Florida Association of County Attorneys
2019 Continuing Legal Education Program
June 12-13, 2019 – Orange County
Hyatt Regency Orlando
Regency O

Thursday, June 13, 2019

8:30 a.m. to 9:00 a.m.	***Continental Breakfast Served***
9:00 a.m. to 9:50 a.m.	Recent Developments, Trends and Predictions in Labor & Employment Law *John Dickinson, Esq.* *Constangy, Brooks, Smith & Prophete, LLP*
9:50 a.m. to 10:40 a.m.	Where Did You Learn to Talk Like That?! Panel Presentation: Lawyer Communication with Clients *Virginia "Ginger" Delegal, Esq.* *FAC Executive Director* *Commissioner Charles Hines, Esq.* *Sarasota County Board of County Commissioners* *Michele Lieberman, Esq.* *County Administrator* *Alachua County* *Commissioner Michael Swindle* *Hendry County Board of County Commissioners*
10:40 a.m. to 11:30 a.m.	Bankruptcy – Ignorance is Not Bliss *Chris Kasten, Esq.* *Kathleen DiSanto, Esq.* *Bush Ross*
11:30 a.m. to 12:20 p.m.	If You Want to Play in Our Yard, You Need to Play by Our Rules – Utility Franchises *Brian Armstrong, Esq.* *Law Office of Brian Armstrong*
12:30 p.m. to 1:30 p.m.	**Awards Luncheon**
1:30 p.m. to 2:20 p.m.	2019 Legislative Briefing *Laura Youmans, Esq.* *FAC Legislative Counsel*

2:20 p.m. to 3:10 p.m.	What's the Problem with Just Hiring the Guy Down the Street? Procurement & Bid Protests *Mark Scruby, Esq.* *Rogers Towers*
3:10 p.m. to 3:20 p.m.	**Refreshment Break**
3:20 p.m. to 4:10 p.m.	Special Assessments and §1983 Claims *Ed Dion, Esq.* *Nabors, Giblin & Nickerson*
4:10 p.m. to 5:00 p.m.	The Life and Times of Septic to Sewer *Christopher B. Roe, Esq.* *Nikki Day, Esq.* *Bryant, Miller & Olive, P.A.*
5:00 p.m.	**Closing Remarks**

Florida Association of County Attorneys
2019 CLE Program

Recent Developments – Trends and Predictions in Federal Labor and Employment Law

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Federal Legislative Developments

- Congress amends FLSA to address tipped employees
    - Employers can no longer keep tips received by employees, regardless of whether or not the employers take a tip credit.

Federal Legislative Developments

- Aftermath of Tax Cuts and Jobs Act

    1. No more business deductions for settlement agreements of sex harassment claims containing “nondisclosure” language.

    2. Elimination of individual mandate penalty tax – resulting in Texas Judge holding the Affordable Care Act is unconstitutional!

Initiatives From the White House

- Presidential Nominations and Appointments

    1. EEOC nominations held up by Republican Senators, but some confirmed.
    2. Trump renominates individuals to key posts at the DOL.
    3. No renomination of Mark Gaston Pearce to the NLRB.
    4. Trump appoints Leen as Acting Director of the OFCCP.

EEOC News and Developments

- EEOC releases Fiscal Year 2018 Enforcement Data

1. EEOC received 76,418 charges nationwide in FY18
2. Down almost 8,000 charges from FY17
3. Decrease in number of race claims raised in charges filed in FY18 from previous year
4. 13.6% increase in sex harassment charges filed in FY18 from FY17 (EEOC attributes to #MeToo Movement)

EEOC News and Developments, cont'd.

Breakdown of Charges by Category of Discrimination:

Category	Amount	Percentage of Charges Filed
1. Retaliation	39,469	51% of all charges filed
2. Sex	24,655	32.3% of all charges filed
3. Disability	24,605	32.2% of all charges filed
4. Race	24,600	32% of all charges filed
5. Age	16,911	22.1% of all charges filed
6. National Origin	7,106	9.3% of all charges filed
7. Color	3,166	4.1% of all charges filed
8. Religion	2,859	3.7% of all charges filed
9. Equal Pay Act	1,066	1.4% of all charges filed
10. Genetic	220	0.3% of all charges filed

EEOC News and Developments

- EEOC removes incentive sections from its Final Rules about Wellness Programs under ADA and GINA.

Developments at the Department of Labor

1. DOL issues proposed Joint Employer Regulations.

2. DOL unveils proposed overtime regulations for “white collar” employees.

Supreme Court Decisions

1. *Janus v. AFSCME*

   - Public sector employees in non-right-to-work states are protected by the 1st Amendment from being required to pay unions "agency fees."

2. *Epic Systems Corp. v. Lewis/Ernst & Young, LLP v. Morris/NLRB v. Murphy Oil USA, Inc.*

   - Trilogy of cases in which Court ruled that FAA and NLRA were not in conflict.

   - As a result, employees who signed arbitration agreements can be compelled to arbitrate their claims in individual arbitration hearings, as opposed to class action lawsuits.

Supreme Court Decisions

3. *Encino Motorcars, LLC v. Navarro*

   - Exemptions to the overtime pay requirements of the FLSA are to be narrowly construed.

4. *Mt. Lemmon Fire District v. Guido*

   - ADEA covers public sector employers, regardless of the number of employees they employ.

Supreme Court Decisions

5. *Yovino v. Rizo*
   - Court holds Judge's Ruling from the Grave Cannot Stand

6. *Davis v. Ft. Bend County*
   - Court holds Title VII's administrative exhaustion requirements are not jurisdictional, but rather mandatory claim processing requirements subject to forfeiture if not timely raised.

7. Court agrees to hear trilogy of sexual orientation cases.

Significant and Interesting Title VII Cases

- Race Discrimination

1. *Lewis v. City of Union City*
   - Eleventh Circuit adopts new prima facie comparator evidence standard – "similarly situated in all material respects" vs. "nearly identical."
2. *Vess v. MTD Consumer Group, Inc.*
   - Fifth Circuit declares that "The 'N-word' is more than an offensive utterance, and not nearly identical to, "ain't no man – he's a white man!"
3. *Jefferson v. Sewon America, Inc.*
   - Eleventh Circuit says statement that the boss "wanted a Korean in that position" creates a triable issue of fact.

Significant and Interesting Title VII Cases

- Sex Discrimination

1. Sexual Orientation and Gender Identity/Nonconformity

A. *Bostock v. Clayton County, Georgia*
   - Dissenting judge calls prior precedent holding sexual orientation is not protected by Title VII an "Edsel without an engine."

B. *EEOC v. R.G. & G.R. Funeral Homes, Inc.*
   - Sixth Circuit says Religious Freedom Restoration Act was no bar to employee's gender identity discrimination claim under Title VII.

Significant and Interesting Title VII Cases

- Sex Discrimination

2. Sex Harassment

A. Hughes v. 21st Century Fox, Inc.

- T.V. news pundit who claimed celebrity news anchor raped and coerced her into having an 18 month sexual relationship, could not bring suit under Title VII because she was not an employee.

Significant and Interesting Title VII Cases

- Sex Discrimination

3. Pregnancy Discrimination

A. Gohrman v. Andy Mohr Avon Nissan, Inc.

- Inconsistent reasons for termination of pregnant employee create a triable issue of fact.

Significant and Interesting Title VII Cases

- National Origin Discrimination
  - *State of Illinois v. Xing Ying Employment Agency*
    - Not the smartest advertisement: "Lots of Mexicans. Honest and sincere (provide the best Mexicans)."

Significant and Interesting Title VII Cases

- Religious Discrimination

1. *Queen v. City of Bowling Green*
   - Things not to say in the workplace: "I'll be damned if I work with atheists" and "atheists need to burn."

2. *Cooper v. City of St. Louis*
   - More things not to say in the workplace: "If you don't stop praying, I'll fire you on the spot."

Important and Interesting Age Discrimination Cases

1. *Kleber v. Carefusion Corp.*
   - En banc panel of Seventh Circuit rules job applicants cannot bring disparate impact discrimination claims under the ADEA.

2. *Owen v. STMicroelectronics*
   - Texas District Court holds that employer's claim that applicant was "too experienced" might be "code" for "too old."

Notable Disability Discrimination Cases

1. *Faidley v. UPS of America, Inc.*
   - Eighth Circuit holds working in excess of 8 hours a day was an essential function of deliverer job.

2. *Snead v. FAMU*
   - Eleventh Circuit says working in excess of 8 hours a day was not an essential function of campus police job.

3. *Trautman v. Time Warner Cable Texas, LLC*
   - Fifth Circuit says employee who refuses to explore employer's offer of a reasonable workplace accommodation has no ADA failure to accommodate claim.

Family and Medical Leave Act Cases

1. *Stein v. Atlas Industries, Inc.*
   - Employee who fails to abide by his employer's "call in or show up" policy cannot maintain an FMLA interference claim.

2. *Antekeier v. Laboratory Corporation of America*
   - District court holds that telephone calls to an employee while on FMLA leave did not constitute interference when no work was assigned to the employee while on leave.

Recent Developments – Trends

- Rise in laws prohibiting inquiries about compensation history
  - California (Enacted 2018)
  - Connecticut (Enacted 2018)
  - Hawaii (Enacted 2018)
  - Massachusetts (Enacted 2018)
  - New Jersey (Enacted 2018)
  - Pennsylvania (Enacted 2018)
  - Puerto Rico (Enacted 2018)
  - Vermont (Enacted 2018)
  - Various local governments (Chicago, Kansas City, Philadelphia, Louisville, San Francisco, Westchester County)

Recent Developments – Trends

- Rise in mandatory sexual harassment training
  - New York (and New York City)
  - Delaware

Recent Developments – Trends

- Rise in paid sick leave laws

Washington State	(Eff. 2018)
Rhode Island	(Eff. 2018)
Maryland	(Eff. 2018)
New Jersey	(Eff. 2018)
New York/City (family leave)	(Eff. 2018)
Michigan	(Eff. 2019)
Austin, Texas	(Eff. 2018)

Predictions

A. NLRB will issue a Final, more narrow, Joint Employer Standard.

B. Supreme Court will hear sexual orientation/gender identity discrimination case and determine Title VII provides protection.

C. Arbitrations of claims will rise.

D. Sex harassment claims will continue to increase due to “#Me Too.”

Predictions

E. Expect more Congressional gridlock.

F. Trump may appoint a third justice to the Supreme Court.

G. Increase in website accessibility, FMLA, ADA and FCRA claims.

H. Supreme Court will agree to decide whether Equal Pay Act allows employers to consider prior salary in setting current salary.

Predictions

I. Marijuana legalization will trigger complex issues.

J. Relationship between marijuana's status under federal and state law will continue to be a theme of litigation.

K. Shift in policy/enforcement initiatives at EEO, DOL, NLRB, etc.

L. Due to new judicial appointments expect more cases being filed in state court under state laws.

Conclusion

RECENT DEVELOPMENTS

TRENDS AND PREDICTIONS IN LABOR AND EMPLOYMENT LAW

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2019 CLE PROGRAM

FLORIDA ASSOCIATION OF COUNTY ATTORNEYS

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RECENT DEVELOPMENTS
TRENDS AND PREDICTIONS IN LABOR AND EMPLOYMENT LAW

I. INTRODUCTION

For most Americans, the past 18 months have been a roller coaster ride of highs and lows, at least insofar as issues impacting their workplaces were concerned. Although, for the most part, the national economy is booming, and unemployment figures have been at the lowest they have been in 50 years, the federal government shut down over border security issues, Congress – which was already gridlocked as a result of its members voting along party lines – is now divided by the result of the mid-term elections, and the President remains under an investigation for corruption and collusion that has no apparent end in sight. To make matters worse, the American public, as evidenced by the recent confirmation hearings for Supreme Court Justice Brett Kavanaugh, appears to have become more polarized and distrustful of government than at any other time in this Nation's history, except for perhaps during the Civil War. It is against this tumultuous backdrop that we will discuss the recent developments in labor and employment law that have taken place since January 1, 2018.

II. FEDERAL LEGISLATIVE DEVELOPMENTS

As mentioned above, for most of its legislative term, the 115th Congress was hopelessly gridlocked over a variety of issues, including labor and employment legislation. Although 2018 largely was the "year that wasn't" with respect to labor and employment legislation at the federal level, a few legislative changes affecting employees and employers did take place.

A. Congress Amends the Fair Labor Standards Act to Address Tipped Employees

One piece of legislation that Congress managed to pass was the Consolidated Appropriations Act of 2018, which President Trump signed into law on March 27, 2018. Although the Act was an omnibus budget bill consisting of more than 2,000 pages, buried within it is text amending the federal Fair Labor Standards Act ("FLSA") to prohibit employers from keeping tips received by their employees, regardless of whether or not the employer takes a tip credit under 29 U.S.C. § 203(m). The Act further provides that regulations promulgated by the U.S. Department of Labor's ("DOL") Wage and Hour Division ("WHD"), that barred tip pooling when employers paid tipped employees at least the full FLSA minimum wage and did not claim a tip credit, shall no longer have any force or effect. As a result of this amendment, the FLSA now clearly states: "An employer may not keep tips received by its employees for any purposes, including allowing managers or supervisors to keep any portion of the employees' tips, regardless of whether or not the employer takes a tip credit."

Employers who violate the FLSA, as amended, by keeping part or all of an employee's tips, are subject to not only losing their tip credit, as well as a disgorgement of any improperly seized tips, but also liquidated damages in an amount equal to the tips that were seized, and a civil money penalty of up to $1,100, if the violation has been determined to have been willful. Although 29 U.S.C. § 203(m), as amended, does not define the terms "manager" or "supervisor," the DOL, in Field Assistance Bulletin No. 2018-3, issued on April 6, 2018, explained that the WHD will use the "primary duties test" for the executive white collar exemption, set forth in 29 C.F.R. § 541.100(a)(2)-(4), to determine whether an employee is a manager or supervisor.

B. The Aftermath of Congress's Passage of the Tax Cuts and Jobs Act

Although signed into law on December 22, 2017, the Tax Cuts and Jobs Act has had, and will have, a significant impact on the American workplace.

1. Congress Eliminates Business Expense Deductions for Settlement Agreements of Sexual Harassment Claims Containing Nondisclosure Agreements

A foreseeable result of the passage of the Tax Cuts and Jobs Act was the elimination of a business expense deduction that employers used to be able to take with respect to settlement agreements containing nondisclosure agreements ("NDAs") when the claims being settled were sexual harassment and/or abuse claims. The Act amended 26 U.S.C. § 162 of the Internal Revenue Code to prohibit business expense deductions for settlements of sexual harassment and/or abuse claims, when the settlements of those claims involved NDAs that either prevented the disclosure of the amounts paid to settle those claims, and/or the attorneys' fees related to such a settlement. As a result of this law, employers will now have to choose whether they would prefer having a business deduction for the sexual harassment and abuse claims it settles, or an NDA that keeps the terms of such settlements confidential.

2. A Texas District Judge Rules the Affordable Care Act Is Unconstitutional

Perhaps a less foreseeable consequence of the passage of the Tax Cuts and Jobs Act was a recent ruling by a federal District Judge in Texas declaring that the Affordable Care Act ("ACA"), in its entirety, was unconstitutional. You may recall that in 2012, Chief Justice Roberts, writing a plurality opinion on behalf of a deeply divided Supreme Court in *National Federation of Independent Businesses v. Sebelius,* ruled that even though the ACA's highly controversial "Individual Mandate" and "Shared Responsibility Payment" were not valid exercises of Congress's power under the Interstate Commerce Clause, they were nevertheless constitutional pursuant to

Congress's Tax Power. In reaching this determination, the Court focused on three (3) factors. First, the Court observed that the Shared Responsibility Payment is paid into the federal Treasury by taxpayers when they file their tax returns. Second, the Court noted that the amount owed under the ACA is determined by such familiar factors as taxable income, number of dependents, and joint filing status; and the requirement to pay is found in the Internal Revenue Code and collected by the IRS in the same manner as taxes. Third, the Court determined that the Shared Responsibility Payment, like a tax, produced revenue for the government.

Via the passage of the Tax Cuts and Jobs Act, however, the ACA's Shared Responsibility Payment was reduced to zero. Once that occurred, several states and individuals filed suit arguing that Congress's Tax Power could no longer serve as a justification for the ACA's Individual Mandate and Shared Responsibility Payment. In addition to arguing that both the Individual Mandate and Shared Responsibility Payment were no longer constitutional, those plaintiffs further argued that because the remainder of the ACA was inextricably linked to the Individual Mandate and Shared Responsibility Payment, the ACA, as a whole, was unconstitutional.

On December 14, 2018, Reed O'Connor, a United States District Judge for the Northern District of Texas, agreed with the plaintiffs and ruled that not only were the Individual Mandate and Shared Responsibility Payment portions of the ACA unconstitutional, but also the entirety of the ACA. Presently, the District Court's ruling is being appealed. In the meantime, because Judge O'Connor did not issue an injunction prohibiting the enforcement of the ACA, the ACA remains in effect during the pendency of this appeal.

C. Missed Opportunities by Congress to Enact Legislation

1. The Save Local Business Act Stalls in the Senate

The Save Local Business Act is a bi-partisan bill co-sponsored by House Republicans and Democrats to overturn the National Labor Relations Board's ("NLRB's") 2015 determination in *Browning-Ferris Industries;* a decision that reversed decades of NLRB precedent in favor of a more expansive and relaxed definition of "joint employer" status. Under the Board's expansive definition in *Browning-Ferris Industries,* a joint employer includes not only those who exercise direct or indirect control over workers, but additionally those who have reserved the authority to do so, even though their reserved authority is never actually exercised. By contrast, the Save Local Business Act would more narrowly define joint employer status to a person who "directly, actually and immediately, and not in a limited or routine manner, exercises significant control over the essential terms and conditions of employment such as hiring employees, discharging employees, determining individual employee rates of pay and benefits, day-to-day supervision of employees, assigning work schedules, positions, and tasks, or administering employee discipline."

If passed, the Save Local Business Act would amend the definition of "employer" as set forth in both the National Labor Relations Act ("NLRA") and the Fair Labor Standards Act ("FLSA"). However, the Act's passage seems unlikely. Although the House passed the Save Local Business Act by a 242 to 181 vote on November 7, 2017, that vote took place before the NLRB, on December 14, 2017, issued its decision in *Hy-Brand Industrial Contractors, Ltd.* In *Hy-Brand*, the Board, in a 3-to-2 decision, overturned *Browning-Ferris Industries* and returned to its earlier definition of joint employer status. However, on February 26, 2018, only a few months after it rendered its decision in *Hy-Brand*, the Board vacated that decision due to claims that Board Member, William Emmanuel, should not have been allowed to participate in the *Hy-Brand* case

because his former law firm was involved in a pending appeal in the *Browning-Ferris Industries* case, i.e., the case that *Hy-Brand* had overturned.

As a result of *Hy-Brand's* vacatur, *Browning-Ferris Industries,* is once again the current law of the land. Despite that fact, the NLRB issued a proposed rule in September of 2018 that proposes to reverse *Browning-Ferris Industries* in favor of a more employer-friendly definition of the term "joint employer." Although the public comment period on the NLRB's proposed rule closed on December 13, 2018, to date, no final rule has been issued. In the meantime, the Senate has never voted on the Save Local Business Act. Detractors of the bill will doubtlessly argue that the Save Local Business Act will be superfluous, given the Board's issuance of a proposed rule reversing *Browning-Ferris Industries*. Proponents of the bill, by contrast, will argue that passage of the Act is the only sure way to guarantee that the NLRB, in future years, will not change its mind again on this issue and adopt a more expansive definition of joint employer status, as it did in *Browning-Ferris Industries*.

2. Senate Fails to Pass the ADA Education and Reform Act

Sadly, the Save Local Business Act was not the only employer-friendly legislative enactment that the 115th Congress failed to pass. The ADA Education and Reform Act of 2017 is a bill aimed at stemming the unchecked proliferation of Title III ADA accessibility lawsuits by law firms seeking to recover quick and easy awards of attorneys' fees. Notably, the number of Title III ADA Accessibility lawsuits rose 37% between 2015 and 2016, with most suits being filed in the states of California and Florida.

The ADA Education and Reform Act would prohibit people from filing civil actions against owners and operators of public accommodations based on their failure to remove an architectural barrier to access into existing places of public accommodation unless: (1) the aggrieved person has

provided the owner or operator a written notice sufficiently specific enough to identify the barrier; and (2) the owner or operator, within 60 days of receiving such written notice, fails to provide the person with a written description outlining improvements that will be made to ameliorate the barrier, and if they fail to remove the barrier, or make substantial progress after providing such a description, within 120 days.

Although the Act was passed by the House of Representatives in February of 2018, it was never voted upon by the Senate. Instead, Senator Tammy Duckworth (D. Illinois) and groups like the American Civil Liberties Union ("ACLU") effectively blocked the bill from reaching the Senate floor for a vote. Given the current state of Congress, it is unlikely that the ADA Education Reform Act, or legislation like it, will be passed anytime soon.

III. EXECUTIVE ORDERS AND OTHER WHITE HOUSE INITIATIVES

A. President Trump Issues an Executive Order Exempting Federal Contractors Performing Seasonal, Recreational Services on Federal Lands from Minimum Wage Set by Executive Order 13658

On February 12, 2014, President Obama signed Executive Order 13658, which established a minimum wage to be paid to parties who contracted with the federal government. In 2014, that minimum wage was $10.10 per hour; however, the minimum wage rate is indexed to inflation and has increased each year. On January 1, 2019, that minimum wage increased from $10.35 an hour to $10.60 an hour. Among other groups of federal contractors, Executive Order 13658 applied to seasonal recreational outfitters and guides operating on federal lands. For the purposes of Executive Order 13658, federal contractors falling within the purview of "outfitters and guides" include people who rent seasonal recreational equipment, as well as people who provide seasonal

recreational services such as "river running, hunting, fishing, horseback riding, camping, mountaineering activities, ski services and youth camps."

On May 25, 2018, President Trump signed Executive Order 13838, exempting federal contractors working as seasonal recreational outfitters and guides working on federal lands from the minimum wage requirements of Executive Order 13658. According to Executive Order No. 13838, seasonal recreational outfitters and guides operating on federal lands frequently conduct multi-day tours and work irregular schedules that require them to work substantial overtime hours. According to Executive Order 13838, the application of Executive Order 13658 to federal contractors working on federal lands as seasonal recreational outfitters and guides threatens to significantly raise the cost of guided hikes and tours on federal lands, thereby preventing many visitors from enjoying the great beauty of America's outdoors, due to the rapid increase of the minimum wage coupled with the likelihood of substantial overtime hours worked by those employees. Notably, Executive Order 13838 did not exempt federal contractors providing seasonal recreational food and lodging services on federal lands from the minimum wage requirements of Executive Order 13658.

B. President Trump Renominates Individuals to Serve at the EEOC and DOL, but Not the NLRB

You may recall that back on June 29, 2017, President Trump nominated Janet Dhillon to chair the United States Equal Employment Opportunity Commission ("EEOC"). At the same time, he nominated Daniel Gade to serve as an EEOC Commissioner and Sharon Fast Gustafson to serve as the EEOC's General Counsel. Almost two years later, on May 9, 2019, the Senate finally confirmed Dhillon as EEOC Chair. Apparently, Senators Marco Rubio (R. Florida) and Mike Lee (R. Utah) had been holding up the vote on these nominations because they disapproved of President Trump's nomination of Democrat, Chai Feldblum, to her third term as a Commissioner on the

EEOC. Feldblum was originally appointed to the EEOC by President Obama, however, her second term expired in July of 2018, and she stepped down from the EEOC on January 4, 2019. Although President Trump renominated Dhillon, Gade and Gustafson in late 2018, Gade withdrew himself from consideration and accepted a faculty position with American University. Presently, Gustafson's nomination to General Counsel of the EEOC remains in limbo.

Currently, Republican, Victoria Lipnic, continues to serve as the Acting Chairperson of the EEOC. For a while, Lipnic, along with Democratic Commissioner, Charlotte Burrows, were the only two Commissioners serving on the EEOC. That meant the EEOC lacked a quorum and was unable to make or implement any new policies. Now that Dhillon has been confirmed as Chair, a quorum exists.

Notably, Gustafson is not the only Trump nominees who has yet to be confirmed by the Senate. In 2017, President Trump nominated three individuals to key posts at the DOL: Cheryl Stanton to head the WHD, William Beach to head the Bureau of Labor Statistics ("BLS"), and Scott Mugno to head the Occupational Safety and Health Administration ("OSHA"). Although Beach and Stanton were finally confirmed on March 13, 2019 and April 10, 2019, respectively, Mugno withdrew his name from consideration on May 15, 2019. Up until recently, the Acting Director of the WHD was Bryan Jarrett; however, he resigned. As of February, the Acting Director of the WHD is the WHD's former Deputy Director, Keith Sonderling.

Interestingly, President Trump, in making his 2019 nominations, did not renominate Mark Gaston Pearce to a third term serving on the NLRB. Pearce, a Democrat, was appointed to the NLRB by President Obama and served as the Board's chairperson during most of the Obama Administration, but his second term expired in August of 2018. Trump had previously renominated

Pearce to a third term on the NLRB on August 29, 2018, however, the Senate did not confirm that nomination. Recently, Pearce withdrew his name from consideration for a third term.

C. Trump Administration Names Craig Leen as Director of the Office of Federal Contract Compliance Programs

Craig Leen has been serving as the Acting Director of the Office of Federal Contract Compliance Programs ("OFCCP") since July of 2018, when his predecessor, Director Ondray Harris, suddenly resigned. On December 27, 2018, however, President Trump officially appointed Leen to the position of Director of the OFCCP. Unlike the above-discussed presidential nominations to the EEOC, NLRB and OSHA, Senate confirmation to the top spot at the OFCCP is not required.

D. White House's FY 2019 Budget Cuts Funding and Staff of the OFCCP, but Increases the EEOC's Funding

You may recall that in last year's Workshop we reported on the White House's failed effort to merge the OFCCP with the EEOC. Although the Trump Administration has tabled the notion of an EEOC/OFCCP merger, it has nevertheless slashed the OFCCP's budget for fiscal year 2019 from $104,476,000 to $91,000,000. The bulk of this $12,677,000 cut would come from the elimination of OFCCP staff. The President's FY 2019 budget would reduce the OFCCP's staff from 563 full-time equivalents ("FTE") to 450 FTEs, resulting in the loss of 113 FTE staff.

In contrast to the OFCCP, the White House's FY 2019 budget adds $1,783,000 to the EEOC's annual budget. In FY 2017, the number of employees leaving the EEOC, i.e., 10.8%, was double the number of its new hires, i.e., 5.2%. The Trump Administration hopes that this budget increase will give the EEOC the funding it needs to maintain its staffing levels and to further reduce its private sector charge workload.

E. President Trump Shuts Down Government over Congress's Refusal to Fund a Border Wall

In the United States, the federal government shuts down when Congress fails to pass either sufficient appropriation bills, or continuing resolutions to fund federal government operations and agencies, or when the President refuses to sign such bills or resolutions into law. Pursuant to legislation known as the Anti-Deficiency Act, all non-essential government operations must cease in the absence of appropriations legislation to fund the federal government. At midnight on December 22, 2018, President Trump shut down the federal government after he and Congress could not agree on either an appropriations bill to fund the federal government during the 2019 fiscal year, or a continuing resolution that would extend the deadline for passing such a bill. Although prior to the shutdown, the Senate had unanimously voted to approve an appropriations bill that appeared likely to be approved by the House of Representatives, President Trump refused to sign the bill because it failed to provide any funding for a border wall between Mexico and the United States. As you may recall, one of President Trump's campaign promises in 2016 was that he would build such a wall.

In January of 2019, the House of Representatives, now controlled by a Democratic majority, voted to approve the previous, Senate-approved appropriations bill that lacked funding for the border wall. However President Trump announced that he would veto that bill, and any other legislation that did not provide funding for the border wall. Additionally, Republican Senate Majority Leader, Mitch McConnell, has declared his intention to not permit the Senate to consider any appropriations bill that does not provide proper funding for the building of the wall (including the appropriations bill that the Senate previously voted to pass).

On January 24, 2019, President Trump agreed to reopen the federal government for a three week period, until February 15, 2019, to allow negotiations to continue over how to secure the

Nation's southwestern border. However, those negotiations failed to produce funding for more than 88 miles of a border wall. Rather than shutting the government down again, President Trump, on February 15, 2019, declared a national emergency so that he can bypass Congress and obtain funding to build the border wall. According to the President, a national emergency exists because the nation is being invaded by drugs and criminals. Opponents of the President and/or the border wall have asserted that the declaration of a national emergency is a sham and they have vowed to bring suit to enjoin the President's actions.

The recent government shutdown is the longest federal government shutdown in the history of the United States. Nine departments of the executive branch of the federal government were either fully, or partially, shut down. This shutdown affected approximately 800,000 federal government employees.

F. Trump Signs the Government Employees Fair Treatment Act into Law

In response to the government shutdown, Congress quickly passed the Government Employee Fair Treatment Act of 2019, which President Trump signed into law on January 16, 2019. The Act covers both furloughed employees and "excepted" employees (i.e., employees who have been required to work during the shutdown) and states that each employee furloughed as a result of the shutdown shall be paid for the period of the shutdown, and that each excepted employee who is required to perform work during the shutdown will be paid for such work at his or her standard rate of pay, at the earliest date possible after the shutdown ends. The Act further provides that each employee who is required to perform work during the shutdown will be entitled to take leave from work for which compensation will be paid at the earliest date possible after the shutdown ends.

While legislation providing back pay to both furloughed and excepted federal workers once the shutdown ends is certainly needed, the Act did not provide those employees, or their families,

with any economic relief during the shutdown while they were going without paychecks. As noted by one of the Act's sponsors, Senator Ben Cardin (D. Maryland), "[t]he promise of back pay will not cover the cost of rent or groceries today. It won't make a car payment or cover prescriptions."

IV. EEOC NEWS AND DEVELOPMENTS

A. EEOC Issues Itself a Report Card (and Gives Itself a Passing Grade)

On November 15, 2018, the EEOC released its annual Performance and Accountability Report. According to the EEOC, it received over 554,000 calls and e-mails and handled over 200 inquiries concerning potential discrimination claims. Additionally, the EEOC reports that the launch of its nationwide online inquiry and appointment systems, as part of the EEOC's Public Portal, has resulted in a 30% increase in inquiries and over 40,000 intake interviews.

Although the specific number of charges filed with the EEOC in 2018, and the specific breakdown of those charges by category of discrimination, has not yet been made publicly available, the EEOC boasts that it filed 199 lawsuits, and resolved another 141 lawsuits, during 2018. The EEOC further claims to have recovered $505,000,000 for victims of discrimination in 2018. Of that amount, $354,000,000 was recovered through mediation, conciliation and settlement efforts, whereas $53,500,000 was recovered through civil litigation, and another $98,600,000 was recovered on behalf of federal employees and applicants through hearings and appeals.

The EEOC also reported that it reduced its backlog of charges in 2018 by 19.5%, to 49,607 charges. According to the EEOC, that is the lowest inventory of backlogged charges it has had in more than a decade. Additionally, the EEOC claims to have reduced its backlog of overdue Freedom of Information Act ("FOIA") requests by 7.6% in 2018. While this may be an improvement from previous years, the EEOC still has a significant backlog of both EEOC charges

and FOIA requests. It is doubtful that the additional $1,783,000 the Trump Administration has earmarked for the EEOC's budget in FY 2019 is going to have much of an impact on the Agency's backlog of charges and FOIA requests.

B. EEOC Releases Fiscal 2018 Enforcement and Litigation Data

On April 10, 2019, the EEOC released information concerning the number of charges of discrimination it received in fiscal year 2018, as well as the number of lawsuits it filed in same year. This data revealed that the EEOC, nationwide, received a total of 76,418 charges of workplace discrimination in fiscal year 2018. That figure is about 8,000 charges fewer than were filed with the EEOC in fiscal year 2017. The data reveals that retaliation continues to be the most frequently claimed form of discrimination in the charges filed with the EEOC, and that more than half of all EEOC charges contain a retaliation claim. The EEOC's data reflects that out of the 76,418 charges filed with the EEOC in fiscal year 2018, the number of charges containing specific claims of discrimination are as follows:

Retaliation: 39,469 (51% of all charges filed)
Sex: 24, 655 (32.3% of all charges filed)
Disability: 24,605 (32.2% of all charges filed)
Race: 24,600 (32.2% of all charges filed)
Age: 16,911 (22.1% of all charges filed)
National origin: 7,106 (9.3% of all charges filed)
Color: 3,166 (4.1% of all charges filed)
Religion: 2,859 (3.7% of all charges filed)
Equal Pay Act: 1,066 (1.4% of all charges filed)
Genetic Information: 220 (0.3% of all charges filed)

Notably, the number of charges containing allegations of race discrimination declined from 33% of all charged filed in fiscal year 2017 to only 22% of all charges filed in fiscal year 2018. For those wondering what effect the "#Me Too Movement" had on the number of charge filings, the EEOC

data for fiscal year 2018 reflects that the number of sex harassment charges increased 13.6% (or a total of 7,609 sex harassment charges) from fiscal year 2017.

In addition to receiving and investigation charges, the EEOC also filed 199 merit lawsuits in fiscal year 2018. Moreover, the EEOC had a total of 3012 cases on its active docket in fiscal year 2018. According to the EEOC, it achieved a successful outcome in 95.7% of all of the cases it resolved before the United States District Courts in fiscal year 2018.

C. EEOC Rescinds Regulations on Wellness Incentives under the ADA and GINA

In 2017, the American Association of Retired People ("AARP"), after a long battle in district court, succeeded in having the EEOC's Workplace Wellness Regulations under the Americans with Disabilities Act ("ADA") and Genetic Information Nondiscrimination Act ("GINA") vacated as being arbitrary and capricious. Introduced in 2016, the EEOC's Wellness Regulations let employers impose greater premiums of up to 30% of self-only coverage on their employees who refused to disclose medical and genetic information through wellness programs at work.

Shortly after the EEOC implemented its Workplace Wellness Regulations, AARP filed suit in the United States District Court for the District of Columbia, claiming that the Regulations were unlawful because the EEOC did not provide any justification or support for imposing an incentive or penalty of up to 30%. At first, the EEOC argued that AARP lacked standing to bring such a challenge against it; however, the district court issued a ruling in January of 2017, that AARP had associational standing to bring suit on behalf of its members. Thereafter, in August of 2017, the district court granted AARP's motion for summary judgment and ruled that the EEOC's Wellness Regulations were arbitrary and capricious because the "EEOC failed to develop any concrete data, studies or analysis to support its conclusion that the 30% incentive level made the incentive

'voluntary' under the ADA and GINA." Nevertheless, the district court declined to vacate the Regulations, despite its "serious concerns" about the EEOC's rulemaking processes, due to the fact that it believed those serious concerns were outweighed by "the disruptive consequences" that employers would experience if it vacated the Regulations. Accordingly, the district court remanded the Regulations back to the EEOC for further reconsideration.

Although it appeared that the AARP may have won the battle but lost the war given the district court's decision not to vacate these Regulations," the district court, in December of 2017, changed its mind and granted AARP's motion to amend its decision to remand the EEOC's Wellness Regulations to the EEOC without vacatur. In its December 2017, ruling, the district court found that vacatur of the Regulations was proper. However, in order to minimize the potential disruption to employers, the district court delayed the effective date of the vacatur until January 1, 2019, in order to allow the EEOC to promulgate new workplace wellness rules. However, the EEOC did not promulgate new workplace wellness rules by the January 1, 2019, deadline. In fact, due to the government shutdown, the EEOC was not even open when the deadline came and went. Accordingly, the vacatur officially has taken effect. Of course, the vacatur does not prevent the EEOC from issuing new workplace wellness rules in the future.

V. DEVELOPMENTS AT THE DOL

A. DOL Issues Proposed Joint Employer Rule

On April 1, 2019, the DOL issued proposed regulations to clarify its interpretation of joint employer status under the Fair Labor Standards Act. The DOL proposes a four-factor test to determine whether an entity would be considered a "joint employer" under the FLSA. The potential joint employer would have to actually exercise the power to:

1. Hire or fire the employee;

2. Supervise and control the employee's work schedules or conditions of employment;

3. Determine the employee's rate and method of pay; and

4. Maintain the employee's employment records.

In proposing to adopt the four-factor test, the DOL relied on the 1983 decision in *Bonnette v. California Health & Welfare Agency,* with one critical exception. In *Bonnette*, the U.S. Court of Appeals for the Ninth Circuit found that "regardless of whether the appellants are viewed as having had the power to hire and fire, their power over the employment relationship by virtue of their control over the purse strings was substantial." In other words, if the employer had the authority to hire and fire, it was a joint employer, whether or not that authority was ever actually exercised.

Under the proposed regulations, the right to hire and fire cannot be a "reserved" power or contractual right. According to the preamble of the proposed regulations, "Only *actions taken* with respect to the employee's terms and conditions of employment, rather than the theoretical ability to do so under a contract, are relevant to joint employer status under the Act." (Emphasis added.)

The proposed regulations include nine examples that the DOL hopes will "further help clarify joint employer status." The examples involve workers at restaurants (both franchised and non-franchised), janitorial service workers at an office park, landscaping employees at a country club, staffing agency employees at a packaging company, a large national chain that requires its suppliers to sign a code of conduct, a global hotel franchisor and one of its hotel franchisees, and a subcontractor in a large retail store. If there is a "joint employer" relationship under the FLSA, then both employers can be legally responsible for any violations of the law. In addition, employees who work for joint employers are entitled to pay for all hours worked for *both* employers, meaning that they are much more likely to be entitled to overtime pay in a given workweek.

B. Despite Promises, the DOL Has Yet to Unveil Its Proposed Overtime Regulations for "White Collar" Employees

In 2016, the United States District Court from the Eastern District of Texas permanently enjoined the DOL's 2016 Final Rule that would have more than doubled the minimum salary level necessary to exempt white collar (i.e., executive, administrative and professional) employees from the overtime provisions of the FLSA. Although the DOL, shortly after the issuance of the district court's injunction, promised to unveil new proposed overtime regulations by October of 2018, that did not happen. Presently, the deadline for unveiling these proposed overtime regulations has been pushed back until March of 2019.

According to a recent report in Bloomberg Law's *Daily Labor Report*, the DOL has drafted proposed overtime regulations and has sent them for review to the White House Office of Information and Regulatory Affairs ("OIRA"). However, it is presently unclear how well-staffed OIRA was during the government shutdown and/or what work it was able to perform with respect to reviewing these proposed overtime regulations. Consequently, it remains uncertain when the DOL's proposed overtime regulations will be issued.

VI. SUPREME COURT DECISIONS

There were several decisions by the United States Supreme Court involving labor and employment law that were issued in the survey period. Those decisions are discussed below.

A. Court Rules First Amendment Shields Non-Union Members of Public Sector Collective Bargaining Units from Being Required to Pay Agency Fees.

In *Janus v. American Federation of State, County and Municipal Employees*, the U.S. Supreme Court changed the legal landscape that has permitted public employee unions in more than 20 states to extract dues or "agency fees" from government employees. The Court decided, 5-4,

that the First Amendment guarantee of free speech prohibited state governments from forcing public sector employees to pay fees when they did not support the unions' activities.

The plaintiff, Mark Janus, a child support specialist working for the Illinois Department of Healthcare and Family Services, was a public employee who did not belong to a union due to political and philosophical reasons. Nevertheless, by virtue of his public employment, he was in a bargaining unit represented by the American Federation of State, County and Municipal Employees ("AFSCME"). An Illinois law mandated that all state employees represented by unions must pay union dues or agency fees, regardless of whether they were members of the unions or not. Janus challenged that law on the ground that it violated his First Amendment right to free speech and assembly. A majority of the Supreme Court agreed with Janus and ruled that the activities of public employee unions are inherently political activities and matters of public policy because the government is the employer.

According to the majority of the Court, "[u]nder Illinois law, public employees are forced to subsidize a union, even if they choose not to join and strongly object to the positions the union takes in collective bargaining and related activities . . . . We conclude that this arrangement violates the free speech rights of nonmembers by compelling them to subsidize private speech on matters of substantial public concern." The Court's majority rejected the view that permitting employees to opt out of membership dues or agency fees allows employees to unfairly "free-ride" on dues-paying union members. Justice Alito said that Janus "argues that he is not a free rider on a bus headed for a destination that he wishes to reach but is more like a person shanghaied for an unwanted voyage." He added that "it is hard to estimate how many billions of dollars have been taken from nonmembers and transferred to public-sector unions in violation of the First Amendment."

Justice Elena Kagan dissented in *Janus*, and was joined by Justices Stephen Breyer, Ruth Bader Ginsburg, and Sonia Sotomayor. As a result of the majority decision, Justice Kagan asserted that "[p]ublic employee unions will lose a secure source of financial support . . . . Across the country, the relationships of public employees and employers will alter in both predictable and wholly unexpected ways. Rarely if ever has the Court overruled a decision — let alone one of this import — with so little regard for the usual principles of *stare decisis*."

Only time will tell if Justice Kagan's prediction is correct. For public employees in Florida, the Court's ruling in *Janus* is not particularly significant because Florida is already a "right-to-work" state. A right-to-work state is a state that has enacted laws to protect public employees from being forced to join, or financially support, unions. However, only 28 of the 50 states are currently right-to-work states. That means the Court's holding in *Janus* could significantly impact public sector unions in 22 states, like Illinois, as the unions in those states can no longer count on "secure source" funding to use in their political efforts. Indeed, some believe that the Court's decision in *Janus* could motivate states to enact more "right-to-work" laws.

B. Court Hands Down a Trilogy of Cases Ruling That Class Action Waivers in Employment Arbitration Agreements Do Not Violate the NLRA

In the cases of *Epic Systems Corp. v. Lewis, Ernst & Young, LLP v. Morris,* and *NLRB v. Murphy Oil USA, Inc.*, the Supreme Court ruled that language contained in arbitration agreements requiring employees to submit employment-related claims to individual arbitrations, as opposed to bringing class action civil lawsuits, was enforceable under the Federal Arbitration Act ("FAA"), irrespective of allowances set out in the NLRA. At issue in each of these cases was the question of whether § 7 of the NLRA – which provides that employees have the right to form, join, or assist unions, and to engage in other concerted activities for their mutual aid and protection -- conflicted

with § 1 of the FAA, which allows disputes related to contractual agreements to be decided through arbitration. In particular, at issue in each of these cases was whether the filing of employee class action lawsuits constituted participation in "other concerted activities" under § 7 of the NLRA. The Court consolidated these three cases and designated *Epic Systems, Inc.*, as the lead case.

In *Epic Systems*, the employer was a Wisconsin software company. In April of 2014, one its employees, Jacob Lewis, a technical writer, signed an employment agreement containing an arbitration clause obligating him to submit any claims he had with Epic Systems to an individual arbitration, as opposed to filing a class action civil lawsuit. Despite the terms of this arbitration clause, Edwards filed a FLSA collective action for unpaid overtime wages, both on his own behalf, as well as on behalf of other technical writers at the company. Although Epic Systems moved to dismiss the collective action on the ground that the arbitration clause in his employment contract required him to submit his dispute to an individual arbitration, as opposed to a class action lawsuit, the United States District Court for the Western District of Wisconsin disagreed and ruled in favor of Edwards. According to the District Court, Edwards's act of bringing a collective action constituted protected concerted activity for purposes of § 7 of the NLRA. Epic Systems immediately filed an interlocutory appeal of the District Court's denial of its motion to dismiss; however, the United States Court of Appeals for the Seventh Circuit affirmed the ruling of the District Court. In doing so, the Seventh Circuit noted that the FAA contained a "savings clause" that states that the FAA may be unenforceable if "such grounds exist at law or in equity for the revocation of any contract." The Court of Appeals determined that § 7 of the NLRA triggered the FAA's savings clause and therefore rendered the arbitration clause unenforceable.

Undeterred, Epic Systems petitioned the United States Supreme Court for certiorari review, which the Court granted. In a 5-4 decision written by Justice Neil Gorsuch, a majority of the Court

concluded that the FAA makes individual arbitration agreements enforceable and neither § 7 of the NLRA, nor the savings clause of the FAA, required a different outcome. In reaching this determination, Justice Gorsuch examined the Congressional intent behind both the NLRA and the FAA and noted no conflict existed between the two statutes. According to Gorsuch, "Congress has instructed federal courts to enforce arbitration agreements according to their terms – including terms providing for individualized proceedings. The National Labor Relations Act does not offer a conflicting command." Gorsuch further noted that Congress, through the enactment of the FAA, sought to promote a liberal federal policy favoring arbitration, whereas Congress's intent in enacting the NLRA was focused more on collective bargaining and other concerted activities, as opposed to specific methods for dispute resolution. Accordingly, Justice Gorsuch ruled that the arbitration agreements were enforceable and that the employees who signed them had to resolve their claims in individual arbitrations, as opposed to civil collective or class actions.

