

## Case Law Update

Zimmerman v. Eckerd Corp., 28 Fla. L. Weekly D613 (Fla. 3<sup>rd</sup> DCA, Mar. 5, 2003). In a brief opinion, the Third District Court of Appeal implied that if the issue was squarely before it, it would find that Florida Statute 768.0710, which superseded Owens v. Publix Supermarkets, Inc., 802 So. 2d 315 (Fla. 2001) and which provides that the burden of proof in slip and fall cases involving transitory foreign substances remains squarely on the plaintiff, and not on the defense, (as the Owens court so held), may be retroactively applied. While this observation was not part of the holding proper and was simply dicta, the court has indicated how it would be inclined to rule if that issue were before it.

Estate of Brown v. Woodham, 28 Fla. L. Weekly D765 (Fla. 1<sup>st</sup> DCA, Mar. 18, 2003). Ordinarily, no liability can be imposed on governmental entities when the duty owed to third persons is no different than that owed to the public in general. But in this case, the First District Court of Appeal held that where a Sheriff had actual knowledge of a threat to an individual, and failed to take reasonable measures within his control to protect that individual from one who is in his custody, the Sheriff could be held liable for breaching this special duty of care. In reaching its opinion, the court did not address issues of sovereign immunity, including the issues of whether the Sheriff's actions were discretionary or operational.

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## Document Your Thoughts to Help Defeat Opportunistic Retaliation Claims



Retaliation claims are the third most frequently alleged type of claim filed with the Equal Employment Opportunity Commission (EEOC), just behind race and sex discrimination claims. Retaliation claims are not only common; they are also becoming quite lucrative to employee lawyers and their clients. A recent survey showed that the median award for a retaliation case was \$120,870. Whistleblower claims were particularly successful, accounting for 66% of the total retaliation awards and yielding an average recovery of \$187,200.<sup>1</sup>

Issues concerning retaliation are of critical importance because an employer can be held liable for retaliation, even if it is not liable for the underlying discrimination of which the employee complains. In fact, it is common for employees to file suits alleging both discrimination and retaliation, and to lose on their discrimination claim but win on their retaliation claim.

**Can Employers Discipline Employees for Frivolous Complaint Discrimination?**  
 Technically, yes. But doing this is extremely dangerous. Whether a charge of discrimination is frivolous (and, therefore, not protected activity) or is based

on a good faith, reasonable belief (and constitutes protected activity) is in the eye of the beholder. Because the only "beholder's" opinion that really matters is the judge's or jury's, it can be very expensive to discipline an employee for what you consider to be a frivolous complaint. If an employee appears to be taking advantage of legal protections rather than sincerely seeking relief, contact legal counsel before you take any adverse action against the employee because of his or her seemingly frivolous complaint.

Employment actions that closely follow an employee's complaint about discrimination or other protected activity will be scrutinized closely by courts. When a manager or supervisor begins to consider terminating a poorly performing employee, he or she can take a number of steps to help defeat a future retaliation claim.

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**Document Contemplated Termination Decisions**

If an employer can show that it had all but made up its mind about firing an employee prior to his or her complaint of discrimination, then it can defeat the inference of a retaliatory motive. The Supreme Court has held, in the context of a Title VII retaliation claim, that there is no evidence of causation where an employer merely follows through on a previously contemplated adverse employment action after an employee has engaged in some protected activity.

*In Clark County School District v. Breeden, 121 S.Ct. 1508 (2001), the Breeden court stated:*

“Employers need not suspend previously planned transfers upon discovering that a Title VII suit has been filed, and their proceeding along the lines previously contemplated, though not yet definitively determined, is no evidence whatever of causality.”

*Breeden, 121 S.Ct. at 1509.*

Obviously, this defense is likely to be met with considerable skepticism when a supervisor claims, after the fact that he



or she had already decided to terminate an employee prior to making a complaint. Therefore, it is critical that supervisors document and date their contemplated decisions in writing and, if appropriate, share that information with a colleague.

For example, suppose a Human Resources Manager and a supervisor meet on June 1st to decide whether to counsel an employee or terminate her. The two

decision makers agree to counsel the employee one last time, but to terminate her unless she demonstrates significant improvement over the next three weeks. Because they believe the employee’s performance will suffer even more if she knows that she is on the brink of termination, the HR Manager and supervisor decide not to tell the employee of their “last chance” decision. Notes of this conversation should be made. That way, if the employee, sensing that the end is approaching, decides to suddenly complain about perceived discrimination on June 7th, a record will exist to demonstrate that the HR Manager and supervisor were seriously contemplating termination even before the employee engaged in the protected activity of complaining about discrimination.

<sup>1</sup> Employment Practice Liability Verdicts and Settlements, 2002 LRP Publications, Vol. 3, Issue 11.

**Employee Discrimination Claims**

The table below shows the types of employment discrimination claims received by Risk Management statewide over a five-year period (July 1, 1998 – June 30, 2003). The most frequent types of discrimination claims were (1) race – 28%, (2) sex (including sexual harassment) – 26%, and (3) “other” types (primarily whistleblower and retaliation claims) - 16%. These top three categories were the same as the most frequent types of discrimination claims filed with the EEOC in figures recently released for the one year period 10/1/01 – 9/30/02.



Type of Discrimination Alleged	# of Claims Received	% of All Claims Received
Race	259	28%
Sexual Harassment	141	15%
Sex	106	11%
Other (Whistleblower, Retaliation, FMLA, etc.)	153	16%
Disability	115	12%
Age	80	9%
National Origin	64	7%
Creed	1	1%
Equal Protection Act	2	1%
Totals	921	100%

**Ergonomics: Working Smarter**

In our busy lives today, our concentration is often spread thinly in many directions while we attempt to complete numerous tasks as rapidly as possible. Often, we give little thought to the needs of our bodies. Emotional and physical stress can result. Whether at work or home, there are practices available to keep us healthy and free of pain. These simple tips take very little time and can help keep you relaxed and happy.

**GENERAL POINTS**

- Look down with your eyes by tucking your chin rather than bending your head forward.
- Sit upright in your chair with a neutral posture; never slouch.
- Keep feet pointed straight and flat on the floor or footrest with knees level with hips.
- Keep elbows, knees and hips bent at about 90 degrees and back supported while working at the desktop.
- Limit reaching to 12-18 inches and never across the body.
- The computer terminal should be at eye level and the center of the screen 10-15 degrees below eye level.
- Change position regularly. Break up tasks to allow frequent changes of position.
- Rest your hands when not typing.
- Keep hands and wrists straight and relaxed while typing.
- Touch computer keys lightly.
- Position computer screen to eliminate glare.



**STRESSED-OUT STRETCHES**

- Extend arms straight in front of you; gently flex hands up and down.
- Look away from the computer periodically.
- Focus your eyes on an object more than 10 feet away for 10 seconds.
- Refocus your eyes on a finger held about 20 centimeters in front of your face; hold for 10 seconds. Repeat two-three times a day.
- Do gentle reverse shoulder rolls.
- Do your favorite neck stretches.



Remember to do exercises gently and frequently during your day. The goal is to relax and refresh your mind and body to prevent injury, not to cause pain or further tire yourself.

**Comments, Questions...**

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