PUBLIC EMPLOYMENT

Public Employment: Discharge

Rice-Lamar* v. *City of Fort Lauderdale,
232 F.3d 836 (11th Cir. 2000)

When personal commentary is inserted within a government-sponsored report, it is not free speech protected under the First Amendment if the individual's free-speech interest is outweighed by the city's interest in promoting the efficiency of its operations. Further, when a plaintiff presents no evidence demonstrating that the employer's proffered reasons for firing the employee are false, a discrimination claim will not survive summary judgment.

FACTS

The City of Fort Lauderdale (the City) hired Deborah Rice-Lamar, a black female, as the City's Affirmative Action Specialist. Her duties included advising City employees on potential EEO liabilities and developing strategies for achieving long-term affirmative-action goals. Although the job required independent judgment, administrative superiors oversaw Rice-Lamar's activities. In the 1996 Affirmative Action Report, Rice-Lamar included personal commentary. In addition to including statistical data, she spoke about the City being "plagued with racism, [having] glass ceilings for women and brick walls for people of color, [having] a tolerance for perceptions of unfairness and a proverbial silence about it all." *Rice-Lamar*, 232 F.3d at 838. Several supervisors requested that Rice-Lamar delete the personal comments. She refused to change the report substantially and was fired. Rice-Lamar then sued the City claiming violations of her First Amendment right to free speech and race and sex discrimination under Title VII.

CASE ANALYSIS

Free Speech

In determining whether an employee has been discharged in retaliation for public speech, the court utilizes a four-part test.

First, the court determines whether the employee's speech constitutes a matter of public concern. Here, the court, without analysis, accepted that Rice-Lamar's statements were on a matter of public concern. Second, the court determines whether the employee's First Amendment interest outweighs the City's interest in "promoting the efficiency of the public services it performs through its employees." *Morgan v. Ford*, 6 F.3d 750, 754 (11th Cir. 1989). In this instance, the court found that the City's interest is in being able to discipline an employee for speech that undermines the City's public mission. Additionally, the court stressed that the burden of caution an employee carries depends upon the extent of his or her authority and accountability. *Rankin v. McPherson*, 483 U.S. 378, 390 (1987). Rice-Lamar's primary responsibility was to write an annual Affirmative Action Report, which would be presented to the City Commission. Her task was to prepare the City's report, not a report of her own personal commentary. Although her work was to be performed with considerable initiative, her job description made clear that her work was to be reviewed by superiors through conferences, periodic reports, and observations of the results she achieved.

The court found that, when Rice-Lamar's supervisors directed her to remove her personal commentary from the City's report and she failed to do so, she lost the protection of the First Amendment. Her job was not to crusade for social justice, but was to follow the lawful instructions of her superiors. "Such refusal to abide by a valid order is closely connected with, and can be classified as insubordination." *Hankard v. Town of Avon*, 126 F.3d 418, 423 (2d Cir. 1997). Additionally, the court noted that the report, in this situation, could not even be classified as Rice-Lamar's speech. Instead, the report was the City's document because it was written at the behest of the employer and was subject to supervisors' approval.

Because the court determined that any First Amendment interest of Rice-Lamar was outweighed by the City's interest, the court did not reach parts three and four of the test: whether the speech played a "substantial part" in the City's decision to discharge the employee, and, if the speech was a substantial factor, whether the City met its burden to prove, by a preponderance of the evidence, that it would have discharged the employee in the absence of the protected conduct.

Title VII

The court also denied Rice-Lamar's claim of discrimination under Title VII of the Civil Rights Act. The undisputed reason for the City's action was that Rice-Lamar failed to follow her supervisors' instructions. Therefore, the City's actions were due to her insistence on including her own conclusions in the Affirmative Action Report, not because of her race or gender. Rice-Lamer failed to present any evidence that other insubordinate employees were treated more favorably than she or that the City's proffered explanation was pretextual. The court therefore upheld the grant of summary judgment concerning the discrimination claim.

RESEARCH REFERENCE

- Eugene McQuillin, *The Law of Municipal Corporations* vol. 4, §§ 12.240, 12.258, 12.210(a) (Charles R.P. Keating & J. Jeffrey Reinholtz eds., 3d ed., Clark Boardman Callaghan 1992).

