

CHAPTER XI.

Local Government as Employer.

I. DISCIPLINE AND DISCHARGE OF PUBLIC EMPLOYEES

A. Is A Public Employee Entitled to Procedural Due Process?

The Fourteenth Amendment to the United States Constitution provides that no person shall “be deprived of life, liberty, or property without due process of law.” Thus, a public employer must analyze whether its employees have a “property right” to continued employment before taking disciplinary action. If a property right to continued employment exists, then the employer must comply with due process requirements. The “essential requirements of due process . . . are notice and an opportunity to respond.” Loudermille v. Cleveland Bd. of Educ., 470 U.S. 532, 546 (1985).

1. Employment At Will

Similar to the private sector, public sector employment is generally “at will.” See Green v. City of Hamilton, Housing Auth., 937 F.2d 1561, 1564 (11th Cir. 1991) (stating that “public employee who may be discharged at will has no property interest in continued employment and no entitlement to due process protection”); Blanten v. Griel, 758 F.2d 1540, 1543 (11th Cir. 1985) (same).

2. Property Interests in Employment

a. Generally

Some public employees may have a property interest in continued employment. These employees are entitled to the procedural due process protection of a pretermination hearing. Loudermille, 470 U.S. at 532. However, an employee must have more than a “unilateral expectation” of continued employment. Bd. of Regents v. Roth, 408 U.S. 564, 577 (1972). Instead, the employee “must have a legitimate claim of entitlement to it.” Id.

Whether there is a property right in employment is typically determined by state law. Silva v. Bieluch, 351 F.3d 1045, 1047 (11th Cir. 2003) (citing Roth, 408 U.S. at 577). See also Barnett v. Housing Authority of Atlanta, 707 F.2d 1571, 1577 (11th Cir. 1983) (holding that a public employee generally has a property interest in continued employment if state law or local ordinance “limits the power of the appointing body to dismiss an employee”). A property right in continued employment may also derive from an express or implied contract. Piroglu v. Coleman, 25 F.3d 1098, 1101 (D.C. Cir. 1994).

◆ *Note:* A “property interest” in employment “appertains without regard to whether the employee is suspended, demoted or discharged.” Metropolitan Dade County v. Sokolowski, 439 So. 2d 932, 934 (Fla. 3d DCA 1983).

b. Police Officers

Section 112.532(4), Florida Statutes, provides in relevant part that:

No dismissal, demotion, transfer, reassignment, or other personnel action which might result in loss of pay or benefits or which might otherwise be considered a punitive measure shall be taken against any law enforcement officer or correctional officer unless such law enforcement officer or correctional officer is notified of the action and the reason or reasons therefor prior to the effective date of such action.

Courts previously construed this section to mean that non-probationary police officers have a property interest in continued employment. See City of Kissimmee v. Grice, 697 So. 2d 186 (Fla. 5th DCA 1997); Dept. of Highway Safety & Motor Vehicles v. Schluter, 705 So. 2d 81, 83 (Fla. 1st DCA 1997) (also finding that property interest was “created by section 321.06, Florida Statutes (1995), which provide[d] that highway patrol officers may only be disciplined for cause”); Venero v. City of Tampa, 830 F. Supp. 1457 (M.D. Fla. 1993); Kamenesh v. City of Miami, 772 F. Supp. 583 (S.D. Fla. 1991).

In 2003, the Florida Legislature amended this statute to provide: “This paragraph shall not be construed to provide law enforcement officers with a property interest or expectancy of continued employment, employment, or appointment as a law enforcement officer.” §112.532(4)(b), Fla. Stat.

3. **Probationary Employment**

There is no right to a pretermination due process hearing for probationary employees because such employees do not have a property right in continued employment. See Silva v. Bieluch, 351 F.3d 1045, 1048 (11th Cir. 2003) (holding that “Plaintiffs, as probationary employees, had no right to their rank as lieutenants until, at the least, they had served their one-year probationary period”); Ross v. Clayton County, 173 F.3d 1305, 1308 (11th Cir. 1999) (providing that “[t]ypically, probationary employees are thought to lack property interests in their employment because they are “at will” employees without legitimate claim of entitlement to continued employment”).

B. **Procedural Due Process Requirement of Pretermination Hearing**

A pretermination hearing “need not be elaborate.” Loudermille, 470 U.S. at 545. The Loudermille Court held that the “formality and procedural requisites for the hearing can vary, depending upon the importance of the interests involved and the nature of the subsequent proceedings.” Id. For example, if the employee is entitled to a full post-termination hearing, the pretermination hearing “need not definitely resolve the propriety of the discharge.” Id. at 546. Instead, the pretermination hearing should offer an “initial check against mistaken decision—essentially, a determination whether there are reasonable grounds to believe that the charges against the employee are true and support the proposed action.” Id. This “hearing” must include “oral or written notice of the charges against [the employee], an explanation of the employer’s evidence, and an opportunity to present [the employee’s] side of the story.” Id. “Due process is flexible and calls for such procedural protection as the particular situation demands.” Gilbert v.

