at 305. Because the administrative exhaustion requirement was held to be non-jurisdictional, the Fifth Circuit treated it as an affirmative defense that should have been pleaded. *Id.* at 307. Thus, because Fort Bend County had allowed five years and an entire round of appeals to pass before making its argument about the employee’s failure to exhaust, Fort Bend County had waived the defense. *Id.* at 308.

<sup>21</sup> *Fort Bend*, 139 S. Ct. at 1851 (citing *EPA v. EME Homer City Generation*, 572 U.S. 489, 511–12 (2014); internal quotation marks omitted).

<sup>22</sup> *Id.* at 1848.

<sup>23</sup> 28 U.S.C. § 1332.

<sup>24</sup> *Fort Bend*, 139 S. Ct. at 1848. The Court also pointed out that it “has stated it would treat a requirement as ‘jurisdictional’ when ‘a long line of [Supreme] Court decisions left undisturbed by Congress’ attached a jurisdictional label to the prescription.” *Id.* at 1849. This situation did not apply to the case at hand.

<sup>25</sup> 546 U.S. 500.

<sup>26</sup> *Arbaugh*, 546 U.S. at 515 n.11.

<sup>27</sup> *Fort Bend*, 139 S. Ct. at 1850–51 (citing 42 U.S.C. § 2000e-5(f)(3), 6(b)).

<sup>28</sup> 42 U.S.C. § 2000e-5(e)(1), (f)(1).

<sup>29</sup> *Fort Bend*, 139 S. Ct. at 1850 n.7; *Arbaugh*, 546 U.S. at 505–06.

<sup>30</sup> *Fort Bend*, 139 S. Ct. at 1850 n.7; *Arbaugh*, 546 U.S. at 505.

<sup>31</sup> The *Fort Bend* decision only addressed Title VII, but there are numerous other employment discrimination statutes that require administrative exhaustion. In particular, the Americans with Disabilities Act (ADA) adopts the same procedures applicable to Title VII. 42 U.S.C. § 12117. Thus, it would be reasonable to predict that courts will apply *Fort Bend* to ADA cases and possibly other employment discrimination statutes with similar administrative exhaustion requirements.

<sup>32</sup> *Fort Bend*, 139 S. Ct. at 1851–52.



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basic principle that arbitration is a matter of consent, not coercion.<sup>6</sup> Because there was no consent to class arbitration in *Stolt-Nielsen*, but rather silence on the issue, SCOTUS found that imposing class arbitration was wholly improper as a matter of law.<sup>7</sup> Silence is not enough, and that reasoning controls in *Lamps Plus*.

*AT&T Mobility LLC v. Concepcion* provided additional legal foundation for the *Lamps Plus* ruling.<sup>8</sup> In *Concepcion*, SCOTUS found that class arbitration “sacrifices the principal advantage of [bilateral] arbitration—its informality—and makes the process slower, more costly, and more likely to general procedural morass than final judgment.”<sup>9</sup> The *Concepcion* Court proffered that ambiguity, like silence, does not provide a sufficient basis to conclude that parties to an arbitration agreement agreed to forgo the advantages of traditional arbitration.<sup>10</sup> The rulings in *Stolt-Nielsen* and *Concepcion* evince SCOTUS’ refusal to infer consent to arbitration where there is silence or ambiguity.

## What Happened Here?

In 2016, a hacker impersonating a company official duped an employee of Lamps Plus, Inc. into disclosing highly sensitive tax information of more than 1,300 company employees.<sup>11</sup> Shortly thereafter, a fraudulent federal income tax return was filed purportedly on behalf of Frank Varela, a Lamps Plus employee.<sup>12</sup> Varela brought suit against Lamps Plus in federal district court in California under state and federal law on behalf of a putative class of employees whose tax information was compromised.<sup>13</sup>

At the onset of Varela’s employment, in line with Lamps Plus’ employee onboarding process, Varela signed an arbitration agreement.<sup>14</sup> Relying on this arbitration agreement in Varela’s employment contract, Lamps Plus moved the federal district court to compel arbitration on an individual rather than on a class-wide basis and to dismiss the lawsuit.<sup>15</sup> The court granted Lamps

Plus’ motion and dismissed Varela’s lawsuit without prejudice; however, Lamps Plus’ request for individualized arbitration was rejected, and the district court authorized class-wide arbitration.<sup>16</sup> Lamps Plus argued that the court erred by compelling class arbitration and appealed to the United States Court of Appeals for the Ninth Circuit.<sup>17</sup> This appeal faced an uphill battle, given the pro-employee decisions being issued by California courts at the local, state, and federal levels.