Addie Patricia Asay

Public Employment: Discrimination

Donato v. American Telephone & Telegraph Company,
767 S.2d 1146 (Fla. 2000)

Under the Florida Civil Rights Act, "marital status" discrimination occurs only when a person is not hired or is terminated because that person is either married, single, divorced, separated, or widowed. This list is exhaustive.

FACTS AND PROCEDURAL HISTORY

AT&T discharged Rosario Donato on November 15, 1994, just three months after his wife, a former employee of AT&T, sued AT&T for sex discrimination and retaliatory discharge. During October 1994, Mr. Donato's wife, Lynda Donato, disclosed her lawsuit to a manager while applying for a temporary position in her husband's division at AT&T. During November 1994, Mr. Donato was told that his position was being eliminated and that he was "at-risk" because of poor performance. Mr. Donato sued under the Florida Civil Rights Act for marital-status discrimination, and the court granted AT&T's motion to dismiss. The issue

before the trial court was whether "marital status" discrimination occurs when an employer discharges an employee because of the identity or actions of that employee's spouse.

On appeal, the Eleventh Circuit certified the question to the Florida Supreme Court, noting that the Florida courts have not yet addressed the issue. The Florida Supreme Court held that the term "marital status" does not include discrimination on the basis of the identity or actions of one's spouse. Thereafter, the Eleventh Circuit affirmed the district court's opinion. *Donato v. AT&T*, 206 F.3d 1031, 1031 (11th Cir. 2000).

LEGAL ANALYSIS

The definition of "marital status" warranted review by the Florida Supreme Court, as an issue of first impression, because the term was not defined in the statute or in the legislative history. Additionally, the issue deserved review because either a narrow or a broad interpretation of "marital status" was possible.

The general purpose of Florida's Civil Rights Act is to secure the freedom from discrimination for all individuals. Section 760.10 of the Florida Statutes states that it is unlawful for an employer to discharge, not hire, or otherwise discriminate against any individual because of that individual's race, color, religion, sex, national origin, age, handicap, or marital status. In 1992, Section 760.10 was amended to state that it is lawful for an employer to take or fail to take any action on the basis of marital status, if that status is prohibited under its anti-nepotism policy. Therefore, an exception was created that made it lawful for an employer who has an anti-nepotism policy to refuse to hire an individual who is married to an employee. However, the statutory exclusion for such policies would be unnecessary if the term "marital status" encompassed only the state of being married or unmarried. Therefore, the question is whether the Legislature intended for the term "marital status" to include the identity and actions of one's spouse in addition to the status of being married or unmarried.

The answer is that the Legislature intended to limit the scope of the term "marital status." The state of being married is not the determinative factor in an anti-nepotism policy. As long as an employer conforms with an anti-nepotism policy and does not terminate or refuse to hire an individual based solely on whether that individual is married or unmarried, the employer is not liable for "marital status" discrimination. An anti-nepotism

policy disadvantages only those persons who have spouses already working for the employer. Because the policy does not disadvantage all married persons, none may challenge it as "marital status" discrimination. Thus, when the Legislature excluded that policy from unlawful employment practices, the Legislature intended to limit employer liability to situations in which an employer discriminates solely on an individual's status relating to marriage. This narrow interpretation of the term "marital status" is supported in other jurisdictions that, in declaring anti-nepotism policies to be discriminatory, have given a broad interpretation to the term. *Ross v. Stouffer Hotel Co. (Haw.) Ltd., Inc.*, 879 P.2d 1037 (Haw. 1994); *Kraft, Inc. v. State*, 284 N.W.2d 386 (Minn. 1979); *Thompson v. Bd. of Trustees, Sch. Dist. No. 12, Harlem, Blaine County*, 627 P.2d 1229 (Mont. 1981).

When the court interpreted "marital status" narrowly to include only discrimination based on the status of being married or unmarried, the court rejected the board interpretation of "marital status" of the Commission on Human Relations, the body charged with administering the Florida Civil Rights Act. *Donato*, 767 S.2d at 1150 (citing *Owens v. Upper Pinellas Assn. for Retarded Citizens*, 8 F.A.L.R. 438 (Commn. on Human Rel. 1985)). In *Owens*, the court noted that an anti-nepotism policy discriminates on the basis of "marital status" because the definition includes the identity or situation of one's spouse. *Id.* at 440–441. Further, a broad interpretation of the term is consistent with the Legislature's intent to construe the Act liberally. However, because the anti-nepotism policy exception was added to the Act after this opinion, it effectively overruled the Commission's interpretation.

