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IN THIS ISSUE

Managing Arbitration in Light of *Managed Care*

By Chris Shulman, Tampa

Background

As any member of the Labor and Employment Law Section is undoubtedly aware, courts continue to enforce predispute arbitration agreements in employment cases, compelling arbitration not just of contractual and common law employment claims, but also statutory discrimination and wage claims (including, e.g., Title VII, ADEA, ADA, FLSA, and the rest of the "alphabet soup" of federal and state employment laws).[1] With this trend, the employment arbitration process resembles the employment litigation process more and more,[2] with parties seeking arbitral authorization of the whole panoply of discovery mechanisms available to litigants in court. One such mechanism often employed in litigation (and now in arbitration) is the use of subpoenas for nonparty discovery. Given the fact that many arbitration proceedings have moved online since the advent of the COVID-19 pandemic (using Zoom or one of the other platforms),[3] the ability to compel

See "Managing Arbitration," page 12

Movie Set Shooting Highlights Importance of Workplace Safety

By Shannon Kelly, Winter Park

The tragic shooting that took place recently on the *Rust* movie set[1] again places a spotlight on workplace safety—not only on film sets, but in workplaces generally. It also highlights the devastating consequences of failing to make workplace safety a priority. In 2020, the United States reported a total of 2.7 million workplace injuries and illnesses.[2] In 2019, the most recent year for which statistics are available, 5,333 workers died as a result of a work-related injury.[3]

So how should businesses respond to concerns regarding workplace safety? Generally, such concerns can and should be addressed in a workplace safety plan. Development of a workplace safety plan begins with a commitment by management to address safety threats to the work environment by carrying out a worksite analysis to assess potential hazards. The nature of the potential threats present in the workplace will vary depending upon the industry and the location of the worksite. Once a workplace safety plan is developed, it is important that employees are trained on

See "Movie Set Shooting," page 14

CHAIR'S MESSAGE

Scott Atwood

As we approached the midpoint of the Bar year, I was hoping for a return to some semblance of normalcy. We had pulled off a fall meeting in Tampa at the Epicurean. Masks were prevalent, but we actually had a live gathering. The Executive Council had a live meeting. It was simulcast via Zoom, but most of the Council were there in person. We even had a members' wine and cheese tasting social event—with more than three dozen attendees. It was nice. But Omicron was in the background. And it kept getting worse. Eventually, it resulted in the Bar's mid-year meeting in January, and thus our live CLE and Council meeting, being switched to virtual. Our CLE chairs (Angeli Murthy and Suzanne Boy) did a spectacular job of pivoting last minute, but it wasn't an easy task. It's been a real roller coaster.

But our members are resilient. We are in a practice area that throws curve balls at you. Every day, we get hit with a new twist. Management-side folks have to help their clients figure out how to keep their businesses running while respecting the needs of their employees in dealing with COVID. Employee-side advocates have to help individuals navigate decisions that may affect both their health and their careers. It's hard. This is leave/accommodation advice on steroids. It's turning our expectation of "reasonable" and "hardship" on its head. So, as we deal with our own personal challenges arising from COVID, we embrace the challenges of the people we represent. We advocate. We extrapolate. We challenge the norms. As we move forward, the world of remote and hybrid workplaces appears likely to remain for most businesses. We are uniquely situated to help usher in a new workplace for our generation. So, take a deep breath and remember that we really are helping people. Isn't that what we all thought we were going to do when we rolled into law school? Let's embrace it.

While embracing change, you may want to see what the government has in mind for the future of the workplace. Come to our Advanced Labor CLE in D.C. on April 7–8. Hear an EEOC Commissioner, a DOL Administrator, and other agency leaders tell you what's in store for enforcement actions. Oh, and did I mention it's cherry blossom week? Click here for more info. See you soon, and stay safe and healthy.

the CHECKOFF

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The Florida Bar Labor and Employment Law Section.

Public Employees' Reasonable Expectation of Privacy in the Workplace

By Kristen Diot, Tallahassee

With the rise in remote and work-from-home employment, the once clearly delineated privacy line between the public workplace and the private home has blurred, leading to complicated Fourth Amendment questions for public employees and employers alike. For example, the Eleventh Circuit Court of Appeals recently concluded in *Smith v. City of Pelham*[1] that a city employee had no reasonable expectation of privacy in the contents of her cell phone, which had inadvertently been downloaded to the city network through her city computer. What follows is a discussion of the Fourth Amendment's application to public employees, including examples of some of the difficult questions faced by courts of late.[2]

Fourth Amendment Protections for Public Employees

The Fourth Amendment's application to the public workplace is of relatively recent vintage. In *O'Connor v. Ortega*,[3] a plurality of the United States Supreme Court (SCOTUS) held for the first time that public employees can have a reasonable expectation of privacy with respect to some areas of the workplace, such that a public employer's intrusion constitutes a violation of the Fourth Amendment.[4] However, an important caveat was included: because of "operational realities" of the work environment, a reasonable expectation of privacy can be reduced by virtue of "legitimate regulation" and "actual office practices," and an otherwise reasonable expectation of privacy may be unreasonable "when the intrusion is by a supervisor."[5]

In defining the bounds of the workplace, the Court plurality concluded that "[t]he workplace includes those areas and items that are related to work and are generally within the employer's control"; for example, offices, desks, file cabinets, hallways, and cafeterias.[6] And these areas remain part of the workplace "even if the employee has placed personal items in them."[7] However, the plurality cautioned that "[n]ot everything that passes through the confines of the business address can be considered part of the workplace context,"[8] and reasonableness must be determined "on a case-by-case basis."[9]

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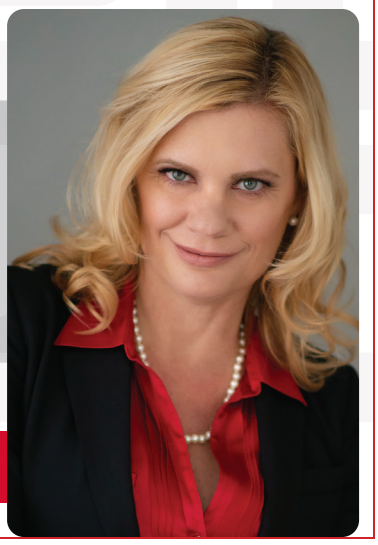

Having decided that employees do have a reasonable expectation of privacy in at least some areas of the workplace, the plurality went on to examine the appropriate standard of reasonableness applicable to workplace searches.[10] Ultimately, the plurality determined "that public employer intrusions on the constitutionally protected privacy interests of government employees for noninvestigatory, work-related purposes, as well as for investigations of work-related misconduct, should be judged by the standard of reasonableness under all the circumstances," explaining that under the standard "both the inception and the scope of the intrusion must be reasonable."[11]

