PUBLIC EMPLOYMENT

Public Employment: ADA, Disability

Rossbach v. City of Miami,
371 F.3d 1354 (11th Cir. 2004)

Although an employer may classify an employee as disabled, the employee must meet the Americans with Disabilities Act's (ADA) definition of "disabled" to bring a successful discrimination suit under the ADA. Most important, the employee must prove that the disability precludes him or her from working in a "class of jobs" or a "broad range of jobs" if he or she claims that the disability limits the major life activity of working.

FACTS AND PROCEDURAL HISTORY

Rossbach and four of his fellow City of Miami Police officers filed suit against the City alleging discrimination under the ADA. Over time, the officers sustained various injuries, mostly as a result of being "combat-ready" police officers. Once injured, the City assigned each officer to limited or light-duty tasks. Further, the City's policy prohibited light or limited-duty officers from working off-duty assignments. Thus, each officer was denied off-duty employment based on this policy. The officers claimed that the City's policy discriminated against them because of their disabilities and brought suit under the ADA.

At trial, the City moved for a directed verdict after the officers had presented their case, and the district court reserved ruling on the motion. After the jury returned a $160,000 verdict for the officers in aggregate, the district court heard oral argument on the City's motion for judgment as a matter of law and issued a written order reversing the jury's verdict. The court found that the officers' physical impairments did not substantially limit any major life activity as required by the ADA and held that the officers were not "disabled" under the ADA definition. The Eleventh Circuit Court of Appeals affirmed the district court's holding that the officers failed to prove a disability under the ADA.

ANALYSIS

On appeal, the officers argued that there was sufficient evidence at trial for the jury to determine that they were disabled under the ADA definition. The three definitions of "disabled" under the ADA are "(A) a physical or mental impairment that substantially limits one or more of the major life activities of such individual; (B) a record of such impairment; or (C) being regarded as having such an impairment." *Rossbach*, 371 F.3d at 1357 (quoting 42 U.S.C. § 12102(2) (2000)). The district court had evaluated only the officers' claim under the first definition. Thus, the Eleventh Circuit Court followed the three-step analysis outlined in *Bragdon v. Abbott*, 524 U.S. 624 (1998), to determine whether the officers met the ADA definition.

The first step of the *Bragdon* analysis was to determine whether the officers had impairments. This step was satisfied because each officer testified to significant injuries resulting from combat duty, ranging from torn ligaments to herniated discs and nerve damage. The second step of the test was to identify the life activity that had been limited and to determine whether it is a major life activity under the ADA. The third part of the test was to determine "whether the impairment 'substantially limits' that life activity." *Rossbach*, 371 F.3d at 1357. The Eleventh Circuit Court agreed with the district court that each officer was impaired, but that their impairments did not substantially limit specifically defined life activities such as walking, sitting, standing, and sleeping. The court reasoned that the officers' testimony regarding their impairments was vague and that the afflictions the officers suffered were not any worse than those suffered by many adults.

However, the Eleventh Circuit Court took issue with the fact that the district court did not address the ADA's third definition of "disabled," which examines whether the City regarded the officers as disabled. In addition, the officers argued that they were "substantially limited" in the major life activity of working as police officers. The court stressed that "essential to either claim, . . . is a showing that each plaintiff was 'significantly restricted in the ability to perform either *a class of jobs or a broad range of jobs* in various classes as compared to the average person having comparable training, skills, and abilities.'" *Id.* at 1359 (quoting 29 C.F.R. § 1630.2(j)(3)(i) (2004)) (emphasis added in

Rossbach). As outlined in *Sutton v. United Air Lines, Inc.*, "[t]he inability to perform a single, particular job[,]" such as police officer, "does not constitute a substantial limitation in the major life activity of working." 29 C.F.R. § 1630.2(j)(3)(i).

The officers' strongest argument was that the City regarded them as being disabled, and therefore, they met the ADA definition of "disabled." Relying on earlier precedent, the court outlined that the officers must show "(1) that the perceived disability involves a major life activity; and (2) that the perceived disability is 'substantially limiting' and significant." *Id.* at 1360 (citing *Sutton v. Lader*, 185 F.3d 1203, 1208 (11th Cir. 1999)). Because the City knew of the officers' impairments and limited the officers' activities to administrative duties, the court reasoned that the City's policies and practices demonstrated "that the City regarded [the officers] as being substantially limited as to working as police officers in general." *Id.*

Based on the finding that the City regarded the officers as disabled, the court proceeded to the final part of its analysis. The case turned on whether the occupation of police officer, for ADA purposes, is a "class of jobs" or "broad range of jobs." The City's position was that the officers were not "disabled" under the ADA definition because they were not disqualified from performing a broad range of jobs, only from performing as combat-duty officers. Using an analogy to an airplane pilot and examining other circuit decisions addressing police officers, the court held that a "police officer" is not a broad range of jobs. Therefore, the Eleventh Circuit Court affirmed the district court's holding that the officers did not meet the ADA's definition of disabled and thus had no discrimination claim under the ADA.

