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Editor

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Editor's Note:

These articles and case notes were written for the *Checkoff*. Because of workplace limitations occasioned by Covid-19, that publication format is currently unavailable. In order for our readers to have timely access to our authors' analyses of recent Eleventh Circuit and SCOTUS cases and recent changes to the FLSA, as well as summaries of selected state and federal decisions, the articles and case notes are included in this *E-Update*. Also, the Labor and Employment Law Section is pleased to announce that Advanced Labor Topics 2020 in Washington D.C. has been rescheduled for September 10-11, 2020. See page 9 for more information.

CHANGES TO THE FLSA JOINT EMPLOYER RULE

By Carly Stein, Tampa

On January 16, 2020, the Department of Labor (DOL) Wage and Hour Division released its final rule addressing joint employer status under the Fair Labor Standards Act (FLSA or the "Act").[1] The new rule, which purports to be a revision and clarification of the prior understanding of the Act, took effect on March 16, 2020.[2] In response to comments received since the proposed rule was published in April of 2019, the DOL has made some changes to clarify and update the proposed rule in this final version.[3]

In addition to clarifying terms, in its final rule the Wage and Hour Division specified that certain factors do *not* automatically weigh in favor of finding joint employer status. In an effort to eliminate any potential confusion, the final rule makes clear in multiple places, including within its enumerated factors, that the mere contractual ability to exercise control over the employee is not, in and of itself, sufficient to establish a joint employer relationship without further action.

The final rule contemplates two joint employer scenarios.[4] In the first scenario, an employer suffers, permits, or otherwise employs the employee to work while, simultaneously, a third party benefits from that work.[5] This third party is a joint employer in this scenario only if the third party acts, whether directly or indirectly, in the interest of the employer in relation to the employee.[6]

This first scenario utilizes in its analysis a four-factor test derived from the Ninth Circuit's decision in *Bonnette v. California Health & Welfare Agency*.[7] The factors to be examined include whether the potential joint employer: (1) hires or fires the employee, (2) supervises and controls the employee's work schedule or conditions of employment to a substantial degree, (3) determines the employee's rate and method of payment, and (4) maintains the employee's employment records.[8]

The addition of "to a substantial degree" under factor two, which was not originally included in the proposed rule, is consistent with the balancing tests for joint employment status currently utilized by other circuit courts.[9]

Following comments and confusion regarding what constitutes employment records, the Wage and Hour Division clarified this term in its final rule.[10]

Employment records may include payroll records and records that pertain to hiring or firing, supervising and controlling of work schedules or conditions of employment, or determining the rate and method of payment.[11] In keeping with the DOL's goal of clarity, the final rule explicitly states that satisfaction of this fourth factor with respect to employment records is not, alone, sufficient for joint employer status.[12]

The potential employer must actually exercise, either directly or indirectly, one or more of these "indicia of control" for joint employment liability to be established.[13] In including indirect exercise of control, the final rule allows for situations wherein a joint employer requires certain rules or directions to be followed by the direct employer with respect to the employee; it does not include situations where the direct employer voluntarily adopts suggestions or recommendations from the potential joint employer.[14]

While these four factors are the focus of the first part of this new rule, they are by no means dispositive.[15] Additional factors may also be explored if they indicate that there exists significant control over the terms and conditions of an employee's work.[16]

In addition, joint employment under the new rule is not tied to the employee's economic dependence on the potential joint employer. As a result, in determining joint employment, factors that are *not* considered include: (1) the specialty of skill required by the employee, (2) the employee's opportunity for profit or loss based on his/her managerial skills, (3) the employee's personal investment in equipment and materials, and (4) the number of other contractual relationships that the employee might have with others for similar services.[17]

Notably, the new rule explains that the franchisee business model does not per se confer joint employer status and provides multiple examples of franchise-like scenarios that do not make joint employment any more or less likely, including—among other things—requiring quality control standards, requiring the use of certain policies and handbooks, and requiring standardization of products and services.[18]