Furthermore, administrative construction of a statute is properly considered only when the statute is ambiguous, and the plain and obvious meaning of the term "marital status" is consistent with a narrow interpretation. *Manhattan Pizza Hut, Inc. v. N.Y. State Human Rights App. Bd.*, 415 N.E.2d 950, 953 (N.Y. 1980). To interpret the term broadly would expand its meaning beyond that which the Legislature intended and, as such, would be an abrogation of legislative power.

DISSENTING OPINION

First, Justice Barbara J. Pariente argued that the majority opinion contradicts the express terms of the Act. The Act provides that it "shall be liberally construed." *Donato*, 767 S.2d at 1155

(Pariente, J., dissenting). In addition, because the Act is a "[r]emedial statute[, it] should be liberally construed in favor of granting access to the remedy provided by the Legislature." *Id*. Second, the majority opinion erred when it failed to give deference to the Commission's decision in *Owens*. The court recognized the problems it faced when defining the term "marital status" (i.e., the meaning of "marital status" is unclear), but the court determined the meaning to be unambiguous. Third, the court failed to adhere to the principle of statutory construction, which requires that "all parts of a statute must be read together to achieve a consistent whole." *Id*. at 1156 (quoting *Forsythe v. Longboat Key Erosion Control Dist.*, 604 S.2d 452, 455 (Fla. 1992)). The addition of the anti-nepotism policy exception demonstrates that the Legislature recognized that an employer has a legitimate business interest in treating those individuals with spouses already working for the employer differently from those who do not. Therefore, the Legislature intended to adopt the *Owens*' broad definition of "marital status."

RESEARCH REFERENCES

- Eugene McQuillin, *The Law of Municipal Corporations* vol. 4, § 12.210.30 (3d ed., Clark Boardman Callaghan 1992).
- John C. Beattie, *Prohibiting Marital Status Discrimination: A Proposal for the Protection of Unmarried Couples*, 42 Hastings L.J. 1415 (1991).

Natalia Kirayoglu

Public Employment: Grievance

Hallandale Professional Firefighters, Local 2238 v. City of Hallandale,
777 S.2d 435 (Fla. Dist. App. 4th 2001).

Florida Statutes Section 447.401, which controls the procedures for grievances between public employers and employees or unions, allows a career-service employee to select among several grievance procedures, including unfair labor practice procedures and arbitration; however, the employee is permitted to utilize only one grievance procedure to settle his or her dispute.

The union alleged that the City wrongfully disciplined three

firefighters in response to their union-related activities. The union sought to arbitrate the grievance and filed an unfair-labor-practice complaint with the Florida Public Employees Relations Commission (PERC). PERC ruled that the City had cause to discipline the firefighters. The union then attempted to arbitrate the matter, but the trial court held that the union was barred from seeking arbitration because it had already utilized the unfair-practice procedure. In *Metropolitan Dade County v. Dade County Association of Firefighters*, 575 S.2d 289 (Fla. Dist. App. 3d 1991), the court held that, under Section 447.401, an employee could not seek relief under a grievance procedure such as arbitration if he already had used the civil-service-appeal procedure. *Metropolitan Dade* involved a Dade County firefighter who was terminated by the fire department for using illegal drugs in violation of department policy. The firefighter appealed his termination in an unsuccessful civil-service appeal. The firefighter then utilized the grievance procedure of arbitration and prevailed. The court concluded as a matter of law that the firefighter's use of the civil-service appeal foreclosed his use of the grievance procedure to seek relief.

The union maintained, but without cited authority, that the statute applies only to "career service" employees, which term does not include firefighters. However, because the statute does not define a "career service" employee, and because there is no authority to suggest that the term applies only to state employees and not city employees such as firefighters, then the union was precluded from utilizing more than one grievance procedure, and the final ruling of PERC stood.

RESEARCH REFERENCE

- Eugene McQuillin, *The Law of Municipal Corporations* vol. 3, § 12.140 (3d ed., West 2001).

Robin Lynn Petronella