Following *O'Connor*, SCOTUS again addressed the Fourth Amendment in the workplace in *City of Ontario, California v. Quon*.[12] The issue before the Court in *Quon* was whether a government employer violated an employee's Fourth Amendment rights when the employer read text messages sent and received via the employee's pager, which had been issued to the employee by the employer. Without reaching a conclusion as to whether Quon had a reasonable expectation of privacy in the text messages, the Court nonetheless held that the government's search of the messages was reasonable because "it was motivated by a legitimate work-related purpose" and "was not excessive in scope."[13] Accordingly, the Court concluded that the city did not violate Quon's Fourth Amendment rights.[14]

Application of Fourth Amendment Protections in Employment Disputes

As noted above, in *Smith v. City of Pelham* the Eleventh Circuit recently held that an employee had no reasonable expectation of privacy in the contents of a personal cell phone when the phone's contents had been inadvertently stored on the city server. Smith, a city employee, was suspended and later terminated based, in part, on inappropriate photographs found on a backup copy of her cell phone, which had been saved to her city computer.[15] Smith sued, alleging, in pertinent part, that the city's search of her work computer violated her Fourth Amendment rights. Relying heavily on the city's computer use policy, which provided that the city could access any data residing on its computer systems, the Eleventh Circuit concluded that Smith did not have a reasonable expectation of privacy in the contents of her personal cell phone, even though Smith did not purposely upload its contents onto the city network.[16] Accordingly, the court concluded, "Once the computer backed up Smith's cell phone, the previously private data became accessible to her employer," and therefore the city's search of her phone did not implicate the Fourth Amendment.[17]

Applying *O'Connor* and *Quon* in a different context, the District Court for the District of Columbia denied a motion to enforce a protective order, concluding that by communicating with their attorney through their workplace e-mail account, student–employees at George Washington University had waived attorney-client privilege.[18] Similar to the Eleventh Circuit, the district court relied heavily on the university's e-mail communication policy, which stated that the university had the authority to search, review, monitor, and copy any e-mail sent to or from a university e-mail account for the purpose of gathering information potentially relevant to legal claims for or against the university.[19] Based upon this policy, the district court found that even though the university allowed the student–employees to use their e-mail for non-work related purposes and did not regularly monitor the e-mail, the student–employees did not have a reasonable expectation of privacy in their e-mail communications.[20] Accordingly, the district court concluded that by sending and receiving attorney-client communications through their workplace e-mail, the student–employees had waived attorney-client privilege.[21]

Conclusion

As remote work and work-from-home assignments continue to increase, new and complex legal issues involving Fourth Amendment privacy concerns in the workplace will likely also arise. When these changes in the workplace are coupled with the "[r]apid changes in the dynamics of communication and information transmission,"[22] it will be interesting to watch how "workplace norms, and the law's treatment of them, will evolve,"[23] in the Fourth Amendment and many other contexts.

K. DIOT

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Endnotes

1 2021 WL 5863412 (11th Cir. Dec. 10, 2021).

2 Article II, section 12 of the Florida Constitution, which prohibits unreasonable searches and seizures, is the state counterpart to the Fourth Amendment of the U.S. Constitution. Because article II, section 12 "shall be construed in conformity with the 4th Amendment to the United States Constitution, as interpreted by the United States Supreme Court," this discussion is equally applicable to Florida constitutional law. FLA. CONST. art. II, § 12.

3 480 U.S. 709 (1987).

4 *Id.* at 717 ("Given the societal expectations of privacy in one's place of work . . . , we reject the contention . . . that public employees can never have a reasonable expectation of privacy in their place of work.").

5 *Id.*

6 *Id.* at 716.

7 *Id.*

8 *Id.*

9 *Id.* at 718.

10 *Id.* at 719; *but see City of Ontario. v. Quon*, 560 U.S. 746, 756–57 (2010) (noting the disagreement between the *O'Connor* plurality and Justice Scalia as to "the proper analytical framework for Fourth Amendment claims against government employers").

11 *O'Connor*, 480 U.S. at 725–26.

[12] *Quon*, 560 U.S. at 755–56.

[13] *Id.* at 764–65; *see also*, *id.* (noting "[f]or the same reasons—that the employer had a legitimate reason for the search, and that the search was not excessively intrusive in light of the justification—the Court also concludes that the search would . . . satisfy the approach of Justice Scalia's concurrence [in *O'Connor*]").

[14] *Id.* at 765.

[15] 2021 WL 5863412, at *4.

[16] *Id.* ("Smith's misunderstanding or inadvertence does not control the outcome.").

[17] *Id.*

[18] *Doe 1 v. George Washington Univ.*, 480 F. Supp. 3d 224, 229–30 (D.D.C. 2020).

[19] *Id.* at 227.

[20] *Id.*

[21] *Id.* at 229–30.

[22] *City of Ontario. v. Quon*, 560 U.S. 759, 759 (2010).

[23] *Id.*

PERC Finds Teacher Evaluation Systems Are a Mandatory Subject of Bargaining

By Alyssa S. Lathrop, Tallahassee

The Public Employees Relations Commission (PERC or the Commission) recently had occasion to address, for the first time, whether school boards are required to bargain with teacher unions over teacher evaluation systems in Florida.[1] The Orange County Classroom Teachers Association, Inc. (Union)—the certified bargaining agent for a unit of instructional personnel—filed an unfair labor practice charge with the Commission, alleging that the School Board of Orange County (School Board) violated sections 447.501(1)(a) and (c), Florida Statutes, by unilaterally imposing teacher evaluation procedures that changed terms and conditions of employment and by refusing to bargain.

A three-day evidentiary hearing was held before the Commission-appointed hearing officer. The hearing officer subsequently issued a recommended order finding that the charge was untimely filed and that the board was entitled to attorneys' fees and costs. The Union filed exceptions to the recommended order. The Commission granted the Union exception with regard to timeliness and remanded the case to the hearing officer for supplemental findings of fact, analysis, and recommendations.

On remand, the hearing officer issued a supplemental recommended order finding that the charge was timely filed. He further concluded that the School Board violated sections 447.501(1)(a) and (c), Florida Statutes, by refusing to bargain collectively; specifically, by failing to respond to a demand for impact bargaining by the Union and by unilaterally imposing a teacher evaluation system. As part of his analysis, the hearing officer concluded that teacher evaluation systems are a mandatory subject of bargaining. The hearing officer recommended that the Union be awarded fees for the "failure to bargain" portion of the charge, but not the unilateral change portion.

The School Board filed forty-eight exceptions to the supplemental recommended order. The School Board also requested oral argument, which was held before the Commission via Zoom on August 19, 2021.

