Legal Update

ROPER, P.A.

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ELEVENTH CIRCUIT DEFINES LEGAL STANDARD FOR STUDENT-ON-STUDENT RACE-BASED HARASSMENT CLAIMS

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A fourth-grade public school student killed herself after allegedly experiencing bullying by another student in school. The student's parent and personal representative of the student's estate sued the school system for wrongful death, violation of Alabama state law, violation of Title IX of the Education Amendments of 1972, violation of Title VI of the Civil Rights Act of 1964, and deprivation of substantive due process and equal protection under the Fourteenth Amendment under 42 U.S.C. § 1983. Title IX generally prohibits sex-based discrimination in education systems that receive federal financial assistance. A prior Supreme Court decision recognized a cause of action for student-

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SHOULD A CORPORATION CARRY UNINSURED MOTORIST PROTECTION FOR EMPLOYEES AND VEHICLE OCCUPANTS?

When an employee is injured in a work-related motor vehicle accident, the initial thought is the only source of recovery is the at-fault driver's policy and workers' compensation benefits. This is primarily due to Fla. Stat. § 440.094(3) which states "the benefits under the workers' compensation insurance… are the exclusive remedy against the employer for any injury." However, this is not the situation when an employer carries Uninsured Motorist coverage for their employees and other occupants in work vehicles as part of their auto-policy. Knowing the policies in play and the ramifications of such, are in the employer's best interest for deciding whether Uninsured Motorist policies are best for their organization.

When the negligence of a driver injures an employee, there are usually two policies that initially come into play. The bodily injury coverage of the negligent driver and the Workers' Compensation benefits of the employee. Liability is not a consideration in

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on-student sexual harassment. Title VI generally prohibits discrimination based upon race, color, or national origin in programs or activities that receive federal financial assistance.

The student was a victim of sex-based and race-based bullying. Prior cases have established for the United States Court of Appeals for the Eleventh Circuit, which hears federal appeals from Florida, Georgia, and Alabama, that holding an education system subject to Title IX liable for student-on-student sexual harassment requires proving that the education system was deliberately indifferent to the harassment. This means that the education system was actually aware of the harassment, which is so severe, pervasive, and objectively offensive that it deprives the victim of access to educational opportunities or benefits of the education system. This is a difficult standard for a plaintiff to meet. It requires knowledge and disregard of an extremely great risk to the victim's health or safety. Stated simply, the response to harassment must amount to an official decision not to remedy the violation. Simple negligence or mere unreasonableness are not enough. The question the Eleventh Circuit answered for the first time in *Adams* is what standard applies to student-on-student race-based harassment claims against education systems. Since Congress modeled Title IX after Title VI, which parallel one another, the Eleventh Circuit held that the deliberate indifference standard also applies to student-on-student race-based harassment claims against education systems under Title VI.

The school system responded to and addressed reports that the student was bullied by another student, although the plaintiff contended the response was inadequate. So, the trial-level court found that the school system was not deliberately indifferent to the harassment. The Eleventh Circuit agreed and affirmed the trial-level court's summary judgment in favor of the school system. The case is *Adams v. Demopolis City Schools*, — F.4th —, 2023 WL 5659895 (11th Cir. 2023).

By: Frank M. Mari

Workers' Compensation benefits, but for that trade-off the employee is restricted to treating under the terms of Fla. Stat. § 440, which limits the employee to treating with approved doctors at special reduced rates under the Workers' Compensation schedule. This is why many employees who are injured in on-the-job car accidents will choose to treat outside of Workers' Compensation if policies are significant enough to cover the injuries. Further, if the injured employee makes a recovery and settlement under the bodily injury policy of the at-fault driver and the employee incurred medical costs and lost wages under Workers' Compensation, a lien can be pursued by Workers' Compensation for recovery of medical and lost wages expenses from the settlement.

However, when employers provide Uninsured Motorist policies to their employees, a third level of coverage can come into play. Uninsured Motorist policies provide coverage for injuries sustained in a motor vehicle accident when the at-fault driver has no coverage or the coverage was too minimal to cover the damages sustained by the employee. This policy is not subject to the restrictions under Fla. Stat. § 440 as mentioned above. Further, under Florida case law, any Uninsured Motorist policy settlement is not subject to a Workers' Compensation lien.

Carrying an Uninsured Motorist policy for an employee no longer makes Workers' Compensation the exclusive benefit for an employee when that employee is not at-fault in an accident. This may encourage them to treat outside the Workers' Compensation system if the policy is significant enough. Therefore, the employer has less control over the loss, treatment, and expenses associated with the employee's claim.

In Uninsured Motorist policy lawsuits, the insurer is typically the named party. This means the company is not listed in the lawsuit; however, insurance related losses would still apply to the company when an employee makes a recovery on the uninsured motorist policy. This is an additional negative to carrying the policy.

