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IN THIS ISSUE

What SB 1718 Means for Hiring in Florida

By Melanie Matamoros Cruz, Tampa

The Florida Legislature recently passed Senate Bill (SB) 1718, a measure that will significantly impact the hiring procedures of many Florida employers. Among other things, the bill makes numerous revisions to Section 448.095, Florida Statutes, imposing several new requirements—and potential penalties—on qualifying Florida employers when it comes to hiring new employees.

By way of background, the federal Immigration Reform and Control Act (IRCA) of 1986 requires employers to verify the identity and employment eligibility of employees, establishes document retention responsibilities, and establishes criminal and civil sanctions for employment-related violations.[1] Federal Form I-9 is the designated form used to verify

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*See "*Senate Bill 1718*," page 5*

How Adverse Does an Adverse Employment Action Have to Be?

SCOTUS is Asked to Resolve Circuit Split Regarding Scope of Actionable Conduct Under Title VII

By Aaron Tandy, Miami

Aaron Tandy

The United States Supreme Court (SCOTUS) currently has before it two cases raising nuanced issues regarding the scope and reach of Title VII of the Civil Rights Act of 1964. Title VII forbids employers from discriminating on the basis of race, color, religion, sex, or national origin with respect to their employees' "compensation, terms, conditions, or privileges of employment."[1] *Davis v. Legal Services Alabama, Inc.*,[2] a holdover case from the last Term that is on appeal from the Eleventh Circuit, asks the Court whether Title VII (and Section 1981 of Title 42) prohibits discrimination as to all terms and conditions of employment or only significant discriminatory action by an employer. The case of *Muldrow v. City of St. Louis*,[3] on appeal from the Eighth Circuit, asks the

*See "*How Adverse*," page 7*

CHAIR'S MESSAGE

Gregg Riley Morton

We are rapidly approaching the midpoint of the Bar year, and I am pleased to report on our successes so far and our plans for the remainder of the year. I need to begin by thanking our new liaison with The Florida Bar, Brittany Baxter, for her tireless efforts in helping our Executive Council with all the planning, budgeting, and implementing involved in fulfilling our goals. In October, we held the 49th Annual Public Employment Labor Relations Forum in Orlando. This joint conference between our Section and the City, County, and Local Government Section was particularly noteworthy this year given the number of recent changes in public sector labor law. Thank you to Janeia Ingram, the co-chair of the program from our Section, and all the excellent speakers for putting on a great seminar with valuable information for practitioners. If you missed it, you can still access the program and its materials at The Florida Bar's website.

We are also excited about our plans for the upcoming months. The 24th Labor and Employment Law Annual Update and Certification Review conference will be taking place January 25–26, 2024, in Orlando during The Florida Bar's Winter Meeting. Co-chairs Robyn Hankins and Karen Evans-Putney have put together an excellent slate of topics and speakers. The seminar is designed for both seasoned and new practitioners to learn about hot topics in labor and employment law, as well as for those who are pursuing Board certification. I would encourage you all to register today!

Next, on March 1st, we will be holding the third "Practicing Before State Labor and Employment Agencies" seminar in Tallahassee with speakers from the Florida Commission on Human Relations, the Public Employees Relations Commission, the Reemployment Assistance Appeals Commission, the Division of Administrative Hearings, and the First District Court of Appeals. This seminar, where moderating practitioners ask questions about the nuts and bolts of appearing in front of the state agencies and appellate courts, has seen increased attendance and popularity each time it has been held. Thank you to co-chairs Cristina Velez and Amanda Neff for putting together a great agenda. Save the date, and look for more information about registering for this conference in the near future.

Last, but certainly not least, I am excited that we will be going to Asheville, North Carolina, for our Advanced Labor Topics Seminar on April 18–19, 2024. Co-chairs James Craig and Alicia Koepke have been diligently putting together the final details for this seminar, which will be held at the Omni Grove Park Inn and will feature nationally renowned speakers. We will be sending out information about registering for this seminar in the near future. I hope to see a lot of Section members in Asheville in April.

Finally, I would like to thank the other officers of the Section—Immediate Past Chair Sacha Dyson, Chair-Elect Yvette Everhart, Secretary/Treasurer Robert Eschenfelder, and Legal Education Director Chelsie Flynn—along with the other members of our Executive Council and our committee chairs, for all their behind-the-scenes efforts in making this year successful and fruitful.

If you would like to become more involved in our Section, please reach out to me and consider coming to one of our upcoming executive council meetings!

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SB 256 Fallout: PERC Issues Waivers to Preserve the State's Eligibility for Federal Funding

By Janeia D. Ingram, Tallahassee

In 1964, Congress enacted the Urban Mass Transportation Act, now known as the Federal Transit Act, "to foster the development and revitalization of public transportation systems with the cooperation of both public transportation companies and private companies engaged in public transportation."[1]

Pursuant to the Federal Transit Act, regional transit authorities in Florida receive federal funding to make improvements and repairs to area transit systems. However, this financial assistance has been subject to certain conditions. Specifically, under 49 U.S.C. § 5333, grantees are required to agree to arrangements that may be necessary for "preservation of rights, privileges, and benefits . . . under existing collective bargaining agreements" and "the continuation of collective bargaining rights."[2]

