PUBLIC EMPLOYMENT

Public Employment: Discharge

***Cropsey v. School Board of Manatee County*,**
19 So. 3d 351 (Fla. 2d Dist. App. 2009)

In order to terminate a government employee for refusal to answer questions relating to her duties, it must be clear to the employee that the questions are asked under threat of dismissal, and she therefore has qualified immunity from the statements being used against her in subsequent criminal proceedings.

FACTS AND PROCEDURAL HISTORY

Cropsey was a teacher in her first full year of employment with the Mills Elementary School (School). Approximately halfway through the year, the School principal decided not to retain Cropsey for the subsequent year, nor to recommend her for reappointment within the school system. Cropsey believed she was being discriminated against and met with a school board administrator to complain formally. Near the end of the next school day, Cropsey received a letter regarding violations of FCAT (Florida Comprehensive Assessment Test) procedures. The letter requested her presence the following afternoon to discuss the matter. The letter concluded with the following statement: "You may bring representation if you would like." Ltr. from Michael F. Rio, Principal, Mills Elementary School, to Mrs. Cropsey, Teacher, Mills Elementary School, *FCAT procedural violations* (March 8, 2007).

While evidence would later indicate the timing was coincidental, Cropsey was suspicious and met with an attorney that afternoon. Cropsey's attorney knew the School Board attorney and called him to clarify the letter. He was told that the statement referred to her ability to bring union representation, not an attorney. Her attorney did not want Cropsey to give a statement under those circumstances because misconduct while administering the FCAT could constitute a misdemeanor. The School Board attorney asked Cropsey's attorney for a letter stating that Cropsey declined the interview. The School Board attorney believed such a

letter was grounds for termination but did not share this belief with Cropsey's attorney. The School Board attorney believed that Cropsey had no choice but to appear for the interview without her attorney.

The School Superintendent then sent Cropsey a letter stating his intent to recommend she be terminated and that she had a right to contest this decision at an administrative hearing. During the hearing, which Cropsey attended, the School Board found that while the FCAT misconduct was not proven, Cropsey should be terminated for following the advice of her attorney and declining to appear at the interview. The Second District Court of Appeal reversed and remanded the decision for a calculation of the back pay due based on the duration of her contract.

ANALYSIS

The court focused on "whether it was 'gross insubordination,' 'willful neglect' of a duty, or any of the other violations relied upon by the School Board, for Ms. Cropsey to follow the advice of her attorney and decline to attend this meeting after her attorney had discussed the matter with the School Board's attorney." *Cropsey*, 19 So. 3d at 354.

Caselaw provides that a government employee answering questions put forth by her employer, who has threatened the employee with dismissal for a failure to answer, receives immunity from the use of the statements in subsequent criminal proceedings. This immunity exists to prevent the government from obtaining incriminating evidence from the employee by threatening discharge. But because this automatic immunity exists, the employee may be disciplined or terminated for refusing to answer questions related to the performance of her duties.

After highlighting the history of the law, the court noted the shortcomings in the arguments made by the School Board. First, Cropsey was not given formal notification of first-degree misdemeanor allegations and was not ordered to appear to answer questions under oath. Instead, the letter mentioned violations of FCAT procedures by an unspecified person at an unspecified time, failing to identify her as the target of any investigation. Second, Cropsey was not instructed to attend an investigatory interview under a threat of discharge, rather her "presence" was "requested." Finally, the court found it reasonable for Cropsey's

attorney to instruct her not to appear because he could not appear with her, and found it reasonable for her to follow his advice. He had only a short amount of time to meet and consult with her and had only a brief discussion with the School Board attorney.

In summary, the court found that Cropsey's decision to follow her attorney's advice and decline to attend a discussion with the school principal was insufficient grounds for her dismissal.

SIGNIFICANCE

Cropsey elaborates on what a government employer must do in order to dismiss an employee who refuses to answer questions during an investigation into her conduct. The case also clarifies when it is reasonable for a government employee to follow the advice of an attorney and decline to attend a meeting designed to investigate her conduct.

RESEARCH REFERENCE

- 81 Am. Jur. 2d *Witnesses* § 118 (2009).

