Legal Update

BELL & ROPER, P.A.

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ADA Accommodations and Employer Job Descriptions

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Samson v. Federal Express Corporation,

24 Fla. L. Weekly Fed. C1137 (11th Cir. March 26, 2014)

Samson received a conditional offer of employment for the position of Senior Global Vehicle Technician (truck mechanic) subject to his passing the DOT medical examination. This examination is required by Federal Motor Carrier Safety Regulations for commercial motor vehicle drivers who transport property or passengers in interstate commerce. Samson failed the medical examination because he was a Type 1 insulin dependent diabetic. FedEx withdrew Samson's job offer and the position was given to the

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An Academic Exercise to Recover Attorney Fees?

The firm was recently retained to defend an insurance carrier client in an uninsured motorist case that concerns the application of Travelers Commercial Insurance Company v. Harrington, 86 So.3d 1274 (1st DCA 2012). We wrote about the Harrington case in a previous newsletter. There, the First District Court of Appeal determined that the provisions of the uninsured motorist statute, section 627.727, specifically the differences between subsection (1) and subsection (9), require a UM carrier to obtain an election of non-stacked coverage from all insureds.

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second-place candidate.

Samson brought suit alleging discrimination under the ADA. FedEx moved for summary judgment on the basis that truck mechanics must occasionally test drive FedEx trucks and that same is an essential function of the position. Therefore, according to FedEx, truck mechanics are required by Federal Motor Carrier Safety Regulations to be medically certified. The District Court granted FedEx summary judgment. The Eleventh Circuit reversed.

The Plaintiff argued that test driving tucks was not an essential element of the job and had introduced evidence that the amount of time spent test driving was miniscule, and never involved interstate transport. The Eleventh Circuit recognized that the employer's judgment as to what is an essential function of the job carries substantial weight. Further, that FedEx's job description specifically identified test driving as an essential function. Additionally, that it was reasonable to assume that if technicians did not conduct test drives it is possible that there could be adverse consequences by failing to correctly diagnose vehicle problem. Finally, the Court acknowledged that there would be only one truck mechanic located at the facility in question.

Nevertheless, the Eleventh Circuit reversed the entry of summary judgment concluding that given the very small amount of time spent test driving, and the fact that other truck drivers were available to whom test driving could be assigned, a jury issue existed as to whether test driving trucks was an essential function of the mechanic's position.

What employer's should take away from this decision is that the Courts will look past the job description to the actual functions performed by the employee as well as the frequency of the performance of such functions, to determine if a task is, in fact, an essential elements of a particular job. Thus, the employer must determine what the employee actually does when evaluating ADA accommodation request, and may not simply rely on what is written in the position description.

By: Michael Bowling, Esquire

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In response, the Florida legislature, effective June 14, 2013, amended section 627.727 to provide that an election of non-stacked coverage by an insured would be binding on all insureds. The subject accident occurred eight days after the effective date of the statutory change.

Here, the insurance policy provides UM coverage with limits of $100,000/$300,000. There are three vehicles insured under the policy. The election form was signed only by the allegedly injured plaintiff's husband (and co-plaintiff). Thus, the plaintiff is contending that she is entitled to $300,000 in stacked coverage when $100,000 in non-stacked coverage was purchased. It is interesting to note that the plaintiffs' demand is within the non-stacked limit of liability. Nevertheless, opposing counsel added to the standard UM and consortium counts a declaratory judgment count triggering a potential recovery of attorney fees.

We have filed a motion to stay the declaratory action as the Harrington case is on appeal to the Supreme Court of Florida. The appeal was filed in June 2012 and oral argument was held in April 2014. Hopefully, the trial court will stay the declaratory action pending an opinion from the Florida supreme court. If the supreme court reverses the district court's opinion, then there would be non-stacked coverage. If the supreme court affirms the district court's opinion, the plaintiff would be entitled to stacked coverage in a case where it may not really matter, except for the potential recovery of attorney fees.

By: David Blessing, Esquire

NEW PUBLIC RECORDS RULING OUT OFTHE 1ST DCA

Recently, the 1st DCA considered whether a Florida public records custodian violated the public records law by delaying the disclosure of non-exempt public records sought by a private company with which the custodian was actively involved in litigation in the state of Mississippi.

The facts in the public records case were mostly undisputed. Promenade D'Iberville, LLC (Promenade) and the Jacksonville Electric Authority (JEA) were involved in contentious litigation in Mississippi for years. At some point, Promenade began making use of Florida's public records act to obtain information from JEA. JEA satisfied a number of large public records requests made by Promenade, but in 2013, changed its course of dealing with Promenade's requests. On June 25, 2013, Promenade sent two additional requests to JEA for non-exempt public records and rather than responding to the request, JEA filed a Motion for Protective Order in the Mississippi litigation, asking the out-of-state court to restrict Promenade's use of the public records law. On multiple occasions thereafter, Promenade followed up on its requests; however, JEA did not respond. The testimony of records handlers at JEA was that it had assembled many of the requested documents shortly following Promenade's request, but on the advice of counsel in Mississippi, JEA delayed and did not make the records available to Promenade pending attempts to block its access to the records in the Mississippi court. During the pendency of the motion for protective order, Promenade filed a public records enforcement action, in Florida. Promenade's Complaint alleged that JEA had "ready access to some or all of the documents requested" and that its failure to respond was tantamount to an unlawful denial of the request. Promenade sought its attorneys' fees and costs associated with the enforcement action. Eventually, the Mississippi trial court denied JEA's motion for protective order and on the next business day thereafter, JEA provided the public records to Promenade. The trial court in the Florida suit held an enforcement hearing and ruled that JEA did not willfully violate the Public Records Act. While the court admonished JEA for failing to respond to Promenade's various follow-up inquiries, it concluded that JEA ultimately satisfied its obligations under the Act by producing the requested records prior to the enforcement hearing. Promenade timely appealed.

