PUBLIC EMPLOYMENT

Public Employment: Benefits

***Simcox v. City of Hollywood Police Officers' Retirement System*,**
988 So. 2d 731 (Fla. 4th Dist. App. 2008)

A police officer who uses techniques or skills acquired from his law enforcement training to commit a felony forfeits any retirement benefits pursuant to Florida Statutes Section 112.3173(2)(e)(6).

FACTS AND PROCEDURAL HISTORY

Thomas Simcox (Simcox), a Hollywood police officer, was arrested by the FBI in a sting operation. Simcox resigned from the force and admitted to his involvement in a drug-trafficking scheme. According to Simcox, his co-conspirators paid him to act as an escort for a truck driver trafficking heroin. Importantly, he confessed to using the counter-surveillance techniques and training he learned as a police officer to ensure that the illegal substance was delivered safely. He pled guilty to a felony offense of conspiracy to possess heroin with the intent to distribute, and the district court sentenced him to 135 months of incarceration.

Following his conviction, the Board of Trustees of the City's Retirement System (Board) held a hearing and determined that Simcox's federal conviction qualified as a "specified offense" under Florida Statutes Section 112.3173(2)(e)(6) because his illegal actions to obtain a profit were related to his position as a police officer. Accordingly, under the Statute, Simcox's conviction required him to forfeit his retirement benefits.

On appeal, Simcox contended that the Board's determination was unsupported by substantial competent evidence because his conduct as a drug escort lacked the requisite nexus to his powers, rights, privileges, duties, or position as a police officer. Alternatively, Simcox argued that his participation in the Deferred Retirement Option Program (DROP) meant that he had effectively retired before his conviction. Thus, Simcox argued that Section 112.3173 was inapplicable because the Statute required forfeiture

of his benefits only if the specified offense was committed before retirement.

ANALYSIS

The Fourth District Court of Appeal agreed with the Board, determining that there was a sufficient nexus between Simcox's crime and his duties as a police officer because he "obtained his monetary advantage through the use or attempted use of his privileges, experience, and duties, which were all a part of his position as a police officer." *Simcox*, 988 So. 2d at 734. The court focused on Simcox's statements during his plea colloquy, in which he confessed that his co-conspirators hired him to utilize the expertise that he acquired as a police officer to further their trafficking scheme. Simcox used the counter-surveillance techniques and police methods acquired by and entrusted to him to enforce the law instead to help his co-conspirators evade the law. Therefore, Simcox's actions as a drug escort were related to his position as a police officer, and the Board properly applied Section 112.3173.

Moreover, the court concluded that Simcox's participation in DROP, which allowed him to accumulate retirement benefits while continuing to work, did not allow him to escape the reach of Section 112.3173. While the Statute is intended to apply only to acts committed prior to retirement, the court concluded that "retirement," within the meaning of the Statute, does not occur until the employee ceases to work. Although Simcox was technically retired for purposes of DROP, he was still employed by the City when he committed the felony—the crime was committed prior to, not after, his retirement. Consequently, the court upheld the Board's determination that Simcox's crime forfeited his retirement benefits.

SIGNIFICANCE

In reaching its conclusion, the *Simcox* court relied heavily on Simcox's concessions to using police methods to commit the felony and the Board's conclusions that Simcox's co-conspirators chose him because of his background as a police officer. However, even absent such admissions, it is difficult to envision a crime in which a police officer would not be using the skills and techniques learned from his position; presumably, a corrupt police officer will always use his expertise while committing a crime. Therefore, it

seems the details or nature of the crime, not necessarily the corrupt police officer's admissions, are dispositive under the Statute.

RESEARCH REFERENCES

- 60A Am. Jur. 2d *Pensions* § 1195 (2001 & Supp. 2008).
- H.C. Lind, *Misconduct as Affecting Right to Pension or Retention of Position in Retirement System*, 76 A.L.R.2d 566 (1961 & Supp. 2008).

Scott Feather

Public Employment: Collective Bargaining

***City of Coral Gables v. Coral Gables Walter F. Stathers Memorial Lodge 7, Fraternal Order of Police*,**
976 So. 2d 57 (Fla. 3d Dist. App. 2008)

In order to succeed on a claim that a public employer violated Florida Statutes Section 447.501(1)(a) by interfering with, restraining, or coercing public employees from exercising their rights under the Florida Public Employees Relations Act (Act), employees must prove the exercise of the statutorily protected conduct motivated the employer to take the action against them.

