Legal Update

BELL & ROPER, P.A.

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SCHOOL PREVAILS IN DRESS CODE CASE

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Sapp v. School Board of Alachua County, Florida, 2011 WL 5084647 (N.D. Fla., Sept. 30, 2011)

This case presented a challenge to the dress code policies of the School Board of Alachua County. Members of the Cove World Outreach Center church made t-shirts with "Islam is the Devil" printed on the back. Seven children Plaintiffs wore the t-shirts to school during the 2009-2010 school year at various Alachua County public schools, and they were sent home for violating the School Board's dress code policy. This policy required students to dress in a way that does not disrupt or distract from the educational process and is not offensive to others or inappropriate at school and at school sponsored events.

The United States Supreme Court has consistently held that the First Amendment rights of school students are not as broad as the rights of adults in public forums.

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RECENT ELEVENTH CIRCUIT DECISION HOLDS THAT FEDERAL DISTRICT COURTS LACK SUBJECT MATTER JURISDICTION TO HEAR USERRA CLAIMS BROUGHT BY PRIVATE PARTIES AGAINST STATE EMPLOYERS

Congress enacted the Uniformed Services Employment and Reemployment Rights Act ("USERRA"), 38 U.S.C. § 4301, et. seq. to prohibit employment discrimination on the basis of military service, as well as to provide reemployment to individuals who engage in non-career service in the military. Coffman v. Chugach Support Servs. Inc., 411 F.3d 1231, 1234 (11th Cir. 2005). Section 4323 of USERRA discusses its judicial enforcement. 38 U.S.C. § 4323(b). It specifically provides that "[i]n the case of an action against a State (as an employer) by a person, the action may be brought in a State court of competent jurisdiction in accordance with the laws of the State." Id. at § 4323(b)(2). By contrast, "[i]n the case of an action against a State (as an employer) or a private employer commenced by the United States, the district courts of the United States shall have jurisdiction over the action." § 4323 (b)(1). *Continued at 2B*

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Morse v. Frederick, 551, U.S. 393, 405 (2007). Also settled is that school facilities are not public forums, and speech within them may be regulated consistent with legitimate pedagogical concerns. Hazelwood Sch. Dist. V. Kuhlmeier, 484 U.S. 260, 273 (1988). In regulating speech, the Eleventh Circuit Court of Appeals has explained that school officials are on their most solid footing when they reasonably fear that certain speech is likely to appreciably disrupt appropriate discipline within the school. Scott v. Sch. Bd. Of Alachua County, 324 F.3d 1246, 1248 (11th Cir. 2003). Further, even if disruption is not immediately likely, school officials are charged with the duty to inculcate the habits and manners of civility and values conducive to both happiness and to the practice of self-government. To do so, they must have the flexibility to control the tenor and contours of student speech within school walls or on school property, even if such speech does not result in reasonable fear of immediate disruption. Id. at 1249.

The District Court found that "Islam is of the Devil" presented a highly confrontational message. It explained that part of public school's mission must be to teach students of differing races, creeds and colors to engage each other in civil terms rather than in terms of debate highly offensive or highly threatening to others. The court held that a school need not tolerate student speech that is inconsistent with its basic educational mission, even though the government could not sensor similar speech outside the school. Thus, summary judgment was granted in favor of the Defendant.

By: Michael Bowling

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In the recent Eleventh Circuit Court of Appeals decision, Wood v. Florida Atlantic University Bd. of Trustees, 432 Fed.Appx. 812, 814-815, (11th Cir. 2011), the Eleventh Circuit stated that the district court in that case correctly noted, "the corollary to this proposition, supported by USERRA's remedial scheme and legislative history, is that the federal court lacks jurisdiction over a USERRA claim brought by a private individual against a state employer."

Although the Eleventh Circuit had not specifically addressed this issue prior to its decision in Wood, it noted that its sister circuits have found that the permissive language of USERRA regarding private actions against state employers vests exclusive jurisdiction in state courts. See McIntosh v. Partridge, 540 F.3d 315 (5th Cir. 2008) (finding that USERRA does not confer jurisdiction upon federal courts to hear action by private individual against state as employer); Velasquez v. Frapwell, 165 F.3d 593 (7th Cir. 1999) (holding, "Congress's intention to limit USERRA suits against states to state courts is unmistakable"); Townsend v. University of Alaska, 543 F.3d 478 (9th Cir. 2008) (noting that under USERRA a state university is indisputably an arm of the state falling under section 4323(b)(2)). Additionally, "Congress did not use the terms 'must' or 'shall' with respect to state court jurisdiction over USERRA claims for the apparent reason that the powers delegated to Congress under Article I of the United States Constitution do not include the power to subject non-consenting States to private suits for damages in state courts." Townsend, 543 F.3d at 484 (internal quotation marks and citation omitted).

The Eleventh Circuit held that district courts lack subject matter jurisdiction because "the text of USERRA has been interpreted to mean that jurisdiction to entertain private USERRA suits against state employers lies exclusively in state court." Wood, 432 Fed.Appx. at 815.

By: Cindy Townsend

RES JUDICATA AND TITLE VII

Palmer v. Miami-Dade County, Florida 2011 WL 1560113 (S.D. Fla. April 25, 2011)

Defendant terminated Plaintiff's employment stating as grounds that the Plaintiff falsified payroll records. The Plaintiff, an African-American female, challenged her termination pursuant to Miami-Dade County Code §2-47, which is the County's classified civil service hearing process. The Civil Service Board found in favor of the County. The Plaintiff thereafter filed a Title VII action. The Defendant moved for summary judgment on the basis of res judicata.

Under Florida law res judicata applies when there is: (1) identity of the thing sued for; (2) identity of the cause of action; (3) identity of the parties; and (4) identity of the quality in the person for or against whom the claim is made. In an administrative proceedings hearing, examiners may, and do, consider allegations of employment discrimination in determining the propriety of an employee's dismissal. The doctrine of res judicata may bar Title VII claims where a state court affirms an administrative agency's decision, provided two criteria are met: (1) the state court would grant preclusive effect to the judgment, and (2) the state proceedings comport with the procedural requirements of the Fourteenth Amendment's Due Process Clause.

Plaintiff's administrative proceedings and the federal action, consisted of the same cause of action for the purposes of res judicata analysis under Florida law. The determining factor in deciding whether the cause of action is the same is whether the facts or evidence necessary to maintain the suit are the same in both actions. When the four identities are present, res judicata prohibits not only re-litigation of claims raised, but also the litigation of claims that could have been raised in the prior action. *Continued at 3A*

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Accordingly, the U.S. District Court found that res judicata barred Plaintiff's discrimination claim because Plaintiff raised and litigated the issue of disparate treatment during her administrative hearing.

By: Michael Bowling

IMPORTANT CHANGES TO FLORIDA MEDIATION ATTENDANCE RULES

Recently, the Florida Supreme Court amended Rule 1.720 of the Florida Rules of Civil Procedure regarding who is required to attend a mediation. The changes are significant and went into effect on January 1, 2012. The new rule requires the following persons to attend mediation: (1) the party with authority to enter into a binding settlement; (2) the party's counsel; and (3) a representative of the insurance carrier who is not such carrier's outside counsel and who has full authority to settle in an amount up to the plaintiff's last demand or policy limits, whichever is less, without further consultation. Counsel is now required to file a written notice at least 10 days before mediation which indemnifies the persons who will be attending the mediation and a certification that those persons have the required "authority." The new rule has mandatory language requiring the trial court to sanction any party who fails to comply with the new rule.

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