Homar, 117 S.Ct. 1807 (1997). In Gilbert, a university police officer was immediately suspended without pay after he was charged by the city police department with a drug felony. The charges were later dropped and the officer was subsequently granted a hearing, after which he was dismissed. Homar contended that any suspension prior to a hearing need be with pay. The Court would have apparently found a suspension without pay and without notice and a prior hearing acceptable if the hearing was held shortly after the charges were dropped. This was based upon the brief length of the loss (of the property right) and the lack of finality (it was a suspension) combined with the fact that an independent party's (local police department and state attorney) determination had triggered the action, and the nature of the position (i.e., police officer).

C. **Procedural Due Process Requirement of Post-Termination Hearing**

"In Loudermille, the Court noted that cursory pre-termination proceedings may be acceptable if the employee is entitled to a full evidentiary hearing within a reasonable time after termination." Adams v. Sewell, 946 F.2d 757, 765 (11th Cir. 1991), overruled on other grounds, McKinney v. Pate, 20 F.3d 1550 (11th Cir. 1994). Courts have held that "[p]ost-termination proceedings [are] inadequate [if] a terminated employee 'had no opportunity to confront and cross-examine his accuser in the presence of the decision maker.'" Id.

D. **Due Process and Liberty Interests of Public Employees**

A public employee's liberty interest may be affected when reputational damage results in the loss of employment opportunities. Buxton v. City of Plant City, 871 F.2d 1037 (11th Cir. 1989). A "liberty interest" includes an employee's right "'to live and work where he will'; 'to pursue any livelihood or avocation'; and 'to engage in the common occupations of life.'" Id. at 1045.

1. **Establishing a Deprivation of Liberty**

A public employee may establish the deprivation of his or her liberty interest by proving that there was: "(1) a false statement (2) of a stigmatizing nature (3) attending [the] employee's discharge (4) made public (5) by the governmental employer (6) without a meaningful opportunity for employee name clearing. Buxton, 871 F.2d at 1042-1043 (finding that "the placing of stigmatizing information in a public employee's personnel file or in an internal affairs report (public records of Florida pursuant to state law) constitutes publication sufficient to implicate liberty interests requiring protection through procedural due process of law proceedings").

◆ **Related Cases:**

- Codd v. Velger, 429 U.S. 624, 627 (1977) ("[I]f the hearing mandated by the Due Process Clause is to serve any useful purpose, there must be some factual dispute between an employer and a discharged employee which has some significant bearing on the employee's reputation.").
- Wisconsin v. Constantineau, 400 U.S. 433, 437 (1971) ("Where the state attaches a badge of infamy to the citizen, due process comes into play. . . . Where a person's good name, reputation, honor, or integrity is at stake because of what the government is doing to him, notice and opportunity to

be heard are essential.”).

2. **What Process is Due?**

The purpose of the due process hearing granted in these cases is to “provide the person an opportunity to clear his name.” Codd, 429 U.S. at 627; *Campbell v. Pierce County, Georgia*, 741 F.2d 1342, 1345 (11th Cir. 1984) (The name clearing hearing “is provided simply to cleanse the reputation of the claimant.”).

This name clearing hearing “need not take place prior to [the employee’s] termination or to the publication of related information adverse to his interests.” *Id.* The Eleventh Circuit has held that:

The hearing . . . is not a prerequisite to publication [of adverse material] and the state is not obliged to tender one. The state need only make known to the stigmatized employee that he may have an opportunity to clear his name upon request. It need not initiate the hearing process of its own accord.

Id.

I. THE PUBLIC EMPLOYEES RELATIONS ACT (PERA)

The Florida Legislature passed the Public Employees Relations Act (PERA) in 1974. This Act is codified at Chapter 447, Part II, Florida Statutes. PERA generally defines the rights of public employers and employees regarding the election of employee organizations as bargaining representatives, collective bargaining, and unfair labor practices procedures. The Legislature enacted PERA to:

- (1) Grant[] to public employees the right of organization and representation;
- (2) Requir[e] the state, local governments, and other political subdivisions to negotiate with bargaining agents duly certified to represent public employees;
- (3) Creat[e] a Public Employees Relations Commission to assist in resolving disputes between public employees and public employers; and
- (4) Recogniz[e] the constitutional prohibition against strikes by public employees and providing remedies for violations of such prohibition.

Fla. Stat. § 447.201.

