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IN THIS ISSUE

Just Say No
Eleventh Circuit Holds Substitute Teachers Can Be Subject to Suspicionless Drug Testing

By Sacha Dyson, Tampa

Much ink has been spilled over the issue of public employees' privacy rights in the workplace. The United States Supreme Court has made clear that a public employee does not leave his or her privacy rights at the door—public employees are protected from unwarranted governmental intrusion by the Fourth Amendment. Equally clear, however, is the public employer's need for supervision, control, and efficient operation of the workplace. Thus, in addressing privacy issues for public employees, the Court balances the employee's privacy right and the employer's interest in the efficient and proper operation of the workplace. While the Court's first decision to directly address the privacy rights of public employees resulted in a plurality opinion,[1] it

See "Just Say No," page 8

It Says What It Says:
Florida Supreme Court Holds Proposals for Settlement Need Not be Served by E-mail, Pursuant to the Plain Language of the Statute and Rule

By Viktoryia Johnson, Tampa

Florida civil litigators are undoubtedly familiar with the proposal of settlement fee-shifting mechanism available under section 768.79 of the Florida Statutes and rule 1.442 of the Florida Rules of Civil Procedure. The use of proposals for settlement may be particularly advantageous in employment cases where the standard for an award of attorneys' fees to prevailing defendants is "stringent,"[1] if not entirely unattainable. For example, in civil rights cases, attorneys' fees may be awarded to the prevailing defendant only upon a finding of frivolousness.[2] That is a high ceiling.

A thorough understanding of the form, service, and content requirements of section 768.79 and rule 1.442 is a must when engaging the proposal for settlement mechanism,

See "It Says What It Says," page 11

Chair's Message

CATHLEEN A. SCOTT

As the section year winds towards the annual June meeting, the section's primary goals continue to be the delivery of premier CLE and educational programs, publication of informative legal articles, implementation of technological changes in the means of delivery services, and the mentorship and development of its members to assume key section roles. We also strive to meet the ever-changing demands of our section.

This year has been an opportunity to showcase the section's exemplary service to the Bar, its membership, the judiciary, and the public. To accommodate the increasingly busy practitioner, we are offering a record number of webinars, as well as regular CLEs, for our section. We collaborated with other sections to bring innovative and thoughtful topics, including a tax and severance agreement webinar. We held our litigation seminar at the Breakers in September in Palm Beach and our Annual Update and Board Certification Review in January in Orlando. We are gearing up for Advanced Labor Topics 2019 which will be held at the Wyndham Grand in Jupiter at Harbourside Place on April 12-13, 2019. This year we will add a day to the meeting for a section leadership retreat to focus on section goals, revenue and cost challenges, and to make sure we are on track to meet the needs of our diverse membership. Our section is made up of small and large firms, public and private attorneys and those representing both the employer and employees. Our CLEs have something for every practitioner, in large part due to the efforts of Robyn Hankins, our legal education director.

Our section is proud to be invited to present at the AJS judicial conference this May. Fourth DCA Judge Forst, Judge Sasser of the 15th Judicial Circuit, and I will be presenting on restrictive covenants.

We are updating our website and are excited to announce that our new site will be up soon.

Through its various committees and subcommittees, the Section has continued its outreach efforts to maintain links with the Bar, the National Labor Relations Board, national and voluntary bar organizations, regulatory agencies, the judiciary, and law schools. Section member Christina Velez organized a law student outreach at Florida A&M University. We are also finalizing our scholarship awards for the state's law schools.

Sadly, we have had to say goodbye to a number of our section's greatest members, many of whom are being nominated for our Hall of Fame.

On behalf of all of our officers and the section's Executive Council, thank you for being a part of the Labor & Employment Law Section.

Cathleen Scott, Chair

Section Bulletin Board

Advanced Labor Topics 2019 (2888)

April 12-13, 2019
Wyndham Grand Jupiter at Harbourside Place, Jupiter

Labor and Employment Law Section
Executive Council Meeting (all invited)
Friday, April 12
5:00 p.m. – 6:00 p.m.

Reception with jazz band (included in registration fee)
6:00 p.m. – 6:30 p.m.

Dinner with jazz band (included in registration fee)
6:30 p.m. – 8:30 p.m.

Update on Gender Discrimination: The New Gender Equality (2883)

AUDIO WEBCAST
June 5, 2019 • 12:00 noon – 12:50 p.m.

The Annual Florida Bar Convention

June 26-29, 2019
Boca Raton Resort & Club

Labor and Employment Law Section
Executive Council Meeting
Thursday, June 27, 2019
5:00 p.m. – 6:30 p.m.

Reception
6:30 p.m. – 7:30 p.m.

Mediation and Arbitration Issues in Employment Matters: Thinking Outside the Box seminar presented by the Alternative Dispute Resolution and the Labor and Emplolyment Law Sections
Friday, June 28, 2019
9:00 a.m. – 11:00 a.m.

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Advanced Labor Topics 2019

This advanced two-day seminar will review 11th Circuit EEO cases; discuss service animals in the workplace; provide wage and hour updates from inside the beltway; provide Supreme Court and agency updates; provide PERC and NLRB updates; present a view from the bench regarding professionalism in labor and employment law cases; and provide OSHA and HIPAA updates.

Course No. 2888 • Advanced Level • Live Presentation

Friday, April 12, 2019

12:00 noon – 12:25 p.m.
Late Registration

12:25 p.m. – 12:30 p.m.
Welcome and Introductory Remarks
Cynthia Sass, Sass Law Firm, Tampa – Program Co-Chair
Gregory A. Hearing, Thompson, Sizemore, Gonzalez & Hearing, P.A., Tampa – Program Co-Chair

12:30 p.m. – 1:45 p.m.
11th Circuit EEO Update
Robert E. Weisberg, Regional Attorney, Equal Employment Opportunity Commission, Miami

1:45 p.m. – 2:00 p.m.
Break

2:00 p.m. – 3:15 p.m.
Service Animals in the Workplace
Amanda Biondolino, Sass Law Firm, Tampa
Sacha Dyson, Thompson, Sizemore, Gonzalez & Hearing, P.A., Tampa

3:15 p.m. – 3:30 p.m.
Break

3:30 p.m. – 4:45 p.m.
Wage and Hour Update from Inside the Beltway
Keith Sonderling, Acting Administrator, U.S. Dept. of Labor, Wage and Hour Division, Washington, D.C.