In its final order, the Commission largely denied the School Board's exceptions to the hearing officer's findings of fact because the findings were supported by competent, substantial evidence and the Commission is not at liberty to weigh the evidence differently than the hearing officer.[2] The Commission also rejected the School Board's arguments that the hearing officer should not have made certain factual findings about the parties' bargaining history prior to 2018 as they were outside the scope of the charge. The Commission stated that those findings were not included to establish an independent unfair labor practice violation allegation, but rather to provide background to the allegations in the charge.[3]

With respect to the School Board's exceptions to the hearing officer's legal conclusions, the Commission first addressed the unilateral change allegation. The Commission observed that the crux of the case was whether a teacher evaluation system is a management right or a mandatory subject of bargaining—an issue of first impression for the Commission.[4] The Commission rejected the School Board's reliance on a prior 2004 case in which the hearing officer concluded that a performance pay plan for teachers was a mandatory subject of bargaining, because the hearing officer's recommended order in that case was never adopted by the Commission.[5] Additionally, that case involved a different statute, evaluation system, and issue.[6] The Commission also rejected the School Board's argument that section 1012.34, Florida Statutes, makes

evaluation procedures the province of the superintendent, not collective bargaining, because the statute is silent on the matter.[7]

The Commission determined that it must apply the *City of Miami*[8] balancing test enunciated by the Florida Supreme Court, because the teacher evaluation system had elements indicative of both a mandatory subject of bargaining and a management right.[9] The Commission rejected the School Board's argument that teacher evaluation systems are a management right because they are the mechanism by which the School Board sets requirements for levels of service. The Commission stated that "in this case the teacher evaluation system goes well beyond simply setting levels of service."[10] The Commission agreed with the hearing officer that complex teacher evaluation systems are distinguishable from the subjects of prior decisions that were determined to be management rights.[11] These subjects included furloughing employees; transferring law enforcement deputies to a detention center temporarily due to inmate suicides, overcrowding, and understaffing; instituting drug testing of law enforcement officers allegedly seen illegally using or buying drugs; laying off employees; and setting school class sizes and minimum staffing levels.[12] The Commission reasoned that, unlike cases dealing with furloughing or drug testing police officers under reasonable suspicion of illegal drug use, teacher evaluation systems are not an issue that cannot wait for bargaining.[13] The Commission noted that the hearing officer found that the parties had, in fact, previously bargained over the teacher evaluation system.[14]

The Commission "recognize[d] the management right to set levels of service or to assign tasks to employees within the basic scope of employment."[15] However, the Commission stated that "such rights cannot subsume mandatory subjects of bargaining."[16] The Commission concluded that to hold that the teacher evaluation system in the case at bar was a management right "would essentially eviscerate the Union's ability to negotiate mandatory subjects of bargaining."[17] Accordingly, the Commission found that teacher evaluation systems that essentially determine hours, wages, and terms and conditions are a mandatory subject of bargaining under the *City of Miami* balancing test.[18] The Commission noted that the requirement to bargain with a union prior to adopting a teacher evaluation system requires the parties to meet at reasonable times and to negotiate in good faith with the intent of reaching a common accord, but there is no requirement that either party make a concession or be compelled to agree to a proposal.[19] The Commission additionally emphasized that there was no dispute that any evaluation system adopted must conform to and comply with the applicable requirements.[20]

The Commission rejected the School Board's argument that it did not commit an unfair labor practice because it had not implemented the teacher evaluation system it imposed.[21]The Commission stated that this argument asked it to weigh the evidence differently than the hearing officer.[22] The Commission further stated that while subsequent actions—such as a decision to rescind the imposition of, to not ultimately implement, or to not fully implement a new evaluation system—may affect the remedy, they cannot expunge or cure the unfair labor practice violation.[23] The Commission also rejected the School Board's argument that the Union had waived its right to bargain over the evaluation system.[24]

Next, the Commission addressed the "failure to impact bargain" portion of the charge. The Commission agreed with the School Board that impact bargaining becomes an issue only when a topic is a management right, not when it is a mandatory subject of bargaining.[25] Accordingly, because the Commission had decided that teacher evaluation systems are a mandatory subject of bargaining, it granted the School Board's exceptions regarding the impact bargaining portion of the charge.[26] The Commission also granted the School Board's exception to the award of attorneys' fees for this portion of the charge.[27] Ultimately, no attorneys' fees and costs were awarded to either party.

Finally, the Commission rejected the School Board's contention that it should not be required to post a notice. The Commission explained that the posting of notices is required even in cases involving novel issues, such as the one in this case.[28]

The Commission's final order has been appealed to the Fifth District Court of Appeal, Case No. 5D21-2607, and the case is currently pending.[29]

An earlier version of this article appeared in the PERC News*, Vol. 21, Issue 3 (2021).*

A. LATHROP

***Alyssa S. Lathrop** is a hearing officer with the Public Employees Relations Commission (PERC). Prior to joining PERC, she worked at the Florida Office of Insurance Regulation and, before that, served as a staff attorney at the Florida Supreme Court.*

Endnotes

1 *See Orange Cty. Classroom Teachers Ass'n, Inc. v. Sch. Dist. of Orange Cty., Fla.*, 48 FPER ¶ 169 (2021) (PERC Case No. CA-2018-050).

2 *Id.*

3 *Id.*

4 *Id.*

5 *Id.* The School Board relied upon the hearing officer's recommended order in *Gilchrist Employees/United v. School Board of Gilchrist County*, 30 FPER ¶ 71 (2004). In that case, the Commission remanded for the hearing officer to consider the issue of contractual waiver, expressly stating that it was not deciding whether criteria for determining whether a teacher was entitled to a performance pay salary supplement were negotiable. *Id.* The Commission ultimately never reached the issue as the charging party subsequently withdrew the charge before the issuance of the final order. *See Gilchrist Employees/United v. Sch. Bd. of Gilchrist Cty.*, Case No. CA-2003-024 (PERC Apr. 27, 2004) (unpublished decision).

6 *Orange Cty. Classroom Teachers Ass'n*, 48 FPER ¶ 169.

7 *Id.*

8 *Id.* (citing *Fraternal Order of Police, Miami Lodge 20 v. City of Miami*, 609 So. 2d 31 (Fla. 1992)).

9 *Id.*

10 *Id.*

11 *Id.*

12 *See id.* Specifically, the Commission cited the following as examples: *Jacksonville Consolidat-*

continued, next page

AUTHOR SPOTLIGHT

Meet Chris Shulman

A frequent contributor to *The Checkoff*, Chris has practiced labor and employment law since graduating Stetson University College of Law thirty years ago and has represented individuals, labor unions, and employers in connection with a variety of such matters. Since January 2002, however, Chris has essentially limited his practice to service as a neutral dispute resolution professional, serving as mediator and arbitrator through the state and federal courts here in Florida, as well as the American Arbitration Association (AAA), the Federal Mediation and Conciliation Service (FMCS), and by permanent labor panel appointment or through case-specific engagement. Over the past six years, he has served as special magistrate for the Pinellas County Office of Civil Rights, conducting monthly hearings on wage theft complaints. In 2019, he was appointed to PERC's roster of special magistrates for impasse proceedings, and he was named as an appeals referee for Hillsborough County's new employee discipline appeal process. Between service as a mediator, arbitrator, hearing officer, federal-sector EEO complaint adjudicator, and the like, Chris has resolved or, in the case of mediation, helped the parties resolve, more than 6,000 matters.