In a caustic dissent, Justice Ginsburg wrote: "The court today holds enforceable this arm-twisted, take-it-or-leave-it contract – including the provisions requiring employees to litigate wage and hour claims only one-by-one . . . . Federal labor law does not countenance such isolation of employees." Notwithstanding Justice Ginsburg's dissent, this trilogy of cases is a significant victory for employers who use arbitration agreements.

C. Supreme Court Determines That FLSA Exemptions Are Not to Be "Narrowly Construed"

The case of *Encino Motorcars, LLC v. Navarro* is an interesting case for more than one reason. First, it is a case that has been decided by the United States Supreme Court twice. Not many cases can claim that distinction. Second, and more importantly, the Supreme Court, in its second decision concerning this case, expressly rejected the notion that courts should "narrowly

construe" the statutory exemptions contained in § 13 of the FLSA, but instead stated that those exemptions should only be subjected to a "fair reading."

At issue in *Encino Motorcars, LLC* was a statutory exemption set forth in 29 U.S.C. § 213(b)(10) that exempts "any salesman, partsman, or mechanic primarily engaged in the selling or servicing of automobiles . . ." from the overtime pay requirements of the FLSA. The plaintiffs in that case were service advisors who worked at a Mercedes-Benz dealership in Encino, California. The plaintiffs had filed a federal lawsuit claiming entitlement to unpaid overtime wages under the FLSA; however, the dealership moved to dismiss those claims asserting that the service advisors were exempt pursuant to 29 U.S.C. § 213(b)(10). Although the District Court agreed with the dealership and dismissed the plaintiffs' FLSA claims, the plaintiffs filed an appeal, and the United States Court of Appeals for the Ninth Circuit reversed. In doing so, the Ninth Circuit relied on a 2011 interpretive regulation issued by the DOL which stated that service advisors were not exempt under 29 U.S.C. § 213(b)(10) because they do not personally service automobiles. Because the Ninth Circuit's ruling was contrary to decisions issued by the Fourth and Fifth Circuits, the dealership petitioned the Supreme Court for certiorari review, which the Court granted.

Justice Anthony Kennedy, writing for the majority of the Court, issued the first decision by the Supreme Court in this case on June 20, 2016. In that decision, the Court voted 6-2, to vacate the Ninth Circuit's ruling and remand the case back to the Court of Appeals. Kennedy's majority opinion focused on whether the 2011 DOL regulation upon which the Ninth Circuit relied was entitled to "*Chevron* deference." Basically, *Chevron* deference requires a court to defer to regulations promulgated by administrative agencies, such as the DOL, in certain situations. Ultimately, the majority concluded that the Ninth Circuit's reliance on the 2011 DOL regulation constituted a marked departure from existing DOL policy and therefore was not entitled to *Chevron*

deference. Accordingly, the Supreme Court vacated the Ninth Circuit's decision and remanded the case back to it for determination.

Despite the vacatur of its earlier decision, the Ninth Circuit, on remand, once again ruled in favor of the plaintiffs and found that the service advisors were not exempt employees under the FLSA. This time, instead of relying on the 2011 DOL regulation, the Ninth Circuit based its decision on the legislative history of the FLSA. The Ninth Circuit also argued that exemptions to the FLSA should be narrowly construed. Once again, the dealership petitioned the Supreme Court for certiorari review, and once again, the Supreme Court granted its petition,

On this occasion, Justice Clarence Thomas issued the Court's majority opinion. In a 5-4 decision, the majority ruled that because the FLSA gives no textual indication that its exemptions should be narrowly construed, courts are only required to give them a "fair reading." Applying that less restrictive standard, the Court determined that under a fair reading of 29 U.S.C. § 213(b)(10), the plaintiffs were exempt from the overtime wage provisions of the FLSA.

Although at first blush, one might not think the Court's ruling in *Encino Motorcars, LLC* is particularly significant given its application to the discrete group of service advisors, it should be noted that the Court's determination that all of the FLSA exemptions in § 13 are to be given a "fair reading," as opposed to being "narrowly construed," is actually quite momentous. For decades, both district and appellate courts have rotely determined that exemptions to the FLSA should be narrowly construed. The Court's decision in *Encino Motorcars, LLC* appears to be a real game changer for employers, as it relaxes that standard for construing exemptions under the FLSA considerably.

D. The Age Discrimination in Employment Act Applies to State and Local Government Employers Regardless of Their Number of Employees

On November 6, 2018, the U.S. Supreme Court handed down its opinion in *Mount Lemmon Fire District v. Guido*, holding 8-0, that the Age Discrimination in Employment Act of 1967 ("ADEA") applies to all state and local governmental employers, regardless of the number of employees working for them. Justice Ruth Bader Ginsburg wrote the opinion. Justice Brett Kavanaugh took no part in the consideration or decision of the case.

According to the Court, Section 630(b) of the ADEA has two separate categories of "employer." "Employer" means (1) "a person engaged in an industry affecting commerce who has twenty or more employees . . .," and (2) it "also means . . . a State or political subdivision of a State . . . ." The Court noted that the language "also means" should be read as connoting "in addition to." Accordingly, the Court ruled that the 20-employee minimum applicable to private sector employers did not apply to state or local governmental employers.

The employer unsuccessfully argued that the ADEA should be interpreted in accordance with Title VII of the Civil Rights Act of 1964, which applies to states and political subdivisions with 15 or more employees. In rejecting the employer's argument, the Court noted that when enacted, neither Title VII nor the ADEA applied to state or local governments at all. Congress amended Title VII in 1972, and the ADEA in 1974, to apply to state and local governments, but in doing so, it had used different language.

Notably, the 1972 amendments to Title VII did not change the definition of the term "employer" – "a person engaged in an industry affecting commerce who has fifteen or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year . . . ." Nevertheless, the amendments changed the definitions of "person," and "industry affecting commerce." Specifically, Congress changed the Title VII definition

of "person" to include "governments, governmental agencies, [and] political subdivisions . . ." Congress changed the definition of "industry affecting commerce" to "include any governmental industry, business, or activity." As a result of these two definitional changes, since 1972, all governmental entities are Title VII "employers" if they have 15 or more employees. By contrast, the 1974 amendments to the ADEA did not alter the existing definitions of "person" or "industry affecting commerce" as set forth in that statute. Instead, Congress changed the ADEA definition of "employer" as described above. Thus, the Supreme Court found that the amendments to Title VII and the ADEA were significantly different, and that the ADEA – unlike Title VII – has no minimum-employee threshold if the employer is a state or local governmental entity.

The impact of the Court's decision in *Mount Lemmon* is expected to be considerable, as state and local governmental employers with fewer than 20 employees are now subject to suit under the ADEA (public employers with 20 or more employees were already covered by the ADEA before the Court's decision.). Although the Eleventh Amendment to the United States Constitution will shield state employers of all sizes from private ADEA actions, state employers with fewer than 20 employees will be subject to age discrimination lawsuits filed by governmental entities such as the Equal Employment Opportunity Commission. Moreover, because Eleventh Amendment immunity does not apply to local governmental entities such as municipalities, counties, and school boards, the *Mount Lemmon* decision exposes those local governmental employers with fewer than 20 employees to suit under the ADEA from private and governmental plaintiffs alike.

E. Court Rules Transportation Workers Cannot Be Required to Arbitrate Their FLSA Minimum Wage Claims Despite Having Signed Arbitration Agreements

For several decades now, the United States Supreme Court has been issuing favorable rulings for employers regarding the enforceability of arbitration agreements. Sooner or later, there had to come a day when that string of uninterrupted favorable rulings would come to an end. That

day came on January 15, 2019, when the Supreme Court issued its 8-0 decision in *New Prime, Inc. v. Oliveira.*

New Prime, Inc. is an interstate trucking company that hired an individual named Dominic Oliveira to work for it as an independent contractor driving a commercial truck. In order to work for New Prime, Inc., Oliveira was required to sign an independent contractor agreement containing an arbitration clause which included a provision allowing the arbitrator to decide threshold questions of arbitrability. When Oliveira filed a putative collective action against New Prime, Inc., alleging violations the FLSA's minimum wage requirements, as well as the labor laws of the states of Maine and Missouri, New Prime, Inc. filed a motion to compel arbitration pursuant to § 4 of the FAA; however, Oliveira opposed that motion and argued that he could not be compelled to arbitrate his claims because as a truck driver, he was a transportation worker, and § 1 of the FAA, expressly contains a "transportation workers exclusion" that excludes "contracts of employment of . . . . seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce."

Even though the arbitration agreement signed by the parties clearly contained a delegation provision allowing the arbitrator to determine threshold questions of arbitrability, the District Court determined that the question of whether the transportation workers exclusion applied in this case was not a question that could be decided by an arbitrator. The District Court further concluded that the FAA's transportation workers exclusion did not apply to independent contractors. Accordingly, it ordered the parties to engage in discovery to determine if Oliveira was truly an independent contractor, as opposed to an employee. Rather than conducting discovery, however, New Prime, Inc. filed an interlocutory appeal concerning the District Court's denial of its motion to compel arbitration.

On appeal, the United States Court of Appeals for the First Circuit agreed with the District Court that the question of whether the transportation worker exclusion applied in this case was a determination that needed to be made before Oliveira could be compelled to arbitrate his claims. However, the First Circuit disagreed with the District Court that the transportation workers exclusion set forth in § 1 of the FAA did not apply to independent contractors based on its interpretation of the phrase "contracts of employment" as it existed at the time that Congress passed the FAA in 1925. Consequently, the First Circuit ruled that Oliveira could not be compelled to arbitrate his claims regardless of whether he was an independent contractor, or an employee. New Prime, Inc. thereafter filed a petition for certiorari review, which the Supreme Court granted.

Justice Gorsuch wrote the opinion for a unanimous Court, although Justice Brett Kavanaugh did not participate in the decision. First, the Court asked the question of whether the applicability of the transportation workers exclusion set forth in § 1 of the FAA should have been decided by the District Court given the fact that the arbitration agreement between the parties contained a delegation provision giving an arbitrator the authority to make that threshold determination. The Court answered that question in the affirmative and concluded that the delegation provision at issue was "merely a specialized type of arbitration agreement," which was only enforceable if the transportation workers exclusion set forth in § 1 of the FAA was inapplicable. As a consequence, it determined that a court could decide that question. Next, the Court examined the meaning of the phrase "contracts of employment" as it was used in 1925, when the FAA was enacted. In doing so, the Court concluded that the term "employment" at that time was synonymous with "work," rather than a true employer-employee relationship that exists today. The Court further concluded that even if Oliveira was a true independent contractor, his contract still fell within the transportation workers exemption in § 1 of the FAA. As a result, it affirmed the ruling of the First Circuit.

F. Court Holds Judge's Ruling From the Grave Cannot Stand

In what is easily one of the more bizarre fact patterns reported on this Article, the United States Supreme Court, on February 25, 2019, ruled that an appellate judicial decision by an *en banc* panel of the United States Court of Appeals for the Ninth Circuit could not stand when the judge writing the majority opinion had died 11 days before the Ninth Circuit had filed its *en banc* decision. According to the Supreme Court, "federal judges are appointed for life, not eternity."

The case at issue was *Yovino v. Rizo.* The plaintiff in that case, Aileen Rizo, had brought suit against her employer, Jim Yovino, the Superintendent of Schools for Fresno County, California, pursuant to the federal Equal Pay Act ("EPA"). The EPA makes it unlawful for employers to pay employees of one sex less than employees of the opposite sex for "equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions." Under the EPA, if a plaintiff establishes a *prima facie* case that he or she was paid less than employees of the opposite sex for work that is substantially equal, then the burden shifts to the employer to demonstrate that the wage disparity is attributable to one of four statutory exceptions: (1) a seniority system; (2) a merit system; (3) a system which measures earnings by quantity or quality of production; or (4) a differential based on any factor other than sex.

Although Rizo demonstrated that she was paid less than male employees for performing substantially the same work, Yovino filed a motion for summary judgment and argued that the disparity between Rizo's pay and that of her male comparators was due to her unequal starting salary. According to Yovino, because the Fresno County Office of Education ("FCOE") had a gender-neutral policy that based an applicant's starting salary on his or her salary with his or her prior employer, and because Rizo's salary at her previous job was lower than that of her male

comparators, it was not unlawful for the FCOE to rely on her lower salary with her former employer when determining her starting salary. In other words, Yovino argued that the FCOE's policy of basing an applicant's starting salary on his or her prior salary with another employer was appropriate because it was based on a factor other than sex. The District Court, however, disagreed and denied Yovino's motion for summary judgment. Yovino then filed an interlocutory appeal.

On appeal, a panel of the Ninth Circuit reversed the District Court and ruled that its prior precedent in *Kouba v. Allstate Ins. Co.*, compelled the conclusion that the EPA does not impose a *per se* prohibition against consideration of prior salary in setting a new employee's salary. Rizo then sought an *en banc* review by the entire Ninth Circuit, which the Court of Appeals granted. Judge Reinhardt wrote the majority opinion for the Ninth Circuit, sitting *en banc*. However, Judge Reinhardt died on March 29, 2018, 11 days before an *en banc* decision of the Court was filed on April 9, 2018. In his majority opinion, Judge Reinhardt ruled that an employee's prior salary was not a "factor other than sex" for purposes of the EPA and that the Ninth Circuit's prior decision in *Kouba,* holding otherwise, was no longer good law. Accordingly, the Ninth Circuit vacated its previous panel decision. Yovino then sought certiorari review from the United States Supreme Court.

The vote of the Ninth Circuit, sitting *en banc*, was extremely close, and a majority only existed if Judge Reinhardt's vote was counted. As stated above, however, the Supreme Court, determined that Judge Rheinhardt's vote could not be counted because he had died before the decision was filed. Accordingly, the Court vacated the *en banc* decision of the Ninth Circuit without ever reaching the merits of whether an employee's prior salary is a factor "other than sex" for purposes of the EPA that an employer can assert as an affirmative defense.

G. The Supreme Court Agrees to Hear Trilogy of Sexual Orientation Cases

Currently, the questions of whether one's sexual orientation and/or gender identity are statuses protected by Title VII of the Civil Rights Act of 1964 ("Title VII") are being hotly debated and courts throughout the nation have reached different conclusions in cases involving remarkably similar facts. On April 22, 2019, the Supreme Court granted certiorari review for three cases raising the question of whether sexual orientation and gender identity are protected statuses under Title VII.

In two of the cases, *Zarde v. Altitude Express and Bostock v. Clayton County, Georgia,* the issue to be decided is whether an employee's sexual orientation is a protected status under Title VII. As we reported in last year's Recent Developments article, in *Zarde,* the United States Court of Appeals for the Second Circuit, issued an *en banc* ruling overturning its own prior precedent and ruling that sexual orientation was a form of sex discrimination prohibited by Title VII. However, the United States Court of Appeals for the Eleventh Circuit, in *Bostock,* determined that based on its own prior precedent, sexual orientation was not a protected status and upheld the District Court's dismissal of Bostock's case. Unlike *Zarda*, the Eleventh Circuit declined to conduct an *en banc* review of the case. As a result, the Second and Eleventh Circuit opinions of *Zarda* and *Bostock* are in conflict with each other.

By contrast, the case of *EEOC v. R.G and G.R. Harris Funeral Homes, Inc.,* concerns the question of whether gender identity is a protected status under Title VII. The plaintiff in that case, Aimee Stephens, is a transgender female who was assigned the sex of male at birth, but who has always considered herself a female. Stephens began working for *R.G and G.R. Harris Funeral Homes, Inc.,* as a male, but was terminated when she announced to her boss that she was going to become "the person she was meant to be" and that she would report to work wearing appropriate

attire. The funeral home had a dress code policy requiring "public facing" males to wear suits and ties. Although the District Court had awarded summary judgment in favor of the funeral home, the United States Court of Appeals for the Sixth Circuit reversed and ruled that gender identity discrimination is a form of sex discrimination protected under Title VII.

Interestingly, the Supreme Court has scheduled the petitions for certiorari review in these three cases on at least three separate occasions, but has yet to grant or deny these petitions, and instead, has deferred ruling on them. While at the time of the writing of this article it is unclear whether the Supreme Court will take up these cases, legal scholars and pundits that closely follow the Court state that such deferrals are uncommon. They suggest that the Court's rescheduling of the consideration of these certiorari petitions indicates that is likely to grant them.

VII. INTERESTING AND SIGNIFICANT TITLE VII CASES

A. Administrative Exhaustion

In *Davis v. Fort Bend County,* the United States Court of Appeals for the Fifth Circuit ruled that a plaintiff's exhaustion of administrative remedies under Title VII was not a jurisdictional requirement, but was instead a "prudential prerequisite to suit." Furthermore, the Fifth Circuit ruled that because the defendant had "waited for five years and an entire round of appeals all the way to the Supreme Court before it argued that [the plaintiff] failed to exhaust . . ." her administrative remedies, it had therefore waived the right to assert that defense.

In *Davis,* the plaintiff had initially filed a charge of discrimination with a state deferral agency known as the Texas Workforce Commission, alleging sexual harassment and retaliation. Although she later amended her intake questionnaire to add claims of religious discrimination under Title VII, she did not ever amend her charge of discrimination to add a claim of religious

discrimination. After receiving a right to sue letter, Davis brought suit alleging religious discrimination and retaliation; however, the defendant, Fort Bend County, did not raise the procedural argument that Davis had not exhausted her administrative remedies under Title VII by amending her charge to assert a claim for religious discrimination. Instead, the County filed a motion for summary judgment on substantive grounds, which the District Court granted. Davis appealed that award of summary judgment and although the Fifth Circuit affirmed the District Court's summary judgment award in favor of the County on Davis's retaliation claim, it reversed and remanded the religious discrimination claim to the District Court because it found that disputed issues of material fact existed. Although the County filed a petition for certiorari review with the Supreme Court, that petition was subsequently denied.

On remand, the County argued, for the very first time, that Davis had failed to exhaust her administrative remedies under Title VII by alleging religious discrimination in her charge of discrimination. The County further argued that administrative exhaustion is a jurisdictional prerequisite in Title VII cases. Davis, by contrast, argued that administrative exhaustion was not jurisdictional, but only a prudential prerequisite for suit, and that the County had waived the right to assert administrative exhaustion at that late stage in the case. The District Court, however, agreed with the County that exhausting administrative remedies under Title VII is a jurisdictional requirement and ruled that Davis's failure to do so with respect to her Title VII religious discrimination claims warranted the dismissal of those claims with prejudice. Once again, Davis filed an appeal with the Fifth Circuit, and once again, the Fifth Circuit reversed the District Court.

In its ruling, the Fifth Circuit examined its own prior Title VII decisions pertaining to the question of administrative exhaustion and noted that there was disagreement within the Circuit about whether Title VII's administrative exhaustion requirement is a jurisdictional requirement that

implicates subject matter jurisdiction, or merely a prerequisite to suit and thus subject to waiver and estoppel. Nevertheless, the Fifth Circuit found that pursuant to its "rule of orderliness" (i.e., its prior precedent rule), that in the absence of an intervening change in the law, as a result of a statutory amendment to Title VII, a ruling by the Supreme Court, or a ruling by an *en banc* panel of the entire Fifth Circuit, it was bound to follow its earliest pronouncement on the issue. Noting that the Fifth Circuit had first ruled in 1989, in *Womble v. Bhangu*, that the failure to exhaust administrative remedies was not jurisdictional, it determined that administration exhaustion is not a jurisdictional requirement.

Additionally, the Fifth Circuit noted that the Supreme Court's decision in *Arbaugh v. Y.&H. Corp.,* was instructive. In *Arbaugh*, the Supreme Court held that Title VII's statutory limitation of covered employers – i.e., requiring employers to employ at least 15 employees in order to be covered -- was not a jurisdictional limitation. The Fifth Circuit concluded that in reaching that determination in *Arbaugh*, the Supreme Court had created a "readily administrable bright line" for courts and litigants to follow in order to determine if a statutory requirement is jurisdictional: "when Congress does not rank a statutory limitation on coverage as jurisdictional, courts should treat the restriction as nonjurisdictional in character." Applying that bright line test, the Fifth Circuit noted that nothing in Title VII indicated that administrative exhaustion was a jurisdictional requirement.

After determining that administrative exhaustion is not jurisdictional, the Fifth Circuit next examined whether the County had waived that defense by not timely raising it at an earlier point in the litigation. After noting that the County had waited five years and entire round of appeals before asserting Davis's failure to exhaust her administrative remedies, the Fifth Circuit concluded that under the facts, it was "abundantly clear that Fort Bend had forfeited its opportunity to assert that

claim." Consequently, it ruled that the District Court had erred in dismissing Davis's lawsuit due to her failure to exhaust her administrative remedies.

Once again, the County filed a petition for certiorari review with the United States Supreme Court; however, this time, the Court granted that petition. Accordingly, this case is scheduled to be heard by the Supreme Court sometime in 2019. In this writer's opinion, the fact that the Supreme Court has granted certiorari concerning this issue is quite strange. This is because in 1982, the Supreme Court, in *Zipes v. Trans World Airlines, Inc.*, pronounced that the filing of a timely charge of discrimination with the EEOC "is not a jurisdictional prerequisite to suit in federal court, but a requirement that, like a statute of limitations, is subject to waiver, estoppel, and equitable tolling . . . ." In view of the Supreme Court's holding in *Zipes,* it would appear that this issue has already been squarely addressed. Curiously, the Fifth Circuit's ruling in *Davis* makes no mention of *Zipes* at all.

In *Scott v. Gino Morena Enterprises, LLC,* the Ninth Circuit addressed the question of what constitutes the appropriate limitations period for filing a Title VII action, i.e., when the plaintiff actually receives a right-to-sue notice from the EEOC, or when he or she is first eligible to receive such notice. The plaintiff, Taylor Scott, began working for Gino Morena Enterprises, LLC ("GME") in April of 2011, at a barber shop located on the United States Marine Corps Base at Camp Pendelton. Scott complained that she was subjected to sexual harassment and retaliation by GME's manager and general manager. Although Scott continued to work for GME, she filed a charge of discrimination on November 13, 2013, with the California Department of Fair Employment and Housing ("DFEH"), which transferred her charge to the EEOC. After she filed this charge, Scott received a written disciplinary warning from GME. As a result, Scott decided to quit. She subsequently filed a second charge with DFEH on November 14, 2014, recounting the

allegations contained in her first charge, as well as a new allegation concerning her written disciplinary warning.

Although the procedural facts are somewhat convoluted and complicated, the bottom line is that Scott initially filed suit against GME on November 20, 2014, alleging only state law claims against GME. That lawsuit was already pending as of June 3, 2015, when she received a right-to-sue notice from the EEOC. That right-to-sue notice stated that "[m]ore than 180 days have passed since the filing of this charge" and "[t]he EEOC is terminating its processing of this charge." The right-to-sue notice further stated that a "lawsuit must be filed in a federal or state court WITHIN 90 DAYS of receipt of this notice; or the right to sue based on this charge will be lost." Within two weeks of receiving her right-to-sue notice, Scott filed her first amended complaint which dropped all of her California law claims and reasserted only Title VII claims.

In response to Scott's first amended complaint, GME moved to dismiss the same on the ground that her Title VII claims had not been timely filed. Although Scott had clearly filed her first amended complaint within 90 days of having received the right-to-sue notice, GME argued that Scott's Title VII claims were untimely because she had not filed her Title VII claims within 90 days of the date when she first became eligible to receive the right-to-sue notice. GME cited 42 U.S.C. § 2000e-5(f)(1), a section of Title VII which states that if a charge is dismissed by the EEOC, or if the EEOC has not filed a civil action within 180 days of the filing of the charge, then the EEOC will notify the person aggrieved, who then has 90 days to file a civil action. GME argued that because Scott had filed her first charge of discrimination on November 13, 2013, she became eligible to receive a right-to-sue notice from the EEOC after more than 180 days had passed from the filing of that charge. GME further claimed that since Scott did not file her Title VII claims

within 90 days of first becoming eligible to receive that notice of right-to-sue, her Title VII claims were now time-barred.

Somewhat surprisingly, the District Court accepted GME's argument and ruled that Scott's 90 day window for filing her Title VII claims opened 180 days after her first charge was filed with the EEOC. Since Scott did not file her Title VII claims within that 90 day window, the District Court granted GME's motion for summary judgment. Scott then appealed to the Ninth Circuit. On appeal, the Ninth Circuit noted that the 90 day statute of limitations for filing a Title VII claim was triggered by the receipt of a right-to-sue notice from the EEOC, not when the employee first became eligible to receive such notice from the EEOC. Consequently, it reversed the District Court's award of summary judgment.

B. Race Discrimination

In *Vess v. MTD Consumer Group, Inc.*, the United States Court of Appeals for the Fifth Circuit upheld a ruling by the United States District Court for the Northern District of Mississippi that found that MTD Consumer Group's termination of employee, Bill Vess, was not unlawful race discrimination under Title VII. MTD Consumer Group has a non-harassment policy that states that "actions, words, jokes, or comments based on an individual's race, color, or gender will not be tolerated." Vess is a white male plant worker who was promoted to the supervisory position of "lead person" in the "weld shop" in 2007. In 2015, Vess and two other white male employees were terminated from employment for using the "N-word" in the workplace. Insofar as Vess was concerned, both a white male employee and an African American employee claimed to have heard him use the N-Word multiple times, either to describe the workers or out of frustration. Prior to terminating Vess, MTD Consumer Group conducted an investigation and specifically asked Vess

if he had used the N-word. Although he denied using the N-word, Vess acknowledged that several years earlier, he had used the term "N-rigged" to refer to a piece of machinery.

After being terminated, Vess filed a lawsuit and alleged that MTD Consumer Group had fired him because he was white and that it applied a double standard with respect to its anti-harassment policy and its stance regarding the usage of the N-word. Specifically, Vess claimed that African American employees used the N-word in the workplace without suffering any consequences. He further argued that at least one African American employee had used racial slurs directed at him, but she had not been disciplined at all. Specifically, Vess claimed that just a few weeks before he was terminated, he had gotten into a verbal altercation with an African American employee named Blaq. Vess claimed that while he was arguing with Blaq, a female African American employee named Carin Ewing was an onlooker. Vess claimed that during his altercation with Blaq, Ewing stated " he ain't no man. He's a white man. They ain't never made a good white man." Although Vess reported Ewing's comments to the plant production manager, as well as his own supervisor, Ewing was never disciplined.

Notably, this was not the first time Vess had reported Ewing's behavior. Vess had previously reported Ewing to the personnel manager in 2012 for grabbing his buttocks at a Christmas party, and on another occasion, for pulling his pants down on the plant floor. Although Ewing received a verbal warning for these actions, these actions did not appear to be motivated by Vess's race.

At the appropriate point in the proceedings, MTD Consumer Group filed a motion for summary judgment, which the District Court granted. According to the District Court, Vess failed to prove a prima facie case of race discrimination. Although the Court acknowledged that Vess had demonstrated three of the four elements of a *prima facie* claim of racial discrimination – i.e., that

he was a member of a protected class, that he was qualified for the position he had held, and that he had been subjected to adverse employment action -- it nevertheless determined he had not satisfied the fourth element of showing that he was treated less favorably than other similarly situated employees who were not members of his protected class, under nearly identical circumstances. Specifically, the District Court concluded that Vess had not identified any non-white comparators who had been treated more favorably than he had.

On appeal, Vess argued that the District Court's requirement that the comparators he identified had to be "nearly identical," was too narrow. Specifically, Vess claimed that the District Court had erred in ruling that the African Americans employees he had identified as using the N-word were not proper comparators because he was a lead person and they were not, and/or because he had used the term N-rigged, not the N-word. Vess argued that by so narrowly construing this element of the *prima facie* test, the District Court made it impossible for him to identify a proper comparator. Despite that argument, the Fifth Circuit noted that the District Court had also found that the African American comparators Vess had identified were not similarly situated to him for another, wholly independent, reason – no one, including Vess, had ever reported any of those employees for using the N-word. Furthermore, the Fifth Circuit noted that Vess had failed to rebut the claim by MTD Consumer's personnel director, that he could not recall any occasion when an employee who was reported to have used the N-word, was not similarly terminated from employment.

Vess also argued that MTD Consumer Group used a double standard when applying its Non-Harassment Policy because Ewing had made a "nearly identical" racially derogatory comment when she stated: "he ain't no man. He's a white man. They ain't never made a good white man . . . ," but she was never punished by the company for making that comment. Once again, however,

the Fifth Circuit rejected the notion that Ewing's comments were "nearly identical" to the N-word. Although the Court of Appeals found that Ewing's "no good white men" comment was "more akin to an offensive utterance," it concluded that the N-word "is more than an offensive utterance. . . . No word in English language is as odious or loaded with as terrible a history." Based on these findings, the Fifth Circuit affirmed the District Court's award of summary judgment to MTD Consumer Group.

Does a governmental employer violate Title VII's prohibition against race-based discrimination in the workplace when it allowed its employees to discuss the Washington Redskins football team and display team paraphernalia in the workplace over the complaints of a Native American employee? That the was the question that the United States District Court for the District of Columbia addressed in *Tallbear v. Perry.*

The plaintiff, Jody Tallbear, is a Native American attorney who was hired to work at the Department of Energy ("DOE") in 2011. The crux of Tallbear's discrimination claim is that she was repeatedly exposed to the Washington Redskins' name and logo in the workplace. Tallbear considered the term "Redskins" to be a racial slur and she claimed to be deeply offended by the term's usage at her workplace in the DOE. In her complaint, Tallbear cited two specific instances of exposure to the Redskins. On the first occasion, she claimed a DOE leadership trainer wore a Redskins necktie and mentioned the Redskins during a presentation in February of 2012. On the second occasion, Tallbear claimed that a DOE attorney left a "Redskins Special" flyer from Subway Sandwich Shop on her desk in December of 2012. Tallbear also alleged that Native Americans were not included in the DOE's diversity training even though other racial groups were, and that DOE had not offered any cultural sensitivity training on "Native American issues." Tallbear further

claimed in her complaint that she had repeatedly notified DOE's leadership that she was deeply offended by the Redskins term and its widespread use in DOE's workplace.

In March of 2013, Tallbear issued a written memorandum to her boss, LaDora Harris, as well as two DOE Deputy Directors, complaining that DOE was fostering a hostile work environment that caused her anxiety and depression. Although this memorandum was forwarded to DOE's Office of the General Counsel, DOE's Office of General Counsel concluded that it had no legal basis to ban Redskins paraphernalia in the workplace; moreover, it did not advise providing sensitivity training on the issues Tallbear had raised. While the DOE's Office of General Counsel suggested that Tallbear could direct her concerns to the federal Office of Personnel Management ("OPM") and/or the EEOC, and she did so, neither the OPM nor the EEOC responded to her. When Tallbear wrote additional memoranda to the OPM in June of 2014, the OPM's Director of Diversity and Inclusion, in December of 2014, responded and told her that "there was no legal basis for banning Redskins paraphernalia" in Tallbear's workplace.

On January 5, 2017, Tallbear filed a Title VII lawsuit alleging racial discrimination against DOE in violation of Title VII. DOE moved to dismiss Plaintiff's suit for failing to state a claim upon which relief may be granted. In granting the DOE's motion, the District Court stated that the pleading threshold necessary to survive a motion to dismiss was relatively low, nevertheless, Tallbear's complaint failed to "meet that bar." Although the Court accepted at face value that Tallbear found the use of the term "Redskins" deeply offensive and hurtful, it noted that she presented no evidence that the term was ever used as an offensive racial slur. The Court noted that while it would be different if Tallbear's supervisors or coworkers were using the term "Redskin" to refer to her in a derogatory way, they were instead using that term to refer to a popular local professional football team. According to the Court, no reasonable person could conclude, based on

the facts alleged in her complaint, that this term was being used to disparage anyone. Likewise the Court found that no reasonable person would conclude that the DOE employees who either wore the Redskins necktie in the office meeting, or placed the "Redskins Special" Subway flyer on her desk, did so in order to harass or ridicule her for being Native American.

In *Payan v. United Parcel Service*, the United States Court of Appeals for the Tenth Circuit affirmed a determination by the United States District Court for the District of Utah that the plaintiff's employer had not subjected him to unlawful harassment in violation of Title VII because of his race. The plaintiff in this case was a Hispanic employee of United Parcel Service ("UPS") named Charles Payan. Payan's immediate supervisor, who is also Hispanic, was Charles Martinez. Payan filed suit against UPS in May of 2014. Among his other claims, Payan asserted that Martinez had subjected him to a racially hostile work environment in violation of Title VII because he (i.e., Payan) was Hispanic. In support of that claim, Payan asserted that Martinez had once called him "a kid who doesn't even speak Spanish," and that Martinez would frequently correct his pronunciation of Hispanic surnames. UPS filed a motion for summary judgment with respect to Payan's race-based hostile work environment claims, which the District Court granted. Shortly thereafter, Payan filed an appeal.

On appeal, the Tenth Circuit affirmed the District Court's award of summary judgment to UPS. With respect to Payan's Title VII race-based hostile work environment claims, the Court of Appeals noted that, as a preliminary matter, the fact that Martinez was also Hispanic did not mean that he could not harbor a discriminatory animus against Payan based on his race. Nevertheless, it noted that the record contained no evidence of such a racial animus held by Martinez toward Hispanics. Instead, the record indicated that Martinez was close friends with a subordinate UPS employee, Jorge Bertot, who was Cuban American. The Court noted that Martinez's relationship

with Bertot actually undercut Payan's claim that Martinez had harassed him because he is Hispanic. The Tenth Circuit further noted that Payan had failed to demonstrate that the harassment he allegedly endured from Martinez was either severe or pervasive. It concluded that Martinez's alleged comments of calling Payan a "little boy" and criticizing him for either his inability to speak Spanish, or his poor pronunciation of Hispanic surnames, while perhaps boorish, juvenile, or annoying behavior, was not sufficient for a reasonable jury to conclude that his workplace was permeated with discriminatory intimidation, ridicule, or insult. Consequently, it ruled that an abusive working environment did not exist.

In *Jefferson v. Sewon America, Inc.,* the Eleventh Circuit affirmed in part, and reversed in part, a District Court's award of summary judgment in favor of Sewon America, Inc. The plaintiff, Jerberee Jefferson, was hired by Sewon America, Inc. as a temporary clerk in the Finance Department. Shortly after being hired in June of 2013, Jefferson learned of a job opening in the Information Technology ("IT") Department. Without her supervisors' knowledge or permission, Jefferson approached the IT Department Manager, Gene Chung, and expressed interest in the position. Chung advised Jefferson that she was a hard worker and that he supported her transfer request. He informed her that the next steps in the transfer process were for her to take a test and to receive permission from Nate Jung, a high-level manager, to approve her transfer. Shortly thereafter, Chung administered a "basic knowledge" test on computers, which Jefferson admits she scored poorly on. Although Chung told her the transfer to the IT Department was not dependent on her test score, after the passage of a few weeks, the transfer did not materialize. On August 23, 2013, Chung met with Jefferson and advised her that she would not be transferred to the IT Department. When Jefferson asked Chung why she would not be transferred, Chung told her that the position required five years of experience and that "Jung said that he wanted a Korean in that

position." Although Jefferson complained about alleged racial discrimination to Sewon America, Inc.'s Human Resources Manager, Ken Horton, he told her "not to take it personally," and to "brush it off."

During this period of time, Jefferson, as a new employee, was still in a probationary status in her position as a clerk in the Finance Department. After both of her supervisors in the Finance Department gave her poor performance evaluation scores, Jefferson's employment was terminated. Jefferson's termination occurred only three weeks after Chung had advised her that she would not be transferred to the open IT Department position. After being terminated, Plaintiff brought suit against Sewon America, Inc. pursuant to Title VII, alleging race discrimination with respect to both her termination and the denial of her transfer. Sewon America, Inc. moved for summary judgment as to all of Jefferson's claims, which the District Court granted. Jefferson subsequently appealed.

The Eleventh Circuit affirmed the District Court's award of summary judgment in favor of Sewon America, Inc. with respect to Jefferson's Title VII race-based termination claim; however, it reversed the District Court's award of summary judgment regarding her race-based denial of transfer claims. The Court of Appeals observed that the District Court had incorrectly analyzed Jefferson's denial of transfer claim using the "burden shifting" circumstantial evidence model established by the Supreme Court in *McDonnell Douglas v. Green,* as opposed to the "direct-evidence" model of proof.[1] Although the Eleventh Circuit noted that Jefferson bore some of the blame for the District Court's use of the wrong model of proof – as she had repeatedly described her evidence as circumstantial, as opposed to direct evidence – it concluded that the statement: "Jung said that he wanted a Korean in that position . . . ," constituted direct evidence of racial animus. As a consequence, the Court found that a genuine issue of material fact regarding whether

[1] Direct evidence of discrimination, in contrast to circumstantial evidence, is evidence that is clear on its face and requires no inference or insinuation of discrimination.

the decision not to transfer Jefferson was based upon race existed, and therefore precluded an award of summary judgment.

In *Williams v. Wells Fargo Bank, N.A.*, the United States Court of Appeals for the Eighth Circuit was asked to determine if Wells Fargo's policy of terminating employees, and refusing to hire applicants who had screened positive for having prior convictions for crimes involving dishonesty, or breach of trust, had an unlawful disparate impact on African Americans and Latinos, in violation of Title VII.

A federal law frequently referred to as "Section 19" prohibits "any person who has been convicted of any criminal offense involving dishonesty or a breach of trust" from becoming or continuing as an employee of any institution insured by the Federal Deposit Insurance Corporation ("FDIC"). Notably, Section 19's employment prohibition does not consider the age of a conviction. As a result, whether an applicant or employee was convicted of a crime involving dishonesty 35 years ago, or 35 days ago, makes no difference; Section 19 mandates termination and/or denial of employment. Wells Fargo is an FDIC-insured bank. By law, persons who have been disqualified from employment under Section 19 can apply to the FDIC for waivers of their disqualifications. Furthermore, banks and other FDIC-insured institutions wishing to hire, or to continue to employ, disqualified employees and/or applicants, can choose to sponsor a disqualified employee's or applicant's waiver application. However, there is no legal requirement mandating that banks and other FDIC-insured entities must sponsor individuals' waiver applications. Significantly, Wells Fargo did not sponsor choose to sponsor such waiver applicants.

Starting in 2010, Wells Fargo instituted a fingerprint-based background check for its current and potential employees, which reports all criminal convictions, regardless of how long ago those convictions occurred. As a result of this background check, between December of 2011 and March

of 2013, Wells Fargo terminated at least 136 African American employees, 56 Latino employees and 28 white employees because of Section 19 disqualifications. Moreover, between February of 2013 and November of 2015, it withdrew at least 1,350 conditional job offers to African Americans and Latinos, compared to 354 conditional job offers to non-minorities that were withdrawn.

The plaintiffs in this case were 10 African Americans and Latinos who brought suit as a putative class. They claimed that Wells Fargo's policy of summarily terminating or withdrawing offers of employment to any individual based on a Section 19 disqualification constituted an unlawful disparate impact on African Americans and Latinos in violation of Title VII. When the District Court concluded that the plaintiffs had failed to establish a *prima facie* case, it awarded summary judgment in favor of Wells Fargo. The plaintiffs thereafter filed an appeal.

In considering this appeal, the Eighth Circuit agreed with the District Court that plaintiffs had failed to present a *prima facie* case of disparate impact. Although it acknowledged that the statistical evidence presented by the plaintiffs demonstrated that African American and Latino employees and applicants were either terminated or not hired at rates at least twice as high as those of non-minorities, it noted that Wells Fargo had uniformly applied Section 19 to all employees and applicants irrespective of their race. The Eighth Circuit further noted that even if the plaintiffs had established *prima facie* evidence of a disparate impact, Wells Fargo had easily established its burden of demonstrating that its Section 19 disqualification policy was job-related and consistent with business necessity. Specifically, the Court of Appeals noted that because noncompliance with Section 19 could result in daily fines of $1,000,000, Wells Fargo's policy of disqualifying applicants and employees from employment on the basis of whether its fingerprint-based background check yielded evidence of convictions for crimes involving dishonesty, or breaches of trust, "was a sound business decision." The Court further noted that "any bank or financial

institution wisely would prefer for its customers to be served by employees who were not previously persons convicted of crimes of dishonesty."

In a disparate impact case under Title VII, if an employer meets its burden of establishing that its workplace policy is job-related and consistent with business necessity, a plaintiff, to prevail, must demonstrate that other tests, devices, or methods would also serve the employer's legitimate business interests without imposing similarly undesirable racial effects. Although the plaintiffs argued that Wells Fargo could have adopted the alternative practice of "giving advanced notice of the need for a Section 19 waiver, granting leave time to seek a waiver, and/or sponsoring a waiver," the Court of Appeals found they presented insufficient statistical evidence to show that these alternative practices would have reduced the disparate impact on people of color. Accordingly, it affirmed the District Court's award of summary judgment in favor of Wells Fargo.

C. Sex Discrimination

1. Sexual Orientation and Gender Identity/Nonconformity

Sexual orientation and gender identity/nonconformity claims continue to be at the forefront of the Title VII cases garnering headlines. As mentioned above, the Supreme Court is currently considering granting certiorari review of three such cases. One of those cases is the United States Court of Appeals for the Eleventh Circuit's ruling in *Bostock v. Clayton County, Georgia.*

As far as Eleventh Circuit opinions go, there was nothing particularly remarkable about the Court of Appeals' ruling in *Bostock.* The plaintiff in that case, Gerald Lynn Bostock, had brought suit against his former employer, alleging sexual orientation and gender identity discrimination claims brought pursuant to Title VII. The defendant, the Board of County Commissioners for Clayton County, Georgia, filed a motion to dismiss Bostock's claims, arguing that Title VII did not encompass discrimination on the basis of either sexual orientation or gender identity. The United

States District Court for the Northern District of Georgia agreed with Board of County Commissioners and dismissed plaintiff's case in its entirety. Although Bostock appealed the dismissal of his Title VII sexual orientation claim, he did not appeal the dismissal of his gender identity discrimination claim.[2]

In denying plaintiff's Title VII sexual orientation claim, a panel of the Eleventh Circuit concluded that it was bound by its prior precedent rule, to affirm the ruling of the District Court, based on a prior panel decision by the former Fifth Circuit Court of Appeals, *Blum v. Gulf Oil Corp.,* which holds that discharging individuals for being homosexuals is not unlawful under Title VII. Pursuant to the Eleventh Circuit's "prior precedent rule," subsequent panels of the Court of Appeals are mandated to follow an earlier panel decision, regardless of whether those judges think that the prior panel decision is wrong, unless an intervening Supreme Court or an *en banc* decision of the Eleventh Circuit is issued. As the panel in *Bostock* explained in its decision, less than a year earlier, in *Evans v. Georgia Regional Hosp.,* another panel of the Eleventh Circuit, by a divided 2-1 vote, had denied a plaintiff's identical Title VII sexual orientation claim based on *Blum* and the prior precedent rule. Therefore, the panel determined that based on *Blum* and *Evans*, it was bound to reach the same result.

However, that was not the end of the case. After receiving the unfavorable panel decision, Bostock filed a petition for an *en banc* review by all of the judges sitting on the Eleventh Circuit. On July 18, 2018, the Eleventh Circuit, by a vote of 9-2, issued an order denying Bostock's request for an *en banc* review. Notably, two Eleventh Circuit judges dissented from the majority's order denying a rehearing *en banc.* One of those dissenting judges, the Honorable Robin Rosenbaum,

[2] The Eleventh Circuit noted that had plaintiff appealed the dismissal of his Title VII gender identity discrimination claim, he would have prevailed, as it has previously ruled in *Glenn v. Brumby,* that gender nonconformity is a form of unlawful sex discrimination protected by Title VII.

had been the dissenting judge in the 2-1 ruling in *Evans,* decided a year earlier. In what can best be described as a blistering dissent, Judge Rosenbaum took her judicial brethren to the proverbial woodshed for "cling[ing] to a 39 year old precedent, *Blum* . . . ," that she characterized as "conclusory as it gets" and which she noted was based on another decision, *Smith v. Liberty Mutual Ins. Co.,* that had been abrogated by both the Supreme Court's decision in *Price Waterhouse v. Hopkins,* and the Eleventh Circuit's decision in *Glenn v. Brumby*.

In her dissent, Judge Rosenbaum noted that in 2017, both the Second and Seventh Circuits, via the *en banc* hearing process, had overturned prior precedents similar to *Blum*, that had held that sexual orientation discrimination was not actionable under Title VII. Criticizing the majority for shirking its obligation "as a Court to at least subject the issue to the crucial 'crucible of adversarial testing . . . ,'" Judge Rosenbaum expressed both her disappointment and bewilderment with the majority's decision to deny Bostock's request for an *en banc* hearing, as follows: "I cannot explain why a majority of our Court is content to rely on the precedential equivalent of an Edsel without an engine, when it comes to an issue that affects so many people."