5:00 p.m. – 6:00 p.m.
Labor and Employment Law Section Executive Council Meeting (all invited)

6:00 p.m. – 6:30 p.m.
Reception (included in registration fee)

6:30 p.m. – 8:30 p.m.
Dinner (included in registration fee)

Saturday, April 13, 2019

8:25 a.m. – 8:30 a.m.
Welcome and Introductory Remarks
Cynthia Sass, Sass Law Firm, Tampa – Program Co-Chair
Gregory A. Hearing, Thompson, Sizemore, Gonzalez & Hearing, P.A., Tampa – Program Co-Chair

8:30 a.m. – 9:30 a.m.
Supreme Court and Agencies Update
Tammy McCutchen, Littler Mendelson, P.C., Washington, D.C.

9:30 a.m. – 10:30 a.m.
PERC & NLRB Update
Donald D. Slesnick, Law Offices of Slesnick & Casey LLP, Coral Gables
Robert S. Turk, Stearns Weaver Miller Weissler Alhadeff & Sitterson, Miami

10:30 a.m. – 10:45 a.m.
Break

10:45 a.m. – 11:30 a.m.
A View From the Bench – Professionalism in Labor and Employment Law Cases
The Honorable Anthony Porcelli, United States Magistrate Judge, Middle District of Florida, Tampa Division

11:30 a.m. – 12:30 p.m.
OSHA & HIPAA Update
Eric Holshouser, Rogers Towers, P.A., Jacksonville

CLE CREDITS

CLER PROGRAM
General: 9 hours
Ethics: 1 hour

CERTIFICATION PROGRAM
Labor and Employment Law: 9 hours

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Is Protection for Florida LGBTQ Employees on the Horizon?

By Aaron W. Tandy, Miami

Unlike some state laws that specifically prohibit discrimination on the basis of sexual orientation,[1] neither the Florida Civil Rights Act[2] (FCRA) nor Title VII of the Civil Rights Act of 1964[3] (Title VII) includes such specific language. Both the FCRA and Title VII only prohibit discrimination by employers on the basis of the sex of their employees; i.e., an employee's gender as male or female. Further—at least for now—the Eleventh Circuit, Florida federal district courts, and Florida state courts continue to draw a distinction between employee discrimination and retaliation claims on the basis of sexual orientation (which are not covered under Title VII or the FCRA) and claims on the basis of gender non-conformity (which are covered).[4]

However, efforts toward providing more safeguards for Florida lesbian, gay, bisexual, transgender, and questioning (LGBTQ) employees are making headway on the legislative front, albeit incrementally. First, individual counties and communities are passing local ordinances intended to provide some modicum of protection for these workers. Second, individual employers are stepping up around the state to include protections for their LGBTQ employees in non-discrimination policies and directives. Third, State Senator Joe Gruter recently introduced the Florida Inclusive Workforce Act, SB 438, which would amend the FCRA to prohibit discrimination in employment on the basis of gender identity and sexual orientation. While these measures do not prevent all discrimination against Florida's LGBTQ population (which a recent survey put at over one million residents), this legislation, if passed, will expand and extend the protections afforded by law to other minority and disenfranchised groups to these individuals and families, positively impacting Florida's business community by attracting skilled and valuable employees to the state and bringing Florida in line with other states around the country.

Additionally, broader federal protections may come out of the United States Supreme Court this term or next. As of this writing, there are two competing petitions for writs of certiorari pending before the Supreme Court regarding the expansion of Title VII to causes of action for sexual orientation discrimination. *Bostock* (Docket No. 17-1618) and *Zarda* (Docket No. 17-1623) were distributed for conference of the justices on February 15, 2019.[5] Also distributed for the February 15th conference was the appeal in *R.G. & G.R. Harris Funeral Homes, Inc.* (Docket No. 18-107), seeking to extend Title VII protections to transgender employees.[6] Of course, the retirement of Justice Anthony Kennedy and appointment of Justice Brett Kavanaugh, as well as the prior appointment of Justice Neil Gorsuch, has realigned the Court from the majority that decided *Obergefell v. Hodges*,[7] which recognized a fundamental right of same sex couples to marry. Nevertheless, protection for LGBTQ workers would seem to be a logical progression from this case, as the right to be free from discrimination as part of the workforce is a right enjoyed by other minority communities.

Until the Supreme Court or Congress acts, jurists will continue to face the prospect of adhering to circuit precedent that some courts have found perpetuates an outmoded distinction between gender non-conformity claims and sexual orientation discrimination.[8]

A. TANDY

Aaron Tandy *is a partner with Pathman Lewis, LLP and a member of its commercial litigation department.*

Endnotes

1 *See, e.g.,* N.Y. Exec. Law § 296(1)(a).

2 Fla. Stat. §§ 760.01, *et seq.*

3 42 U.S.C. §§ 2000e, *et seq.*

4 *Compare Bostock v. Clayton Cnty. Bd. of Comm'rs*, 723 F. App'x 964 (11th Cir. 2018) (affirming dismissal of sexual orientation discrimination claim) *with Glenn v. Brumby*, 663 F.3d 1312 (11th Cir. 2011) (finding discrimination on the basis of gender nonconformity is sex discrimination). *See also Evans v. Ga. Reg'l Hosp.*, 850 F.3d 1248, 1255 (11th Cir. 2017) (vacating trial court dismissal of plaintiff's gender non-conformity claims but confirming dismissal of claims for discrimination and retaliation based on sexual orientation). Recently the Fifth Circuit Court of Appeals joined the Eleventh Circuit in finding that Title VII does not prohibit discrimination on the basis of sexual orientation. *Wittmer v. Phillips 66 Co.*, __ F.3d __, 2019 U.S. App. LEXIS 3731 (5th Cir. Feb. 6, 2019). In doing so, the Fifth Circuit acknowledged that three other circuits—the Second, Sixth, and Seventh—had decided the question the other way. *See Zarda v. Altitude Express, Inc.,* 883 F.3d 100 (2d Cir. 2018) (en banc); *EEOC v. R.G. & G.R. Harris Funeral Homes, Inc.*, 884 F.3d 560 (6th Cir. 2018); *Hively v. Ivy Tech Cmty. Coll. of Ind.*, 853 F.3d 339 (7th Cir. 2017) (en banc).

5 This is not the first time these cases have been scheduled for conference, only to have the discussion postponed. *See* https://www.scotusblog.com/case-files/cases/altitude-express-inc-v-zarda/.

6 *See* https://www.scotusblog.com/case-files/cases/r-g-g-r-harris-funeral-homes-inc-v-equal-opportunity-employment-commission/.

7 576 U.S. __ (2015).

8 *See, e.g., Coleman v. Amerihealth Caritas*, 2017 U.S. Dist. LEXIS 85319 (E.D. Pa. June 2, 2017) (dismissing sexual orientation discrimination claims but granting leave to amend to bring gender stereotyping claim).