FACTS AND PROCEDURAL HISTORY

The City of Coral Gables (City) and the Police Officers' Union (Union) negotiated a collective-bargaining agreement (Agreement), which provided that the police officers would contribute five percent of their gross pay toward the City's retirement plan. The Agreement also provided for a re-opener to occur ninety days after ratification of the Agreement in order to negotiate a change for the cost-of-living provision of the retirement plan. However, at the re-opener, the City refused to renegotiate the cost-of-living provision due to budget constraints and increasing pension costs. The Union filed a grievance based on the City's failure to renegotiate the cost-of-living provision. The City offered to return the police officers' contributions and halt further reductions to avoid arbitration on the grievance. The Union accepted the City's offer (Settlement Agreement).

The City Manager David Brown (Brown) and Union President Eugene Gibbons (Gibbons) met to exchange the reimbursement checks as provided for in the Settlement Agreement. At the meeting, Brown did not bring the checks and told Gibbons that the Union did not understand the consequences of its actions. Brown explained that the City Commission was extremely upset and that if the Union took the checks back, the police officers would probably not receive raises for the next three years because the City Commission would want to recoup the money. Gibbons maintained Brown's statements were definite and that these actions would be taken. Conversely, Brown maintained he simply conveyed what might happen if the Union took back the checks. In response, Gibbons demanded the checks. The City produced the checks four days later. The Union subsequently brought an unfair-labor-practice charge, alleging that the City, through Brown's statements, violated Sections 447.501(1)(a), (c), and (d) of the Act by threatening not to raise wages or some other retaliatory action if the Union accepted the reimbursement checks as it was entitled to do under the Settlement Agreement.

After an administrative hearing, the hearing officer found the City had violated Section 447.501(1)(a) because Brown had threatened the Union's bargaining agent, but the officer concluded Brown's statements were motivated by the City's disagreement with the Union over the terms of the Agreement and the ramifications stemming from that disagreement rather than the Union's protected activity of filing the grievance. The City then filed three exceptions with the Public Employees Relations Commission (Commission), arguing that they had not coerced the Union, that the statements were not motivated by protective conduct, and that the only right interfered with was contractual and not statutorily protected. The Commission rejected all three of the City's contentions and concluded in its final order that the City had violated Section 447.501(1)(a) because Brown's statements made the Union reasonably believe further participation in the protected activity of filing grievances might result in retaliatory action by the City. The Third District Court of Appeal reversed the Commission's order, finding the Commission misapplied the law and misconstrued the hearing officer's findings.

ANALYSIS

A public employer may not interfere with, restrain, or coerce public employees from exercising their rights. Fla. Stat. § 447.501(1)(a) (2006). The First District created a two-pronged test for an employee to establish an unfair labor practice claim against an employer under Section 447.501(1), *Pasco County School Board v. Florida Public Employees Relations Commission*, 353 So. 2d 108, 117 (Fla. 1st Dist. App. 1978); then reaffirmed the test in *School Board of Lee County v. Lee County School Board Employees, Local 780, AFSCME*, 512 So. 2d 238, 240–241 (Fla. 1st Dist. App. 1987). The test requires the employees to prove their conduct was protected and the protected conduct "was a substantial or motivating factor in the action taken by the employer." *Lee Co.*, 512 So. 2d at 241. After the *Lee County* decision, the Commission continued to apply a different standard for the second prong of this test in cases of threats or coercive action by employers. Instead, the Commission's standard focused on the foreseeable effect of the statements or actions to make the employees reasonably believe that further participation in protected conduct would result in adverse action by the employer.

The Commission applied the foreseeable-effect/reasonable-belief standard to the City's conduct and determined the Union reasonably believed further pursuit of grievances might result in adverse action by the City. The Third District first determined that it would not give the Commission's decision the usual deference afforded to an administrative agency's decision because the Commission erroneously applied the law and the findings of fact were not supported by competent and substantial evidence. The court then turned to the reasonable-belief standard applied by the Commission. The court determined this was the incorrect standard and that the Commission should have applied the *Lee County* test to determine if the Union's protected conduct "was a substantial or motivating factor" for Brown's statements.

The Union asserted the court did not need to adhere to the First District test and should instead follow the decision by the Commission which distinguished *Lee County* and used the foreseeable-effect/reasonable-belief standard. *Id.* at 65 (citing *Prof. Fire Fighters of Orlando v. City of Orlando*, 13 Fla. Pub. Employee Rptr. ¶ 18218 (Fla. Pub. Employees Rel. Commn. 1987)). To support its position, the Union argued the Commission had a

unique and special expertise in labor issues. The Third District rejected these arguments, noting that the Commission is not permitted to disregard court interpretations of a statute. The court explained that the Commission improperly departed from *Lee County*, declined to give any deference to the Commission's *City of Orlando* interpretation, holding that the Commission misapplied the law.

