BELL & ROPER LEGAL UPDATE

Survey of Insurance and Civil Rights Issues and Recent Court Decisions from Bell & Roper, P.A.

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FIRM SUCCESS AGAINST PRISONER PLAINTIFF

On June 28, 2011, United States District Court Judge Mary Scriven issued an order granting summary judgment for several Osceola County Jail employees sued by an inmate for violating his 14th Amendment rights. (Concepcion v. Dowd, Case No. 6:08-cv-2130-Orl-35GHK, 2011 WL 2560451 (M.D. Fla. June 28, 2011.) Jorge Luis Concepcion, who represented himself, alleged that the Osceola County Jail employees, represented by **Michael J. Roper** and **Gail C. Bradford**, failed to investigate threats against him, failed to safely house him, and failed to prevent an inmate-on-inmate attack against him.

Concepcion was arrested on February 8, 2007, for Attempted Felony Murder and Armed Robbery. Sharif Silva was identified as his criminal co-defendant. By court order, the two men were not to be housed together. Several months after being detained at Osceola County, Concepcion advised jail staff that Silva had arranged for Concepcion to be brought to him and threatened to kill him. The incident was investigated and it was determined that Concepcion himself had initiated the conflict with Silva. Shortly thereafter, the Jail Mailroom received an anonymous report that Silva was planning to kill Concepcion. Jail employees confirmed that the inmates were housed separately. Moreover, efforts were made to keep other inmates away from both men so that no weapons could be passed to them. In addition, Silva and his cell were searched but no contraband was found. During a second search of Silva and his cell several weeks later, metal rods and razor blades were found. Concepcion was immediately placed into medical isolation for two days for his protection. Concepcion was told that he had been placed in medical isolation because jail staff had determined that Silva might present a threat. Another inmate's cell was searched in response to a possible threat against Concepcion's wife but no evidence of the threat or contraband was found.

Concepcion also alleged that Silva's role in a criminal gang subjected Concepcion to threats from other gang members. However, Concepcion had been housed with at least one gang associate without issue and did not express any concern about being housed with possible gang associates.

On July 27, 2007, Concepcion and another inmate were involved in a fight. Concepcion received superficial stab wounds to his scalp from the other inmate's pencil. Almost a month

later, at the request of his criminal defense attorney, Concepcion was transferred to the Orange County Jail, returning periodically for Osceola County court appearances. When he returned to Osceola County Jail, he was placed in protective custody. However, Concepcion complained about being placed in protective custody and threatened to sue the County.

The Court determined that Concepcion had failed to establish a constitutional violation. The inmate that stabbed Concepcion in the scalp was not Silva. In that light, jail staff had and could have no information that the inmate presented a threat to Concepcion. Therefore, they could not have been deliberately indifferent to a threat posed by the inmate, as opposed to Silva. Furthermore, there was no evidence that the inmate was a member of Silva's gang. The Court pointed out that Concepcion and the inmate had been housed together before the "stabbing" without issue. The Court determined that the actions of the jail employees in investigating the threats against Concepcion, classifying and housing Concepcion, and placing him in protective custody did not show deliberate indifference to the threats alleged against him and his safety. Moreover, the Court found that the named defendants would have been entitled to qualified immunity as they were acting within the scope of their discretionary authority and that they did not violate any clearly established law.

The realistic damages in this case were relatively low. Concepcion sustained minimal physical injuries as a result of the inmate-on-inmate fight. As such, it might have been tempting to settle the case for "nuisance value." However, to do so risks encouraging the volume of frivolous litigation filed by inmates. The Administrative Office of the United States Court reported that from October 1, 2009, through September 30, 2010, there were a total of 51,901 civil cases filed by prisoners, of which 48,581, or almost 94%, were *pro se*. (*See* Judicial Business of the United States Courts, Annual Report of the Director, 2010, Table S-23, available at www.uscourts.gov.) Compare that with the 282,895 total civil cases filed during the same period, of which 72,900, or almost 26%, were *pro se*. (*Id.*) While we encourage our clients to reasonably evaluate claims alleged against them, we also encourage that they consider the long-term view; sometimes settlement of one claim can have negative repercussions far beyond the facts and parties involved in that one claim. The prison population in particular is an unending supply of litigation, something that our correctional clients, and in fact, any governmental entity, should consider in evaluating claims alleged against them.