NLRB Restores Previous Standard for Establishing Section 7 "Concerted Activity" Under the NLRA

By Benjamin Bard, Tampa

A contractor providing ground services at an international airport discharged a skycap employee after he grumbled to a supervisor in the presence of three other skycaps about the lack of tips provided on a previous occasion by a soccer team that was again seeking assistance. Specifically, the employee said: "We did a similar job a year prior, and we didn't receive a tip for it."

A complaint was issued alleging that the employee had been discharged for engaging in concerted activity protected by Section 7 of the National Labor Relations Act (NLRA). An administrative law judge dismissed the complaint, finding that the employee's conduct was neither concerted activity nor undertaken for the purpose of mutual aid or protection. In a January 11, 2019, Decision and Order issued in *Alstate Maintenance, LLC and Trevor Greenidge*[1] by Chairman Ring, Member Kaplan, and Member Emanuel, the National Labor Relations Board (the Board) adopted the judge's recommended order, with Member McFerran dissenting. In so doing, the Board overruled decisions, including *Worldmark by Wyndham*,[2] that had deviated from the standards established in the *Meyers Industries* line of cases.[3] The deviations, said the Board, had created "an-all-but-meaningless inquiry" designating activity as "concerted" and sufficient to satisfy the first requirement for protection under Section 7 of the NLRA when it involves the use of "the first-person plural pronoun in the presence of fellow employees and a supervisor."[4]

The Board reaffirmed "the standards articulated in Meyers I and [Meyers II], under which individual griping does not qualify as concerted activity solely because it is carried out in the presence of other employees and a supervisor and includes the use of the first-person plural pronoun."[5] To qualify as concerted activity, "an individual employee's statement to a supervisor or manager must either bring a truly group complaint regarding a workplace issue to management's attention, or the totality of the circumstances must support a reasonable inference that in making the statement, the employee was seeking to initiate, induce or prepare for group action."[6] In reaching its holding, the Board identified the following factors as tending to support drawing such an inference:

> (1) the statement was made in an employee meeting called by the employer to announce a decision affecting wages, hours, or some other term or condition of employment;
>
> (2) the decision affects multiple employees attending the meeting;
>
> (3) the employee who speaks up in response to the announcement did so to protest or complain about the decision, not merely . . . to ask questions about how the decision has been or will be implemented;
>
> (4) the speaker protested or complained about the decision's effect on the work force generally or some portion of the work force, not solely about its effect on the speaker him- or herself; and
>
> (5) the meeting presented the first opportunity employees had to address the decision, so that the speaker had no opportunity to discuss it with other employees beforehand.[7]

The Board found that the discharged skycap's statement constituted the type of individual griping that falls outside the scope of "concerted activity" and held that because the employee's statement did not relate to wages, hours, or other terms or employment and was not "aimed at improving [other employees'] lot . . . through channels outside the immediate employee-employer relationship . . . , the statement did not have mutual aid or protection as its purpose"

continued, next page

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SECTION 7 "CONCERTED ACTIVITY", *continued*

so as to meet the second requirement to merit protection under Section 7 of the NLRA.[8]

As part of a lengthy dissent, Member McFerran wrote:

> [L]ongstanding Board and court precedent compels a finding that [the skycap's] complaint constituted an attempt to initiate a group objection over tips, and that he was thus engaged in concerted activity for the mutual aid and protection of his fellow skycaps—conduct for which he could not lawfully be fired. Instead, the majority upholds [his] discharge, misreading and overruling (without being asked) a recent Board decision and imposing sharp new restrictions (unsupported by precedent) on what counts as "concerted" and "mutual aid or protection" for purposes of Section 7.[9]

B. BARD

Benjamin W. Bard *is Of Counsel with Thompson, Sizemore, Gonzalez & Hearing in Tampa and represents both public and private sector employers in all matters related to labor and employment law.*

Endnotes

1 367 N.L.R.B. 68 (2019).

2 356 N.L.R.B. 765 (2011).

3 268 N.L.R.B. 493 (1984) (*Meyers I*), remanded sub nom. *Prill v. NLRB*, 755 F.2d 941 (D.C. Cir. 1985), cert. denied 474 U.S. 948 (1985), and *Meyers Indus.*, 281 N.L.R.B. 882 (1986) (*Meyers II*), aff'd sub nom. *Prill v. NLRB*, 835 F.2d 1481 (D.C. Cir. 1987), cert. denied 487 U.S. 1205 (1988).

4 *Alstate Maintenance, Inc.* 367 N.L.R.B. 68 at *1.

5 *Id.* at *8.

6 *Id.*

7 *Id.*

8 *Id.* at *9

9 *Id.* at *11.

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FloridaBar.org/certification.

was able to reach a consensus, albeit five to four, when addressing this issue in the context of drug testing of public employees in *National Treasury Employees Union v. Von Raab*.[2]

In *Von Raab*, the Court upheld the drug testing of applicants for jobs as customs agents. In doing so, the Court observed that urine tests for drugs, even in the context of employment, are searches and must meet the reasonableness requirement of the Fourth Amendment. The Court balanced the privacy rights of employees against the public employer's need for the intrusion and found that, when an employee was engaged in drug interdiction or required to carry a firearm, the government's need for suspicionless drug testing was compelling. The Court concluded that employees who carry a firearm or are involved in drug interdiction have a diminished expectation of privacy regarding inquiries into their fitness, probity, judgment, and dexterity. As a result, the Court held that the government's need for the intrusion outweighed the employee's diminished expectation of privacy. Notably, Justice Antonin Scalia dissented, finding no compelling government need for this bodily intrusion because the real purpose of the drug testing program, in his view, was to show that the government was "serious about its 'war on drugs,'" and therefore the justification for the program was merely symbolic.[3]

Eight years later, the Court again addressed the issue of drug testing.[4] This time, however, Justice Scalia's symbolism argument prevailed, and the Court rejected mandatory drug testing of all candidates for public office. In concluding that this requirement was not reasonable under the Fourth Amendment, the Court explained: "Our precedents establish that the proffered special need for drug testing must be substantial—important enough to override the individual's acknowledged privacy interest, sufficiently vital to suppress the Fourth Amendment's normal requirement of individualized suspicion."[5] The Court held that the government failed to establish concrete evidence of a special need for drug testing to allow suspicionless testing, noting that there was no evidence of a drug abuse problem or that this testing would effectively identify drug users. Instead, the evidence showed that the purpose was symbolic—to protect the image of the state—and was insufficient to justify a suspicionless search. The Court reiterated the standard for suspicionless testing:

> [W]here the risk to public safety is substantial and real, blanket suspicionless searches calibrated to the risk may rank as "reasonable"—for example, searches now routine at airports and at entrances to courts and other official buildings. But where, as in this case, public safety is not genuinely in jeopardy, the Fourth Amendment precludes the suspicionless search, no matter how conveniently arranged.[6]

Fast forward to 2013 when, as a result of Florida Governor Rick Scott's order requiring suspicionless drug testing of all applicants for state employment and random drug testing of all state employees, the Eleventh Circuit addressed the issue of suspicionless drug testing of public employees.[7] The Eleventh Circuit held that the state failed to show a special need to drug test all state employees and applicants. At the same time, however, the Eleventh Circuit concluded that the district court's injunction prohibiting all suspicionless testing was overbroad because employees holding certain safety-sensitive positions or employees engaged in safety-sensitive tasks could be subject to such testing.

