

REASONABLE AWARD FOR PAST MEDICAL EXPENSES/ JURY DECISION FACTORS

The plaintiff claimed multiple injuries as a result of a motor vehicle accident. As the plaintiff did not have any health insurance, he was ushered to a local orthopaedic group and surgery center, who provided treatment under “Letters of Protection.” Six months before trial, the orthopaedic group’s charges totaled \$102,000.00 for treatment that included two surgeries. The surgical center where the two surgeries were performed charged \$157,000.00 for “facility fees.”



2707 E. Jefferson Street
Orlando, FL 32803

During discovery, we learned that the surgical center assigned its receivable in exchange for payment of approximately \$39,000.00 (25%). We also learned that if the plaintiff were Medicare eligible, Medicare
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INDEMNIFICATION/RECENT CASES

In Florida Department of Transportation v. Schwefringhaus, 41 Fla. L. Weekly S137 (April 7, 2006), the Supreme Court of Florida held that the Department of Transportation’s contractual indemnity obligation to CSX was not limited to its sovereign immunity limitation.

In Wert v. Camacho, 41 Fla. L. Weekly D814 (March 30, 2016), the Second District Court of Appeal held that an indemnity provision requiring indemnification to an indemnitor who was responsible “in whole or in part” was insufficient to require indemnity for the indemnitee’s own negligence.

By: Michael M. Bell, Esquire

CONTACT A MEMBER OF THE FIRM

- | | |
|--|--|
| Michael M. Bell - mbell@bellroperlaw.com | Frank M. Mari - fmari@bellroperlaw.com |
| David B. Blessing - dblessing@bellroperlaw.com | Michael J. Roper - mroper@bellroperlaw.com |
| Michael H. Bowling - mbowling@bellroperlaw.com | Dale A. Scott - dscott@bellroperlaw.com |
| Anna E. Engelman - aengelman@bellroperlaw.com | Sherry G. Sutphen - ssutphen@bellroperlaw.com |
| Christopher R. Fay - cfay@bellroperlaw.com | Joseph D. Tessitore - jtessitore@bellroperlaw.com |
| John M. Janousek— jjanousek@bellroperlaw.com | Dani S. Theobald - dtheobald@bellroperlaw.com |
| Mai Le - mle@bellroperlaw.com | Cindy A. Townsend - ctownsend@bellroperlaw.com |

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would have paid the surgical center only \$10,000.00 for “facility fees.” We also developed witness testimony utilizing our contacts with a local orthopaedic practice. A billing representative from that practice testified that it would have rendered charges of \$20,000.00 for treatment. Further, the billing representative testified that its surgery center would have charged \$25,000.00 for “facility fees.”

At trial, the jury would have been instructed to determine, “whether the plaintiff’s medical expenses were reasonable.” In our view, evidence that the plaintiff’s orthopaedic group and surgery center charges were unreasonable is clearly admissible. Plaintiff’s counsel, of course, advanced a plethora of reasons why evidence developed by the defense should not be presented to the jury. Obviously, plaintiff’s counsel wanted the jury to hear the “unreasonable” amounts in an effort to “pump up” the plaintiff’s damages.

Unfortunately, there are no reported cases to provide guidance. In researching the issue, we found numerous Circuit Court Opinions (unreported) in which Trial Court Judges were evenly divided on the issue of whether the jury should hear evidence that a receivable was sold at a discount. In our view, it is only fair that the jury have all information obtained by the defense so the jury can make a determination as to whether the plaintiff’s medical expenses were “reasonable.”

Should any reported cases surface on this issue, we will provide an update in future issues of this newsletter.