SIGNIFICANCE

Rossbach is significant to practitioners because it outlines what is required to find an employee disabled under the ADA definition. This case clarifies that it is not enough that the employer regards the employee as disabled. Rather, the employee must meet the ADA's definition of "disabled" to bring a successful suit for discrimination. Although an employee may prove that he or she has an impairment that substantially limits major life activities, the employee must still prove that he or she was substan-

tially restricted in his or her ability to perform a class of jobs or broad range of jobs.

This case also demonstrates federal courts' strict adherence to the ADA's definitions. In general, the case follows a trend in the circuit courts toward placing the burden of proof on the employee to demonstrate that his or her desired occupation is a broad range or class of jobs when the employee claims that a disability substantially limits his or her ability to work, one of the ADA-recognized major life activities.

RESEARCH REFERENCE

- Frank C. Morris & Minh N. Vu, *The Americans with Disabilities Act—Current Developments*, ALI-ABA Course of Study, July 29–31, 2004 (Thomson/West 2005).

Josephine W. Thomas

Public Employment: Civil Procedure

***Guess v. City of Miramar*,**
889 So. 2d 840 (Fla. 4th Dist. App. 2004)

A litigant seeking to dismiss a claim voluntarily may dismiss a single cause of action if it is derived from a distinct set of facts.

FACTS AND PROCEDURAL HISTORY

Former assistant police chief William Guess brought claims against the City of Miramar under the Whistle-blower's Act, Florida Statutes § 112.3187 (2003), and the Florida Civil Rights Act (FCRA), Florida Statutes § 760.01–760.11 (2003).

The Whistle-blower's Act claim alleged retaliatory discharge due to disclosures regarding the City's independent contractor towing company. Guess, charged with overseeing the City's towing services, wrote a memo to the Chief of Police that detailed the current towing contractor's improprieties. Despite Guess's memo, the City extended the existing contract. A few months later, citing budget constraints, the City demoted Guess to the position of captain. The City explained that Guess had less seniority than the other assistant police chief and reassigned him to the next highest position, where he retained most of his duties.

Guess's job responsibilities also included oversight of the professional standards unit, which investigated sexual harassment claims. When a police officer approached Guess to discuss alleged sexual harassment by her supervisor, Guess informed the officer of the procedures to follow to make a sexual harassment claim and gave her the Equal Employment Opportunity Commission's (EEOC) telephone number. Further, Guess met with and submitted a memo to the Chief of Police that documented the conversation with the officer and warned of the imminent complaint, but did not provide any specific information regarding the nature of the sexual harassment. Without specific details, the police department never commenced an investigation. The officer's attorney submitted a demand letter to the Chief of Police, who fired Guess shortly thereafter.

At trial, the City moved for a directed verdict on both claims. The trial court directed a verdict for the City on the FCRA claim, but sent the Whistle-blower's Act claim to the jury, which found for the City as well. On appeal, Guess argued that the trial court erroneously allowed the jury to determine questions of law through questions posed to the jury on the verdict form. The Fourth District Court of Appeal affirmed the final judgment on the Whistle-blower's Act claim, but reversed the final judgment on the FCRA claim and remanded the FCRA claim with instructions.

ANALYSIS

The Whistle-blower Act is intended to prevent governmental agencies from taking retaliatory action against an employee who reports a violation by another public employee or independent contractor, which creates a substantial danger to public health, safety, and welfare. Guess attributed his demotion to his memo regarding the City's towing service and, on appeal, challenged the questions posed to the jury on the jury verdict form. The Fourth District Court found that the trial court properly submitted the issue to the jury because Whistle-blower's Act claims contain mixed questions of law and fact. Further, the court upheld the use of the verdict form, which paralleled the court's instruction on the law.

When reviewing all evidence underlying a directed verdict in the light most favorable to the non-moving party, it is proper for

the reviewing court to affirm only when no reasonable interpretation of the evidence supports the nonmovant's claim. *Decarlo v. Griffin*, 827 So. 2d 348 (Fla. 4th Dist. App. 2002). The Fourth District Court affirmed the FCRA directed verdict, holding that no reasonable interpretation of the evidence supported Guess's FCRA claim. Guess failed to establish a prima facie claim for retaliation that requires (1) engagement in a statutorily protected activity, (2) an adverse employment action, and (3) a causal relation between the two events. The third prong requires a burden-shifting test that first requires the plaintiff to show that the adverse employment action and protected activity are not entirely unrelated. The burden then shifts to the defendant, who must provide a legitimate, nonretaliatory reason for the action, and then back to the plaintiff, who must ultimately prove by a preponderance of the evidence that defendant's proffered reason is a pretext for prohibited conduct.

The Fourth District Court ruled that Guess failed to establish a prima facie retaliation claim. Guess predicated his FCRA claim on the City's alleged wrongful discharge relating to the officer's sexual harassment claim. However, the FCRA was not applicable to the action because the officer had not filed a formal charge with the EEOC. Moreover, Guess's vague memorandum and failure to take action other than to inform the officer of EEOC procedures, does not qualify as a "protected action" under the FCRA. Assuming that Guess did establish a prima facie retaliation case, the police chief provided legitimate, nonretaliatory reasons for Guess's termination. The burden then shifted back to Guess, who ultimately had to prove the City's stated reasons for termination were false and, in fact, retaliatory. Because Guess failed to prove pretext by a preponderance of the evidence, the Fourth District Court affirmed the directed verdict against Guess on the FCRA claim.