The Ninth Circuit affirmed the district court’s order compelling the parties to undergo class arbitration—not the individual arbitration requested by Lamps Plus.<sup>18</sup> In its ruling, the court distinguished the case from SCOTUS’ holding in *Stolt-Nielsen*.<sup>19</sup> In *Stolt-Nielsen*, SCOTUS held that the court was prohibited from forcing a party “to submit to class arbitration unless there is a contractual basis for concluding that the party *agreed* to do so.”<sup>20</sup> Where an arbitration agreement is silent on the issue of class arbitration, the *Stolt-Nielsen* court concluded that compelling class arbitration was improper.<sup>21</sup> Given that *Lamps Plus* involved an arbitration agreement that was ambiguous, rather than silent, on the issue of class arbitration, the Ninth Circuit found that *Stolt-Nielsen* was not controlling.<sup>22</sup> Lamps Plus had drafted the arbitration agreement at issue, and by construing any ambiguity against the drafter (pursuant to California state law applied in the case), the lower court adopted Varela’s interpretation authorizing class arbitration and ruled in his favor.<sup>23</sup> Lamps Plus petitioned for a writ of certiorari, arguing that the Ninth Circuit’s ruling directly contravened *Stolt-Nielsen* and derived conflict among the United States Courts of Appeals.<sup>24</sup> SCOTUS granted certiorari.<sup>25</sup>

Lamps Plus’ argument won the day. The issue presented was whether, consistent with the FAA, an ambiguous arbitration agreement can provide the necessary contractual basis for compelling class arbitration.<sup>26</sup> Chief Justice Roberts declared: “We hold

that it cannot—a conclusion that follows directly from our decision in *Stolt-Nielsen*.”<sup>27</sup> In reversing the decision of the Ninth Circuit, SCOTUS zeroed in on “the interaction between a state contract principle for addressing ambiguity and a rule of fundamental importance under the FAA, namely, that arbitration is a matter of consent, not coercion.”<sup>28</sup> Affirming that “courts may not infer consent to participate in class arbitration absent affirmative contractual basis for

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concluding that the party *agreed* to do so,” SCOTUS ruled that, “[l]ike silence, ambiguity does not provide a sufficient basis to conclude that parties to an arbitration agreement agreed to sacrifice the principal advantage of arbitration.”<sup>29</sup> SCOTUS reasoned further that “[c]lass arbitration is not only markedly different from the ‘traditional individualized arbitration’ contemplated by the FAA, it also undermines the most important benefits of that familiar form of arbitration.”<sup>30</sup> Thus, unless it is crystal clear that the parties agreed to arbitrate on a class-wide basis, there remains a formidable roadblock to class arbitration for any putative class.

### Where Do We Go from Here?

Prior to *Lamps Plus*, employees argued that courts should consider references to the American Arbitration Association or the JAMS Comprehensive Arbitration Rules and Procedures that “any and all claims” are subject to arbitration, or provisions allowing the arbitrator to grant “all relief that a court could award,” as sufficient contractual basis to compel class arbitration proceedings. Such arguments are now moot.

*Lamps Plus* effectively puts an end to the debate over the accessibility of class arbitration and instead puts the inquiry in the hands of the judiciary based on express dictates of the subject agreement. After *Lamps Plus*, employers should have firmer footing on which to proceed in lower courts on the issue of class arbitration; namely, class arbitration is available only if the parties specifically contract for it. Notwithstanding this landmark “win” and SCOTUS’ pro-arbitration majority, employers should be wary that courts and legislatures in many states continue to view pre-suit arbitration agreements with a measure of contempt. Best practice for employers still is to incorporate an express class action waiver and, in an abundance of caution, specify that a court, not an arbitrator, is armed with the authority to determine whether class arbitration can proceed.