The Public Employees Relations Commission (PERC) has the ability to issue subpoenas, conduct hearings, and monitor the behavior of individuals appearing before it. See Fla. Stat. §

447.207 (providing that “the commission may preserve and enforce order during any proceeding; issue subpoenas for, administer oaths or affirmations to, and compel the attendance and testimony of witnesses; or issue subpoenas for, and compel the production of, books, papers, records, documents, and other evidence”).

A. The Duty to Collectively Bargain in Good Faith under PERA

Section 447.203(14) imposes a legal duty upon a public employer and a public employee organization to bargain.

◆ **Definition of Collective Bargaining.** “Collective bargaining” means “the performance of the mutual obligations of the public employer and the bargaining agent of the employee organization to meet at reasonable times, to negotiate in good faith, and to execute a written contract with respect to agreements reached concerning the terms and conditions of employment, except that neither party shall be compelled to agree to a proposal or be required to make a concession unless otherwise provided in this part.” Fla. Stat. § 447.203(14).

◆ **Duty to Bargain in “Good Faith”.** The public employer and the employees’ collective bargaining representative must be willing to meet at a mutually agreed upon reasonable time and place “to discuss issues which are proper subjects of bargaining, with the intent of reaching a common accord.” Fla. Stat. § 447.203(17). The duty to bargain in good faith includes “an obligation for both parties to participate actively in the negotiations with an open mind and a sincere desire, as well as making a sincere effort, to resolve differences and come to an agreement.” Id.

◆ **Impasse Resolutions.** If after a reasonable period of negotiations concerning terms and conditions of employment to be incorporated into a collective bargaining agreement the parties are unable to agree, either party may declare impasse and invoke the statutory impasse resolution process. § 447.403, F.S. If not otherwise resolved through negotiations during this time, resolution of the disputed items will be imposed at a hearing before the legislative body of the public employer acting as it deems to be in the public interest, including the interest of the public employees involved, i.e., as a neutral. The imposed items are combined with those tentatively agreed upon and submitted for ratification. If ratification does not occur, the disputed items go into effect for the remainder of the fiscal year, the parties go back to the table to resolve those matters previously tentatively agreed upon and thus not “imposed.”

B. Unfair Labor Practices under PERA

PERC has the jurisdiction to process unfair labor practices claims by employers, employee organizations, and individuals. Fla. Stat. § 447.501. See Browing v. Brody, 796 So. 2d 1191, 1192 (Fla. 5 th DCA 2001) (“The jurisdictional scope of the Act has broadly included, as falling within PERC's exclusive jurisdiction, those activities which ‘arguably’ constitute unfair labor practices.”).

It is an unfair labor practice for an employer or its agent(s) or representative(s) to:

- (a) Interfer[e] with, restrain[], or coerce[e] public employees in the exercise of any rights guaranteed them under this part.
- (b) Encourag[e] or discourag[e] membership in any employee organization by discrimination in regard to hiring, tenure, or other conditions of employment.
- (c) Refus[e] to bargain collectively, fail[] to bargain collectively in good faith, or refus[e] to sign a final agreement agreed upon with the certified bargaining agent for the public employees in the bargaining unit.
- (d) Discharg[] or discriminate[e] against a public employee because he or she has filed charges or given testimony under this part.
- (e) Dominat[e], interfere[e] with, or assist[] in the formation, existence, or administration of, any employee organization or contribut[e] financial support to such an organization.
- (f) Refus[e] to discuss grievances in good faith pursuant to the terms of the collective bargaining agreement with either the certified bargaining agent for the public employee or the employee involved.

§ 447.501(1).

1. Bargaining in Bad Faith

When determining whether a party bargained in bad faith, PERC will “consider the total conduct of the parties during negotiations as well as the specific incidents of alleged bad faith.” Fla. Stat. § 447.203(17).

◆ Statutory Interpretation of Bargaining in Bad Faith.

Under § 447.203(17), incidents indicating bad faith may include, without limitation:

- (a) Failure to meet at reasonable times and places with representatives of the other party for the purpose of negotiations.
- (b) Placing unreasonable restrictions on the other party as a prerequisite to meeting.
- (c) Failure to discuss bargainable issues.

(d) Refusing, upon reasonable written request, to provide public information, excluding work products as defined in s. 447.605.

(e) Refusing to negotiate because of an unwanted person on the opposing negotiating team.

(f) Negotiating directly with employees rather than with their certified bargaining agent.

(g) Refusing to reduce a total agreement to writing.

- ◆ **Case Law Examples of Bargaining in Bad Faith.**
 - Prof'l Fire Fighters of Ocala, Local 2135 v. City of Ocala, 18 FPER ¶ 23171 (PERC 1992) (“An employer violates its duty to bargain in good faith when, in the absence of an express agreement by the union, it legislatively imposes contract provisions which eliminate statutory and constitutional rights.”).
 - Hillsborough Area Regional Transit Auth. v. Amalgamated Transit Union Local 1593, 450 So. 2d 590 (Fla. 1st DCA 1998) (providing that issue of whether a party to public employee labor contract has bargained in bad faith is a factual determination that will not be set aside if supported by competent substantial evidence).