After the trial court directed the verdict against Guess on the FCRA claim, but before the court entered the final judgment, Guess voluntarily dismissed the FCRA claim. Despite Guess's dismissal, the trial court erroneously entered final judgment. Although a plaintiff's right to dismiss an action voluntarily is absolute, typically only the entire action can be voluntarily dismissed. *Desert Ranches of Fla., Inc. v. Bowman*, 340 So. 2d 1232, 1233 (Fla. 4th Dist. App. 1976). Thus, the trial court found Guess could

not voluntarily dismiss only the FCRA claim and not the Whistleblower's claim. The Fourth District Court, however, found that he had joined two completely different legal actions derived from totally distinct facts. Thus, the Fourth District Court remanded with instructions to affirm the final judgment on the Whistleblower's Act claim, but to dismiss the FCRA claim voluntarily.

SIGNIFICANCE

This case is useful for practitioners who have several, unrelated causes of action pending against a defendant and seek to dismiss a claim voluntarily. Rather than having to dismiss the entire claim, the litigant can dismiss a single cause of action when it is derived from facts that are distinct from those facts underlying the remaining cause of action.

RESEARCH REFERENCES

- 1 Fla. Jur. 2d *Actions* § 144 (Westlaw database updated Apr. 2005).
- 9 Fla. Jur. 2d *Civil Rights* §§ 19, 24 (Westlaw database updated Apr. 2005).

Mary Ellen Pullum

Public Employment: Discharge

Walton v. Health Care District of Palm Beach County, Florida,
862 So. 2d 852 (Fla. 4th Dist. App. 2003)

A public agency's decision to terminate employment is a quasi-judicial action if the affected employee is legally entitled to notice and a hearing prior to his or her termination. Such an employee is, therefore, precluded from raising any independent collateral claims, such as a wrongful termination, and, instead, may only seek certiorari in circuit court in response to the agency's action. If, however, the agency is not required to provide notice and conduct a hearing, then the agency's action is quasi-executive and the affected employee may bring independent causes of action against the agency.

FACTS AND PROCEDURAL HISTORY

The Health Care District of Palm Beach County (HCD), a special taxing district, hired Ronald Walton as a registered nurse. HCD later sought to terminate Walton's employment for "continued negligence and misconduct." *Walton*, 862 So. 2d at 854. In doing so, pursuant to its internal policy, HCD first sent Walton written notice of its intent to terminate his employment and then conducted a formal hearing.

Believing that the termination decision was inadequate and unfair, Walton filed a complaint against HCD in circuit court and claimed that HCD's actions amounted to wrongful termination, a violation of federal due process, and a violation of the Fair Labor Standards Act (FLSA). 29 U.S.C. § 215 (1998). HCD moved to dismiss the complaint. The circuit court ruled for HCD and dismissed all three counts of the complaint with prejudice. The court reasoned that HCD's decision to terminate Walton's employment was a quasi-judicial action because Walton had been afforded notice and a hearing prior to his termination. As a result, the trial court found that Walton could not file an independent collateral claim and, instead, could only seek certiorari in the circuit court within thirty days after HCD's decision. Because Walton failed to file a petition for writ of certiorari within that time, he was barred from pursuing any further remedy in circuit court; thereafter, he appealed to the Fourth District Court of Appeal.

ANALYSIS

Quasi-Judicial versus Quasi-Executive

The Fourth District Court agreed with the circuit court in that, if HCD's decision amounted to a quasi-judicial action, Walton could not bring an independent collateral suit and, instead, could only seek certiorari in circuit court following the District's decision. HCD undisputedly gave Walton notice of its intent to terminate his employment and then conducted a formal hearing on the issue. The Fourth District Court, however, reasoned that the proper test for determining whether a public agency action is quasi-judicial is whether the employee was legally entitled to notice and a hearing. The court then held that, because HCD was not statutorily required to provide Walton with notice and a hearing, its decision to terminate his employment was not quasi-judicial despite the fact that notice and a hearing were afforded.

Instead, HCD's decision constituted quasi-executive action. Walton, consequently, was not entitled to appeal HCD's decision or to seek certiorari in the circuit court. Walton was, however, entitled to raise independent collateral claims against HCD because of the quasi-executive nature of the agency's decision. As a result, the Fourth District Court considered each of the three counts alleged in Walton's complaint.

The Complaint

While the Fourth District Court agreed with the circuit court's decision to dismiss Walton's wrongful termination and FLSA claims for failure to state a cause of action, it took issue with the court's decision to dismiss those counts with prejudice. It reasoned that, given the applicable law and the facts alleged, Walton's complaint may have been amended so as to properly allege valid wrongful termination and FLSA claims. Because the circuit court dismissed all three counts with prejudice, Walton did not have any opportunity to properly amend his complaint. The court, therefore, reversed the dismissals of the wrongful termination and FLSA counts. The court affirmed the dismissal of the federal due process claim, reasoning that Walton had adequate state remedies available to him and could not therefore raise a federal due process claim.