Justin P. Miller

Public Employment: Labor Relations

***School District of Martin County v. Public Employees Relations Commission*,**
15 So. 3d 42 (Fla. 4th Dist. App. 2009)

In deciding a case arising under a prior version of a recently amended law, the court may use the legislative intent manifested in the amended version of the law to ascertain the legislative intent of the prior version of the law.

FACTS AND PROCEDURAL HISTORY

The Martin County Education Association (Teachers Association) filed an unfair labor practice charge against the School District of Martin County (School District), alleging that the School District unlawfully denied the collective bargaining rights of the members of the Teachers Association.

Under the Florida Teacher Lead Program (FTLP), teachers are allocated money to purchase materials and supplies for use in

their classrooms. Beginning in the 2001–2002 school year, teachers received this money via stipend checks issued by the School District. Because the checks could be cashed and converted to personal use, teachers could and often did purchase materials and supplies before receiving their checks at a time when the materials and supplies were for sale at discounted prices, and they would later use the checks as reimbursement. The School District changed its policy just prior to the 2007–2008 school year, choosing instead to distribute FTLP funds via pre-paid debit cards. The pre-paid debit cards were not convertible to cash and, as a result, teachers who purchased materials and supplies in preparation for the 2007–2008 school year were not reimbursed.

The Teachers Association filed suit with the Public Employees Relations Commission (Commission), arguing that the School District's decision to switch from stipend checks to pre-paid debit cards amounted to a change in terms and conditions of employment and, as a result, the Teachers Association had a collective bargaining right in arriving at that decision. By unilaterally making this decision, the School District denied that right. The School District countered, arguing that the decision was a managerial prerogative in which the Teachers Association had no collective bargaining right. The Commission ultimately held that the School District's actions were unlawful. The School District appealed the Commission's holding to the Fourth District Court of Appeal.

Subsequent to the Commission's decision, Florida Statutes Section 1012.71 (2008), authorizing the distribution of FTLP funds, was amended to state that the school board may distribute funds by any means determined appropriate, including debit cards. "Funds received by a classroom teacher do not affect . . . terms and conditions of employment and, therefore, are not subject to collective bargaining." *Sch. Dist. Martin Co.*, 15 So. 3d at 44 (quoting Fla. Stat. § 1012.71) (emphasis removed). This amendment was retroactive to July 1, 2007. The Fourth District reversed the Commission, holding that the School District's action did not constitute a change in terms and conditions of employment and, therefore, was not subject to collective bargaining.

ANALYSIS

Article 1, Section 6 of the Florida Constitution affords public employees the right, "by and through a labor organization, to bar-

gain collectively." Section 447.309(1) of the Florida Statutes states that the "bargaining agent for the organization . . . shall bargain collectively in the determination of the . . . terms and conditions of employment of the public employees within the bargaining unit." But, if the action taken by the public employer either does not affect a term or condition of employment or is a managerial prerogative, then public employees have no right to bargain collectively. *Fraternal Or. of Police, Miami Lodge 20 v. City of Miami*, 609 So. 2d 31, 33 (Fla. 1992). The Fourth District reasoned that it is the province of the legislature to determine whether a particular practice by a public employer affects terms and conditions of employment and, as a result, must be submitted to collective bargaining. In amending Section 1012.71, the legislature clearly expressed (1) FTLP funds may be distributed by debit card, and (2) "the method of distributing FTLP funds did not affect a term or condition of employment and thus, was not a mandatory subject of collective bargaining." *Sch. Dist. Martin Co.*, 15 So. 3d at 45. Therefore, the holding of the Commission was directly contrary to the clear intent of the legislature.

The Fourth District placed particular emphasis on the fact that the legislature amended Section 1012.71 soon after the controversy arose between the School District and the Teachers Association. In deciding a case arising under a prior version of a law, the court may look toward the amended version of the law to determine what the legislature intended under the prior version of the law.

By looking at the amended version of Section 1012.71, it was clear that, under the previous version of Section 1012.71, the legislature did not intend for the method of distributing FTLP funds to affect terms and conditions of employment. Therefore, the decision to change the method of distributing FTLP funds was not one that was required to be submitted to collective bargaining.