THE EFFECTS OF EEOC'S FINAL REGULATIONS FOR AMERICAN WITH DISABILITY ACT AMENDMENTS ACT OF 2008

By Cindy A. Townsend

On March 24, 2011, the Equal Employment Opportunity Commission ("EEOC") published its final regulations for the American with Disability Act Amendments Act of 2008 ("ADAAA"). The EEOC enumerated nine "rules of construction" to apply when determining whether an impairment substantially limits an individual in a major life activity. These rules of construction are:

(1) The term "substantially limits" shall be construed broadly in favor of expansive coverage, to the maximum extent permitted by the terms of the ADA. "Substantially limits" is not meant to be a demanding standard.

(2) An impairment is a disability within the meaning of this section if it substantially limits the ability of an individual to perform a major life activity as compared to most people in the general population. An impairment need not prevent, or significantly or severely restrict, the individual from performing a major life activity in order to be considered substantially limiting. Nonetheless, not every impairment will constitute a disability within the meaning of this section.

(3) The primary object of attention in cases brought under the ADA should be whether covered entities have complied with their obligations and whether discrimination has occurred, not whether an individual's impairment substantially limits a major life activity. Accordingly, the threshold issue of whether an impairment "substantially limits" a major life activity should not demand extensive analysis.

(4) The determination of whether an impairment substantially limits a major life activity requires an individualized assessment. However, in making this assessment, the term "substantially limits" shall be interpreted and applied to require a degree of functional limitation that is lower than the standard for "substantially limits" applied prior to the ADAAA.

(5) The comparison of an individual's performance of a major life activity to the performance of the same major life activity by most people in the general population usually will not require scientific, medical, or statistical analysis. Nothing in this paragraph is intended, however, to prohibit the presentation of scientific, medical, or statistical evidence to make such a comparison where appropriate.

(6) The determination of whether an impairment substantially limits a major life activity shall be made without regard to the ameliorative effects of mitigating measures. However, the ameliorative effects of ordinary eyeglasses or contact lenses shall be considered in determining whether an impairment substantially limits a major life activity.

(7) An impairment that is episodic or in remission is a disability if it would substantially limit a major life activity when active.

(8) An impairment that substantially limits one major life activity need not substantially limit other major life activities in order to be considered a substantially limiting impairment.

> (9) The six-month "transitory" part of "transitory and minor" exception to "regarded as" coverage does not apply to the definition of "disability" under the first prong ("actual disability") or second prong ("record of" a disability). The effects of an impairment lasting or expected to last fewer than six months can be substantially limiting within the meaning of this section.

The ADAAA and the final regulations specifically state that an impairment that is episodic or in remission meets the definition of disability if it would substantially limit a major life activity when active. This means that chronic impairments with symptoms or effects that are episodic rather than present all the time can be a disability even if the symptoms or effects would only substantially limit a major life activity when the impairment is active. The Appendix provides examples of impairments that may be episodic, including epilepsy, hypertension, asthma, diabetes, major depressive disorder, bipolar disorder, and schizophrenia. An impairment such as cancer that is in remission but that may possibly return in a substantially limiting form will also be a disability under the ADAAA and the final regulations.

Mitigating measures eliminate or reduce the symptoms or impact of an impairment. The ADAAA and the final regulations provide a non-exhaustive list of examples of mitigating measures. They include medication, medical equipment and devices, prosthetic limbs, low vision devices (e.g., devices that magnify a visual image), hearing aids, mobility devices, oxygen therapy equipment, use of assistive technology, reasonable accommodations, and learned behavioral or adaptive neurological modifications. In addition, the final regulations add psychotherapy, behavioral therapy, and physical therapy to the ADAAA's list of examples.