The Third District further held that remand was unnecessary because the Commission's finding that Brown's threats were motivated by the Union filing a grievance was unsupported by the record given the hearing officer's determination that other factors motivated Brown. The Third District therefore concluded that Brown was motivated by factors other than the Union's exercise of its protected right to file grievances and reversed the Commission's order.

SIGNIFICANCE

Coral Gables reaffirms that the *Pasco County* and *Lee County* two-pronged test must be used to establish an unfair labor practice charge under Section 447.501(1)(a). It also specifically rejects the Commission's foreseeable effect/reasonable belief test and mandates that the Commission use the substantial or motivating factor standard and follow the statutory interpretations and tests established by the district courts of appeal. Thus, in order to set out a prima facie case of unfair labor practices for a threatening or coercive action by the employer under Section 447.501(1)(a), employees must prove that they engaged in protected conduct and the protected conduct was a substantial or motivating factor for the threat or coercive action.

RESEARCH REFERENCE

- 34 Fla. Jur. 2d *Labor and Labor Relations* § 174 (2007).

Kristin M. Tolbert

Public Employment: Forfeiture of Retirement Benefits

***Childers v. State*,**
989 So. 2d 716 (Fla. 4th Dist. App. 2008)

Under the forfeiture statute, Florida Statutes Section 112.3173, an employee convicted of a felony involving a breach of public trust forfeits his or her state retirement benefits. Forfeiture of retirement benefits is not a fine for purposes of the Excessive Fines Clause because the government is not receiving any payment. Agency action to enforce benefits forfeiture is a civil action and does not violate the double jeopardy clause. Because the forfeiture statute was enacted prior to the commission of the crime initiating the agency action, the forfeiture does not implicate the ex post facto law prohibition.

FACTS AND PROCEDURAL HISTORY

This appeal arose out of a final agency order by the Department of Management Services, Division of Retirement (DMS) ordering W.D. Childers (Childers) to forfeit his full pension pursuant to Florida Statutes Section 112.3173. Childers made retirement contributions for over thirty years in his capacity as a school teacher, state legislator, and county commissioner. A jury convicted Childers of bribery and unlawful compensation or reward for official behavior during his time as a county commissioner. The DMS ruled that Childers' conviction resulted in the forfeiture of his full retirement. Childers appealed to the Fourth District Court of Appeal.

ANALYSIS

The Fourth District first addressed whether the forfeiture of retirement benefits violated the Excessive Fines Clause, noting that the clause only limits fines paid to the government. It explained that the DMS did not order Childers to pay anything. The order "merely relieves the State of its duty to pay retirement benefits." *Childers*, 989 So. 2d at 719. The court characterized the order as an action to enforce the terms of the pension, which included a condition precedent requiring the employee to avoid committing particular offenses.

Next, the court held that the forfeiture of Childers' pension was a civil action that did not trigger the constitutional protection against double jeopardy. In determining whether the forfeiture was civil or criminal, the court considered several issues. Initially, it considered whether the forfeiture statute imposed an affirmative disability or restraint, noting that Florida courts typically hold that statutes requiring forfeiture of government benefits do not impose a punishment but simply enforce the original contract. The court recognized that while deterrence is an effect of the forfeiture statute, the statute's primary purpose is to protect and maintain the public trust.

Finally, the Fourth District held that the forfeiture statute does not violate the constitutional prohibition against ex post facto laws. The relevant date for an ex post facto analysis is the date the crime was committed, not the date Childers began contributing to the pension system nor the date his pension vested. Florida Statutes Section 112.3173 became law before Childers committed the crimes leading to the forfeiture of his pension, and therefore, the Statute does not implicate the ex post facto prohibition.

Because the forfeiture statute does not violate the Excessive Fines Clause, double jeopardy, or the ex post facto laws prohibition, the Fourth District affirmed the agency order forfeiting Childers' benefits.

SIGNIFICANCE

Childers places the forfeiture of retirement benefits provided by the government in the realm of contract law, which has far fewer due process implications than a government entitlement program. *Childers* further reinforces the strong policy of preventing officials from receiving retirement benefits after breaching the public trust while holding public office.