Government entities in Florida are broadly responsible to make public records available to those who request to see them. Article I, Section 24, Florida Constitution. Florida's public records law declares that it is "the policy of this state that all state, county, and municipal records are open for personal inspection and copying by any person." Florida Statutes, section 119.01(1). "Disclosure of public records is not a discretionary act; it is a mandatory act." Mills v. Doyle, 407 So. 2d 348, 350 (Fla. 4th DCA 1981). Those with custody of public records must permit records "to be inspected and copied by any person desiring to do so, at any reasonable time, under reasonable conditions." Florida Statutes, section 119.07 (1)(a). Moreover, a public records custodian must "acknowledge requests to inspect or copy records promptly and respond to such requests in good faith." Florida Statutes, section 119.07(1)(c).

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NEW PUBLIC RECORDS RULING OUT OF THE 1ST DCA

JEA did not argue that any statutory exemption excused its obligation to make the requested documents available, nor did it dispute that the documents were non-exempt public records. Rather, JEA delayed making the records available pending a ruling on its Mississippi motion. Delay in making public records available is permissible under very limited circumstances. A records custodian may delay production to determine whether the records exist, Florida Statutes, section 119.07(1)(c); if the custodian believes that some or all of the record is exempt under the Act, Florida Statues, sections 119.07 (1)(d)-(e); or if the requesting party fails to remit the appropriate fees, Florida Statutes, section 119.07 (4). Otherwise, "[t]he only delay permitted by the Act is the limited reasonable time allowed the custodian to retrieve the record and delete those portions of the record the custodian asserts are exempt." Tribune Co. v. Cannella, 458 So. 2d 1075, 1079 (Fla. 1984). Unjustified delay in making non-exempt public records available violates Florida's public records law. Id.

In this case, JEA violated the Act by delaying Promenade's access to non-exempt public records for legally insufficient reasons. JEA imposed what amounted to a requester-specific barrier to records requests made by Promenade, because it was an adversary in out-of-state litigation. This was not a legally sufficient reason for delaying Promenade's access to public records. Florida law does not allow public records custodians to play favorites on the basis of who is requesting records. Rather, it is "the policy of this state that all . . . records are open for personal inspection and copying by any person." Florida Statutes, section 119.01; also see 119.07(1)(a) (allowing records "to be inspected and copied by any person desiring to do so, at any reasonable time, under reasonable conditions"). Moreover, "[t]he motivation of the person seeking the records does not impact the person's right to see them under the Public Records Act." Curry v. State, 811 So. 2d 736, 742 (Fla. 4th DCA 2002); see also Staton v. McMillan, 597 So. 2d 940, 941 (Fla. 1st DCA 1992) ("the appellant made proper requests for access . . . and his reasons for seeking such access are immaterial.").

JEA had a duty to produce the non-exempt public records requested by Promenade regardless of Promenade's identity and JEA's decision to seek a ruling from a Mississippi court related to Promenade's request did not justify its decision to delay its disclosure of the requested records. Finally, JEA's production of the records on the eve of the enforcement hearing did not cure its unjustified delay. Rather, the case law is clear that unjustifiable delay to the point of forcing a requester to file an enforcement action is by itself tantamount to an unlawful refusal to provide public records in violation of the Act. See Weeks v. Golden, 764 So.2d 633, 635 (Fla. 1st DCA 2000) ("[a]n unjustified failure to respond to a public records request until after an action has been commenced to compel compliance amounts to an unlawful refusal for purposes of section 119.12(1)"); see also Althouse v. Palm Beach County Sheriff's Office, 92 So. 3d 899, 902 (Fla. 4th DCA 2012) ("the Sheriff's delay in complying with Althouse's request until after the filing of his suit amounted to an 'unlawful refusal' under section 119.12, for which fees and costs are to be awarded").

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NEW PUBLIC RECORDS RULING OUT OFTHE 1ST DCA

The 1st DCA reversed and remanded the matter back to the trial court for proceedings consistent with its opinion, including the award of whatever enforcement-related fees and costs were due to Promenade under the Act. Within the 1st DCA's decision in *Promenade D'Iberville, LLC v. Rachelle M. Sundy, et al,* Case No.: 1D13-5583 (Fla 1st DCA August 28, 2014), there are some very important warnings for a custodian of public records to heed.

- Delay associated with active litigation which is not occasioned by an exemption or other statutory mechanism is not justified

- Failing to acknowledge and respond to a public records request is tantamount to a refusal to provide the requested record

- Refusing to provide non-exempt public records until after an enforcement suit has been filed is a sure fire way to earn an award of attorney's fees and costs associated with the enforcement action

The applicability of Florida's public records law is very fact specific. When in doubt regarding the proper response to a request or the parameters of Chapter 119, seek the advice of your legal counsel.

By: Sherry Hopkins, Esquire

CONGRATULATIONS

- **We would like to congratulate Cindy Townsend on being made a Partner.**

If you are interested in being added to our newsletter e-mail list, or if you wish to be taken off of this list, please contact Krysta Reed at kreed@bellroperlaw.com.

Questions, comments or suggestions regarding our newsletter, please let us know your thoughts by contacting Christian Anderson at canderson@bellroperlaw.com

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