As mentioned above, although the Eleventh Circuit denied Bostock's request for an *en banc* review, Bostock petitioned the Supreme Court for certiorari review, which the Supreme Court recently granted, based on the split now existing between the Second and Seventh Circuits and the Eleventh Circuit on whether Title VII protects sexual orientation discrimination. It will be interesting to see how the Supreme Court rules in this case.

Another case that the Supreme Court has chosen to hear is *EEOC v. R.G & G.R. Harris Funeral Homes, Inc.* The plaintiff in this case is Aimee Stephens (formerly William Anthony Beasley Stephens). Stephens was born a male. While living and presenting as a man, Stephens worked at R.G. & G.R. Harris Funeral Homes, Inc., a privately held business that operates three

funeral homes in the state of Michigan. Stephens was terminated from her job as a funeral director when she advised the owner and operator of R.G. & G.R. Harris Funeral Homes, Inc., Thomas Rost, of her plan to transition from a male into a female, as well as her intention to dress as a woman while at work. Rost is a devout Christian who claims that he is in the funeral home business because God had called him to minister to the grieving. The website for R.G. & G.R. Harris Funeral Homes, Inc. states that its highest priority is honoring God in all that it does. Nevertheless, the business is not affiliated with a particular church, its articles of incorporation contain no statement of a religious purpose, it serves clients of all faiths or no faith at all, and people or employees of all faiths or no faith at all.

R.G. & G.R. Harris Funeral Homes, Inc. has a dress code policy that requires all "public-facing" male employees to wear suits and neckties, and all public-facing women to wear skirts and business jackets. It also provides its male employees, who interact with clients, with a clothing allowance; however, it provided no such clothing allowance to its similarly situated female employees until October 14, 2014, i.e., a point in time after the EEOC had filed suit against it in this case. According to Rost, the business would provide suits to all funeral directors irrespective of sex, but it had not had a female funeral director since his grandmother stepped down from that position around 1950. He further claimed that only one female funeral director had applied for a job with R.G. & G.R. Harris Funeral Homes, Inc. during the past 35 years and that she was not hired because she was not deemed qualified for the job.

On July 31, 2013, Stephens gave Rost a letter explaining that she had struggled with gender identity disorder her entire life and that she had "decided to become the person that [her] mind already is." Her letter to Rost explained that she intended to undergo sex reassignment surgery and that the first step in that process was to live and work full-time as a woman. Stephens explained

that when she returned from a vacation on August 26, 2013, she would refer to herself as Aimee and that she would dress as a woman. Shortly before she was scheduled to go on vacation, Rost informed Stephens that "this is not going to work out" and offered to pay her a severance if she would quietly resign. When Stephens refused to do so, Rost terminated her employment. Stephens thereafter filed a charge of discrimination with the EEOC alleging she had been terminated on the basis of gender identity. Stephens claimed that the only explanation she had been given for her termination was that "the public would [not] be accepting of [her] transition." On June 5, 2014, the EEOC issued a determination finding that reasonable cause existed to believe that R.G. & G.R. Harris Funeral Homes, Inc. had discharged Stephens due to her sex and gender identity, in violation of Title VII. Following failed conciliation efforts, the EEOC filed suit against R.G. & G.R. Harris Funeral Homes, Inc. on September 25, 2014.

Rost claimed that he sincerely believes that the Bible teaches that a person's sex was "an immutable God-given gift" and that he would be violating God's commands if he were to either permit one of his funeral directors to deny their sex while acting as a representative of his organization, or allow one his male funeral directors to wear the attire of a female funeral director while at work. Rost further claimed that paying for a male funeral director to wear the clothing of a female funeral director would render him complicit "in supporting the idea that sex is a changeable social construct rather than an immutable God-given gift." At the appropriate phase in the litigation, both parties filed motions for summary judgment.

Although the District Court concluded that there was direct evidence to support Stephens' claims of discrimination on the basis of sex, it also concluded that the Religious Freedom Restoration Act ("RFRA") precluded the EEOC from enforcing Title VII against R.G. & G.R. Harris Funeral Homes, Inc., as doing so would substantially burden Rost's religious exercise. It

further found that the EEOC had failed to demonstrate that enforcing Title VII was the least restrictive way to achieve its compelling interest "in ensuring that Stephens was not subject to gender stereotypes in the workplace in terms of required clothing at the Funeral Home." Specifically, the District Court concluded that the EEOC could have achieved its goals by proposing that R.G. & G.R. Harris Funeral Homes, Inc. impose a gender-neutral dress code. Additionally, it determined that it lacked jurisdiction to consider the EEOC's discriminatory clothing allowance claim because it found that claim had not been asserted in Stephens' EEOC charge, nor did it reasonably grow out of the claims contained in that charge. Accordingly, it granted summary judgment in favor of R.G. & G.R. Harris Funeral Homes, Inc. The EEOC appealed.

On appeal, the Sixth Circuit discussed the Supreme Court's ruling in *Price Waterhouse v. Hopkins,* concerning how "discrimination based on a failure to conform to stereotypical gender norms" was no less prohibited than discrimination based on "the biological differences between men and women." As a result, it found that Rost's decision to terminate Stephens based on the fact that he was no longer going to represent himself as a man and because he planned to present himself as a woman, fell "squarely within the ambit of sex-based discrimination" that the Supreme Court, in *Price Waterhouse*, intended to forbid. Accordingly, it agreed with the District Court that R.G. & G.R. Harris Funeral Homes, Inc. had discriminated against Stephens on the basis of sex, in violation of Title VII. However, the Sixth Circuit disagreed with the District Court's finding that Title VII's proscriptions against sex discrimination substantially burdened Rost's religious exercise.

For example, the Court of Appeals noted that the funeral home failed to demonstrate that allowing Stephens to dress as a woman would create a distraction that would obstruct its ability to minister to grieving families. According to the Court, R.G. & G.R. Harris Funeral Homes, Inc. had

premised its claim in this regard on "presumed biases" that were unsupported by any facts. The Sixth Circuit then ruled, "as a matter of law, that a religious claimant cannot rely on customer's presumed biases to establish a substantial burden under the RFRA."

The Court of Appeals further found that R.G. & G.R. Harris Funeral Homes, Inc. had failed to establish that the EEOC's action in forcing Rost to purchase female attire for Stephens, or allowing her to dress in female attire while representing his business, forced Rost to choose between violating federal law and violating his religious beliefs. According to the Court, neither of those choices constituted a substantial burden under the RFRA. First, the Court noted that although Rost was providing a clothing allowance for the funeral home's public-facing employees, his decision to do so did not substantially burden the RFRA because the clothing allowance was not a benefit that Rost was required to provide, either by law, or as a result of his own religious beliefs. Second, the Court further noted that even if permitting Stephens to wear female attire in the workplace was at odds with Rost's religious beliefs, doing so was not a substantial burden under the RFRA, because "tolerating Stephens' understanding of her sex and gender identity is not tantamount to supporting it." As a consequence, the Sixth Circuit reversed the District Court and awarded summary judgment to the EEOC on its unlawful termination claims.

2. Sexual Harassment

The United States District Court for the Northern District of Alabama's decision in *Whitt v. Berckman's Foods, Inc.,* is a case that just as easily could have been included in the preceding category concerning discrimination based on sexual orientation and gender discrimination. The plaintiff, Adrian Whitt, is a lesbian female. The defendant, Berckman's Foods, Inc., is a McDonald's franchisee that owns and operates two McDonald's restaurants. The sole owner of Berckman's Foods, Inc. is an individual named Alain Nikoudou. Whitt first began working for

Berckman's Foods, Inc. as a shift manager at its restaurant in Bessemer, Alabama, on March 31, 2013; however, she resigned on October 13, 2013. Whitt was later rehired by Berckman's Foods, Inc. to work at its other restaurant in Brighton, Alabama in December of 2014. As an employee of the McDonald's restaurant located in Brighton, Whitt reported directly to the manager of that location, Dena Pass.

Whitt claims that as soon as she started working at the Brighton McDonald's restaurant, Pass began subjecting her to sexually harassing behavior and told her "I don't like people like you." Whitt further alleged that Pass knew she was a lesbian. After the first week, Pass also made comments to Whitt about being "too aggressive" and "talking like a man." On one occasion when Whitt, Nikoudou and Pass were seated at one of the restaurant's dining tables, Pass told Whitt, "I barely talk to you because I don't deal with people like you." When Whitt asked Pass if she was referring to people who were gay, Pass nodded her head affirmatively. Although Nikoudou tried to comfort Whitt by stating "I don't judge people," he then asked Whitt how she could have children if she was gay. After that incident, Whitt claims that Pass's comments about her sexual identity increased and that Pass would often make comments in front of customers. Whitt alleges that on one occasion, Pass told a male customer, in reference to her, that "he was barking up the wrong tree with that one." Whitt claimed Pass also told her that she should "act more ladylike because she scared people," "walk more femininely," "talk more femininely," "date men," as well as "wear makeup" and "look cute." Although Whitt alleges that she told Nikoudou, as well as Monique Taylor, the manager of the Bessemer McDonald's restaurant, that she was being sexually harassed and subjected to a hostile work environment by Pass, the harassment persisted. Although Whitt claimed that Taylor had spoken to Pass, and that as a result, the harassment stopped for one day,

she said that the harassment from Pass resumed on the following day. Notably, both Nikoudou and Taylor deny Whitt ever complained to them about sexual harassment.

On July 31, 2015, Nikoudou terminated Whitt for stealing money from the deposits during the time she had worked at the Bessemer McDonald's restaurant. According to Nikoudou, Whitt had bragged to other employees in the Brighton McDonald's restaurant about stealing money from the other McDonald's restaurant in Bessemer when she had previously managed that store. Nikoudou conducted an investigation into the theft and offered Whitt an opportunity to respond to the allegations, which she accepted. Whitt denied stealing any money. After completing his investigation, Nikoudou concluded that despite her claims to the contrary, Whitt had stolen the money, and he terminated her employment. Whitt then filed a charge of discrimination with the EEOC wherein she alleged that she had been "terminated because of a 'perceived failure to conform to a gender role.'" After the EEOC dismissed her charge, Whitt filed a lawsuit against Berckman's Foods, Inc. on July 28, 2016. At the appropriate phase in that litigation, Berckman's Foods, Inc. filed a motion for summary judgment.

As explained above, the Eleventh Circuit currently does not recognize discrimination based on sexual orientation as being actionable under Title VII, but it does recognize claims of gender identity and gender nonconformity discrimination as being actionable under Title VII. In keeping with Eleventh Circuit precedent, the District Court concluded that although Whitt could not pursue Title VII claims of sexual orientation discrimination and harassment, she could pursue claims of sex discrimination and harassment predicated on her gender identity and/or nonconformity. In analyzing Whitt's harassment claims, the District Court noted that although the plaintiff may have demonstrated that Pass's numerous statements concerning her gender identity and nonconformity were "pervasive," it did not find that those comments were objectively severe enough to alter the

terms and conditions of her employment. Furthermore, the Court stated that even if Whitt had presented sufficient evidence to demonstrate that Pass's comments were "severe or pervasive," she had not presented evidence that the cumulative effect of Pass's conducted had "unreasonably interfered with [her] job performance." Accordingly, it granted summary judgment to Berckman's Foods, Inc. on Whitt's sex harassment claims.

The District Court also awarded summary judgment to Berckman's Foods, Inc. regarding Whitt's discriminatory discharge claims under Title VII, as it concluded that the defendant had presented a legitimate business reason for terminating her employment, i.e., its belief that Whitt had stolen money from it, which Whitt failed to demonstrate was a pretext for unlawful gender identity discrimination.

In *Hughes v. Twenty-First Century Fox, Inc.,* the United States District Court for the Southern District of New York addressed the question of whether a guest television contributor named Scottie Nell Hughes, could maintain Title VII claims of sexual harassment against Twenty-First Century Fox, Inc., Fox News Network, LLC, as well as Fox News anchor and contributor, Charles Payne. According to Hughes' civil complaint, she first met Payne in the spring of 2013, when she was invited to appear on Payne's news program and provide commentary as a conservative political strategist and pundit. Shortly thereafter, in the summer of 2013, Hughes and Payne met again and shared a taxi ride. According to Hughes, during the taxi ride, Payne cajoled her into giving him her hotel room information and persuaded her to meet with him in her hotel room later that night in order to discuss work and career opportunities for Hughes. Hughes claims that when Payne visited her hotel room later that evening, he sexually assaulted and raped her.

Hughes claims she did not report the rape to the police, or anyone else, because she was traumatized by the event. However, as a result of that sexual encounter, invitations to appear on

both Payne's news program, as well as other Fox programs soon began to flood in. Although Hughes never received a salary, an hourly wage, or any form of remuneration for her appearances on these programs, she was led to believe that Fox was considering her for a full-time contributor position with the Network. According to Hughes, even though she was never compensated for her appearances, Payne and Fox had almost complete dominion over her, including the programs she could appear on and those she could not. She further stated that Payne made it clear to her that her continued appearances on both his program and other Fox programs was dependent on her participation in an ongoing sexual relationship with him. Although Hughes acquiesced and participated in a sexual relationship with Payne for over a year, she ultimately terminated her relationship with him in June of 2015. Hughes claims that neither Payne nor the Fox News Network were pleased with her decision to end the relationship. Hughes claims that as a result of her ending that relationship Payne and Fox News blacklisted her within the industry. She claims that they further leaked the story of the affair to the National Enquirer, along with selected e-mails between Hughes and Payne, to create the false narrative that the sexual relationship between them was not only uncoerced, but welcomed by Hughes.

Shortly after Hughes filed her civil complaint, the defendants moved to dismiss the same for failing to state a claim upon which relief may be granted. Specifically, the defendants argued that they could not be held liable for sexual harassment under either Title VII, or New York state law, because Hughes was never employed by any of the defendants. The District Court noted that a two-part test existed for determining if someone was an "employee" for purposes of Title VII. First the person must demonstrate that he or she was hired by the putative employer. In order to satisfy the first part of this two-part test, the District Court noted that Hughes had to demonstrate that she had received remuneration for her work. Although Hughes readily conceded that she never

received a salary, or any other form of monetary payment for her program appearances, she claims that Fox paid for her travel to and from its Manhattan headquarters, and that it paid the cost of her hair and makeup for appearances on the program, "Making Money." According to the Court, however, in the absence of either a salary, or some other form of monetary remuneration, those benefits fell short of the "minimum level of significance or substantiality" required to establish employment status under Title VII. Accordingly, it determined Hughes was not an employee and it dismissed her Title VII claims of sexual harassment.

3. Pregnancy Discrimination

Although Title VII's protections did not originally extend to pregnancy when it was passed by Congress in 1964, the law was amended in 1978 via the passage of the Pregnancy Discrimination Act ("PDA"), to prohibit discrimination on the basis of pregnancy, childbirth, or related medical conditions.

In *Dejesus v. Florida Central Credit Union,* the United States District Court for the Middle District of Florida was required to decide whether the plaintiff, Elena DeJesus, had stated a claim for pregnancy discrimination under the PDA sufficient to withstand a motion to dismiss. DeJesus was employed as a teller by the Florida Central Credit Union ("FCCU") at its St. Petersburg, Florida Branch. On November 1, 2016, just one day after requesting and receiving a transfer to FCCU's Clearwater, Florida Branch, DeJesus discovered that she was pregnant. DeJesus immediately notified her supervisor at FCCU's Clearwater branch, Julie Irizarry. Not wanting to have a child, DeJesus scheduled an appointment on November 10, 2016, to terminate her pregnancy. Because she needed to take time off from work to undergo this medical procedure, DeJesus informed Irizarry that she needed the day off from work to undergo a medical procedure. Irizarry then approved DeJesus's request for time off. As a result, DeJesus underwent the procedure as scheduled and did not come into work on that date.

On November 16, 2016, Irizarry and another supervisor from FCCU's Tampa Branch, conducted a two week performance evaluation on DeJesus. The evaluation was favorable and the FCCU supervisors who rated her noted that DeJesus had not been subjected to disciplinary action. However, shortly thereafter, the branch manager of the Clearwater Branch of FCCU, Minerva Villanueva, called DeJesus into her office and terminated her due to her absence from work, even though that absence had been approved by Irizarry. Shortly thereafter, DeJesus filed a lawsuit which FCCU moved to dismiss.

As grounds for its motion to dismiss, FCCU claimed that DeJesus had not sufficiently pled a claim for discrimination under the PDA because she had not alleged the elements of a *prima facie* case of pregnancy discrimination in her civil complaint. FCCU acknowledged that Title VII, as amended by the PDA, protects women from discrimination based on their choice to have an abortion. Nevertheless, it argued that Title VII did not require FCCU to provide preferential treatment to pregnant employees; it only required it to treat pregnant employees the same as similarly situated non-pregnant employees. FCCU then argued because DeJesus had not pled in her complaint that she had been treated any differently than other similarly situated non-pregnant employees, she had failed to plead a *prima facie* case of pregnancy discrimination.

In denying FCCU's motion to dismiss, the District Court ruled that within the Eleventh Circuit, it was well established that a claimant need not plead a *prima facie* case in order to survive a motion to dismiss; instead, she need only plead sufficient factual allegations to present a plausible claim of discrimination. The Court then stated that DeJesus's complaint, as pled, contained sufficiently plausible facts to support a Title VII claim for pregnancy discrimination.

Sometimes an employer's inconsistent reasons for taking disciplinary action can create a triable issue of fact. That was the circumstance in *Gorman v. Andy Mohr Avon Nissan, Inc.* The

plaintiff in that case was Amanda Gorman. Although she had no experience selling automotive parts, in April of 2012, Gorman applied for, and received a position at Andy Mohr Avon Nissan, Inc., as a parts counter sales representative at one of its automobile dealerships. Gorman performed well in this position and was quickly promoted to the newly created position of parts manager. According to Andy Mohr Nissan, Inc., in late August or early September of 2015, it began receiving complaints about Gorman regarding her performance in that new position. Employees in the parts department complained that Gorman exhibited favoritism and gave special treatment to certain employees. Although Andy Mohr Nissan, Inc. did not discipline Gorman regarding these complaints, or even document them, it began considering whether to restructure its parts department to operate without a parts manager. Even though such restructuring was discussed at that time, no immediate action was taken to restructure the department.

On August 31, 2015, Gorman was involved in an automobile accident and was unable to come to work for several days. During her absence, Andy Mohr Nissan, Inc. hired Monty Havins as a parts counter representative. Havins had prior work experience in that position and was familiar with the Nissan brand. Because Gorman was at home convalescing at the time, Andy Mohr Nissan, Inc. did not consult her regarding its hiring of Havins. Andy Mohr Nissan, Inc. claims that when Gorman returned to work, she did not want to work with Havins and appeared threatened or jealous of his experience. Evidently, Havins did not enjoy working with Gorman either. In late September of 2015, after only a month of employment, Havins walked off the job after Gorman had allegedly left him in charge of the parts department by himself for a period of three consecutive days. Even though he had walked off the job and had no plans or returning, Havins telephoned the dealership's service department director, Matt Pope to explain why he had quit. During the course of this call, Pope convinced Havins to come back to work for the dealership,

When Pope received Havins' telephone call, he was at a business lunch with the dealership's general manager, Benjamin Mendoza. Pope and Mendoza discussed the situation and ultimately made the decision to eliminate the parts department manager position held by Gorman, and have Pope assume the duties of supervising both the parts and service departments. On October 1, 2015, Mendoza informed Gorman that she was being terminated due to the fact that her position as parts manager was being eliminated. At that time, Mendoza had recently learned from other employees at the dealership that Gorman was pregnant. During the termination meeting, Gorman asked Mendoza if she was being fired due to the fact that she was pregnant and Mendoza denied that was the reason.

For a few weeks after Gorman's termination, Pope managed both the service department and the parts department at the dealership. However, Pope ultimately approached Mendoza and informed him he no longer wished to manage the parts department. As a result, in November of 2015, Havins was promoted to the position of parts manager at Andy Mohr Nissan, Inc.

After filing a charge of discrimination with the EEOC, and then receiving a right-to-sue notice, Gorman filed suit on September 20, 2016, alleging that she had been terminated on the basis of her sex and pregnancy in violation of Title VII. During the course of the litigation, Andy Mohr Nissan, Inc. presented evidence of performance problems that it had never either brought to Gorman's attention, or documented. Andy Mohr Nissan, Inc. also claimed that it had promoted Havins to the part department manager position because he was more qualified than Gorman.

At the appropriate phase in the litigation, Andy Mohr Nissan, Inc. moved for summary judgment, however, the District Court denied that motion. According to the Court, not only had Gorman established a *prima facie* case of pregnancy discrimination, she had demonstrated that the timing of her termination, i.e., only days after she announced that she was pregnant, was

"suspicious." Although the District Court concluded that Andy Mohr Nissan, Inc. had proffered legitimate business reasons for its determination to terminate Gorman, it found that Gorman had also adduced evidence that its reasons were a pretext for unlawful discrimination. More specifically, the Court noted that Andy Mohr Nissan, Inc. had told Gorman that she was being terminated because her position was being eliminated, yet only a few weeks later, it promoted Havins, a male into that position.

D. National Origin Discrimination

In *El-Saba v. University of South Alabama,* the plaintiff, Aed El-Saba, was an American citizen who was born in Lebanon. El-Saba was employed at the University of South Alabama as a tenured associate professor in its Electrical and Computer Department. In that capacity, he reported to the dean of the University's Department of Engineering, John Steadman. Even though Steadman recommended El-Saba for raises each year and recommended him for tenure and promotion to the rank of associate professor, El-Saba began to believe that American-born professors in his department were being paid more than foreign-born professors. He further believed that Steadman was the person causing that salary disparity to occur. Accordingly, in May of 2007, at a faculty meeting, El-Saba passed out a chart and alleged that native-born, native-English speaking professors received greater raises than foreign-born professors. Although Steadman was not at this faculty meeting, the chairman of the Department of Engineering, Mohammed Alam, was present and he both showed Steadman El-Saba's chart and informed him of El-Saba's accusations. Later that year, Steadman attended at least two faculty meetings. At one of those meetings, Steadman was confronted about the pay discrepancies El-Saba had raised at the May 2007 faculty meeting; however, Steadman responded by saying that he strictly followed the University's rules for recommending pay increases. At the second faculty meeting, Steadman allegedly told the faculty

that he wanted to change the demographics of the Engineering Department and that he preferred to hire more native-born natural English-speakers. In response to these alleged remarks, El-Saba accused Steadman of discrimination at departmental meetings throughout 2008. Although Steadman was not present at those meetings, he subsequently became aware of El-Saba's accusations.

Thereafter, a couple of additional incidents occurred which caused El-Saba to believe that Steadman harbored a discriminatory animus. El-Saba requested to take the entire fall 2008 semester off as a medical leave of absence due to series of dental surgeries he had scheduled; however, after he met with Steadman, Alam and other representatives from the University, his medical leave of absence was limited to August 29 through October 21, 2008. In 2010, El-Saba was the sole nominee for the Engineering Department's Excellence in Research Award, but the award committee – of which Steadman was not a member and over which Steadman had no influence – decided not to issue an award based on its conclusion that the quality of the research exhibited by the nominees as a whole was not at a level warranting recognition. El-Saba believed that Steadman was responsible for the cancellation of this award and he accused Steadman of cancelling the award in order to punish him for his previous complaints of discrimination. According to Alam, Steadman told him that it seemed like El-Saba was unhappy at the University and that he (i.e., Steadman) hoped El-Saba would find a position elsewhere and leave. El-Saba claims that Alam told him that Steadman had said that he would make it tough on El-Saba and that he would force him to resign.

During his final two years at the University, from the fall semester of 2011 until after the spring semester in 2013, El-Saba was on an almost continuous leave of absence for medical conditions related to his wife's need for chemotherapy treatments, and/or for his own need to recuperate from a heart attack he had suffered. Steadman had recommended the approval of these

leaves of absence to his superior, Dr. David Johnson, the University's Senior Vice President for Academic Affairs, and Johnson approved those leaves of absence. In July of 2013, El-Saba suffered another heart attack while overseas. He requested an additional one year unpaid medical leave of absence; however, Steadman sent him an e-mail stating that due to staffing needs, he could not approve such a lengthy leave request. Steadman asked El-Saba to let him know by August 5, 2013, whether or not he would be able to work on August 15, 2013, for the beginning of the fall semester.

On August 5, 2013, El-Saba e-mailed Steadman informing him that he would not be able to return to work before November 11, 2013. As Steadman was out of the office between the dates of August 3 and 13, 3013, Johnson responded to El-Saba's e-mail. Johnson advised El-Saba that due to staffing needs, the University could not grant his request for a one-year medical leave of absence. Johnson further informed El-Saba that in order for the University to consider granting him a medical leave of absence for only the fall semester, he needed to provide a statement from his physician by August 12, 2013, stating that he would be capable of returning to work on January 2, 2014. On August 13, 2013, El-Saba sent Johnson an e-mail with an attached "Sick Leave Certificate" stating that he would be fit to work on January 2, 2014. El-Saba's e-mail further stated that a more detailed medical report would soon follow. On August 15, 2013 – i.e., the date the fall semester began – El-Saba sent Steadman a more detailed medical report that indicated that he was presently "fit to resume his routine work." Steadman showed this more detailed medical report to Johnson. After discussing the matter with Steadman, Johnson made the decision that El-Saba's medical leave request was unnecessary and that he had abandoned his job by not returning to work on August 15, 2013, for the beginning of the fall semester. Accordingly, Johnson terminated El-Saba's employment. Notably, at the time he terminated El-Saba's employment, Johnson had no knowledge that El-Saba previously had accused Steadman of discrimination.

El-Saba thereafter filed a civil action against the University in the United States District Court for the Southern District of Alabama alleging national origin discrimination and unlawful retaliation in violation of Title VII. After the parties conducted extensive discovery, the University moved for summary judgment. Regarding El-Saba's discrimination claim, the District Court acknowledged that there was evidence in the record that Steadman had allegedly said that he wanted to hire more native-born applicants. Nevertheless, it concluded that Johnson was the undisputed decision-maker as to El-Saba's termination and that El-Saba had failed to present any evidence that Johnson had any discriminatory intent, or that his decision was motivated by any discriminatory animus. The District Court further found that the University had proffered a legitimate, nondiscriminatory reason for El-Saba's termination – i.e., that El-Saba had failed to report to work despite his medical leave request being denied as medically unnecessary – and that El Saba had failed to show that this reason was pretextual. As to El-Saba's Title VII retaliation claims, the District Court concluded that he had demonstrated that he had engaged in protected activity by making complaints between 2007 and 2011, and that he had suffered adverse action as a result of being terminated; however, it concluded that he failed to show that but for his engaging in protected activity, he would not have been fired. According to the District Court, the protected activities El-Saba had engaged in from 2007 to 2011, were too remote in time to establish that they were the reason for his termination in the fall of 2013. Accordingly, the District Court granted the University's motion for summary judgment. El-Saba appealed.

On appeal, the Eleventh Circuit affirmed the District Court's award of summary judgment. It concluded that the University offered ample evidence that its decision to terminate El-Saba was made because he failed to return to work after his medical leave request, which was unsupported by evidence of medical need. El-Saba had not rebutted the University's legitimate,

nondiscriminatory business reason for terminating his employment by showing that reason was a pretext for unlawful national origin discrimination, nor had he provided a "convincing mosaic" of circumstantial evidence to allow a jury to infer intentional discrimination. The Court of Appeals further agreed that the temporal distance between the occurrence of El-Saba's protected activity and his termination was too remote to create any causal relationship sufficient to salvage his Title VII retaliation claims. Although El-Saba petitioned the Supreme Court for certiorari review of his claims, that petition was denied on January 22, 2019.

Rarely do claims of employment discrimination involve "black and white issues." However, in the case of *State of Illinois v. Xing Ying Employment Agency*, the issue of whether the defendants had violated Title VII's prohibition against national origin discrimination literally involved a black and white print advertisement. The plaintiffs in this case were the State of Illinois, the Illinois Department of Labor, and Illinois' Attorney General, Lisa Madigan. The defendants were the Xing Ying Employment Agency, an unlicensed employment agency in Chicago, Illinois, and its owners, Zhu Ying Zhang and Jun Jin Cheung.

Xing Ying Employment Agency finds jobs for workers, and then refers and places workers into those jobs, in return for a commission. One of the ways Xing Ying Employment Agency places workers with prospective employers is by advertising in a Chinese-language newspaper called the World Journal. The World Journal is distributed in downtown Chicago, as well as in the surrounding suburbs. From April 12, 2011 until October 31, 2015, Xing Ying Employment Agency ran an advertisement in the World Journal that stated the following:

Chicago Xingying
Employment Agency
Please contact Ms. Zhang
Tel: 312-791-1558
312-791-1503
Cell: 312-927-9958

Lots of Mexicans
Honest and sincere
(provide the best Mexicans)

When the plaintiffs discovered this advertisement, they brought suit against the defendants alleging that they had engaged in discriminatory and abusive treatment of Hispanic employees in violation of Title VII.

Title VII contains a little used provision pertaining to employment agencies, codified as 42 U.S.C. § 2000e-3(b). This provision prohibits employment agencies from causing to be printed or published:

> Any notice or advertisement . . . relating to any classification or referral for employment by such an employment agency . . . indicating any preference, limitation, specification, or discrimination, based on race, color, religion, sex, or discrimination based on religion, sex, or national origin when religion, sex, or national origin is a bona fide occupational qualification for employment.

The plaintiffs moved for summary judgment arguing that the defendants' advertisement violated the plain language of 42 U.S.C. § 2000e-3(b) because it indicated a "specification" based on national origin when it promoted Mexicans for hire. The plaintiffs argued that by identifying its available workforce as Mexicans for hire, the defendants violated Title VII by indicating a prohibited specification on the basis of national origin. The defendants, on the other hand, argued that 42 U.S.C. § 2000e-3(b) "should not be construed as a sweeping declaration that outlaws any mention of race [or national origin]," because only advertisements that mentioned Mexicans in a derogatory or disparaging way violated Title VII, and that their advertisement did not do that.

The District Court disagreed with the defendants, and in granting the plaintiffs' motion for summary judgment against Xing Ying Employment Agency, the Court noted that 42 U.S.C. § 2000e-3(b) clearly prohibits any referral for employment indicating any "preference, limitation,

specification, or discrimination" based on national origin. According to the Court, if Congress had intended to outlaw the mention of national origin in advertisements only when it was plainly discriminatory, it could have done so by merely prohibiting "discrimination" based on national origin in that portion of Title VII. The Court concluded that because Congress had included the terms "preference, limitation, [and] specification," in addition to "discrimination" within the text of 42 U.S.C. § 2000e-3(b), it had clearly intended to prohibit the printing and/or publishing of any material indicating a specification of national origin. Since neither party disputed that the advertisement in question contained a specification based on Mexican national origin, the Court concluded Xing Ying Employment Agency had violated Title VII.

Although the District Court granted summary judgment in favor of the plaintiffs against Xing Ying Employment Agency, it denied the plaintiffs' motion for summary judgment against Zhang and Cheung. According to the Court, the plaintiffs had not argued in their pleadings that Zhang and Cheung, in their individual capacities, were employment agencies for purposes of Title VII. Nor, for that matter, did the plaintiffs demonstrate that Zhang and Chueng, as individuals, had caused the advertisement in question to be published.

Rajko Dugandzic, the plaintiff in *Dugandzic v. Nike, Inc.,* worked for Nike, Inc. as an "athlete" from 2004, until his termination from employment on July 1, 2015. In that capacity, he was responsible for identifying mismatched shoes and placing them in the correct box with a newly printed label. In September of 2014, Dugandzic requested a transfer from Nike's Vineville Factory Store to its International Factory Store. Tom Sweeney, the Senior Head Coach for Nike's International Factory Store, examined both Dugandzic's transfer request and his performance activity record Sweeney noted that during the decade he worked for Nike, Inc., Dugandzic had received "coaching" with respect to his violation of Nike's "Matter of Respect Policy," and in 2014,

he had received a performance review indicating that he did not "accept feedback well." Nevertheless Sweeeney approved the transfer request and Dugandzic began working at Nike's International Factory Store in October of 2014.

Within weeks thereafter, another employee, Amber Mayne, transferred to the Nike International Factory Store. Mayne worked as a "specialist" for Nike. Additionally, she sometimes performed the duties of "team captain," which required her to ensure that the athletes, including Dugandzic, remained in their assigned areas during working hours. Dugandzic is Croatian and has a thick Croatian accent. Beginning in December of 2014, Dugandzic made a series of complaints to Nike's employee hotline complaining that Mayne was mocking him and mimicking his accent. Dugandzic claimed that Mayne had done this on 10 to 15 occasions and that she would "follow [him] the restroom . . . , to the lunch room, to the breakroom, and on the floor." On March 14, 2015, Dugandzic met with Sweeney, as well as Eric Lugo, the Head Coach of Nike's International Factory Store, and complained to them that Mayne had followed him to the bathroom and had laughed in his face in the breakroom on that date. Although Sweeney and Lugo reviewed video footage of the breakroom and observed Dugandzic walk into the bathroom, they did not witness Mayne either follow Dugandzic to the bathroom, or laugh in his face. Three days later, on March 17, 2015, Dugandzic telephoned Nike's employee relationship representative and complained that Mayne was both following him to the restroom and refusing to greet him while at work. He also accused Mayne of trying to "assert her authority over him" because she was a new employee.

On March 18, 2015, Sweeney and Lugo met with Mayne to question her about Dugandzic's allegations. Mayne denied that she was following him to the bathroom and/or making fun of him. She further stated that she usually greeted Dugandzic, but she did not do so every time she saw him. After meeting with Mayne, Sweeney and Lugo met with Dugandzic. Dugandzic insisted that

Mayne was impersonating his voice and following him to the bathroom. As a consequence, even though he could find no evidence that Mayne was doing any of the things Dugandzic claimed, Sweeney transferred Dugandzic away from Mayne in order to minimize contact between them. Unfortunately, that did not work.

On June 9, 2015, Dugandzic contacted the employee hotline and complained that Mayne was regularly checking on his whereabouts over the Store radio. He further alleged that while he was in the Store's breakroom, Mayne blew air in his face and said "boo." Dugandzic claimed this event was witnessed by seven or eight employees in the breakroom, as well as recorded on the breakroom camera. On June 11, 2015, Sweeney and Lugo again met with Dugandzic to discuss his allegations. During this meeting, he told them that Mayne hated him because he is a male and she is "a lesbian." He also called her a "racist white girl." Although Sweeney asked Dugandzic to identify the people in the breakroom who witnessed the events he reported, Dugandzic was unable to provide him with any names. After meeting with Dugandzic, Sweeney and Lugo reviewed the video footage of the breakroom; however, the video revealed that Mayne never came close to Dugandzic in the break room. That same day, Sweeney and Lugo met with Mayne and asked her about Dugandzic's latest allegations. Although she admitted to asking for Dugandzic over the Store radio on June 9, 2015, she claimed she did so as part of her job duties as a team captain, as Dugandzic was not in zone. She further denied treating Dugandzic differently than any other employee.

On June 13, 2015, Sweeney notified Dugandzic that he was being suspended. Sweeney based his decision to suspend Dugandzic on his statements about Mayne being a lesbian and a racist, as well as his false allegations concerning Mayne. Sweeney recommended terminating Dugandzic. On July 1, 2015, after reviewing Sweeney's recommendation, Nike terminated Dugandzic's

employment. Dugandzic then filed a charge of discrimination with the EEOC alleging national origin discrimination. After receiving a right-to-sue notice from the EEOC, Dugandzic filed a Title VII lawsuit asserting that Nike had unlawfully harassed him by subjecting him to a hostile work environment based upon his "European-Croatian national origin."

Nike subsequently filed a motion for summary judgment as to Dugandzic's national origin harassment claim, which the United States District Court for the Middle District of Florida granted. According to the Court, most of the alleged harassing activity, i.e., following him the bathroom, laughing and/or blowing air in his face, saying "boo" to him, and/or calling him on the Store radio had nothing to do with his national origin. Furthermore, with respect to the 10 to 15 times Dugandzic claimed Mayne mimicked or mocked his accent – which were uncorroborated by any witness – the Court noted that such acts, even if thy occurred, were not sufficiently severe or pervasive enough to create a hostile work environment.

E. Religious Discrimination

In *Queen v. City of Bowling Green*, the United States District Court for the Western District of Kentucky ruled that a city firefighter, who claimed he was an atheist, had pled sufficient facts to survive the City's motion for summary judgment. The plaintiff, Jeffrey Queen, claims that during his employment as a firefighter, he was constantly subjected to a hostile work environment based on his religious beliefs. While undergoing training to become a firefighter, Queen alleged that the Assistant Fire Chief of Training Simpson referred to non-Christians as "pagans," and that other firefighters asked him to which church he belonged. After his training concluded, Queen alleged that Fire Chief Colson told him that "he needed to join a church" and that he "needed to get right with Jesus," and that other firefighters asked him if he was "saved." Queen also claimed that Captain Barnard had stated that atheists "needed to burn," while Chief Frye had said "I'll be damned

if I work with atheists," and that he was "sure as hell glad none of those f@ckers work here." Queen alleged that he was forced to participate in a bible study during dinners at the fire station, and that when he finally acknowledged he was an atheist, another firefighter had threatened to "burn his house down." Ultimately, Queen resigned from employment. He thereafter filed suit alleging religious discrimination pursuant to Title VII.

The City denied Queen's claim and moved for summary judgment. The City first argued that it could not have discriminated against Queen on the basis of his religion, or lack thereof, because no one at the fire station was aware that Queen was an atheist. However, because Queen had claimed he had divulged the fact he was an atheist to his coworkers, the Court found that a genuine issue of disputed material fact existed concerning whether the City was aware of his religious views. The City also argued that any statements made to Queen about his religious views amounted to nothing more than "jokes, pranks, and teasing," which are all part of the "fraternal environment at the Fire Department." However, the Court rejected that argument because, at the summary judgment phase, it was required to accept the facts in a light most favorable to Queen. Accordingly, it denied the City's motion for summary judgment.

Similarly, in *Cooper v. City of St. Louis*, the United States District Court for the Eastern District of Missouri denied the City of St. Louis's motion for summary judgment in a Title VII religious harassment lawsuit brought by an employee named Rodney Cooper. Cooper is Christian who works for the City as a utility worker in its public parks system. Cooper's second level supervisor at the time of the events giving rise to this lawsuit was an individual named Roger Berry. Cooper claims that in 2013, he experienced a religious conversion and from that point forward, he frequently talked about religion with coworkers in the workplace. Plaintiff claimed Berry would tell him to "shut up" almost every day and that Berry threatened to fire him if Cooper "didn't stop

talking about God." Cooper's latter claim was corroborated by a coworker who claimed that "Berry literally told Rodney Cooper that if he didn't stop praying he would get fired on the spot." Although Berry denied threatening to fire Cooper for praying, he did admit to calling Cooper "Reverend Rodney" on several occasions. Other employees claimed that Berry would frequently call Cooper "preacher man."

When Cooper filed a Title VII lawsuit asserting a religiously hostile work environment claim against the City, the City moved for summary judgment and argued that the alleged harassment was not sufficiently severe or pervasive as a matter of law. As set forth above, however, the District Court disagreed. The Court concluded that Plaintiff had pled sufficient facts "to support a finding of intimidation that is sufficiently 'severe' and 'pervasive' to alter the terms and conditions of [Cooper's] employment."

VIII. IMPORTANT AND INTERESTING AGE DISCRIMINATION CASES

A question that continues to remain unclear is whether the Age Discrimination in Employment Act of 1967 ("ADEA") covers job applicants asserting claims of disparate impact discrimination against their prospective employers. In last year's Recent Developments article, we reported that the Supreme Court had denied certiorari review of a 2016 *en banc* panel decision of the United States Court of Appeals for the Eleventh Circuit in *Villareal v. R. J. Reynolds Tobacco Co.,* that had ruled, 6-5, that job applicants could not bring disparate impact claims under Section 624(a)(2) of the ADEA because they were not "employees." Recently, the United States Court of Appeals for the Seventh Circuit addressed this issue in *Kleber v. CareFusion Corporation*, first by a panel of three judges, and later, by an *en banc* panel of the entire Court.

The plaintiff in *Kleber* was a 58 year old lawyer who had applied for a position as an in-house attorney at CareFusion Corporation. Kleber was an "outside applicant," meaning that he was not already an employee of CareFusion Corporation when he applied for this position. The position Kleber applied for was advertised as having an experiential requirement of "no less than three years, and no more than seven years." Kleber, who possessed more than seven years of experience at the time he applied for the position, was not offered an opportunity to interview. When CareFusion Corporation hired a 29 year old attorney for this position, Kleber filed suit under the ADEA alleging that CareFusion Corporation's experience requirement in its job posting violated the ADEA because it had a discriminatory disparate impact on older applicants.

CareFusion Corporation moved to dismiss Kleber's lawsuit on the ground that unlike other sections of the ADEA, Section 624(a)(2) of the Act, which is applicable to claims of disparate impact discrimination, only applied to employees, not applicants. The United States District Court for the Northern District of Illinois agreed with CareFusion Corporation and dismissed Kleber's case. Kleber then appealed that dismissal to the Seventh Circuit. A three member panel of the Seventh Circuit then reversed the District Court. In doing so, the panel relied heavily on the Supreme Court's decision in *Griggs v. Duke Power Co.,* a disparate impact discrimination case arising under Title VII that determined job applicants could bring disparate impact claims. According to the panel, to read the ADEA as not protecting job applicants would be "arbitrary and baffling." The panel further stated that "we have not been presented with, and could not imagine on our own, a plausible policy reason why Congress might have chosen to allow disparate impact claims by current employees, including internal job applicants, while excluding outside job applicants." CareFusion Corporation thereafter filed a petition for an *en banc* review of the entire Court of Appeals. That petition was granted.

Sitting *en banc*, a majority Seventh Circuit reversed the panel's decision and affirmed the dismissal by the District Court. For reasons strikingly similar to the *en banc* ruling by the Eleventh Circuit in *Villareal*, the Seventh Circuit concluded that the text of Section 624(a)(2) of the ADEA was clear and does not permit outside job applicants to bring disparate impact claims. Accordingly, it found that the panel had erred in relying on *Griggs*.

In a somewhat factually similar case, the United States District Court for the Northern District of Texas ruled that an attorney working in a temporary status who was passed over for a permanent senior position, had an age discrimination claim that could proceed to trial. In *Owen v. STMicroelectronics, Inc.*, the plaintiff, Charles Owen was a 64 year old attorney who, in 2013, was working for STMicroelectronics, Inc. ("STM") in a temporary position reviewing nondisclosure agreements ("NDAs"). When a full-time senior attorney position at STM became open, Owen announced his interest in the position to Terry Blanchard, who was the person ultimately responsible for making that hiring decision. Owen claimed that Blanchard told him that while he was qualified for the position, STM did not want "someone with so much experience that they would be inflexible." Blanchard then posted an advertisement for the attorney position that stated STM was looking for someone with "strong academic performance and employment credentials" who had "about 10 years of experience," and that "big firm and in-house counsel experience" was preferred. Although Owen applied for the position, STM hired Sean Barrett, a 36 year old attorney with nine years of big firm and in-house counsel experience. Shortly thereafter, Owen's temporary position was eliminated.

Owen filed suit under the ADEA alleging disparate treatment discrimination (i.e., intentional discrimination). Owen specifically alleged that Blanchard's statement that STM did not want to hire "someone who was too experienced" was "code" for age discrimination. STM filed a

motion for summary judgment arguing that Owen was not qualified for the position, because he did not have either a strong academic background, or experience working with large law firms. STM further claimed it had hired Barrett because he possessed those qualifications (i.e., a law degree from Georgetown University and nine years of experience working for big law firms or in-house). The District Court, however, denied STM's motion because it found that there were triable issues of fact as to whether Owen was not qualified and/or whether STM's reasons for hiring Barrett instead of Owen were a pretext for unlawful age discrimination.

In *Joye v. Secretary, Department of Navy,* the Eleventh Circuit addressed the question of when the doctrine of equitable tolling should be employed to resurrect a lawsuit brought under the ADEA when that lawsuit had been dismissed by the District Court because it had been filed one day beyond the applicable limitations period.