The ADAAA and the final regulations direct that the positive (or ameliorative) effects from an individual's use of one or more mitigating measures be ignored in determining if an impairment substantially limits a major life activity. In other words, if a mitigating measure eliminates or reduces the symptoms or impact of an impairment, that fact cannot be used in determining if a person meets the definition of disability. Instead, the determination of disability must focus on whether the individual would be substantially limited in performing a major life activity without the mitigating measure. This may mean focusing on the extent of limitations prior to use of a mitigating measure or on what would happen if the individual ceased using a mitigating measure.

Conversely, the ADAAA does allow for consideration of the negative effects of a mitigating measure in determining if a disability exists. For example, the side effects that an individual experiences from use of medication for hypertension may be considered in determining whether the individual is substantially limited in a major life activity. However, it will often be unnecessary to consider the non-ameliorative effects of mitigating measures in order to determine whether an individual has a disability. For example, it is unnecessary to consider the burdens associated with receiving dialysis treatment for someone whose kidney function would be substantially limited without this treatment.

The ADAAA's prohibition on assessing the positive effects of mitigating measures applies only to the determination of whether an individual meets the definition of "disability." All other determinations – including the need for a reasonable accommodation and whether an

individual poses a direct threat – can take into account both the positive and negative effects of a mitigating measure. The negative effects of mitigating measures may include side effects or burdens that using a mitigating measure might impose. For example, someone with diabetes may need breaks to take insulin and monitor blood sugar levels, and someone with kidney disease may need a modified work schedule to receive dialysis treatments. On the other hand, if an individual with a disability uses a mitigating measure that results in no negative effects and eliminates the need for a reasonable accommodation, a covered entity will have no obligation to provide one.

The ADA Amendments Act is effective as of January 1, 2009. However, the ADAAA does not apply retroactively. For example, the ADAAA would not apply to a situation in which an employer, union, or employment agency allegedly failed to hire, terminated, or denied a reasonable accommodation to someone with a disability in December 2008, even if the person did not file a charge with the EEOC until after January 1, 2009. The original ADA definition of disability would be applied to such a charge. However, the ADAAA would apply to denials of reasonable accommodation where a request was made (or an earlier request was renewed) or to other alleged discriminatory acts that occurred on or after January 1, 2009.

The EEOC's regulations to implement the equal employment provisions of the ADA Amendments Act are effective as of March 25, 2011.

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OVERTIME LAW: THE KEY IS EMPLOYER KNOWLEDGE

By Michael H. Bowling

West v. Verison Services Corp., 22 Fla. L. Weekly Fed. D577(N.D. Fla. Tampa Division, Case No. 8:088-CV-1325-T-33MAP, January 21, 2011).

The *West* decision addresses issues frequently at the core of overtime cases. The Court recited the long standing rule that a non-exempt plaintiff must prove that she: (1) worked overtime hours without compensation; and (2) her employer knew or should have known of the overtime work. It has been my experience that many employers are under the mistaken impression that as long as they do not *require* their employee to work overtime they have no obligation to pay overtime. That is not the law. A person is entitled to overtime pay if he or she is "suffered or permitted" to work more than 40 hours per week. It is not relevant that the employer did not ask the employee to do the work. The reason the employee performed the work is also not relevant. The question is to whether the employer knows, or has reason to believe, that the employee was working overtime.

Further, the employer may not rely on the employee's report of the hours he or she worked, if the employer had an opportunity to acquire knowledge of the employee's work by using reasonable diligence. In other words, simply because an employee fills out a time sheet indicating that he or she has not worked overtime, where the employee could reasonably have learned of the actual hours worked by the employee, then the employer is charged with knowledge of any overtime worked.

In a period of staffing cuts, it is very difficult for a supervisor to tell an employee who is working past his or her schedule to stop and go home. These employees tend to want to work to complete the task assigned to them and most understand that they will not be compensated. However, this is not a defense under the Fair Labor Standards Act.