Additionally, Chris has been involved in the legal and ADR communities. He has served two four-year terms on The Florida Bar's Clients' Security Fund Committee (serving as its chair, 1998–1999), two four-year terms on the Florida Supreme Court's Mediator Ethics Advisory Committee, and two four-year terms on the Florida Supreme Court's Committee on ADR Rules and Policy; he is currently in his second four-year term on the Florida Supreme Court's Mediator Qualifications and Disciplinary Review Board (where he served as chair of the Qualifications Inquiry Committee, 2018–2019). He has also served as co-chair of the Hillsborough County Bar Association ADR Committee. Chris is also a primary circuit civil and county mediator trainer, a Florida court-appointed arbitrator trainer, and an adjunct professor at Stetson University College of Law, where he has taught both negotiation/mediation and mediator training classes for more than ten years.

Chris and his wife Brenda, a retired business professional who now mediates, live in Tampa. They co-teach initial mediator certification training classes but, for fun, they love to visit family, travel, and read. Given that they are both practicing ADR professionals, perhaps it's no surprise that another of their shared pastimes is solving crossword and other puzzles.

TEACHER EVALUATION SYSTEMS, *continued*

ed Lodge 5-30, Fraternal Order of Police v. City of Jacksonville, 44 FPER ¶ 129 (2017) (instituting body-worn cameras); *Teamsters Local Union No. 769 Affiliated with the International Brotherhood of Teamsters v. Martin County Board of County Commissioners*, 2011 WL 2275530 (2011) (furloughing employees); *Coastal Florida Police Benevolent Association v. Brevard County Sheriff's Office*, 30 FPER ¶ 297 (2004) (temporarily transferring law enforcement deputies to a detention center due to inmate suicides, overcrowding, and understaffing); *Hillsborough Area Regional Transit Authority*, 24 FPER ¶ 29247 (subcontracting); *City of Miami*, 609 So. 2d 31 (instituting drug testing of law enforcement officers allegedly seen illegally using or buying drugs); *Florida Nurses Association v. State of Florida*, 18 FPER ¶ 23265 (1992) (laying off employees); *International Association of Firefighters, Local 2416 v. City of Cocoa*, 14 FPER ¶ 19311 (1988) (setting manning level), *per curiam aff'd*, 545 So. 2d 1371 (Fla. 1st DCA 1989); *Hillsborough Classroom Teachers Association, Inc. v. School Board of Hillsborough County*, 8 FPER ¶ 13074 (1982), *aff'd*, 423 So. 2d 969 (Fla. 1st DCA 1982) (setting class sizes and minimum staffing levels)).

[13] *Orange Cty. Classroom Teachers Ass'n*, 48 FPER ¶ 169.

[14] *Id.*

[15] *Id.*

[16] *Id.*

[17] *Id.*

[18] *Id.*

[19] *Id.* (citing FLA. STATS. §§ 447.203(14), (17); 447.309).

[20] *Id.* (specifying that these requirements include those contained in FLA. STATS. § 1012.34 and FLA. ADMIN. CODE r. 6A-5.065).

[21] *Id.*

[22] *Id.*

[23] *Id.*

[24] *Id.*

[25] *Id.* (citing *Headley v. City of Miami*, 215 So. 3d 1, 9 (Fla. 2017)).

[26] *Id.*

[27] *Id.*

[28] *Id.*

[29] As this article is being finalized for publication, initial briefs are not yet due.

William Jeffrey "Jeff" Carnes
August 14, 1947 – April 11, 2021

Jeff Carnes Inducted into Section Hall of Fame

At a meeting of The Florida Bar Labor and Employment Law Section in Orlando on October 14, 2021, William Jeffrey "Jeff" Carnes was inducted into the Section Hall of Fame. Hall of Fame recognition is a posthumous honor, awarded to individuals who have had significant involvement in both the Section and the active practice of labor and employment law in Florida for a substantial portion of his or her career.

Born in Kannapolis, North Carolina, Jeff Carnes received a degree in business administration and economics from Catawba College in Salisbury, North Carolina, and his Juris Doctor degree from the Stetson University College of Law. He began practicing labor and employment law in Tampa in 1993. He also served as a visiting and adjunct instructor at the University of South Florida from 1997 forward, teaching courses in management ethics, labor and employment law, and labor negotiation and collective bargaining agreement administration in the School of Business Administration. Before his law career, Jeff was an officer with the Tampa Fire Department and a member of IAFF Local 754, serving as executive board member, negotiation team member, and political director. He was president of the Bay Area Council of Firefighters and the 10th District vice president of the Professional Firefighters of Florida. He was president emeritus of the West Central Florida Industrial Relations Research Association. In addition to his membership in FTP/NEA and the AFL-CIO Lawyers Coordinating Committee, he served as co-chair of the Labor and Employment Law Section's Labor Relations Committee. His labor law practice provided counsel and representation to more than seventy bargaining units representing employees of public utilities, of government (firefighters, paramedics, and general employees), and of industrial, construction, and craft trades. He also wrote two books—*The Survivor's Guide to a Successful Public Sector Union: Fire/Rescue Edition* and *Finding the Forest Without Any Trees*.

Florida Law Kills Vaccine Mandates by Private Employers

By Carly Stein, Tampa

In November of 2021, Florida Governor Ron DeSantis signed House Bill 1-B, codifying section 381.00317, Florida Statutes, which essentially neuters a private employer's attempts to require employees to receive COVID vaccinations. This law bars private employers from imposing and enforcing a COVID-19 vaccine mandate without allowing for multiple categories of exemptions for employees.[1] These exemptions include medical reasons, pregnancy or anticipated pregnancy, religious reasons, COVID-19 immunity, periodic testing, and the use of employer-provided personal protective equipment (PPE).[2]

While the law places the responsibility on the employee to request the exemption, exemption requirements are not onerous. To qualify for a medical exemption, an employee need only provide a note from a physician or physician's assistant indicating that vaccination "is not in the best medical interest of the employee."[3] Similarly, exemptions based on religious reasons require an employee to provide a statement indicating the employee declines the vaccination for an unspecified "sincerely held religious belief."[4] An employee who requests an exemption based on COVID-19 immunity need only attach a copy of his or her test result, whether from a polymerase chain reaction (PCR) test, an antigen test, or an antibody test.[5] Further, neither the Department nor Florida statutes set a time restriction for the date of a test or for the claimed exemption, despite reports of new variants and repeated COVID-19 infections.