By: Michael M. Bell, Esquire

***LIEBMAN V. METROPOLITAN LIFE INSURANCE COMPANY,
808 F. 3d 1294 (11th Cir. 2015)***

The case of *Liebman v. Metropolitan Life Insurance Company* involved a summary judgment order granted in favor of the employer based upon two primary findings by the District Court. The first was that the Plaintiff, who was 49, failed to set forth a *prima facie* case of age discrimination where his replacement was 42 years old. The Eleventh Circuit explained that the ADA prohibits employers from firing employees who are 40 years or older because of their age and that age must be the “but for” cause of the termination. However, the fact that the person who suffered the adverse employment action was replaced by someone who is also in the age protected class is irrelevant, so long as the person is “substantially younger.” The Court held that seven years qualifies as substantially younger. The Eleventh Circuit also cited other cases indicating that five, four, and even three years is enough to constitute substantially younger for the purpose of a *prima facie* case.

The second finding addressed by the decision was the Eleventh Circuit’s reversal of the District Court’s conclusion that the Plaintiff was not qualified for the job from which he was discharged because he had received, during the prior year, an evaluation stating that he was “not performing as expected.” The Eleventh Circuit held that courts should infer that someone who has enjoyed a long tenure in a certain position is qualified to hold that position. In that the Plaintiff in this case held the position from which he was fired for nine years, and had worked for the company for 30 years, according to the Eleventh Circuit, was long enough to support the inference that he was qualified for his job.

The District Court’s summary judgment order was vacated and the case was remanded for further proceedings.

By: Michael H. Bowling, Esquire

CIVIL RIGHTS – EMPLOYMENT – DISCRIMINATION

The United States Court of Appeals for the Eleventh Circuit (which includes Florida) has announced a new standard to be utilized when examining the validity of a mixed-motive employment discrimination claim based upon circumstantial evidence. In *Quigg v. Thomas County School District, et al.*, No. 14-14530, 2016 WL 692177 (11th Cir. Feb. 22, 2016), the court considered a claim of sex and gender discrimination brought by a former employee of the School District, who was contending that the School District had discriminated and retaliated against her by refusing to renew her employment contract and filing an ethics complaint against her. The salient issue on appeal was whether the lower court had properly utilized the *McDonnell Douglas* three-part burden-shifting test to evaluate plaintiff's mixed-motive discrimination claim based upon circumstantial evidence. As a matter of first impression in this Circuit, the court held that this was not the proper framework for examining a claim of this nature and, therefore, reversed the summary judgment which had been entered in favor of the School District.

The Eleventh Circuit explained that discrimination claims brought under Title VII and Section 1983 are typically categorized as either mixed-motive or single-motive claims. It further explained that mixed-motive and single-motive discrimination are different theories of discrimination, as opposed to distinct cause of action, and serve as alternative causation standards for proving discrimination. An employee can succeed on a mixed-motive claim by showing that illegal bias, such as bias based on sex or gender, was a motivating factor for an adverse employment action, even though other legitimate factors also motivated the action. In contrast, single-motive claims, which are also known as "pretext" claims require showing that bias was the "true reason" for the adverse action. Single-motive and mixed-motive discrimination claims can be established with either direct or circumstantial evidence.

Up until this point, the Eleventh Circuit had used the *McDonnell Douglas* framework to evaluate circumstantial evidence-based discrimination claims at summary judgment. That standard developed by the Supreme Court established a three-part burden-shifting framework for determining liability in discrimination cases. Under that framework, the employee first must show a prima facie case of discrimination. Then the employer must articulate a legitimate, non-discriminatory reason for the adverse employment action. Finally, the employee has to show that the proffered reason is mere pretext. In *Quigg, supra*, the Eleventh Circuit found that although that framework was still valid in the context of a single-motive claim, it was "...fatally inconsistent with the mixed-motive theory of discrimination because the framework is predicated on proof of a single, "true reason" for an adverse action." In order to meet the *McDonnell Douglas* pretext requirements, an employee must prove that the "true reason" for an adverse action was illegal. In other words, an employee can only meet her burden under *McDonnell-Douglas* by showing the employer's purported legitimate reasons never motivated the employer in its employment decisions or because the reasons did not do so in a

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particular case. Accordingly, if an employee cannot rebut her employer's proffered reasons for an adverse action, but offers evidence demonstrating that the employer also relied on a forbidden consideration, she would be unable to meet the burden of proof. However, this is the exact type of employee that the mixed-motive theory of discrimination was designed to protect. Accordingly, the Eleventh Circuit found that the *McDonnell-Douglas* framework was inconsistent with the theory of a mixed-motive claim, and, therefore, it would be improper to use that framework to evaluate these types of discrimination claims.