2. The Doctrine of “Unilateral Change”

A refusal to bargain is considered an unfair labor practice under section 447.501(c). A refusal to bargain most commonly occurs when a public employer makes a unilateral change in wages, hours, or terms and conditions of employment. See Fla. Stat. 447.309(1) (providing that “the bargaining agent for the organization and the chief executive officer of the appropriate public employer or employers, jointly, shall bargain collectively in the determination of the wages, hours, and terms and conditions of employment of the public employees within the bargaining unit”).

- ◆ **Managerial Prerogatives.** A public employer may unilaterally determine “the purpose of each of its constituent agencies, set standards of services to be offered to the public, and exercise control and discretion over its organization and operations.” Fla. Stat. § 447.209. A public employer also has the unilateral right to “direct its employees, take disciplinary action for proper cause, and relieve its employees from duty because of lack of work or for other legitimate reasons.” Id.
 - Amalgamated Transit Union Local 1593 v. Hillsborough Area Regional Transit Authority, 742 So. 2d 380 (Fla. 1st DCA 1999) (“[T]he right to subcontract is a management prerogative which is not a subject of mandatory collective bargaining.”).
 - IAFF, Local 1403 v. Metropolitan Dade County, 11 FPER 16285 (1985) (the decision on whether to close a fire station was a managerial prerogative).

- IBEW, Local 2358 v. Jacksonville Electric Authority, 24 FPER 29117 (G.C. Sum. Dism. 1998) (“The JEA’s changes to its organizational structure and the duties of the employees represented by Local 2358 are within the scope of the JEA’s management right to exercise control and discretion over its organization and operations.”).

◆ **The “Impact Bargaining” Limitation.** In order to show a negotiable impact, the union must show direct and substantial effects on existing wages, hours, terms and conditions of employment caused by and foreseeably resulting from the implementation of the employer’s action. This collective impact must be presented in the initial demand upon the employer to negotiate over the impact. Government Supervisors Association of Florida, OPEIU Local 100, AFLCIO v. Broward County, 26 FPER 31267 (2000). The exercise of managerial rights “shall not preclude employees or their representatives from raising grievances, should decisions on the above matters have the practical consequence of violating the terms and conditions of any collective bargaining agreement in force or any civil or career service regulation.” Fla. Stat. § 447.209. See also Duval Teachers United, FEA-AFT v. Duval County School Bd., 3 FPER 96, 100 (1977) (recognizing that “the employer’s right to ‘exercise control and discretion over its organization and operations,’ or its right to ‘direct its employees’ will [] at some point conflict with the employer’s duty to collectively bargain over ‘terms and conditions of employment’”). Thus, public employers have a duty to “negotiate the areas of overlap.” Id.

3. Retaliation for Protected Activity

To establish that an unfair labor practice based on retaliation for engaging in protected activity occurred, a claimant must prove “by a preponderance of the evidence that (a) his conduct was protected and (b) his conduct was a substantial or motivating factor in the decision taken against him by the employer.” Pasco County School Bd. v. Fla. Public Employees Relations Commission, 353 So. 2d 108, 117 (Fla. 1st DCA 1977). If the hearing officer finds that a “non-permissible reason” motivated the employer, the burden then “shifts to the employer to show by a preponderance of the evidence that notwithstanding the existence of factors relating to protected activity, it would have made the same decision affecting the employee anyway.” Id.

II. FLORIDA’S PUBLIC SECTOR WHISTLEBLOWER’S ACT

Florida’s public-sector Whistle-blower’s Act prevents agencies “from taking retaliatory action against an employee who reports to an appropriate agency violations of law on the part of a public employer [] that create a substantial and specific danger to the public’s health, safety, or welfare.” Fla. Stat. § 112.3187(4). The statute also prevents agencies from “taking retaliatory action against any person who discloses information to an appropriate agency alleging improper use of governmental office, gross waste of funds, or any other abuse or gross neglect of duty on the part of an agency, public officer or employee.” Id. at § 112.3187(2); see also Guess v. City of Miramar, 889 So. 2d 840, 844 (Fla. 4th DCA 2004); Rice-Lamar v. City of Fort Lauderdale, 853 So. 2d 1125, 1131-32 (Fla. 4th DCA 2003); Ujic v. City of Apopka, 581 So. 2d 218, 219

(Fla. 5th DCA 1991). Accordingly, the Act provides a cause of action for an employee who suffers adverse personnel action as a result of disclosing the information. § 112.3187(8).