On May 9, 2023, Governor DeSantis signed Senate Bill (SB) 256, which made significant changes to collective bargaining provisions contained in Chapter 447, Florida Statutes.[3] Anticipating that the United States Department of Labor (DOL) might seek to deny the State of Florida federal funding because of these changes, the Florida Legislature authorized the Public Employees Relations Commission (PERC), in Section 447.207(12), Florida Statutes (2023), to waive, to the extent necessary for a public employer to comply with the requirements of 49 U.S.C. § 5333(b), any of the following for an employee organization that has been certified by PERC as a bargaining agent to represent mass transit employees:

Janeia D. Ingram

a. the prohibition on dues and assessment deductions provided in Section 447.303(1);

b. the requirement to petition the commission for recertification; and

c. the revocation of certification provided in Sections 447.305(6) and (7).[4]

Shortly before the new law's first effective date of July 1, 2023, DOL began notifying Florida entities of its determi-

continued, next page

nation that SB 256 "jeopardizes [their] continued eligibility to receive Federal Transit Administration Funding" in light of Section 5333(b). In response, affected public employers began to file petitions for waiver, namely: Miami-Dade County Board of County Commissioners; Hillsborough Area Regional Transit Authority (HART); Central Florida Regional Transportation Authority (LYNX); Broward County Board of County Commissioners; Lakeland Area Mass Transit District (Citrus Connection); Pinellas Suncoast Transit Authority; City of Gainesville; Palm Tran, Inc. and Palm Beach County (Palm Tran); Sarasota County Transportation Authority; and Escambia County Board of County Commissioners.

These public entities employ personnel to provide mass transit services in their geographic areas. Those mass transit employees are members of bargaining units defined by PERC and represented by various certified bargaining agents. Except for Escambia County, the public employers and the employee organizations that represent the public employees all have existing collective bargaining agreements (CBA).

Based on DOL's correspondence, PERC granted the public employers and the impacted employee organizations a waiver from the pertinent provisions of Sections 447.303(1), 447.305(6) and (7), Florida Statutes. The waiver was granted with respect to each bargaining unit of mass transit employees and limited to the period covered by the respective CBAs between the public employer and the employee organization representing each bargaining unit. The time-limited nature of the waivers was designed to resolve any conflict with 49 U.S.C. § 5333(b)(2)(A), which requires public employers to preserve rights under existing CBAs.

The public employers notified DOL of the waivers and requested that DOL issue final certifications for the pending grants. In response, DOL notified the public employers that the time-limited waivers granted by PERC failed to resolve the conflict with SB 256 because the "duration of the waiver is less than the duration of the protective arrangements required by 49 U.S.C. § 5333(b), which extend for the life of the federally funded project." According to DOL, "[W]hile a collective bargaining agreement may expire, the Grantee's assurance to continue collective bargaining pursuant to 49 U.S.C. § 5333(b)(2)(b) does not."

Affected entities again sought waivers from PERC and provided information about their pending federally funded projects, including the amount of the grant, a description of the project(s), and dates of duration. While PERC questioned DOL's interpretation of 49 U.S.C. § 5333(b)(2)(B), it nonetheless recognized the financial hardship facing the public employers and their public employees given DOL's refusal to certify various pending federal grants absent an extended waiver. Rather than allow the State of Florida to lose more than $750 million in federal funds, PERC began issuing permanent waivers subject to the caveat that the waiver will immediately expire upon any final decision of DOL or a declaration by a court of competent jurisdiction that the provisions at issue do not violate the protections imposed by 49 U.S.C. § 5333(b), or if Congress changes the effect of that law. As of this writing, all but one of the public employers has filed a second petition for waiver and been granted a permanent waiver.

For reasons stated in the special concurrence in *In re Petition for Waiver of Broward County Board of County Commissioners*,[5] PERC's Chair, Don Rubottom, did not agree with the indefinite term of the waivers granted, but instead preferred a waiver that extended for the length of the federally funded project at issue.

On October 4, 2023, Florida Attorney General Ashley Moody filed a federal lawsuit in the Southern District of Florida (Fort Lauderdale Division) asserting that certain federal officials, including the Secretary of Transportation, are violating federal law by threatening to withhold federal grant funding if PERC did not grant public employers a waiver pursuant to Section 447.207(12), Florida Statutes. The lawsuit asks the court, among other things, to (1) preliminarily and permanently enjoin the defendants from withholding grants from Florida entities based on 49 U.S.C. § 5333(b); (2) declare unconstitutional, facially and as applied to Florida, the requirements in Section 5333(b); or (3) alternatively, if the court declines to declare the law unconstitutional, set aside DOL's written decisions determining that Florida must waive provisions of SB 256 in order to be eligible for funding or to declare that Florida law complies with Section 5333(b).[6]

Janeia D. Ingram *is Deputy General Counsel of the Public Employees Relations Commission.*

Endnotes

1 49 U.S.C. § 5301(a).

2 49 U.S.C. § 5333(b)(2)(A)–(B).

3 *See* FLA. STAT. § 447.207. For a thorough discussion of the new law, see Christopher Shulman's article in the August 2023 issue of *The Checkoff* at https://www.laboremploymentlaw.org/wp-content/uploads/2023/08/August-2023-Checkoff-Final.pdf.