The remaining two exemptions place the cost burden for safety protocols on the employer. Employees may elect an exemption based on periodic testing, which can occur no more than weekly and the cost of which must be borne by the employer.[6] As a final way to avoid employer vaccination mandates, employees can simply agree to comply with an employer's reasonable written requirement to use employer-provided PPE when in the presence of other employees or other persons.[7]

Employers considering vaccination requirements for their workforce should be aware of these exemptions and the potential consequences of failing to permit the exemptions. Employers who fail to honor exemptions will be subject to action by the Florida Attorney General's Office.[8] Employers are permitted to cure initial noncompliance found by the Attorney General, provided the employee has not been terminated.[9] In instances where an employee has been terminated as a result of the vaccination mandate, the employer must either reinstate the affected employee with back pay or be subject to a fine.[10] The fine is up to $10,000 for employers with fewer than 100 employees and $50,000 for employers with 100 or more employees.[12]

Finally, given the recent United States Supreme Court ruling[13] upholding a Biden administration rule regarding vaccination mandates by employers providing healthcare to Medicare and Medicaid beneficiaries, Florida's law presents further complications for employers who also fall under the federal mandate.

C. STEIN

***Carly Stein** is Vice President of HR Risk Governance at Citi in Tampa.*

Endnotes

1 Fla. Stat. § 381.00317(1).

2 *Id.*

3 *Id.* § 381.00317(1)(a).

4 *Id.* § 381.00317(1)(b).

5 Florida Department of Health Form, DOH-8018-DCHP-11/2021.

6 Fla. Stat. § 381.00317(1)(c); Florida Department of Health Form, DH8019-DCHP-11/2021.

7 Fla. Stat. § 381.00317(1)(e); Florida Department of Health Form, DOH-8020-DCHP-11/2021

8 Fla. Stat. § 381.00317(3)–(5).

9 *Id.* § 381.00317(4)(a).

10 *Id.*

11 *Id.* § 381.00317(4)(a)(1).

12 *Id.* § 381.00317(4)(a)(2).

13 *Biden v. Missouri*, No. 21A240, 2022 WL 120950 (U.S. Jan. 13, 2022)



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For hotel reservations, click here or call 1-800-HILTONS and mention the group name (The Florida Bar) and the group code (FLBar4).

Group rate deadline is March 16, 2022

appearance by videoconference becomes an issue.

Managed Care

In 2019, the Eleventh Circuit, in *Managed Care Advisory Group, LLC v. CIGNA Healthcare, Inc.*,[4] ruled that under the Federal Arbitration Act (FAA),[5] arbitrator subpoenas that purport to require non-party discovery—whether subpoenas for depositions (duces tecum or not) or for production without deposition—are not enforceable;[6] neither are arbitrator subpoenas purporting to compel a witness to attend a proceeding by videoconference.[7]

The *Managed Care* court reached this conclusion by analyzing the language of the FAA, noting specifically that "Section 7 of the FAA allows an arbitrator to 'summon in writing any person to attend before them . . . as a witness and in a proper case to bring with him [or her] . . . any book, record, document, or paper which may be deemed material as evidence in the case.'"[8] Noting that in *Hay Group, Inc. v. E.B.S. Acquisition Corp.*,[9] the Third Circuit (in an opinion authored by then-Judge Alito) found that Section 7 "unambiguously restricts an arbitrator's subpoena power to situations in which the non-party has been called to appear in the physical presence of the arbitrator and to hand over the documents at that time,"[10] the Eleventh Circuit sided with the Second, Third, Fourth, and Ninth Circuits to conclude that an arbitrator may not issue subpoenas for "pre-hearing depositions and discovery from non-parties."[11] Likewise, quoting the text of FAA Section 7 with emphasis, the court held that an arbitrator's ability to "compel the *attendance* of [a person] *before* said arbitrator" necessarily requires the person to appear at a location in the arbitrator's physical presence.[12] Consequently, subpoenas purporting to compel appearance by videoconference—not in the physical presence of the arbitrator—cannot be enforced under the FAA.[13]

Options and Considerations

So, what to do?

First, try a discovery hearing. Both *Managed Care* and *Hay Group* suggest the possibility of an arbitrator convening a discovery hearing to which a non-party might be validly subpoenaed to appear (in person, in the arbitrator's presence) and either give testimony, present documents, or both.[14] So, the parties might ask the arbitrator to convene an in-person discovery hearing at which non-parties would be required to appear and testify to authenticate records and allow them to be copied. Presumably, arbitral subpoenas for such a hearing, properly served, would be enforceable.[15] One assumes that the party at whose instance the arbitral discovery hearing subpoena issued might be able to provide the subpoenaed party with the option simply to produce the requested documents voluntarily as an alternative to having to appear before the arbitrator.

Second, have the arbitration conducted pursuant to state arbitration law, not the FAA. *Managed Care*'s limitations on arbitral subpoenas necessarily apply only if the arbitration is subject to the FAA. If the Revised Florida Arbitration Code (RFAC), Chapter 682, Florida Statutes, applies, then the arbitrator has the authority to issue enforceable pre-hearing discovery subpoenas to non-parties. The RFAC provides, in relevant part:

> **682.08 Witnesses, subpoenas, depositions.—**
>
> (1) An arbitrator may issue a subpoena for the attendance of a witness and for the production of records and other evidence at any hearing and may administer oaths. A subpoena must be served in the manner for service of subpoenas in a civil action and, upon motion to the court by a party to the arbitration proceeding or the arbitrator, enforced in the manner for enforcement of subpoenas in a civil action.
>
> (2) In order to make the proceedings fair, expeditious, and cost effective, upon request of a party to, or a witness in, an arbitration proceeding, an arbitrator may permit a deposition of any witness to be taken for use as evidence at the hearing, including a witness who cannot be subpoenaed for or is unable to attend a hearing. The arbitrator shall determine the conditions under which the deposition is taken.
>
> (3) An arbitrator may permit such discovery as the arbitrator decides is appropriate in the circumstances, taking into account the needs of the parties to the arbitration proceeding and other affected persons and the desirability of making the proceeding fair, expeditious, and cost effective.
>
> (4) If an arbitrator permits discovery under subsection (3), the arbitrator may order a party to the arbitration proceeding to comply with the arbitrator's discovery-related orders, issue subpoenas for the attendance of a witness and for the production of records and other evidence at a discovery proceeding, and take action against a noncomplying party to the extent a court could if the controversy were the subject of a civil action in this state. . . .

Regarding the prohibition on videoconference appearance, the RFAC does not have the same language found in FAA Section 7 ("compel the attendance of [a person] before said arbitrator "). Thus, the statutory basis for disallowing videoconference hearings does not apply. Indeed, the RFAC provides, in relevant part, that the arbitrator "may conduct an arbitration in such manner as the arbitrator considers appropriate for a fair and expeditious disposition of the proceeding."[16] Consequently, arbitration hearings under the RFAC could occur by Zoom or the like, if the arbitrator agrees.