◆ **Establishing a *Prima Facie* Case.** To state a cause of action under the Florida Whistle-blower's Act, a complainant must demonstrate the following: (1) prior to termination, the public employee made a disclosure protected by the statute; (2) the employee was discharged; and (3) the disclosure was not made in bad faith or for a wrongful purpose, and did not occur after an agency's personnel action against the employee. See Walker v. Florida Dep't of Veterans' Affairs, 925 So. 2d 1149, 1150 (Fla. 4th DCA 2006) (citing Fla. Dep't of Transp. v. Florida Comm'n on Human Relations, 842 So. 2d 253, 255 (Fla. 1st DCA 2003); see also Lindamood v. Office of the State Attorney, Ninth Judicial Circuit of Florida, 731 So. 2d 829, 831 (Fla. 5th DCA 1999).

◆ **Construction and Application.** The Florida Whistle-blower's Act is remedial in nature and should be construed liberally in favor of granting access to the remedy so as not to frustrate the legislative intent. See Irven v. Dep't of Health and Rehabilitative Servs., 790 So. 2d 403, 406 (Fla. 2001); Martin County v. Edenfield, 609 So. 2d 27, 29 (Fla.1992).

◆ **Remedies.** When a local government decides to establish an administrative procedure to handle whistle-blower complaints, Florida's Whistle-blower's Act requires that the procedure be adopted by ordinance and provide for the complaints to be heard "by a panel of impartial persons appointed by the appropriate local governmental authority." Fla. Stat. § 112.3187(8)(b). Whether the town's administrative procedure complies with the requirements of the Act is a question of law. See Pino v. City of Miami, 315 F. Supp. 2d 1230, 1251 (S.D. Fla. 2004) (citing Dinehart v. Town of Palm Beach, 728 So. 2d 360, 362 (Fla. 4th DCA 1999)). Accordingly, public employees are *only* entitled to bring a civil action under the Whistle-blower's Act without having first filed a complaint with the appropriate governmental authority where the local governmental authority has not adopted an administrative procedure. T.J.R. Holding Co. v. Alachua County, 617 So. 2d 798, 800 (Fla. 1st DCA 1993) (emphasis added).

◆ **Individual Liability.** The Florida Whistle-blower's Act does not subject officials or officers of a public agency to suit in their individual capacities for alleged violations of the Act. See De Armas v. Ross, 680 So. 2d 1130, 1131 (Fla. 3d DCA 1996).

◆ **Defenses.** The Florida Whistleblower's Act provides that: "It shall be an affirmative defense to any action brought pursuant to this section that the adverse action was predicated upon grounds other than, and would have been taken absent, the employee's or person's exercise of rights protected by this section." Fla. Stat. 112.3187(10). See also City of Hollywood v. Witt, 789 So. 2d 1130 (Fla. 4th DCA 2001).

III. ANTI-DISCRIMINATION LAW (TITLE VII AND 42 U.S.C. § 1983)

A. Title VII

The primary federal statute prohibiting employment discrimination is Title VII of the Civil Rights Act of 1964 (Title VII). 42 U.S.C. § 2000e-2(a). Title VII bars employment discrimination based on race, color, religion, sex, or national origin. Id.; see also EEOC v. Joe's Stone Crab, Inc., 220 F.3d 1263, 1286 (11th Cir. 2000) (noting that the two theories of intentional discrimination under Title VII are disparate treatment discrimination and “pattern or practice” discrimination). Moreover, because the Florida Civil Rights Act (FCRA) mirrors Title VII, federal case law construing Title VII is persuasive authority for interpretation of the FCRA. See Fla. Stat. § 760.01 (In addition, the FCRA prohibits disparate treatment because of marital status); Alford v. Florida, 390 F. Supp. 2d 1236, 1246 (S.D.Fla. 2005); Castleberry v. Edward M. Chadbourne, Inc., 810 So. 2d 1028, 1030 n. 3 (Fla. 1st DCA 2002).

◆ **Establishing a *Prima Facie* Case.** To prevail on a Title VII claim, a plaintiff must first establish a *prima facie* case of discrimination, which creates a rebuttable presumption that the employer acted illegally. McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802-04 (1973); St. Mary's Honor Center v. Hicks, 509 U.S. 502, 505-15 (1993). When establishing a *prima facie* case, a plaintiff may rely upon direct, circumstantial, or statistical evidence. See Holifield v. Reno, 115 F.3d 1555, 1561-62 (11th Cir. 1997). However, in most instances, direct evidence is not present and the plaintiff must rely on circumstantial evidence. Id. at 1562. Notwithstanding the form of proof, the ultimate burden of persuading the trier of fact that the defendant intentionally discriminated against the plaintiff remains at all times with the plaintiff. Texas Dept. of Cmty. Affairs v. Burdine, 450 U.S. 248, 253 (1981). Generally, a plaintiff must demonstrate: (1) that he or she belongs to a protected class; (2) that he or she suffered an adverse employment action; (3) that he or she and a similarly situated non-protected person were dissimilarly treated; and (4) that the employment action was causally related to the protected status. See, e.g., Perkins v. Sch. Bd. of Pinellas County, 902 F. Supp. 1503, 1506-7 (M.D. Fla. 1995) (citing McDonald v. Santa Fe Trail Transportation Co., 427 U.S. 273 (1976)).