4 FLA. STAT. § 447.207(12)(a)–(c).

5 50 FPER ¶ 95 (2023).

6 *See State of Florida v. Buttigieg*, 0:23-cv-61890-RS (filed Oct. 4, 2023).

the identity and employment authorization of individuals hired for employment in the United States.[2] Employees are required to complete Form I-9 within three business days after an employee's first day, with Section 1 to be completed on the first day and Section 2 to be completed within the first three days.[3] All U.S. employers are required to complete a Form I-9 for their employees and must keep the original Form I-9, or an online version, for inspection for current employees. For former employees, employers must retain the Form I-9 at least three years from the first day of employment or one year from the date the employment ended, whichever is longer.[5]

E-Verify is an online database created by the U.S. Department of Homeland Security that works in conjunction with Form I-9. While not mandatory for most employers under federal law, E-Verify, using records available to the U.S. Department of Homeland Security and Social Security Administration, enables employers to quickly and electronically verify an employee's identity and employment authorization provided in Form I-9. Florida and other states have passed similar measures requiring employees to use the E-Verify system as part of hiring process.[8]

Florida SB 1718 heightens the requirements for how Florida employers must verify the employment eligibility of new employees. SB 1718 requires a private employer with twenty-five or more employees to use the federal E-Verify program to verify a new employee's eligibility to work if hired on or after July 1, 2023. An "employee" is defined as "an individual filling a permanent position who performs labor or services under the control or direction of an employer that has the power or right to control and direct the employee in the material details of how the work is to be performed in exchange for salary, wages, or other remuneration." Individuals hired for casual labor and independent contractors are excluded for purposes of this statute.[9]

Private employers must verify the employee's employment status within three business days after the first day the new employee begins working for pay.[10] If the private employer cannot access the E-Verify system within three business days after the employee begins working, the employer must instead use the Form I-9 provided by the U.S. Citizenship and Immigration Services (USCIS) to document employment eligibility and must keep a screenshot from each day the employer lacks access, a public announcement that the system is unavailable, or any other documentation showing that the employer was not able to access the system. E-Verify cannot be used to verify an existing employee's employment status—only new hires after they have accepted an offer of employment.[11]

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Private employers must maintain a copy of the documentation provided and the official verification generated by E-Verify for three years.[12] Employers must also certify on the first tax return of each calendar year that the employer is compliant with the statute.[13] Public employers will remain largely unaffected by the new law. Since 2021, state agencies,[14] as well as contractors and subcontractors working with a state agency, have been required to use E-Verify as part of their hiring process.[15]

The Department of Law Enforcement, the state attorney general, the local state attorney where the employee works, the statewide prosecutor, and the Department of Economic Opportunity (DEO) are responsible for enforcing the statute. Each entity can also request copies of employees' documentation maintained by employers.[16] Penalties for noncompliance have the potential to quickly escalate. Beginning July 1, 2024, if DEO finds an employer failed to use E-Verify, the employer has thirty days to cure after notice. If DEO determines that the employer failed to use E-Verify three times within any twenty-four-month period, DEO will impose a fine of $1000 per day until the noncompliance is cured. Noncompliance with SB 1718 is also grounds to suspend an employer's license until the noncompliance is cured.[17]

In the prior version of Section 448.095, private employers had the choice to verify a new employee's employment eligibility by either voluntarily using the E-Verify system or retaining copies of the documents employees provide for their identity and employment authorization to complete Form I-9.[18] By now mandating that private employers use E-Verify, rather than rely on paper identification, Florida is clamping down on the practice of hiring undocumented aliens.

The new amendments under SB-1718 will provide additional civil penalties on top of the civil and criminal penalties the federal IRCA already imposes for hiring unauthorized aliens. On top of the heightened hiring requirements, starting July 1, 2024, it will be unlawful for any person to "knowingly employ, hire, recruit, or refer, either for herself or himself or on behalf of another . . . an alien who is not duly authorized to work."[19] If an employer is found to have knowingly hired an unauthorized alien, the employer must pay a fine to DEO and will be placed on probation for one year.[20] Any further violations within two years of the initial violation will be penalized by the revocation of state-issued licenses for a period of time dependent on how many unauthorized aliens were hired.[21] Unlawful aliens, in turn, who are found to have knowingly used false identification documents or fraudulently used another person's identification to gain employment will be guilty of a third-degree felony.[22]

Due to its recent enactment and prospective implementation date for the penalties, the direct impact on employers remains to be seen. Lawyers and employers alike should keep an eye on what will continue to be a developing area of the law.

***Melanie Matamoros Cruz** is an associate in Allen Norton & Blue's Tampa office.*

Endnotes

1 8 U.S.C. § 1324a.

2 8 C.F.R. § 274a.2.

3 The USCIS has published the latest version of Form I-9 that all employers must use as of November 1, 2023. U.S. CITIZENSHIP & IMMIGR. SERV., *I-9 Employment Eligibility Verification*, https://www.uscis.gov/i-9.

4 *Id.*

5 *Id.*

6 For additional information on the E-Verify program, see U.S. DEP'T OF HOMELAND SEC., *About E-Verify* (2023) https://www.e-verify.gov/about-e-verify.

7 *Id.* at https://www.e-verify.gov/about-e-verify/what-is-e-verify/e-verify-and-form-i-9.