Likewise, at a minimum, arbitrators under the RFAC have the ability to order discovery ***proceedings*** and therefore may issue enforceable subpoenas to non-parties to attend such discovery proceedings. Clearly, *Hay Group*/*Managed Care* in-person discovery hearings are authorized under the RFAC, specifically section

682.08(4). However, the RFAC also draws a distinction between subpoenas for a ***hearing*** (section 682.08(1)) and subpoenas for attendance and production at a discovery ***proceeding*** (section 682.08(4)). The use of different terms implies different meanings. The use of "proceeding" rather than "hearing" for discovery seems to suggest that for the former, the arbitrator need not be present or decide anything. Moreover, section 682.08(2) speaks to the arbitrator's ability to determine the conditions under which a deposition may occur, and section 682.08(3) empowers the arbitrator to order discovery in a flexible manner, "taking into account the needs of the parties to the arbitration proceeding and other affected persons and the desirability of making the proceeding fair, expeditious, and cost effective." Thus, section 682.08 seems to authorize, if ordered by the arbitrator, non-party depositions (video or in person, duces tecum or otherwise) as well as non-party production.

In summary, by invoking arbitration under the RFAC instead of the FAA, parties may gain (preserve?) the ability to take traditional non-party prehearing discovery in employment arbitration.[17]

Third, is this a labor case? The Taft-Hartley Act (LMRA)[18] may also offer a basis for requesting a prehearing discovery subpoena, at least in the labor arbitration context. While traditional prehearing discovery is rare in the labor-management grievance arbitration milieu, at least one court has held that labor arbitrator-issued subpoenas for non-party discovery production of documents is allowed.[19]

Conclusion

As arbitration continues to be a regular means of resolving employment disputes, counsel should consider how best to get at information held by non-parties. Simply having the arbitrator compel the non-parties' attendance at the final evidentiary hearing on the merits is clearly allowed under the FAA, but doing so may prevent adequate preparation for that hearing. So, in light of *Managed Care*, counsel should either ask the arbitrator to conduct discovery hearings along the way or get the opposing party to agree to have the arbitration conducted pursuant to the Revised Florida Arbitration Code. Since arbitrators typically charge for hearings by the day, I suspect it would be cheaper for the parties to choose the latter.


C. SHULMAN

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Endnotes

1 *See, e.g., Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 32 (1991) (ADEA claims arbitrable); *EEOC v. Waffle House, Inc.*, 534 U.S. 279 (2002) (Title VII claims subject to arbitration, but EEOC not bound to arbitrate enforcement action—even one seeking individual employee relief—since not a party to arbitration clause); *Epic Sys. Corp. v. Lewis*, 485 U.S. __, 138 S. Ct. 1612 (2018) (FLSA claims arbitrable notwithstanding waiver of collective actions); *see also*, Chris Shulman, *Waivers of Collective Actions in Employment Arbitration: The Supreme Court Makes an Epic Decision*, The Checkoff, Vol. LVIII No. 1, at 1 (Oct. 2018).

2 For better or worse.

3 In this writer's opinion, this is generally a good thing. *See, e.g.*, Chris Shulman, *Video Arbitration of Labor or Employment Issues: How to Have Meaningful Arbitration Proceedings in the Era of COVID-19 and Social Distancing*, Florida Bar Labor and Employment Section Special Issue: Practicing in a Pandemic (May 2020).

4 939 F.3d 1145 (11th Cir. 2019) [hereinafter *Managed Care*].

5 9 U.S.C. §§ 1–16.

6 *Managed Care*, 939 F.3d at 1160–61.

7 *Id.* The court also approved nationwide scope for service of arbitrator-issued subpoenas that are subject to the Federal Arbitration Act. *Id.* at 1157–58.

8 *Id.* at 1159.

9 360 F.3d 404 (3d Cir. 2004) [hereinafter *Hay Group*].

10 *Managed Care*, 939 F.3d at 1159 (quotation marks omitted) (quoting *Hay Group*, 360 F.3d at 407).

11 *Id.* at 1159–1160. The court expressly declined to follow the Eighth Circuit, which has allowed such discovery. *Id.* at 1160.

12 *Id.* at 1160.

13 *Id.* As of this writing, there are no reported cases by the Eleventh Circuit or Florida state courts that have questioned the videoconference subpoena ban, even despite COVID. A pre-COVID decision out of the Southern District of Florida acknowledges the seeming absurdity and clear inconvenience of the limited reading of Section 7 but states that, nonetheless, the rule later adopted by the Eleventh Circuit is what the plain text of Section 7 requires. *Kennedy v. Am. Express Travel Related Servs. Co., Inc.*, 646 F. Supp. 2d 1342, 1345–46 (S.D. Fla. 2009) (thorough explanation of interplay of FAA § 7 and Fed. R. Civ. P. 45).

14 *Managed Care*, 939 F.3d at 1161 (quoting *Hay Group*, 360 F.3d at 409).

15 To maximize chances of judicial enforcement, it might be advisable that such a hearing actually be the commencement of the evidentiary hearing itself, which would then be continued to a date to be set (after discovery was closed, for example) for completion.

16 Fla. Stat. § 682.06(1).

17 While the FAA applies to agreements to arbitrate involving interstate commerce, the Supreme Court has noted "[t]he FAA contains no express preemptive provision, nor does it reflect a congressional intent to occupy the entire field of arbitration." *Volt Info. Sci., Inc. v. Bd. of Trustees of Leland Stanford Junior Univ.*, 489 U.S. 468, 476–78 (1989). Thus, parties may agree that their dispute should be subject to the RFAC instead of the FAA (assuming the RFAC otherwise applies), since the FAA does not preempt state law. It seems evident that the choice of which arbitration law should apply may be made at the agreement's pre-dispute inception; however, given that arbitration is entirely a creature of the parties' agreement, I should think parties could make the RFAC applicable even post-dispute, but I could find no case directly addressing such a choice.

18 Section 301, 29 U.S.C. § 185.

19 *American Federation of Television & Radio Artists (AFTRA) v. WJBK*-TV, 164 F.3d 1004, 1009 (6th Cir. 1999) ("[U]nder [LMRA] § 301, a labor arbitrator is authorized to issue a subpoena duces tecum to compel a third party to produce records he [or she] deems material to the case either before or at an arbitration hearing."). This opinion's applicability within the Eleventh Circuit—even as persuasive authority—is somewhat in question, since the Sixth Circuit, while ruling that LMRA § 301 empowered labor arbitrator non-party production subpoenas, clearly rests on FAA § 7. *Id.* at 1009. The waters get even murkier if the arbitration agreement entails a statutory discrimination claim of an employee covered by a collective bargaining agreement (CBA) that prohibits discrimination and that provides that "[a]ll such claims shall be subject to the grievance and arbitration procedure . . . as the sole and exclusive remedy for violations." *14 Penn Plaza LLC v. Pyett*, 556 U.S. 247, 252 (2009). Does the LMRA § 301 provide for prehearing non-party discovery subpoenas there? Does the FAA?

all aspects of the plan. Also important is continual revision and modification over time to keep that plan relevant to actual workplace conditions. OSHA's website has tips to get started and a process to follow to develop the workplace safety plan that is right for the needs of the employer worksite.[4]

Florida's "Guns at Work Law"

An unpleasant reality for employers is the potential for gun violence in the workplace. In 2016, shootings accounted for 394, or 79 percent, of all workplace homicides in the United States.[5] A comprehensive workplace safety plan should also address how to identify employees at risk of perpetrating workplace violence and how to utilize threat assessment practices when faced with incidents at work.