The plaintiff, Kathryn Joye, filed a charge of age discrimination with the EEOC after she had been passed over for a promotion by her employer, the United States Navy. On May 12, 2016, Joye received a right to sue notice from the EEOC which instructed her that she had 90 days from its receipt in which it file a civil action against the Navy in federal court. On August 10, 2016, i.e., the 90th day after her receipt of the EEOC's right to sue notice, Joye completed and signed a *pro se* complaint against the Navy. However, she did not take her complaint to the District Court and physically file it with the Clerk of the Court due to the fact that it was raining hard that day and she was concerned about driving 25 minutes to the courthouse in the rain. Unsure about whether her complaint would be deemed timely filed if she simply mailed it on the 90th day, she first attempted to research the issue on the internet; however, she was unable to find an answer to that question. As a consequence, Joye telephoned the Clerk of the District Court who allegedly informed her that as long as her complaint was postmarked by the 90th day, it would be deemed timely filed. That

information, if given by the clerk of the court, was incorrect. Based on this incorrect information, Joye allegedly gave her *pro se* complaint to her husband, who put it in the mail on August 10, 2016. On August 11, 2016, one day after the filing deadline had expired, the Clerk of the District Court received plaintiff's complaint. Joye's complaint was postmarked August 10, 2016.

Not surprisingly, the Navy filed a motion to dismiss Joye's complaint, arguing that it was untimely filed. In response, Joye did not dispute that her complaint was filed a day late. Instead, she argued that her late filing should be excused pursuant to the doctrine of equitable tolling, based on the information the Clerk had provided to her. Along with her response, she attached exhibits, including an affidavit and a copy of the United States District Court for the Northern District of Florida's instructions for *pro se* litigants filing employment discrimination claims (which mentioned the 90 day period in which to file suit, but did not indicate when a complaint was deemed to be "filed" with the Court). Because the Navy's motion to dismiss, and Joye's response, required the District Court to consider matters beyond the four corners of the complaint, the court converted the Navy's motion to dismiss into a motion for summary judgment, and after allowing all parties to engage in a brief period of discovery, granted the same. In its order, the District Court ruled that Joye was not entitled to employ the doctrine of equitable tolling because she had not acted diligently in pursuing her rights under the ADEA, as she had waited until the final day of the filing period to ascertain how to file her lawsuit. Joye appealed.

In affirming the District Court's award of summary judgment, the Eleventh Circuit stated that equitable tolling was an extraordinary remedy that should be used sparingly, and under circumstances in which it can be demonstrated that the party seeking tolling has: (1) been pursuing her rights diligently; and (2) some extraordinary circumstance stood in the party's way and prevented him or her from timely filing suit. In the present case, the Eleventh Circuit agreed with

the District Court that Joye had not been diligent by waiting until the 90th day to make efforts to file her *pro se* complaint. It further found that even if Joye had acted diligently, the incorrect information she received from the Clerk of the District Court did not amount to an extraordinary circumstance warranting the equitable tolling of the 90 day limitations period.

IX. NOTABLE DISABILITY DISCRIMINATION CASES

In *Faidley v. United Parcel Service of America, Inc.*, an *en banc* panel of the United States Court of Appeals for the Eighth Circuit had to decide whether an employer's requirement that its package car drivers work in excess of an eight hour day was an essential function of the job. The plaintiff, Jerry Faidley, had worked for UPS as a package car driver since 1987. In that capacity, he made business and residential deliveries of packages for UPS. Due to problems with his back and hip, Faidley's physician issued a permanent restriction indicating that he could work no more than eight hours a day. As a consequence of the busy and irregular nature of the package car driver position, UPS determined that being able to work more than eight hours a day was an essential function of its package car driver position. Notably, UPS's job description for the position of package car driver stated that working overtime, and being able to work in excess of eight hours a day, were essential functions of that job. Additionally, UPS, in collective bargaining negotiations with the Teamsters Union, had specifically negotiated a requirement that it could not work its car package drivers in excess of nine-and-a-half hours per day.

Although Faidley claimed he could not work as a package car driver without some form of accommodation, due to the job requirement that he work in excess of eight hours a day, he claimed he could perform other positions at UPS, such as car washer, porter, and pre-load air driver, as long as he did not work in those positions for more than eight hours each day. Unfortunately, those positions at UPS were not open at the time and/or Faidley lacked sufficient seniority to be eligible

to receive one of those jobs. UPS also considered Faidley for the position of "feeder driver," a position that would have required him to work in excess of eight hours a day, but which did not require him to perform as much lifting, climbing, and walking as the package car driver position; however, UPS did not offer that job to Faidley because it required Faidley to drive a semi-truck (which he was not trained to do), no feeder driver positions were then available, and because the feeder truck position also required him to drive more than eight hours each day. Ultimately, Faidley was offered, and accepted, a fulltime combined loader/preloader position; however, after only a few weeks in that position, he complained to his doctor that he was in too much pain. As a result, his doctor recommended Faidley work only four hours per day in the loader/preloader position. However, the position of loader/preloader at UPS was a fulltime position that required the employee to work at least an eight hour shift. Finding no fulltime positions available to offer Faidley, UPS offered him a part-time position which Faidley declined. Faidley then retired and filed charges of discrimination with the EEOC.

The EEOC then brought suit against UPS on Faidley's behalf, alleging that it had failed to accommodate him in violation of the ADA. UPS disagreed and moved for summary judgment. The United States District Court for the Southern District of Iowa agreed with UPS and ruled that: (1) working more than eight hours was an essential function of the package car driver position; (2) Faidley was not qualified for reassignment to the feeder driver position because of his medical restriction requiring him to work no more than eight hours a day; and (3) because there were no fulltime positions available that Faidley could perform, offering him a part-time position was a reasonable accommodation. On appeal, a divided panel of the Eighth Circuit agreed with the District Court that Faidley was not qualified for the package car driver position due to his eight hour work restriction; however, a majority of the panel concluded that the District Court erred in

granting summary judgment to UPS as it found evidence existed to show Faidley was qualified to be a feeder driver. An *en banc* review then ensued.

Sitting *en banc*, the Eighth Circuit affirmed the District Court across the board. It concluded that the requirement that the drivers in the package car position must be able to drive in excess of eight hours each day was an essential function of that position. It further concluded that because Faidley's doctor had determined Faidley was not capable of working in excess of eight hours a day in any position that he held, he likewise was not qualified for a feeder driver position. Finally, the Court concluded that because UPS had explored all of its fulltime positions that Faidley was capable of performing and none of those positions were available, it did not fail to reasonably accommodate him by offering him an available part-time position, within his medical restrictions, that he was qualified to perform.

Certainly one of the important lessons for employers to learn from *Faidley v. United Parcel Service of America, Inc.,* is the value and importance of carefully crafted position descriptions. As set forth above, UPS's job descriptions for package car driver and feeder driver clearly indicated that the ability to work in excess of eight hours a day was an essential function of those jobs. In *Snead v. Florida Agricultural and Mechanical Univ.,* quite a different result transpired under factual circumstances that were not too dissimilar from those at issue in *Faidley.*

Stanley Snead was a campus police officer for the Florida Agricultural and Mechanical University ("FAMU"). Prior to August of 2013, Snead had worked fulltime as a police officer and routinely worked a bi-weekly 80 hour pay period consisting of only eight hour shifts. However, after FAMU hired a new police chief, Snead was required to work a bi-weekly 80 hour pay period consisting of six 12 hour shifts and one eight hour shift. When Snead began experiencing high blood pressure problems, he consulted his physician, who identified the 12 hour shifts as the cause

of his high blood pressure. Snead then requested to be allowed to work shorter shifts. In support of that request, Snead provided a letter from his physician stating that Snead could perform all of the essential functions required of a police officer, but that he required an accommodation allowing him to work no more than eight hours a shift. FAMU, however, refused to accommodate Snead. As a result, Snead retired and brought suit against FAMU alleging that it denied his request for a reasonable accommodation in violation of the ADA.

The case proceeded to a two day jury trial. At the conclusion of the trial, the jury returned a verdict in favor of Snead. FAMU appealed. On appeal, FAMU argued, among other grounds, that Snead failed to disprove that working a 12 hour shift was an essential function of the position. FAMU argued that its job description established that working a 12 hour shift was an essential function of the police officer position because that job description, in a section entitled "working hours," stated "80-hour biweekly pay period consisting of six (6) 12-hour shifts and one 8-hour day." However, that job description also had a section entitled "essential functions" that was silent to the number of hours the employee was required to work per shift. In upholding the jury's verdict, the Eleventh Circuit noted that a reasonable juror could have concluded from that job description that working a 12 hour shift was not an essential function of Snead's position. The Court further found that in view of the physician's letter stating that Snead was capable of performing the essential functions of his job as long as he worked no more than eight hours per shift, it was not unreasonable for the jury to conclude that FAMU had denied his request for a reasonable accommodation.

In *Trautman v. Time Warner Cable Texas, LLC,* the United States Court of Appeals for the Fifth Circuit addressed the subject of whether an employer failed to reasonably accommodate an employee who missed a staggering amount of work. The plaintiff, Heather Trautman, was hired

by Time Warner in October of 2012, and fired less than three years later due to excessive absenteeism. Trautman became pregnant in March of 2013. Shortly thereafter, in June of 2013, she began experiencing dizzy spells and submitted a formal ADA accommodation request asking to be allowed to lie down at work. Although Time Warner concluded that her request did not qualify as an ADA accommodation, it nonetheless granted her request. A few months later, while still pregnant, Trautman experienced anxiety while driving to work in traffic on two separate occasions. Her obstetrician informed her that she had experienced panic attacks and needed to avoid stressful situations. Trautman communicated her doctor's recommendation to Time Warner, however, on this occasion, she did not submit an ADA accommodation request. Instead, Trautman asked her supervisor for a temporary modification of her work schedule. Although this presented a staffing challenge to Time Warner because Trautman's job required her to interact with other members of her work team, it agreed to allow her to leave the office between 2:00 p.m. and 3:00 p.m. each day in order to avoid heavy traffic.

Trautman had her baby in December of 2013. She then took 12 weeks of FMLA leave to care for the birth of her child. When her FMLA leave expired in March of 2014, Trautman requested permission to temporarily work from home because she was having difficulty transitioning her infant to bottle feeding. Time Warner agreed to let Trautman work from her home until the end of 2014. During this period of time, Adrienne Greth became Trautman's new supervisor. Greth was concerned that Trautman was not performing necessary job duties that required her to be in the office. As a result, in early December, 2014, Greth requested that Trautman resume working from the office starting on January 12, 2015. Trautman, however, did not want to work a normal 8:00 a.m. to 5:00 p.m. schedule. She asked Greth if she could work from home during the afternoons. Greth declined her request and advised Trautman that unless she had a

doctor's note and a formal accommodation request approved by Time Warner's Human Resources Department that allowed her to work from home, Trautman was needed in the office eight hours each day.

On December 12, 2014, Trautman submitted an ADA accommodation request to Time Warner's Human Resources Department, asking to work a schedule in the office from 7:00 a.m. to 2:00 p.m., with her remaining two hours per day to be worked from home. The ADA accommodation request placed no limitations on Trautman's job duties, but merely stated that in order to avoid panic/anxiety attacks related to traffic and driving, she should be allowed to leave work at 2:00 p.m. in order to avoid heavy traffic. On the ADA accommodation request form, Trautman identified the "major life activity" impaired by her anxiety as "traffic/driving." Time Warner denied Trautman's accommodation request on the ground that both the request and the accommodation sought were not related to an essential function of Trautman's job. Nevertheless, Time Warner offered to adjust her work schedule from 8:00 a.m. to 4:00 p.m., so that she could leave the office one hour earlier than otherwise scheduled. Rather than attempting to see if leaving the office by 4:00 p.m. addressed her anxiety, Trautman instead submitted a letter from her doctor stating that she needed to leave the office by 2:00 p.m.; however, the doctor's letter did not explain why allowing Trautman to leave at 4:00 p.m. was insufficient to accommodate her anxiety. In addition to submitting that letter to Time Warner's Human Resources Department, Trautman again requested permission to leave work between 2:00 p.m. and 3:00 p.m. As an alternative, Trautman suggested leaving even earlier, by 11:00 a.m., and working the rest of the day from her home. Time Warner rejected those requests and reiterated that it needed her to work all of her hours from the office.

Rather than complying with the work schedule Time Warner had given her, Trautman, in January of 2015, began submitting requests for intermittent FMLA leave to Time Warner's third party FMLA claims administrator, Sedgwick Claims Management Services ("Sedgwick"), wherein she requested permission to leave work at 2:00 p.m. each day. The day after submitting these requests for intermittent FMLA leave, and before any of those requests were approved, Trautman began leaving work at 2:00 p.m. On February 20, 2015, Sedgwick ultimately approved Trautman to take one hour of FMLA leave per week from January 14, 2015 through July 13, 2015; however, it denied Trautman's requested FMLA leaves of absence in January and February that exceeded this approved amount of FMLA leave.

On February 24, 2015, Greth issued Trautman a written warning for numerous attendance violations. Throughout January and February of 2015, Trautman had missed work on several occasions that were unrelated to her FMLA requests. According to Greth, she had missed a total of 19 work days during January and February of 2015. Trautman responded to this written warning by leaving work early on February 24, 2015, and calling in sick for the following three days. On March 2, 2015, Greth sent Trautman a final warning which threatened termination due to 22 absences from work since the beginning of 2015 that were unrelated to her usage of FMLA leave. On April 8, 2015, Trautman called Greth stating she was unable to come to work due to child care issues. At that point, Trautman had no accrued leave left to use. When she did not report to work, Time Warner terminated Trautman's employment. Trautman thereafter sued Time Warner alleging that it failed to provide her with a reasonable accommodation by allowing her to leave work each day between 2:00 p.m. and 3:00 p.m. The District Court disagreed with Trautman and granted Time Warner's motion for summary judgment. Undaunted, Trautman appealed.

On appeal, a panel of the Fifth Circuit affirmed the ruling of the District Court. In doing so, the Court of Appeals noted that even if it assumed that Trautman was a qualified individual with a disability, she could not show that Time Warner had failed or refused to reasonably accommodate her. The Court noted that Time Warner had offered to allow her to leave work at 4:00 p.m. each day, but that Trautman rejected that accommodation without ever even attempting to see if it was a workable one. The Court further noted that Trautman had not investigated ride-sharing options, the use of public transportation, and/or requesting additional breaks in the afternoon to help mitigate her anxiety. Instead, she unilaterally ended her work day each day at 2:00 p.m. According to the Fifth Circuit, "[n]either the ADA nor the 2008 amendments to the ADA, permits an employee to leave work early and then sue her employer for being unreasonable."

X. FAMILY AND MEDICAL LEAVE ACT CASES

In *Stein v. Atlas Industries*, the Sixth Circuit confronted the question of whether an employer's policy that required employees on medical leave to either return to work or call in once their doctor released them to return to work with light duty restrictions, constituted unlawful interference under the FMLA. The plaintiff, Robert Stein, had taken FMLA leave for his own serious health condition after he tore his meniscus. Although the doctor told Stein he would not be released to return to work until August 10, he gave Stein a return to work slip stating that Stein could return to work on July 20, but that he could only perform office work until August 10. Stein turned that slip into Atlas Industries' workers' compensation office. When Stein did not report to work on Monday July 20, or on either of the following two days, Atlas Industries fired him. Stein then filed suit against Atlas Industries claiming that its "call in or show up" policy unlawfully interfered with his ability to take FMLA leave. The Sixth Circuit disagreed.

According to the Court of Appeals, "the FMLA does not grant an unconditional right to leave. To qualify, an employee must comply with his employer's usual and customary notice and procedural requirements, including internal call-in policies." It further noted that when an employee fails to comply with the employer's usual and customary notice requirements, an employer is within its rights to terminate the employee, even if the days he failed to call in on were otherwise FMLA-protected. In this case, the Court found that Atlas Industries had a policy that stated "any associate who is absent three (3) consecutive days without permission or without calling in [would] be automatically discharged." Accordingly, it found that when Stein failed to call in to report that he would not be coming into work on July 20, or the following two days, Atlas Industries "was within its rights to terminate him."

Stein argued that pursuant to 29 C.F.R. § 825.220(d) of the FMLA Regulations, an employer cannot fire an employee who fails to provide notice in accordance with an employer's usual and customary notice requirements due to "unusual circumstances." Although the Sixth Circuit acknowledged that was true, it concluded that Stein's own confusion as to his return to work date does not constitute an unusual circumstance. According to the Court, "People make mistakes – there is nothing unusual about that. And for Stein, this was indeed an unfortunate misunderstanding. But it is not one that federal law can fix."

In *Antekeier v. Laboratory Corporation of America,* the District Court was confronted with a question of first impression as to whether calls received by an employee from the employee's supervisors and coworkers while she was absent from work on FMLA leave constituted unlawful interference in violation of the FMLA. The plaintiff, Kelly Antekeier, a former salesperson for Laboratory Corporation of America, took two weeks of FMLA leave for sinus surgery. While out on FMLA leave, Antekeier received a series of telephone calls from her supervisor and coworkers.

On one occasion, a coworker asked Antekeier for a client's contact information. On a second occasion, another coworker called asking for information concerning a new account Antekeier had opened. On a third occasion, a coworker called to tell Antekeier that one of her supervisors had resigned. Shortly after returning to work, Antekeier collapsed at work due to a brain aneurism. Accordingly, she took approximately three weeks of FMLA leave to undergo brain surgery to repair her aneurism. During her second period of FMLA leave, Antekeier claims she received several calls from her supervisor asking her about her medical condition and when she planned to return to work, as well as several calls from coworkers asking her for client contact information for Antekeier's accounts, and one call regarding a holiday party which sought her opinion of whether she thought the company should hold such a party.

Shortly after Antekeier returned from her second FMLA leave of absence, Laboratory Corporation of America's Vice President of Business, James Maruca, and a coworker named Gretchen Morriss, got into a heated argument at the Charlotte Airport. Although, the parties dispute who started the argument, Maruca made the decision to terminate Antekeier for unprofessional conduct. Antekeier then filed suit and alleged that the telephone calls she received while on FMLA leave constituted unlawful interference in violation of the Act. The District Court disagreed. According to the Court, "[a] sensible construction of actionable interference in the context of the FMLA plainly does not include situations where an employee on leave was contacted by her employer or co-employee for some purpose other than to do work." The District Court further stated that "FMLA interference does not include *de minimis* work-related contact, such as a telephone call to request client contact information or a call to update an employee about news in the workplace." The Court found that Antekeier had failed to provide any evidence that she had been harmed by these telephone calls. She presented no evidence that she had lost compensation

as a result of receiving those calls. Accordingly, the Court granted Laboratory Corporation of America's motion for summary judgment.

In *Hendrix v. Jesse White,* the plaintiff, Tom Hendrix, was a Senior Facility Manager for State of Illinois's Department of Motor Vehicles ("DMV") at the DMV's Schaumburg facility. In that capacity, Hendrix reported to Tom Begnino, the Deputy Secretary of State for the State of Illinois. Before the summer of 2015, Begnino had received complaints about Hendrix's behavior. Later that summer, Begnino received a letter signed by multiple employees working under Hendrix. That letter complained that Hendrix's conduct was creating a hostile work environment at the Schaumburg facility. As a result of receiving that letter, Begnino, on August 4, 2015, met with several of the employees who had signed the letter. He also telephoned and spoke to Hendrix on August 4, 2015, who, unbeknownst to Begnino, or anyone in the Secretary of State's Office, had started an FMLA leave.

After conducting the meeting, Begnino made the decision to transfer Hendrix from the Schaumburg DMV facility to the DMV facility in Naperville. Although Hendrix would experience no change in pay, or benefits and his job duties would be the same, his commute to and from work would be increased by a distance of 20 miles each way. Although Begnino communicated his decision to transfer Hendrix to the Naperville DMV facility, the transfer never occurred, as Hendrix went back out on FMLA leave from September 18, 2015, until September 6, 2017, when his doctor allowed him to return to work with certain permanent restrictions.[3] When Hendrix finally returned to work, he was transferred to the DMV facility in Elk Grove Village, a facility that was closer to his home than either the Schaumburg and Naperville DMV Facilities. The day after he returned to work, Hendrix filed suit against the Secretary of State for the State of Illinois, Jesse White, claiming

[3] It is unclear from the reported decision of the Court how Hendrix managed to continuously remain out on FMLA leave for a period of almost two years without exhausting his entitlement to FMLA leave.

that the State had violated his rights under the FMLA because it had failed to return him to the same position, or a substantially equivalent one when he returned from FMLA leave.

The District Court for the Northern District of Illinois rejected Hendrix's claims. It noted that Hendrix's transfer to the Elk Grove DMV facility did not constitute adverse employment action sufficient to support either an FMLA interference or retaliation claim, as he held the same job title, duties, rate of pay and benefits as the position he had held at the Schaumburg DMV facility. Moreover, insofar as Hendrix's FMLA retaliation claim was concerned, there was no evidence to suggest that Begnino's decision to transfer him had anything to do with Hendrix's decision to take FMLA leave, as Begnino was never aware of him taking FMLA leave.

In *Smith v. Bibb County School District,* the plaintiff, Terrance Smith, was an African American male former employee of the Bibb County School District who worked as the Coordinator of Parent Education at the School District's Welcome Center from January of 2012, until his layoff in April of 2015. During the spring of 2014, Smith had applied for several vacant positions at the School District for which he was not selected. As a result, on July 29, 2014, Smith filed a charge of discrimination with the EEOC alleging that he had not been selected because of his race and/or sex. Although Smith and the School District mediated that EEOC charge and actually reached an agreement whereby Smith would dismiss his EEOC charge in return for being offered a half-time assistant principal/half-time math teacher position, the agreement was never formalized due to the parties' inability to agree about Smith's salary. Nevertheless, the EEOC, believing the matter had been resolved, notified the parties on September 17, 2015, that it was discontinuing its investigation of Smith's charge. As a result, Smith continued to work as the Coordinator of Parent Education at the School District's Welcome Center.

In February and April of 2015, Smith applied for, and was granted, FMLA leaves of absence from work to care for his sick mother. Although Smith returned to work from an FMLA leave on April 14, 2015, he was notified the next day, April 15, 2015, that his position at the Welcome Center had been eliminated as a result of a district-wide consolidation of positions. Shortly thereafter, Smith filed suit against the School District in the United States District Court for the Middle District of Georgia, asserting claims of race and sex discrimination pursuant to Title VII, as well as retaliation claims pursuant to both Title VII and the FMLA. Following the close of discovery, the School District moved for summary judgment as to all of Smith's claims.

Although the District Court declined to award the School District summary judgment with respect to Smith's Title VII retaliation claims, it awarded the School District summary judgment on all of Smith's other Title VII claims, as well as summary judgment on his FMLA retaliation claim. In ruling in the School District's favor with respect to Smith's FMLA retaliation claim, the District Court found that Smith had asserted a circumstantial evidence case. Accordingly, it applied the *McDonnell Douglas* model of proof. In doing so, the District Court concluded that Smith had met his *prima facie* burden of establishing a claim of FMLA retaliation. Nevertheless, the District Court noted that the School District had asserted a legitimate, nondiscriminatory reason for Smith's layoff – i.e., the loss of his position due to a district-wide consolidation – which Smith failed to demonstrate was a pretext for unlawful, FMLA-based retaliation. Specifically, Smith had argued that he had been "black-balled because of his having filed an EEOC charge; however, the District Court refused to consider that evidence because it was not related to any FMLA-related protected activity.

XI. INTERESTING USERRA CASES

In *Mace v. Willis,* Corey Willis, the owner of Kickbox Dakota, LLC, a business that operates a kickboxing gym, appealed a judge's ruling that he had violated the Uniformed Services Employment and Reemployment Rights Act ("USERRA") when it failed to restore the plaintiff, Kieshia Mace, to employment upon her return from mandatory military training. Mace, a member of the South Dakota National Guard, had been working for Kickbox Dakota as a fitness trainer. The gym employed several fitness trainers and all of them, Mace included, had never been guaranteed shifts to work at the gym. Instead, Willis, or his general manager, would contact Mace and the other fitness trainers to work shifts using a mobile app. Prior to her departure for military leave, Mace had been working, on average, 13.6 hours a week at Kickbox Dakota. Prior to her departure for three weeks of mandatory military training, Mace notified Willis that she was a member of the National Guard and that she had to depart for military training.

While Mace was away at training, Willis deleted her from the scheduling app and hired a new fitness trainer to work at the gym. He also hired a second fitness trainer two days after Mace returned from military training After she returned, Mace attempted to access the mobile app, but was unable to do so. When she asked the general manager of Kickbox Dakota why she was unable to access the app, he told her that she had been replaced. Although Willis later offered to put Mace back on the schedule, she decided to sue him instead for violating USERRA. USERRA protects "any person whose absence from a position of employment is necessitated by reason of service in the uniformed services." Typically, USERRA entitles service members to return to the positions in which they would have been employed but for their military service.

At a bench trial in federal court, Willis argued that he was not liable for violating USERRA because he did put Mace back into the same position she left when she departed for military training,

i.e., a position for which he had complete discretion to assign her no shifts at all. The District Court disagreed and ruled in favor of Mace because it concluded that Mace had not been returned to the position she held prior to departing for mandatory military leave. Willis then appealed; however, he fared no better before the Eighth Circuit, which affirmed the ruling of the District Court. The Court of Appeals found that Willis had taken steps to delete Mace from the scheduling app and that the general manager had told Mace she had been replaced. It further found that Willis had hired, not one, but two, fitness trainers, instead of Mace.

In *Padilla-Ruiz v. Communication Technologies, Inc.,* the United States District Court for the Eastern District of Virginia was confronted with the question of whether an Army Reservist who had been discharged from his civilian employment based upon the recommendations of Army officers to whom he reported as a Reservist, had a USERRA claim against the civilian employer. The plaintiff, Raul Padilla-Ruiz was a member of the United States Army Reserve. From 2002 until 2008, he was also employed by Communication Technologies, Inc. ("ComTek") as an Assistant Professor of Military Science at the San German campus of InterAmerican University in Puerto Rico. At that time, ComTek had a contract with the United States Army to staff assistant professors of military science, such as Padilla-Ruiz, as instructors for the Army's ROTC programs at colleges and universities throughout the United States.

Padilla-Ruiz claims that as an Assistant Professor of Military Science at the San German campus of InterAmerican University, he was successively supervised by two Army officers, Lt. Colonel Betancourt, and later after Betancourt was promoted, by Lt. Colonel Plaza, as well as a civilian supervisor for ComTek named John Cray. Notably, both Betancourt and Plaza worked with Padilla-Ruiz at InterAmerican University, in Puerto Rico, whereas Cray did not. At all points in time, Cray was located in the territorial United States. Padilla-Ruiz claims that because his

training schedule as a reservist frequently conflicted with his teaching ROTC program schedule, both Betancourt and Plaza had advised him to rearrange his reservist training and threatened him with adverse employment action if he did not do so. Padilla-Ruiz claimed that once, in 2006, Betancourt expressly threatened to fire him if he took time off from his ROTC instructor duties in order to undergo Army Reserve training.

On July 1, 2008, only six months after Cray became Padilla-Ruiz's civilian supervisor, Plaza, in his capacity as Padilla-Ruiz's ROTC supervisor, initiated an investigation into alleged acts of misconduct by Padilla-Ruiz. The first incident of misconduct alleged that Padilla-Ruiz had intentionally lied to a fellow ROTC instructor about a work-related conflict he had in order to defer Army Reserve training, when in reality, Padilla-Ruiz sought to defer Army Reserve training at an alternative date so he could attend his daughter's birthday party. The second instance of alleged misconduct involved an allegation that Padilla-Ruiz had claimed he had worked on June 9, 2008, on his timecard, when, in actuality, he had been absent from work on that date. Plaza assigned Major Jose Torres, one of the other ROTC instructors at InterAmerican University, to conduct an investigation into these two incidents of misconduct. Upon completing his investigation, Torres issued a written report finding that both claims of misconduct by Padilla-Ruiz were substantiated.

Upon receiving Torres' investigative report, Plaza shared the same with his immediate supervisor, Betancourt, as well as Padilla-Ruiz's civilian supervisor at ComTek, Cray. Plaza and Betancourt then recommended to Cray that Padilla-Ruiz be terminated from the ROTC program due to his "lack of honor and integrity." Upon receiving this investigative report, Cray concluded that Padilla-Ruiz had "lost the confidence of the customer." Accordingly, he recommended that ComTek terminate Padilla-Ruiz "per the recommendation of the Army." Padilla-Ruiz was subsequently terminated by ComTek on August 15, 2008.

After initiating suits in United States District Court for the District of Puerto Rico on two separate occasions in 2009 and 2011, and having those claims dismissed without prejudice due to venue issues, Padilla-Ruiz finally filed suit against ComTek in the United States District Court for the Eastern District of Virginia on October 26, 2016. In his lawsuit, Padilla-Ruiz claimed that ComTek had unlawfully discriminated against him on the basis of his Army Reserve status in violation of USERRA. In particular, Padilla-Ruiz argued that ComTek, by relying on the recommendations of Plaza and Betancourt, was liable under the "cat's paw" theory. In order for the cat's paw theory to be applicable, a plaintiff must demonstrate that an employee or agent of an employer who lacks the authority to directly terminate, demote, transfer, or discipline a subordinate employee, has manipulated a higher level supervisor or manager possessing such authority to unwittingly terminate, demote, transfer, or discipline the subordinate employee, in furtherance of an unlawful discriminatory animus. In this instance, Padilla-Ruiz argued that Betancourt and Plaza had both indicated an anti-Army Reserve animus toward him by threatening him adverse employment action when his Reservist training conflicted with his teaching duties under the ROTC program. Padilla-Ruiz further claimed that Betancourt and Plaza convinced Cray to terminate his civilian employment with ComTek in furtherance of that unlawful discriminatory animus by falsely recommending to Cray that he had engaged in misconduct and lacked honor and integrity.

At the appropriate phase in the litigation, ComTek filed a motion for summary judgment. The District Judge presiding over the case assigned the motion for summary judgment to a United States Magistrate Judge who issued a report and recommendation ("R&R") recommending that ComTek's motion for summary judgment be denied, as Padilla-Ruiz had presented sufficient evidence that Betancourt and Plaza had unlawfully used Cray as a cat's paw to effectuate Padilla-Ruiz's termination in violation of USERRA. ComTek filed objections to the Magistrate Judge's

R&R arguing that the cat's paw analysis did not apply to it in this instance because neither Betancourt nor Plaza were either employees or agents of ComTek. The District Court, in reviewing ComTek's objections to the R&R, agreed with ComTek. According to the Court, unlike a typical cat's paw analysis, there was no evidence that either Betancourt or Plaza were ever employees or agents of ComTek; they were at all times employees and agents of the United States Army. Accordingly, it granted ComTek's motion for summary judgment.

XII. PREDICTIONS

Each year we try to forecast significant developments for the year that have yet to take place. Below is our list of predictions for 2019:

A. The Supreme Court Will Determine that Discrimination on the Basis of Gender Identity and Sexual Orientation Are Forms of Sex Discrimination Prohibited by Title VII

Although the Supreme Court is now clearly dominated by conservative justices, we predict that in 2019, the Supreme Court is going to rule that both sexual orientation and gender identity/nonconformity are protected statuses under Title VII.

B. Arbitration of Both Individual and Class Action Employment Lawsuits Will Rise

As a natural consequence of the Supreme Court's ruling in *Epic Systems,* employers will be taking employee's individual and class action lawsuits to arbitration in ever increasing numbers to 2019, and beyond. Although as explained above, attempts to arbitrate claims involving employment-related claims involving transportation workers may be impeded as a result of the Supreme Court's ruling in *New Prime, Inc.*, in all other areas of business, we expect the number of claims being arbitrated will increase significantly.

C. Sex Harassment Claims Will Increase as a Result of the #Me Too Movement

Although we were already beginning to see an uptick in sexual harassment lawsuits being filed in mid-to-late 2018, we anticipate that the number of those lawsuits will steadily rise in 2019, as investigations involving charges filed with the EEOC, as well as state and local deferral agencies 12 to 18 months ago, are being closed and right to sue notices are being issued.

D. Expect More Congressional Gridlock

With the Democrats in control of the House of Representatives and the Senate and White House controlled by the Republicans, we anticipate that little, if any meaningful federal legislation of any kind is likely to get passed in 2019.

E. Trump May Appoint a Third Justice to the Supreme Court

Although Justice Ruth Bader Ginsburg has publicly stated that she plans to remain on the Supreme Court for at least another five years, the question of whether she has the stamina to do so remains unclear. She has had a few serious health concerns that could impede her ability to serve on the Court. In November of 2018, she cracked several ribs as a result of a fall, and in late December of 2018, she underwent surgery to remove two cancerous nodules from her left lung. These health issues have left her sidelined from her duties on the Court for several months. It is anticipated that Justice Ginsburg will be returning to the Court in the near future, but it is presently unclear precisely when that will occur, or how productive she will be once she returns. Even if she makes a full recovery, which this writer certainly hopes is the case, Justice Ginsburg is currently 85 years old. Should her health decline to point where she can no longer serve on the Court, President Trump may have the opportunity to appoint a third Supreme Court Justice.

XIII. CONCLUSION

There was a continuing trend by federal courts on both a district and circuit level, to recognize sexual orientation and gender identity as protected statuses under Title VII. On the other hand, from a federal legislative standpoint, little, if any, meaningful change took place in 2018 and early 2019. And while arguably, a considerable amount of change took place in federal administrative agencies such as the NLRB, the DOL, and the EEOC, many of those changes reflect a return to pre-Obama Administration policies and perspectives, rather than the development of truly new policies, positions and practices. As usual, we predict that more big changes are in store for employees and employers in 2019, as we inch closer and closer to the presidential election in 2020. So lower the safety bar and tighten your seatbelts, 2019 promises to be a wild ride!

Close Encounters with the Fourth Kind: Navigating Bankruptcy Basics

A. Christopher Kasten, III, Esq. and
Kathleen L. DiSanto, Esq.

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Objectives in Bankruptcy

- Equality of distributions for similarly situated creditors
- Fresh start for honest debtor
- Fair and equitable treatment of creditors based on priority of claims

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Types of Bankruptcies

- Chapter 7
- Chapter 11
- Chapter 13

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Common Players in Bankruptcy Cases

- Debtor
- Debtor-in-possession
- Chapter 7 trustee
- Chapter 11 trustee
- Examiner
- Creditors (secured, unsecured, committees)

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General Concepts in Bankruptcy Cases

- Pre- versus Post-Petition
- Property of the Estate
- Automatic Stay
- The Claims Process and Proofs of Claims
- Avoidance Actions

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Pre- Versus Post-Petition

Pre- Versus Post-Petition

- The date on which the petition is filed (the "Petition Date") is the line in the sand.

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Property of the Estate

Property of the Estate

- Very broad concept
- Section 541 includes all property, rights, and interests owned by the debtor.

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The Automatic Stay

The Automatic Stay

- The automatic stay is essentially an injunction against all of the debtor's creditors which comes into effect upon the filing of the petition for relief.

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The Automatic Stay

- Under Eleventh Circuit law, all actions taken in violation of the automatic stay are void *ab initio*.

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The Automatic Stay

- Seek relief from the automatic stay to pursue rights and remedies against debtor
- Bankruptcy court will assess whether there is “cause” to terminate of modify the automatic stay.
- Even if non-debtor entities are involved, it is prudent to seek a determination that the automatic stay does not apply or to seek stay relief in an abundance of caution.

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The Claims Process and Proofs of Claim

The Claims Bar Date

- Creditors will receive notice of the deadline for filing proofs of claim at the beginning of the bankruptcy case.
- The claims bar date is like a statute of limitations—miss the deadline, and it will be an uphill battle for the claim to be allowed!

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The Claims Bar Date

- In chapter 11, claims may be deemed allowed if the debtor lists the claim on its bankruptcy schedules and does not check the box disputed, contingent, or unliquidated.
- Better practice is to file a proof of claim, as the "deemed claim" WILL NOT be recognized if the case is later converted to chapter 7.
- Can attempt to show excusable neglect in a chapter 11 case to have a late filed claim allowed.

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Proofs of Claim

- Filing a proof of claim is critical to preserving your client's right to a distribution from the bankruptcy estate.
- But it is not without consequences…

Proofs of Claim

- By filing a proof of claim, your client is submitting to the jurisdiction of the bankruptcy court.

Avoidance Actions

Avoidance Actions

- Analysis of preferential transfers
  - Transfer of the debtor's money or property
  - Within 90 days of the petition date
  - To or for the benefit of a creditor
  - On account of an antecedent debt
  - That allows a creditor to receive more that it would receive in a hypothetical chapter 7 case

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Avoidance Actions

- Key defenses to preferential transfers:
  - Transfer in the ordinary course of business
  - Transfer was a contemporaneous exchange for value
  - Transfer was on account of new value including new unsecured credit

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Avoidance Actions

- Analysis of Fraudulent Transfers
  - Actual Fraud – Intent
  - Constructive Fraud
    - Transfer of money or property of the debtor or the incurring of an obligation
    - Made within 2 (and sometimes 4) years of the filing of the petition
    - While the debtor was insolvent or became insolvent as the result
    - Received less than reasonably equivalent value

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If there's something strange in your neighborhood, who you gonna call?

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If You Want To Play In Our Yard, You Need To Play By Our Rules

Presented by:
Brian P. Armstrong, Esq.
Law Office of Brian Armstrong, PLLC
2019 Florida Association of County Attorneys Conference

I. Franchise Basics: who can and cannot require franchises and what can they include
   a. Why have a franchise?
II. Tavistock/Sunbridge Stewardship District/Osceola County
   a. Special law to create district with enumerated powers
   b. Alternative providers existed: investor-owned and government-owned utilities
   c. Wholesale/retail split in a wholesale services agreement was the answer
      i. District performs retail service
      ii. Government utility provides wholesale service
      iii. Landowner affiliate investor-owned utility provided compensation
   d. Franchise issued by District to private company
   e. Private company builds and pays for utility systems with obligation to convey to District (distribution/collection) and TWA (treatment)
   f. District enters management and operations agreement with private company upon conveyance
III. Recent Electric Franchise Experiences: Right to Purchase
   a. Cape Coral/Lee County Electric Cooperative experience
      i. Nuances of a rural electric cooperative
   b. Other recent events

2019 FACA Legislative Briefing

2019 CLE Program

June 13, 2019

Hyatt Regency Orlando

THE PUBLIC POLICY TEAM

at the FLORIDA ASSOCIATION OF COUNTIES

Susan Harbin-Alford
Deputy Director

Growth, Agriculture, Transportation, Environment

Laura Youmans
Legislative Counsel

Finance, Tax, & Administration

Tonnette S. Graham
Associate Director

Health & Safety

2019 SESSION STATISTICS

- 3,491 total bills filed
  - 2,506 House bills (including 1630 appropriations project bills)
  - 985 Senate bills filed

- 197 bills passed both the House and Senate (5.6% of the total bills filed)

2019 HOUSE AND SENATE PRIOIRITES

- House Speaker Oliva: HB 21 (Hospital Licensure)
  - Eliminates the existing certificate of need (CON) program, administered by AHCA, which requires certain health care facilities like hospitals and nursing homes to obtain authorization from the state before building new facilities or expanding services
  - Passed Senate 23-17; Passed House 77-33

- Senate President Galvano: SB 7068 (Transportation)
  - Creates the Multi-use Corridors of Regional Economic Significance Program within FDOT; goal is construction and/or expansion of three major toll roads through mainly rural areas
  - Projected cost: $45 million in FY 2019-20; $90 million in FY 2020-21; increasing to a recurring $140 million in FY 2022-23 and beyond
  - Passed Senate 37-1; Passed House 76-36

PREEMPTIONS FILED

(Not even an exhaustive list!)

PASSED

- Tree trimming and removal
  - HB 1159
- Timing of impact fee collection
  - HB 207
- Plastic straw bans (Vetoed)
  - HB 771
- CS in public rights-of-way
  - SB 1000
- Property Development Regulations
  - HB 7103

FAILED

- Local business regulations and occupational licensing requirements
- Increased approval threshold for local discretionary sales surtaxes
- Vacation Rentals
- Over-the-counter proprietary drugs and cosmetics (Sunscreen)
- Tobacco and nicotine product marking regulations
- Establishing legal smoking age
- Towing
- Affordable housing requirements for developers
- Municipal annexation and purchase of property
- Regulation of motorized scooters
- Removal of monuments and memorials

FINANCE, TAX & ADMINISTRATION

HB 3: Preemption of Local Regulations *(FAILED)*

- HB 3 ultimately **failed** after passing the House but not being taken up by the Senate; the Senate companion (SB 1748) was **not considered** in any Senate committee.
- Very broad preemption as originally filed – would have preempted the regulation and licensing of occupations and professions to the state
- Amended in its final House committee to remove the general business preemption language and to instead preempt local government licensing requirements not expressly authorized by law (still very broad)

FINANCE, TAX & ADMINISTRATION

HB 5 – Discretionary Sales Surtaxes *(PASSED)*

- HB 5 **passed** being amended with the more favorable Senate language (SB 336), requires that discretionary sales tax referendums only be held during a general election.
- As originally filed, HB 5 would have required a 2/3 approval threshold for such referenda.
- Language imposing additional requirements for the citizen initiative process for amending the state constitution was added on the final day of the regular Session.

FINANCE, TAX & ADMINISTRATION

HB 7123 – Tax Package *(PASSED)*

- Includes 2 sales tax holidays; a 3-day back to school holiday; and a 7-day disaster preparedness holiday
- Reduces tax on commercial leases from 5.7% to 5.35%
- Changes the timing of payments to local governments in fiscally constrained counties and Monroe County to offset property tax refunds granted to homeowners due to hurricanes in 2016 and 2017
- Requires school districts to share discretionary property tax levies with charter schools (future referenda only)

FINANCE, TAX & ADMINISTRATION

HB 829 – Attorneys' Fees and Costs *(PASSED)*

- Requires a court to award attorneys' fees and damages to the prevailing party in an action challenging a local ordinance on the ground that it is expressly preempted
- Grants a 60-day period for a local government to take corrective action to avoid paying fees and costs upon receiving written notice that a proposed or adopted ordinance is preempted
- Does not apply to ordinances adopted pursuant to part II of Ch. 163 (land development regulations), s. 553.73 (Florida Building Code), or s. 633.202 (Fire Prevention Code).

FINANCE, TAX & ADMINISTRATION

SB 1000 – Communications Services *(PASSED)*

- Makes significant changes to state law governing the use of public rights-of-way by communications services providers
- Prohibits local governments from imposing moratoria on permits for collocation small cell facilities
- Creates additional requirements for a local government's permit registration and application process for communications services providers
- Note: see House final bill analysis for HB 693 for best summary

FINANCE, TAX & ADMINISTRATION

SB 426 – Firefighters *(PASSED)*

- Entitles firefighters diagnosed with one of 21 specific cancers to receive cancer treatment through an employer-sponsored health plan or group health insurance trust fund;
- Requires employer to timely reimburse the firefighter for out-of-pocket deductible, copayment, or coinsurance costs incurred by the firefighter;
- A one-time case payout of $25,000 upon the firefighter's initial cancer diagnosis.

FINANCE, TAX & ADMINISTRATION

SB 7021 – Financial Disclosure *(PASSED)*

- Requires Florida Commission on Ethics to procure and test an electronic financial disclosure filing system by January 1, 2022;
- Form 6 filers will be required to file electronically beginning in 2022; Form 1 filers by 2023;
- Removes ability for Form 6 filers to submit copy of federal income tax returns as proof of income
- Removes ability of Form 1 filers to report required information using a comparative threshold based on a percentage value.
- Requires COE to collect filer email addresses and requires local governments to provide email addresses to COE by Feb 1 or each year.

FINANCE, TAX & ADMINISTRATION

SB 7014 – Governmental Accountability*(PASSED)*

- Requires non-charter county audit committees to consist of each constitutional officer and a member of the BOCC;
- Creates additional requirements for the procurement of audit services;
- Includes Tourist Development Councils and Tourism Development Agencies to definition of “local government entity”, authorizing the Auditor General to audit these entities.

FINANCE, TAX, & ADMINISTRATION

OTHER BILLS OF INTEREST

- HB 127: Permit Fees – ***PASSED***
- HB 861/SB 1616 Local Government Financial Reporting – ***PASSED***
- HB 7071: Workforce Education – ***PASSED***
- HB 7054: Taxation Transparency – ***FAILED***
- SB 596/HB 671: Regional Rural Development Grants– ***FAILED***

GROWTH, AG, ENVIRONMENT, & TRANPORTATION (GATE)

HB 7103 – Property Development *(PASSED)*

- 2019's major growth management package
- Allows for local inclusionary housing ordinances but requires counties to fully offset the costs to the developer (through incentives, density bonuses, etc.)
- Sets shot clock for decisions on development orders/permits; can be extended by both parties
- Expands scope of work for private providers and prohibits county from charging inspection fees when private provider is used; can charge reasonable administrative fee
- Addresses impact fee credits (applies prospectively)

GATE

HB 207: Impact Fees *(PASSED)*

- Provides that local governments may not require the payment of impact fees prior to the issuance of a building permit for the property subject to the fee.
- Amends the Impact Fees statute to codify the dual rational nexus test, the legal standard used by courts to determine whether an impact fee is appropriate.
- Exempts water & sewer connection fees the new provisions.