SIGNIFICANCE

The Fourth District's holding in this case effectively enables courts to decide controversies using law that was not in place at the time the controversy arose, the consequences of which could not have been contemplated by the parties. In addition to the obvious potential for unfairness that inheres in any case where a change in the law is applied retroactively, this concept vests the

legislature with the power to influence the outcome of pending cases by promptly passing legislation that reforms and further clarifies the prior statute under which the case arose.

RESEARCH REFERENCE

- 34 Fla. Jur. 2d *Labor and Labor Relations* § 173 (2007 & Supp. 2009).

Charles E. Simpson

Public Employment: Labor Relations

***Utility Workers Union of America v. City of Lakeland*,**
8 So. 3d 436 (Fla. 2d Dist. App. 2009)

When a public employer has initiated collective bargaining negotiations with employees, the employer may not unilaterally alter employment terms where there was an established status quo, irrespective of the existence of a prior collective bargaining agreement binding the employer to such terms.

FACTS AND PROCEDURAL HISTORY

Appellants, Utility Workers Union of America and UWUA Local 604 (collectively, the Union), entered into collective bargaining negotiations with defendant, City of Lakeland (City). In the fall of each year, for almost two decades preceding the negotiations, the City increased the wages of its employees. After commencing negotiations, the City gave all of its nonunionized employees a wage increase. The Union filed suit alleging unfair trade practices after the City refused to increase the wages of the unionized employees. The General Counsel found that the parties had entered into an agreement where they established the ground rules for contract negotiations. In this agreement the parties established that they would address non-economic issues first. Accordingly, the General Counsel dismissed the Union's complaint as premature. The dismissal was upheld by the Lakeland Public Employee Relations Commission (PERC). The Union appealed to the Second District Court of Appeal.

ANALYSIS

The Union contended on appeal that the PERC was required to apply the proper "status quo analysis" but failed to do so. Under this analysis, the "status quo period" is the "gap between collective bargaining agreements, when one agreement has expired and another has not yet been executed." *Util. Workers Union of Am.*, 8 So. 3d at 437–438 (quoting *Fla. Pub. Employees Council v. State*, 921 So. 2d 676, 679 (Fla. 1st Dist. App. 2006)). During this period, it is unlawful for the employer to unilaterally alter the terms of the expired contract. The Union further contended that this rule applies even in the absence of an expired collective bargaining agreement so long as there is an established status quo.

The Second District agreed with the Union, finding that there was evidence of an established status quo and, accordingly, the PERC was required to apply the proper status quo analysis. The Second District based its holding on (1) the fact that there was evidence of annual wage increases for nearly two decades preceding the collective bargaining negotiations for both classes of employees, and (2) the City's refusal to increase the wages of its newly unionized employees after having increased the wages of its nonunionized employees.

SIGNIFICANCE

Utility Workers Union of America goes much further than earlier cases in which the status quo doctrine has been used. Unlike earlier cases where the status quo doctrine was invoked based on the existence of a prior, albeit expired, collective bargaining agreement, following *Utility Workers Union of America*, the employer need not have ever previously agreed to terms in a prior collective bargaining agreement in order to be held to such terms. This could be problematic in that a public employer may fall subject to employment terms, such as previously gratuitous wage increases, that have become financially unsustainable for the employer. Conversely, this development forces a public employer to deal evenhandedly with newly unionized employees during the collective bargaining process, if there is no prior collective bargaining agreement to protect employees.

RESEARCH REFERENCES

- 34 Fla. Jur. 2d *Labor and Labor Relations* §§ 151, 153 (2007).
- 2 Am. Jur. 2d *Labor and Labor Relations* §§ 2363–2378 (2005).

Charles E. Simpson

Public Employment: Statute of Limitations

***Pintado v. Miami-Dade County Housing Agency*,**
20 So. 3d 929 (Fla. 3d Dist. App. 2009)

If an employee desires to bring a civil action under the Whistle-blower's Act, it *must* be brought within 180 days after the government's final decision.

FACTS AND PROCEDURAL HISTORY

An employee of the Miami-Dade Housing Agency sought relief under the Whistle-blower's Act after he was fired from his job. The employee wrote a letter accusing a supervisor of violating a bidding ordinance and soon thereafter received a disciplinary report for his work performance. The employee threatened the supervisor who issued the report, and he was subsequently terminated on January 7, 2003.