To provide additional guidance, the court identified the following examples of positions that could be subject to suspicionless drug testing: employees who carry firearms; sworn law enforcement officers; correctional officers who interact with parolees or inmates; firefighters; medical residents; emergency medical technicians; individuals involved in drug interdiction or who have access to sensitive information; employees who work with or operate heavy machinery or large vehicles, such as planes, trains, buses, or boats; or individuals who operate mass transit.[8] The court noted that this list was not exhaustive, and there may be other positions "that actually present real, substantial, and immediate threats to public safety" that may be subject to suspicionless testing.[9] Notably, teachers were not included in this list.

In the 2013 decision, the Eleventh Circuit set forth the framework for determining whether suspicionless drug testing violated the Constitution. First, said the court, the employee has the initial burden of demonstrating that there was a search and that it was conducted without individualized suspicion. The employer then has the burden of showing the special need to allow a suspicionless search under the Fourth Amendment. If the employer meets this burden of production, then the court must balance the special need against the employee's privacy, "bearing in mind that the ultimate burden of persuasion remains squarely on the plaintiff."[10]

These cases provide the backdrop for the Eleventh Circuit's recent decision in *Friedenberg v. School Board of Palm Beach County*,[11] which addressed, as an issue of first impression, whether substitute teachers could be subject to suspicionless drug testing. The unanimous decision authored by Judge Stanley Marcus affirmed the district court's order denying a motion for preliminary injunction. The court concluded: "We think that the School Board has a sufficiently compelling interest in screening its prospective teachers to justify this invasion of the privacy rights of job applicants."[12]

The plaintiff in this case had applied for three positions in the Palm Beach County school district: substitute teacher, tutor, and early childhood aide. The school district made a conditional offer of employment of the substitute teacher position to the plaintiff. The plaintiff had to pass a drug test. The plaintiff, however, refused to submit to the drug test

and brought suit in federal court seeking to enjoin the school district's drug-testing policy.[13] In reaching the conclusion that the test did not violate the Fourth Amendment, the court closely examined the testing protocol, efficacy of the testing, and substitute teachers' duties and responsibilities. This drug test involved a urine test administered in a private bathroom stall where staff remained outside of the stall. The test was administered in accordance with the Florida Administrative Code.

Judge Marcus recognized that "[s]uspicionless searches are permissible in a narrow band of cases where they serve sufficiently powerful and unique public needs."[14] He also observed that the needs are dependent on the context in which the search takes place. In the context of this case, the court found that "ensuring the safety of millions of schoolchildren in the mandatory supervision and care of the state, and ensuring and impressing a drug-free environment in our classrooms, are compelling concerns."[15] The court was careful to emphasize that its decision was limited to the unique context of public schools[16] and was highly dependent on the context of the search and on the duties of the person being searched.

In reaching its holding, the Eleventh Circuit reviewed the precedent addressing drug testing in the public workplace over the last thirty years. The court noted that, based on the special needs associated with the unique context of public schools, it previously had upheld the drug testing of students participating in athletics and extracurricular activities. It observed that the prevention and deterrence of student drug use was a special need to justify suspicionless drug testing. The court also recognized that a special need exists when a government employee occupies a safety-sensitive position, where "'even a momentary lapse of attention c[ould] have disastrous consequences.'"[17] The Eleventh Circuit further observed that the Supreme Court invalidated a policy of drug testing elected officials when the government failed to establish a concrete danger or to demonstrate that the hazards associated with drug use were "real and not simply hypothetical.'"[18]

In affirming the denial of the preliminary injunction, the court explained that this case was at the crossroads of its precedent addressing searches in schools and those cases addressing drug testing of persons in safety-sensitive positions. The court first evaluated the danger that the drug-testing policy was implemented to address and found that this danger was significant and concrete. While recognizing that a teacher does not hold the same type of safety-sensitive position as a railroad operator, the court concluded that the position was sufficiently safety-sensitive because "guaranteeing a safe and effective learning environment presents a compelling need to justify suspicionless drug testing."[19] Danger, said the court, can be measured by the likelihood that a teacher will be intoxicated, the likelihood that a dangerous situation will arise to which the intoxicated teacher cannot effectively respond, and the gravity of harm resulting from an ineffective response. All three factors do not have to be present in order to find a danger sufficiently concrete to justify a suspicionless search. A serious danger can be found even when the probability of intoxication is low.

The court recognized that serious emergencies frequently arise in schools, and teachers, who are on the front lines, have the responsibility to keep children safe: "[A]n obvious and basic step necessary to ensure student safety is ensuring that the guardian in closest daily contact with students is able to respond, and to do so promptly and without any cognitive or physical impairment."[20] It was not rank speculation to conclude that teachers will have to handle emergencies. As the court noted, children get sick, have dangerous allergic reactions, and get into fights. It also observed that, tragically, "[s]chool shootings are a real and palpable possibility."[21] In such situations, the court recognized, intoxicated teachers pose a profound danger.

Although an intoxicated teacher may be improbable,[22] the risk of grave harm posed by a teacher who is intoxicated cannot be accepted given the fact that emergencies will happen: "[T]he result of our calculus is that teachers, including substitutes, who are drug-addicted pose a real danger to our school children."[23] As this danger is concrete and substantial,[24] the court concluded that the school district had a significant safety reason for conducting the drug testing. This need is just as compelling as that involving a train operator, customs official, or police officer, even though teachers do not often face the life-and-death circumstances that these employees do. The government does not have to take a chance, present empirical evidence of past drug abuse, or wait for disastrous consequences to occur before it can take action to prevent such consequences through suspicionless drug testing. The court held that "special need" does not have to be established through hard, demonstrable evidence but can be shown through an innate understanding of the problem and an intuitive sense of the danger presented. As a result, the Eleventh Circuit concluded the school district demonstrated a powerful special need for drug testing in this case.