RESEARCH REFERENCES

- 39 Fla. Jur. 2d *Penalties & Forfeitures* §§ 20, 21 (2005 & Supp. 2009).
- 10A Fla. Jur 2d *Constitutional Law* § 398 (2009).

Ashley M. Elmore Drew

Public Employment: Retaliation

***Donovan v. Broward County Board of Commissioners*,**
974 So. 2d 458 (Fla. 4th Dist. App. 2008)

An employer violates the anti-retaliation provision of the Florida Civil Rights Act (FCRA) if it denies an employee the right to utilize its internal-review procedures because the employee also exercised his or her right to file complaints with other administrative agencies.

FACTS AND PROCEDURAL HISTORY

Richard Donovan (Donovan), a white bus driver, filed a complaint with the Office of Equal Opportunity (OEO) of Broward County (County), claiming the County wrongfully promoted a less-qualified African American instead of Donovan. According to the County's published policy, the filing of the complaint entitled Donovan to internal procedural processes, such as an investigation, internal mediation, and follow-up management action. However, upon learning that Donovan had filed similar complaints with the State Equal Employment Opportunity Commission (EEOC) and Florida Commission on Human Relations (FCHR), the County OEO refused to allow Donovan to utilize its internal-grievance procedures. Donovan argued the County's denial of these procedures amounted to a retaliation, prohibited under the FCRA.

The trial court disagreed, finding that the denial of internal procedures did not amount to retaliation within the meaning of the FCRA's anti-retaliation provision. The trial court relied on federal case law, which focused on the nature of the challenged policy rather than the policy's impact on Donovan or other similarly situated employees. Moreover, the trial court concluded that the County's policy required Donovan to file his complaint with County OEO before filing a complaint with the EEOC and the FCHR, and the County denied access to its internal procedures only when an employee simultaneously filed complaints with multiple administrative agencies. Donovan appealed the dismissal of his retaliation claim to the Fourth District Court of Appeal.

ANALYSIS

The Fourth District reversed the trial court's dismissal because the trial court's holding was based on an improperly limited interpretation of "retaliation." Because the FCRA anti-retaliation provision is identical to its federal counterpart, Title VII 42 U.S.C. § 2000e-3(a), the court reiterated that Florida courts adhere to the EEOC's interpretation of the federal retaliation provision. A prima facie claim under Title VII requires that an employee: (1) engage in an activity protected under the statute; (2) suffer an adverse employment action; and (3) show a causal link between the protected activity and the adverse employment action. While the EEOC interpreted the denial of an internal-grievance procedure to be a retaliation that constituted an adverse employment action, the Fourth District noted that some federal courts have failed to follow the EEOC's interpretation. However, in *Burlington Northern & Santa Fe Railway Co. v. White*, the Supreme Court of the United States resolved this apparent conflict and broadened the definition of a retaliation claim within the meaning of "adverse employment action" to include any employment action that impacted an employee adversely rather than just actions that adversely changed an employee's terms and conditions of employment. 548 U.S. 53, 63 (2006). Accordingly, the Fourth District Court of Appeals determined that, in light of the Supreme Court's interpretation of the meaning of an "adverse employment action," the trial court should have focused on the impact of the County's policy on Donovan rather than on the nature of the policy itself.

The underlying purpose of the County's policy—administrative efficiency and economy—might have been reasonable because it prevented a doubling of administrative procedural efforts at the state and federal level, but it still impacted Donovan adversely. For example, while the policy required sequential filing of the OEO complaint before the Title VII or the FCRA claim to allow Donovan to avail himself of the internal procedures, such a requirement might cause the latter claim to be barred by the statute of limitations. The court noted that mandating this decision would force employees "to choose between filing a charge and losing access to internal dispute resolution mechanisms or continuing their pursuit of an internal remedy and risk losing the right to bring a formal charge if those efforts fail." *Donovan*, 974 So. 2d at

461. Therefore, the policy requiring sequential filing of the complaint with the County OEO before other formal charges violated the FCRA's anti-retaliation provision because the policy denied Donovan and other similarly situated employees the opportunity to pursue the local review process, which was often less strenuous than a formal litigation process.

SIGNIFICANCE

Donovan confirms that retaliation encompasses classic instances where an employee is terminated or his wages reduced after bringing a claim, as well as policies that adversely and unintentionally impact an employee's decision with respect to filing a claim. More specifically, employees cannot be forced to choose between receiving internal-review procedures and pursuing alternate avenues to effectuate a change in his or her employer's promotional practices.