The employee filed a petition for a writ of certiorari with the Miami-Dade Circuit Court, Appellate Division and the Third District Court of Appeal. Both courts declined to hear the case with the final denial on September 22, 2004. The employee then filed a civil action under the Whistle-blower's Act in federal court on November 10, 2004. The Eleventh Circuit concluded that it did not have jurisdiction over the claim. On October 2, 2007, the employee filed his civil action claim in the Miami-Dade Circuit Court, which held his claim was barred because the 180-day statute of limitations had expired. On appeal to the Third District Court of Appeal, the court held that the employee's assertion that the statute's 180-day provision was permissive and not mandatory was invalid because he did not raise it at the lower court level, and his claim was barred because the 180 days was a mandatory statute of limitations.

ANALYSIS

The Third District held the employee's claim failed on two separate grounds. First, the permissive/mandatory issue was not raised at the court below and therefore was not preserved for review on appeal. Second, the court found that even if it had been properly preserved, the statute provides for a mandatory 180-day statute of limitations.

A civil action for violating the Whistle-blower's Act "may" be brought within 180 days after the final decision of the government authority involved. Fla. Stat. § 112.3187(8)(b) (2007).

The employee contended that the wording of the statute should be read to be permissive and not mandatory. The Third District held the employee's reading of the statute to be "unreasonable" because the wording of the statute provides that an employee *may*, but is not required to, file a whistle-blower's claim after a governmental authority makes its final decision. "However, if the public employee opts to file a civil action asserting a whistle-blower's claim under the Act, the claim *must* be filed within 180 days." *Pintado*, 20 So. 3d at 932 (emphasis in original).

The concurrence observed that the analysis should have concluded after the court determined the issue had not been preserved for review.

SIGNIFICANCE

Pintado cautions employees desiring to file a claim for violation of rights under the Whistle-blower's Act to do so within 180 days of the final action by the government agency. An employee may not wait until his appeals of the termination decision are final before commencing a civil action because the statute of limitations may have expired.

RESEARCH REFERENCE

- 9 Fla. Jur. 2d. *Civil Servants and Other Public Officers and Employees* § 181 (2009).

Stacey L. Rowan

Public Employment: Whistle-blower Protection Act

***University of Central Florida Board of Trustees v. Turkiewicz*,**
21 So. 3d 141 (Fla. 5th Dist. App. 2009)

A public employee who decides to pursue a legal remedy under the Whistle-blower's Act must file a complaint with the Florida Commission on Human Relations prior to filing a civil action.

FACTS AND PROCEDURAL HISTORY

Richard Turkiewicz had been a University of Central Florida (UCF) employee since 1988. In late 2005 and early 2006, he reported to his supervisor possible regulatory violations and acts of gross malfeasance by UCF. Near the end of 2006, he received a letter stating that in approximately one year he would not be reappointed. In December 2006, Turkiewicz initiated a grievance against UCF pursuant to UCF regulations. He subsequently resigned from his position in February 2007. Each allegation was dismissed as either unsubstantiated or unfounded. The decision not to reappoint him was upheld by both the UCF vice president and president. Following these decisions, Turkiewicz filed suit against UCF for violating the Whistle-blower's Act (Act).

UCF filed a motion to dismiss, asserting that Turkiewicz had failed to exhaust his administrative remedies because the Act requires public employees to file a complaint with the Florida Commission on Human Relations (FCHR) before bringing a civil action. Turkiewicz argued that he had exhausted his administrative remedies when he initiated a hearing through the university. The trial court denied UCF's motion to dismiss because it determined the statute to be unclear. UCF sought appellate review of the denial.

The appellate court granted the certiorari review of the trial court's motion, ultimately quashing the order that denied the motion.

ANALYSIS

The appellate court first looked to the applicability of Florida Statutes Section 112.3187(8)(a) (2008) to Turkiewicz. The key language states that "[u]pon receipt of notice from the Florida Com-

mission on Human Relations of termination of the investigation, the complainant may elect to pursue the administrative remedy available under [Section] 112.31895 or bring a civil action within 180 days after receipt of the notice." Turkiewicz argued that the court should look to the word "may" and find that the filing of such a complaint was merely permissive. The court found that such an interpretation would ignore that the statute refers to a notice being received from the FCHR. "In this context, the use of the word 'may' simply acknowledges that one who has a claim under the Act has the right to pursue a legal remedy or to choose not to pursue a legal remedy. However, if the aggrieved person does choose to pursue a legal remedy, he or she must do so by first filing a complaint with the FCHR." *Turkiewicz*, 21 So. 3d at 145.