Accordingly, the Eleventh Circuit has adopted a new framework for examining mixed-motive discrimination claims based upon circumstantial evidence, at the summary judgment stage. The court elected to adopt the standard which had been previously articulated by the Sixth Circuit in *White v. Baxter Healthcare Corp.*, 533 F.4d 183 (6th Cir. 2008). That framework requires a court to ask only whether a plaintiff has offered evidence sufficient to convince a jury that: (1) the defendant took an adverse employment action against the plaintiff; and (2) a protected characteristic was a motivating factor for the defendant's adverse employment action. In other words, the court must determine whether the plaintiff has presented sufficient evidence for a reasonable jury to conclude, by a preponderance of the evidence, that her protected characteristic was a motivating factor for an adverse employment decision. The court went on to note that an employee challenging a decision made by an employer can succeed on a mixed-motive claim if they can demonstrate that "discriminatory input", such as sex or gender bias, has been factored into the "decisional process" and, further that statements made by persons involved in that decisional process, which suggest bias, can serve as circumstantial evidence of discrimination.

The Eleventh Circuit recognized that the "same decision" defense is still available to an employer in these types of cases. The "same decision" defense allows an employer who can demonstrate that it would have taken the same action in the absence of the impermissible motivating factor, to avoid liability completely under Section 1983 and avoid liability for damages and certain equitable relief under Title VII.

This case will obviously make it more difficult for Florida employers to prevail in mixed-motive circumstantial evidence discrimination cases, at summary judgment. It does not necessarily mean that an employer will always lose at the summary judgment stage, but it will require that an employer's focus be more sophisticated than prior reliance upon the *McDonnell Douglas* three-part shifting burden standard. It is no longer sufficient for an employer to simply identify one or two neutral reasons for its actions in order to avoid a possible jury trial in a mixed-motive case based on circumstantial evidence. The employer must instead focus its pleadings on whether the actual circumstantial evidence offered by a plaintiff raises a jury question about whether a discriminatory motive was a reason for the adverse decision. Simply stressing that the plaintiff cannot show pretext will no longer be enough to carry the day. In defending these claims particular attention will have to be paid to the identity, actions and motivations of the decision makers, when the decision was made, comments or statements made in the past or during consideration of the relevant employment action. The crux will be disproving that the plaintiff's proffered circumstantial evidence is not adequate proof that discriminatory considerations were a reason for the adverse decision and that no material issue of fact exists for the jury to decide.

By: Michael J. Roper, Esquire

2016 LEGISLATIVE SESSION UPDATE

The 2016 Legislative Session produced various proposed changes and additions to the laws of the State of Florida. The following is a list of relevant bills that were either passed or signed into law, as indicated, which will have an impact on local government entities and/or certain constitutional officers.

House Bill 93 - Body Cameras (Passed)

Requires law enforcement agencies that use body cameras to have policies and proper training for their use.

House Bill 179 – Rape Kits (Passed)

Requires local law enforcement agencies to submit rape kits to a statewide crime lab within 30 days of a reported sexual assault. Testing of the kits would have to be completed with 120 days by crime labs.

House Bill 7029 – School Choice (Passed)

Changes capital funding eligibility for charter schools and spending limits for traditional schools; allows public school students to attend any school in the state that has space available; increases financial transparency of charter schools; allows high school athletes to transfer schools and have immediate eligibility; codifies in law performance funding for state colleges and universities; among other provisions.

Senate Bill 112 – Absentee Repeal (Signed Into Law)

Removes term “absentee ballot” from state laws and replaces it with “vote by mail ballot”.

Senate Bill 552 – Water Policy (Signed Into Law)

Overhauls state water policy to focus on best management practices for agricultural businesses and heavy water users.

House Bill 7007/Senate Bill 1010 – Styrofoam Preemption (Passed)

Local governments will be prohibited from imposing bans on Styrofoam and polystyrene products.