GATE

SB 824/HB 987: Vacation Rentals *(FAILED)*

- Would have preempted regulation of short-term rentals to the state, including inspection, licensing, and occupancy limits
- Would have required local ordinances to apply uniformly to all residential properties, regardless of property use
- Would have removed grandfather clause
- Passed by a narrow margin (13-11) in final House committee; not considered by any Senate committee

GATE

HB 1159: Private Property Rights *(PASSED)*

- Provides that a local government may not require an application, approval, permit, fee, or mitigation for the tree trimming or removal on residential property if the property owners obtains documentation from an arborist or landscape architect that the tree is a danger to persons or property
- Prohibits replanting requirements
- Requires “property owner bill of rights” to be posted on county property appraiser websites

GATE

HB 771: Environmental Regulation *(Vetoed)*

- Requires counties and cities to address the contamination of recyclable material in contracts entered into for the collection, transport and processing of residential recycling materials
- Imposes a five-year moratorium on local regulations of single-use plastic straws
- Directs OPPAGA to conduct study on local plastic straw regulations and bans

GATE

Substantive Water Quality Legislation *(FAILED)*

- Both chambers proposed bills covering various water quality related issues; however, ultimately nothing made it to the Governor's desk
- Major topics covered: septic tank program oversight; wastewater treatment; biosolids; BMAP requirements; sewage spill notifications
- Significant funding for water quality improvement efforts included in final budget (~$680 million)

GATE

OTHER BILLS OF INTEREST

- HB 9: Community Redevelopment Agencies – ***PASSED***
- HB 453: Micromobility Devices & Motorized Scooters ***– PASSED***
- HB 311: Autonomous Vehicles ***– PASSED***
  - Includes preemption of local regulations imposing tax, fee, or other requirement on automated vehicles or systems
- SB 246: Retainage ***– PASSED***
- HB 1383/SB 1720: Property Rights/Bert Harris ***– FAILED***
- HB 291/SB 429: Private Property Comp Plan Element ***– FAILED***

HEALTH & SAFETY

HB 337- Courts – *PASSED*

- Incrementally increases the jurisdictional threshold from $15,000 to $30,000 on January 1, 2020 then to $50,000 on January 1, 2022;
- County court case with amount in controversy exceeding $15,000 is appealed to the district court of appeal;
- Low-cost county court mediation is reserved for those cases valued at less than $15,000;
- Filing fee structure adjusted to maintain fiscal neutrality.

HEALTH & SAFETY

HB 107: Texting While Driving – *PASSED*

- Changes current enforcement of the ban on texting while driving from a secondary offense to a primary offense
- Authorizes enforcement of the ban on the use of a wireless communications device in a handheld manner while operating a motor vehicle in a designated school crossing, school zone, or active work zone area as a primary offense

HEALTH & SAFETY

SB 7012: Vaping – *PASSED*

- Amends current preemption in s. 386.209, F.S.,
- Implements grant of authority to local governments in Constitutional Amendment 9 from 2018, authorizing local governments to adopt more restrictive local ordinances on the use of vaping devices.

HEALTH & SAFETY

HB 441: E-911 Systems – *PASSED*

- Requires each county to develop a plan to implement countywide text-to-911 service and, by January 1, 2022, to enact a system that allows for text-to-911 service.

HEALTH & SAFETY

HB 7030: MSD Commission Recommendations – *PASSED*

- Requires a sheriff to establish a guardian program if the local school board votes by majority to implement the program, or contract with another sheriff's office that has established a program, to provide training to school district or charter school employees
- Contains a provision that would allow trained public school teachers to carry firearms in schools

HEALTH & SAFETY

HB 7125: Criminal Justice – *PASSED*

- Raises Florida's retail theft "threshold" from $300 to $750
- Repeals and reduces driver license suspensions and revocations for non-driving related reasons and revises specified offenses for driving while license suspended or revoked
- Repeals mandatory direct file for juvenile offenders and revises youthful offender sentencing eligibility
- Increases penalties for introducing a cell phone and other contraband into a state correctional institution (FAC Legislative Program Issue – proposed by Orange County)

HEALTH & SAFETY

OTHER BILLS OF INTEREST

- SB 168: Federal Immigration Enforcement ***- PASSED***
- SB 366: Needle Exchange Program ***– PASSED***
- HB 49: Incarcerated Women ***– PASSED***
- HB 411: Nonemergency Medical Transportation Services ***– PASSED***
- HB 639: Courthouse Security ***– FAILED***

Questions?

Thank You.

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Florida Association of County Attorneys
2019 Continuing Legal Education Program

June 12-13, 2019

What's the Problem with Just Hiring the Guy Down the Street? Procurement & Bid Protests

1. FS 255.20 – Local bids and contracts for public construction works
2. FS 336.41 – When competitive bidding required for county roads
3. FS 287.055 – The Consultants' Competitive Negotiation Act
4. Part VII FS Ch. 218 – The Local Government Prompt Payment Act
5. FS 255.05 – Performance and Payment Bonds
6. Bid Protests
7. FS 212.08(6) – Direct Purchase Sales Tax Exemption
8. Public Records and Public Procurement

FS 255.20 Local bids and contracts for public construction works

FS 255.20 requires local governments and special districts to competitively award specified public works projects estimated to cost more than $300,000. Projects subject to FS 255.20 include the construction or improvement of public buildings, structures or other public construction works. The same applies to electrical work estimated to exceed $75,000. The thresholds are subject to indexing as specified in subsection (2) of the statute.

Competitively award means to award contracts based on the submission of sealed bids, proposals submitted in response to an RFP, proposals submitted in response to an RFQ, or proposals submitted for competitive negotiation.

Statute authorizes, but does not require, prequalifying contractors for road and bridge projects exceeding $250,000 subject to specific implementing requirements.

Excluded from the scope of the statute are nearly a dozen exceptions. Many of the exceptions are governed by very narrow and detailed criteria in order to qualify. A few require published notice and public hearing. One exception pertains to projects subject to chapter 336, which I will discuss momentarily.

If the contract is to be awarded based on price, it must be to the lowest qualified and responsive bidder unless all bids are rejected.

What about small-business or disadvantaged-business enterprise programs or local-preference ordinances? The statute specifically provides that they are not preempted, so they may still be taken into consideration.

Subject to specified exceptions, every contract for public work, for the construction of public bridges, buildings, and other structures must specify in the contract lumber, timber, and other forest products produced and manufactured in this state, if wood is a component of the public work, and if such products are available and their price, fitness, and quality are equal.

What happens if you fail to comply with this three page, somewhat byzantine package of procurement laws? The statute authorizes any qualified contractor or vendor who could have been awarded the project had it been competitively bid to challenge the award based upon lack of compliance, and the prevailing party is entitled to recover its reasonable attorney's fees.

In AGO 96-73, the Attorney General opined that, as an agency or subdivision of the state, the Monroe County FHA must comply with FS 255.20 as well as the CCNA, the Consultants' Competitive Negotiation Act under FS 287.055 in awarding construction contracts for public buildings. We will discuss the CCNA later.

In AGO 2002-59, the Attorney General reached the same conclusion regarding both statutes for a non-profit corporation created to construct, manage and operate a county jail, reasoning that

the corporation was an instrumentality of the county used in discharging its responsibility to provide a jail.

So according to the Attorney General, these statutes must be broadly construed to embrace not only the governmental entities themselves, but also their agencies and instrumentalities.

Later in the presentation under the bid protest topic, I will discuss some case law addressing competitive procurement disputes involving FS 255.20.

FS 336.41 Counties; employing labor and providing road equipment; accounting; when competitive bidding required

FS Chapter 336 governs the county road system.

FS 336.41 allows counties to use their own labor and equipment for constructing and opening of new roads or bridges and repair and maintenance of any existing roads and bridges unless funded from the proceeds of the 80-percent portion of the surplus of the constitutional gas tax, in which case, and subject to specified exceptions, the work must be awarded by competitive bid to the lowest responsible bidder. The rules governing the solicitation in such a case are provided in FS 336.44.

As in the case of FS 255.20, the statute authorizes, but does not require, prequalifying contractors for road and bridge projects exceeding $250,000 subject to specific implementing requirements.

FS 287.055 The Consultants' Competitive Negotiation Act

The Consultants' Competitive Negotiation Act is set forth in FS 287.055. It governs the procurement of professional services in the practice of architecture, professional engineering, landscape architecture, and registered surveying and mapping.

The Act applies to the state and local governments alike.

The Act requires an agency to publicly announce, in a uniform and consistent manner, each occasion when professional services must be purchased for a project the basic construction cost of which is estimated by the agency to exceed the threshold amount provided in FS 287.017 for CATEGORY FIVE, currently $325,000, or for a planning or study activity when the fee for professional services exceeds the threshold amount provided in FS 287.017 for CATEGORY TWO, currently $35,000, except in cases of valid public emergencies certified by the agency head.

Under the Act, "project" means the fixed capital outlay study or planning activity described in the solicitation, and may include a grouping of minor construction, rehabilitation, or renovation activities, or a grouping of substantially similar construction, rehabilitation, or renovation activities.

The procurement process contemplates two distinct steps. In the first step, the agency publishes an RFQ in which it describes the scope of the project and the professional services required, and solicits qualifications from firms desiring to provide the services. The agency then evaluates the qualifications of the responding firms, must conduct discussions with, and may require public presentations by, no fewer than three firms regarding their qualifications, approach to the project, and ability to furnish the required services. Qualification factors to be considered include the ability of professional personnel; whether a firm is a certified minority business enterprise; past performance; willingness to meet time and budget requirements; location; recent, current, and projected workloads of the firms; and the volume of work previously awarded to each firm by the agency, with the object of effecting an equitable distribution of contracts among qualified firms but at the same time selecting the most highly qualified firms.

Moving to the second step, once the qualifications are evaluated the agency must select in order of preference no fewer than three firms deemed to be the most highly qualified to perform the required services. The agency must then negotiate a contract with the most qualified firm for compensation which the agency determines is fair, competitive, and reasonable. If the negotiations are unsuccessful, they must be formally terminated following which negotiations with the second ranked firm must be commenced. If unsuccessful, an attempt to negotiate with the third ranked firm must be undertaken.

The Act prohibits the agency from requesting, accepting and considering proposals for compensation except during the negotiation process. It is unlawful, then, to require compensation proposals with the solicitation for qualifications.

The manifest goal of the Act is to limit the selection process to identifying the most qualified firms without regard to compensation, and only then to negotiate a price.

In *City of Lynn Haven v. Bay County Council of Registered Architects, Inc.*, 528 So. 2d 1244 (1st DCA 1988), the city acquired a set of plans from a third party for a prefabricated metal building costing in excess of the CCNA threshold and solicited bids to construct the building according to the plans. The bid instructions provided that the contractor would be responsible for securing the architectural services required to have the plans signed and sealed for the permit. A coalition of architects brought suit to enjoin any contract award under the solicitation, contending that requiring the contractor to obtain the architectural services was contrary to the CCNA. The First District Court of Appeal agreed, concluding that the solicitation procedure violated the provisions of the CCNA requiring the city to publicly announce the need for the professional services, requiring the city to effectuate an equitable distribution of contracts among the most qualified firms, and requiring the city to determine that the professional fees it would be paying indirectly were fair, competitive and reasonable.

Subsection (10) of the Act permits an agency to reuse plans from a prior agency project without complying with the CCNA procedures, but only if the public notice for the acquisition of the plans states that they are subject to reuse in accordance with the subsection.

Among other features of the Act, an agency is allowed to enter into a continuing contract for professional services if the selection and negotiation procedures of the Act are followed. The Act defines a continuing contract as follows:

> A "continuing contract" is a contract for professional services entered into in accordance with all the procedures of this act between an agency and a firm whereby the firm provides professional services to the agency for projects in which the estimated construction cost of each individual project under the contract does not exceed $2 million, for study activity if the fee for professional services for each individual study under the contract does not exceed $200,000, or for work of a specified nature as outlined in the contract required by the agency, with the contract being for a fixed term or with no time limitation except that the contract must provide a termination clause. Firms providing professional services under continuing contracts shall not be required to bid against one another.

A continuing contract is useful for handling minor and recurring projects that require professional services, such as repair, replacement or redesign of drainage systems, or small road paving projects. The agency can have any number of firms engaged under continuing contracts, but cannot require those firms to bid against each other for the work.

The Act permits an agency to solicit bids for a design-build contract, but it first must prepare a design criteria package to be used in the solicitation. For the specific requirements of a design criteria package please refer to the Act. The package must be prepared by an appropriate design criteria professional employed by the agency or retained under a contract entered into in compliance with the competitive selection and negotiation provisions of the Act. Each local government desiring to procure projects through design-build must adopt rules or ordinances for the awarding of contracts. The minimum procedures which the regulations must include are extensive. Please refer to subsection (9) of the Act for the details.

The Act prohibits third party consultants from soliciting or securing a professional services contract with an agency for a fee, commission, percentage, gift, or other consideration, and requires the professional to certify in the contract that no such arrangement has been made.

Local Government Prompt Payment Act (Part VII FS Ch. 218)

The Local Government Prompt Payment Act is codified in Part VII FS Ch. 218.

The Act is a detailed set of regulations governing local government payment obligations for the legislative purpose of requiring payments to be prompt, requiring interest on late payments, and requiring a dispute resolution process.

The regulations govern payments for so-called nonconstruction services, and payments to contractors for construction services.

Nonconstruction services are those provided by vendors, who are defined as persons who sell goods or services, sell or lease personal property, or lease real property directly to a local governmental entity, and include waste hauling services.

In the case of nonconstruction services, payment is due within 45 days following the date the local government receives a proper invoice that conforms with all statutory requirements and all requirements specified by the local government, or in the absence of a proper invoice, the date delivery of personal property is accepted, or services are completed, or the rental period begins, or as specified in a contract with the vendor. If the payment request is not a proper invoice, the local government so notify the vendor in writing within 10 days identifying the deficiency and corrective action.

The regulations for construction services are much more detailed. Either in the contract or in a separate notice required thereunder, the local government must identify its agent or employee to whom payment requests must be submitted, or the submission location. The local government is required to establish procedures for date-stamping all payment requests received by its agent or employee, or at the submission location. The payment due date clock starts upon receipt of the request. It is 25 days if an agent must approve the request, and otherwise 20 days.

If the request is not a proper invoice, the local government must reject it and so notify the contractor in writing within 20 days identifying the deficiency and corrective action. Unless again rejected, payment is then due by the later of the 10th day following receipt of the corrected request and the first business day after the next regularly scheduled meeting of the local governmental entity. The process repeats until resolved or an impasse is reached.

If a dispute remains, the undisputed portion of the request must be paid when due, and the disputed portion resolved in accordance with the procedure prescribed in the construction contract or any applicable ordinance, which must be referred to in the contract.

The contract must also provide for the development of a single punch list of the items required to render the construction services complete, satisfactory, and acceptable. Please refer to FS

218.735(7) for the requirements governing the punch list creation and deadlines, and the consequences of non-compliance for each party.

Except for projects paid from funding sources subject to federal requirements that are contrary to the Act, under a construction services contract the local government can withhold up to 10% retainage from progress payments until 50% completion of the project. Thereafter retainage is capped at 5% until final completion unless the population of the local government is below a specified threshold. After 50% completion, the contractor can submit a payment request for up to one-half of the outstanding retainage, which must be paid except for any portion in dispute. The retainage rules do not apply, however, to contracts for projects not exceeding $200,000 in cost.

Once the punch list items are completed, the contractor can submit a payment request for any remaining retainage, which must be paid except for any portion in dispute.

For a construction services contract, interest on late payments is 1 percent per month, or the rate specified by the contract, whichever is greater. For nonconstruction services, interest is 1 percent per month. Unpaid interest is compounded monthly. Interest must be invoiced to be payable. The Act prohibits a contractual waiver of interest payments. Each December a report regarding the number and amounts of interest payments made during the preceding fiscal year must be made to the local government's governing body if the total amount exceeds $250.

FS 218.76(2) requires each local government to establish a dispute resolution procedure which applies to vendors. The procedure will also apply to payment disputes under a construction services contract if the contract is silent as to procedure. The procedure must commence within 45 days following submission of the disputed payment request, and concluded by final decision within 60 days. Interest begins to accrue 15 days after a decision in favor of the local government, and from the original due date if in favor of the vendor or contractor. Should the local government fail to commence the procedure within the 45 days, a contractor can so notify the local government in writing. The local government must then commence the procedure within 4 business days thereafter or else its objection to payment is deemed waived, and interest accrues from the original due date.

In a civil action to recover amounts due under the Act, reasonable attorney's fees and costs must be awarded to the prevailing party, including those incurred on appeal.

What steps should a local government take to be in compliance with the Act?

- Adopt the required procedures for:
  - Date-stamping all payment requests received by its agent or employee, or at the submission location.
  - Dispute resolution.

- Include required provisions in a construction services contract:

- Either in the contract or in a separate notice required thereunder, identification of the local government's agent or employee to whom payment requests must be submitted, or the submission location.
- Procedure for producing a single punch list of the items required to render the construction services complete, satisfactory, and acceptable.

➢ Consider including optional provisions in a construction services contract for:
- Retainage.
- Dispute resolution.

➢ Ensure all parties involved in handling payment requests are aware of the processing requirements and the applicable deadlines.

➢ Commence dispute resolution in a timely manner to avoid waiving payment objections.

To date there are no reported appellate decisions interpreting the Act.

Included in the materials are examples of well drafted prompt payment policies that address the procedures required under the Act, one from Pasco County and the other from Seminole County.

Public Bid Disclosure Act (FS 218.80)

Mention should be made regarding FS 218.80, which appears at the end of Part VII FS Ch. 218 and is entitled the Public Bid Disclosure Act. It requires the disclosure in bid or RFP solicitations and in all contracts, of all of a local government's permits or fees, including, but not limited to, all license fees, permit fees, impact fees, or inspection fees, payable by a contractor to the local government that issued the solicitation. If a final fixed price is not required in the initial response, then the disclosure must be made at least 10 days prior to the price submission deadline. If a local government fails to make the required disclosure, then the fees cannot be assessed and collected, nor can construction be halted.

Pasco County

Prompt Payment Policy

In Accordance With the Local Government Prompt Payment Act

Chapter 218, Part VII, Florida Statutes

Revised 1-2012

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I. Purpose

The purpose of this policy is to provide a guideline for Pasco County Departments to help insure that Vendors and Contractors who provide goods and/or services to the Pasco County Board of County Commissioners (BCC) and its Departments (County) receive payment for such goods and/or services on a timely basis and in accordance with the Local Government Prompt Payment Act (Chapter 218, Part VII, Florida Statutes). The Local Government Prompt Payment Act (the "Prompt Payment Act") is contained in §§ 218.70 - 218.80, Fla. Stat.

The purpose (§ 218.71, Fla. Stat.) of the Prompt Payment Act is:

- To provide for prompt payments by local governmental entities and their institutions and agencies
- To provide for interest payments on late payments made by local governmental entities and their institutions and agencies, and
- To provide for a dispute resolution process for the payment of obligations.

Please note that the Prompt Payment Act, like any statute or law, can be amended by legislative action. This policy is based on the statutory requirements as of the latest revision of this document.

II. Scope

This policy applies to all operations of the BCC and Pasco County (County).

III. Definitions

The following definitions are provided as an aid in the review and application of these guidelines.

A. Agent

The project architect, project engineer, or other agency or person, acting on behalf of the County, that is required to review invoices or payment requests from vendors or contractors, must be identified in accordance with §218.735 (1), Fla. Stat., and as defined in the contract between the County and the Vendor or Contractor.

B. Construction Services

All labor, services, and materials provided in connection with the construction, alteration, repair, demolition, reconstruction, or other improvements to real property.

C. Contractor or Provider of Construction Services

The person who provides construction services through direct contract with the County.

D. County

A political subdivision of the state established pursuant to Art. VIII, § 1, Fla. Const. (In regard to this policy, Pasco County).

E. Date Stamped

Each invoice and payment request received by the County, shall be marked, by use of a date stamp or other method, which clearly indicates the date such invoice or payment request is first delivered into the hands of an employee, agent (i.e., the Pasco County Clerk & Comptroller), or officer of the County, or is first delivered to a facility or office of the County.

F. Improper Invoice

An invoice that does not conform to the requirements of a proper invoice.

G. Improper Payment Request

A request for payment for construction services which does not conform to all statutory requirements and to all requirements specified by the County in the contract.

H. Local Governmental Entity

A county, or any office, board (in regard to this policy, the BCC), commission, department, branch, division, or institution thereof or any project supported by county funds.

I. Proper Invoice

An invoice that conforms to all statutory requirements and all requirements specified by the County. Such County requirements should be included in the contract for the project or task for which the invoice is submitted.

J. Proper Payment Request

A request for payment for construction services which conforms to all statutory requirements and to all requirements specified by the County. Such requirements must be included in the contract of the project for which payment is requested.

K. Provider

Includes any vendor or contractor, as defined herein.

L. Purchase

The purchase of goods, services, or construction services; the purchase or lease of personal property; or the lease of real property by the County.

M. Vendor

Any person who sells goods or services, sells or leases personal property, or leases real property to the County.

IV. Proper Invoice/Payment Request Requirements

A. General

Generally, and as applicable, goods shall actually have been received and services shall actually have been performed, in accordance with contractual or other specifications or requirements, to the satisfaction of the County before any payment is due to the Vendor or Contractor. Certain limited exceptions, such as for utility-type services, which require payment in advance, are permitted when authorized by the BCC.

B. Sales Tax

Sales tax should *not* be included on any invoice or payment request. The BCC's current tax-exempt number is 85-8013866417C-5. A copy of the tax-exempt form will be supplied to Vendors and Contractors upon request.

C. Federal Identification and Social Security Numbers

Vendors and contractors are paid using either a Federal Identification Number or Social Security Number. To receive payment, vendors and contractors must supply the County and/or the Pasco County Clerk & Comptroller (Clerk & Comptroller) with the correct number as well as a proper Internal Revenue Service W-9 Form.

Vendors and Contractors should be advised to notify the Accounts Payable Department in the Office of the Pasco County Clerk & Comptroller when changes in data occur (telephone 352-521-4556, email accts.payable@pascoclerk.com, Fax 352-521-4549).

D. Proper Invoice for Non-Construction Goods and Services

Unless otherwise specified in the applicable contract, invoices *shall* contain the following minimum information in order to be considered a Proper Invoice:

1. Name of vendor,

2. Remittance address or wiring instructions,

3. Invoice Date.

4. Invoice number.

5. The “Bill To” party must be the Pasco County Board of County Commissioners or a clearly identified department or division thereof.

6. Authorizing Pasco County purchase order number(s).

7. Project name (for those invoices related to contracts which do not involve a purchase order).

8. In the case of non-purchase order procurement (emergency purchases), the full name and department of the County individual placing the order.

9. In addition to the information required in Section IV.D.1-8 above, invoices involving the purchase of goods *shall* also contain**:**
   a. A complete item description,
   b. Quantity purchased,
   c. Unit price(s),
   d. Total price (for each item),
   e. Total amount of invoice (all items), and
   f. All items invoiced must agree to the terms as specified in the purchase order and bid (if applicable) or be equal to or better than such terms.

10. In addition to the information required in Section IV.D.1-8 above, invoices involving the purchase of services, including utility services (e.g., electric, telephone), *shall* also contain:
    a. Itemized description of services performed,
    b. Date(s) services performed,
    c. Billing method for services performed (i.e., approved hourly rates, percentage of completion, cost plus fixed fee, direct/actual costs, etc.),
    d. Itemization of other direct**,** reimbursable costs (including description and amount),
    e. Copies of invoices for other direct, reimbursable costs (other than incidental costs such as copying) and one (1) of the following:
       i. Copy of both sides of a cancelled check evidencing payment for costs submitted for reimbursement,
       ii. Paid receipt,

iii. Waiver from subcontractor (if applicable), or
iv. Any other information or documentation, which may be required or specified under the terms of a contract or agreement.

f. All items invoiced must agree to the terms as specified in the purchase order and bid (if applicable), contract or agreement, or be equal to or better than such terms.

E. Proper Invoice/Payment Request Requirements for Construction Services

Payment Requests must conform to all requirements of Section IV A-D, above, unless otherwise specified in the terms of the applicable agreement or contract between the BCC and the Contractor or Vendor.

V. Submission of Invoices and Payment Requests to the Clerk & Comptroller

The vendor shall submit all Invoices and Payment Requests (billed to the *Pasco County Board of County Commissioners*) to the Clerk & Comptroller as follows:

A. Non-Construction Invoices

All Non-Construction Invoices may be submitted by mail, by hand delivery, or via email (Note: email is the preferred method for receipt of non-construction invoices).

1. Mailing Address

Pasco County Board of County Commissioners
c/o Pasco County Clerk & Comptroller
Accounts Payable Department, Suite 210
38053 Live Oak Avenue
Dade City, FL 33523

2. Drop Off Locations

Pasco County Board of County Commissioners
c/o Pasco County Clerk & Comptroller
East Pasco Government Center
14236 Sixth Street
Suite 201
Dade City, FL 33523

OR

Pasco County Board of County Commissioners
c/o Pasco County Clerk & Comptroller

Official Records Department
West Pasco Government Center
8731 Citizens Drive
Suite 220
New Port Richey, FL 34654

3. Email Address

accts.payable@pascoclerk.com

B. Construction Payment Requests

Payment Requests and Invoices issued in connection with construction contracts should be submitted in accordance with the terms of the contract or agreement. If not so specified in the contract or agreement, see submission options in Section V. A. above.

VI. Calculation of Payment Due Date

A. Non-Construction Invoices and Construction Services ≤ $200,000

1. Receipt of Proper Invoice

The time at which payment is due from the County is forty-five (45) days from the date on which a Proper Invoice is received by the Clerk & Comptroller, as the BCC's Chief Disbursement Officer.

2. Receipt of Improper Invoice

If an Improper Invoice is received, a required invoice is not received, or invoicing of a request for payment is not required**,** the time at which payment is due from the County is forty-five (45) days from the latest of the following:

The date:

a. On which delivery of personal property is accepted by the County; or
b. On which services are completed; or
c. On which the rental period begins (if applicable); or
d. On which the County and the Vendor agree, in a contract that provides dates relative to payment periods, whichever date is the latest under the applicable options listed.

3. Rejection of an Improper Invoice

The County may reject an Improper Invoice. Within ten (10) days after the County's determination that the improper invoice has been received, the Vendor must be notified that the invoice is improper

and be given an opportunity to correct the incorrect or missing information.

The County's rejection of an Improper Invoice must

- Be written,
- Specify any and all deficiencies, and
- State actions necessary to make the Improper Invoice proper.

If the Vendor submits a corrected invoice, which corrects the deficiencies specified in the County's written rejection, the County must pay or reject the corrected invoice no later than ten (10) business days after the date the corrected invoice is stamped as received (this is the date on which it is delivered to the Clerk & Comptroller as the County's chief disbursement officer).

4. Payment of Undisputed Portion of Invoice

If the County disputes a portion of an invoice, the undisputed portion shall be paid in a timely manner, in accordance with the due dates for payment as specified in this policy guideline.

B. Payment Requests for Construction Services > $200,000

1. Receipt of Proper Payment Request

The time at which payment is due from the County is as follows:

a. If an Agent of the County must approve the Payment Request (or invoice) before it is submitted to the Clerk & Comptroller, payment (whether full or partial) is due twenty-five (25) business days after the Payment Request (or invoice) is stamped as received on the date it is delivered to the County's agent or to a facility or office of the County. The Contractor may send the County an overdue notice. If the payment request (or invoice) is not rejected within four (4) business days after delivery of the overdue notice, the payment request (or invoice) shall be deemed accepted, except for any portion of the payment request (or invoice) that is fraudulent or misleading.

   The contract between the County and the Contractor must identify the agent or employee of the County, or the facility or office, to which the Contractor may submit its payment request or invoice, or shall be provided by the County through a separate written notice, as required under the contract, no later than 10 days after the contract award or notice to proceed. A Contractor's submission of a payment request or invoice to the identified agent, employee, facility, or office of the County shall

be stamped as received as provided in § 218.74(1), Fla. Stat. and shall commence the time periods for payment or rejection of a payment request or invoice as provided in this section.

b. If an agent of the County need not approve the Payment Request (or invoice) submitted to the County, whether full or partial, payment is due twenty (20) business days after the Payment Request is stamped as received on the date it is delivered to the County's agent or to a facility or office of the County as identified in the contract.

2. Receipt of Improper Payment Request

The time at which payment is due from the County is as follows:

a. The County must reject the Improper Payment Request (or invoice) within twenty (20) business days after the date on which the Payment Request is stamped as received (this is the date on which it is delivered to the County's agent or to a facility or office of the County). The Contractor must be notified within ten (10) days of the County's determination that the Payment Request has been rejected.

b. The County's rejection of the Improper Payment Request (or invoice) must:
    1) Be in writing,
    2) Specify what is deficient, and
    3) State the action necessary to make the Improper Payment Request proper.

c. If a Contractor submits a Payment Request (or invoice), which corrects the deficiency specified in the County's written rejection, the County must pay or reject the corrected submission no later than ten (10) business days after the date the corrected Payment Request is stamped as received (this is the date on which it is delivered to the County's agent, or to a facility or office of the County).

d. Payment of Undisputed Portion
    1) If the County disputes a portion of an Invoice or Payment Request, the undisputed portion shall be paid in a timely manner, in accordance with the due dates for payment as specified in this section.

VII. Resolution of Disputes

If a dispute arises between a Vendor or Contractor and the County concerning payment of an invoice or payment request, the dispute shall be resolved as set forth in § 218.735, F.S., for construction services when the total cost of the construction services purchased is more than $200,000, and § 218.76, Fla. Stat. for non-construction goods or services and for construction services when the total cost of the construction services purchased is $200,000 or less.

A. Dispute Between the County and a Contractor

If a dispute between the County and a Contractor cannot be resolved following resubmission of a Payment Request (or Invoice) by the Contractor, the dispute must be resolved in accordance with the dispute resolution procedure prescribed in the construction contract or in any applicable ordinance, which shall be referenced in the contract. In the absence of a prescribed procedure, the dispute must be resolved by the procedures specified below.

B. Disputes Initiated by Vendors or Contractors

1. The Vendor or Contractor shall, not later than thirty (30) days after the date on which a proper invoice or payment request was received by the BCC, submit a written statement via certified mail to the department for which the purchase was made, specifying the nature of the dispute that the vendor or contractor may have regarding payment of such Invoice or Payment Request.

2. Within forty-five (45) days of receipt by the BCC of the payment request or proper invoice, the appropriate/authorized County employee(s) shall commence investigation of the dispute and render a final decision on the matter no later than sixty (60) days after the date on which the Payment Request or Invoice is received by the BCC. A written explanation of the final decision made shall be sent to the Vendor or Contractor, via certified mail, within five (5) business days from the date on which such final decision was made. A copy of the written explanation of the final decision shall be provided to the Clerk & Comptroller simultaneously with the certified mailing to the Vendor or Contractor.

VIII. Purchases Involving Federal Funds

When the County intends to pay for a purchase with federal funds, the County shall not make such purchase without reasonable assurance that federal funds, to cover the cost, will be received. Where payment, or the time of payment, is contingent upon the receipt of federal funds or federal approval, any contract and any solicitation to bid shall clearly state such contingency. (§ 218.77, Fla. Stat.).

IX. Construction Services Contract Requirements – Project Completion

A. Development of the List of Items Needed

Construction services contracts, covered by the provisions of the Prompt Payment Act, must provide for the development of a single list of items required to render complete, satisfactory, and acceptable the construction services purchased by the BCC, as well as the process for developing the list, including the responsibilities of the BCC and the contractor in developing and reviewing the list and a reasonable time for developing the list. The contract must also specify a date for delivery of the list of items, not to exceed five (5) days after the list has been developed and reviewed [Note: See § 218.735 (7), Fla. Stat., for additional information as to timing, contract requirements, and completion requirements, including damages].

B. Failure by County in its Responsibilities to Develop List

If County fails to comply with its responsibilities to develop the list required under § 218.735, Fla. Stat., a Contractor may submit a Payment Request for all remaining retainage (see X. Retainage, below) withheld by the County and payment of any remaining undisputed contract amount, less any amount withheld, pursuant to contract for incomplete or uncorrected work. The County must pay such amounts within twenty (20) business days after receipt of a Proper Payment Request (or Proper Invoice).

C. Failure by Contractor in its Responsibilities to Develop List

If the County has provided written notice to the Contractor specifying the Contractor's failure to meet contract requirements in development of the list, the County need not pay or process payment for retainage.

X. Retainage

The Prompt Payment Act specifies the way in which retainage must be managed. [See §. 218.735 (7) and (8), Fla. Stat.]

A. Ten Percent Retainage

With regard to a contract for construction services of $201,000 or more, the County (unless otherwise specified in the contract) may withhold, from each progress payment made to the Contractor, an amount not to exceed 10% of the payment as retainage until 50 percent completion of such construction services.

B. Reduction to Five Percent Retainage

After 50 percent completion of the construction services have been achieved, the County must automatically reduce, to 5%, the amount of

retainage withheld from each subsequent progress payment to the Contractor. (Note: This is a change in procedure, required in earlier versions of the statute, which required the Contractor to request a reduction to 5%).

C. Payment Request for Partial Retainage

After 50 percent completion of the construction services have been achieved, the Contractor may submit a Payment Request for up to one-half of the retainage held by the County. The County is required to promptly pay such Payment Request, unless the funds are the subject of a good faith dispute or claim as provided under § 218.735(8)(f), Fla. Stat.

XI. Late Payment Interest Charges

Failure on the part of the County to make timely payments may result in the BCC being subject to late payment interest charges. No contract between the BCC and a Vendor or Contractor may prohibit the collection of late payment interest charges allowable under the Prompt Payment Act as mandatory interest. (§ 218.75, Fla. Stat.).

A. Related to Non-Construction Services

All payments due from the BCC, and not made within the time specified within this policy, will bear interest, from 30 days after the due date, at the rate of one percent (1%) per month on the unpaid balance. The vendor must invoice the BCC for any interest accrued in order to receive the interest payment. (§ 218.74 (4), Fla. Stat.).

An overdue period of less than one (1) month is considered as one (1) month in computing interest. Unpaid interest is compounded monthly. The term one (1) month means a period beginning on any day of a month and ending on the same day of the following month.

B. Related to Construction Services

All payments for construction services that are not made within the time periods, as specified within the applicable statute, shall bear interest, from 30 days after the due date, at the rate of one percent (1%) per month, or the rate specified by contract, whichever is greater. The contractor must invoice the BCC for any interest accrued in order to receive the interest payment. An overdue period of less than one (1) month is considered as one (1) month in computing interest. (§ 218.735 (8)(i), Fla. Stat.).

Unpaid interest is compounded monthly. The term one (1) month means a period beginning on any day of a month and ending on the same day of the following month.

C. Report of Interest

If the total amount of interest paid during the preceding fiscal year exceeds $250, the Clerk & Comptroller is required to submit a report to the BCC during December of each year, stating the number of interest payments made and the total amount of such payments. (§ 218.78, Fla. Stat.).

XII. Release of Payments to Vendors and Contractors

The BCC must authorize payments before funds can be disbursed to a Vendor or Contractor.

A. Payments to be Mailed

Following pre-audit review by the Office of the Clerk & Comptroller, proper Invoices and Payment Requests are presented to the BCC or its designee (Chairman or Vice Chairman) for approval. Approved check payments are mailed to Vendors and Contractors on the day following BCC approval. Generally, approvals are issued on Tuesdays for the release of payments.

B. Payments to be Picked Up by Vendors or Contractors

Vendors and Contractors have the option of picking up their check payments on the day following approval. Checks approved for release may be picked up, between the hours of 8:30 A.M. and 3:00 P.M, at the Office of the Pasco County Clerk & Comptroller, East Pasco Government Center, 14236 Sixth Street, Suite 201, Accounts Payable Department, Dade City, FL 33523 or the Office of the Pasco County Clerk & Comptroller, Official Records Department, West Pasco Government Center, 8731 Citizens Drive, Suite 220, New Port Richey, FL 34654. Checks not picked up by 3:00 P.M. will be mailed. Vendors and Contractors must call the Accounts Payable Department at 352-521-4599, before 5:00 P.M. on the Monday preceding the day on which such checks are available for pick-up, in order to:

1. Receive instructions concerning proper identification required for in-person issuance of checks, and

2. Advise the Accounts Payable Department not to mail such checks.

C. Payments to Vendors and Contractors by Wire or ACH

1. By Wire

Vendors and Contractors also have the option of having their payments wired. Wires are released, after 1:00 P.M., on the day following approval. Vendors and Contractors must call the Accounts Payable Department at 352-521-4599, by 11:30 A.M. on the

Wednesday prior to payment approval, in order to advise the department of the wiring request. Arrangements can also be made to have all subsequent payments wired, as well.

2. By ACH

Vendors and Contractors have the option to receive payments, via the Automated Clearing House (ACH), for invoices billed to the Pasco County Board of County Commissioners. An ACH Payment Form can be obtained by going to www.pascoclerk.com. On the Home Page, click on county finances in the Message from the Clerk & Comptroller section. This will take the user to Financial Services and Budget Operations. Click on the ACH Payment Form. The Form can be completed on-line and printed for forwarding to the Office of Paula O'Neil, Clerk & Comptroller, Pasco County, by mail or by fax.

SECTION 22. BUDGET AND FISCAL MANAGEMENT

22.15 PROMPT PAYMENT PROCEDURES

A. PURPOSE. To provide for prompt payment on all invoices received by Seminole County and to comply with the "Florida Prompt Payment Act" (Section 218.70, Florida Statutes).

B. ORGANIZATIONS AFFECTED. All Seminole County Departments, Divisions, Boards, Commissions, projects, etc.

C. PROCEDURES.

(1) Proper Invoices Required. All original invoices for payment must be submitted to Director of County Finance, P. O. Drawer Q, Sanford, Florida 32772-0869 on a Proper Invoice. A Proper Invoice shall be defined as any invoice acceptable by the Clerk of the Circuit Court, Finance Department, provided that the following information, at a minimum, is contained on such invoice:

(a) Date

(b) Description and quantity of items purchased or service rendered

(c) Purchase price or cost of service

(d) Name and address of vendor

(e) Purchase Order Number, Release Order Number, Blanket Purchase Order Number, Emergency Purchase Order Number, Confirming Purchase Order Number, Work Order Number, or Contract Number

(f) All other information required by the applicable contract, work order, purchase order, or similar instruments

(2) Invoice Requirements To Be Published and Distributed. County Finance shall make the requirements of a Proper Invoice available to all vendors upon request.

(3) Improper Invoices. Any invoice not meeting the requirements of a Proper Invoice is an Improper Invoice.

(4) Date Stamping Of All Invoices.

(a) All invoices received by Seminole County shall be marked as to the date the invoice is received by being stamped or clocked in the day received. The stamp or time clock shall include the date and words Seminole County and Received.

(b) If a Proper Invoice for payment is received by County Finance, it shall be stamped and held for authorization for payment from the department.

(c) All invoices received by a department directly from a vendor must be forwarded to County Finance within five (5) business days of receipt to determine if it meets the requirements of a Proper Invoice, regardless of authorization for payment.

(5) Review of Invoices.

(a) All invoices received by County Finance, either directly from a vendor or from a department, shall be reviewed by County Finance to determine if the invoice meets the requirements of a Proper Invoice.

(b) If determined by County Finance to be a Proper Invoice, the invoice shall be held by County Finance for authorization for payment from the department or forwarded to the department for authorization for payment by the department.

(c) If the invoice is determined by the County Finance to be an Improper Invoice, County Finance shall notify the vendor within ten (10) days of receipt of the Improper Invoice by the County that the invoice is an Improper Invoice and inform the vendor as to what corrective action is required to make the invoice a Proper Invoice. Copies of the notice to the vendor of an Improper Invoice shall be submitted to the department and the Purchasing and Contracts Division.

(d) Vendors are to be informed, by the Purchasing and Contracts Division, that all original invoices are to be submitted directly to County Finance.

(6) Department Authorization For Payment.

(a) Within five (5) business days of receipt of goods and/or services, departments shall submit the original invoice (if received from a vendor or County Finance), packing slip, bill of lading, receiving copy of the Purchase Order, or any other documentation designating receipt of goods and/or services with authorization, fund and account number, and date stamp visible to County Finance for payment.

(b) If authorization for payment is received by County Finance on documentation other than an invoice, County Finance shall be responsible to compare the invoice, document authorizing payment, and County Finance's copy of the purchase order to verify accuracy and completeness of the invoice. County Finance shall review and process all properly authorized invoices within seven (7) business days of receipt of the authorization, but not later than forty-five (45) days from receipt of the original invoice or receipt of goods and/or services if no invoice exists.

(c) If an invoice pertains to goods and/or services that are contracted and no purchase order exists, County Finance shall submit the original invoice to the department within three (3) business days of receipt for authorization for payment.

(d) If a purchase is of a complex nature, County Finance may refer the original invoice to the department for authorization for payment; OR a department may request from County Finance the original invoice be submitted to the department for authorization of payment.

(e) If County Finance has NOT received authorization for payment within five (5) business days of receipt of the invoice, County Finance shall contact the department to notify the department of the delinquency in forwarding the necessary authorization for payment. Upon follow-up notification from County Finance, the department shall submit, within two (2) business days, authorization for payment or

contact County Finance as to why authorization has not been submitted and the date authorization will be submitted.

(f) Upon review by County Finance, if an invoice differs from the purchase order, County Finance shall submit the invoice to Purchasing within two (2) business days of receipt for the submission of a Change Order.

(g) County Finance shall prepare the billhead for all invoices.

(7) Dispute Resolution Procedure.

(a) All original invoices, packing slips, bills of lading, receiving copies of Purchase Orders, or other documentation designating receipt of goods and/or services, not authorized for payment after review by a department, must be referred to the Purchasing and Contracts Division Manager within five (5) business days of receipt of the goods and/or services with a detailed explanation outlining the reasons for disapproval of payment, with notification given to County Finance.

(b) Within five (5) business days of receipt of documentation not authorizing payment of goods and/or services from a department, the Purchasing and Contracts Division Manager shall contact the department and review the reasons for the non-payment recommendation.

(c) Upon receipt of the Purchasing and Contracts Division Manager's decision to authorize or not authorize payment, the following action shall be taken:

(i) Within two (2) business days of the Purchasing and Contracts Division Manager's decision to make payment, Purchasing shall notify the department and authorize County Finance, in writing, to make payment to the vendor with a copy of said notice provided to the department.

(ii) Within two (2) business days of the Purchasing and Contracts Division Manager's decision to withhold payment, the Purchasing and Contracts Division shall send written notice to the vendor with a copy sent to County Finance and the applicable department.

(iii) Within five (5) days of the notice being sent to the vendor that an invoice or the County is withholding payment, the vendor, if desiring to contest that determination, must file a written protest with the Deputy County Manager/Administration who shall, within five (5) days determine if the invoice was, in fact, an Improper Invoice. This decision shall be final. Failure to make the protest described herein shall cause the invoice to be conclusive determination to be an Improper Invoice.

(8) Invoice For Interest Payment.

(a) All invoices seeking a payment of interest shall be forwarded to County Finance.

(b) All invoices seeking payment of interest shall be reviewed and investigated by County Finance within ten (10) days of receipt to determine whether the interest payment should be authorized.

(c) If County Finance determines that payment of interest is warranted, it shall authorize and process payment from an account established within each fund for the payment of such interest and notify the department of such payment.

(d) If County Finance determines that the payment of interest is not warranted, it shall report its findings in writing to the Purchasing and Contracts Division Manager. The Purchasing and Contracts Division Manager shall make the final decision regarding payment of interest and notify County Finance of the decision. Based on the Purchasing and Contracts Division Manager's decision, County Finance shall make payment or notify the vendor that payment is not authorized and the reasons for nonpayment of the interest. The vendor may protest as to such determination in accordance with the procedures set forth in Section C(7)(c)(iii).

(e) Not later than the 10th of the month following the month in which an interest payment was made, County Finance shall submit a report to the Resource Management Department disclosing the previous month's interest payments, the amount of each payment, an explanation outlining the reason for the payment, and the department associated with the interest payment. A final interest payment report shall be published by County Finance not later than December 31st following the close of the Fiscal Year and submitted to the Resource Management Department with a copy to the County Manager.

(f) The Resource Management Department shall review and monitor the monthly interest payment reports. If more than two (2) interest payments are made pertaining to one department, the Resource Management Department shall meet with the department to offer assistance in resolving the problem of late payment of invoices.

D. AUTHORITY. Approved by the BCC September 19, 1989, Agenda Item D6
Resolution 2012-R-107 adopted June 12, 2012

Performance and Payment Bonds (FS 255.05)

FS 255.05 requires counties to obtain from a contractor undertaking construction or repair of a public building or public work for a price exceeding $200,000 a performance and payment bond issued by a surety insurer authorized to do business in Florida as a surety. Prior to commencement of the work, the bond must be issued, recorded in the public records and a certified copy delivered to the county.