8 Other states that require all or most employers to use E-Verify include Alabama, Arizona, Georgia, Mississippi, North Carolina, South Carolina, Tennessee, and Utah. Paychex WORX Blog, *Florida Mandates Use of E-Verify for Private Employers with 25 or More Employees* (last updated June 9, 2023), https://www.paychex.com/articles/compliance/florida-e-verify-requirements-for-private-employers#:~:text=The%20states%20that%20require%20all,with%2025%20or%20more%20employees.

9 FLA. STAT. § 448.095(1)(b) ("An individual hired for casual labor, as defined in s. 443.036, which is to be performed entirely within a private residence is not an employee of an occupant or owner of a private residence. An independent contractor, as defined in federal laws or regulations, hired to perform a specified portion of labor or services is not an employee.").

10 *Id.* at § 448.095(2)(a).

11 U.S. DEP'T OF HOMELAND SEC., E-VERIFY, May I verify an existing employee in E-Verify? (last updated Aug. 18, 2023), https://www.e-verify.gov/faq/may-i-verify-an-existing-employee-in-e-verify#:~:text=E%2DVerify%20does%20not%20allow,to%20verify%20their%20existing%20employees.

12 FLA. STAT. § 448.095(2)(d).

13 *Id.* at § 448.095(2)(b)(3).

14 The new statute preserves this requirement: "A public agency shall use the E-Verify system to verify a new employee's employment eligibility as required under paragraph (a)." *Id.* at § 448.095(2)(b)(1).

15 "A public agency must require in any contract that the contractor, and any subcontractor thereof, register with and use the E-Verify system to verify the work authorization status of all new employees of the contractor or subcontractor. A public agency or a contractor or subcontractor thereof may not enter into a contract unless each party to the contract registers with and uses the E-Verify system." *Id.* at § 448.095(5)(a).

16 *Id.* at § 448.095(3)(a).

17 *Id.* at § 448.095(6).

18 *See* Fla. Ch. 2020–49 or FLA. STAT. § 448.095 (2022).

19 To be codified as FLA. STAT. § 448.09.

20 *Id.* at § 448.09(3).

21 *Id.* at § 448.09(4).

22 *Id.* at § 448.09(5).

HOW ADVERSE, *continued from page 1*

Court whether Title VII liability lies only for discriminatory conduct that a court determines materially or significantly disadvantages the affected employee.

The facts regarding each case are not in dispute, although the claim of discriminatory motive or animus is. And in each case, the defendants were granted summary judgment at the trial level, and those decisions were upheld by the respective appellate courts relying on prior Circuit precedent.

In the case arising out the Eleventh Circuit, Arthur Davis applied to serve as Executive Director of Legal Services of Alabama, a non-profit that provides legal services to underserved citizens of that state. Davis, an African-American male, was ultimately hired as director but encountered difficulties in leading the staff and faced some insubordination from staff members. The non-profit's Board of Directors (Board) ultimately decided to suspend Davis with pay as it investigated a hostile work environment claim against him. Davis resigned and sued the non-profit and two Board members for violations of Title VII and Section 1981, claiming in part that the Board's treatment of him was sharply different than its treatment of white executives who faced hostile work environment claims. The district court granted summary judgment, finding that the suspension with pay did not rise to the level of an "adverse employment action"—a concept arising out of Title VII case law—because Davis was not materially impacted financially by the suspension decision and because the suspension, standing alone, was not an egregious employment action. For the same reasons, the Eleventh Circuit panel affirmed based upon Circuit precedent.

In the Eighth Circuit case, Sergeant Jatonya Clayborn Muldrow brought claims against the City of St. Louis and her supervisor based upon her "forced" transfer out of the St. Louis Police Department's Intelligence Division, claiming that the transfer was motivated by gender discrimination and retaliation. The district court determined that Sergeant Muldrow's transfer did not involve a demotion, loss of rank, loss of privileges, loss of benefits, or loss of pay and that there was no lasting impact on her future career prospects. Therefore, the court found that the transfer itself could not be seen as an adverse employment action and that the defendants were entitled to summary judgment. Relying on Circuit precedent that "an employee's reassignment, absent proof of harm resulting from that reassignment, is insufficient to constitute an adverse employment action,"[4] the Eighth Circuit panel affirmed. (The appellate court also dismissed claims by Sergeant Muldrow that the Intelligence Division posting was more prestigious or career-enhancing because of its location at police headquarters and the opportunity to work with the FBI, and dismissed her argument that her previous work schedule was preferential.)

Both cases ask SCOTUS to resolve

a perceived split among the Circuits as to the plain meaning and interpretation of Title VII. The petitions for certiorari in the two cases are somewhat similar, arguing that SCOTUS should adopt the approach of the Sixth and D.C. Circuits—which, petitioners claim, focuses only on whether an act of discriminatory conduct occurred—rather than adopt the approach of other Circuits, which allow cases to proceed only if there is some harm or damage caused by the conduct in question. The petitioners point out that the imposition of a damage component to the definition of "adverse employment action" is judicially created parlance, not found in the actual text of the statute. On the other hand, the respondents argue that not every action taken by an employer, even if it is unfavorable to an employee, is necessarily actionable or has lasting consequences, even if there is discipline or an unfavored work assignment involved. Moreover, in the case of Sergeant Muldrow, some of the amicus briefs note that a transfer, by its very nature, often involves different employment circumstances, but the fact that Sergeant Muldrow preferred her position in the Intelligence Division because of the perceived prestige, "easier" work schedule, and location from her dwelling does not make the transfer out of the Division actionable, especially as transfers occur in many work situations.