The second joint employer scenario contemplated by the rule involves an employer employing an employee for one set of hours in a workweek while another employer employs the same individual for a separate set of hours in that workweek. If these two employers are disassociated from one another as it pertains to the employee's employment, then they are not joint employers and do not have to proceed with wage calculations as such. If, however, they are joint employers, the two must aggregate the hours worked by the employee in making their wage calculations and will be jointly and severally liable to the employee for any damages under the FLSA.[19]

The DOL's standard for "association" versus "disassociation" under this section is the same under the final rule as it was in the proposed rule. Ordinarily, employers would be sufficiently associated with one another if: (1) one or more have an arrangement to share the employee's services, or (2) one employer acts in the interest of the other with respect to the employee, or (3) the two share control of the employee because one employer is controlled by or controls the other employer.[20]

Recognizing the potential for confusion, multiple examples are included in the general guidance of this new rule to demonstrate potential joint employment. In the first example, the employee works at two restaurants that are part of the same franchise but owned by separate franchisees who do not coordinate regarding the employee.[21] These two franchisees are not joint employers, demonstrating the new rule's emphasis that the franchise relationship does not constitute per se joint employment. On the contrary, a joint employment relationship would be created where an employee works at two different restaurant establishments owned by the same individual; the two restaurants coordinate the employee's schedule and rate of pay; and the employee works at the two interchangeably.[22]

In another example, a restaurant employs a cleaning company and provides instructions and requirements for tasks; a cleaning company supervisor monitors the employees; and the company accedes to the restaurant's request to fire an employee who does not abide by the proper safety requirements.[23] This restaurant is not a joint employer of the cleaning crew. On the other hand, the same restaurant employing the same cleaning company would be a joint employer if a restaurant official supervised the work of the cleaning crew, kept the cleaning crew members' wage and schedule records, and could fire cleaning crew employees without question.[24]

The implementation of this new rule from the DOL

rescinds any prior rules or interpretations from the DOL and is the standard by which attorneys should analyze the joint employment status of employees moving forward.[25] Finally, it should be noted that despite requests from commenters to align the FLSA joint employer definition with that of the National Labor Relations Act, such efforts were explicitly rejected by the DOL.[26] Meanwhile, on February 26, 2020, the National Labor Relations Board released its own Final Rule defining Joint Employer Status under the NLRA, which will go into effect on April 27, 2020.[27]

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Endnotes

1 Joint Employer Status Under the Fair Labor Standards Act, 85 Fed. Reg. 2820 (to be codified at 29 C.F.R. pt. 791).
2 *Id.*
3 *Id.* at 2823–24.
4 *Id.* at 2858.
5 *Id.*
6 *Id.*
7 *Id.* at 2826–28 (citing *Bonnette v. California Health & Welfare Agency*, 704 F.2d 1465 (9th Cir. 1983)).
8 *Id.* at 2859.
9 *Id.* at 2820–21.
10 *Id.* at 2859.
11 *Id.*
12 *Id.*
13 *Id.*
14 *Id.*
15 *Id.*
16 *Id.*
17 *Id.*
18 *Id.*
19 *Id.*
20 *Id.* at 2860.
21 *Id.*
22 *Id.*
23 *Id.*
24 *Id.*
25 *Id.* at 2858.
26 *Id.* at 2828.
27 Joint Employer Status under the National Labor Relations Act, 85 FR 11184 (to be codified at 29 C.F.R. pt. 103).

SCOTUS Confirms Section 1981 Requires Proof of "but for" Cause of Injury

By Viktoryia Johnson, Tampa

On March 23, 2020, the Supreme Court of the United States (SCOTUS) decided *Comcast Corporation v. National Association of African American-Owned Media*.[1] SCOTUS held that, to prevail on a 42 U.S.C. § 1981 race discrimination claim, a plaintiff must initially plead and ultimately prove that "but for" his or her race, the plaintiff would not have lost a legally protected right. The "but for" burden remains the same throughout the case and does not change as the lawsuit moves from the pleading stage to the summary judgment or trial stage. After *Comcast Corporation*, § 1981 litigants will now, presumably, have a harder time pleading and ultimately proving race discrimination claims. Practically speaking, however, this decision may not have a significant effect because its impact is limited to claims under § 1981, whereas plaintiffs claiming race discrimination may still bring claims under Title VII and its more forgiving "motivating factor" standard of causation.