The form of the bond is prescribed in the statute, and the payment provisions are to be construed and deemed a statutory payment bond as opposed to a common law bond.

In addition to specified provisions that must appear on the face of payment bond forms, the statute specifies the matters which must appear on the first page of the bond:

1. The name, principal business address, and phone number of the contractor, the surety, the owner of the property being improved, and, if different from the owner, the contracting public entity.
2. The contract number assigned by the contracting public entity.
3. The bond number assigned by the surety.
4. A description of the project sufficient to identify it, such as a legal description or the street address of the property being improved, and a general description of the improvement.

Included in the materials is a form for a combined performance and payment bond to be used by a county conforming to the statutory requirements and clearly providing that the obligation securing payment is separate and in addition to the obligation securing performance. This protects the county from counting disbursements to subcontractors, suppliers and laborers under the payment obligation against the obligation securing performance.

Please be mindful of the county's obligation under the statute to promptly supply copies of the contract and bond to a claimant upon request so as not impair the claimants rights against the bond, since subcontractors, suppliers and laborers have no lien rights against county property and are subject to time limitations in notifying the contractor of an intent to look to the bond for payment.

PUBLIC CONSTRUCTION COMBINED
PERFORMANCE AND PAYMENT BOND

Bond No. (enter bond number)

BY THIS BOND, we _____, a _____ corporation, as the Principal and _____, a _____ corporation, as the Surety, are bound to _____ County, a political subdivision of the State of Florida, and its Board of County Commissioners, herein called the Owner, in the sum of **$**_____ **U.S.**, for performance, and the separate additional sum of **$**_____ **U.S.**, for payment, for the payment of each of which we bind ourselves, our heirs, personal representatives, successors and assigns, jointly and severally.

The names, principal addresses and telephone numbers of the Principal (who is also the contractor within the meaning of Section 255.05, Florida Statutes), the Surety and the Owner are:

Principal	Surety	Owner
_____	_____	_____
_____	_____	_____
_____	_____	_____
_____	_____	_____
Phone: _____	Phone: _____	Phone: _____

The contract that is the subject of this bond, herein called the Contract, has been entered into between the Principal and the Owner, and is for [insert project name]. The Contract has been designated by the Owner as Contract No. _____ and is dated as of _____. Improvements to be made under the Contract are those outlined in the Contract which include but are not limited to [insert brief description of project]. The property upon which the improvements are to be made under the Contract is located [insert description of property sufficient to identify it, such as legal description or street address].

THE CONDITION OF THIS BOND is that if the Principal:

1. Performs the Contract dated as of _____, between the Principal and the Owner for [insert project name], the Contract being made a part of this bond by reference, and all of the terms and provisions of the Contract being incorporated in this bond by reference, at the times and in the manner prescribed in the Contract; and,

2. Promptly makes payments to all claimants, as defined in Section 255.05(1), Florida Statutes, supplying the Principal with labor, materials, or supplies, used directly or indirectly by the Principal in the prosecution of the work provided for in the Contract; and,

3. Pays the Owner all losses, damages, expenses, costs, and attorney's fees, including costs and attorney's fees incurred in any appellate proceedings, that the Owner may sustain because of default by the Principal under the Contract; and,

4. Performs the guarantee of all work, materials and warranties furnished under the Contract for the time specified in the Contract;

THEN this bond is void; otherwise it remains in full force and effect.

Any action instituted by a claimant under this bond for payment or recovery of retainage must be

in accordance with the notice and time limitation provisions in subsections (2) and (10) of Section 255.05, Florida Statutes.

This bond is to be deemed a statutory bond under Section 255.05, Florida Statutes, the provisions of which are hereby incorporated by reference and made a part hereof.

Interested parties are specifically directed to the following provisions regarding time and notice limitations as set out in paragraph (a) of Section 255.05(2), Florida Statutes, the Principal being the "contractor" as referred to in said provisions:

1. If a claimant is no longer furnishing labor, services, or materials on a project, a contractor or the contractor's agent or attorney may elect to shorten the time within which an action to enforce any claim against a payment bond must be commenced by recording in the clerk's office a notice in substantially the following form:

NOTICE OF CONTEST OF CLAIM
AGAINST PAYMENT BOND

To: (Name and address of claimant)

You are notified that the undersigned contests your notice of nonpayment, dated _____, _____, and served on the undersigned on _____, _____, and that the time within which you may file suit to enforce your claim is limited to 60 days after the date of service of this notice.

DATED on _____, _____.

Signed: (Contractor or Attorney)

The claim of a claimant upon whom such notice is served and who fails to institute a suit to enforce his or her claim against the payment bond within 60 days after service of such notice shall be extinguished automatically. The contractor or the contractor's attorney shall serve a copy of the notice of contest to the claimant at the address shown in the notice of nonpayment or most recent amendment thereto and shall certify to such service on the face of the notice and record the notice.

2. A claimant, except a laborer, who is not in privity with the contractor shall, before commencing or not later than 45 days after commencing to furnish labor, services, or materials for the prosecution of the work, furnish the contractor with a written notice that he or she intends to look to the bond for protection. A claimant who is not in privity with the contractor and who has not received payment for his or her labor, services, or materials shall deliver to the contractor and to the surety written notice of the performance of the labor or delivery of the materials or supplies and of the nonpayment. The notice of nonpayment shall be served during the progress of the work or thereafter but may not be served earlier than 45 days after the first furnishing of labor, services, or materials or later than 90 days after the final furnishing of the labor, services or materials by the claimant or, with respect to rental equipment, not later than 90 days after the date that the rental equipment was last on the job site available for use. Any notice of nonpayment served by a claimant who is not in privity with the contractor which includes sums for retainage must specify the portion of the amount claimed for retainage. An action for the labor, materials, or supplies may not be instituted against the contractor or the surety unless the notice to the contractor and notice of nonpayment have been served, if required by this section. Notices required or permitted under this section shall be

served in accordance with s. 713.18. A claimant may not waive in advance his or her right to bring an action under the bond against the surety. In any action brought to enforce a claim against a payment bond under this section, the prevailing party is entitled to recover a reasonable fee for the services of his or her attorney for trial and appeal or for arbitration, in an amount to be determined by the court, which fee must be taxed as part of the prevailing party's costs, as allowed in equitable actions. The time periods for service of a notice of nonpayment or for bringing an action against a contractor or surety shall be measured from the last day of furnishing labor, services, or materials by the claimant and may not be measured by other standards, such as the issuance of a certificate of occupancy or the issuance of a certificate of substantial completion.

Interested parties are specifically directed to the following provisions regarding time and notice limitations as set out in subsection (10) of Section 255.05, Florida Statutes:

An action, except an action for recovery of retainage, must be instituted against the contractor or the surety on the payment bond or the payment provisions of a combined payment and performance bond within 1 year after the performance of the labor or completion of delivery of the materials or supplies. An action for recovery of retainage must be instituted against the contractor or the surety within 1 year after the performance of the labor or completion of delivery of the materials or supplies; however, such an action may not be instituted until one of the following conditions is satisfied:

(a) The public entity has paid out the claimant's retainage to the contractor, and the time provided under s. 218.735 or s. 255.073(3) for payment of that retainage to the claimant has expired;

(b) The claimant has completed all work required under its contract and 70 days have passed since the contractor sent its final payment request to the public entity; or

(c) At least 160 days have passed since reaching substantial completion of the construction services purchased, as defined in the contract, or if not defined in the contract, since reaching beneficial occupancy or use of the project.

(d) The claimant has asked the contractor, in writing, for any of the following information and the contractor has failed to respond to the claimant's request, in writing, within 10 days after receipt of the request:

1. Whether the project has reached substantial completion, as that term is defined in the contract, or if not defined in the contract, if beneficial occupancy or use of the project has occurred.

2. Whether the contractor has received payment of the claimant's retainage, and if so, the date the retainage was received by the contractor.

3. Whether the contractor has sent its final payment request to the public entity, and if so, the date on which the final payment request was sent.

If none of the conditions described in paragraph (a), paragraph (b), paragraph (c), or paragraph (d) is satisfied and an action for recovery of retainage cannot be instituted within the 1-year limitation period set forth in this subsection, this limitation period shall be extended until 120 days after one of these conditions is satisfied.

Any changes in or under the Contract Documents referred to in the Contract and compliance or noncompliance with any formalities connected with the Contract or the changes does not affect the Surety's obligation under this bond.

By its execution of this bond the Surety expressly acknowledges that the Contract has been incorporated by reference herein, that all provisions of the Contract, including but not limited to any amendments thereto, apply fully to and are binding upon the Surety as if fully set forth in this bond, that the Surety guarantees the full and faithful performance by the Principal of all of the Principal's work, materials, covenants, obligations, promises, guarantees and warranties set forth in and otherwise arising under the Contract such that the Surety's obligations are co-extensive with those of the Principal under the Contract, and that said performance shall occur within the times specified in the Contract.

DATED ON _____.

Principal:

_____, a _____ corporation

By: _____
[insert name]
Its _____ President

Surety:

_____, a _____ corporation

By: _____
[insert name]
Its Attorney-in-Fact

Bid Protests

Currently FS 120.57 sets forth detailed procedures and requirements for resolving bid protests involving government agencies as defined in FS Ch. 120, the Administrative Procedure Act. If a protest cannot be resolved at the agency level, the dispute must be referred to the Division of Administrative Hearings and under most circumstances the agency's process of awarding the bid and contract must be halted. But as counties and municipalities are not agencies subject to the Administrative Procedure Act, FS 120.57 does not apply to them.

The question then is where and how should local government bid protests be processed and resolved? As for where, the ideal answer, of course, is at the local level. As for how, local governments are left to their own devices in establishing procedures. If case law provides any guidance, it appears that some local governments have no formal procedures, leaving disputes to be resolved in civil actions. I suggest that is the least desirable alternative for several reasons. First, progressing through a civil action is slow at best. Even if the local government's decision is ultimately upheld, the procurement has been substantially delayed, and terms, timing and pricing may very likely be out of date. Second, the personnel involved in the procurement, including staff preparing the solicitation and the selection committee members, may be dragged through the discovery process by producing documents and explaining their actions, recommendations and justifications in depositions, leading to all kinds of mischief. Third, litigation is not only lengthy but expensive and time consuming for counsel and staff. Last and perhaps most important, the ultimate decision is being handed over to a court operating in a *de novo* setting for making findings.

I submit that the better alternative is the establishment of a protest procedure maximizing local control over the outcome. My personal preference is mirroring the process outlined in the Administrative Procedure Act by using a hearing officer to conduct a hearing, make written findings and submit a written recommendation to the governing body. Any challenge to the governing body's final decision is then subject to review only by certiorari. The administrative hearing and final decision can be completed in weeks, not months or longer, and certiorari is likewise a shorter process than a civil action, and can be expedited with the cooperation of the parties. Most importantly, certiorari review is much more limited in scope, and the court is bound by the hearing officer's findings so long as they are supported by competent substantial evidence. The rules of evidence are also more relaxed in administrative proceedings, allowing for hearsay, for example. Moreover, the standards and principles of law that govern the ultimate decision can be articulated by the local government in establishing the process.

With that in mind, provided in the materials is a protest procedure that I drafted for Clay County several years ago, that is codified in the County's Purchasing Policies Manual, and that remains in use today. It follows the process described in the Administrative Procedure Act in material respects, but is crafted to be implemented at the local level. I recommend it for your consideration.

The procedure features the following elements, many of which have analogs in the Administrative Procedure Act:

(1) A formal process for posting notices regarding bid awards or rejections, including date and time of posting, which is essential for starting the clocks triggered.
(2) A formal process, method and timeframe for an affected party to file a notice protesting the terms of the solicitation or the intended award.
(3) A process, method, timeframe and format for filing a formal written petition setting forth with particularity the facts and law upon which the protest is based and conforming to the requirements of FAC Rule Chapter 28-106 governing decisions determining substantial interests.
(4) A waiver of rights for failing to timely file the notice or petition.
(5) Intervenor practice.
(6) An opportunity to resolve the dispute informally by agreement.
(7) The scheduling of a hearing within 10 days of filing the petition, with the County Manager or designee presiding as the hearing officer. The designee must be a department head who was not involved with the procurement.
(8) Rules for conducting the hearing steeped in the customary procedural due process minimum requirements, allowing for prehearing motion practice, and requiring the parties to confer and file a written stipulation identifying relevant and undisputed facts, documentary or tangible items deemed admitted into evidence, and material facts in dispute.
(9) Opportunity at the conclusion of the hearing for each party to offer appropriate argument and summation, and to submit a written brief and proposed order.
(10) The issuance by the hearing officer of a recommended order containing findings of fact and a disposition of the protest.
(11) The submission of the recommended order, record and transcript of the hearing to the county commission.
(12) Opportunities for the parties to be heard by the county commission on the recommended order and to challenge a finding of fact as not supported by competent substantial evidence.
(13) Issuance of a final decision by the county commission, which is bound by the findings of fact except for challenges to findings upheld by it.
(14) Rules governing hearsay and *ex parte* communications, and providing that proceedings before the hearing officer are informal with relaxed rules of evidence, but requiring the hearing officer and the county commission to observe the requirements of procedural and substantive due process that are the minimum necessary for accomplishing a fair, just and expeditious resolution of the protest.
(15) Rules providing that the substantive principles of law guiding the resolution of the dispute are those found in the decisions of the Florida appellate courts, as well as any statutes or agency rules that may be applicable to the particular bid solicitation, specifically including the following:

(a) placing the burden of establishing a ground for invalidating the award on the protesting party;
(b) providing that the standard of proof is whether the proposed award was clearly erroneous, contrary to competition, arbitrary, or capricious;
(c) providing that the proposed award is deemed arbitrary or capricious if it is contrary in a material way to any governing statutes, the County's rules or policies, or the bid or proposal instructions or specifications;
(d) authorizing the hearing officer to recommend an alternate disposition of the award, including rejecting all bids or proposals, but only if the hearing officer first determines that the protested award was improper; and,
(e) prohibiting the county commission from using the protest as a vehicle to revisit the proposed award absent a determination of impropriety.

(16) Finally, a statement that the protest procedures shall be construed and implemented so as to secure the just, speedy, and inexpensive resolution of bid protests.

The following are summaries of a few published appellate decisions that illuminate some of the substantive legal principles governing bid protests in Florida:

In *American Engineering and Development Corp. v. Town of Highland Beach*, 20 So. 3d 1000 (Fla. 4th DCA 2009), the Fourth District Court of Appeal denied a low bidder's challenge to the town's award of a construction project to the second low bidder. The bid solicitation was based upon price, and the town had rejected the low bid as nonresponsive. Noting the requirement in FS 255.20 that price-based bids be awarded to the "lowest qualified and responsive bidder", the court held that a responsible, or qualified, bidder is one who has the capability in all respects to fully perform the contract requirements and the integrity and reliability that will assure good faith performance; and that a responsive bidder is one that has submitted a bid, proposal, or reply that conforms in all material respects to the solicitation. Because the low bid failed to satisfy the solicitation specifications, the court concluded that the town was justified in rejecting it as nonresponsive.

Contrast that result with *City of Sweetwater v. Solo Const. Corp.*, 823 So. 2d 798 (Fla. 3d DCA 2002). There the Third District Court of Appeal upheld the low bidder's challenge and set aside the award to what the city had considered to be the most responsible bidder. The city had made its award based upon selection criteria and a scoring system that were not identified in the solicitation, and the selection committee was given no direction or standards for scoring bids. The city conceded that the low bid was both responsive and responsible, which was all the court needed in determining that the selection process was arbitrary, capricious, and contrary to FS 255.20.

In *Emerald Correctional Management v. Bay County Bd. of County Comrs.*, 955 So. 2d 647 (Fla 1st DCA 2007), the First District Court of Appeal reversed a trial court decision dismissing with prejudice a challenge to a correctional facilities expansion and management contract award under an RFP. The complaint alleged that the county had requested that the winner modify its

response to reduce the cost of the project without providing the same opportunity to the other respondents, and then relied on the modification in making the award; and further that the award was made even though the winning proposal materially altered the requirements of the RFP concerning termination rights and failed to identify the construction cost as required under the RFP. In reversing, the court held that the question whether an award is arbitrary is controlled by the determination whether the county complied with its own proposal criteria in the RFP, and that if proven the allegations amounted to impermissible favoritism.

Emerald is a particularly important decision in procurement law. Among the significant takeaways from *Emerald* are (1) the government is bound by the terms of its own solicitation; (2) the government cannot allow responses to be modified post-submittal; (3) government has wide discretion in the bidding process and its decision, when based on an honest exercise of the discretion, should not be overturned even if reasonable persons might disagree; (4) absent a governing ordinance the standard for evaluating a competitive procurement award is arbitrary and capricious; and (5) the government acts arbitrarily when it fails to comply with its own proposal criteria.

The Florida Supreme Court made the following observations about competitive bidding and award discretion in *Liberty County v. Baxters Asphalt & Concrete, Inc.*, 421 So. 2d 505 (Fla. 1982):

> [Bid] statutes "serve the object of protecting the public against collusive contracts and prevent favoritism toward contractors by public officials and tend to secure fair competition upon equal terms to all bidders, [and] they remove temptation on the part of public officers to seek private gain at the taxpayers' expense, are of highly remedial character, and should receive a construction always which will fully effectuate and advance their true intent and purpose and which will avoid the likelihood of same being circumvented, evaded, or defeated." [quotation from *Wester v. Belote*, 138 So. 721 (Fla. 1931).
>
> [A] public body has wide discretion in soliciting and accepting bids for public improvements and its decision, when based on an honest exercise of this discretion, will not be overturned by a court even if it may appear erroneous and even if reasonable persons may disagree.

Not infrequently a bid dispute will arise from a claim that a bid submittal deviated from or otherwise failed to conform to the bid specifications and instructions, and therefore should have been disqualified as nonresponsive. The Second District Court of Appeal examined such a claim in *Harry Pepper & Associates, Inc. v. City of Cape Coral*, 352 So. 2d 1190 (Fla. 2d DCA 1978), and held that "[t]he test for measuring whether a deviation in a bid is sufficiently material to destroy its competitive character is whether the variation affects the amount of the bid by giving the bidder an advantage or benefit not enjoyed by the other bidders." There the initial response of the apparent low bidder included the installation of pump equipment that was inconsistent with the bid specifications. The city allowed the bidder to cure the

nonconformity by submitting an amended response stating that it would comply with the specifications. The court determined that the deviation was material and set aside the award, stating that the city could either reject all bids or award the contract to the next lowest bidder. The court observed that by failing to propose the specified equipment, the bidder "had everything to gain and nothing to lose," and that after the responses were all opened the bidder "was in a position to decide whether it wanted the job bad enough to incur the additional expense of supplying conforming pumps," giving it an unfair competitive advantage.

Finally, *Intercontinental Properties, Inc. v. State Dept. of Health and Rehabilitative Services*, 606 So. 2d 380 (Fla. 3d DCA 1992), stands for the seemingly unremarkable proposition that a protesting party must demonstrate not only the deficiency of the awarded party's bid, but that the protesting party's bid did not suffer from the same deficiency.

(N) Bid Awards and Protests:

1. Both the **INSTRUCTIONS** and the **PUBLISHED NOTICE** for every sealed bid solicitation shall include conspicuously the following statements:

> FOLLOWING THE BID OPENING AND TABULATION, A "NOTICE OF INTENT TO AWARD BID" OR A "NOTICE OF REJECTION OF ALL BIDS" WILL BE POSTED ON THE INTERNET AT: [insert bid notice web address[1]]. THIS WEBPAGE CAN ALSO BE ACCESSED FROM THE HOMEPAGE OF THE COUNTY'S WEBSITE AT: [insert County's homepage address[2]] BY [insert suitable directions[3]]. NO OTHER NOTICE WILL BE POSTED.
>
> PROSPECTIVE BIDDERS ARE NOTIFIED THAT THE FAILURE TO INCLUDE WITHIN THE SEALED BID ENVELOPE A PROPER BID BOND OR OTHER SECURITY APPROVED UNDER THE COUNTY'S PURCHASING

[1] As of the date on which this Purchasing Policy was adopted, the bid notice web address was: http://www.claycountygov.com/Departments/Finance/decision_bids.htm.

[2] As of the date on which this Purchasing Policy was adopted, the County's homepage address was: http://www.claycountygov.com/.

[3] As of the date on which this Purchasing Policy was adopted, suitable directions would be: "FOLLOWING THE "Notice of Intent Bids" LINK UNDER THE "Business" ROLLOVER BUTTON".

POLICY, IF REQUIRED FOR THIS SOLICITATION, OR THE FAILURE TO FILE A WRITTEN NOTICE OF PROTEST AND TO FILE A WRITTEN PETITION INITIATING A FORMAL PROTEST PROCEEDING WITHIN THE TIMES AND IN THE MANNER PRESCRIBED IN SECTION 8.N. OF SAID POLICY, SHALL CONSTITUTE A WAIVER OF THE RIGHT TO PROTEST THE BID SOLICITATION, ANY ADDENDUM THERETO, OR THE BID DECISION, AS APPLICABLE, AND TO INITIATE A FORMAL PROTEST PROCEEDING UNDER SAID POLICY. THE COUNTY'S PURCHASING POLICY CAN BE VIEWED AT THE COUNTY'S WEBSITE BY FOLLOWING THE APPROPRIATE LINKS FROM THE HOMEPAGE ADDRESS SET FORTH ABOVE.

IF A PROSPECTIVE BIDDER IS IN DOUBT WHETHER THIS SOLICITATION REQUIRES A BID BOND, SUCH PROSPECTIVE BIDDER IS SOLELY RESPONSIBLE FOR MAKING APPROPRIATE INQUIRY.

2. Unless otherwise expressly directed by the Board in its decision on a bid award, immediately following such decision the County Manager shall cause a "Notice of Intent to Award Bid" or a "Notice of Rejection of All Bids" to be posted on the County's website, with the time and date of posting appearing thereon. Notice shall not be posted elsewhere. The notice shall be posted in portable document format or other secure format.

3. The failure on the part of a prospective bidder to include within the sealed bid envelope a proper bid bond or other security approved under this policy, if required for the particular bid solicitation, or the failure by a prospective bidder to file a written notice of protest and to file a written petition initiating a formal protest proceeding within the times and in the manner prescribed in this section shall constitute a waiver of the prospective bidder's right to protest the bid solicitation, any addendum thereto, the Board's bid decision, as applicable, and to initiate a formal protest proceeding hereunder.

4. A prospective bidder is solely responsible for determining whether a particular bid solicitation requires a bid bond, and for resolving any doubt by making appropriate inquiry.

5. The County Manager shall cause a copy of this policy to be posted on the County's website in portable document format or other secure format. The County Manager shall cause to be established conspicuous and easy-to-follow links to the policy from the homepage.

6. Any person who is adversely affected by a bid solicitation, by any addendum thereto, or by a bid decision may file with the County Manager a written notice of protest no later than 4:30 p.m. on the third business day immediately following the date notice is published, with respect to a bid solicitation; no later than 4:30 p.m. on the third business day immediately following the date of issuance, with respect to a bid addendum; and within 72 hours after the posting of the notice, exclusive of hours occurring during days that are other than business days, with respect to a bid decision.

7. A formal protest proceeding shall be deemed commenced upon the timely filing of a written petition initiating the same. A written petition initiating a formal protest proceeding must be filed with the County Manager no later than 4:30 p.m. on the tenth calendar day immediately following the date on which the written notice of protest was filed; provided, if the tenth calendar day is not a business day, then the petition must be filed no later than 4:30 p.m. on the first business day immediately following said tenth calendar day. The petition must set forth with particularity the facts and law upon which the protest is based. The petition must conform substantially with the requirements for petitions set forth in Rule 28-106.201, Florida Administrative Code. References in this section to a petition shall mean a written petition initiating a formal protest proceeding filed in accordance with this subsection.

8. Any protest of a bid solicitation or bid addendum shall pertain exclusively to the terms, conditions, and specifications contained in a bid solicitation or bid addendum, including any provisions governing the methods for ranking bids, proposals, or replies, awarding contracts, reserving rights of further negotiation, or modifying or amending any contract.

9. Upon receipt of a formal written notice of protest that has been timely filed, the County Manager shall suspend the bid solicitation or bid award process until the subject of the protest is resolved by final action as specified in this section, unless the County Manager sets forth in writing particular facts and circumstances which require the continuance of the solicitation or

award process without delay in order to avoid an immediate and serious danger to the public health, safety, or welfare. Such suspension shall be lifted immediately in the event the protesting party shall have failed to timely file a petition.

10. Intervenors shall be permitted to participate in the formal protest proceeding in accordance with the procedures governing intervenor practice set forth in Rule Chapter 28-106, Florida Administrative Code, and shall be subject to all limitations provided therein applicable to intervenors.

11. In his or her discretion, the County Manager may provide an opportunity to resolve the protest by mutual agreement between the County Manager and the protesting party within 7 calendar days after receipt of a timely petition. Such agreement must be reduced to writing, signed by the County Manager and the protesting party or such party's authorized agent, and submitted to the Board at the earliest opportunity. The agreement shall not be deemed effective unless ratified by the Board. If the Board shall fail to ratify the agreement, then the protest shall proceed to resolution as hereinafter provided.

12. Within 10 business days following the timely filing of a petition, or, if the Board shall have considered but failed to ratify an agreement submitted to it under subsection 11, then within 10 business days thereafter, a hearing shall be conducted pursuant to subsection 13 before a hearing officer, who shall be the County Manager or his or her designee. The County Manager may designate any department head as the hearing officer; provided, a department head who is substantially involved in or connected with the bid solicitation or bid award process shall be deemed disqualified from serving as the hearing officer, unless such involvement or connection is purely ministerial in nature.

13. All hearings shall be conducted pursuant to written notice to the protesting party, the County Attorney's Office and all intervenors by the hearing officer specifying the time, date and place of the hearing. Particular rules and procedures governing each such hearing are as follows:

a. The audio thereof shall be recorded electronically.

b. Prior to the hearing only, motion practice may be permitted by the hearing officer in his or her discretion in accordance with the rules

governing the same set forth in Rule Chapter 28-106, Florida Administrative Code. All motions shall be ruled upon prior to or at the start of the hearing, except that rulings on motions in limine may be deferred to an appropriate time during or after the hearing.

c. Prior to the hearing, the protesting party, the County and all intervenors must confer and endeavor to stipulate to as many relevant and undisputed facts upon which the decision is to be based as may be practicable. Such stipulation must also identify those issues of material fact, if any, that remain in dispute. The stipulation must be reduced to a writing signed by or on behalf of the protesting party, the County and all intervenors, and be submitted to the hearing officer at least two business days prior to the hearing. The stipulation may include an appendix comprising documents that shall be deemed admitted and considered as evidence for purposes of the hearing, or referring to tangible items deemed admitted and considered as evidence for purposes of the hearing, which items shall either be presented at the hearing or, if such presentation is impractical, submitted to the hearing officer by graphic, descriptive, representational, photographic, videotape or similar medium properly depicting or characterizing the items.

d. The protesting party and all intervenors shall have the right to appear before the hearing officer at the hearing in proper person or through counsel and, as to those issues of material fact, if any, that remain in dispute, as identified in the stipulation, to present relevant testimonial, documentary and tangible evidence, and to be heard on the substantive issues bearing on the protest. The County shall be deemed a party to the proceeding, and the County Attorney or any assistant county attorney may participate in the protest proceeding, appear before the hearing officer, present evidence and be heard on behalf of the County.

e. All witnesses shall be placed under oath by the hearing officer prior to testifying, and shall be subject to cross-examination by any hearing participant.

f. Hearsay evidence shall be admissible unless the hearing officer shall determine the same to be redundant, unreliable or prejudicial.

g. At the hearing any hearing participant may offer appropriate argument and summation, and submit a written brief and a proposed order, but only after the conclusion of the evidentiary portion of the hearing, if any.

h. Immediately following the hearing, the County Manager shall cause a written transcript of all testimonial evidence introduced at the hearing to be prepared expeditiously based upon the audio recording, and shall provide copies of the same to all of the hearing participants.

i. Within 7 business days following the hearing, the hearing officer shall submit a recommended order to the County Manager and serve copies on all hearing participants; provided, if the County Manager is the hearing officer, then within 7 business days following the hearing, the County Manager shall issue a recommended order and serve copies on all hearing participants. The recommended order shall contain findings of fact and, based upon such facts, a disposition of the protest; provided, no finding of fact may be predicated solely upon the basis of hearsay.

j. The recommended order shall thereafter be submitted to the Board along with the transcript of the hearing testimony and the entire written and tangible record of the protest proceedings at the earliest opportunity to be considered at a time certain, with notice thereof served upon the hearing participants. Each of the hearing participants shall be allowed 3 minutes to address the Board regarding the recommended order, unless the Chairman in his or her discretion shall allow additional time. If a hearing participant intends to challenge any finding of fact in a recommended order that was based upon testimonial evidence, such participant shall be allowed 2 additional minutes for such purpose, and may direct the attention of the Board members to any portion of the transcript relevant to the challenge. The other hearing participants shall each have the right to offer argument in rebuttal to the challenge, and to direct the attention of the Board members to any portion of the transcript relevant to the rebuttal. No testimony or other evidence beyond the record and the transcript shall be presented to the Board. Thereafter the Board shall render its decision on the protest. In so doing the Board shall be bound by the findings of fact in the recommended order that are based upon testimonial evidence, except those for which it upholds a

challenge. A challenge shall be upheld only if the finding of fact is not supported by competent, substantial evidence in the record or in the transcript. Otherwise, the Board shall not be bound by any of the provisions of the recommended order. The decision of the Board shall be reduced to a written order signed by the Chairman, and shall constitute final action of the County on the protest.

k. The date, type and substance of all ex parte communications between any Board member and a hearing participant, including counsel therefor or any agent thereof, and between any Board member and third party, must be publicly disclosed by the Board member prior to the rendering of the Board's decision. All such communications that are written or received electronically must be filed for the record, and copies thereof provided to each Board member and hearing participant.

14. All proceedings before the hearing officer shall be informal, and customary rules of evidence shall be relaxed. In all respects both the hearing officer and the Board shall observe the requirements of procedural and substantive due process that are the minimum necessary for accomplishing a fair, just and expeditious resolution of the protest.

15. Ex parte communications between a hearing participant and the hearing officer are forbidden. The hearing officer may take such steps as he or she may deem just and appropriate to prevent or sanction attempted ex parte communications, including promptly disclosing the attempted communication, or requiring the offending hearing participant to disclose promptly the attempted communication, to the other hearing participants. Where necessary, the hearing officer may recuse himself or herself, and the subsequently designated hearing officer may order the offending participant to pay for all or any portion of the costs incurred by the County and any other hearing participant strictly as a consequence of the ex parte communication or attempted ex parte communication, else be excluded from further participation. Neither the County Attorney nor any assistant county attorney shall be subject to this subsection or prohibited from engaging in ex parte communications with the hearing officer.

16. The purpose of this policy is to promote fairness and public confidence in the competitive bidding process. To further such end, and except as otherwise specifically provided herein, the substantive law

governing the resolution of bid protests found in the decisions of the Florida appellate courts, as well as any statutes or agency rules that may be applicable to the particular bid solicitation, shall guide the hearing officer and the Board in rendering a decision on a bid protest under this section. The significant principles of law governing the bid protest and the resolution thereof, which shall prevail to the extent not otherwise in conflict with any governing statutes or agency rules, are as follows:

a. The burden is on the party protesting the award of the bid to establish a ground for invalidating the award.

b. The standard of proof for the protest proceeding shall be whether the proposed award was clearly erroneous, contrary to competition, arbitrary, or capricious.

c. The proposed award shall be deemed arbitrary or capricious if it is contrary in a material way to any governing statutes, the County's rules or policies, or the bid or proposal instructions or specifications.

d. The scope of the inquiry is limited initially to whether the proposed award is improper under the foregoing standard of proof. If and only if the hearing officer first determines on the basis of competent and substantial evidence that the proposed award is improper, then the hearing officer may recommend, in accordance with the law and this policy, an alternate disposition for the proposed award. Such disposition may include, but shall not be limited to, rejecting all bids, or awarding all or a portion of the bid to the protesting party.

e. A bid protest proceeding may not serve as a vehicle for the Board to revisit the proposed award absent a determination of impropriety as set forth above.

17. By written agreement amongst the protesting party, the County, and all then-existing intervenors, any provision of this section pertaining to the procedures for resolving a protest for which a petition has been timely filed may be modified or waived so long as such modification or waiver shall not hinder or thwart the proper and expeditious resolution of the protest, or otherwise operate to undermine the salutary purposes of competitive, public bidding.

18. Only to the extent necessary to avoid a miscarriage of justice or to prevent a manifest violation of a hearing participant's procedural or substantive due process rights, a hearing officer may modify or suspend the applicability of any of the provisions or requirements of this section in the course of conducting a protest proceeding hereunder; provided, a hearing officer may not modify or suspend any of the provisions or requirements of subsections 3, 4, 6, 7, 8, 16, 20, 21 and 22 hereof.

19. Except and to the extent specifically provided in this section, and except and to the extent otherwise specified provided by written agreement amongst the protesting party, the County, and all then-existing intervenors, no provisions of Rule Chapter 28-106, Florida Administrative Code, shall be deemed applicable to the resolution of protests under this section.

20. For purposes of this section, the filing with the County Manager of a written notice of protest or of a written petition initiating a formal protest proceeding shall be deemed accomplished only when the original written notice or original written petition has been physically received by the County Manager or his or her designee. A notice or petition shall be deemed original only if it bears the original signature of the protesting party or such party's authorized agent. No notice or petition may be filed by facsimile transmission or by e-mail, and any notice or petition received in such manner shall be deemed unfiled and ineffective. The use of an overnight delivery service or of the United States Postal Service to file a notice or petition shall be entirely at the risk of the person submitting the same, and any such notice or petition so received after the applicable deadline shall be deemed untimely.

21. For purposes of this section, a business day shall mean any 24-hour day that is not a Saturday, a Sunday, or a holiday observed by the County.

22. For purposes of this section, counsel shall mean an attorney who is a member of the Florida Bar in good standing.

23. For purposes of this section, all notices of protest and petitions initiating formal protest proceedings, and all stipulations, briefs, proposed findings of fact, written motions and proposed orders submitted to a hearing officer shall be on white, opaque paper 8 ½ by 11 inches in size. The pages of all such documents shall have margins on all sides of not less than 1 inch; shall be in Times New Roman or Courier New font no smaller than 12 in

size, including footnotes and endnotes; shall have standard double-spacing between lines, excluding quotations, footnotes and endnotes; and shall be numbered at the bottom. All quotations shall be indented. Briefs shall not exceed 15 pages in length, and may not include any appendices. A digital copy of all written stipulations, briefs, proposed findings of fact, written motions and proposed orders submitted to the hearing officer must be simultaneously provided to the hearing officer in Word format, version 2000 or later, on compact disc or 3 ½" diskette.

24. For purposes of this section, a hearing participant shall mean and include the protesting party, the County and any intervenor.

25. This section shall be construed and implemented so as to secure the just, speedy, and inexpensive resolution of bid protests.

Direct Purchase Sales Tax Exemption (FS 212.08(6))

Materials and equipment purchased by a contractor and incorporated into a public building or public work are subject to Florida's sales and use tax. When pricing the contract, the contractor will typically include the amount of the sales taxes it must pay for purchasing the materials and equipment in calculating its cost of delivering the project, effectively passing those taxes on to the owner government.

A governmental entity is exempt from paying sales and use taxes for its own purchases of otherwise taxable goods and services so long as it has obtained from the Department of Revenue a Consumer's Certificate of Exemption, and has provided a copy of the same to the vendor.

Many governmental entities utilize their exemption in directly purchasing the materials and equipment required for the construction of a public building or public work which the contractor then incorporates into the project, thereby avoiding the pass-through of the taxes from purchases made by the contractor itself. Authorization for this arrangement, known as Direct Purchasing, is specifically provided in FS 212.08(6).

As specified in subsection (6),

> A determination of whether a particular transaction is properly characterized as an exempt sale to a government entity or a taxable sale to a contractor shall be based upon the substance of the transaction rather than the form in which the transaction is cast.

Subsection (6) goes on to provide,

> The department shall adopt rules for determining whether a particular transaction is properly characterized as an exempt sale to a governmental entity or a taxable sale to a contractor which give special consideration to factors that govern the status of the tangible personal property before being affixed to real property. In developing such rules, assumption of the risk of damage or loss is of paramount consideration in the determination.

The department's rule adopted in accordance with subsection (6) is FAC 12A-1.094, a copy of which is in the materials. Subsection (4) of the rule provides in part as follows:

> (4)(a) The exemption in Section 212.08(6), F.S., is a general exemption for sales made directly to the government. A determination whether a particular transaction is properly characterized as an exempt sale to a governmental entity or a taxable sale to or use by a contractor shall be based on the substance of the transaction, rather than the form in which the transaction is cast. The Executive Director or the Executive Director's designee in the responsible program will

determine whether the substance of a particular transaction is a taxable sale to or use by a contractor or an exempt direct sale to a governmental entity based on all of the facts and circumstances surrounding the transaction as a whole.

(b) The following criteria that govern the status of the tangible personal property prior to its affixation to real property will be considered in determining whether a governmental entity rather than a contractor is the purchaser of materials:

1. Direct Purchase Order. The governmental entity must issue its purchase order directly to the vendor supplying the materials the contractor will use and provide the vendor with a copy of the governmental entity's Florida Consumer's Certification of Exemption.

2. Direct Invoice. The vendor's invoice must be issued to the governmental entity, rather than to the contractor.

3. Direct Payment. The governmental entity must make payment directly to the vendor from public funds.

4. Passage of Title. The governmental entity must take title to the tangible personal property from the vendor at the time of purchase or delivery by the vendor.

5. Assumption of the Risk of Loss. Assumption of the risk of damage or loss by the governmental entity at the time of purchase is a paramount consideration. A governmental entity will be deemed to have assumed the risk of loss if the governmental entity bears the economic burden of obtaining insurance covering damage or loss or directly enjoys the economic benefit of the proceeds of such insurance.

(c)1. To be entitled to purchase materials tax exempt for a public works project, a governmental entity is required to issue a Certificate of Entitlement to each vendor and to the governmental entity's contractor to affirm that the tangible personal property purchased from that vendor will go into or become a part of a public work. This requirement does not apply to any agency or branch of the United States government.

2. The governmental entity's purchase order for tangible personal property to be incorporated into the public works project must be attached to the Certificate of Entitlement. The governmental entity must issue a separate Certificate of Entitlement for each purchase order. Copies of the Certificate may be issued.

3. The governmental entity will also affirm that if the Department determines that tangible personal property sold by a vendor tax-exempt pursuant to a Certificate of Entitlement does not qualify for the exemption under Section 212.08(6), F.S., and this rule, the governmental entity will be liable for any tax, penalty, and interest determined to be due.

4. The following is the format of the Certificate of Entitlement to be issued by the governmental entity:

[Intentionally omitted; refer to the rule for the format.]

Once contract language providing for a Direct Purchase program has been drafted, the governmental entity may petition the Department to review the same for compliance. The Department will respond by issuing a Technical Assistance Advisement. The materials include a copy of recently issued TAA 18A-011 evaluating and approving certain Direct Purchase contract language, which is set forth in the TAA verbatim. It is recommended that governmental entities seeking to engage in Direct Purchasing consider adapting the contract language approved in TAA 18A-011 for their use.

The materials also include the Department's Tax Information Publication TIP 13A01-01 addressing Direct Purchase programs.

12A-1.094 Public Works Contracts.

(1) This rule shall govern the taxability of transactions in which contractors manufacture or purchase supplies and materials for use in public works contracts, as that term is referred to in Section 212.08(6), F.S. This rule shall not apply to non-public works contracts for the repair, alteration, improvement, or construction of real property, as those contracts are governed under the provisions of Rule 12A-1.051, F.A.C. In applying this rule, the following definitions are used.

(a)1. "Contractor" is one that supplies and installs tangible personal property that is incorporated into or becomes a part of a public facility pursuant to a public works contract with a governmental entity exercising its authority in regard to the public property or facility. Contractors include, but are not limited to, persons engaged in building, electrical, plumbing, heating, painting, decorating, ventilating, paperhanging, sheet metal, roofing, bridge, road, waterworks, landscape, pier, or billboard work. This definition includes subcontractors.

2. "Contractor" does not include a person that furnishes tangible personal property that is not affixed or appended in such a manner that it is incorporated into or becomes a part of the public property or public facility to which a public works contract relates. A person that provides and installs tangible personal property that is freestanding and can be relocated with no tools, equipment, or need for adaptation for use elsewhere is not a contractor within the scope of this rule.

3. "Contractor" does not include a person that provides tangible personal property that will be incorporated into or become part of a public facility if such property will be installed by another party.

4. Examples.

a. A vendor sells a desk, sofas, chairs, tables, lamps, and art prints for the reception area in a new public building. The sales agreement requires the vendor to place the furniture according to a floor plan, set up the lamps, and hang the art prints. The vendor is not a contractor within the scope of this rule, because the vendor is not installing the property being sold in such a way that it is attached or affixed to the facility.

b. A security system vendor furnishes and installs low voltage wiring behind the walls, motion detectors, smoke alarms, other sensors, control pads, alarm sirens, and other components of a security system for a new county courthouse. The components are direct wired, fit into recesses cut into the walls or other structural elements of the building, and are held in place by screws. The vendor is a contractor within the scope of this rule. The security system is installed and affixed in such a manner that it has been incorporated into the courthouse.

c. A vendor enters an agreement to provide and install the shelving system for a new public library. The shelves are built to bear the weight of books. The shelf configuration in each unit maximizes the number of books the shelves can hold. The number and size of the units ordered is based on the design for the library space. The units will run floor to ceiling and will be anchored in place by bolts or screws. The vendor is a contractor within the scope of this rule. The shelving system will be affixed in such a manner that it becomes a part of the public library.

d. A vendor agrees to provide and install the computer terminals, monitors, keyboards, servers, and related equipment for a county tax collector's office in central Florida. The job includes connecting the equipment to the structural cabling system that has been installed by an electrical contractor. The cables running to the computer terminals are held in place by screws that fit into the back of the terminal units. The vendor is not a contractor within the scope of this rule. The computer equipment has not been affixed in such a way as to become a part of the facility. The equipment has not been attached to any structural element of the building.

e. A manufacturer agrees to provide the prestressed concrete forms for a public parking garage. A construction company is awarded the bid to install those forms and build the garage. The manufacturer is not a contractor within the scope of this rule, because the manufacturer will not install any tangible personal property that becomes a part of the garage. The construction company is a contractor within the scope of this rule.

(b) "Governmental entity" includes any agency or branch of the United States government, a state, or any county, municipality, or political subdivision of a state. The term includes authorities created by statute to operate public facilities using public funds, such as public port authorities or public-use airport authorities.

(c) "Public works" are defined as projects for public use or enjoyment, financed and owned by the government, in which private persons undertake the obligation to do a specific piece of work that involves installing tangible personal property in such a manner that it becomes a part of a public facility. For purposes of this rule, a public facility includes any land, improvement to land, building, structure, or other fixed site and related infrastructure thereon owned or operated by a governmental entity where governmental or public activities are conducted. The term "public works" is not restricted to the repair, alteration, improvement,

or construction of real property and fixed works, although such projects are included within the term.

(d) “Real property” within the meaning of this rule includes all fixtures and improvements to real property. The status of a project as an improvement or fixture to real property will be determined by reference to the definitions contained in subsection 12A-1.051(2), F.A.C.

(2) The purchase or manufacture of supplies or materials by a public works contractor, when such supplies or materials are purchased for the purpose of going into or becoming part of public works, whether the purchase or manufacture occurs inside or outside Florida, is taxable to the public works contractor if the public works contractor also installs such supplies or materials, since the public works contractor is the ultimate consumer of such supplies or materials. Public works contractors that purchase or manufacture such supplies and materials in Florida are liable for sales tax or use tax on such purchases and manufacturing costs. A public works contractor that purchases supplies or materials that may be sold as tangible personal property or may be incorporated into a public works project may purchase such supplies or materials without tax by issuing a copy of the contractor’s Annual Resale Certificate and accrue and remit tax upon withdrawing such supplies or materials from inventory to go into or become a part of public works. Public works contractors that purchase or manufacture such materials outside the State of Florida are liable for use tax, subject to credit for any sales or use tax lawfully imposed and paid in the state of purchase or manufacture.

(3) The purchase or manufacture of tangible personal property for resale to a governmental entity is exempt from tax, provided this exemption shall not include sales of tangible personal property made to, or the manufacture of tangible personal property by, public works contractors when such tangible personal property goes into or becomes a part of public works.