With this in mind, Uninsured Motorist policies, depending on how the policy is written, provide valuable benefits to employees, administrators, mangers, supervisors, and executives that may not have Uninsured Motorist policies that provide coverage when operating a vehicle while in the course and scope of their employment. Rejecting this coverage could potentially limit those employees to the Fla. Stat. § 440 maximum lost wage cap ($917 weekly in 2023) and leave them exposed should an at-fault driver have no policy or minimal policy limits, with their only recovery being through Workers' Compensation or a disability policy. Further, some executives and employees can be opted-out of Workers' Compensation, which could potentially leave them with no coverage. A final thing to consider is if an employee of the company, which the company does not carry Uninsured Motorist coverage, transports guests and an accident occurs, while the employee will be covered through workers' compensation, the guests in the vehicle can only recover through the at-fault driver's bodily injury coverage, which may leave the guests with no recovery at all if that at-fault driver has no or minimal policy limits.

It is important for any company to thoroughly consider the ramifications of carrying, or not carrying, Uninsured Motorist coverage based use of the vehicles and requirements of the corporation.

By: Eric R. Arckey

APPELLATE COURT CLARIFIES REQUIREMENTS OF WRITTEN COMPLAINT UNDER WHISTLE-BLOWER'S ACT

The Fourth District Court of Appeal ("DCA") recently reversed and remanded a judgment in favor of a City of Fort Lauderdale "("City") employee under Florida's Whistle-blower's Act ("the Act") in *Wheeler v. City of Fort Lauderdale*, Case No. 4D20-2676 (Fla. 4th DCA July 12, 2023), confirming the strict construction of the Act's requirements. The Court found that the employee's submission of phone records, spreadsheets, and screenshots did not constitute a "written and signed complaint" as required by the Act. The employee, Richard Wheeler, worked in the IT department of the City's Public Works Department. Upon learning that a colleague was suspected of working a second job on the City's time, Wheeler took it upon himself to investigate.

Wheeler did not notify his supervisor of his suspicions prior to initiating his own investigation. He obtained the supervisor's phone records and accessed the employee's private computer files, taking screenshots of documents unrelated to her employment with the City. Wheeler also created spreadsheets listing what he considered suspicious incoming and outgoing calls from the employee's extension. Wheeler e-mailed the City's Assistant Director of the Public Works Department (not his direct supervisor) to request a meeting. At the meeting, Wheeler verbally explained his suspicions and provided the Assistant Director with the files he had collected.

After the meeting, Wheeler was notified that he was under investigation for violating the City's computer usage policy. He was eventually terminated, and the employee he suspected of wrongdoing was cleared of violating any City policies. Wheeler then brought a claim under the Whistle-blower's Act, and the case proceeded to trial. The jury entered a verdict in favor of Wheeler and awarded him damages for lost wages and benefits.

Wheeler appealed, challenging the final judgment and the denial of several post-trial motions in which he sought additional damages. The City cross-appealed. The Fourth DCA agreed with the City's arguments, concluding that "Wheeler failed to comply with the Act's 'written and signed complaint' requirement because the screenshots and spreadsheets submitted by Wheeler failed to identify any violation of law, rule, or policy, nor identify any act of misfeasance, malfeasance, or other gross conduct that would trigger the Act's protections." The Court held: "In short, merely providing documents potentially supporting a protected disclosure without any written explanation bearing the signature of the complainant fails to qualify as a 'written and signed complaint' within the meaning" of the Act. Accordingly, the Fourth DCA reversed the final judgment awarding Wheeler damages and remanded the case to the trial court for entry of judgment in favor of the City.

By: Christina M. Locke

FIRM SUCCESS

Summary Judgment in School Board Lawsuit

The firm recently obtained summary judgment for the firm's clients in a lawsuit arising out of allegations of abuse by a special education teacher. Five plaintiffs sued a school board, on behalf of their minor children, over alleged abuse in the classroom. The parties disputed whether the teacher's actions, conducted as alleged, violated federal and/or state laws. At issue was whether the teacher's actions were necessary for the behavioral management of students with special needs. On summary judgment, the court decided that there had been no federal or constitutional violations by the teacher or the school board, and declined to exercise supplemental jurisdiction over the plaintiffs' remaining state law claims. Prior to the court granting summary judgment, we were able to convince the court to exclude the plaintiffs' untimely responses to our motions for summary judgment and to deny the plaintiffs' motion for extension of time to submit expert witness reports. We also obtained a Clerk's entry of costs in excess of $18,000.00. The case is *A.E., et al. v. Brevard County School Board, et al.*, United States District Court for the Middle District of Florida case number 6:20-cv-2153-GAP-RMN. The firm is delighted to provide our clients with this favorable outcome. We would be happy to discuss any matter involving alleged educator misconduct.

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