Facts and Holding

Entertainment Studios Network (ESN), an African American-owned television network operator, sought to have cable television conglomerate Comcast Corporation (Comcast) carry its channels.[2] When Comcast refused, ESN sued and sought billions in damages, arguing that Comcast systematically disfavored media companies wholly owned by African Americans and that its alleged legitimate business reasons for refusing to carry ESN channels were merely pretextual.[3] ESN alleged that Comcast's behavior violated 42 U.S.C. §1981(a), which guarantees "[a]ll persons . . . the same right . . . to make and enforce contracts . . . as is enjoyed by white citizens."[4]

The district court dismissed ESN's complaint for failure to plausibly establish that "but for" the racially motivated animus, Comcast would have contracted with ESN.[5] The Ninth Circuit reversed, holding that ESN only had to plausibly plead that race played "some role" in Comcast's decision to refuse to carry

ESN's channels, a more "forgiving" standard; under that standard, ESN had pleaded a viable claim.[6] To resolve the split among federal circuits as to the proper standard of causation in § 1981 cases, SCOTUS agreed to hear the appeal.

SCOTUS[7] opened the analysis in its unanimous decision by noting that a plaintiff's duty to establish causation is well established. In the law of torts, for example, a plaintiff must first plead and then prove that an injury would not have occurred "but for" the defendant's unlawful conduct. ESN argued that 42 U. S. C. §1981 should be interpreted as departing from this "but for" standard, but the Court disagreed: "[L]ooking to this particular statute's text and history, we see no evidence of an exception."[8]

On appeal, ESN argued that a § 1981 plaintiff must prove only that race was a "motivating factor" in the challenged decision.[9] ESN conceded that a §1981 plaintiff has to prove but-for causation at trial, but it argued the rule should be different at the pleading stage. ESN posited that in order to beat a motion to dismiss, a plaintiff should only be required to allege facts plausibly showing that race was a "motivating factor."[10] ESN admitted that this standard would allow some claims to survive a motion to dismiss just to be "destined" to fail as a matter of law later.[11]

Acknowledging that most rules bear exceptions, SCOTUS found that, considered collectively, Court precedent and the text and history of § 1981 dictated application of the general rule in this case. The statutory language does not expressly discuss causation, but SCOTUS believed it to be "suggestive."[12] If the defendant would have responded the same way to the plaintiff if he had been white, it could be said that the plaintiff received the same legally protected right as a white person. Conversely, if the defendant would have responded differently but for the plaintiff's race, SCOTUS reasoned, the plaintiff then did not receive the same right as a white person.[13] Nor did anything in § 1981 suggest that this test should change on a motion to dismiss.[14]

The Court further reviewed the larger structure and history of the Civil Rights Act of 1866 and found it would be "more than a little incongruous" for SCOTUS to employ the laxer rules ESN proposed.[15] SCOTUS also reviewed its precedent, recalling that when the Court first inferred a private cause of action under § 1981, it described it as "afford[ing] a federal remedy against discrimination . . . on the basis of race"—the "on the basis of" language being "strongly suggestive" of a but-for causation standard.[16] In a subsequent case, the Court explained that §1981 was "designed to eradicate blatant deprivations of civil rights," such as where "a private offeror refuse[d] to extend to [an African American], . . . because he is [an African American], the same opportunity to enter into contracts as he extends to white offerees"; the "because of" language also being associated with but-for causation.[17] Further, nothing in the Court's prior decisions suggested the possibility that this "but for" rule of causation could be modified in the early stages of a case.[18]

Finally, SCOTUS considered the neighboring statutory provision, § 1982, to interpret the § 1981 causation standard. Because the two provisions use nearly identical language, the Court has traditionally construed them similarly and has repeatedly held that § 1982 prohibits unequal treatment in allowing a citizen "to acquire property . . . because of color," requiring "but for" causation. SCOTUS did not believe it could demand "less" proof from a § 1981 plaintiff.[19]