SIGNIFICANCE

Walton does much to clarify the remedies available to public employees who feel they have been wrongfully terminated. Under the court's holding, an employee who is terminated by a public entity that is required, either by statute, ordinance, or other legislative act, to act in a quasi-judicial capacity prior to terminating its employees may seek direct review of the termination decision by filing a writ of certiorari in circuit court. Such an employee may not, however, file an independent collateral claim against the entity in response to the termination decision. Conversely, an employee who is terminated by a public entity and who is not entitled by statute or ordinance to notice and a hearing, may bring independent collateral actions against his or her employer.

RESEARCH REFERENCES

- *Depaola v. Town of Davie*, 872 So. 2d 377 (Fla. 4th Dist. App. 2004).
- 2 Fla. Jur. 2d *Administrative Law* § 8 (Westlaw database updated Feb. 2005).
- 9 Fla. Jur. 2d *Civil Servants* § 145 (Westlaw database updated Feb. 2005).
- 10A Fla. Jur. 2d *Constitutional Law* § 506 (Westlaw database updated Feb. 2005).
- 34 Fla. Jur. 2d *Labor and Labor Relations* § 21 (Westlaw database updated Feb. 2005).

J. Jervis Wise

Public Employment: Due Process

Beary v. Johnson,
872 So. 2d 943 (Fla. 5th Dist. App. 2004)

A violation of an agency's internal operating procedure does not constitute per se violation of a government employee's due process rights. Due process is a flexible concept and requires only that proceedings affecting the individual are essentially fair.

FACTS AND PROCEDURAL HISTORY

The Orange County Sheriff's department disciplined Robin Johnson, a deputy sheriff, following several incidents of noncompliance. Johnson was "administratively charged with unsatisfactory performance of his duties . . . , violation of the rules pertaining to the exercise of his legal authority, and conduct unbecoming an officer for . . . an illegal traffic stop." *Beary*, 872 So. 2d at 945. Johnson appealed to the administrative review captain who further charged him with "violating the policy requiring deputies to conform to all laws," to the disciplinary appeals board, and eventually to Sheriff Beary. *Id.* Each appeal affirmed the administrative findings, and Sheriff Beary terminated Johnson. Johnson then sought certiorari review with the Orange County Circuit Court.

The circuit court cited General Order 340(24)(D), which required the Orange County Sheriff's Department to have "a Level

2 Administrator in the appealing deputy's chain of command" present the department's case at an appeals board hearing. *Id.* In Johnson's case, the Level 2 Administrator who participated was not in Johnson's chain of command. The circuit court subsequently found that Johnson had a property interest in his job and that, when the department did not follow its own policy, it violated Johnson's right to due process. Sheriff Beary sought certiorari review of the circuit court's order with the Fifth District Court of Appeal, and the Fifth District Court quashed the termination order.

ANALYSIS

Sheriff Beary conceded that Johnson had a property interest in his job and that Johnson was entitled to due process. Sheriff Beary argued, however, that the department's policy did not create a "protectable property interest or constitutional right." *Id.* at 946.

The *Beary* court noted the Third District Court of Appeal's finding in *Armesto v. Weidner* that "[a]n agency violates a person's due process rights if it ignores rules it promulgated which affect individual rights." *Id.* (quoting 615 So. 2d 707, 709 (Fla. 3d Dist. App. 1992)). Although the *Beary* court did not disagree with the Third District Court as a general principle, it found that the rule had no application in Johnson's case. The *Beary* court found the holding in *Tonkovich v. Kansas Board of Regents* to be more applicable; in that case, the United States Court of Appeals for the Tenth Circuit held that a state "agency's failure to follow established guidelines regarding a grievance" is not a due process violation per se. *Id.* (referencing 159 F.3d 504, 522 (10th Cir. 1998)). The *Beary* court found that, generally, an individual's due process rights are not violated when an entity violates its own administrative procedure because due process rights are created from the United States Constitution. Specifically, "[t]he Fourteenth Amendment does not constitutionalize the violation of every right granted by state laws, but only those which deprive a person of some right secured by the constitution or laws of the United States." *Id.* The Fifth District Court, therefore, concluded that an individual will succeed in a due process argument only when the state agency's conduct "infringes on federal or state constitutional safeguards." *Id.*

The Fifth District Court noted that Johnson did not argue, and the circuit court did not find, that the department's failure to have a Level 2 Administrator at the hearing "directly implicated any property interest or protected right," or that the department violated the defendant's "procedural due process right to notice and an opportunity to be heard." *Id.* The court stated that due process is flexible and requires that a proceeding affecting constitutional rights be "essentially fair." *Id.* (citing *Gilbert v. Homar*, 520 U.S. 924, 930 (1997)). With this, the Fifth District Court found that the circuit court had departed from the essential requirements of law when it found that the department's failure to comply with its own rules violated Johnson's due process rights.

SIGNIFICANCE

To prevail on a due process argument in the Fifth District, an employee must put forth a strong justification that the violation directly implicated a constitutionally protected right. This may involve a protectable property interest in employment, or some other constitutional right such as a liberty interest.