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**School of Law.**

### Endnotes

- <sup>1</sup> *Lamps Plus, Inc. v. Varela*, 139 S. Ct. 1407 (2019).
- <sup>2</sup> *Id.* at 1428–35 (Kagan, J., dissenting) (“That holding has no basis in any Act—or in any of our decisions relating to it . . . . Today’s opinion is rooted instead in the majority’s belief that class arbitration ‘undermine[s] the central benefits of arbitration itself.’ . . . But that policy view—of a piece with the majority’s ideas about class litigation—cannot justify displacing generally applicable state law about how to interpret ambiguous contracts. I respectfully dissent.” (internal citations omitted)).
- <sup>3</sup> See *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333 (2011); *Stolt-Nielsen v. Animalfeeds Int’l Corp.*, 559 U.S. 662 (2010).
- <sup>4</sup> See generally *Stolt-Nielsen*, 559 U.S. 662.
- <sup>5</sup> *Id.* at 686–88.
- <sup>6</sup> *Id.* at 681.
- <sup>7</sup> *Id.* at 687.

- <sup>8</sup> *Concepcion*, 563 U.S. 333.
- <sup>9</sup> *Id.* at 348.
- <sup>10</sup> *Id.* at 334.
- <sup>11</sup> *Lamps Plus, Inc. v. Varela*, 139 S. Ct. 1407, 1412 (2019).
- <sup>12</sup> *Id.*
- <sup>13</sup> *Id.* at 1413.
- <sup>14</sup> *Id.*
- <sup>15</sup> *Id.*
- <sup>16</sup> *Id.*
- <sup>17</sup> *Id.*
- <sup>18</sup> *Id.*
- <sup>19</sup> *Id.* (reconciling SCOTUS’ decision in *Stolt-Nielsen*).
- <sup>20</sup> *Stolt-Nielsen v. Animalfeeds Int’l Corp.*, 559 U.S. 662, 684 (2010).
- <sup>21</sup> *Id.* at 686–88.
- <sup>22</sup> See *Lamps Plus*, 139 S. Ct. at 1413 (“The Ninth Circuit followed California law to construe the ambiguity against the drafter, a rule that ‘applies with peculiar force in the case of a contract of adhesion’ such as this.” (quoting *Sandquist v. Lebo Auto., Inc.*, 376 P.3d 506, 514 (2016))).
- <sup>23</sup> *Id.*
- <sup>24</sup> *Id.* at 1412–13.
- <sup>25</sup> *Id.*
- <sup>26</sup> *Id.* at 1415.
- <sup>27</sup> *Id.*
- <sup>28</sup> *Id.* at 1415–16 (internal quotation marks and brackets omitted).
- <sup>29</sup> *Id.* at 1411 (internal quotation marks and brackets omitted) (quoting *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333 (2011)).
- <sup>30</sup> *Id.* (quoting *Epic Sys. Corp. v. Lewis*, 584 U.S. \_\_\_\_ (2018)).

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# Where There's Smoke, Courts Don't Always Find Fire

## Recent Decisions on “Convincing Mosaic” Evidence in Discrimination Cases

By Viktoryia Johnson, Tampa

Evidence that a non-African American candidate was hired at a specially called board meeting where the sole African American board member was absent; that the successful candidate had prior discipline; that the employer exaggerated the successful candidate's qualifications in its statement of position to the EEOC; and that no African Americans were employed in defendant's transportation department was not sufficient to establish a “convincing mosaic” of circumstantial evidence of intentional race discrimination. Although the misstatements to the EEOC were the “most compelling” piece of circumstantial evidence, “considerably more” was overall required to show a “circumstantial mosaic” of intentional discrimination.

*Dukes v. Shelby Cnty. Bd. of Educ.*, 762 F. App'x 1007 (11th Cir. 2019).

