

Litigating in Florida: Updates and Recent Decisions

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Court Advises Parties: Put It In Writing

Resolution of commercial disputes are increasingly being committed to arbitration. As demonstrated in the January 6, 2010 decision in *BDO Seidman, LLP v. Bee*, 24 So. 3d 1278 (Fla. 3d DCA 2010), it is wise to thoughtfully consider all aspects of the relationship being committed to arbitration. It also demonstrates the necessity of being careful about the choice of words in all types of agreements.

Charles Bee was a Florida partner in BDO Seidman, LLP's international accounting practice. On October 19, 2003, Bee and BDO entered into an "Understanding Regarding Continued Employment" which addressed his entitlement to future compensation and guaranteed bonuses. This "Understanding" was separate and distinct from the partnership agreement between Bee and BDO. Just over a year after entering into the Understanding, BDO notified Bee of its decision to rescind the Understanding and to terminate his partnership interest for cause. Bee demanded arbitration of the dispute between him and BDO. The arbitration panel ruled in favor of Bee, concluding that the termination of Bee's partnership interest was without cause and was a material breach of the Understanding. It also determined that BDO's attempt to rescind the Understanding was in bad faith, and awarded Bee approximately \$4 million plus prejudgment interest.

Bee then filed an action in Florida circuit court to confirm the

arbitration award and for an award of attorneys' fees and costs under Section 448.08 of the Florida Statutes. This statute provides that "[t]he court may award to the prevailing party in an action for unpaid wages costs of the action and a reasonable attorney's fee." The trial court awarded Bee \$286,655.50 in attorneys' fees and costs against BDO. BDO appealed.

The appellate court observed that the question before it had never been decided in Florida: whether Section 448.08 applies to a compensation dispute between a partner and a limited liability company. Although recognizing that partners are normally co-owners of the business and that logically Section 448.08 should not apply, the appellate court was constrained by the arbitration panel's determination that the Understanding and partnership agreement were separate and distinct from one another. Therefore, since the record before the appellate court demonstrated that Bee and BDO treated the Understanding as one governing employment and wages, then the general law of partnership did not apply. Additionally, the appellate court observed that the Understanding's titled attorney's fee to Bee's continued "employment" and characterized money earned thereunder as "wages." Consequently, the appellate court affirmed the trial court's award under Section 448.08 of the Florida Statutes.

Almost as a commentary on its own decision but also as a warning, the court gave this advice: "If LLPs and

other partnership entities operating in Florida intend to avoid statutory fee-shifting in compensation disputes involving a Florida partner or partnership, it may be advisable to put that intention in writing."

Supreme Court's Upcoming Decision in Case Involving Privacy of Employee Communications Through Employer-Owned Hand-Held Electronic Devices Should Prompt Employers to Review Their Policies and Practices

The U.S. Supreme Court is set to review an issue with wide implications for employers and employees in the internet age: "What are the legal boundaries of an employee's privacy in this interconnected, electronic-communication age, one in which thoughts and ideas that would have been spoken personally and privately in ages past are now instantly text-messaged to friends and family via hand-held, computer-assisted electronic devices?"

The question (as framed by the District Court) arises as boundaries between work time and personal time continue to blur. Employers are increasingly distributing hand-held devices with the expectation that employees will use them to perform job responsibilities. Employees are increasingly using such devices outside the workplace, even while on vacation, to meet employer and customer expectations of accessibility. Many existing policies still declare employees "should have no expectation of privacy or confidentiality" when using

employer-owned equipment, restrict usage to company business only, broadly prohibit personal use and warn unauthorized use may lead to disciplinary action. In reality, many such policies, though written on paper, are not enforced in practice. That is what the employees suing in *Quon vs. City of Ontario* contend.

In *Quon v. Arch Wireless Operating Company, Inc.*, 529 F. 3d , 892 (9th Cir. 2008), the Ninth Circuit Court of Appeals addressed claims by a City of Ontario SWAT Team officer, against the City of Ontario for invasion of privacy based on the City's unauthorized review of text messages sent and received by that officer on a two-way pager provided to him by the City. Sergeant Quon was provided the pager and informed that the official City policy was that the pager was to be used exclusively for official business. However, a direct supervisor allowed the informal practice of officers using the pagers for personal business, provided any overage charges were paid by the Officer. When the officer who was tasked with collecting overage fees for the pagers at issue grew tired of his collection duties, the City Police Chief instructed the lieutenant to contact the wireless carrier and obtain transcripts of the text message transmissions for

“audit purposes.” Quon and others brought claims against the City under the Fourth Amendment claiming that the search accomplished by obtaining the transcripts of the text messages sent and received to Sergeant Quon’s pager was unreasonable as a matter of law. The Circuit Court held that search of Quon’s text messages violated their Fourth Amendment and California constitutional privacy rights because Quon had a reasonable expectation of privacy in the content of the text messages, and the City’s search was unreasonable in scope.

The City appealed the Ninth Circuit’s decision and the U.S. Supreme Court granted certiorari. The issue before the court – whether employees have a constitutional right to privacy for Communications made on employer-provided telecommunications devices - intersects directly with the employer’s right to enforce its policies restricting the use of their property given to employees for business use. Multiple state and federal court decisions have addressed variations on this fact pattern and a consistent trend has yet to emerge. If the Supreme Court were to frame the issue as broadly as did the district court, its decision could establish principles for use by employers in the public sector and

private sector on the extent to which they may scrutinize and disclose nonwork-related communications through use of employer-owned hand-held electronic devices. Whatever its ultimate basis of decision, the Supreme Court seems likely to discuss an employer’s potential risks when it has written policies proclaiming personal communications on company-owned equipment are not private but an informal practice of tolerating or encouraging such communications. This is a familiar and recurring inquiry in employment law cases: Do employer’s policies exist merely on paper and not in practice – or in operational reality? Employer readiness to withstand this inquiry will be increasingly important in the world of electronic communications that the district court in the *Quon* case described so well. ■

**Courtesy of Berger Singerman's Dispute Resolution Team with offices in Fort Lauderdale, Miami, Boca Raton and Tallahassee.*

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