The court drew support for this interpretation by comparing it to the similar results reached during interpretation of both the Florida Civil Rights Act and the Fair Housing Act. In both, the "may" language was found to require a filing with the appropriate commission prior to bringing a civil case. While there was no case directly on point, the court found it standard to require an employee to exhaust administrative remedies prior to pursuing a case in court. The court further found that Turkiewicz's grievance process through the university did not satisfy the pre-suit requirements. Because the Act requires that one seek relief from the FCHR prior to filing a civil action, which Turkiewicz did not do, the writ was granted and the order quashed.

SIGNIFICANCE

Turkiewicz clarifies an ambiguity within the Whistle-blower's Act regarding whether a government employee must seek administrative relief prior to the filing of a civil suit.

RESEARCH REFERENCE

- 15A Am. Jur. 2d *Civil Service* § 92 (2000 & Supp. 2009).

Justin P. Miller

Public Employment: Workers' Compensation

***Carney v. Sarasota County Sheriff's Office*,**
26 So. 3d 683 (Fla. 1st Dist. App. 2009)

Incapacity to earn wages is all that is necessary to qualify as a "disability" under Florida Statutes Section 112.18(1) (2007). An employee need not show loss of wages because loss of wages does not factor into whether or not a disability exists.

FACTS AND PROCEDURAL HISTORY

Timothy Carney, appellant, is a law enforcement officer and has been employed by the Sarasota County Sheriff's Office, the appellee, since 1981. In 2007, after complaining about shortness of breath, fatigue, and experiencing problems with his heart rate, Carney's primary physician referred him to a cardiologist, who gave Carney a "Holter monitor." Two days after returning the monitor, while Carney was on duty, he received a call from the cardiologist's office and was instructed to go to the office as soon as possible. Carney was then hospitalized due to an irregular heart rate and was given medication to regulate his heartbeat. The medication was successful and Carney was released from the hospital the next day, which was the first day of the Thanksgiving weekend. Carney returned to work on his next regularly-scheduled workday with no restrictions.

Carney applied for worker's compensation, but the judge denied the claim reasoning that Carney did not establish a disability under Section 112.18(1); the fact that Carney was hospitalized to regulate his heartbeat did not equate to an incapacity for him to earn the wages he was receiving at the time of the injury through the same or any other employment. The trial court further held that Carney did not fall under the statutory presumption of compensability because he did not have any restrictions on his work duties, and his hospitalization and resulting loss of work time did not qualify as a disability.

Carney appealed, and the trial court's decision was reversed in favor of Carney.

ANALYSIS

The First Circuit ruled in favor of Carney, finding that Carney satisfied the disability requirements of the statute because he was incapacitated during his hospitalization and was unable to earn the wages he was receiving at the time of the injury through the same or any other employment.

First, the court addressed the rebuttable presumption of compensability for law enforcement officers who suffer from heart disease laid out in Section 112.18(1). The court pointed out that the only issue in contention was whether Carney satisfied the "disability" requirement. Florida Statutes Section 440.02(13) (2007) defines disability as "incapacity because of the injury to earn in the same or any other employment the wages which the employee was receiving at the time of the injury." Courts have found a disability when an employee becomes actually incapacitated, either partially or totally, from performing his or her employment requirements. Furthermore, the court emphasized that a loss of wages does not affect a finding of disability, which is determined solely by the employee's ability to earn income. Lastly, the court stated that a disability does not have to be permanent; it can exist even if the incapacity to earn wages is temporary.

Second, the court distinguished the decision in *Bivens v. City of Lakeland*, 993 So. 2d 1100, 1103 (Fla. 1st Dist. App. 2008), relied on by the trial court, by pointing out that Carney was not hospitalized for diagnostic purposes but instead hospitalized and medicated in order to regulate his unsafe heart rate. Additionally, the court distinguished *Michels v. Orange County Fire/Rescue*, 819 So. 2d 158 (Fla. 1st Dist. App. 2002) and *Sledge v. City of Fort Lauderdale*, 497 So. 2d 1231 (Fla. 1st Dist. App. 1986) by pointing out that those cases referred to previous versions of Chapter 440 and, furthermore, did not address the same issue of whether the claimant employee was incapacitated. The court therefore held that the trial court's reliance on such cases was misplaced.