In each case, the Solicitor General has filed an amicus brief in favor of the petitioners' positions. The federal government argues that acts motivated by discrimination or bias, regardless of whether they cause economic or tangible harm to the employee, are actionable under Section 2000e-2(a)(1), or at least create sufficient textual support to allow the employee to proceed to trial rather than face dismissal on summary judgment grounds. To the extent that SCOTUS adopts this position—and that of the Sixth or D.C. Circuits—it is likely that more employment discrimination cases will survive to go to trial. It appears that SCOTUS will hear both cases together; however, although the petitions have been distributed for conference, no oral argument has been scheduled as of this writing. Given the potential impact on practices utilized by a significant number of employers to manage their staff, these cases should be closely watched by employment practitioners.

***Aaron Tandy** is in-house general counsel for Boucher Brothers Management Inc., one of the largest employers located on Miami Beach, Florida, where he helps counsel the company on employment-related issues, among other matters.*

Endnotes

1 42 U.S.C. § 2000e-2(a)(1).

2 19 F.4th 1261(11th Cir. 2021), *petition for cert. filed*, Sept. 8, 2022 (No. 22-231).

3 30 F. 4th 680 (8th Cir. 2022), *petition for cert. filed*, Aug. 29, 2022 (No. 22-193).

4 *Id*. at 688.

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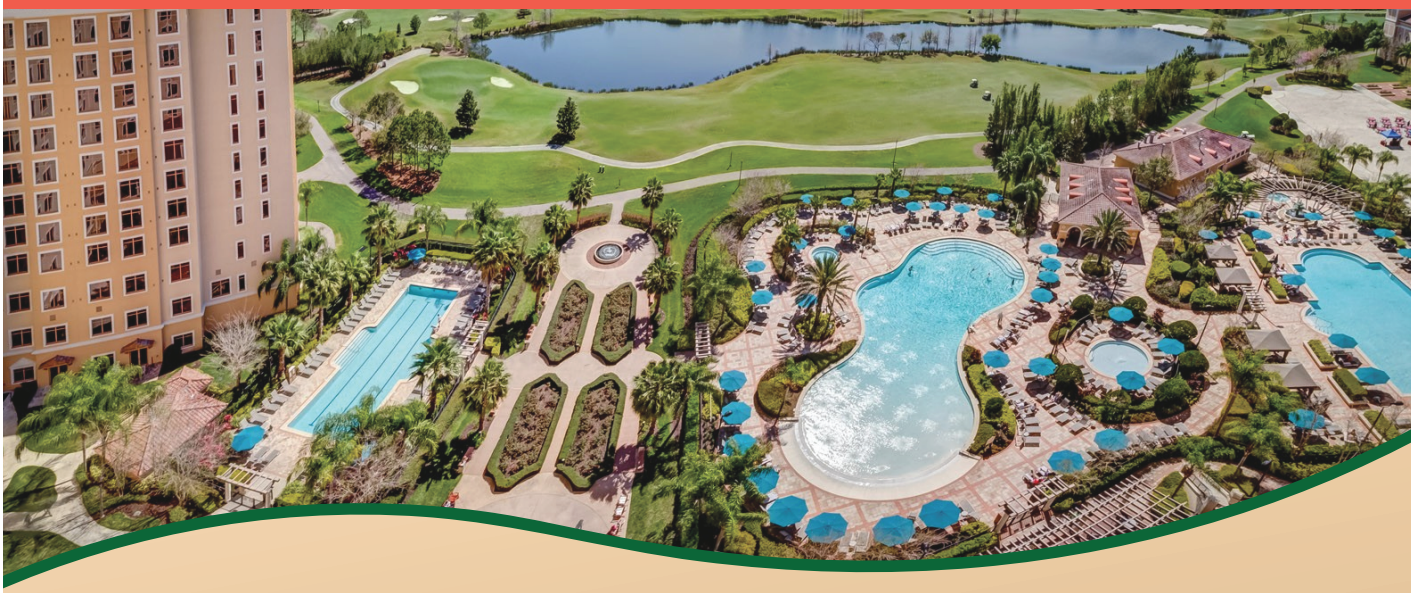

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Navigating Workplace Harassment: Understanding the EEOC's Updated Guidance

By Suhaill M. Morales, Miami Lakes

On September 29, 2023, the United States Equal Employment Opportunity Commission (EEOC or Commission) issued proposed updated enforcement guidance on workplace harassment.[1] The guidance is 156 pages and reflects the Commission's position on important legal issues concerning harassment claims under the federal workplace anti-bias laws it enforces. Specifically, the guidance expands the definition of harassment; provides employers with instructions on effective anti-harassment policies, training, and complaint procedures for employees; includes steps for suitable training for supervisors to recognize and report instances of harassment; and emphasizes that harassment can occur not only between co-workers but also between managers and subordinates, and can even involve non-employees such as customers or clients. Additionally, the guidance notes that "most" harassment claims based on a hostile work environment involve a series of acts, rather than a single act.