RESEARCH REFERENCES

- 45A Am. Jur. 2d *Job Discrimination* § 240 (2002 & Supp. 2008).
- 14A C.J.S. *Civil Rights* § 246 (2006 & Supp. 2008).

Scott Feather

Public Employment: Statute of Limitations

***Fox v. City of Pompano Beach*,**
984 So. 2d 664 (Fla. 4th Dist. App. 2008)

The question of whether the statute of limitations under Florida's Public Sector Whistleblower Act begins to run at the time the employer takes action against the employee or when the employee's appeal before an employment board is disposed creates a genuine issue of material fact that should be determined by a factfinder, not on a motion for summary judgment.

FACTS AND PROCEDURAL HISTORY

Christopher Fox (Fox) worked for the City of Pompano Beach (City) as a supervisor at a water-treatment plant. In August of 2002, while working for the City, Fox contacted the Florida De-

partment of Health to report the City's plan to use recycled water in a manner that Fox believed to be illegal. A month later, Fox was demoted. In response to his demotion, Fox sent a letter to the City Commissioner outlining the conditions of the alleged illegal plan. Fox was then fired effective November 12, 2002.

After his termination, Fox appealed to the City's Employees' Board of Appeals (Board). While his appeal was pending, Fox inquired whether the City had an administrative procedure for handling whistleblower complaints under Florida's Public Sector Whistleblower's Act (Act). The Act provides employees with a cause of action against public-sector employers who have taken adverse personnel action against an employee for disclosing certain types of information. The Act contains a 180-day statute of limitations, which begins to run after the employer's adverse action. The City took more than three months to answer Fox's inquiry, responding that it did not have an administrative procedure, and that Fox's termination would be considered final if and when he withdrew his appeal from the Board. On March 23, 2003, Fox withdrew his appeal.

On June 12, 2003, Fox filed a whistleblower's claim in the circuit court. The City moved for summary judgment on the basis that the 180-day statute of limitations had tolled and Fox countered with an equitable estoppel claim. The trial court granted the City's motion, finding that the adverse personnel action was taken when Fox was terminated on November 12, 2002, and therefore the 180-day limitation expired on March 11, 2003, before Fox filed his action in circuit court.

Fox appealed to the First District Court of Appeal, arguing that the adverse personnel action by the City occurred upon withdrawal of his claim before the Board and that there was an equitable estoppel claim based on Fox's detrimental reliance on the City's letter, which Fox interpreted as meaning his termination was not final as long as his appeal was before the Board.

ANALYSIS

On appeal, the First District held that there was a genuine issue of material fact as to when the adverse action against Fox was actually taken; however, there was no claim for equitable estoppel.

In analyzing the statute of limitations claim, the court adhered to the summary judgment standard, explaining that there was an issue of fact as to which date—June 12, 2003 when the City terminated Fox or March 25, 2003, when Fox withdrew his appeal from the Board. Thus, the trier of fact, not a summary judgment motion, should make the determination. The court noted that Fox was "entitled to argue to the fact-finder that . . . he suffered an adverse personnel action . . . when he withdrew his direct appeal from the [Board] in reliance upon the City's advisement that the withdrawal of his appeal would render his termination 'final.'" *Fox*, 984 So. 2d at 667. The court explained that if the City intended to maintain that Fox's termination date was the date of the allegedly adverse personnel decision, it would be a question of material fact to be found by a jury, rather than on a motion for summary judgment. Further, the court reversed the trial court's dismissal of Fox's claim that the City's letter of March 20, 2003 amounted to a waiver of its statute of limitations defense.

As to the equitable estoppel claim, the court found that Fox may have detrimentally relied on the City's letter, which suggested that Fox's termination was not final while his appeal was pending in front of the Board. However, the court held there was no equitable estoppel claim because there was no evidence of the City's intent to mislead Fox regarding the time in which he could file his claim. Finally, the court noted that under the Act plaintiffs are entitled to jury trials to the extent that plaintiffs request appropriate relief under the Act. Because Fox sought remunerative relief under the Act, the court concluded that he was entitled to a jury trial.

SIGNIFICANCE

Fox holds that under Florida's Public Sector Whistleblower Act's 180-day statute of limitations, a dispute as to when an adverse personnel action is taken while an appeal is pending before an employment board creates an issue of material fact for a jury to determine and should not be decided on a motion for summary judgment.

RESEARCH REFERENCES

- 9 Fla. Jur. 2d *Civil Servants and Other Public Officers and Employees* § 175 (2004 & Supp. 2009).
- Fla. Stat. § 112.3187 (2008).

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