Employers in Florida must also be aware of the impact of the state's law on guns in the workplace. Section 790.251, Florida Statutes, known as the "Preservation and Protection of the Right to Keep and Bear Arms in Motor Vehicles Act" or, more commonly, the "Guns at Work Law" (the Act), was passed by the Florida Legislature in 2008 in order to "codify the long-standing legislative policy of the state that individual citizens have a constitutional right to keep and bear arms."[6] In the Legislature's view, this right includes "a citizen's lawful possession, transportation, and secure keeping of firearms and ammunition within his or her motor vehicle."[7]

To that end, the Act imposes several restrictions on most public employers and private businesses. First, employers may not discriminate on the basis that an employee owns a legally licensed firearm;[8] nor can employers prohibit employees from keeping a legal firearm locked inside a vehicle parked in the employer's parking lot.[9] However, the Act does not apply when an employee drives a vehicle owned or leased by the company. In those circumstances, the employer does not have to allow the employee to keep a gun inside.[10] Similarly, a business cannot prevent its customers from keeping a "legally owned firearm" locked in a car while on its property.[11] In addition, a business is prohibited from making any "verbal or written inquiry" about the presence of a firearm inside the car of an employee, customer, or invited guest.[12]

However, the Act does not prohibit employers from terminating an employee for bringing a firearm onto the employer's property or from displaying a firearm in the workplace. In *Bruley v. Village Green Management Company*,[13] the United States District Court for the Middle District of Florida held that the Act did not protect an employee who brought a weapon onto the business property, even after the commission of a crime on the property.[14]

Exceptions to the Act

The Act provides exceptions for schools, correctional institutions, nuclear power plants, or employers associated with national defense, homeland security, and the aerospace industry.[15] Notably, the definition of "school" encompasses preschool and elementary through secondary schools as well as career centers and post-secondary schools, whether public or private.[16] However, in *Florida Carry, Inc. v. University of North Florida*,[17] Florida's First District Court of Appeal held that the University of North Florida could not prohibit the carrying of a securely encased firearm within a motor vehicle that was parked in a university campus parking

lot, as the Florida Legislature had not delegated to state universities its authority under Article I, Section 8(a) of the Florida Constitution to regulate the manner of bearing arms.[18]

It should be noted the Act also provides employers with immunity from civil suits arising from any "actions or inactions" taken in connection with the law.[19] This means that as a general rule, a business may have defenses to claims of workplace violence caused by individuals who legally brought firearms onto the employer's property. On the other hand, an employer can be liable for damages if it violates the rights of an employee, customer, or other invited guest under the Act.[20]

In summary, when developing and implementing a workplace safety plan, employers must be mindful of Florida laws concerning guns at work. These requirements should be incorporated into a broad-based, ever-evolving safety plan under which employees and management alike receive training and develop a stake in keeping the workplace safe. As the *Rust* shooting shows, the failure to do so can be tragic.


S. KELLY

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Endnotes

1 On October 21, 2021, a cinematographer was fatally shot and a director was injured on the set of the film *Rust* when actor Alec Baldwin accidentally discharged a live round from a revolver he was using as a prop. The incident is currently being investigated by law enforcement and the New Mexico Occupational Health and Safety Bureau. Production of the film is suspended indefinitely. The incident has sparked debate on occupational safety in the film industry and the use of real guns as props.

2 News Release, Bureau of Labor Statistics, Employer-Reported Workplace Injuries and Illnesses – 2020 (Nov. 3, 2021), https://www.bls.gov/news.release/pdf/osh.pdf.

3 *One worker died every 99 minutes from a work-related injury in 2019*, TED: The Economics Daily, Bureau of Labor Statistics (Dec. 18, 2020), https://www.bls.gov/opub/ted/2020/one-worker-died-every-99-minutes-from-a-work-related-injury-in-2019.htm.

4 *Help for Employers, Sample Programs*, OSHA, https://www.osha.gov/complianceassistance/sampleprograms (last visited Jan. 14, 2022).

5 *There were 500 workplace homicides in the United States in 2016*, TED: The Economics Daily, Bureau of Labor Statistics (Jan. 23, 2018), https://www.bls.gov/opub/ted/2018/there-were-500-workplace-homicides-in-the-united-states-in-2016.htm.

6 Fla. Stat. § 790.251(3).

7 *Id.*

8 *Id.* § 790.251(4)(e).

9 *Id.* § 790.251(4)(a).

10 *Id.* § 790.251(7)(f).

11 *Id.* § 790.251(4)(a).

12 *Id.* § 790.251(4)(b).

13 592 F. Supp. 2d 1381 (M.D. Fla. 2008).

14 *Id.* at 1387.

15 Fla. Stat. § 790.251(7)(b)–(d).

16 *Id.* § 790.115(2)(a).

17 133 So. 3d 966 (Fla. 1st DCA 2013).

18 *Id.* at 977.

19 Fla. Stat. § 790.251(5)(b).

20 *Id.* § 790.251(6).

CASE NOTES

ELEVENTH CIRCUIT

By Melissa M. Castillo, Tampa

A forensic examination of an employee's computer that has a clear, tangible impact on the employee's terms of employment can constitute an adverse employment action under Title VII.
Smith v. City of Pelham, 2021 WL 5863412 (11th Cir. Dec. 10, 2021).

A former employee alleged that the city terminated her in retaliation for filing an internal sex discrimination complaint against her supervisor. The employee had complained that her supervisor permitted male employees to use their earned leave time to work secondary jobs but did not permit her to do so, and that he told her and other female employees that they looked good in new uniforms. The supervisor learned of the complaint the same day, and the employee expressed fear of retaliation. A few days later, the supervisor ordered a forensic analysis of the employee's work computer, instructing the analyst to search for anything inappropriate or related to the employee's secondary employment. The forensic analysis produced iPhone backups from the employee's phone, which contained nude photos of herself and others, as well as internet history reflecting that she visited websites related to her secondary job during work hours. As a result, the supervisor placed the employee on administrative leave pending internal investigation and ultimately terminated her employment. The employee appealed her termination, but it was upheld by the city's personnel board. On de novo review of the former employee's Title VII retaliation case, the Eleventh Circuit found that the district court erred by concluding that the forensic search of the employee's computer did not constitute an adverse employment action. In doing so, the Eleventh Circuit stated that there were clear, tangible consequences of the search, as it resulted in the employee's termination, noting that such consequences would have dissuaded a reasonable worker from making a discrimination complaint. The Eleventh Circuit further concluded that the employee presented sufficient evidence to find that her supervisor's reason for instigating the secret forensic computer analysis was pretext for retaliation, as he initiated it only a week after learning of the employee's discrimination complaint against him and failed to utilize the initial steps of the progressive discipline policy prior to suspending the employee. Thus, the court reversed and remanded the issue of whether the forensic computer examination was motivated by a desire to retaliate.