◆ **Burden-Shifting Framework.** If the plaintiff succeeds in establishing a *prima facie* case, the burden shifts to the defendant “to articulate some legitimate, nondiscriminatory reason for the employee’s rejection.” McDonnell Douglas, 411 U.S. at 802. See also Burdine, 450 U.S. at 254-55 (stating that the employer’s only burden at this point is to explain clearly the legitimate, nondiscriminatory reasons for its actions – the overall burden of proof remains on the complainant); E.E.O.C. v. Alton Packaging Corp., 901 F.2d 920, 923 (11th Cir. 1990); Garcia v. Dep't of Health & Rehab. Servs., 697 So. 2d 841 (Fla. 1st DCA 1996). If the defendant carries this burden, the plaintiff is then given an opportunity to show that the legitimate reasons offered by the defendant were not its true reasons but were a pretext for discrimination. Reeves v. Sanderson Plumbing Prods., Inc., 530 U.S. 133, 143 (2000) (quoting Burdine, 450 U.S. at 253); Morris v. Emory Clinic, Inc., 402 F.3d 1076, 1081 (11th Cir. 2005) (if former employer offers a legitimate explanation for adverse action, then plaintiff “must show the explanation is inadequate, a mere pretext”); Rojas v. Florida, 285

F.3d 1339, 1342 (11th Cir. 2002); Silvera v. Orange County Sch. Bd., 244 F.3d 1253, 1258 (11th Cir. 2001); Ash v. Tyson Foods, Inc., 126 S.Ct. 1195 (2006).

◆ **Retaliation.** Section 42 USCA 2000(e)(3)(a) forbids an employer from discriminating against an employee or job applicant because that individual has opposed any practice made unlawful by Title VII, or made a charge, testified, assisted, or participated in a Title VII proceeding or investigation. This applies to participation in an employer's internal investigation of another employee's EEOC charge, Clover v. Total System Services, Inc., 176 F.3d 1346 (11th Cir. 1999), but not to a wholly internal investigation conducted apart from a formal charge with the EEOC. EEOC v. Total System Services, Inc., 221 F.3d 1171 (11th Cir. 2000). The opposition clause will not prevent an employee from being fired based upon an employer's good faith belief that the employee lied during the investigation. In Burlington Northern and Santa Fe Ry Co. v. White, 126 S.Ct. 1671 (2006), the Court significantly expanded the scope of retaliation provisions by holding that retaliatory actions need not be strictly confined to employment or occur at the workplace (i.e., employer causes a criminal investigation of employee), but ones that would have dissuaded a reasonable worker from making or supporting a charge of discrimination (termination even if review and reinstatement is readily available); that is, an action that would have been materially adverse to a reasonable employee or job applicant.

B. 42 U.S.C. § 1983

Section 1983 provides in pertinent part: "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia . . . subjects, or causes to be subjected, any citizen of the United States . . . to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress." 42 U.S.C. § 1983. Furthermore, the United States Supreme Court has held that although section 1983 is not a source of substantive rights, it provides a method for vindicating federal rights conferred by the Constitution and federal statutes. Baker v. McCollan, 443 U.S. 137, 144 n. 3 (1979).

◆ **Establishing a *Prima Facie* Case.** In order to prevail on a claim under section 1983, a plaintiff must make a *prima facie* showing that (1) the defendant deprived him or her of a right secured under the Constitution or federal law and (2) such a deprivation occurred under color of state law. Arrington v. Cobb County, 139 F.3d 865, 872 (11th Cir. 1998) (citing Willis v. Univ. Health Serv., 993 F.2d 837, 840 (11th Cir. 1993)).

◆ **Eleventh Circuit Heightened Pleading Standard for § 1983 Claims.** Although Fed.R.Civ.P. 8 allows a plaintiff considerable leeway in framing his complaint, the Eleventh Circuit tightened the application of Rule 8 with respect to § 1983 cases in an effort to weed out meritless claims. Accordingly, a plaintiff bringing a claim under § 1983 must allege with some specificity the facts which make out his claim. GJR Invs., Inc. v. County of Escambia, 132 F.3d 1359, 1367

(11th Cir. 1998) (stating that some factual detail in the pleadings is necessary to the adjudication of § 1983 claims).