However, this conclusion did not end the analysis. To evaluate the reasonableness of the search, the court then weighed the privacy interest of the public employees against the government's special need. At this stage, noted the court, "once the government has carried its burden of establishing the special need, the burden returns to the plaintiff to persuade the court that the balance weighs in its favor."[25] The court considered four factors in balancing these interests: the employee's reasonable expectation of privacy; the nature and extent of the intrusion from the search; the nature and extent of the government's interest; and the efficacy of the testing policy to achieve the government's purpose. In balancing these factors, the court found that they weighed in favor of allowing the drug testing of substitute teachers because the government attempted to minimize the intrusion to a reasonable extent and the need was compelling.[26]

The court first found that teachers in public schools have a diminished ex-

continued, next page

pectation of privacy. It next considered the character of the intrusion, noting that the school district employed a procedure that the Supreme Court has found to be minimally intrusive. There were only two components of the testing that differed from the test addressed by the Supreme Court. The school district's procedure allowed for the search of a wallet for evidence of tampering if the employee chose to keep his or her wallet in the stall. The school district also required the disclosure of medications prior to the testing, but this information was kept confidential. The court concluded that these parts of the procedure did not change the character of the intrusion, which the court found to be minimally invasive. Next, the court considered the nature and extent of the school district's interest, which it again recognized as compelling. The government's interest is in protecting students before a drug problem arises or causes harm, which interest cannot be served by a warrant requirement. Finally, in considering the efficacy of the test, the court did not determine whether the testing was the most effective method for detecting drug use or whether an applicant could use means to pass the test while still abusing drugs. It considered only whether the testing policy was an effective means for deterring drug use, and the court found that it was.

After considering these factors, the court concluded that the government's special need for the drug testing of substitute teachers in public schools outweighed the teachers' privacy interests. The court explained that the school district's drug testing protocol for substitute teachers, which was "reasonably effective," is a minimal intrusion on the diminished privacy interests of these employees, in the service of a serious and compelling need. Therefore, it affirmed the district court's denial of the plaintiff's request to enjoin this drug testing policy.[27]

Friedenberg presents three lessons. First, the Eleventh Circuit and the courts will continue to scrutinize drug testing of public employees based on the specific factual context, including the drug testing protocol, the efficacy of the drug testing, and the responsibilities of the position.[28] While there are a few positions, now including substitute teachers, where the Eleventh Circuit has recognized a special need for drug testing, this list is far from exhaustive.[29] Second, public employers are not required to provide empirical data to establish a special need for drug testing if they can show that there is a common sense need for drug testing, considering the likelihood and gravity of harm. Toward this end, public employers need to ensure that their job descriptions and other evidence reflect the safety-sensitive nature of the position for which they are conducting drug testing and understand why they are requiring suspicionless drug testing for each position. In other words, public employers need to be able to establish that the duties of the position justify the invasion of privacy. Finally, substitute teachers need to "just say no," as they can be subject to suspicionless and random drug testing.

S. DYSON

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Endnotes

1 *See O'Connor v. Ortega*, 480 U.S. 709 (1987).

2 489 U.S. 656 (1989).

3 *Id.* at 686 (Scalia, J.,dissenting).

4 *Chandler v. Miller*, 520 U.S. 305 (1997).

5 *Id.* at 318.

6 *Id.* at 323.

7 *Am. Fed'n of State, Cnty., and Mun. Emps. (AFSCME) Council 79 v. Scott*, 717 F.3d 851, 857-58 (11th Cir. 2013).

8 *Id.* at 858, 867-69.

9 *Id.* at 872.

10 *Id.* at 867.

11 911 F.3d 1084 (11th Cir. 2018).

12 *Id.* at 1087.

13 The school district had a policy requiring drug testing of all applicants, regardless of the job position. The plaintiff initially attempted to challenge this policy as unconstitutional, but the district court concluded *sua sponte* that the plaintiff had standing to contest only the application of the policy to substitute teachers as it was the only position she was offered. *Id.* at 1090; *see also Friedenberg v. Sch. Bd. of Palm Beach Cnty.*, 257 F. Supp. 3d 1295, 1305 (S.D. Fla. 2017), *aff'd*, 911 F.3d 1084 (11th Cir. 2018).

14 *Friedenberg*, 911 F.3d at 1087.

15 *Id.* at 1101.

16 "[T]he government possesses far-reaching power in the unique setting of a school." *Id.*

17 *Id.* at 1096 (quoting *Skinner v. Railway Labor Executives Ass'n*, 489 U.S. 602 (1989)).

18 *Friedenberg*, 911 F.3d at 1097 (quoting *Chandler*, 520 U.S. at 319).

19 *Id.* at 1098.

20 *Id.* at 1099.

21 *Id.*

22 The court observed that substitute teachers may be supervised more frequently than permanent teachers, which could increase the likelihood that an impaired teacher could be discovered. However, the court found that the school district did not have to take the chance given the gravity of harm posed if the impairment was not discovered. In addition, it noted that "at the end of the day, there is no real distinction between the responsibilities assumed by substitute teachers and full-time classroom teachers except for the amount of time they spend in the classroom." *Id.* at 1103.

23 *Id.* at 1100.

24 In rejecting the argument that the harm was speculative, the court recognized: "We know with a high degree of confidence that serious problems will arise, that substitute teachers just like permanent teachers are the first and primary line of protection for minor students in the care of the public schools, and that an intoxicated guardian may well be unable to respond properly and promptly." *Id.* at 1100.

25 *Id.* at 1104.

26 As the court observed, "the government is justified in demanding more from those to whom our country's children are entrusted." *Id.* at 1105.

27 While this decision addressed only the issuance of a preliminary injunction, after the Eleventh Circuit's decision, the district court dismissed the case with prejudice after a stipulation of dismissal was filed by the parties.

28 "[W]e do not think that by recognizing a special need in this unique setting we have opened the floodgates to indiscriminate suspicionless searches. We have always required, as we do today, an exceptional showing of a special need to allow a suspicionless search, and not all government jobs present the same needs." *Id.* at 1103.

29 "We think a court can reasonably draw the line between a substitute teacher and another employee, say a janitor who simply cleans a school building in the evening, whose responsibilities do not involve safety and security, relate far less directly to students, involve profoundly different risks, or implicate more persuasive countervailing concerns." *Id.* at 1104.

as courts are quick to deny motions for attorneys' fees for anything less than perfect compliance with the rule and the statute. The strict requirements of Section 768.79 and rule 1.442 set many traps for the unwary. On January 4, 2019, however, the Florida Supreme Court removed at least one trap.