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2011 CLAIMS BILLS

By Kathryn A. Johnson

At the end of the 2011 legislative session, three claim bills were presented to Governor Rick Scott for his signature. Relief of Angela Isham by the City of Fort Lauderdale (CS/SB 34/HB 185) arose from the death of David Isham in a motor vehicle crash that occurred during a police pursuit. Mr. Isham was driving in Ft. Lauderdale when he was struck by a suspect who was being pursued by undercover, narcotic surveillance officers driving an unmarked police vehicle.

A lawsuit was filed in 2003 in Broward County by Angela Isham on behalf of herself and the estate of David Isham. Prior to trial, the parties stipulated that the economic damages were $1,270,438.50. In February 2008 after a five day trial, the jury found that the City and the suspect driver (who the police were originally chasing) were each fifty percent liable for Mr. Isham's death.

The jury awarded damages in the amount of $600,000 for Angela Isham's loss of her husband's companionship and for pain and suffering. Based upon the division of damages under the version of §768.81, *Florida Statutes*, the City's liability was $1,435,219.25. The City previously contested liability and objected to any payment to the Claimant through a claim bill in 2009. The City paid the Claimant the sovereign immunity limit of $200,000 leaving $1,235,219.25, which was the amount sought through the claim bill. The parties reached a settlement agreement where the City agreed to pay $600,000 to the Claimant. After the entry of this settlement agreement, the City withdrew its objection to the passage of the claim bill. On June 2, 2011, the Governor signed into law the Relief of Angela Isham by the City of Fort Lauderdale (CS/SB 34/HB 185) after the withdrawal of the objection of the City. This claim bill was introduced by Senator Charlie Dean and Representative Debbie Mayfield.

Governor Scott signed the two other claim bills into law on June 21, 2011. The Relief of Laron S. Harris, Jr, Melinda (Williams) Harris and Laron S. Harris, Sr. by North Broward Hospital District (SB 16/HB 609) arose from a catastrophic brain injury in utero due to an unreasonable delay in diagnosing his mother's placental abruption. A lawsuit was brought in 2004 in the Circuit Court in and for Broward County, Florida.

The case proceeded to trial in 2009. After jury selection and opening statements, the parties agreed to attend mediation, where North Broward Hospital District agreed to the entry of a Consent Judgment in the Plaintiffs' favor in the sum of $2,200,000. North Broward Hospital District agreed to pay and has paid $200,000 and agreed to take no action that might prevent the passage of a claim bill for the remaining $2,000.000.

Now that the claim bill has been enacted, North Broward Hospital District must pay the remaining $2,000,000 to Laron S. Harris, Jr., by and through his parents Melinda Williams and Laron s. Harris, Sr., and to Melinda Williams and Laron S. Harris, Sr., individually, as compensation for injuries and damages sustained. Senator Jeremy Ring and Representative Marti Coley introduced this claim bill.

Lastly, the Relief of Estate of Cesar Solomon by Jacksonville Transportation Authority (SB 22/HB 629) arose from the negligent operation of a city bus that caused the death of Cesar Solomon. Mr. Solomon was a traffic signal repairman employed by the City of Jacksonville who was struck and killed by a City of Jacksonville employee who was driving a bus owned by the Jacksonville Transportation Authority.

A lawsuit was brought in 2008 in Duval County against the Jacksonville Transportation Authority, and in June 2010 the estate of Mr. Solomon and the Jacksonville Transportation Authority entered into a Stipulated Final Judgment in the amount of $1,250,000. The Jacksonville Transportation Authority paid $200,000 against the judgment and further agreed to remain neutral with respect to the passage of a claim bill. Now that the bill has been enacted, the Jacksonville Transportation Authority will pay $350,000 annually for three years for a total of $1,250,000. Senator Anthony C. Hill, Sr., and Representative Charles McBurney sponsored this claim bill.

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