In this Title VII, 42 U.S.C. §§ 1981 and 1983 failure-to-promote case, the Eleventh Circuit affirmed the district court's grant of summary judgment to the employer because the African American plaintiff failed to establish a “convincing mosaic” of circumstantial evidence of intentional race discrimination. After the employee was not selected for the transportation route supervisor position, he argued the following facts established a reasonable inference of discrimination: (1) the defendant Board of Education hired a non-African American candidate during a specially called meeting, at which the board president (the only African American board member) was not in attendance, two days before its regularly scheduled meeting, and the meeting minutes incorrectly stated that the plaintiff had attended the meeting; (2) the board misstated the successful candidate's qualifications in its statement of position to the EEOC; (3) no African Americans were employed in the transportation department; (4) an earlier vacancy for a transportation route supervisor was removed to allegedly avoid hiring the plaintiff; (5) a board member's comment that “a ‘black’ would be considered [for a position] if the Board ever received a decent resume” from an African American candidate; and (6) the board hired a non-African American candidate despite his prior discipline for bringing his special needs child on a school field trip.

The Eleventh Circuit analyzed the facts of the case with those of *Connelly v. Metropolitan Atlanta*

*Rapid Transit Authority*, 764 F.3d 1358 (11th Cir. 2014), which did not present a convincing mosaic of circumstantial evidence, and with those of *Smith v. Lockheed-Martin Corp.*, 644 F.3d 1321 (11th Cir. 2011), which did, and concluded the plaintiff here had failed to present a convincing mosaic of circumstantial evidence. While the reasons for the specially called meeting were unknown, the plaintiff offered no evidence that the board intentionally excluded the African American president from taking part in the vote or intentionally misrepresented the plaintiff's attendance at the meeting. Similarly, the plaintiff pointed to no evidence that the successful candidate's discipline was disregarded so that he could be hired instead of the plaintiff or that the earlier vacancy was removed to avoid hiring the plaintiff. As to the argument that the transportation department employed no African Americans, the plaintiff offered no comparative information that made the anecdotal information significant. The Eleventh Circuit further found that the board received information only about the superintendent's recommended candidate—information limited to the applicant's name, job title, and location of the position—so the court could not infer discriminatory conduct by the board based on the member's comment concerning the resumes of African Americans. The “most compelling” piece of circumstantial evidence was the erroneous statements made in the board's EEOC statement of position but, even when taken into account, the erroneous statements alone did not create a convincing mosaic of circumstantial evidence. All in all, “considerably more” evidence demonstrating that the employer intentionally discriminated based on race in its decision not to promote the plaintiff was required than what the employee had presented in this case.

**Evidence that employer did not follow its progressive discipline policy or consistently enforce the zero-tolerance policy pursuant to which the plaintiff was fired, and evidence that the employee had previously received excellent performance evaluations and was subjected to a racial remark, was not enough to create a “convincing mosaic” of intentional discrimination, even when considered together with other evidence.**

*Frazier v. Safelite Grp., Inc.*, No. 3:17-cv-1366-J-32MCR, 2019 U.S. Dist. LEXIS 94136 (M.D. Fla. June 5, 2019).

In this race discrimination case under the Florida Civil Rights Act of 1992, the court granted summary judgment to the employer because the plaintiff failed to establish a “convincing mosaic” of circumstantial evidence of intentional discrimination. After the employee was terminated for failure to use a cleansing and activating agent on the customer’s car windshield, he argued the following facts established a reasonable inference of discrimination: (1) the employer did not follow its progressive discipline policy; (2) the zero-tolerance policy for failure to use the agent, pursuant to which the plaintiff was fired, was unwritten and inconsistently enforced or not enforced; (3) the employer engaged in suspect business practices; (4) the plaintiff had excellent performance evaluations; (5) all comparators who were fired for failing to use the agent were terminated after the plaintiff’s discrimination complaint; (6) comparators were treated differently; and (7) the plaintiff was subjected to a racially offensive remark in the workplace.

As an initial matter, the court noted that the employee’s convincing mosaic argument failed as a matter of law because no Florida courts had adopted that standard under the FCRA. Even, said the court, if it were to consider whether the evidence presented a convincing mosaic, the plaintiff did not put forth proof that was “comparably powerful” to evidence that the plaintiff was treated less favorably than a similarly situated employee. Where a company does not follow a progressive discipline policy in every case, its failure to conform to the policy does not establish pretext. Moreover, the company’s installation compliance agreement provided for the possibility of immediate dismissal for failure to comply with its installation methods or tool usage policy, and the employer had in fact terminated numerous employees of various races for violating same. Although the zero-tolerance policy was not in writing, the installation compliance agreement provided that failure to adhere to the approved installation methods or tool usage policy could result in immediate dismissal. Moreover, both before and after the plaintiff’s complaint and termination, the employer had fired similarly situated comparators for failure to activate or prime windshields. The evidence of a non-decision-maker’s single alleged racist remark unrelated to the decision-making process was too weak to raise a genuine issue of fact. Finally, the plaintiff’s excellent performance evaluations were irrelevant where he admittedly failed to use the agent on the customer’s windshield, in violation of company policy. Even taking all of the arguments together, there

was no evidence of a convincing mosaic of intentional race discrimination.