1. Personal (or Individual) Liability under § 1983.

Under section 1983, liability may be imposed on any individual, including a government employee or official, who acts “under color” of a state “statute, ordinance, regulation, custom or usage.”

◆ Personal (or Individual) Liability Not Barred by 11th Amendment.

Generally, the doctrine of qualified immunity protects government officials from “liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.” Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982). Qualified immunity extends to actions of a government official, even those ministerial in nature, so long as the official’s actions (1) “were undertaken pursuant to the performance of his duties,” and (2) were “within the scope of his authority.” Jordan v. Doe, 38 F.3d 1559, 1566 (11th Cir. 1994).

However, “the Eleventh Amendment does not erect a barrier against suits to impose ‘individual and personal liability’ on state officials under § 1983.” See Hafer v. Melo, 502 U.S. 21, 30-31 (1991); Hobbs v. Roberts, 999 F.2d 1526, 1528 (11th Cir. 1993) (noting that Eleventh Amendment immunity does not extend to “‘individual’ or ‘personal’ capacity suits in federal court”); Gamble v. Fla. Dep’t of Health & Rehabilitative Servs., 779 F.2d 1509, 1512-13 (11th Cir. 1986) (“[T]he Eleventh Amendment provides no bar to federal court adjudication of suits against state officers individually.”).

◆ Distinction from Other Federal and State Discrimination Statutes.

In the Eleventh Circuit, the imposition of personal (or individual) liability is not permitted under Title VII, the Age Discrimination in Employment Act, the Americans with Disabilities Act, or the Florida Civil Rights Act. See Busby v. City of Orlando, 931 F.2d 764, 772 (11th Cir. 1991) (Title VII); Smith v. Lomax, 45 F.3d 402, 403 n. 4 (11th Cir. 1995) (ADEA); Mason v. Stallings, 82 F.3d 1007, 1009 (11th Cir. 1996) (ADA); Jolley v. Wallace, 1995 WL 463709 (M.D. Fla. May 30, 1995) (Florida Civil Rights Act).

2. Official Capacity Liability under § 1983.

Essentially, an official capacity action is a suit against the local government entity that the official represents. Kentucky v. Graham, 473 U.S. 159, 166 (1985). In an official-capacity action, a governmental entity is liable under § 1983 *only* when the entity itself is a “‘moving force’ ” behind the deprivation. Polk County v. Dodson, 454 U.S. 312, 326 (1981) (quoting Monell v. New York City Dept. of Social Services, 436 U.S. 658, 694 (1978)) (emphasis added). Accordingly, in an official-capacity action, the entity’s “policy or custom” must have played a part in the violation of federal law. Oklahoma City v. Tuttle, 471 U.S. 808, 817-818 (1985).

3. Local Government Liability under § 1983.

Although the United States Supreme Court has held that local government entities are subject to liability under § 1983, a plaintiff cannot rely upon a theory of *respondeat superior* to hold an entity liable. See Monell v. Dept. of Soc. Servs., 436 U.S. 658, 692 (1978) (finding that § 1983 “cannot be easily read to impose liability vicariously on governing bodies solely on the basis of the existence of an employer-employee relationship with a tortfeasor”); Pembaur v. Cincinnati, 475 U.S. 469, 479 (1986). However, if the “execution of the government’s policy or custom . . . inflects the injury,” then a local government entity may be held liable. City of Canton v. Harris, 489 U.S. 378, 385 (1989); Pembaur, 475 U.S. at 481-83 (“Municipal liability attaches only where the decision maker possesses final authority to establish municipal policy with respect to the action ordered.”). In addition, to impose § 1983 liability on a local government entity, a plaintiff must show: (1) that his or her constitutional rights were violated; (2) that the local government entity had a custom or policy that constituted deliberate indifference to that constitutional right; and (3) that the policy or custom caused the violation. See City of Canton, Ohio v Harris, 489 U.S. 378, 388 (1989).

4. Relationship to Title VII Claims.

Although an alleged Title VII violation cannot provide the sole basis for a § 1983 claim, a Title VII claim does not preempt a Fourteenth Amendment cause of action for employment discrimination under § 1983. See Allen v. Denver Pub. Sch. Bd., 928 F.2d 978, 982 (10th Cir. 1991) (“[S]ection 1983 cannot be used to assert the violation of rights created only by Title VII.”); Johnson v. City of Fort Lauderdale, 114 F.3d 1089, 1092 (11th Cir. 1997) (holding that Title VII does not preempt).