RESEARCH REFERENCE

- 63C Am. Jur. 2d *Public Officers and Employees* § 447 (Westlaw database updated May 2004)

Rachel L. Soffin

Public Employment: Due Process, Civil Procedure

Miami-Dade County v. Moreland,
879 So. 2d 23 (Fla. 3d Dist. App. 2004)

Once a civil service employee obtains a quasi-judicial review of an employment decision through an administrative hearing, that employee is not entitled to challenge that decision by filing an independent action in a circuit court.

FACTS AND PROCEDURAL HISTORY

Miami-Dade County terminated Sherry Moreland from her position as a corrections officer after she violated Corrections Department rules. Moreland appealed the action through the County's civil service appeals process. A hearing officer held a

two-day hearing and recommended that Moreland be suspended for twenty-eight months without pay. The County Manager reviewed the hearing officer's findings and recommendations, but rejected the recommendation. The County Manager found that Moreland's violations warranted a more severe penalty, demoted Moreland to a non-sworn position at a comparable salary, and suspended her for forty-one months.

Moreland did not appeal the County Manager's decision to the appellate division of the circuit court. One year after Moreland was reinstated, she filed a civil complaint. Moreland alleged that the County Manager violated due process under the Florida Constitution when he demoted her to a non-sworn position. The County requested a writ of prohibition to prevent the circuit court from exercising trial-level jurisdiction on the grounds that Moreland had fully utilized the civil service review process. The Third District Court of Appeal agreed and issued the writ.

ANALYSIS

Once an employee obtains a quasi-judicial hearing through the administrative review process, he or she is not entitled to a second hearing at the trial court level. At that point, the employee's recourse is to initiate an appellate review of the decision in the circuit court's appellate division. *City of Miami Springs v. Barad*, 448 So. 2d 510 (Fla. 3d Dist. App. 1983).

Moreland was granted an administrative hearing before the civil service hearing officer, which resulted in a quasi-judicial decision. Moreland's next appellate step should have been an appeal to the circuit court's appellate division.

SIGNIFICANCE

A civil service employee is afforded due process when he or she utilizes the administrative review process for an adverse employment decision. After the administrative process is exhausted, the employee can appeal only to the circuit court appellate division, which shall not exercise trial-level jurisdiction.

RESEARCH REFERENCES

- 9 Fla. Jur. 2d *Civil Servants* §§ 151, 152 (Westlaw database updated Feb. 2005).

Sandy Phillips

Public Employment: Ethics

Bennett v. Commission on Ethics,
871 So. 2d 924 (Fla. 5th Dist. App. 2004)

No legal or ethical violation necessarily arises when a public official proposes that an entity subordinate to or affected by the official's public position take actions that may presumably benefit that official. It will not be a violation so long as the official has no direct control over the decision to undertake the actions and does not abuse his or her power in an attempt to bring about the desired outcome. Furthermore, the public official should not conceal the fact that such proposed actions would be of personal benefit or attempt to take such actions on his or her own accord.

FACTS AND PROCEDURAL HISTORY

Samuel Bennett, while serving as Chairman of the Council of the Town of Pierson, Florida, found himself at the center of a heated dispute concerning the town's official zoning map. When the 1994 zoning map proved to be inaccurate, the Council considered replacing it with a computer-generated digital zoning map, which would presumably be more accurate and also easier to modify than the paper map. The Council then requested that Bennett and the commissioned land planner, Mr. Keeth, draft a new zoning map. Sometime later, Bennett and Keeth surveyed the town while scrutinizing the map and wrote several suggested changes on the map in pencil. Some of those changes, if adopted, would have significantly increased the value of Bennett's property.

The Council later considered several proposed changes to the zoning map, aside from those that Bennett made, and ultimately adopted a draft that did not incorporate Bennett's suggestions. The Council, nonetheless, became concerned with the potential benefits that Bennett would have received had his changes been adopted and followed up with an investigation to determine whether Bennett had acted corruptly. After an administrative hearing, the Commission on Ethics found that Bennett did act corruptly in violation of Florida Statutes § 112.313(6) (1999). The Fifth District Court of Appeal, however, found that the evidence failed to support the Commission's conclusion and reversed the Commission's decision.

ANALYSIS

Florida Statutes § 112.313(6) prohibits a public officer from using his or her official position, official duties, or the property or resources entrusted to the officer as a result of that position, in a corrupt manner to bring about any "special privilege, benefit, or exemptions for" the officer or another. In hearing Bennett's appeal, the Fifth District Court of Appeal first considered whether Bennett's behavior was corrupt under the definition provided in Florida Statutes § 112.312(9) (1999), which states that corrupt behavior is acting "with a wrongful intent and for the purpose of obtaining, or compensating or receiving compensation for, any benefit resulting from some act or omission of a public servant which is inconsistent with the proper performance of his or her public duties."