**The plaintiff presented a “convincing mosaic” of circumstantial evidence of retaliation where he raised overtime violations multiple times to his employer, the record contained contradictory evidence concerning the company’s reason for the adverse decision, and the plaintiff’s complaints occurred in close proximity to his termination.**

***Santiago v. Jaguar Therapeutics, Ltd. Liab. Co.***, No. 17-22749-CIV, 2019 U.S. Dist. LEXIS 86682 (S.D. Fla. May 17, 2019).

In this FLSA retaliation case, the court denied the employer’s motion for summary judgment, finding the plaintiff presented a “convincing mosaic” that would allow a reasonable jury to infer retaliation. The plaintiff alleged that the company terminated his employment because of his internal complaints that he was being forced to work overtime without compensation. The record, when viewed in the light most favorable to the plaintiff, included contradictory evidence concerning the employer’s reason for the plaintiff’s termination. Also, shortly before his termination, the plaintiff sent the company an email with an invoice for past due overtime compensation and stated he was entitled by law to extra compensation for the overtime, and another email in which he complained about his schedule not being “fair or legal” and that he worked overtime without “benefit.” By email, the company challenged the plaintiff’s representations about his overtime. The court found this evidence presented a convincing mosaic that would allow a reasonable jury to infer a retaliatory act by the company. As such, there was a genuine issue of material fact as to whether the employee’s complaints were in such close temporal proximity to his termination that it negated the company’s proffered legitimate and non-retaliatory reason for his termination.



V. JOHNSON

***Viktoryia Johnson*** is a Senior Associate with FordHarrison, LLP in Tampa, Florida. Ms. Johnson’s practice focuses on company-side employment litigation.

# Eleventh Circuit Case Notes on FLSA and ADA

By Melissa Castillo, Tampa

**Packing shed employees were not employed in agriculture under FLSA where they processed onions grown by contract farmers.**

*Acosta v. Bland Farms Prod. & Packing, LLC*, No. 17-15322, 2019 U.S. App. LEXIS 10118 (11th Cir. Apr. 5, 2019).

The employer ran a packing shed that processed onions grown by its own and other contract farmers. The district court found that the packing shed employees were not exempt under FLSA's agricultural exemption because the employer was not so intimately involved in the contract farmers' operations as to make its employees secondary agriculture employees. The district court awarded overtime wages and liquidated damages. The Eleventh Circuit affirmed the decision of the district court and concluded that because the farming operations of the contract farmers were separate from the farming operations of the employer, the packing shed employees were not employed in agriculture when they processed the contract farmers' onions. The Eleventh Circuit also vacated and remanded the award of liquidated damages because of the district court's failure to address the employer's reasonable belief that it was the farmer of the onions that its employees processed.

**An impairment alone does not demonstrate that an employee is substantially limited from working so as to qualify as a disability under the ADA, nor does it prompt an accommodation by an employer unless requested.**

*Hudson v. Tyson Farms, Inc.*, No. 18-10476, 2019 U.S. App. LEXIS 12753 (11th Cir. Apr. 29, 2019).

The employee was a tray packer who sued her employer for alleged violations of the ADA. The dis-

trict court granted summary judgment in favor of the employer, finding that the employee's back injury and asthma were not disabilities under the ADA and that the employer did not fail to reasonably accommodate those conditions. The Eleventh Circuit affirmed both decisions of the district court. Although a back injury and asthma may constitute impairments, an impairment that does not substantially limit a person's ability to work does not qualify as a disability under the ADA. In arriving at this conclusion, the Eleventh Circuit noted an impairment does not substantially limit the ability to work merely because it prevents a person from performing either a particular specialized job or a narrow range of jobs. The court also pointed out that, when making the "substantially limits" determination, courts consider the manner in which the individual is limited in the activity as compared to the general population and may consider the difficulty, effort, or time required to perform a major life activity as well as the length of time the individual can perform the activity and the pain experienced. The Eleventh Circuit also found that an employer does not fail to reasonably accommodate an employee's request if the employee breaks down the interactive process by abruptly quitting the following day.