IV. AMERICANS WITH DISABILITIES ACT (ADA) (42 U.S.C. § 12112).

The Americans with Disabilities Act of 1990 (ADA) prohibits employers with fifteen or more employees from discriminating “against a qualified individual with a disability because of the disability of such individual.” 42 U.S.C. § 12112(a) (2000). The ADA defines “disability” as “(A) a physical or mental impairment that substantially limits one or more of the major life activities of such individual; (B) a record of such an impairment; or (C) being regarded as having such an impairment.” 42 U.S.C. § 12102(2). Accordingly, “[t]he ADA imposes upon employers the duty to provide reasonable accommodations for known disabilities unless doing so would result in undue hardship to the employer.” Morisky v. Broward County, 80 F.3d 445, 447 (11th Cir. 1996) (citing 42 U.S.C. 12112(b)(5)(A)).

- ◆ **Establishing a *Prima Facie* Case.** To establish a *prima facie* case of discrimination under the ADA, a plaintiff must demonstrate that he or she (1) had, or was perceived to have, a “disability”; (2) was a “qualified” individual; and (3) was discriminated against because of his or her disability. Carruthers v. BSA Adver., Inc., 357 F.3d 1213, 1216 (11th Cir. 2004) (citing Williams v. Motorola, Inc., 303 F.3d 1284, 1290 (11th Cir. 2002)); Reed v. Heil Co., 206 F.3d 1055, 1061 (11th Cir.2000).

◆ **Defining a “Qualified” Individual.** Under the ADA, a “qualified individual with a disability” is an “individual with a disability who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires.” 42 U.S.C. § 12111(8). Thus, an ADA plaintiff “must show either that he can perform the essential functions of his job without accommodation, or, failing that, show that he can perform the essential functions of his job with a reasonable accommodation.” Davis v. Florida Power & Light, 205 F.3d 1301, 1305 (11th Cir. 2000). Consequently, if the individual “is unable to perform an essential function of his [or her] . . . job, even with an accommodation, he [or she] is, by definition, not a ‘qualified individual’ and, therefore, not covered under the ADA. In other words, the ADA does not require [an employer] to eliminate an essential function of [the plaintiff’s] job.” Id.

◆ **Defining an “Essential Function.”** “The term essential functions means the fundamental job duties of the employment position the individual with a disability holds or desires,” and “does not include the marginal functions of the position.” 29 C.F.R. § 1630.2(n)(1). “Whether a function is essential is evaluated on a case-by-case basis by examining a number of factors.” Davis, 205 F.3d at 1305. In making this determination, the statute provides, “consideration shall be given to the employer’s judgment as to what functions of a job are essential, and if an employer has prepared a written description before advertising or interviewing applicants for the job, this description shall be considered evidence of the essential functions of the job.” 42 U.S.C. § 12111(8); see also Holbrook v. City of Alpharetta, 112 F.3d 1522, 1526 (11th Cir.1997).

Other factors to consider are: “(1) the amount of time spent on the job performing the function, (2) the consequences of not requiring the incumbent to perform the function, (3) the terms of the collective bargaining agreement, (4) the work experience of past incumbents in the job, and (5) the current work experience of incumbents in similar jobs.” Davis, 205 F.3d at 1305 (citing 29 C.F.R. § 1630.2(n)(3)).

Courts consider three additional criteria upon which a job function may be deemed essential: “(1) the reason the position exists is to perform the function; (2) there are a limited number of employees available among whom the performance of the job function can be distributed; and (3) the function is highly specialized so that the incumbent in the position was hired for his or her expertise or ability to perform the particular function.” Holbrook, 112 F.3d at 1526 (citing 29 C.F.R. § 1630.2(n)(2)).

◆ **Proving “Disability” or “Impairment.”** Under the ADA, a physical or mental impairment constitutes an actual disability only if it substantially limits one or more major life activities. See 42 U.S.C. § 12102(2)(A); Toyota Motor Mfg., Kentucky, Inc. v. Williams, 534 U.S. 184, 195 (2002) (holding that “to be substantially limited in performing manual tasks, an individual must have an

impairment that prevents or severely restricts the individual from doing activities that are of central importance to most people's daily lives . . . [and] . . . [t]he impairment's impact must also be permanent or long term"); 29 C.F.R. pt. 1630 app. at 351 (1999) ("An individual is substantially limited in working if the individual is significantly restricted in the ability to perform a class of jobs or a broad range of jobs in various classes, when compared with the ability of the average person with comparable qualifications to perform those same jobs."); Hilburn v. Murata Elecs. N. Am., Inc., 181 F.3d 1220, 1226 (11th Cir. 1999) ("a physical impairment alone is not necessarily a disability under the ADA"). In addition, a person with a record of an impairment substantially limiting a major life activity, or who is regarded as having such an impairment, also qualifies as disabled under the ADA. See 42 U.S.C. § 12102(2)(B)-(C). "Determinations of disability must take into account mitigating measures used by the employee, such as eyeglasses or high blood pressure medication." Sutton v. United Airlines, Inc., 119 S.Ct. 2139 (1999).