Finally, SCOTUS rejected ESN's plea to draw on the "motivating factor" causation test found in Title VII cases.[20] SCOTUS considered and rejected ESN's creative arguments, finding that Title VII's history revealed "more than a few reasons to be wary of any invitation to import its motivating factor test into §1981."[21] In the end, the Court held: "All the traditional tools of statutory interpretation persuade us that § 1981 follows the usual rules, not any exception. To prevail, a plaintiff must initially plead and ultimately prove that, but for race, it would not have suffered the loss of a legally protected right."[22] SCOTUS remanded the case to the Ninth Circuit to consider whether ESN had stated a cause of action under the correct "but for" standard of causation.[23]

Significance

Comcast Corporation has resolved a dispute among the federal circuits as to the correct standard of causation in § 1981 cases. The ruling may be considered a victory for employers, as presumably § 1981 litigants will now have a harder time stating a cause of action for, and ultimately proving, race discrimination. Practically speaking, however, this decision may not have such a significant effect because its impact is limited to § 1981 cases, whereas plaintiffs claiming race discrimination under Title VII may continue to rely on the "motivating

factor" standard of causation. Of course, where a race discrimination plaintiff's only option is to bring a § 1981 claim—where, for example, he or she has failed timely to exhaust administrative remedies—the *Comcast Corporation* decision is a more palpable win for companies. Going forward, employment defense lawyers should be mindful of asserting the "but for" standard of causation in its defenses to plaintiffs' complaints and should review any of their pending § 1981 cases to ensure the defense has been asserted.

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Endnotes

1 No. 18-1171, 2020 U.S. LEXIS 1908 (Mar. 23, 2020).
2 *Id.* at *1.
3 *Id.* at *1, 5.
4 *Id.* at *5–6.
5 *Id.* at *1, 6.
6 *Id.* at *1, 6–7.
7 Justice Gorsuch delivered the opinion of the Court.
8 *Id.* at *4–5, 7–8.
9 *Id.* at *8.
10 *Id.* at *8–9.
11 *Id.* at *9.
12 *Id.* at *10–11.
13 *Id.* at *11.
14 *Id.*
15 *Id.* at *10–13.
16 *Id.* at *13 (citing *Johnson v. Ry. Express Agency, Inc.*, 421 U.S. 454, 459–60 (1975)).
17 *Id.* at *13–14 (citing *General Bldg. Contractors Assn., Inc. v. Pennsylvania*, 458 U. S. 375 (1982)).
18 *Id.* at *14.
19 *Id.*
20 *Id.*
21 *Id.* at *14–21.
22 *Id.* at *21.
23 *Id.*

Eleventh Circuit Remands *Johnson v. Miami-Dade County* in Light of New Comparator Standard

By Michelle A. Snoberger and Jeffrey D. Slanker, Tallahassee

The Eleventh Circuit Court of Appeals has been divided for some time about just how "similarly situated" a Title VII plaintiff must be to a comparator employee in order to establish a prima facie case. Last year, however, the court finally established a measure of clarity. In *Lewis v. City of Union City*, a 9–3 en banc holding, the court explained that a plaintiff must demonstrate at the first stage of analysis that he or she was "similarly situated in all material respects" to a proffered comparator.[1]

Prior to *Lewis*, there was an intra-circuit split on which standard to use under the *McDonnell Douglas* test regarding comparators. One panel may have required a plaintiff to show that a comparator was "nearly identical" to the plaintiff,[2] while a different panel completely rejected the "nearly identical" standard.[3] Other panels adopted the less stringent "same or similar" conduct standard,[4] while some applied a Frankenstein standard of both "nearly identical" and "same or similar."[5]

In an effort to clarify this muddled approach, the *Lewis* court rejected the plaintiff's argument that the comparator analysis should be conducted during the pretext stage, reaffirming that such analysis must instead take place at the prima facie stage.[6] Additionally, and most notably, the court settled on a comparator standard: a plaintiff must show that his or her comparators were "similarly situated in all material respects."[7]

Recently, in *Johnson v. Miami-Dade County*, the Eleventh Circuit applied the new standard it set out in *Lewis*.[8] Sort of. In *Johnson*, the plaintiff, a recently terminated police officer, filed suit against the Miami-Dade County Police Department (MDPD) alleging his termination was motivated by racial discrimination and unlawful retaliation in violation of 42 U.S.C. § 1983, Title VII of the Civil Rights Act, and the Florida Civil Rights Act.[9] MDPD maintained that the plaintiff was terminated for insubordination and disrespecting his superior officers.[10] The district court granted MDPD's motion for summary judgment.[11] On appeal, the Eleventh Circuit held that the district court must reevaluate the plaintiff's comparator evidence in light of the new standard the court announced in *Lewis*, which was decided after the district court granted summary judgment.[12]