The Commission on Ethics maintained that Bennett acted both with a wrongful intent and in a manner inconsistent with proper performance of his duties as a town council chairperson. The court, however, referred to *Blackburn v. State Commission on Ethics*, which held that, in order to satisfy the corruption element, the statute also requires that the public official have reasonable notice that (1) a particular behavior would conflict with the proper performance of the official's duties, and (2) such behavior would constitute a legal or ethical violation. 589 So. 2d 431, 434 (Fla. 1st Dist. App. 1991)

Drawing on the *Blackburn* reasoning, the *Bennett* court held that Bennett's actions were not corrupt under the statutory language, and therefore, did not constitute an ethical violation. It reasoned that, because Keeth had asked Bennett to suggest the proposed changes and because such changes were mere suggestions and not actual alterations of the zoning map, Bennett did not act outside the scope of his duties. The court also noted that Bennett did not vote on whether his suggestions would be incorporated into the new map, nor did he hide the fact that the proposed zoning changes would affect his property value. If Bennett had secretly changed the zoning map or failed to hold a public hearing concerning those changes, he likely would have been acting corruptly under the statute. Because his case lacked such circumstances, and despite the fact that Bennett's suggestions would have benefited him individually, the court held that Bennett's actions were not unlawful.

SIGNIFICANCE

A public official may lobby for changes that benefit the official individually. When members of the general public take such actions nearly every day in Florida, why should a public official be excluded from doing the same, so long as he or she has no control over whether the particular entity in question imposes the suggested changes? The public official, of course, cannot legally or ethically abuse the powers stemming from his or her public office in an attempt to influence the decision-making process. In this case, Bennett, as a public official, did no more than Florida law allows. The court, therefore, held that his actions were not corrupt.

It is likely that Bennett, being the Town Council Chairperson, had more influence over the decision to implement his proposed changes than would a layperson. Yet, as far as the court knew, he did nothing to sway the Town Council's vote or to hide his personal stake in the Town Council's decision. The fact that Bennett had significant connections to the decision-making body did not, by itself, give rise to a finding that he acted corruptly under the Florida Statutes. However, as the court noted, if Bennett had secretively made any changes that would have benefited him personally, or if he had direct control over the decision to include those changes, a completely different ethical dilemma would have ensued. Given the reasonable-notice requirements of *Blackburn*, however, even if a public official acts in an unethical manner, the Commission would still bear the burden of proving that the official also knew or should have known that his or her behavior was outside the scope of his or her duties and a possible legal or ethical violation. The reasonable-notice standard is arguably a low one, but still must be met to prove that an official acted in a statutorily corrupt manner.

RESEARCH REFERENCES

- *Kinzer v. State Commission on Ethics*, 654 So. 2d 1007 (Fla. 3d Dist. App. 1995).
- *Gordon v. State Commission on Ethics*, 609 So. 2d 125 (Fla. 4th Dist. App. 1992).
- 9 Fla. Jur. 2d *Civil Servants and Other Public Officers and Employees* § 159 (2004).

- 12A Fla. Jur. 2d *Counties and Municipal Corporations* § 164 (1998 & Supp. 2005).

J. Jervis Wise

Public Employment: Labor Relations

City of Winter Springs v. Winter Springs Professional, 885 So. 2d 494 (Fla. 1st Dist. App. 2004)

A pay-freeze-during-negotiations clause in a collective bargaining agreement may represent the status quo during negotiations for a new agreement when the parties' history supports such a finding. After impasse, and regardless of whether the parties have waived the special-master process of impasse resolution, the parties may alter bargaining positions before submitting recommendations to the legislative body charged with resolving the dispute.

FACTS AND PROCEDURAL HISTORY

The City of Winter Springs and the Winter Springs Professional Firefighters, Local 3296 (Union) engaged in negotiations for a new collective bargaining agreement (CBA). The Union sought to remove a pay-freeze provision that had been a part of prior CBAs for several years, and the City sought to add a management-rights provision to the contract. The Union objected to the City's provision "because it waived the Union's right to bargain." *City of Winter Springs*, 885 So. 2d at 496. Negotiations failed to produce an agreement, and the Union declared an impasse. The parties bypassed the statutorily provided special-master process and, as provided in Florida Statutes § 447.403(2)(a), took the dispute directly to the local legislative body, the Winter Springs City Council. The parties submitted their recommendations for resolving the impasse to the Council. The City's recommendation included an amended management-rights provision that specifically stated that it "was not intended to waive any of the Union's rights to impact bargain." *Id.* The Council adopted the amended management-rights provision and retained the pay-freeze provision.

The Union then filed an unfair labor practice (ULP) charge with the Florida Public Employees Relations Commission (PERC). It alleged that the imposition of the pay-freeze and management-rights provisions violated Florida Statutes § 447.501(1)(a) and (c), providing, inter alia, that failures to bargain collectively in good faith are ULPs. PERC's hearing officer issued a recommended order that determined that the parties' history suggested that the pay freeze represented the status quo and that its imposition did not constitute a ULP. The hearing officer did, however, find that, when the City amended the management-rights provision after impasse but before submitting its recommendations to the Council, the City committed a ULP. The officer also concluded that the provision waived the Union's right to impact bargain.