In *Wheaton v. Wheaton,*[3] an opinion authored by Justice Quince, Florida's highest court resolved a district split created by the Third District Court of Appeal's decision in *Wheaton v. Wheaton*[4] and the Second District's decision in *Boatright v. Phillip Morris USA, Inc.,*[5] the Fourth District's decision in *McCoy v. R.J. Reynolds Tobacco Co.,*[6] and the First District's decision in *Oldcastle Southern Group, Inc., v. Railworks Track Systems, Inc.*[7] The Third District split from the other districts on the question of whether proposals for settlement under section 768.79 and rule 1.442 must comply with the e-mail service provisions of rule 2.516 of the Florida Rules of Judicial Administration.[8] The Florida Supreme Court answered this question in the negative, holding that the plain language of section 768.79 and rule 1.442 do not require service by e-mail, thus reversing the Third District.

Wheaton Factual Background

In *Wheaton,* Mardella Wheaton sued Sandra Wheaton for unlawful detainer.[9] Sandra served a proposal

continued, next page

for settlement on Mardella via e-mail; Mardella received but did not accept the proposal.[10] After the trial court granted Sandra's motion for summary judgment, she moved to enforce the proposal for settlement and collect attorneys' fees.[11] Mardella opposed, arguing that Sandra's proposal failed to strictly comply with the e-mail service requirements of rule 2.516 of the Florida Rules of Judicial Administration.[12] The trial court agreed, finding that Sandra's service e-mail did not include a certificate of service or a subject line saying "SERVICE OF COURT DOCUMENTS" and in other respects failed to comply with rules 1.442 and 1.080[13] of the Florida Rules of Civil Procedure and rule 2.516 of the Florida Rules of Judicial Administration.[14]

Sandra appealed the trial court's denial of her motion for attorneys' fees, arguing that, "because the proposal for settlement is neither a pleading nor a 'document filed in any court proceeding,' it is not subject to the requirements of rule 2.516."[15] Rejecting Sandra's argument that the operative subdivision was subdivision (a) of rule 2.516 (which instructs that "every pleading subsequent to the initial pleading and every other document filed in any court proceeding . . . must be served in accordance with this rule. . ."),[16] the Third District held the operative language was subdivision (b) of rule 2.516 (which states that "[a]ll documents required *or permitted to be served* on another party *must be served by e-mail. . .").*[17] The district court went on to hold that, because the proposal for settlement was "permitted to be served on another party," it "must be served by e-mail," pursuant to rule 2.516(b), regardless of whether the document was also being filed with the court.[18]

Sandra moved for rehearing, arguing that the district court's decision conflicted with the Florida Supreme Court's decision in *Kuhajda v. Borden Dairy Co. of Alabama, LLC,*[19] filed after the briefing in *Wheaton* was complete.[20] The Third District summarily denied the motion, and the Supreme Court accepted the appeal to resolve the district split.[21]

The Florida Supreme Court's Analysis

The issue before the Supreme Court was whether proposals for settlement made pursuant to section 768.79 and rule 1.442 must comply with the e-mail service provisions of rule 2.516 of the Florida Rules of Judicial Administration.[22] The Court began its analysis by reciting the relevant rules and the statute:

- Section 768.79 of the Florida Statutes "provides a sanction against a party who unreasonably rejects a settlement offer."[23] Pursuant to Section 768.79, if a defendant's offer of judgment is not accepted by the plaintiff within 30 days of service, the defendant "shall be entitled to recover reasonable costs and attorney's fees incurred by her or him on the defendant's behalf . . . if . . . the judgment obtained by the plaintiff is at least 25 percent less than such offer."[24] The statute provides strict requirements for the form and content of offers of judgment and directs that a proposal "shall be served upon the party to whom it is made, but [generally] it shall not be filed."[25]
- Section 768.79 is implemented by rule 1.442 of the Florida Rules of Civil Procedure and contains further specific requirements regarding the contents of the proposal, stating that it must "include a certificate of service in the form required by rule 1.080."[26] Like section 768.79, rule 1.442 also states that a proposal generally "shall be served on the party or parties to whom it is made but shall not be filed."[27] While rule 1.442 requires proposals to include a certificate of service, rule 1.080 no longer includes a provision regarding a certificate of service.[28] Instead, rule 1.080 states that "[e]very pleading subsequent to the initial pleading, all orders, and every other document filed in the action must be served in conformity with the requirements of Florida Rule of Judicial Administration 2.516."[29]
- Rule 2.516 requires that "*every pleading subsequent to the initial pleading and every other document filed in any court proceeding . . . must be served in accordance with this rule on each party.*"[30] Regarding service by e-mail, the rule states that generally, "*[a]ll documents required or permitted to be served on another party must be served by e-mail.*"[31] The rule further provides for specific formatting requirements for service by e-mail.[32]

The District Split

After reciting the relevant rules and law, the Court briefed the conflicting district court decisions. Not surprisingly, the basic underlying facts of those cases are largely the same.

In *Boatright,* the plaintiffs served four proposals for settlement on the defendants via U.S. certified mail.[33] After a favorable verdict, the plaintiffs moved for attorneys' fees based on the defendants' failure to accept the proposals for settlement.[34] The trial court denied the motion due to the plaintiffs' failure to serve the proposals by e-mail in strict compliance with section 768.79 and rule 1.442.[35] The Second District reversed, holding that proposals for settlement need not follow the service requirements of rule 2.516 because the proposals do not meet rule 1.080(a)'s requirement that they be "filed in the action."[36] The Second District rejected the *Wheaton* court's reliance on subdivision (b) of rule 2.516, because rule 2.516(b)(1)'s service requirement "is confined to every pleading subsequent to the initial pleading and documents that are filed in court," but "it does not extend to every document" subject to service.[37]

In *McCoy*, the plaintiff also served a proposal for settlement on defendants by U.S. certified mail.[38] The defendants did not accept the proposals.[39] After a favorable verdict, the plaintiff moved for attorneys' fees.[40] The defendants argued that the plaintiff failed to e-mail the proposals pursuant to rule 2.516, and the trial court agreed.[41] The Fourth

District reversed, finding that, "[w]here a party has actual notice of an offer of settlement, and the offering party has satisfied the requirements of section 768.79 on entitlement, to deny recovery because the initial offer was not e-mailed is to allow the procedural tail of the law to wag the substantive dog."[42] Because both section 768.79 and rule 1.442 require service of proposals for settlement but prohibit filing, the Fourth District held that, as applied to rule 2.516(a), a proposal for settlement was neither a pleading nor a document "filed in any court proceeding."[43] Thus, the district court concluded that under the "plain language" of rule 2.516(a), the initial offer of judgment was outside of the e-mail requirements.[44] The Fourth District also rejected *Wheaton* because "the Third District import[ed] language from rule 2.516(b) to add words to the plain language of 2.516(a)," thereby manipulating the meaning of the rule, and instead of focusing on subsection 2.516(a), which specified when e-mail service was "required," used 2.516(b) to hold that e-mail service was required for the initial delivery of an offer of judgment.[45]