Specifically, the Eleventh Circuit affirmed in part, vacated in part, and remanded to the district court for

reconsideration.[13] The court affirmed the district court's judgment that, in the absence of valid comparators, the plaintiff failed to establish a retaliation claim regarding: (1) the actions of his lieutenant in 2013, (2) the discipline he suffered from his captain in 2015, and (3) the director's decision to terminate him in 2015.[14] Additionally, the court affirmed the district court's ruling barring the plaintiff from deposing the Miami-Dade County mayor regarding the section 1983 claim.[15] As this article is being finalized for publication, the district court has not yet issued any new order.

Johnson likely will not be the last case of its kind. In its decision regarding the comparator evidence, the court stated:

> The District Court evaluated Johnson's comparators before this Court changed the standard for considering such evidence in *Lewis*. There, we concluded that the traditional "nearly-identical test is too strict," and held that the new standard is "show[ing] that [the plaintiff] and [his] comparators are 'similarly situated in all material respects.'" We therefore vacate the District Court's ruling on Johnson's comparators evidence and remand to the District Court for reconsideration of the evidence in light of our guidance in *Lewis*.[16]

The court thereby indicated that any case dealing with comparator evidence that comes up on appeal is fair game for reconsideration.

So, what exactly does it mean to be "similarly situated in all material respects?" The court in *Lewis* laid out situations in which a comparator would likely be found to be sufficiently similarly situated under its new standard. According to the court, a similarly situated comparator would have engaged in the same basic conduct or misconduct; been subjected to the same employment policies, guidelines, or rules; been under the jurisdiction of the same supervisor; or shared similar employment or disciplinary history.[17] Essentially, the focus should be on substantive likenesses, not formal labels.[18]

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Endnotes

1 *Lewis v. City of Union City*, 918 F.3d 1213, 1218 (11th Cir. 2019) (en banc).
2 *See, e.g., Nix v. WLCY Radio/Rahall Commc'ns*, 738 F.2d 1181, 1185 (11th Cir. 1984).
3 *See, e.g.*, *Alexander v. Fulton Cnty.*, 207 F.3d 1303, 1333–34 (11th Cir. 2000), *overruled in part on other grounds in Manders v. Lee*, 338 F.3d 1304 (11th Cir. 2003).
4 *See, e.g.*, *Holifield v. Reno*, 115 F.3d 1555, 1562 (11th Cir. 1997) (per curiam).
5 *See, e.g.*, *Maniccia v. Brown*, 171 F.3d 1364, 1368 (11th Cir. 1999).
6 *Lewis*, 918 F.3d at 1218.
7 *Id.*
8 *Johnson v. Miami-Dade Cty.*, 948 F.3d 1318 (11th Cir. 2020).
9 *Id.* at 1322.
10 *Id.*
11 *Id.*
12 *Id.* at 1322–23.
13 *Id.* at 1323.
14 *Id.*
15 *Id.* at 1329–30.
16 *Id.* at 1326 (citation omitted).
17 *Lewis*, 918 F.3d at 1227–28.
18 *Id.* at 1228.

Case Notes

By Melissa Castillo, Gainesville

Sporadic instances of harassment over a four-month period, where the employer commented on the employee's appearance and made crude sexual references, were not sufficiently pervasive to support the employee's claim of sexual harassment.

Allen v. Ambu-Stat, LLC, 2020 WL 260261 (11th Cir. Jan. 16, 2020).