PERC's final order adopted the hearing officer's finding that the amendment of the management-rights provision was, in itself, a ULP without reaching the question of whether the provision contained a waiver of the Union's right to impact bargain. Also, contrary to the hearing officer's recommendation, PERC found that imposition of the pay-freeze provision constituted a ULP.

The City appealed PERC's decision to the First District Court of Appeal, which found that neither provision constituted a ULP. The court, therefore, reversed and remanded the case on both issues.

ANALYSIS

In reviewing the pay-freeze issue, the First District Court cited the substantial, competent evidence standard of review. Its analysis, however, appeared to review the hearing officer's and PERC's positions de novo and the court ultimately adopted the hearing officer's position. The court stated that the resolution of the issue turned on what represented the status quo—the pay freeze during contract negotiations or the continuation of wage increases scheduled under the existing CBA. It held that repeated use of the pay-freeze language in prior CBAs indicated "that the employees had no expectation of . . . wage increases once a CBA expired." *Id.* at 498.

The court also held that the pay-freeze language itself did not waive the Union's bargaining rights regarding wages. Thus, the Council's imposition of that language, pursuant to statutorily

provided impasse-resolution procedures, did not violate the laws governing the collective bargaining process.

Next, the court reviewed PERC's determination that the amendment of the management-rights article during the impasse-resolution process constituted a ULP. In reaching its decision, PERC relied upon its prior recognition of an "insulated period" that occurs between the waiver of the special-master process and the legislative body's resolution of the impasse. The court, however, noted that the insulated-period rule dealt with the issue of ex parte communications with members of the legislative body when that body was acting in a quasi-judicial capacity. It also noted that PERC's application of the insulated-period rule was contrary to the impasse-resolution framework provided in Florida Statutes § 447.403(4)(a) and (b). Those subsections specifically allow the parties to submit their own recommendations to the legislative body after the conclusion of the special-master process. The court found no reason to deny the parties the opportunity to do the same, just because they had waived the special-master process.

In his dissent, Justice Allen indicated that he would have deferred to PERC's rulings on both issues because they appeared reasonable and consistent with important public policies. Moreover, "establishment of the policy falls within PERC's authority under Chapter 447 of the Florida Statutes." *Id.* at 502 (Allen, J., dissenting). As Justice Ervin noted in his concurring opinion, the dissent would therefore have the court apply the clearly erroneous standard of review and give great deference to PERC's statutory interpretations. According to Justice Ervin, however, the court correctly reviewed the case de novo because contract interpretation is a question of law.

SIGNIFICANCE

By clarifying that a pay-freeze-during-negotiations clause in a CBA can represent the status quo during contract negotiations when such language was used in prior CBAs, the First District Court has given added weight to such provisions. The court's decision also encourages settlement during all stages of the impasse-resolution process by holding that the parties may amend their last bargaining positions regardless of whether they have submitted to or waived the special-master process.

RESEARCH REFERENCE

- 34 Fla. Jur. 2d *Labor and Labor Relations* §§ 170, 183–184, 187 (Westlaw database updated Feb. 2005).

Lauren W. Berns, Jr.

Public Employment: Salaries, Pensions & Benefits

Wiggins v. State of Florida, Department of Management Services, Division of Retirement,
882 So. 2d 1030 (Fla. 3d Dist. App. 2004)

A government healthcare employee will be classified as a member of the Special Risk Class only if the employee works for the Department of Corrections or the Department of Children and Family Services, and meets the criteria set forth by statute. The legislature, not the courts, must correct any resulting inequity.

FACTS AND PROCEDURAL HISTORY

Special-risk employees are entitled to a higher retirement benefit under the Florida Retirement Trust Fund (FRTF) because of the hazardous nature of their duties. Law enforcement officials, fire fighters, and correctional officers are typically classified as special-risk employees. Seventeen Miami Dade County employees who worked at the correctional health facilities at Jackson Memorial Hospital applied for designation as special-risk employees. The employees claimed that their job descriptions and duties substantively matched those of state employees who were classified as special-risk employees. Specifically, the county hospital employees claimed that 75 percent of their work included contact with inmates in a correctional facility. In addition, the county hospital employees claimed that they were denied equal protection under the law because county and municipal employees classified as firefighters, law enforcement personnel, correctional officers, paramedics, and probation officers were treated the same as their state counterparts in special-risk designation.

The County endorsed the employees' application. The State Retirement Commission denied the application based on Florida Statutes § 121.021(15)(d)(2) (2003), which limits special-risk classification of healthcare workers to employees of "the Department

of Corrections, or the Department of Children and Family Services." *Wiggins*, 882 So. 2d at 1032. The employees appealed the ruling to the Third District Court of Appeal, which affirmed the Commission's ruling.

ANALYSIS

Courts are required to apply the plain meaning of state statutes. Florida Statutes § 121.021(15)(d)(2) specifically identifies that, for professional healthcare workers, special-risk classification is limited to employees of the Department of Corrections or the Department of Children and Family Services.