M. CASTILLO

*Melissa Castillo is a summer associate at Ford Harrison, LLP in Tampa. She received her undergraduate degree magna cum laude from Florida International University and is a third-year law student at the University of Florida Levin College of Law.*

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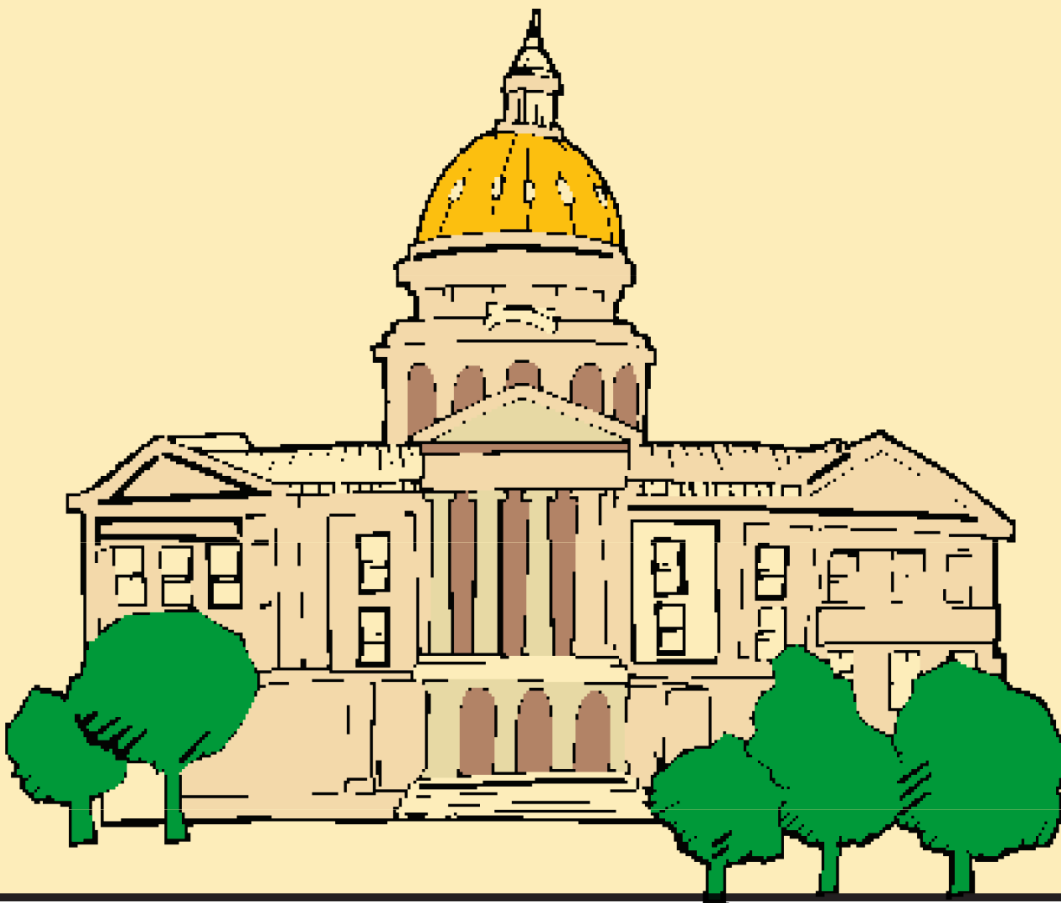
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*Looking Ahead*

# **ADVANCED LABOR TOPICS**

**April 2020**

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## COURSE AGENDA

### Thursday, October 17, 2019

12:45 p.m. – 1:00 p.m.

#### **Late Registration**

1:00 p.m. – 1:10 p.m.

#### **Welcome and Opening Remarks**

*Gregg Riley Morton, Deputy General Counsel, PERC, Tallahassee*

*Janeia Ingram, Hearing Officer, PERC, Tallahassee*

1:10 p.m. – 2:00 p.m.