In this Title VII case, the Eleventh Circuit affirmed the lower court's grant of summary judgment, rejecting the employee's claims of sexual harassment and retaliation. The employee was an emergency medical technician who sued her employer, a provider of ambulatory services, alleging sporadic instances of sexual harassment over the course of approximately four months. Among other things, the employee alleged that one of the co-owners of the company made frequent comments about the employee's appearance,

including comments that she was "really pretty" and "fine as hell." The employee also alleged that the co-owner made crude sexual references, including that the co-owner, after listening to a song containing the lyrics "eating booty like groceries," asked the employee whether her boyfriend "[ate] that thang." The employee also noted two instances of physical touching in the office, although the touching was by the co-owner's four-year old son, who slapped her buttocks, and not by the co-owner himself, who only laughed at his son's actions. In analyzing whether the element of "severity or pervasiveness" was met, the Eleventh Circuit looked to *Mendoza v. Borden* and *Gupta v. Florida Board of Regents*. The court ultimately concluded that the employer's conduct fell short of the pervasiveness present in both *Mendoza* and *Gupta*. The employee relied on *Johnson v. Booker T. Washington Broadcasting Service, Inc.*, where fifteen instances of attempted physical touching over the course of four months by the employer satisfied the pervasiveness requirement, but the court found the conduct in the instant case was less frequent and fundamentally less offensive than the conduct in *Johnson*. The employee abandoned her severity argument at oral argument, and her sexual harassment claim ultimately failed. The employee's retaliation claim also failed as she did not identify any instance where she acted in opposition to an unlawful employment practice.

Under an "alter ego" theory, the female plaintiff deputy sheriff adequately pled a hostile work environment claim against the county sheriff based on allegations that the sheriff did not discipline male employees who subjected female employees to gender-based slurs and offensive conduct; also, the plaintiff could establish retaliation given the cumulative nature of the adverse actions alleged.

Massey v. Dorning, 2020 WL 607573 (N.D. Ala. Feb. 7, 2020).

In this Title VII and section 1983 case out of Alabama, the court declined to dismiss the sex-based discrimination claims of a deputy sheriff against the sheriff and the county. The plaintiff was one of the few female officers in a predominantly male workplace with no female supervisors, where the female employees were allegedly subjected to offensive conduct and derogatory slurs. The alleged conduct included referring to the female employees as "whores," "bitches," and "prostitutes"; commenting on female co-workers' body parts; openly discussing having sex with married female co-workers; and discussing sexual desires for female co-workers. The sheriff allegedly communicated to a female employee that he would not take any disciplinary action against male employees for offensive or discriminatory behavior and that he expected female employees to accept such behavior without complaint. After several female employees filed reports of sex-based harassment, the plaintiff came forward and reported that her direct supervisor had assaulted her two years prior. The defendants argued the alleged conduct was not severe or pervasive enough, that the plaintiff did not allege she was personally subjected to the harassment, and that liability could not be imputed to the sheriff. The court disagreed with the defendants, finding the conduct was gender specific and "precisely the sort of behavior that exposes women to disadvantageous conditions in the workplace." The court explained the conduct need not be directed specifically at the plaintiff if the conduct is sufficiently gender specific and either severe or pervasive, as it was in the instant case. The court also found that it could fairly be argued at this stage that the sheriff was liable as the employer under the "alter ego theory" because he held a high enough rank in the company that his conduct could be attributable to the employer, and that the plaintiff adequately pled a hostile work environment claim against him.

Additionally, the court declined to dismiss the plaintiff's Title VII retaliation claims, finding that the sheriff's alleged conduct was "materially adverse" when viewed cumulatively. The alleged conduct included an abusive interrogation conducted by the local police department and refusal to provide the plaintiff with backup for a dangerous assignment. The court rejected the defendant's argument that there was no retaliation because the county did not personally conduct the plaintiff's allegedly abusive interrogation, finding that liability under Title VII may be imputed to an employer and any agent of the employer. Further, the court reasoned that if a victim of sexual harassment knew that her employer would leak her accusation, that her co-workers and supervisors would ridicule her, that her attacker would go unpunished, and that her colleagues would not provide backup on dangerous assignments, it would dissuade her from filing a charge of discrimination, thus meeting the *Burlington* standard.

Finally, the court denied the defendant's motion to

dismiss the Title VII claims against the county, finding the plaintiff raised a plausible argument that the county might be a joint employer of the sheriff's office, an issue that could be resolved through additional discovery.