The updated guidance reflects the impact of current case law on issues of workplace discrimination and harassment. For example, pursuant to the United States Supreme Court's 2020 decision in *Bostock v. Clayton County,*[2] the guidance explains that sex-based harassment encompasses harassment based on employees' sexual orientation or gender identity. According to the guidance, harassment may range from physical assault to intentional and repeated misgendering (use of a name or pronoun inconsistent with an individual's gender identity) or denying access to a bathroom consistent with an individual's gender identity. Additionally, the guidance broadens the types of harassment that can be based on sex, including harassment based on pregnancy, childbirth and other "related medical conditions." The broadened definition protects against harassment based on employees' decisions pertaining to contraception and abortion, as well as lactation.

Moreover, the guidance expands the definitions of race and color, national origin, religion, sex, disability, and age as "covered bases" to include harassment based on stereotypes of individuals belonging to those groups. For example, it protects against harassment based on stereotypes of individuals belonging to a certain race or culture. It also protects against harassment based on stereotypes of older workers, such as pressuring an older employee to transfer to a less technology-focused position or encouraging an older employee to retire.

Suhaill M. Morales

Catching up with the times, the guidance addresses harassment in a virtual sphere. In that regard, it discusses how social media postings and other online content can be part of a "virtual work environment," which can contribute to hostile work environments. This is true even if the harassment occurs outside of the workplace and is not work-related. Thus, virtual conduct that occurs in a non-work-related context, such as communication over private phones, computers, or social media accounts, may create a hostile work environment if it impacts the workplace.

The updated guidance underscores the significance of proactive measures such as clear anti-harassment and discrimination policies and procedures implemented by employers to prevent workplace harassment. These policies should set forth complaint procedures and include multiple channels through which employees can report harassment, ensuring that individuals feel safe coming forward with their concerns. Employ-

continued, next page

ers should clearly identify accessible points of contact to whom reports of harassment should be made and should include contact information. Moreover, since employees may feel uncomfortable reporting harassment, the EEOC suggests that employers conduct climate surveys of employees to determine whether employees believe that harassment exists in the workplace. Finally, employer policies should contain anti-retaliation and confidentiality protections.

Additionally, training should be conducted regularly to educate employees and supervisors on recognizing and preventing harassment. These sessions should focus not only on legal standards but also on fostering a respectful workplace culture. Employers should have a commitment from senior leaders in the organization to lead by example, demonstrating their commitment to a harassment-free workplace. When leaders take harassment seriously, it sends a powerful message to all employees. Furthermore, the updated guidance notes that bystander intervention is an effective way to prevent harassment, which should be encouraged by employers. To that end, employees should be empowered to step in when they witness inappropriate behavior, whether it is a sexist comment or a discriminatory action.

Finally, in instances where there are allegations of harassment in the workplace, the updated guidance provides some key steps for employers to respond effectively. The guidance emphasizes that employers should promptly investigate any complaints of harassment. Investigations should be conducted impartially, and all relevant parties should be interviewed, in order to develop a complete picture of the situation. If harassment is substantiated, employers should take appropriate remedial action, which may include instituting disciplinary measures against the harasser, providing support to the complainant, and implementing preventive measures. Finally, the guidance reminds employers that it is critical that employees who report harassment be protected from retaliation. Employers must take steps to ensure that individuals who come forward are not subjected to adverse employment actions as a result.

The proposed guidance was published in the *Federal Register* on October 2, 2023. After reviewing input gathered during the public comment period, the EEOC will consider appropriate revisions before finalizing the guidance, which would supersede the guidance released by the EEOC in the 1980's and 1990's.

The EEOC's updated guidance on workplace harassment serves as a valuable resource for employers striving to create a safer, more inclusive, and respectful workplace. By embracing prevention, creating clear policies, and ensuring effective responses, employers will not only fulfill their legal obligations but also foster environments where employees can thrive without fear of harassment. Ultimately, these efforts contribute to building stronger organizations and communities that promote equity, respect, and dignity for all.

Suhaill Machado Morales *is managing partner of SSM Law P.A. in Miami Lakes.*

Endnotes

1 https://www.eeoc.gov/proposed-enforcement-guidance-harassment-workplace.

2 140 S. Ct. 1731 (2020).

CASE NOTES

Federal Case Notes

By Viktoryia Johnson, Tampa

In a Section 1981 suit, employer was not liable under "cat's paw" theory where causation between a supervisor's racial animus and the human resources vice president's termination decision was broken by general manager's independent investigation.

Ossmann v. Meredith Corp., 82 F.4th 1007 (11th Cir. 2023).

Paul Ossmann, former chief meteorologist at an Atlanta news station, was repeatedly accused of sexual harassment by female co-workers. After several co-worker complaints and a series of disciplinary actions for "poor judgment" that failed to correct Ossmann's behavior, the station decided to part ways with Ossmann. The local HR director and Ossmann's immediate supervisor put Ossmann on suspension, until the station's general manager could decide how to proceed. The immediate supervisor and the general manager then reviewed the allegations and decided, based on Ossmann's pattern of violating company policy against sexual harassment, to terminate him. The general manager instructed the local HR director to seek authorization of the termination decision from the station's parent company. The corporate vice president of HR ultimately approved the termination decision—and Ossmann was let go. Ossmann brought suit alleging race discrimination in violation of 42 U.S.C. § 1981 and breach of his employment contract's for-cause provision. The district court granted the station's motion for summary judgment, and Ossmann appealed. On appeal, he argued, in part, that he had shown a viable "cat's paw" theory under which the corporate vice president of HR "merely rubberstamped the racial animus of the station managers."