#### **Federal 11th Circuit and Florida Public Sector Update**

*Damon Kitchen - Constangy, Brooks & Smith, LLP, Jacksonville*

2:00 p.m. – 2:50 p.m.

#### **State and Federal Causes of Action for Retaliatory Conduct in Florida Public Employment**

*Robert Eschenfelder - Trask Daigneault LLP, Clearwater*

2:50 p.m. – 3:05 p.m. **Break**

3:05 p.m. – 3:55 p.m.

#### **Special Considerations under FLSA for Public Employers**

*Linda Bond Edwards – Rumberger Kirk & Caldwell, Tallahassee*

3:55 p.m. – 4:45 p.m.

#### **EEOC/FCHR Update**

*Rob Sniffen - Sniffen & Spellman, Tallahassee*

4:45 p.m. – 5:00 p.m. **Break**

5:00 p.m. – 6:00 p.m.

#### **Section Meetings (All Invited)**

6:00 p.m. – 7:30 p.m.

#### **All Members' Reception (Included in Registration Fee)**

### Friday, October 18, 2019

8:50 a.m. – 9:00 a.m.

#### **Opening Remarks**

*Gregg Riley Morton, Deputy General Counsel*  
*Janeia Ingram, Hearing Officer, Tallahassee*

9:00 a.m. – 9:55 a.m.

#### **PERC: Year in Review**

*Gregg Riley Morton, Deputy General Counsel, PERC, Tallahassee*

*Janeia Ingram, Hearing Officer, PERC, Tallahassee*

*Lyyli Van Whittle, Hearing Officer*

9:55 a.m. – 10:45 a.m.

#### **Is Florida's Workplace Still Drug Free? Discussion of the Impact of Medical Marijuana on Drug-Free Workplace Policies**

*Sacha Dyson - Gray Robinson, Tampa*

10:45 a.m. – 11:00 a.m. **Break**

11:00 a.m. – 11:50 a.m.

#### **FRS & Pension Developments**

*Glenn Thomas and Janice Rustin - Lewis, Longman & Walker, P.A., Tallahassee/West Palm Beach*

11:50 a.m. – 1:00 p.m.

#### **Luncheon (Included in Registration Fee)**

1:00 p.m. – 1:50 p.m.

#### **Effective and Ethical Uses of Social Media in Litigation**

*Dixie Daimwood - Dunlap & Shipman, Tallahassee*

1:50 p.m. – 2:40 p.m.

#### **First Amendment in Public Employment**

*Don Slesnick - Slesnick & Casey LLP, Coral Gables*

*Cynthia Sass - Sass Law Firm, Tampa*

*Bill Candela - Miami-Dade County, Miami*

2:40 p.m. – 3:30 p.m.

#### **Best Practices to Avoid Discrimination, Harassment, and Retaliation Claims**

*Brian Hayden - Jackson Lewis, Jacksonville*

3:30 p.m. – 3:40 p.m.

#### **Q&A and Closing Remarks**

#### **CLER Program**

(Max credit: 10.0 hours)

General: 10.0 hours

Ethics: 1.0 hour

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#### **Certification Program**

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# CALENDAR OF EVENTS 2019-2020

**Labor and Employment Law Section  
Executive Council Meeting**

August 29, 2019, 5:00 p.m. – 6:00 p.m.  
Offices of GrayRobinson  
301 E. Pine Street, Suite 1400  
Orlando, Florida 32801

**45th Annual  
Public Employment Labor Relations Forum**

October 17-18, 2019  
Rosen Plaza Hotel  
9700 International Drive  
Orlando, FL 32819

**Executive Council Meeting (All Invited)**

Thursday, October 17  
5:00 p.m. – 6:00 p.m.

**All Members' Reception  
(Included in Registration Fee)**  
6:00 p.m. – 7:30 p.m.

**20th Labor & Employment Law Annual Update and  
Certification Review**

February 6-7, 2020  
Florida Bar Winter Meeting  
Hyatt Regency Orlando  
9801 International Drive  
Orlando, FL 32819

**Practicing Before State Agencies**

March 2020  
Tallahassee, FL

**Advanced Labor Topics**

April 2020  
Washington, D.C.