Senate Bill 1044 – Seized Property (Passed)

Requires criminal conviction before police can permanently confiscate personal property used in committing a crime.

House Bill 307 – Medical Marijuana (Passed)

Legalizes medical marijuana for people who have terminal illnesses, expands the number of licensed growers after customer base reaches 250,000.

Senate Bill 12 – Mental Health (Passed)

Pushes for coordination between local agencies offering mental health and substance abuse treatment, including the creation of a “no wrong door” policy.

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House Bill 131 – Unattended Vehicles (Signed Into Law)

Allows people to break into locked vehicles to rescue animal or vulnerable persons who are “in imminent danger of suffering harm”.

House Bill 449 - Value Adjustment Boards (Passed)

Changes the process by which county value adjustment boards resolve property tax disputes and requires all disputes to be resolved by June 1.

The following is a list of bills that failed; however, they will likely reappear in some form next session with revisions:

Senate Bill 168/House Bill 4027 – Red Light Cameras

Bans local governments from using red-light cameras at intersections.

House Bill 509 – Ridesharing Companies

Prevents local governments from regulating or banning ridesharing apps like Uber and sets insurance requirements.

Senate Bill 220 – Public Records

Requires anyone who sues a government official for public records law violation to give five days’ notice and removes the requirement that governments that violate the law pay attorney fees; requires online disclosure of public records custodians on government web sites.

If you have any questions regarding any of these bills, you should contact your general counsel or feel free to contact our office directly.

By: Sherry G. Sutphen, Esquire

FIRM SUCCESS!

FLORIDA'S FIFTH DISTRICT COURT OF APPEAL AFFIRMS DISMISSAL WITH PREJUDICE

In *Meeks v. City of Holly Hill* (Fla. 7th Cir. 2012-30596-CICI, Fla. 5th DCA 5D14-3824), attorneys Michael J. Roper, Michael H. Bowling, and Frank M. Mari prevailed in an appeal that arose out of a labor and employment dispute. The plaintiff was laid off from her position with the City's Code Enforcement/Animal Control Division along with three other employees due to budget constraints. Approximately seven months later, the City recalled the plaintiff and interviewed her for a reopened position in the Code Enforcement/Animal Control Division. However, the City declined to rehire the plaintiff. The plaintiff sued, asserting claims for breach of contract, deprivation of a property interest in public employment, and deprivation of due process. The City moved to dismiss with prejudice, and the trial court dismissed plaintiff's Third Amended Complaint with prejudice, agreeing with the City's position that the plaintiff could not state any cause of action arising out of the City's declining to rehire the plaintiff. The plaintiff took an appeal to Florida's Fifth District Court of Appeal, which affirmed the trial court's order per curiam, without opinion and without oral argument.

FLORIDA'S FIRST DISTRICT COURT OF APPEAL AFFIRMS FINAL JUDGMENT

In *Kesterson v. Gibson* (Fla. 8th Cir. 38-2015-CA-0016, Fla. 1st DCA 1D15-0956), attorneys Michael J. Roper, Dale A. Scott, and Frank M. Mari prevailed on behalf of the plaintiff in an appeal that arose out of a dispute regarding a municipal recall election. The plaintiff was a Town Commissioner for the Town of Inglis, Florida. The defendant was the chair of a committee that sought to recall the plaintiff. The defendant gathered a sufficient number of signatures from town residents to conduct a recall election; however, the defendant's recall petition was legally insufficient and no sufficient ground existed to recall the plaintiff under Florida law. The plaintiff sued, seeking to enjoin the recall election from occurring. Following a hearing, the trial court ordered that the recall election not occur and entered judgment in favor of the plaintiff. The defendant appealed, and Florida's First District Court of Appeal affirmed the trial court's judgment per curiam. District Judge Makar authored a concurring opinion, through which he agreed with each of the arguments that we raised on behalf of the plaintiff.

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Questions, comments or suggestions regarding our newsletter, please let us know your thoughts by contacting Cindy Townsend at ctownsend@bellroperlaw.com

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