In *Oldcastle,* the plaintiff sent a proposal for settlement by e-mail.[46] The defendant received but did not accept the proposal.[47] After receiving a judgment more than 25 percent greater than the amount demanded in the proposal, the plaintiff moved for fees.[48] The defendant argued that the proposal had to be served in accordance with rule 2.516, but the First District disagreed.[49] While acknowledging that the proposal did not comply with the formatting requirements of rule 2.516(b)(1)(E), the First District concluded they did not apply because rule 2.516 was not triggered by the service of a proposal for settlement.[50] The First District adopted the rationale of *Boatright* and *McCoy*, agreeing that pursuant to rule 2.516(a), "since the proposal for settlement is not to be filed when it is served, the proposal is not included in the clause 'every other document filed in any court proceeding.'"[51]

Statutory Interpretation

After reviewing the facts of the conflict cases, the Florida Supreme Court noted that rule 1.442 and section 768.79 are to be strictly construed.[52] The Court reiterated the well-established principle that when the language of a statute is clear and unambiguous, there is no need for statutory interpretation.[53] Where the language is ambiguous and subject to different interpretations, on the other hand, statutory construction should be applied to resolve the ambiguity.[54] Based on the plain language of section 768.79 and rule 1.442, the Court concluded: "[N]either require[s] service by e-mail."[55]

The Court went on to say that the procedure for communicating an offer of settlement under section 768.79(3) is for the offer to "*be served upon the party to whom it is made, but [the offer] shall not be filed.*"[56] The statute requires only that the offer be served and not filed; it does not require service by e-mail.[57] Subdivision (d) of rule 1.442, which discusses the procedure for communicating a proposal, also states that "[a] proposal shall be served . . . but shall not be filed."[58] The rule likewise does not require service by e-mail.

The Court noted that rule 1.442 requires that a proposal for settlement "include a certificate of service in the form required by rule 1.080."[59] Rule 1.080 is silent as to the form of the certificate of service but provides that "*[e]very pleading subsequent to the initial pleading, all orders, and every other document filed* in the action must be served in conformity with the requirements of Florida Rule of Judicial Administration 2.516."[60] The Court found that this requirement does not apply to proposals for settlement because a proposal "is neither a pleading subsequent to the initial pleading, an order, or a document filed with the court."[61] Accordingly, based on rule 1.080's plain language, the Court held rule 2.516 does not apply to proposals for settlement pursuant to section 768.79 and rule 1.442.[62]

The Court then pointed out that in requiring the service of proposals for settlement by e-mail, the Third District misplaced its focus by construing rule 2.516 rather than section 768.79 and rule 1.442.[63] According to the Court, even the plain language of rule 2.516, however, does not support the Third District's conclusion, and the Third District therefore erred in finding that a proposal was subject to this rule.[64]

Holding

In reversing the Third District Court of Appeal in *Wheaton* and approving the *Boatright*, *McCoy*, and *Oldcastle* decisions, the Florida Supreme Court held: "The plain language of section 768.79 and rule 1.442 do not require service by [e-]mail. Moreover, because a proposal for settlement is a document that is required to be served on the party to whom it is made, rule 2.516 does not apply."[65]

Conclusion

With the *Wheaton* decision, the Florida Supreme Court has finally resolved the district split as to whether proposals for settlement under section 768.79 and rule 1.442 must comply with the e-mail service provisions of rule 2.516, holding that they need not. The *Wheaton* decision therefore offers some clarity to Florida employment litigators in the already challenging realm of proposals for settlement.

V. JOHNSON

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Endnotes

1 *EEOC v. W. Customer Mgmt. Grp., LLC,* 678 F. App'x 836, 838 (11th Cir. 2017) (noting a "stringent" standard for an award of attorneys' fees in the Title VII context (citing *Christiansburg Garment Co. v. EEOC,* 434 U.S. 412, 421 (1978))).

2 *See, e.g.*, *id.* (noting that a district court may award attorneys' fees to prevailing Title VII defendants only after a finding that the action was "frivolous, unreasonable, or without foundation, even though not brought in subjective bad faith"); *Alansari v. Tropic Star Seafood, Inc.*, 395 F. App'x 629, 632 (11th Cir. 2010) (noting, in whistleblower and workers' compensation claims under Florida law, that "because Florida law prevents awards of attorneys' fees, even after an offer of judgment, in state and federal civil rights cases absent a showing of frivolity, the court did not err in declining to award fees under section 768.79").

3 44 Fla. L. Weekly 94 (2019).