The Third District Court empathized with the employees and urged the legislature to re-visit the issue of employee risk designation based on job duties. However, the court recognized a rational basis for distinguishing between state healthcare workers and county healthcare workers. Because retirement benefits under a special-risk designation cost the government more than other forms of retirement, the legislature would not force local county and municipal governments to bear that burden. Although some local government employees are treated the same as their state counterparts in special-risk designation, the legislature had the discretion to refuse to extend that designation to all employees classified as healthcare workers. Because the legislature, not the judiciary, determines how public funds are spent, the court refused to expand the statute to cover the county healthcare employees.

SIGNIFICANCE

A county or municipal employee whose job duties match the criteria for special-risk designation will not be designated a special-risk employee unless the job meets all specific statutory criteria.

RESEARCH REFERENCE

- 39 Fla. Jur. 2d *Pensions and Retirement Funds* § 49 (Westlaw database updated Feb. 2005).

Sandy Phillips

Public Employment: Unlawful Compensation

State v. Castillo,
877 So. 2d 690 (Fla. 2004)

When a public servant corruptly solicits, requests, accepts, or agrees to accept an unlawful benefit for the performance or nonperformance of an official duty, neither direct evidence nor evidence of a specific agreement is required to prove a violation of Florida's unlawful compensation statute.

FACTS AND PROCEDURAL HISTORY

On March 9, 2000, at approximately 4:00 a.m., Miami-Dade County Police Officer Fernando Castillo pulled his police cruiser, with its overhead lights on, behind the vehicle of A.S., a nineteen-year-old female. A.S. had been drinking heavily and was speeding. After Castillo directed A.S. to exit her vehicle and they talked for a while, he ordered A.S. to follow him to a nearby deserted area where he had sexual intercourse with her. Fearing she would be arrested because she was drunk and speeding, A.S. complied with all of Castillo's demands. Further, Castillo did not report his over forty-minute encounter with A.S., but stated that he had engaged in various other patrol duties during that period.

Castillo was charged and found guilty of unlawful compensation and official misconduct. At trial, the court denied Castillo's motion for judgment of acquittal. On appeal, the Third District Court of Appeal reversed Castillo's conviction for unlawful compensation, reasoning that he never specifically stated that he would arrest A.S. if she did not have sex with him. After looking at A.S.'s trial testimony, the Third District Court concluded that, due to the absence of direct evidence of any spoken understanding, the State could not establish an agreement proving unlawful compensation. The State appealed the conviction's reversal. The Florida Supreme Court quashed the district court's holding and remanded the case for further proceedings because competent and substantial evidence supported Castillo's conviction.

ANALYSIS

Florida's unlawful compensation statute makes it a crime for public servants to corruptly request, solicit, accept, or agree to

accept any pecuniary or other benefit not authorized by law for the performance or non-performance of an official duty. Fla. Stat. § 838.016(1) (1999). Although the statute does not contain a proof requirement, courts should always allow the use of circumstantial evidence to prove a statutory violation. As provided in *State v. Gerren*, 604 So. 2d 515, 520 (Fla. 4th Dist. App. 1992), if courts interpreted the statute to require an express agreement, public servants could receive unauthorized benefits while avoiding prosecution when there is no explicit agreement to perform public duties improperly. Often, the element of intent (i.e., the actor's state of mind) can be proven only through the use of circumstantial evidence.

Further, the Florida Supreme Court considered whether the unlawful compensation statute requires evidence of an agreement or meeting of the minds. The Court did not read such a requirement into the statute, finding that the statute does not focus on the agreement, but on the public official's intent. Facially, the statute does not require an agreement because it penalizes mere solicitation of a benefit. In fact, the beneficiary does not have to agree to or even understand the exchange. The Court quoted § 240.1 of the Model Penal Code, which states that "[e]ach defendant should be judged by what he thought he was doing and what he meant to do, not by how his actions were received by the other party." *Castillo*, 877 So. 2d at 695 (quoting Model Penal Code § 240.1 cmt. 4(b) (1980) (emphasis omitted)). Thus, the Court interpreted the statute to require only evidence of an actor's corrupt intent and not a specific agreement.

While uniformed and performing various patrol duties, Castillo did not issue a traffic citation to A.S either before or after engaging her in sexual intercourse, a "benefit not authorized by law." Fla. Stat. § 838.016(1). Although Castillo did not explicitly threaten or solicit A.S., his comment that "the party must have been good," indicates that he knew she was intoxicated. *Castillo*, 877 So. 2d at 696. Further, Castillo's remark after intercourse that she was lucky he did not ticket her, combined with the fact that he did not report and entirely misrepresented his contact with A.S., demonstrated his corrupt intent.

SIGNIFICANCE

In *Castillo*, the Florida Supreme Court clarified that a meeting of the minds is not required to prove that a public servant violated Florida's unlawful compensation statute. In this, the Court disapproved both the Third District Court's *Castillo* holding and the Fourth District Court's *Gerren* holding. The State's only statutory requirement is that it must prove the actor's corrupt intent. *Castillo* therefore enhances the State's ability to hold public officials accountable for their intentional acts aimed at receiving unlawful benefits.

RESEARCH REFERENCE

- 16A Fla. Jur. 2d *Criminal Law* § 4511 (Westlaw database updated Apr. 2005).

Mary Ellen Pullum