(4)(a) The exemption in Section 212.08(6), F.S., is a general exemption for sales made directly to the government. A determination whether a particular transaction is properly characterized as an exempt sale to a governmental entity or a taxable sale to or use by a contractor shall be based on the substance of the transaction, rather than the form in which the transaction is cast. The Executive Director or the Executive Director’s designee in the responsible program will determine whether the substance of a particular transaction is a taxable sale to or use by a contractor or an exempt direct sale to a governmental entity based on all of the facts and circumstances surrounding the transaction as a whole.

(b) The following criteria that govern the status of the tangible personal property prior to its affixation to real property will be considered in determining whether a governmental entity rather than a contractor is the purchaser of materials:

1. Direct Purchase Order. The governmental entity must issue its purchase order directly to the vendor supplying the materials the contractor will use and provide the vendor with a copy of the governmental entity’s Florida Consumer’s Certification of Exemption.

2. Direct Invoice. The vendor’s invoice must be issued to the governmental entity, rather than to the contractor.

3. Direct Payment. The governmental entity must make payment directly to the vendor from public funds.

4. Passage of Title. The governmental entity must take title to the tangible personal property from the vendor at the time of purchase or delivery by the vendor.

5. Assumption of the Risk of Loss. Assumption of the risk of damage or loss by the governmental entity at the time of purchase is a paramount consideration. A governmental entity will be deemed to have assumed the risk of loss if the governmental entity bears the economic burden of obtaining insurance covering damage or loss or directly enjoys the economic benefit of the proceeds of such insurance.

(c)1. To be entitled to purchase materials tax exempt for a public works project, a governmental entity is required to issue a Certificate of Entitlement to each vendor and to the governmental entity’s contractor to affirm that the tangible personal property purchased from that vendor will go into or become a part of a public work. This requirement does not apply to any agency or branch of the United States government.

2. The governmental entity’s purchase order for tangible personal property to be incorporated into the public works project must be attached to the Certificate of Entitlement. The governmental entity must issue a separate Certificate of Entitlement for each purchase order. Copies of the Certificate may be issued.

3. The governmental entity will also affirm that if the Department determines that tangible personal property sold by a vendor tax-exempt pursuant to a Certificate of Entitlement does not qualify for the exemption under Section 212.08(6), F.S., and this rule, the governmental entity will be liable for any tax, penalty, and interest determined to be due.

4. The following is the format of the Certificate of Entitlement to be issued by the governmental entity:

CERTIFICATE OF ENTITLEMENT

The undersigned authorized representative of_____ (hereinafter "Governmental Entity"), Florida Consumer's Certificate of Exemption Number_____, affirms that the tangible personal property purchased pursuant to Purchase Order Number_____ from _____ (Vendor) on or after _____ (date) will be incorporated into or become a part of a public facility as part of a public works contract pursuant to contract # _____ with _____ (Name of Contractor) for the construction of _____.

Governmental Entity affirms that the purchase of the tangible personal property contained in the attached Purchase Order meets the following exemption requirements contained in Section 212.08(6), F.S., and Rule 12A-1.094, F.A.C.:

You must initial each of the following requirements.

____ 1. The attached Purchase Order is issued directly to the vendor supplying the tangible personal property the Contractor will use in the identified public works.

____ 2. The vendor's invoice will be issued directly to Governmental Entity.

____ 3. Payment of the vendor's invoice will be made directly by Governmental Entity to the vendor from public funds.

____ 4. Governmental Entity will take title to the tangible personal property from the vendor at the time of purchase or of delivery by the vendor.

____ 5. Governmental Entity assumes the risk of damage or loss at the time of purchase or delivery by the vendor.

Governmental Entity affirms that if the tangible personal property identified in the attached Purchase Order does not qualify for the exemption provided in Section 212.08(6), F.S. and Rule 12A-1.094, F.A.C., Governmental Entity will be subject to the tax, interest, and penalties due on the tangible personal property purchased. If the Florida Department of Revenue determines that the tangible personal property purchased tax-exempt by issuing this Certificate does not qualify for the exemption, Governmental Entity will be liable for any tax, penalty, and interest determined to be due.

I understand that if I fraudulently issue this certificate to evade the payment of sales tax I will be liable for payment of the sales tax plus a penalty of 200% of the tax and may be subject to conviction of a third degree felony.

Under the penalties of perjury, I declare that I have read the foregoing Certificate of Entitlement and the facts stated in it are true.

_____ _____

Signature of Authorized Representative Title

_____

Purchaser's Name (Print or Type) Date

Federal Employer Identification Number: _____

Telephone Number:_____

You must attach a copy of the Purchase Order to this Certificate of Entitlement.

Do not send to the Florida Department of Revenue. This Certificate of Entitlement must be retained in the vendor's and the contractor's books and records.

(d) Sales to contractors, including subcontractors, are subject to tax.

(e) The governmental entity may not transfer liability for such tax, penalty, and interest to another party by contract or agreement.

(f) In the case of contracts with any agency or branch of the United States government in which the federal governmental agency or branch is not required to produce a Certificate of Entitlement, the purchase must comply with the five criteria provided in paragraph (b), for the purchase of tangible personal property to be exempt from sales and use tax. If the criteria in paragraph (b) are not met, the contractor is the ultimate consumer of such tangible personal property and is liable for sales or use tax on such purchases and manufacturing costs.

(5) Contractors, including subcontractors, that manufacture, fabricate, or furnish tangible personal property that the contractor incorporates into public works are liable for tax in the manner provided in subsection (10) of Rule 12A-1.051, F.A.C. The contractor and subcontractors, not the governmental entity, are deemed to be the ultimate consumers of the articles of tangible personal property they manufacture, fabricate, or furnish to perform their contracts and may not accept a Certificate of Entitlement for these articles.

(6) Contractors that supply raw materials such as rock, shell, fill dirt, and similar materials for incorporation into public works shall be liable for tax in the manner provided in subsection (10) of Rule 12A-1.051, F.A.C.

(7) Contractors that manufacture and incorporate asphalt into public works projects are liable for tax on their costs, as provided in subsection (12) of Rule 12A-1.051, F.A.C., subject to a partial exemption, as provided in Section 212.06(1)(c), F.S.

(8) Contractors that install people mover systems in public works projects are exempt from sales and use tax on their purchases of such systems or components of such systems and on any other costs incurred in the manufacture of such systems that would be taxable under the provisions of subsection (10) of Rule 12A-1.051, F.A.C.

(a) A "people mover system" includes wheeled passenger vehicles and related control and power distribution systems that form a transportation system owned by a public entity and used by the general public. The vehicles may be operator-controlled, driverless, self-propelled, or externally powered. They may run on roads, rails, guidebeams, or other permanent structures that are an integral part of the system. "Related control and power distribution systems" includes electrical or electronic control or signaling equipment that distributes power or signals from the control center or centers or from the power source throughout the system. Embedded wiring, conduits, or cabling and the roads, rails, guidebeams, or other permanent structures on which the vehicles run are not included within the term "people mover system." A contractor that installs such embedded wiring, conduits, or cabling or that builds such a road, rail, guidebeam, or permanent structure is taxable on the purchase or use of tangible personal property incorporated into the project.

(b) A people mover system contractor should claim the exemption by providing a vendor with a certificate of entitlement to the exemption. The vendor must maintain copies of certificates until tax imposed by Chapter 212, F.S., may no longer be determined and assessed under Section 95.091, F.S. Possession by a vendor of such a certificate from the purchaser relieves the vendor from the responsibility of collecting tax on the sale, and the Department shall look solely to the purchaser for recovery of tax if it determines that the purchaser was not entitled to the exemption. A suggested form of certificate follows:

SUGGESTED PURCHASER'S EXEMPTION CERTIFICATE
PEOPLE MOVER SYSTEMS AND PARTS

_____ (Purchaser's Name) certifies that the tangible personal property purchased on or after _____ (date) will be used as part of a people mover system that will become a part of a publicly owned facility pursuant to a contract with the United States, a state, a county, a municipality, a political subdivision of a state, or the public operator of a public-use airport as defined in Section 332.004, F.S. Such contract requires Purchaser to purchase the tangible personal property for use in manufacturing, installing, manufacturing and installing, repairing, or maintaining, all or part of a people mover system operated by the governmental entity as a public facility.

_____ (Purchaser's Name) further certifies: a) that all of the tangible personal property purchased pursuant to this certificate is or will be part of a wheeled passenger vehicle or of related control or power distribution systems that are part of a transportation system for use by the general public; and b) none of the tangible personal property purchased pursuant to this certificate will be used as embedded wiring, conduits, or cabling to transmit signals among the vehicles, control equipment, power distribution equipment, and signaling equipment that make up the people mover system.

The undersigned understands that if such tangible personal property does not qualify for this exemption, the undersigned will be subject to sales and use tax, interest, and penalties. The undersigned further understands that when any person fraudulently, for the purpose of evading tax, issues to a vendor or to any agent of the state a certificate or statement in writing in which he or she claims exemption from the sales tax, such person, in addition to being liable for payment of the tax plus a mandatory penalty of 200% of the tax, shall be liable for fine and punishment provided by law for conviction of a felony of the third degree, as provided in Section 775.082, 775.083 or 775.084, F.S.

_____
Purchaser's Name (Print or Type)

_____ _____ _____
Signature and Title Date Florida Sales Tax Number

_____ _____

Federal Employer Identification Number or Social Security Number

Telephone Number

Retain in vendor's records. Do not send to the Department of Revenue.

(c) Contractors that maintain an inventory of parts that may be incorporated into people mover system components that are sold as tangible personal property, may be used in performing real property contracts, and may be incorporated into exempt people mover systems pursuant to a public works contract may purchase such inventory parts by issuing a copy of the contractor's Annual Resale Certificate in lieu of providing a certification of specific eligibility under the people mover system exemption. If appropriate, tax should be remitted upon subsequent taxable sale or use of such parts.

Rulemaking Authority 212.08(6), 212.17(6), 212.18(2), 212.183, 213.06(1) FS. Law Implemented 92.525(1), 212.02(4), (14), (15), (16), (19), (20), (21), 212.06(1), (2), (14) 212.07(1), 212.08(6), (7)(bbb), 212.085, 212.18(2), 212.183, 213.37 FS. History–New 6-3-80, Amended 11-15-82, Formerly 12A-1.94, Amended 1-2-89, 8-10-92, 6-28-04, 1-12-11.

Florida Department of Revenue
Technical Assistance and Dispute Resolution

Leon M. Biegalski
Executive Director

5050 West Tennessee Street, Tallahassee, FL 32399

floridarevenue.com

SUMMARY

TAX: Sales and Use Tax
TAA NUMBER: 18A-011
ISSUE: Public Works Contract
STATUTE CITE: 212.08(6), F.S.
RULE CITE: 12A-1.094, F.A.C.

QUESTION:
Whether the provisions contained in the submitted proposed contract are sufficient to enable the Taxpayer to realize savings of its tax-exempt status on the purchase of materials for use in a public works project.

ANSWER:
Section 212.08(6), F.S., provides only direct purchases by governmental entities are exempt. Therefore, if a contractor, who is employed by a governmental entity, purchases tangible personal property to be used in a public works contract, then the exemption listed in s. 212.08(6), F.S., does not apply. Rule 12A-1.094, F.A.C, provides the guidelines for purchasing materials tax-exempt for a public works contract. Here, the Taxpayer's submitted proposed contract satisfies the conditions of the foregoing statute and rule.

08/06/2018

XXXXXX
Attn: XXXXX
P.O. Box XXXXX
XXXXXXX, Florida XXXXX-XXX

Re: Technical Assistance Advisement XXX-XXX
Public Works Contract
Section: 212.08, Florida Statutes (F.S.)
Rules: 12A-1.038, 12A-1.051, 12A-1.094, Florida Administrative Code (F.A.C.)
Petitioner: XXXXXXX (“Taxpayer”)
FEI: XXXXXXXX

Dear XXXXXX:

This letter is a response to your petition received on July 13, 2017, for the Department's issuance of a Technical Assistance Advisement ("TAA") concerning the above referenced party and matter. Your petition has been carefully examined and the Department finds it to be in compliance with the requisite criteria set forth in Chapter 12-11, F.A.C. This response to your request constitutes a TAA and is issued to you under the authority of s. 213.22, F.S.

Requested Advisement

Whether the proposed contract provisions will enable Taxpayer to directly purchase materials from suppliers without sales tax when the materials are used in a public works contract?

Facts

Taxpayer[1] is entering into a contract (the "Agreement"), pursuant to which Contractor is engaged to construct an improvement of a water reclamation facility (the "Project"). Taxpayer provided draft copies of the contract and general terms and conditions (“GTC”) incorporated by reference into the contract. On June 12, 2018, updated copies of the contract and GTC were provided. Taxpayer also provided copies of the documents referenced in the GTC’s table of contents on June 14, 2018.

The updated contract contains the following in relevant part:

ARTICLE 8 – OWNER’S DIRECT PURCHASE OPTION

***

8.2.3 **OWNER DIRECT PURCHASE POLICY.** The OWNER reserves the right to issue OWNER Purchase Orders directly to suppliers of materials to be incorporated into the Work of Project as described in the Contract, in order to obtain the exemption from sales taxes available under Fla. Stat. § 212.08(6), in accordance with the procedures listed below. For purposes of this Policy, the term, “materials,” means all items of tangible personal property which OWNER may be eligible to directly purchase tax free in accordance with Fla. Stat. § 212.08(6), and implementing administrative regulations; and all other terms will have the meaning provided or suggested in the Contract, where applicable.

***

(2) The OWNER may accept or reject the CM’s [construction manager] recommendations and will at OWNER’s discretion directly purchase those items that OWNER deems suitable for direct purchase. The OWNER’s election to make direct

[1] Taxpayer is referred to in the documents as “City” or “Owner.” To preserve the language of the draft contract and GTC these terms are left in the text.

purchases under this Policy will not eliminate or affect the CM's responsibilities under the Contract except as specifically noted herein. Among other things, CM will remain responsible for controlling the means and methods by which the Work is to proceed; working diligently to complete the Work in accordance with applicable deadlines; and for tracking ordering and delivery of materials so as to maintain the critical path. Neither the procedures herein, nor the OWNER's election to directly purchase certain materials, will alter or the applicability of the procedures and standards to be used under the Contract for claims for delay or change orders.

(3) The CM will require that all quotes for materials received by CM for tangible personal property to be incorporated into the Project: (i) itemize sales tax as a separate item; (ii) include language that the quotations are assignable to the OWNER; and (iii) include language stating that if assigned to OWNER, no sales tax will be charged upon provision of OWNER's sales tax exemption certificate. Nothing herein will prohibit the OWNER from requiring the supplier of materials to be directly purchased by OWNER, from requiring the supplier to issue a written quotation directly to OWNER, even where CM has provided OWNER with an assignable quotation as provided herein.

***

(5) For those items of tangible personal property that OWNER elects to directly purchase, CM will prepare City form Purchase Order Requisitions, consistent with the quotes provided by the suppliers and this Policy.

(6) CM will forward the completed Purchase Order Requisition to the OWNER's Account Clerk, and provide a copy to the Contract Administrator.

(7) The Purchasing Agent will issue a purchase order to the supplier based on the information provided by the CM and the supplier's written quotation. The Purchasing Agent will provide a copy of the purchase order to the CM.

***

(9) OWNER will acquire title to and assume responsibility for materials directly purchased by OWNER under this Policy, upon delivery to the Job Site.[2]

(10) Suppliers will directly invoice the OWNER. Invoices will be forwarded to the CM for verification. Immediately as materials directly purchased by

[2] Please note the contract also provides, in section 2.13 on page 19, Title and Risk of Loss of Materials and Equipment, that the risk of loss does not pass to the owner until title passes and title does not pass until the payment is made. However, the section notes this section does not apply in cases of an owner direct purchase.

OWNER are delivered to the Job Site, the CM will review the condition of the materials delivered for conformity with contract specifications and the supplier's invoice for conformity with this Policy, including confirmation that the invoice references OWNER's purchase order and is billed to OWNER, not CM. CM will promptly advise the OWNER of any deficiencies in the materials or invoice. The intent of this requirement is to require CM to act diligently to allow OWNER to meet its obligations to the supplier under Florida's Prompt Payment Act, Fla. Stat. § 218.70 *et seq*. Nothing herein will prohibit the CM from requiring a Subcontractor of CM's conduct a similar review for CM's benefit; however, CM will remain responsible to OWNER for promptly reviewing the materials and invoice in accordance with this Section.

(11) Upon being satisfied that directly purchased materials and the accompanying invoice from the supplier are satisfactory, OWNER will pay the supplier for the items purchased. Under no circumstances will CM be responsible for paying the supplier. The OWNER will issue a check for the Approved invoice amount and mail this check directly to the supplier, accompanied by the Certificate of Entitlement. A copy of the check will be forwarded to the CM so that CM can accurately track and summarize all OWNER Direct Purchase payments.

In the event the OWNER does not timely execute the appropriate documents submitted by the CM for direct purchase, the CM may, upon timely notice to the OWNER, order such materials irrespective of loss of sales tax savings. It is the intent of these provisions to implement the cost savings afforded by the sales tax exemption without delay of the Work and that the CM retain complete control of the Project Schedule. While the OWNER'S direct purchase of materials or supplies will not relieve the CM of responsibility to maintain and safeguard such materials and supplies until they are incorporated into the Work and accepted by the OWNER, the OWNER will assume liability for the materials at the time they are delivered to the jobsite. The CM will not be entitled to a time extension in the event that delay is occasioned by the OWNER'S direct purchase of materials.

(12) The OWNER will bear the economic burden of obtaining insurance covering damage or loss or will directly enjoy the economic benefit of the proceeds of any such insurance. Nothing herein will prohibit the OWNER from requiring CM to supply additional coverage, such as through a builder's risk policy or installation floater, to insure materials directly purchased by OWNER from damage and risk of loss.

(13) The OWNER does hereby defend, hold harmless, and indemnify the CM from any and all liability for unpaid sales taxes which the CM may suffer as a result of claims, demands, costs, interest, penalties or judgments against the CM made by or in favor of the State of Florida on account of failure to pay Florida State Sales Taxes on materials purchased by the OWNER under this Policy The OWNER agrees to defend

against any such claims or actions brought against the CM whether rightfully or wrongfully brought or filed. The CM agrees that it will promptly notify the OWNER of any such claim, demand, or action. Furthermore, the CM expressly agrees that, if and when requested by the OWNER, it will enter into such amendments to this Contract as the OWNER, upon consultation with its legal counsel, may deem necessary or useful to preserve or ensure its right under Florida law to the sales tax exemption contemplated by this subsection. OWNER's obligation to indemnify and hold harmless CM as provided herein is subject to limitations, including monetary limitations, contained in Florida Statutes § 768.28.

The GTC also provides includes the following in relevant part:

ARTICLE 18 - OWNER DIRECT PURCHASE POLICY

***

The CITY may accept or reject the CM's recommendations and will in CITY's discretion directly purchase those items that CITY deems suitable for direct purchase. The CITY's election to make direct purchases under this Policy will not eliminate or affect the CM's responsibilities under the Contract except as specifically noted herein. Among other things, CM will remain responsible for controlling the means and methods by which the Work is to proceed; working diligently to complete the Work in accordance with applicable deadlines; and for tracking ordering and delivery of materials so as to maintain the critical path. Neither the procedures herein, nor the CITY's election to directly purchase certain materials, will alter or the applicability of the procedures and standards to be used under the Contract for claims for delay or change orders.

The CM will require that all quotes for materials received by CM for tangible personal property to be incorporated into the Project: (i) itemize sales tax as a separate item; (ii) include language that the quotations are assignable to the CITY; and (iii) include language stating that if assigned to CITY, no sales tax will be charged upon provision of CITY's sales tax exemption certificate. Nothing herein will prohibit the CITY from requiring the supplier of materials to be directly purchased by CITY, from requiring the supplier to issue a written quotation directly to CITY, even where CM has provided CITY with an assignable quotation as provided herein.

***

The CITY will issue a Purchase Order to the supplier based on the information provided by the CM and the supplier's written quotation. The City will provide a copy of the Purchase Order to the CM.

***

CITY will acquire title to and assume responsibility for materials directly purchased by CITY under this Policy, upon delivery to the job site.

Suppliers shall directly invoice the CITY. Invoices will be forwarded to the CM for verification. Immediately as materials directly purchased by CITY are delivered to the Project site, the CM will review the condition of the materials delivered for conformity with Contract specifications and the supplier's invoice for conformity with this Policy, including confirmation that the invoice references CITY's Purchase Order and is billed to CITY, not CM or Subcontractor. CM will promptly advise the CITY of any deficiencies in the materials or invoice. The intent of this requirement is to require CM to act diligently to allow CITY to meet its obligations to the supplier under Florida's Prompt Payment Act, Fla. Stat. § 218.70 et seq. Nothing herein will prohibit the CM from requiring a Subcontractor of CM's conduct a similar review for CM's benefit; however, CM will remain responsible to CITY for promptly reviewing the materials and invoice in accordance with this Section.

Upon being satisfied that directly purchased materials and the accompanying invoice from the supplier are satisfactory, CITY will pay the supplier for the items purchased. Under no circumstances will CM be responsible for paying the supplier. The CITY will issue a check for the approved invoice amount and mail this check directly to the supplier, accompanied by the Certificate of Entitlement. A copy of the check will be forwarded to the CM so that CM can accurately track and summarize all CITY Direct Purchase payments.

***

The CITY will bear the economic burden of obtaining insurance covering damage or loss or will directly enjoy the economic benefit of the proceeds of any such insurance. Nothing herein will prohibit the CITY from requiring Cm to supply additional coverage, such as through a builder's risk policy or installation floater, to insure materials directly purchased by CITY from damage and risk of loss.

***

Authority

Sales to governmental units are exempt from sales tax pursuant to Section 212.08(6), Florida Statutes, which provides in pertinent part:

(a) There are also exempt from the tax imposed by this chapter sales made to the United States Government, a state, or any county, municipality, or political subdivision of a state when payment is made directly to the dealer by the governmental entity....

(b) <u>The exemption provided under this subsection does not include sales of tangible personal property made to contractors employed directly to or as agents of any such</u>

> government or political subdivision when such tangible personal property goes into or becomes a part of public works owned by such government or political subdivision.... (Emphasis Supplied)

By its terms, Section 212.08(6), Florida Statutes, exempts only direct purchases by governmental entities. Rule 12A-1.094, Florida Administrative Code, which provides guidelines for governmental entities purchasing materials tax exempt for a public works contracts. The rule provides in pertinent part:

> (4)(a) The exemption in Section 212.08(6), F.S., is a general exemption for sales made directly to the government. A determination whether a particular transaction is properly characterized as an exempt sale to a governmental entity or a taxable sale to or use by a contractor shall be based on the substance of the transaction, rather than the form in which the transaction is cast. The Executive Director or the Executive Director's designee in the responsible program will determine whether the substance of a particular transaction is a taxable sale to or use by a contractor or an exempt direct sale to a governmental entity based on all of the facts and circumstances surrounding the transaction as a whole.
>
> (b) The following criteria that govern the status of the tangible personal property prior to its affixation to real property will be considered in determining whether a governmental entity rather than a contractor is the purchaser of materials:
>
> 1. Direct Purchase Order. The governmental entity must issue its purchase order directly to the vendor supplying the materials the contractor will use and provide the vendor with a copy of the governmental entity's Florida Consumer's [Certificate] of Exemption.
> 2. Direct Invoice. The vendor's invoice must be issued to the governmental entity, rather than to the contractor.
> 3. Direct Payment. The governmental entity must make payment directly to the vendor from public funds.
> 4. Passage of Title. The governmental entity must take title to the tangible personal property from the vendor at the time of purchase or delivery by the vendor.
> 5. Assumption of the Risk of Loss. Assumption of the risk of damage or loss by the governmental entity at the time of purchase is a paramount consideration. A governmental entity will be deemed to have assumed the risk of loss if the governmental entity bears the economic burden of obtaining insurance covering damage or loss or directly enjoys the economic benefit ofthe proceeds of such insurance.
>
> (c) Sales are taxable sales to the contractor unless it can be demonstrated to the satisfaction of the Executive Director or the Executive Director's designee in the

responsible program that such sales are, in substance, tax exempt direct sales to the government.

(5) Contractors that manufacture materials for incorporation into public works shall be liable for tax in the manner provided in subsection (10) of Rule 12A-1.051, F.A.C. . . . (Emphasis Supplied)

Discussion

Section 212.08, F.S., and Rule 12A-1.038(4)(b), Florida Administrative Code, state that in order for a sale to a governmental entity to be tax exempt, "[p] ayment for tax exempt purchases . . . must be made directly to the selling dealer by the . . . political subdivision of a state. . .." Rule 12A-1.094(2) and (3), Florida Administrative Code, state that the purchase of materials for public works contracts is taxable to the contractor as the ultimate consumer where the contractor is deemed to be the purchaser. If the purchaser of the materials is the governmental entity, however, the transaction is exempt. For there to be an exempt transaction, the governmental entity must directly purchase, hold title to, and assume the risk of loss of the tangible personal property prior to its incorporation into realty, and satisfy various factors contained in Rule 12A-1.094, Florida Administrative Code.

Rule 12A-1.094(4), Florida Administrative Code, which sets forth the criteria that govern the status of the tangible personal property prior to its affixation to real property, will be considered in determining whether a governmental entity rather than a contractor is the purchaser of materials. These criteria include direct purchase order, direct invoice, direct payment, passage of title, and assumption of risk of loss. However, the assumption of risk of damage or loss during the time that the building materials are physically stored at the job site prior to their installation or incorporation into the project is a paramount consideration. The governmental entity must assume all risk of loss or damage for the tangible personal property during that period. To establish that it has assumed that risk, the governmental entity should purchase, or be the insured party under insurance on the building materials.

To summarize, the conditions that must be met to satisfy the requirements of Rule 12A-1.094, F.A.C, and establish that the governmental entity rather than the contractor is the purchaser of materials, include:

1. The governmental entity must execute the purchase orders for the tangible personal property involved in the contract, which must include the governmental entity's consumer's certificate of exemption number. The contractor may present the governmental entity's purchase orders to the vendors of the tangible personal property;

2. The governmental entity must acquire title to and assume liability for the tangible personal property from the point in time when it is delivered to the job site up until the time it is incorporated as real property;

3. Vendors must directly invoice the governmental entity for supplies;

4. The governmental entity must directly pay the vendors for the tangible personal property; and

5. The governmental entity must assume all risk of loss or damage for the tangible personal property involved in the contract, as indicated by the entity's acquisition of, or inclusion as the insured party under, insurance on the building materials.

Conclusion

So long as the criteria provided by Rule 12A-1.094, F.A.C, is satisfied, the purchase of tangible personal property under the proposed Owner direct purchase provisions provided for review will not be subject to sales and use tax. Taxpayer will be required to complete all measures provided herein, including, but not limited to, direct issuance of purchase orders, direct payment to vendors by Taxpayer, direct invoicing from vendors to Taxpayer, passage of title of tangible personal property directly from the vendors to Taxpayer, assumption of risk of loss of the materials used in project from the moment the vendor delivers the material to the jobsite until it is permanently affixed as a real property improvement. If all measures that are provided in the request are completed by Taxpayer, then Taxpayer may purchase the materials used in project without paying the vendor for sales tax. Therefore, based on the documentation provided, Taxpayer's contract meets the requirement of the above-mentioned Rule, and Taxpayer may purchase the materials tax-exempt for use in a public works contract.

Please note: Taxpayer’s contract and the incorporated GTC, provide that Taxpayer assumes the risk of loss upon delivery to the jobsite. It is unclear how the risk of loss is affected in the event delivery takes place at a location other than the jobsite. Therefore, this determination does not discuss the applicability of sales and use tax, in instances where the goods are not delivered to the jobsite.

This response constitutes a Technical Assistance Advisement under Section 213.22, F.S., which is binding on the Department only under the facts and circumstances described in the request for this advice, as specified in Section 213.22, F.S. Our response is predicated on those facts and the specific situation summarized above. You are advised that subsequent statutory or administrative rule changes or judicial interpretations of the statutes or rules upon which this advice is based may subject similar future transactions to a different treatment than expressed in this response.

You are further advised that this response, your request and related backup documents are public records under Chapter 119, F.S., and are subject to disclosure to the public under the conditions of s. 213.22, F.S. Confidential information must be deleted before public disclosure. In an effort to protect confidentiality, we request you provide the undersigned with an edited copy of your request for Technical Assistance Advisement, the backup material and this response, deleting names, addresses and any other details which might lead to identification of the taxpayer. Your response should be received by the Department within 15 days of the date of this letter.

Sincerely,

Timothy Surface

Senior Attorney
Technical Assistance and Dispute Resolution
Control #7000016560

Florida Department of Revenue
Tax Information Publication

TIP

No: **13A01-01**

Date Issued:
March 11, 2013

Owner-Direct Purchase Programs
Public Works Contracts

Under Florida law, real property contractors and subcontractors are the ultimate consumers of materials they use in the performance of real property construction contracts. Therefore, purchases of materials by real property contractors and subcontractors are subject to sales tax. This law applies to contractors and subcontractors who buy materials for public works construction contracts.

Florida law allows government entities to buy goods and services tax-free when the government entity makes payment directly to the vendor. When a government entity directly buys materials for use in a public works construction contract, these purchases are exempt from sales tax when the government entity follows certain procedures. These procedures are in Rule 12A-1.094, F.A.C.

Direct purchase of materials by the government entity for use in a public works construction project is commonly referred to an "owner-direct purchase program." Government entities use owner-direct purchase programs to take advantage of their tax-exempt status to directly purchase materials for public works construction projects. If a contractor or subcontractor, rather than the government entity, buys materials for use in a public works construction contract, the contractor or subcontractor must pay sales tax.

Government entities, contractors, and subcontractors who enter into public works construction projects have asked questions about the requirements that must be met to qualify for the sales tax exemption available for direct purchases by a government entity. This is especially true when a contractor or subcontractor engaged in a public works construction contract provides the materials in an owner-direct purchase program or other similar arrangement.

To help the parties involved in a public works construction contract understand the conditions that must be met to satisfy the requirements of Rule 12A-1.094, F.A.C., and prove that the government entity rather than the contractor or the subcontractor is the purchaser of the materials, the Department provides the following guidance from this rule:

1. Direct Purchase Order. The government entity must issue its purchase order directly to the vendor supplying the materials the contractor will use and provide the vendor with a copy of the government entity's Florida Consumer's Certificate of Exemption.

2. Direct Invoice. The vendor's invoice must be issued to the government entity, rather than to the contractor.

3. Direct Payment. The government entity must make payment directly to the vendor from public funds.

4. Passage of Title. The government entity must take title to the tangible personal property from the vendor at the time of purchase or delivery by the vendor.

5. Assumption of the Risk of Loss. Assumption of the risk of damage or loss by the government entity at the time of purchase is a paramount consideration. A government entity will be deemed to have assumed the risk of loss if the government entity bears the economic burden of obtaining insurance covering damage or loss or directly enjoys the economic benefit of the proceeds of such insurance.

6. Certificate of Entitlement. To be entitled to purchase materials tax exempt for a public works project, a government entity is required to issue a Certificate of Entitlement to each vendor and to the government entity's contractor to affirm that the tangible personal property purchased from that vendor will go into or become a part of a public work. This requirement does not apply to any agency or branch of the United States government.

   Purchases made by the government entity for a public works construction contract without a Certificate of Entitlement are subject to tax.

In some cases, the government entity is not able to use its tax exempt status on the purchase of materials. For example, when the contractor or subcontractor installing the materials is also selling the materials to the government entity, the purchases are taxable, even if the government entity has established an owner-direct purchase program. See Rule 12A-1.094(5), F.A.C. Other instances where the government entity is not able to use its tax-exempt status and owner-direct purchase program include, but are not limited to:

1. When the contractor or subcontractor is the manufacturer of the materials.
2. When the contractor or subcontractor has exclusive rights from the manufacturer of the materials to furnish and install the materials.
3. When the contractor or subcontractor has already purchased the materials. The government entity cannot, after the fact, try to prepare or change the documentation to appear to have properly followed the procedures.

References: Section 212.08(6), F.S.; Rule 12A-1.094, F.A.C.

For More Information

This document is intended to alert you to the requirements contained in Florida laws and administrative rules. It does not by its own effect create rights or require compliance.

For forms and other information, visit our Internet site at www.myflorida.com/dor or call Taxpayer Services, 8:00 a.m. to 7:00 p.m., ET, Monday through Friday, excluding holidays, at 800-352-3671.

For a detailed written response to your questions, write the Florida Department of Revenue, Taxpayer Services, Mail Stop 3-2000, 5050 West Tennessee Street, Tallahassee, FL 32399-0112.

Public Records and Public Procurement

FS 119.0701

Government agencies are accustomed to receiving public records requests and are familiar with the requirements of the law for complying with them. A private contractor that enters into a contract for services with a governmental agency and that is acting on behalf of the agency must also comply with public records requests that fall within the scope of the services and are not otherwise exempt from disclosure. Often the contractor is less familiar with the public record law requirements and can end up on the wrong side of compliance.

To address this issue, FS 119.0701 requires each contract for services with a governmental agency under which the contractor is acting on behalf of the agency within the scope of FS 119.011(2) to include specified provisions addressing the contractor's obligations under the public records law, and a specified statement in at least 14-point boldfaced type. The materials include a specimen that can be used when drafting a contract for services under which the contractor is acting on behalf of the agency.

FS 119.071

Sealed bids and proposals received in response to competitive solicitations are exempt from public records disclosure until the earlier of the notice of the intended decision or thirty days following the opening of the responses.

If the agency rejects all responses and concurrently gives notice of its intent to reissue the solicitation, the responses remain exempt from public records disclosure until the notice of the intended decision or the withdrawal of the solicitation, but not longer than 12 months following the initial notice of rejection.

Any financial statement that an agency requires a prospective bidder to submit in order to prequalify for responding to a solicitation for a road or any other public works project is exempt from public records disclosure.

Trade Secrets

FS 812.081(1)(c) defines a trade secret as the whole or any portion or phase of any formula, pattern, device, combination of devices, or compilation of information that is (i) secret, (ii) of value, (iii) for use or in use by a business, and (iv) of advantage to the business, or providing an opportunity to obtain an advantage, over those who do not know or use it, but only when the owner of the trade secret takes measures to prevent it from becoming available to persons other than those selected by the owner to have access for limited purposes.

In FS 815.045, the Legislature has found it to be a matter of public necessity that trade secret information as defined in FS 812.081 and in the hands of a governmental agency be made confidential and exempt from the public records law.

In *Sepro Corp. v. Florida Dept. of Environmental Protection*, 839 So. 2d 781 (Fla. 1st DCA 2003), the First District Court of Appeal held that the exemption in FS 815.045 is to be broadly construed to embrace all trade secret information as defined in FS 812.081, but made clear that the exemption applies only to information marked as a confidential trade secret when delivered to the governmental agency.

The exemption applies to materials marked as a confidential trade secret in a sealed bid or proposal submitted in response to a competitive solicitation.

What does a procurement official do when a public records request of a solicitation response is made that includes information marked as a confidential trade secret when the official doubts the legitimacy of the trade secret claim? On the one hand, if the official discloses the information and the trade secret claim is subsequently upheld as legitimate, the official could be guilty of a felony under FS 812.081 or FS 815.04. On the other hand, if the official withholds the information and the trade secret claim is subsequently found to be illegitimate, the official could be guilty of an offense under FS Ch. 119.

In March of 2016, the Florida Attorney General issued an informal opinion addressing this situation, and recommended that the government agency advise the trade secret claimant that it had received a public records request and would release the records and allow the claimant to seek a protective order for those materials. The problem with this approach is that the claimant can reassert its position that the information is a confidential trade secret and do nothing more, leaving the agency in the same place it started. If negotiation and reason fail to resolve the impasse, likely the only safe way to proceed is to bring a declaratory judgment action against both parties and let them fight it out, much like an interpleader action. The court will likely examine the materials in camera and make a decision that provides the agency a safe harbor.

[Per Section 119.0701, Florida Statutes, the following provision is required to be inserted in each contract for services in which the Contractor is acting on behalf of the County as provided under Section 119.011(2), Florida Statutes.]

Section ___. PUBLIC RECORDS LAW: As used in this section, the term the "Agreement" means the agreement or contract within which the provisions of this section appear; the term "Contractor" means the vendor or other party in this Agreement providing construction, labor, materials, professional services, and/or equipment to the County hereunder; the term "County" means _____ County, a political subdivision of the State of Florida, its Board of County Commissioners, or any other name or label set forth in this Agreement identifying such entity; and the term "Public Record Laws" means Art. 1, Section 24, Florida Constitution, and Chapter 119, Florida Statutes, as from time to time amended. The Contractor acknowledges the County's obligation under the Public Records Laws to release public records to members of the public upon request. The Contractor acknowledges that the County is required to comply with the Public Records Laws in the handling of the materials created under this Agreement and that the Public Records Laws control over any contrary terms in this Agreement. In accordance with the requirements of Section 119.0701, Florida Statutes, the Contractor covenants to comply with the Public Records Laws, and in particular to:

(a) Keep and maintain public records required by the County in order to perform the services required under this Agreement;

(b) Upon request from the County's custodian of public records, provide the County with a copy of the requested records or allow the public records to be inspected or copied within a reasonable time at a cost that does not exceed the cost provided in Chapter 119, Florida Statutes, or as otherwise provided by law;

(c) Ensure that public records that are exempt or confidential and exempt from public records disclosure requirements are not disclosed except as authorized by law for the duration of the term of this Agreement and following completion of this Agreement if the Contractor does not transfer the records to the County; and,

(d) Upon completion of this Agreement, transfer, at no cost, to the County all public records in possession of the Contractor or keep and maintain public records required by the County to perform the services. If the Contractor transfers all public records to the County upon completion of this Agreement, the Contractor shall destroy any duplicate public records that are exempt or confidential and exempt from public records disclosure requirements. If the Contractor keeps and maintains public

records upon completion of this Agreement, the Contractor shall meet all applicable requirements for retaining public records. All records stored electronically must be provided to the County, upon request from the County's custodian of public records, in a format that is compatible with the information technology systems of the County.

Failure to comply with this paragraph or section shall be deemed a material breach of this Agreement, for which the County may terminate this Agreement immediately upon written notice to the Contractor.

NOTICE: **IF THE CONTRACTOR HAS QUESTIONS REGARDING THE APPLICATION OF CHAPTER 119, FLORIDA STATUTES, TO THE CONTRACTOR'S DUTY TO PROVIDE PUBLIC RECORDS RELATING TO THIS CONTRACT, CONTACT THE CUSTODIAN OF PUBLIC RECORDS AT (telephone number, e-mail address, and mailing address).**

[Per Section 119.0701, Florida Statutes, the foregoing Notice must be included in at least 14-point boldfaced type in each contract for services in which the Contractor is acting on behalf of the County as provided under Section 119.011(2), Florida Statutes.]

Special Assessments and § 1983 Claims

FLORIDA ASSOCIATION OF COUNTY ATTORNEYS ANNUAL CONTINUING LEGAL EDUCATION

JUNE 13, 2019

Edward A. Dion, Esq.
Nabors, Giblin & Nickerson, P.A.
110 East Broward Blvd. Suite 1700
Ft. Lauderdale, Florida 33301
edion@ngnlaw.com
(954) 315-3852

Nabors
Giblin &
Nickerson P.A.

OUTLINE OF THIS PRESENTATION

- Background – Town of Palm Beach Underground Utilities
- The Case – PBT Real Estate, LLC. V. Town of Palm Beach, *et. al.*
- Suggested Tips
- Questions

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Giblin &
Nickerson P.A.

BACKGROUND

TOWN OF PALM BEACH UNDERGROUND UTILITIES BACKGROUND

- Early 2000s discussions began on undergrounding the utilities within the town;

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2006 UTILITY UNDERGROUNDING ASSESSMENT METHODOLOGY CREATED

Three Separate and Distinct Special Benefits would be provided to the properties in the Town by undergrounding the utilities:

1. Safety

2. Reliability

3. Aesthetics

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EQUIVALENT BENEFIT UNIT

SINGLE FAMILY RESIDENCE = 1.0 EBU
WITH OVERHEAD UTILITY LINES

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Nickerson P.A.

EQUIVALENT BENEFIT UNIT

- Safety – took into account parcels that were adjacent to underground utilities and reduced the assessment to 0.5 EBU
- Reliability – discounted by 1/3 to account for reliability already received by parcels whose utilities were previously undergrounded.
- Aesthetics – discounted by 1/2 for those properties because of the improved aesthetics to the general neighborhood.

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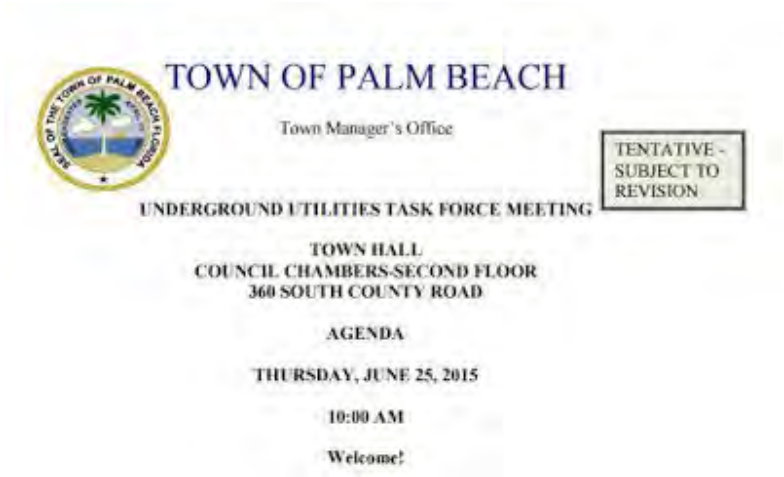
2014 AND 2015 – PUBLIC MEETINGS & TASK FORCE



TOWN OF PALM BEACH

Town Manager's Office

TENTATIVE - SUBJECT TO REVISION

UNDERGROUND UTILITIES TASK FORCE MEETING

TOWN HALL
COUNCIL CHAMBERS-SECOND FLOOR
360 SOUTH COUNTY ROAD

AGENDA

THURSDAY, JUNE 25, 2015

10:00 AM

Welcome!

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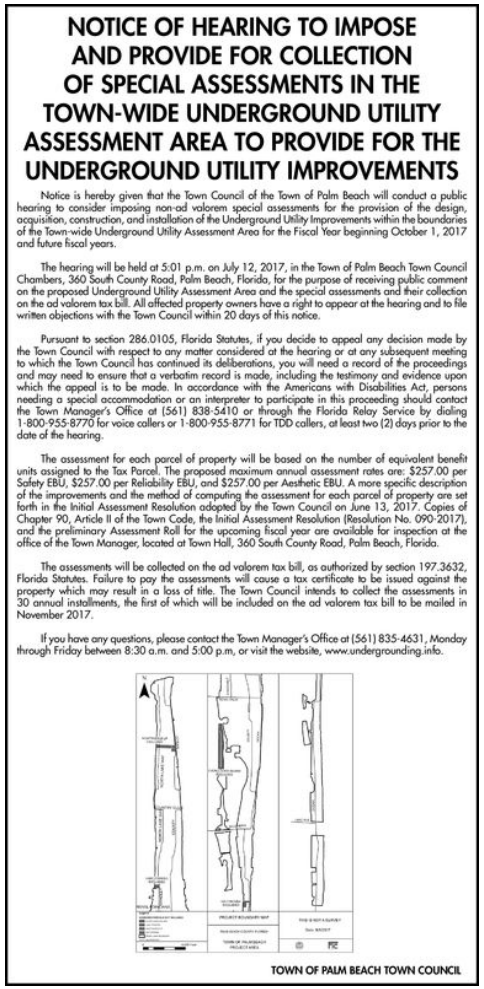
2016 REFERENDUM

- Approved by a majority of the voters in the Town

Nabors Giblin & Nickerson P.A.

2017 – METHODOLOGY UPDATE AND INITIAL AND FINAL ASSESSMENT RESOLUTIONS PASS

Collected Annually for 30 years



NOTICE OF HEARING TO IMPOSE AND PROVIDE FOR COLLECTION OF SPECIAL ASSESSMENTS IN THE TOWN-WIDE UNDERGROUND UTILITY ASSESSMENT AREA TO PROVIDE FOR THE UNDERGROUND UTILITY IMPROVEMENTS

Notice is hereby given that the Town Council of the Town of Palm Beach will conduct a public hearing to consider imposing non-ad valorem special assessments for the provision of the design, acquisition, construction, and installation of the Underground Utility Improvements within the boundaries of the Town-wide Underground Utility Assessment Area for the Fiscal Year beginning October 1, 2017 and future fiscal years.