Where a plaintiff suffered from a progressive disease, his Title II ADA discrimination claim against a city did not accrue until the time his disability prevented him from readily accessing city facilities.
Karantsalis v. City of Miami Springs, 17 F.4th 1316 (11th Cir. 2021).

The plaintiff, who suffers from multiple sclerosis, previously sued the City of Miami Springs in 2008 alleging it failed to make its facilities and infrastructure accessible to individuals with disabilities, but he voluntarily dismissed the lawsuit based on his belief that he lacked standing to pursue the claim because of the mildness of his symptoms and his ability to access the facilities. In 2017, the plaintiff's symptoms progressed significantly, to the point that he was prescribed a wheelchair. In 2019, the plaintiff again sued the city under the ADA and Rehabilitation Act alleging the city's sidewalks, municipal gymnasium, and parking at public facilities were inaccessible to him due to the progression of his symptoms. The district court dismissed the case, finding it was barred by the statute of limitations, which had been triggered in 2008 when the plaintiff first became aware of his multiple sclerosis diagnosis. On de novo review, the Eleventh Circuit determined that the ADA cause of action did not accrue until 2017, when the plaintiff's symptoms became so severe that he could no longer readily access and use the city's services. In doing so, the Eleventh Circuit rejected the city's argument that the cause of action accrued in 2008 as a result of the initial diagnosis and found that the mere fact that the plaintiff's condition was progressive did not preclude a finding that his claim ultimately accrued in 2017 when the symptoms inhibited the plaintiff's ability to use the city's services and facilities. The Eleventh Circuit further reasoned that the injury in this case was not the multiple sclerosis diagnosis itself, rather the plaintiff's inability to readily access the city's facilities and the resulting denial of the benefits of the city's public services. Accordingly, the case was reversed and remanded for further proceedings.

Paying an employee bonuses on top of a fixed weekly salary does not preclude an employer from using the fluctuating workweek method to calculate the employee's overtime pay.
Hernandez v. Plastipak Packaging, Inc., 15 F.4th 1321 (11th Cir. 2021).

In this FLSA case, the Eleventh Circuit reversed and remanded the district court's grant of summary judgment in favor of the employee, who had alleged his employer failed to pay him time and one-

half compensation for overtime. The employee was a salaried non-exempt employee who was paid a fixed biweekly salary and worked a varied number of hours each week. The employer utilized the fluctuating workweek method to calculate and pay the employee an overtime premium in addition to his salary. Specifically, the employer calculated the employee's regular rate for a given week by dividing his weekly salary by forty hours (rather than by the total number of hours he worked that week) and then multiplied the employee's regular rate (rather than half of his regular rate) by the number of overtime hours he worked that week. The employer also paid the employee a shift premium of $30 for working nights. The employer prorated the premium based on the hours worked if the employee worked less than a full week on the night shift. Further, the employer paid the employee holiday pay. The district court granted summary judgment to the employee on grounds that the employee's receipt of holiday pay and night shift premiums precluded a finding that he received a fixed salary so as to qualify for the fluctuating workweek method. On de novo review, the Eleventh Circuit determined that the payment of premiums and holiday pay on top of the employee's salary did not preclude a finding that the employee had a fixed salary and, accordingly, did not preclude the use of the fluctuating workweek method. In doing so, the Eleventh Circuit reasoned that 29 C.F.R. § 778.114 requires an employee to receive a "fixed salary" in addition to "extra compensation" for all overtime at the rate of one-half the regular pay. The court also referenced the Department of Labor's (DOL) regulatory guidance regarding bonus payments in addition to an employee's regular earnings in concluding that a fixed salary represents the unchanging compensation that an employee is paid regularly and does not include irregular payments. The court concluded: "[The DOL regulation] requires that the employee receive a 'fixed salary [as] compensation for the hours worked each workweek, whatever their number[.]' 29 C.F.R. § 778.114(a) (2016). That's what [the plaintiff] received. His salary was fixed, even if [the defendant] sometimes paid him more on top of his fixed salary. Thus, [the defendant] was allowed to apply the fluctuating workweek method to calculate [the plaintiff's] overtime pay."

As a matter of first impression in the Eleventh Circuit, a simple paid suspension, on its own, does not constitute an adverse employment action under Title VII.

Davis v. Legal Servs. Alabama, Inc., 2021 WL 5711043 (11th Cir. Dec. 2, 2021).

In this Title VII case, the employee appealed the grant of summary judgment in favor of his employer. In part, the employee argued that the district court erred in holding, as a matter of law, that his paid suspension was not an adverse employment action for purposes of his discrimination claim. The employee was executive director for a non-profit law firm providing legal services for low-income Alabama citizens. During the employee's tenure with the employer, he was the subject of complaints from his subordinates and colleagues, which resulted in his paid suspension pending an investigation. The employee subsequently resigned. As a matter of first impression in the Eleventh Circuit, the court noted that no other circuit had ever held that a simple paid suspension alone constitutes an adverse employment action. The court then agreed with its sister circuits that a simple paid suspension does not constitute an adverse employment action, noting that a paid suspension is a "useful tool for an employer to hit 'pause' and investigate when an employee has been accused of wrongdoing." Likewise, the Eleventh Circuit rejected the employee's argument that the manner in which his suspension was handled (which involved the hiring of the employee's political adversary to deal with public relations related to the employee's suspension), as well as the placement of a security guard in the building (which was not out of the ordinary for the employer), amounted to an adverse employment action as those actions were not punitive.

M. CASTILLO

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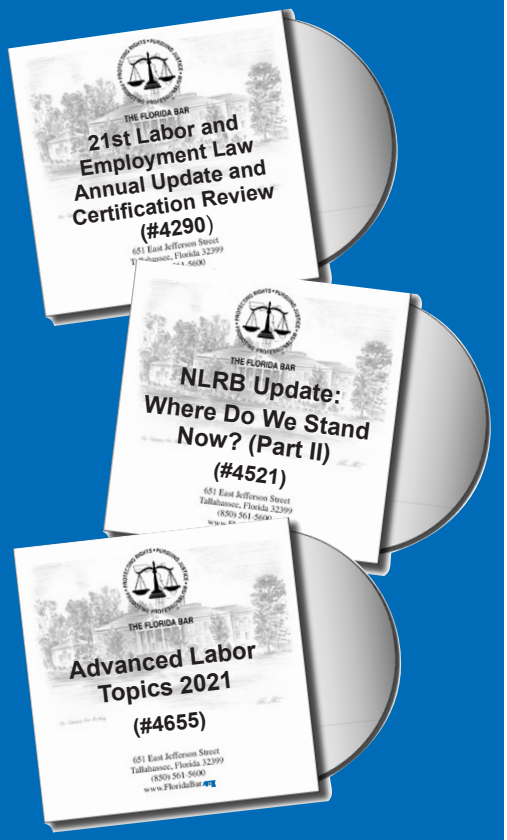

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