Viktoryia Johnson

The Eleventh Circuit first explained that the cat's paw theory "provides that causation may be established if the plaintiff shows that the decisionmaker followed the biased recommendation without independently investigating the complaint against the employee. . . . Still, the non-decisionmaker's racial animus must be a but-for cause of the termination." Ossmann argued the immediate supervisor's reasons for recommending Ossmann's termination—repeated episodes of sexual harassment—were pretext because, Ossmann claimed, the immediate supervisor had previously privately admitted to Ossmann that he (the supervisor) himself did not believe that Ossmann's conduct violated policy. But even if that were true, the court said, Ossmann did not argue the same for the general manager, who independently reviewed

CASE NOTES, *continued from previous page*

the facts and directed the local HR director to submit the termination decision for corporate approval. "Because both acted together, the causal chain between [the immediate supervisor] and the ultimate recommendation to [the corporate vice president of HR] [was] broken by [the general manager's] participation in the decision." The court concluded that, for the immediate supervisor's alleged racial animus to be a but-for cause of Ossmann's termination, Ossmann would have had to argue either that the general manager also acted with racial animus or that the general manager—like the vice president of HR—was a mere rubberstamp. "He has done neither here."

County did not violate media aide's First Amendment rights by terminating his employment after he submitted an opinion piece where he referred to LGBTQ+ community using derogatory slurs and offensive stereotypes, and then failed to comply with the county's directive to undergo training on the county's anti-discrimination policies.

Labriola v. Miami-Dade Cty., No. 22-CV-23196-PCH, 2023 WL 6456525 (S.D. Fla. Sept. 21, 2023).

John Labriola previously worked for Miami-Dade County as a media aide for the Board of County Commissioners' Media Division, drafting media communications on behalf of various county commissioners, including press releases concerning legislative developments and city events, and talking notes for commissioners' speeches. Labriola was also a self-described Christian who had "sincere religious beliefs about human sexuality and using [his] talents to spread God's truths." In 2021, Labriola wrote and submitted an opinion piece to an online newsletter, where he discussed his views on the then-pending Equality Act being considered in the U.S. House of Representatives and said that the Equality Act's legal protection of marriages and gender identities, which did not comport with his religious views, would have negative impacts on the rights of Christians. Further, he explicitly referred to LGBTQ people using derogatory slurs and offensive stereotypes such as "scary-looking, child-molesting tranny" and "flamboyant, heavily-made up pedophile in a dress." A concerned citizen saw and reported Labriola's opinion piece to the county, questioning whether it was representative of the county's views of its own LGBTQ citizens. Later the same month, the *Miami Herald* published an article reporting Labriola's opinion piece and describing it as a "slur-laden tirade against transgender people." Several county employees, including Labriola's coworkers, were upset. Additionally, a "barrage of phone calls" from concerned county residents interfered with the county's ability to carry out its typical governmental duties for several days. Labriola was issued a disciplinary action, suspended for three days, and ordered to schedule and complete training regarding the county's anti-discrimination policies within thirty days. Despite several follow-ups and reminders from his supervisor, Labriola never scheduled the ordered training, and was subsequently terminated for insubordination. Labriola sued the county based on alleged violations of the free speech clause of the First Amendment.

On summary judgment, the court analyzed whether the county's firing of Labriola violated his First Amendment rights. The court began by stating that "[a] public employee's interests are limited by the state's need to preserve efficient governmental functions." To balance both important interests, the court used the four-step *Pickering-Connick* test. Because the first two steps of the analysis were not at issue, the court needed only to "weigh the employee's first amendment [sic] interests against the interest of the state, as an employer, in promoting the efficiency of the public services it performs through its employees." First, although the parties disagreed on the scope of the disruption, the court found that Labriola's opinion piece did cause at least a minor scandal that impeded the government's ability to perform its duties efficiently. It also disrupted the harmony of the office: several coworkers expressed discomfort with or took offense at the opinion piece. Further, county residents suffered a lack of confidence in their local government. The court also strongly considered the fact that the patently offensive slurs and statements in the opinion piece compromised the county's confidence in Labriola's ability to fulfill his role as a writer for the voice of the county. Although Labriola did write the speech as a private citizen on his own time, the court noted that a public employee has less First Amendment interest in speech that is "disrespectful, demeaning, insulting and rude," even on a matter of public concern. The court also found Labriola was disciplined not merely for expressing a political opinion but for his use of slurs and other offensive statements in the opinion piece. Further, the court found that Labriola's speech at issue was the kind for which he could be reasonably disciplined without raising any constitutional problem. Considering all of the above, the court found that the *Pickering-Connick* balancing test weighed in favor of the county and granted it summary judgment.

CASE NOTES, *continued from previous page*

State Court Case Notes

By Viktoryia Johnson, Tampa

The Fourth District Court of Appeal holds that the business judgment rule, which prohibits courts from second-guessing business judgment of employers, applies to claims of workers' compensation retaliation under FLA. STAT § 440.205.