Finally, the court held that Carney satisfied the statute's disability requirements because "claimant, while hospitalized for treatment of his heart disease, was actually incapacitated, at least partially and temporarily, from earning 'in the same or any other employment the wages which [he] was receiving at the time of the injury.'" *Carney*, 26 So. 3d at 685 (quoting Fla. Stat.

§ 112.18(1)). The court therefore reversed the trial court's ruling and found in Carney's favor.

SIGNIFICANCE

Carney emphasizes the factors relevant in determining whether a disability exists under the language of Section 112.18(1). Incapacity to earn wages, whether permanent or temporary, qualifies as a disability, and loss of wages does not impact such a finding.

RESEARCH REFERENCE

- 82 Am. Jur. 2d *Workers' Compensation* § 333 (2003 & Supp. 2009).

Mitali Vyas

Public Employment: Workers' Compensation

***Miami-Dade County v. Davis*,**
26 So. 3d 13 (Fla. 1st Dist. App. 2009)

If a firefighter has a condition or impairment of health caused by heart disease, the condition is presumed to be work related if the firefighter passed a physical exam without heart disease prior to beginning employment as a firefighter. However, an initial physical exam for certification as a firefighter does not give rise to this statutory presumption if heart disease is found during a more recent physical taken prior to receiving a new position with a new employer.

FACTS AND PROCEDURAL HISTORY

In 1972, William Davis passed a physical, which indicated he did not have heart disease, and began his career as a firefighter in Gainesville. He later developed heart disease, underwent bypass surgery, and stopped working for the City. In 1995, Davis submitted to a medical exam for employment purposes as a firefighter for Miami-Dade County (County). The doctor noted the presence of heart disease, but cleared Davis for employment. In 2002, Davis experienced a cardiac episode while surfing and applied for medical benefits from the County.

The judge of compensation claims held the relevant physical for the statutory presumption of compensability under Florida Statutes Section 112.18(1) (2001) was the exam Davis underwent in 1972 for certification. Therefore, Davis' heart condition was compensable by the County. The First District Court of Appeal reversed holding the original physical in 1972 did not make the County accountable for benefits for a cardiac episode when an exam given prior to beginning work for the County in 1995 revealed the heart disease.

ANALYSIS

Under Section 112.18(1), when a firefighter has a "condition or impairment of health . . . caused by . . . heart disease," the condition is presumed to be work related unless the employer can prove otherwise. The presumption arises if the firefighter passes a physical exam that does not uncover any signs of a heart condition prior to beginning employment as a firefighter.

The judge of compensation claims relied upon Florida Statutes Section 163.490(6) (1971) to determine that the relevant physical for the statutory presumption of compensability was the exam given when Davis was "initially employed as a firefighter." The First District, however, held that Florida Statutes Section 633.34 (1995), which mandated a physical to demonstrate good health for "any person applying for employment as a firefighter," controlled because it was the version in effect when Davis began working for the County. In compliance with this statute, the County gave Davis a new physical, which revealed the heart disease. In reversing the judge of compensation claims' decision, the First District held that "Section 112.18(1) did not . . . give rise to a presumption of occupational causation when, after he took the job, heart disease manifested itself while he was surfing." *Miami-Dade County*, 26 So. 3d at 17.

Furthermore, the First District emphasized the most recent statutory language supports its decision. Florida Statute Section 943.13(6) (2008) asserts that a physical from a prior employment agency cannot be used to satisfy the exam requirement that gives rise to the presumption of compensability.

SIGNIFICANCE

Miami-Dade County clarifies that the statutory presumption of compensability for firefighters' heart conditions arises only upon a physical exam that does not find any indication of heart disease, prior to employment with the current agency.

RESEARCH REFERENCE

- 39 Fla. Jur. 2d *Pension and Retirement Funds* § 37 (2006 & Supp. 2010).

Stacey L. Rowan