The hearing will be held at 5:01 p.m. on July 12, 2017, in the Town of Palm Beach Town Council Chambers, 360 South County Road, Palm Beach, Florida, for the purpose of receiving public comment on the proposed Underground Utility Assessment Area and the special assessments and their collection on the ad valorem tax bill. All affected property owners have a right to appear at the hearing and to file written objections with the Town Council within 20 days of this notice.

Pursuant to section 286.0105, Florida Statutes, if you decide to appeal any decision made by the Town Council with respect to any matter considered at the hearing or at any subsequent meeting to which the Town Council has continued its deliberations, you will need a record of the proceedings and may need to ensure that a verbatim record is made, including the testimony and evidence upon which the appeal is to be made. In accordance with the Americans with Disabilities Act, persons needing a special accommodation or an interpreter to participate in this proceeding should contact the Town Manager's Office at (561) 838-5410 or through the Florida Relay Service by dialing 1-800-955-8770 for voice callers or 1-800-955-8771 for TDD callers, at least two (2) days prior to the date of the hearing.

The assessment for each parcel of property will be based on the number of equivalent benefit units assigned to the Tax Parcel. The proposed maximum annual assessment rates are: $257.00 per Safety EBU, $257.00 per Reliability EBU, and $257.00 per Aesthetic EBU. A more specific description of the improvements and the method of computing the assessment for each parcel of property are set forth in the Initial Assessment Resolution adopted by the Town Council on June 13, 2017. Copies of Chapter 90, Article II of the Town Code, the Initial Assessment Resolution (Resolution No. 090-2017), and the preliminary Assessment Roll for the upcoming fiscal year are available for inspection at the office of the Town Manager, located at Town Hall, 360 South County Road, Palm Beach, Florida.

The assessments will be collected on the ad valorem tax bill, as authorized by section 197.3632, Florida Statutes. Failure to pay the assessments will cause a tax certificate to be issued against the property which may result in a loss of title. The Town Council intends to collect the assessments in 30 annual installments, the first of which will be included on the ad valorem tax bill to be mailed in November 2017.

If you have any questions, please contact the Town Manager's Office at (561) 835-4631, Monday through Friday between 8:30 a.m. and 5:00 p.m, or visit the website, www.undergrounding.info.

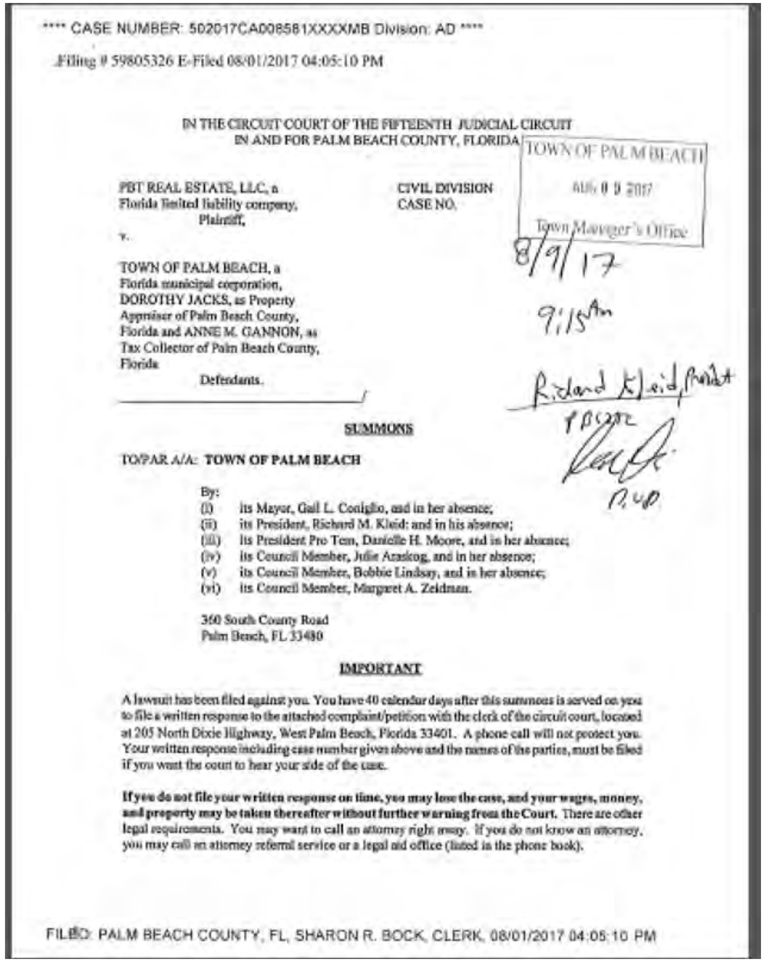
TOWN OF PALM BEACH TOWN COUNCIL

Total Project $90 million

Nabors Giblin & Nickerson P.A

THE CASE

PBT REAL ESTATE, LLC. V.. TOWN OF PALM BEACH, *ET AL.* CASE NO. 2017-CA-008581 (15TH JUDICIAL CIRCUIT)



**** CASE NUMBER: 502017CA008581XXXXMB Division: AD ****

Filing # 59805326 E-Filed 08/01/2017 04:05:10 PM

IN THE CIRCUIT COURT OF THE FIFTEENTH JUDICIAL CIRCUIT
IN AND FOR PALM BEACH COUNTY, FLORIDA

TOWN OF PALM BEACH
AUG 0 9 2017
Town Manager's Office

8/9/17
9:15 Am

PBT REAL ESTATE, LLC, a
Florida limited liability company,
Plaintiff,

v.

TOWN OF PALM BEACH, a
Florida municipal corporation,
DOROTHY JACKS, as Property
Appraiser of Palm Beach County,
Florida and ANNE M. GANNON, as
Tax Collector of Palm Beach County,
Florida
Defendants.

CIVIL DIVISION
CASE NO.

Richard Kleid, President

SUMMONS

TO/PAR A/A: **TOWN OF PALM BEACH**

By:
(i) its Mayor, Gail L. Coniglio, and in her absence;
(ii) its President, Richard M. Kleid: and in his absence;
(iii) its President Pro Tem, Danielle H. Moore, and in her absence;
(iv) its Council Member, Julie Araskog, and in her absence;
(v) its Council Member, Bobbie Lindsay, and in her absence;
(vi) its Council Member, Margaret A. Zeidman.

360 South County Road
Palm Beach, FL 33480

IMPORTANT

A lawsuit has been filed against you. You have 40 calendar days after this summons is served on you to file a written response to the attached complaint/petition with the clerk of the circuit court, located at 205 North Dixie Highway, West Palm Beach, Florida 33401. A phone call will not protect you. Your written response including case number given above and the names of the parties, must be filed if you want the court to hear your side of the case.

If you do not file your written response on time, you may lose the case, and your wages, money, and property may be taken thereafter without further warning from the Court. There are other legal requirements. You may want to call an attorney right away. If you do not know an attorney, you may call an attorney referral service or a legal aid office (listed in the phone book).

FILED: PALM BEACH COUNTY, FL, SHARON R. BOCK, CLERK, 08/01/2017 04:05:10 PM

- August 1, 2017 PBT Real Estate, LLC. filed a class action complaint in State Circuit Court.

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THE PLAINTIFF

- Owns a Commercial Unit;
- Originally assessed $513.27 which was reduced to $293.33.

Nabors Giblin & Nickerson P.A.

THE ORIGINAL COMPLAINT

- The challenge alleged that PBT's utilities were already underground, so that the Town-Wide Undergrounding Project did not provide a special benefit to those properties.

WHEREFORE, Plaintiff, PBT REAL ESTATE, LLC, request entry of a judgment:

A. Certifying this action as a class action;

B. Determining the Class described herein, as represented by PBT as Class Representative and by Class Counsel, pursuant to Rule 1.220, FRCP;

C. Declaring Resolution 100-2017 and the Special Assessments and liens imposed on PBT's Property and the Class members properties at the PALM BEACH TOWERS unconstitutional, illegal and void;

D. Permanently enjoining the TOWN, PROPERTY APPRAISER and TAX COLLECTOR from in any way levying, assessing, billing and collecting Special Assessments in Resolution 100-2017 from the Class member and PBT for the Town-Wide Underground Project;

E. Pursuant to Section 86.011(2), Fla. Stat., grant such additional, alternative, coercive, subsequent, or supplemental relief as may be appropriate;

F. Require the TOWN to refund in full any Special Assessments, with interest, paid or prepaid by PBT or any other Class member;

G. Award PBT its reasonable attorney's fees, including without limitation, based on the common fund and/or substantial benefits doctrines, and award costs; and/or

H. Such other and further relief as the Court may deem just and proper.

The Town filed an Answer

8 days later: Plaintiff moved to amend the Complaint

Court granted the motion to amend

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Giblin &
Nickerson P.A

THE AMENDED COMPLAINT

- Count I – alleged a taking under the 5th and 14th and 42 U.S.C.A. §1983
- Count II – alleged a violation of equal protection and 1983, claiming it was being treated differently than other neighborhoods which had been excluded from the Town-Wide Assessment.

> WHEREFORE, PBT, and all those within the class, demands a permanent injunction, and an award of its attorney's fees and costs to be charged against the Town of Palm Beach.

UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF FLORIDA
West Palm Beach Division

Case Number:

PBT REAL ESTATE, LLC, a Florida limited liability company,

Plaintiff,

v.

TOWN OF PALM BEACH, a Florida municipal corporation, DOROTHY JACKS, as Property Appraiser of Palm Beach County, Florida and ANNE M. GANNON, as Tax Collector of Palm Beach County, Florida,

Defendants.
_____/

NOTICE OF REMOVAL

Petitioner, TOWN OF PALM BEACH, a Florida municipal corporation (the "Tow

and through its undersigned counsel, and pursuant to 28 U.S.C. §1446, Fed. R. Civ. P. 81(

S.D. Fla. Loc. R. 7.2, hereby petitions this Court for removal of the attached action fr

Circuit Court of the Fifteenth Judicial Circuit in and for Palm Beach County, Florida,

United States District for the Southern District of Florida, West Palm Beach Division. In s

of this petition, the Town states as follows:

1. Petitioner is a defendant in a civil action styled PBT REAL ESTATE, L

Florida limited liability company v. TOWN OF PALM BEACH, a Florida mu

corporation, DOROTHY JACKS, as Property Appraiser of Palm Beach County, Flori

ANNE M. GANNON, as Tax Collector of Palm Beach County, Florida, Case No. 201

Attached

REMOVED TO CIRCUIT COURT

Nabors Giblin & Nickerson P.A.

IMMEDIATELY FILED A MOTION TO DISMISS

- We argued that they failed to allege the existence of any federal constitutionally protected right. The imposition of a special assessment does not constitute a fundamental right under the U.S. Constitution.
- We also argued that with respect to the takings claim, they failed to allege that the Town's assessment deprived it of all or substantially all economically beneficial use of its property.
- As to the equal protection claim, this is what is known as a class of one claim because there is not discrimination against a protected class, but the allegation is that the plaintiff has been treated differently from others similarly situated and there is no rational basis for the difference in treatment.

AWAITING THE COURT TO RULE ON THE MTD – SCHEDULING ORDER ISSUED NOVEMBER 30, 2017

Set Mandatory Mediation

April 16, 2018 – **DISCOVERY DEADLINE**

May 14, 2018 – Pretrial Motions Deadline

Less than 8 months later!

July 23, 2018 – **Trial Set** for two (2) week period

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COURT GRANTED TOWN'S MOTION TO DISMISS FEBRUARY 22, 2018

- The takings claim was dismissed with prejudice because the Takings Clause does not apply to a mere obligation to pay an assessment.

- The equal protection claim was dismissed without prejudice, the court finding that while the plaintiff alleges the existence of similarly situated properties it fails to allege that the comparators "are similarly situated in light of all the factors that would be relevant to an objectively reasonable governmental decisionmaker."

Court: March 9, 2018 to Amend Complaint

SECOND AMENDED COMPLAINT
MARCH 19, 2018 (* 10 DAY EXTENSION)

- Count I – Substantive Due Process "The Town has engaged in ad hoc unwritten rules that have purposefully and knowingly deprived PBT of its property in violation of the 14th Amendment."
- Count II – Equal protection – pretty much the same allegations as before.
- Count III – Violation of Florida Constitution and Florida Law – didn't allege what part of the constitution or what Florida law. Other than the Town was arbitrarily imposing a special assessment without conferring any benefit to it so that it was an unconstitutional tax.
- Also sought attorney's fees under §192.0105(3)(g), Florida Statutes as well as under the common fund and/or substantial benefits doctrines.

THE SAGA CONTINUES…

March 28, 2018
Plaintiff's First Request For Production

April 2, 2018
Town's Motion to Dismiss the Second Amended Complaint

April 10, 2018
Joint Motion to Extend Pretrial Deadlines by 60 days

May 4, 2018
New Discovery Deadline

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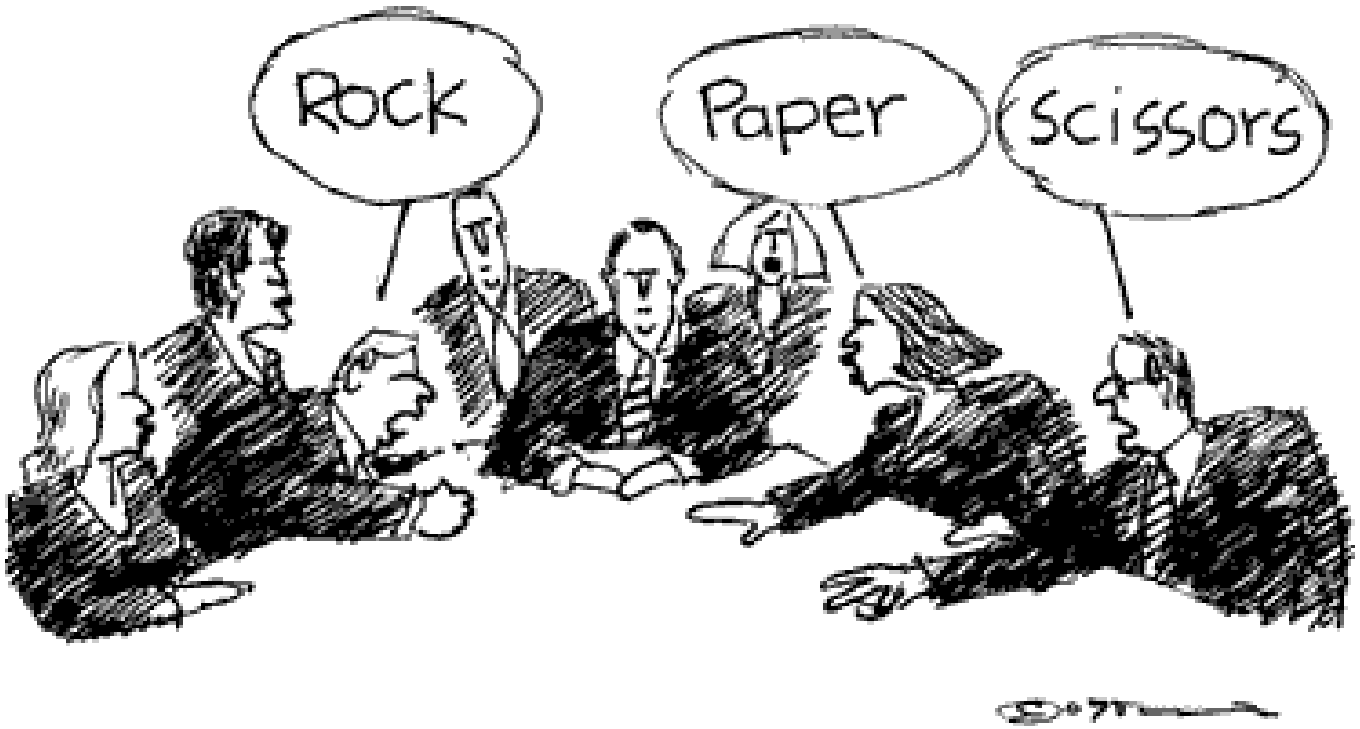
DISCOVERY MADNESS

MEDIATION – MAY 3, 2018 – IMPASSE BY LUNCH



Jameson, the mediator, uses his last remaining negotiating tool in an effort to break the stalemate.

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MAY 11, 2018 – COURT GRANTS TOWN'S MOTION TO DISMISS THE SECOND AMENDED COMPLAINT

As to Count I

engaging in unwritten rules was a legislative act. Because Plaintiff fails to sufficiently allege that the "legislative exception" applies, the general rule that there is "no substantive due process protection for state-created property rights" bars Plaintiff's claim. *Kentner v. City of Sanibel*, 750 F.3d 1274, 1279 (11th Cir. 2014). Accordingly, Count I is dismissed.

MAY 11, 2018 – COURT GRANTS TOWN'S MOTION TO DISMISS THE SECOND AMENDED COMPLAINT

As to Count II

I previously dismissed Plaintiff's equal protection claim for failure to allege that the Comparators "are similarly situated 'in light of all the factors that would be relevant to an objectively reasonable governmental decisionmaker.'" *Douglas Asphalt Co. v. Qore, Inc.*, 541

Count III - Plaintiff failed to allege a specific cause of action, alleging instead a violation of Florida law generally.

Court: May 18, 2018 to Amend Complaint

Note: Scheduling Order deadline for Motions for Summary Judgment was May 14, 2018 – Court granted a 7 day extension since there was no Complaint

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May 18, 2018 – Third Amended Complaint is filed

May 21, 2018 - the Town files its Motion for Summary Judgment

~~May 30 -31, 2018 – Plaintiff schedules depositions of Comcast, AT&T and FPL~~

Canceled and rescheduled for June

May 31, 2018 – Plaintiff Moves for an extension of time on answer to MSJ (but files response the next day

Denied for failure to show good cause

June 1, 2018 – the Town files its Motion to Dismiss the Third Amended Complaint

June 19, 2018 – the Court granted the Town's MSJ and MTD

Plaintiff moved for reconsideration because of "newly found evidence"

The Court denied the motion

Plaintiff Appealed

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THE TOWN NEXT MOVED FOR ATTORNEYS' FEES AND COSTS

- In order for a defendant to prevail, it must demonstrate that plaintiff's lawsuit "was frivolous, unreasonable or without foundation, event though not brought in subjective bad faith."

- In determining whether a suit is frivolous a court must focus on the question whether the case is so lacking in arguable merit as to be groundless or without foundation rather than whether the claim was ultimately successful.

COURT GRANTED ATTORNEYS' FEES AND COSTS

- $121,377.50 in fees and $4,676.47 in non-taxable costs.

merit of Plaintiff's § 1983 claims. I need not determine whether the claims were frivolous at the outset of this litigation, but I am convinced that the claims were frivolous by the time the Third Amended Complaint was filed. This is because the function of a motion to dismiss is, at least in

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SUGGESTED TIPS

- 1. If a 1983 claim is filed, immediately remove it to federal court
- 2. Make the plaintiff plead ultimate facts rather than conclusory statements.
- 3. When drafting resolutions and ordinances, take the time to include facts to demonstrate a rational basis for the legislative action your commission is taking.

QUESTIONS?

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Nabors
Giblin &
Nickerson P.A.

The Life and Times of Septic to Sewer

Florida Association of County Attorneys
Hyatt Regency Orlando

June 13, 2019
Chris Roe & Nikki Day

Bryant Miller Olive

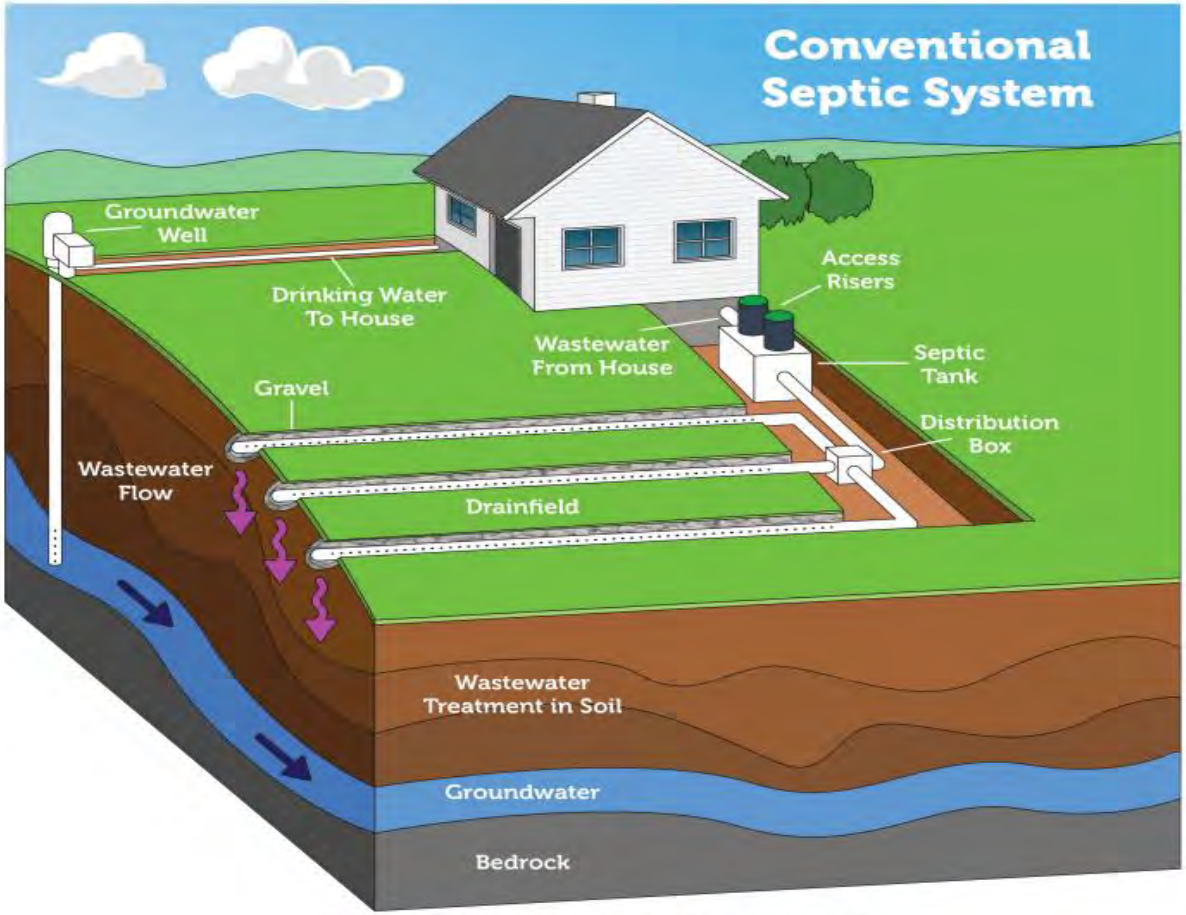
OUR NAME IS EASY TO REMEMBER OUR WORK IS HARD TO FORGET.

Tallahassee Orlando Miami Jacksonville Tampa Atlanta Washington D.C.

What are Septic/Onsite Systems?

- Wastewater facilities which collect and treat onsite
- Basically => a septic tank/drainfield or package plant
  - Septic tank serves single property (120 GPD per bedroom)
  - Package plant can serve small community (flows up to 0.5 MGD)
- OSTDS defined: sections 373.802, 381.0065, 489.551, Fla. Stat.
  - **"Onsite sewage treatment and disposal system"** means a system that contains a standard subsurface, filled, or mound drainfield system; an aerobic treatment unit; a graywater system tank; a laundry wastewater system tank; a septic tank; a grease interceptor; a pump tank; a solids or effluent pump; a waterless, incinerating, or organic waste-composting toilet; or a sanitary pit privy that is installed or proposed to be installed beyond the building sewer on land of the owner or on other land to which the owner has the legal right to install a system. [The term includes any item placed within, or intended to be used as a part of or in conjunction with, the system.] *This term does not include package sewage treatment facilities and other treatment works regulated under chapter 403.*
- Drainfield defined: section 64E-6.002(18), FAC
  - Drainfield – a system of open-jointed or perforated piping, approved alternative distribution units, or other treatment facilities designed to distribute effluent for filtration, oxidation and absorption by the soil within the zone of aeration.

Conventional Septic System



Please note: Septic systems vary. Diagram is not to scale.

By the Numbers

- Originated in France in 1860s, introduced to US in 1883
- 30% of Florida's population served by OSTDS
- 2.7 million septic systems in operation
- Florida accounts for 12% of U.S. septic systems
- Sewer: 240 million people nationwide served by appx. 14,500 wastewater treatment plants
- Costs:
  - Septic system for 3 bedroom SFR: $3,000-$6,000
  - Nitrogen reduction feature: $10,000-$15,000*
  - Periodic inspection and pumping: $250-$400 every 3-5 years
  - Decommissioning: $1,000-$2,000
- Typical system life: 20-40 years depending on use and maintenance

* New septic systems on lots < 1 acre permitted in some spring sensitive areas (PFAs/priority focus areas) required to be nitrogen reducing by 2016 Florida Springs and Aquifer Protection Act, Part VIII, Chapter 373, Fla. Stat.

OSTDS Disadvantages

- Ongoing maintenance and inspection responsibility
- Initial/ongoing costs may be less than sewer but substantial
- Reduces usable land area
  - Precludes parking, building expansion, trees/shrubs, pools and other features
- Heavy rainfall can cause system backup
- May limit development potential, setback requirements
- Limits on flow and type of waste – bleach, drain cleaner may kill beneficial bacteria
- Potential for public health and environmental harms

OSTDS Disadvantages: Septic System Failure

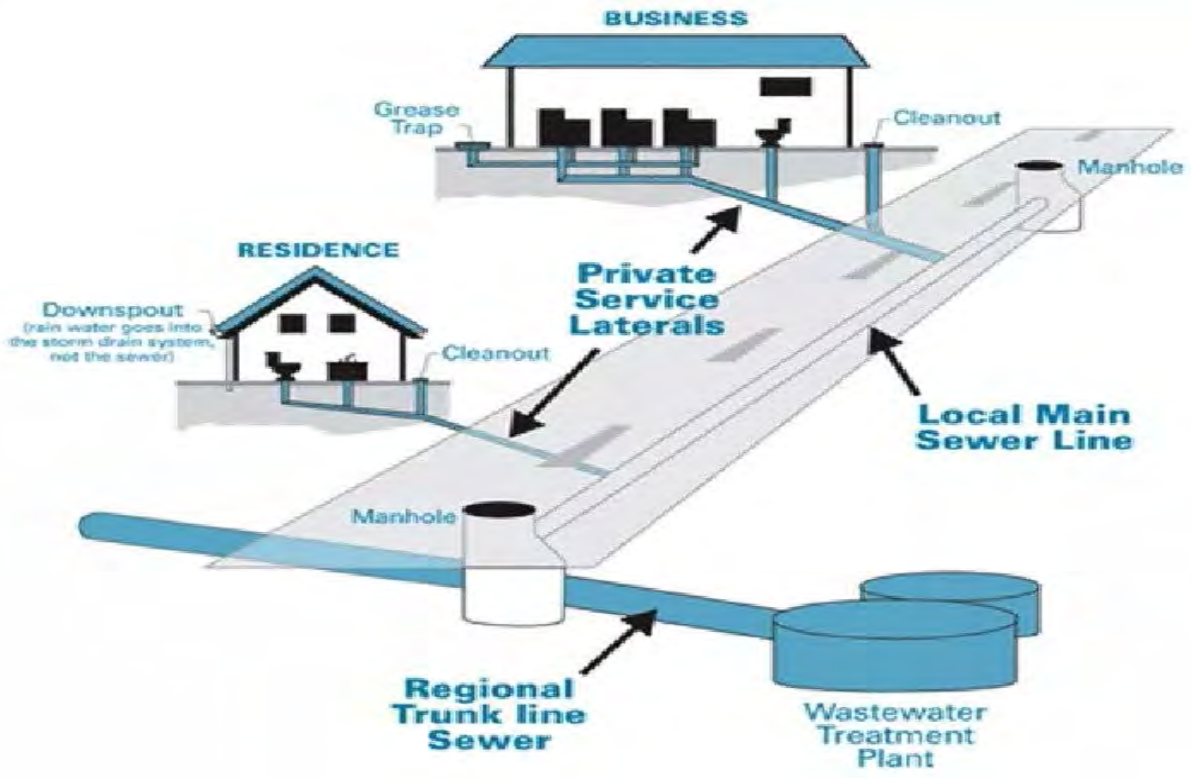
- **Common Causes**
  - Using too much water/rainfall
  - Tree root intrusion
  - Improper design/construction (ex. improper ventilation, lid failure)
  - Lack of maintenance
- **Consequences**
  - Contamination of drinking water and recreational surface water
  - Pathogens: bacteria, parasites, viruses (hepatitis A, polio, viral gastroenteritis)
  - Nitrogen/nitrate pollution
- **Failure Signs**
  - Bright green, spongy grass on the drainfield
  - Excessive weed or algae growth in nearby shore waters
  - Unpleasant odors, pooling water or muddy soil near system
  - Soil/water testing indicate biological contamination

Drainfield Failure

Septic Tank Displacement

Septic tank on Vilano Beach, St. Augustine after Hurricane Matthew

Ending/Reversing Proliferation of OSTDS: Conversion to Central Sewer Systems



Advantages of Sewer

- Avoids disadvantages of septic, i.e. eliminates landowner maintenance responsibilities and costs
- Proponents say safer for the environment
  - Lower potential for surface and groundwater contamination
  - Avoid aiding another Red Tide
    - "The question is not that they do or don't. The question is how big of an impact is it to the algae bloom?"

      -University of Florida professor Ed Phlips
    - *See* Amy Sherman, What role do septic tanks play in Florida's algae bloom? PolitiFact Florida (2018), https://www.politifact.com/florida/article/2018/aug/20/what-role-do-septic-tanks-play-algae-bloom-crisis-/

Central Systems – Local Government Ownership

- Advantages:
  - Local control over rates
  - Better service quality/more reliable
  - Accountability to customers
  - System can earn profit which may be expended for other purposes (ex. millage reduction). City of Pompano v. Oltman, 389 So.2d 283 (Fla. 4th DCA 1980)
- Disadvantages:
  - Local control over rates, i.e. rate-setting responsibility
  - Sewer systems also subject to failure
- HB 141 would have required
  - Written notice of spills, names/numbers of authorities responsible for plant oversight
  - Penalty up to $2/gallon of sewage released

How Conversion Initiatives Start

- Local governing board determination
  - Environmental & public health concerns
  - Increase rate base => lower costs for all users through economies of scale, raise net revenues
- Landowner request/petition process
- Bond covenants
  - Local government issues bonds to acquire system
  - Bond covenants require mandatory connection
- Statute requires conversion in a given area
  - E.g. FL § 380.0555(10)(b): "Franklin County and the municipalities within it shall, within 60 days after a sewerage system is available for use, notify all owners and users of onsite sewage disposal systems of the availability of such a system and that **connection is required** within 180 days of the notice. Failure to connect to an available system within the time prescribed shall be a misdemeanor of the second degree…."

General Conversion Steps

- Development
  - Determination to convert
  - Plan of finance and cost estimate
  - Mandatory connection ordinance
  - Notices
- Financing
  - Implement plan of finance
  - Assessment process – notice and public hearing
  - Bond issue/loan
  - Validation if required or to resolve challenge/controversy
- Construction
  - Assessment collection
- Project completion
  - Enforcement of mandatory connection/decommissioning septic
  - Cost/assessment true-up
  - Apply grant funding to buy down cost

Availability and Mandatory Connection

- Make central sewer available by:
  - Acquiring or constructing system for unserved area
  - Extend system facilities into unserved area
- Adopt mandatory connection ordinance
  - § 153.12, Fla. Stat. – counties may, upon construction of a sewage disposal system and the financing of such a system by the issuance of sewer revenue bonds, require that each abutting lot or parcel connect to such sewer
  - § 153.62, Fla. Stat. – county sewer districts authorized to regulate use of sewers and prohibit use of septic tanks
  - § 180.01, Fla. Stat. – cities may establish a utility service area and prescribe reasonable regulations requiring all persons to connect with sewerage system
  - § 381.00655, Fla. Stat. – owner of OSTDS must connect to publicly owned or investor owned system upon availability

Challenges to Mandatory Connection

- Taking/inverse condemnation – property owner deprived of the value of the septic system
- Equal Protection - equal protection of the laws and the right to the full use of their property
- Substantive Due Process – mandatory connection ordinance is irrational and therefore violates substantive due process
- Appellants unsuccessfully argued that because their well water was "safe and pure" the mandatory connection was irrational as to them
    - Stern v. Halligan, 158 F.3d 729, 731 (3d Cir. 1998)

Challenges to Mandatory Connection

- District of Columbia v. Brooke, 214 US 138 (1909)
  - Plaintiff argued that the penalty tax she was made to pay was unconstitutional because she had her own private system that worked
  - However, the Court held that the use of police power, which is one of the most essential powers, did not result in a taking that required compensation
    - It is a necessary regulation for the public good
  - Also, although her system worked and may have even been more efficient than the sewer system, allowing her not to comply would have made it a legislative impossibility to create a functioning drainage system for the District

Challenges to Mandatory Connection

- Hutchinson v Valdosta, 227 US 303 (1913)
  - Forced connection not a taking, a valid exercise of police power
  - Although the Supreme Court posited that there was "no necessity on account of health or sanitary conditions" to require a sewer connection to the owner's land, id. at 305, and even noted the possibility that the construction of a sewer line might pose interim health hazards, the Court upheld the sewer connection requirement as a constitutional exercise of police power.
  - "It is the commonest exercise of the police power of a state or city to provide for a system of sewers, and to compel property owners to connect therewith." Id. at 949-50

Not a taking, a legitimate use of police powers

- Police power is legitimately used if in furtherance of a public good
  - If so, property rights yield to that public good
  - Protection of environmentally sensitive areas and pollution prevention are legitimate concerns within the police power.
    - *See* Graham v. Estuary Properties, Inc., 399 So. 2d 1374, 1381 (1981) ("Onsite facilities bring unnecessary risks of water contamination and other environmental concerns.")

Challenges to Mandatory Connection

- No requirement for individualized determination of sanitation risk
  - "Municipal governments are not required to gamble against public health risks. To protect the public health, as well as to promote public safety, a legislative body may adopt `the most conservative course which science and engineering offer.' " City of Nokomis v. Sullivan, 153 N.E.2d 48, 51 (Ill. 1958) (quoting Queenside Hills Realty Co. v. Saxl, 328 U.S. 80, 83, 66 S.Ct. 850 (1946)).

Florida Cases Involving Mandatory Connection

- Keys Citizens for Responsible Government, Inc. v. Florida Keys Aqueduct Authority, 795 So.2d 940 (Fla. 2001)
  - The Authority filed a complaint to validate bonds that would be used to finance sewer projects
  - Bonds repaid by fees from users through mandatory connection
  - The Court upheld mandatory connection requirement
    - The Legislature gave the Authority the power to initiate mandatory connections and prohibit the use of septic tanks and other sanitary structures, provided notice was properly given

Florida Cases Involving Mandatory Connection

- Schrader v. Florida Keys Aqueduct Authority, 840 So.2d 1050 (Fla. 2003)
  - Similar to the prior case, the Authority filed a complaint to validate bonds that would be financed by a sewage system
    - A citizen appealed the ruling stating that because the applicable section only pertains to areas of critical state concern, this special law was unconstitutionally passed as a general law, and the mandatory connection ordinances are unenforceable for the same reason
  - The Court affirmed the lower court's ruling in favor of the Authority that this was a valid general law because the environmental impact of these ordinances exceeds the boundary of the County

Major Conversion Cost Components

1. Plant capacity to serve additional customers
2. Neighborhood facilities
    - Transmission/collection mains and lines
    - Lift stations
    - Pumps
3. Onsite facilities (ex. meters, service laterals)
4. Decommissioning of existing facilities*

* Costs typically paid directly by landowner, no local government involvement

Funding Conversion Initiatives

- Cost spreading/sharing
  - Utility system revenues
  - General fund
- Isolate costs to benefitted properties
  - Contributions in aid of construction
  - Special assessments
    - Capacity component in lieu of impact fee
    - Neighborhood facilities component
  - Betterment fees
  - Impact fees

Funding Conversion Initiatives

- Grants (principal forgiveness) thru state/federal loan program
  - USDA Rural Utilities Service
  - FDEP State Revolving Fund
  - Small Community Sewer Construction Assistance Program (sections 403.8532, 403.1835 and 403.1838, Fla. Stat.)
  - State budget appropriations
    - Chapter 216, Fla. Stat.
    - Local Funding Initiative Request submitted for fiscal year
    - Example appropriations FY 2019-20
      - $500,000 Brevard County Septic to Sewer Conversion for 1,019 Homes
      - $500,000 Indian River County North Sebastian Septic to Sewer Phase II
      - $500,000 Pinellas County Lofty Pines Septic to Sewer
      - $400,000 South Daytona Septic to Sewer Conversion Project
      - $350,000 St. Augustine – West Augustine Septic to Sewer, W. 5th St.
- Combination of funding sources

Financing the Conversion Initiative

- Bond issue – revenue or general obligation
- Bank loan: smaller projects (< $10,000,000); lower financing costs
- State/federal lending programs
  - EPA/FDEP State Revolving Fund Loan Program
  - USDA Rural Development Loan and Grant Program
- Each typically involves:
  - Loan secured by net revenues of utility system
  - Bondholder covenants
    - No free service
    - Rate sufficiency
    - Limitations on future debt
    - Mandatory connection
    - Up to 20-30 year repayment schedule

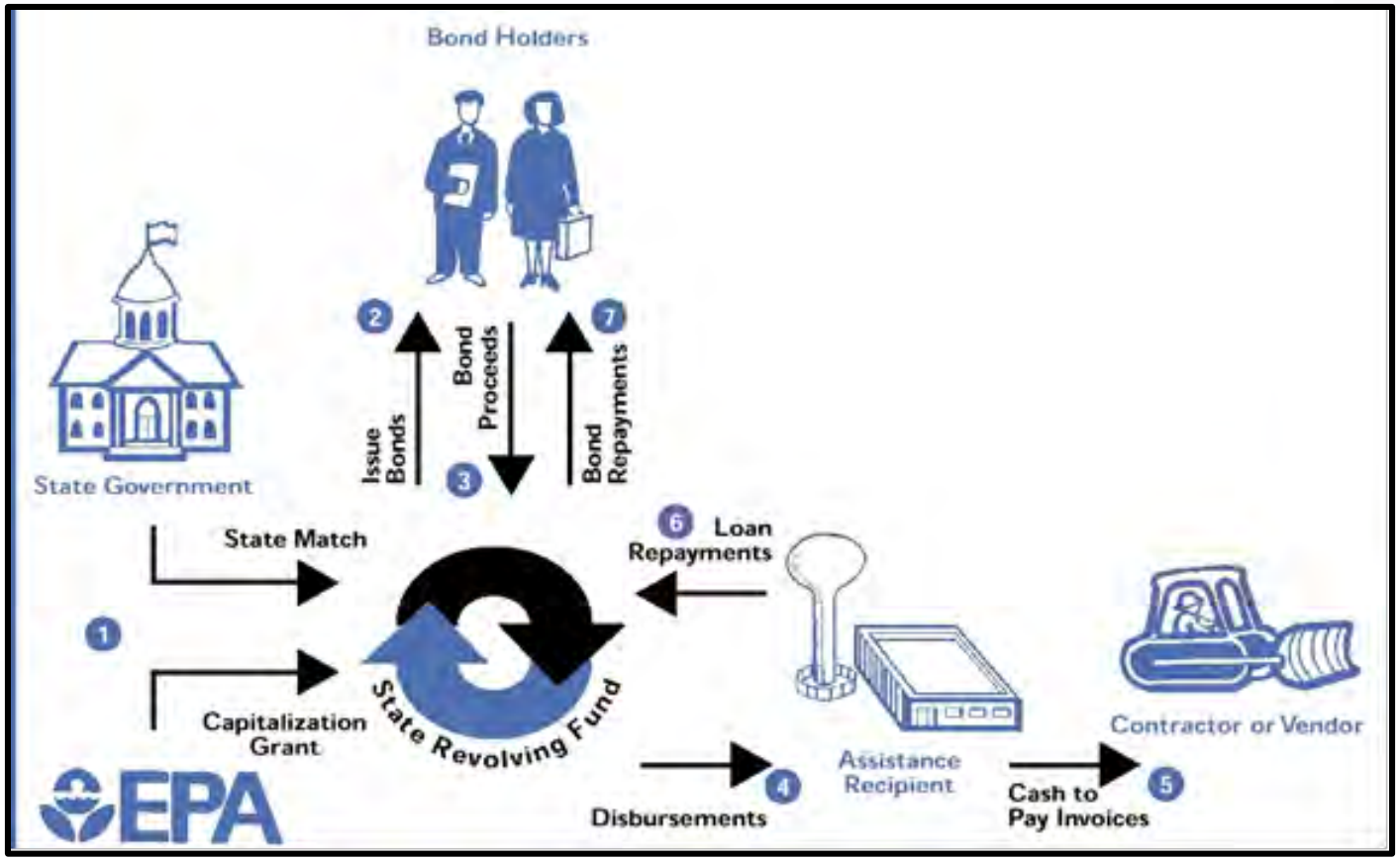
State Revolving Fund Loans

- EPA/state financing programs for water & wastewater
  - Clean Water State Revolving Fund (CWSRF)
    - Clean Water Act, 33 U.S.C. §§ 1251-1387
  - Drinking Water State Revolving Fund (DWSRF)
    - 42 U.S.C. § 300f
- Low interest loans and grants
- Programs receive federal appropriation each year
- EPA provides funding, states match 20%
- States administer both programs with EPA oversight

State Revolving Fund Loans

- FDEP administers SRF loan program in Florida
  - CWSRF - wastewater, stormwater, nonpoint pollution prevention projects
  - DWSRF - water projects
  - Loans secured by system revenues and/or special assessments
- FDEP info re SRF: https://floridadep.gov/wra/srf ; funding sources: https://floridadep.gov/wra/wra/highlights/water-project-funding-sources
- EPA info:
  - https://www.epa.gov/cwsrf
  - https://www.epa.gov/drinkingwatersrf

SRF Flow of Funds



USDA Water & Waste Disposal Loan & Grant Program

- Similar to SRF program but:
  - Administered directly by USDA
  - Primarily for rural areas with population limits
- Low interest loans and grants
- Extended application process
- Requires interim/construction loan backed by USDA
  Requires validation under Chapter 75, Fla. Stat.
- 7 CFR Parts 1780 & 1782
- https://www.rd.usda.gov/programs-services/water-waste-disposal-loan-grant-program

Fostering Community Acceptance for Conversion

- Deferred payment
  - Voluntary agreement by which landowner elects to defer payment until sale/transfer of property
- Deferred connection
  - Allow continued use of existing OSTDS for extended period; local option waiver of mandatory connection authorized by § 381.00655(2)
- No acceleration of assessment upon sale/transfer of property
- Partner cost sharing
- Contribute to costs/buy down
  - Ex. Repaving funded by general fund revenues
  - Future grants reduce cost
- Supplemental community project
  - Ex. water line extension; drainage; park/recreational facilities

Compelling Connection Thru Fee Imposition

- Pinellas County v. State, 776 So.2d 262 (Fla. 2001) ("[W]here a governmental entity provides access to traditional utility services, this Court has not hesitated to uphold local ordinances imposing mandatory fees, regardless of whether an individual customer actually uses or desires the service.")
- Stone v. Town of Mexico Beach, 348 So.2d 40 (Fla. 1st DCA 1977) (mandatory flat rate for garbage service, regardless of use, was not contrary to constitutional standards)
- State v. City of Miami Springs, 245 So.2d 80 (Fla.1971) (a flat rate for sewer charges for all single family residences, unrelated to actual use, was not unreasonable, arbitrary or in conflict with state or federal constitutions or law)
- Riviera Beach v. Martinique 2 Owners Ass'n., 596 So.2d 1164 (Fla. 4th DCA 1992) (solid waste removal ordinance applied to unoccupied condominiums without regard to actual use)
- Town of Redington Shores v. Redington Towers, Inc., 354 So.2d 942 (Fla. 2d DCA 1978) (mandatory sewer charges against unoccupied property applied from the date the sewer main was available to be used, and sewage charges were reasonably related to the value of service rendered either as actually consumed or as readily available)

Compelling Connection Thru Litigation

- § 381.00655, Fla. Stat.
  - 1 year notice of availability
  - Connection required within 365 days of notice
  - Options for:
    - Prepayment of connection charges
    - Payment plans for financial hardship
    - Waiver

Case Study


LANCASTER DR
LAURENCE CT
JUANITA CT
ATE CT
N BELCHER RD
KENT PL
PARLIAMENT WAY
ALICIA WAY
BUENA VISTA DR
WELLESLEY RD
BEAU VOYAGE DR

Questions

Bryant Miller Olive