continued, next page

[4] 217 So. 3d 125 (Fla. 3d DCA 2017).
[5] 218 So. 3d 962 (Fla. 2d DCA 2017).
[6] 229 So. 3d 827 (Fla. 4th DCA 2017).
[7] 235 So. 3d 993 (Fla. 1st DCA 2017).
[8] *Wheaton*, Fla. L. Weekly 94, at *1.
[9] *Id.*
[10] *Id.* at *1–2.
[11] *Id.* at *2.
[12] *Id.*
[13] Rule 1.080 governs the service and filing of "pleadings, orders, and documents."
[14] *Wheaton,* Fla. L. Weekly 94, at *2.
[15] *Id.* at 3 (quotations omitted) (quoting *Wheaton*, 217 So. 3d at 127).
[16] Fla. R. Jud. Admin. 2.516(a).
[17] *Wheaton*, Fla. L. Weekly 94, at *3 (citing *Wheaton*, 217 So. 3d at 127).
[18] *Id.* at *3–4 (quoting *Wheaton*, 217 So. 3d at 127–28).
[19] 202 So. 3d 391 (Fla. 2016).
[20] *Wheaton*, Fla. L. Weekly 94, at *4.
[21] *Id.*
[22] *Id.*
[23] *Id.* at *5 (citing *Willis Shaw Exp., Inc. v. Hilyer Sod, Inc.*, 849 So. 2d 276, 278 (Fla. 2003)).
[24] *Id.* (citing § 768.79(3), Fla. Stat. (2018)).
[25] *Id.* (quotations omitted) (citing § 768.79(3), Fla. Stat.).
[26] *Id.* at *6 (quoting Fla. R. App. P. 1.442(c)(2)).
[27] *Id.* (quotations omitted) (quoting Fla. R. App. P. 1.442(d)).
[28] *Id.* A certificate of service provision of rule 1.080(f) was removed in 2012 when rule 2.516 was adopted. *See In re Amend. to Fla. Rules of Jud. Admin.*, 102 So. 3d 505, 510 (Fla. 2012).
[29] *Wheaton*, Fla. L. Weekly 94, at *6–7 (quoting Fla. R. Civ. P. 1.080(a)).
[30] *Id.* at *7 (quoting Fla. R. Jud. Admin. 2.516(a)).
[31] *Id.* at *8 (quoting Fla. R. Jud. Admin. 2.516(b)(1)).
[32] *Id.* (citing Fla. R. Jud. Admin. 2.516(b)(1)).
[33] *Id.* at *9 (citing *Boatright*, 218 So. 3d at 964).
[34] *Id.* (citing *Boatright*, 218 So. 3d at 964).
[35] *Id.* at *9–10 (citing *Boatright*, 218 So. 3d at 964).
[36] *Id.* at *10 (citing *Boatright*, 218 So. 3d at 965).
[37] *Id.* (quotations omitted) (quoting *Boatright*, 218 So. 3d at 970).
[38] *Id.* (citing *McCoy*, 229 So. 3d at 828).
[39] *Id.*
[40] *Id.*
[41] *Id.*
[42] *Id.* at *11 (quotations omitted) (quoting *McCoy*, 229 So. 3d at 828).
[43] *Id.* (citing *McCoy*, 229 So. 3d at 829 (quoting Fla. R. Jud. Admin. 2.516(a))).
[44] *Id.* (quotations omitted) (citing *McCoy*, 229 So. 3d at 829).
[45] *Id.* (citing *McCoy*, 229 So. 3d at 829).
[46] *Id. at *11–12* (citing *Oldcastle,* 235 So. 3d at 993–94).
[47] *Id.* at *12 (citing *Oldcastle*, 235 So. 3d at 994).
[48] *Id.* (citing *Oldcastle*, 235 So. 3d at 994).
[49] *Id.* (citing *Oldcastle*, 235 So. 3d at 995).
[50] *Id.* (citing *Oldcastle*, 235 So. 3d at 994).
[51] *Id.* (citing *Oldcastle*, 235 So. 3d at 994–95).
[52] *Id.* (citing *Campbell v. Goldman*, 959 So. 2d 223, 226 (Fla. 2007)).
[53] *Id.* at * 12–13 (citing *Holly v. Auld*, 450 So. 2d 217, 219 (Fla. 1984)).
[54] *Id.* at *13 (citing *Gulfstream Park Racing Ass'n, Inc., v. Tampa Bay Downs, Inc.*, 948 So. 2d 599, 606 (Fla. 2006)).
[55] *Id.*
[56] *Id.* (citing § 768.79(3), Fla. Stat.).
[57] *Id.*
[58] *Id.* at *13–14 (citing Fla. R. Civ. P. 1.442(d)).
[59] *Id.* at *14 (quotations omitted) (citing Fla. R. Civ. P. 1.442(c)(2)(G)).
[60] *Id.* (citing Fla. R. Civ. P. 1.080(a)).
[61] *Id.*
[62] *Id.*
[63] *Id.*
[64] *Id.* at *14–15.
[65] *Id.* at *19.

CASE NOTES

FEDERAL COURTS

Eleventh Circuit

By Carlo Marichal

Meaningful comparator analysis must be conducted at prima facie stage of *McDonnell Douglas* burden-shifting framework, and proper test for evaluating comparator evidence requires plaintiff to demonstrate that she and her proffered comparators were similarly situated in "all material respects."

Lewis v. City of Union City, GA, --F.3d--, 2019 WL 1285058 (11th Cir. 2019).

In this discrimination case, the Eleventh Circuit rejected the plaintiff's argument that the comparator analysis should be conducted at the tertiary pretext stage. While noting that the evidence necessary and proper to support a plaintiff's prima facie case, under the Supreme Court's *McDonnell Douglas* burden-shifting framework in an action alleging intentional discrimination in violation of Title VII, the Equal Protection Clause, or § 1981, may be used later in the framework to demonstrate that the defendant's explanation for its conduct was pretextual, the court held that the comparator analysis must occur in *McDonnell Douglas's* preliminary stage. Furthermore, the Eleventh Circuit clarified that a person is similarly situated "in all material respects" to the plaintiff where the comparator: (1) engaged in the same basic conduct; (2) was subjected to the same employment policy or rule; (3) was under the same supervisor; and (4) shared the plaintiff's disciplinary history. In other words, said the Eleventh Circuit, quoting a recent Supreme Court decision, the persons "'cannot reasonably be distinguished.'"

District Courts

Federal enclave doctrine prohibited plaintiff from bringing suit under the Fair Credit Reporting Act (FCRA) based on actions occurring at a detention center situated on land owned by the United States government.

Aponte v. Akima Global Servs., LLC, No. 17-cv-24184, 2019 WL 451797 (S.D. Fla. Jan. 18, 2019).

The plaintiff, a former employee of defendant stationed at the Krome Detention Center in Miami, filed suit under the FCRA. The court dismissed the FCRA claims under the federal enclave doctrine. In dismissing the claims, the judge noted that the land upon which Krome was situated was ceded to the United States prior to the FCRA becoming law. As such, the FCRA had no force at Krome.

STATE COURTS

Employee did not exhaust administrative remedies where she failed to include a narrative in the charge of discrimination, and there was no temporal proximity between the termination and her protected activity.

Buade v. Terra Group, LLC, 259 So. 3d 219 (Fla. 3d DCA 2018).

A terminated employee filed a charge of discrimination. In the charge, she alleged sexual harassment but did not check off "retaliation" and otherwise did not include any allegations relating to retaliation. Rather, she argued that any investigation into the charge would have revealed the retaliation. The appellate court rejected the argument, finding that the alleged retaliation predated the filing of the charge, so that the plaintiff was required to specifically include a supporting factual narrative. The court further found that a more than six-month gap between the protected activity and the alleged retaliation was insufficient to establish causation.

C. MARICHAL

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In Memoriam

Alan M. Gerlach, Jr.

December 6, 1949 – February 20, 2017

Longtime labor and employment law practitioner Alan Meyer Gerlach, Jr., age 69, of Orlando passed away February 20, 2019. He attended Harvard College, where he graduated cum laude with honors, and then received his law degree from the University of Florida College of Law, where he was Executive Editor of the *Law Review*. He also received a degree from Southern Methodist University School of Law, with a concentration in labor and employment law. For years, Alan was in private practice with local and national law firms representing management. Prior to his retirement from AdventHealth, he was the Chief Legal Officer and senior in-house labor and employment counsel. He was Board Certified by The Florida Bar in Labor and Employment Law and a member of the Bar's Labor and Employment Law Section, serving on the corporate counsel committee and the wage and hour administration liaison committee. Alan has been praised for exemplifying both excellence and integrity in the practice of law, his broad and deep knowledge of the law, and his ability to present complex issues in a manner that would be understood by all.

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