Francois v. JFK Med. Ctr. Ltd. P'ship, 370 So. 3d 324, 330 (Fla. 4th DCA 2023).

Mathieu Francois, working as a mental health technician at JFK Medical, was involved in two altercations at the institution on September 1, 2020. Francois intervened in two separate situations of a patient attacking a nurse, and he sprained his left wrist during the first altercation as a result. Several hospital staff who witnessed the second altercation claimed they saw Francois strike the patient, which Francois denied. Several department directors and the chief nursing officer separately reviewed security footage and, while their impressions of what the footage showed differed slightly, they generally reported they saw Francois, while sitting atop the patient, draw his hand back in a striking motion and, likely, strike the patient in the head two or three times. Francois was terminated for excessive use of force. Francois then sued under § 440.205, F.S., alleging he was fired in retaliation for his work-related injury of a sprained wrist. JFK Medical moved for summary judgment, arguing the business judgment rule precluded Francois from challenging the wisdom of his termination, and Francois had not presented any evidence that his firing was related to workers' compensation. The trial court agreed and granted the motion for summary judgment; Francois appealed.

On appeal, the employer maintained it terminated Francois' employment due to his excessive use of force against a patient. Francois claimed he was actually fired for his workers' compensation claim, arguing the use of excessive force contention was pretextual, and that the trial court erred when it granted the employer's motion by relying on the business judgment rule to find that Francois was quarreling with the logic of the employer's decision to fire him.

The Fourth DCA noted that workers' compensation cases under Florida law do not receive any special treatment under the amended summary judgment standard, and, to prevail on a pretext claim, Francois was required to show pretext by demonstrating the employer's proffered reason was unworthy of credence. Addressing the business judgment rule—which prohibits courts from second-guessing the business judgment of employers, making the only relevant inquiry "whether the employer in good faith believed that the employee had engaged in the conduct that led the employer to discipline the employee"—the court noted that the Eleventh Circuit had already adopted the rule in workers' compensation retaliation claims. The Fourth DCA then noted that no case from the Fourth DCA had explicitly applied the business judgment rule to employees' discrimination or retaliation claims. After analyzing case law that implicitly accepted the business judgment rule, the Fourth DCA found no persuasive reason not to apply the business judgment rule given its implicit acceptance in the previous decisions and its prevalence in the Eleventh Circuit. "Therefore," the court held, "the business judgment rule applies to workers' compensation retaliation claims under section 440.205."

Merely asserting a violation of federal law in a charge of discrimination and dually filing the charge with the FCHR is insufficient to satisfy the administrative remedies of the FCRA.

Belony v. N. Broward Hosp. Dist., No. 4D2022-3061, 2023 WL 7172299 (Fla. 4th DCA Nov. 1, 2023).

CASE NOTES, *continued from previous page*

Following his termination from Broward Health, Kreiger Belony filed a charge of discrimination with the EEOC. On the charge form, Belony checked the FEPA box and stated he wanted to dual file the charge with both the EEOC and the FCHR. In addition to checking the "sex" and "retaliation" discrimination boxes, the charge included a narrative, which concluded as follows: "Claimant believes that he has been discriminated against in violation of Title VII of the Civil Rights Act of 1964."

Ultimately, the EEOC issued Belony a "right to sue" letter, advising Belony he could file a private suit in federal court within ninety days from the date of his receipt of same. Instead, Belony sued Broward Health in state court for sexual harassment and retaliation in violation of FLA. STAT. §§ 760.10(1)(a), 760.10(7). Broward Health moved to dismiss the complaint on the ground that the court lacked subject matter jurisdiction because Belony failed to exhaust his administrative remedies under the FCRA. Broward Health further argued that dually filing the charge of discrimination with the EEOC and the FCHR, without also specifically alleging a violation of the FCRA in the charge, was insufficient to satisfy the statutory prerequisites. The trial court agreed and dismissed the action with prejudice.

The dispute on appeal was whether the discrimination charge sufficiently put the FCHR and Broward Health on notice that Belony was alleging an FCRA violation when the charge referenced only Title VII. Belony argued that, "if the FEPA box is checked and the charging party indicates that the charge should be dual filed with another agency, that is all that is required." Broward Health countered that, "[i]t is axiomatic that an employer cannot be placed on notice that a claimant is claiming a violation of the FCRA when his charge only asserts a violation of federal law." The court's plain reading of FLA. STAT. § 760.11 compelled it to conclude that "the statutory prerequisite to bringing a civil lawsuit for an FCRA violation is premised on the claimant asserting a violation in a form sufficient to put the employer on notice that the claimant is alleging a violation of Florida law." In the case at issue, the charge specifically alleged a violation of Title VII only and did not reference any state law violation. "Under this factual scenario, one would reasonably assume the claimant only intended to bring a discrimination charge under federal law. Concluding otherwise would leave the employer having to guess whether the claimant also intended to bring a charge under Florida law." Accordingly, the Fourth DCA upheld the trial court's conclusion that it lacked subject matter jurisdiction because Belony failed to exhaust his administrative remedies under the FCRA.

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Labor and Employment Law Section Hall of Fame

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