An injunction to enforce the restrictive covenants in a non-compete agreement was necessary to prevent the independent contractor from soliciting the employer's customers, notwithstanding the customers' testimony that they would not have retained the employer's services anyway.

Picture It Sold Photography, LLC v. Bunkelman, 287 So. 3d 699 (Fla. 4th DCA 2020).

In this restrictive covenant case, the court reversed and remanded the lower court's denial of the employer's motion for a temporary injunction to enforce its non-solicitation and non-compete agreement with an independent contractor. At the temporary injunction hearing, the contractor admitted that he was unsatisfied with his earnings and began providing his services to some of the employer's customers on the side without the employer's knowledge and in violation of the restrictive covenants. Although the trial court found that the employer was entitled to the presumption of irreparable injury, it concluded the employer failed to establish the unavailability of an adequate remedy at law after several former customers testified they would not retain the employer's services again, irrespective of the contractor's actions. The Fourth DCA disagreed with the trial court, reasoning the continued breach of the non-compete agreement threatened the employer's customer relations and that injunctive relief was necessary to stop the contractor from soliciting the employer's customers. After determining the employer had a substantial likelihood of success on the merits and that enforcement of the covenants protected its interest, the Fourth DCA determined the employer was entitled to a temporary injunction.

The prevailing party on an ADEA claim was entitled to front pay without a showing of "egregious circumstances" since reinstatement was not at issue but was required to provide the testimony of an expert witness to support the reasonableness of the attorneys' fees award.

Capital Health Plan v. Moore, 281 So. 3d 613 (Fla. 1st DCA 2019).

The employee doctor successfully sued his employer for age discrimination after a position sought by the employee was filled with a much younger doctor. After trial, the employee moved for front pay and attorneys' fees, which the court awarded. Subsequently, the employer appealed the final judgment and the orders granting front pay and attorneys' fees. The employer argued, in part, that the trial court erred when it gave the jury instructions that it could award front pay without a showing of "egregious circumstances" and could award attorneys' fees without testimony as to reasonableness. The First DCA disagreed with the appellant's first argument, explaining that a showing of "egregious circumstances" might be necessary to justify a plaintiff's refusal of reinstatement, but reinstatement was not an issue in the instant case. The court also found that front pay here adequately made the employee whole by providing the difference in salary the employee would have made in the position for which he was rejected. The First DCA reversed and remanded the award of attorneys' fees based on the employee's failure to provide the necessary testimony of an expert witness to support the reasonableness of the fee award. The court noted: "Florida cases establish that '[w]hen someone other than the client is required to pay the other party's attorney's fees, the trial court must award only a reasonable fee, determined from testimony by expert witness lawyers as to the prevailing rates for attorneys in comparable circumstances and as to the amount of time reasonably expended by the attorney for the party seeking payment.'"

Rescheduling certain discovery events to accommodate the employee's new employment outside the United States was appropriate.

Sarac v. Univ. of S. Fla. Bd. of Trustees, 2020 WL 97782 (M.D. Fla. Jan. 8, 2020).

In this Title VII and FCRA case, the plaintiff was a female visiting scholar and research assistant from Turkey who sued her employer for sex and national origin discrimination and retaliation. The employee acknowledged she placed her mental condition in controversy by alleging the discrimination caused her to seek mental health counseling to treat her severe general anxiety, panic attacks, and disturbances to her sleep and appetite. While the employee did not oppose the employer's request for a mental examination, she moved for a protective order for relief from having to travel to the United States for her deposition and mental examination. The employee had accepted an offer of employment in Qatar and could not take time

off to travel because she was in the probationary period with her new employer. The court noted that ordinarily a defendant should be permitted to depose a plaintiff in person. Balancing these competing interests, the court granted the protective order, in part, so the deposition and examination could be scheduled on consecutive days sometime after the probationary period, an alternative proposed by the plaintiff. The court reasoned it was better to reschedule the discovery events than to take the deposition by videoconference and allow the plaintiff to undergo the examination in Qatar since the employee did not demonstrate a specific undue burden precluding her from traveling to Florida and because the parties could not ensure the examining doctor in Qatar would be available as a witness at trial. Accordingly, the court used its broad discretion to find a solution that considered the interests of both the employee and employer.

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Looking Ahead!

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