



Litigating Trends in Florida

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Suing Former Co-Workers for Tortious Interference With Business Relationship with Employer

In a lawsuit for tortious interference with a business relationship, can a co-employee be considered a “third party?” On June 29, 2011, the Third District Court of Appeal decided that the answer can be “yes” in certain circumstances. *Alexis v. Ventura*, No. 09-88468, 2011 WL 2555643 (Fla. 3d DCA June 29, 2011).

In Florida, a claimant for tortious interference with an advantageous business relationship must allege five elements:

1. The existence of a business relationship under which the claimant has legal rights;
2. The defendant's knowledge of such relationship
3. An intentional and unjustified interference with that relationship
4. By a third party
5. Damages to the claimant caused by the interference.

Sloan v. Sax, 505 So. 2d 526, 527-28 (Fla. 3d DCA 1987).

In *Alexis*, a former employee filed a three-count complaint against her former employer, alleging violations of the Florida Civil Rights Act. The former employee amended her complaint to add her immediate supervisor as a defendant, and added a fourth count alleging her former supervisor tortiously interfered with an advantageous business relationship. Generally, the former employee alleged the former supervisor made

hostile statements and engaged in hostile acts that were motivated by a discriminatory intent to undermine the former employee's job performance in the eyes of their employer, and that these statements and acts ultimately led to the former employee's termination. The former supervisor moved to dismiss this fourth count and to dismiss herself as a defendant, arguing that a co-employee could not state a claim against a co-employee for tortious interference with a business relationship. The trial court agreed and dismissed the claim and dismissed the former supervisor as a defendant.

In Florida, the general rule is that in the context of a managerial/supervisory employee terminating an employee, a claim cannot lie against the managerial/supervisory employee, because such managerial/supervisory employee is considered to be a party to the employment relationship. *Rudnick v. Sears, Roebuck & Co.*, 358 F. Supp. 2d 1201, 1206 (S.D. Fla. 2005) (citing *West v. Troelstrup*, 367 So. 2d 253, 255 (Fla. 1st DCA 1979)). The exception to this rule is when the defendant “acts solely with ulterior purposes and the advice is not in the principal's best interest.” *O.E. Smith's Sons, Inc., v. George*, 545 So. 2d 298, 299 (Fla. 1st DCA 1989).

In *Alexis*, the Third District Court of Appeal reversed the trial court and found that when a co-employee does not act on employer's behalf or was acting to employer's detriment, the co-employee becomes a “third party” as required for a tortious interference

claim. This was the case even where the former supervisor acted with other co-employees to interfere in the former employee's business relationship.

In sum, a lawsuit suing a former co-employee for tortious interference in the co-employee's employment may survive a motion to dismiss.

LLC Operating Agreements and Conflicts of Interest

The Second District Court of Appeal recently attempted to reconcile the tension between the well accepted premise that parties are free to waive any conflict of interest in a contract with the duty of loyalty that is inherent in any manager's relationship with a limited liability company. In *Razin v. A. Milestone, LLC*, 36 Fla. L. Weekly D1713a (Fla. 2d DCA, Aug. 5, 2011), one of two managing members of a limited liability company (Razin) lent \$1,000,000.00 to the LLC. After the promissory note became due, and the LLC failed to repay the loan, the relationship between Razin and the other managing member of the LLC (Bahl) deteriorated. Razin sued the LLC, and chose the attorney for the LLC to retain in defense of the lawsuit. Razin alleged that he was authorized to hire this attorney on behalf of the LLC because, under the LLC's operating agreement, “during the period that any portion of the Razin loan is outstanding, in the event of a disagreement between the Managers regarding any matter affecting the Company, the decision of Razin shall control with respect to such matter...”

Once Razin and the attorney chosen by him to represent the LLC began taking steps to resolve the lawsuit, Bahl retained another attorney on behalf of the LLC who filed affirmative defenses and a counterclaim against Razin in his simultaneous, but separate, defense of the LLC. Razin filed a motion to disqualify the Bahl-chosen attorney for the LLC, and Bahl filed a motion to disqualify the Razin-chosen attorney for the LLC. The trial court found that neither Bahl's nor Razin's attorney could properly represent the LLC because a majority of the members (i.e. Razin and Bahl) were required to authorize the retention of counsel. Thus, both counsel were disqualified, and a custodian was appointed to resolve the dispute. Both parties appealed.

The Second District Court of Appeal found that where there is an unambiguous contractual provision, a trial court cannot give it any other meaning beyond that expressed and must construe it "in accord with its ordinary meaning." *Emergency Assocs. of Tampa v. Sassano*, 664 So. 2d 1000, 1003 (Fla. 2d DCA 1995). Therefore, the Court found that the parties are bound to the provision of the operating agreement

giving control of "any matter affecting the Company" to Razin. Next, the Court considered whether an apparent conflict of interest in Razin's right to choose counsel to defend the company from Razin's own lawsuit voided the contractual provision of the operating agreement giving Razin that authority. The court found that it did not – "[p]arties are free to waive any potential conflicts of interest . . . and we are powerless to rewrite the agreement in order to make it more reasonable for Bahl." Razin, 36 Fla. L. Weekly D1713a (citing *Rudolf v. Gray, Harris & Robinson, PA*, 901 So. 2d 148, 150 (Fla. 5th DCA 2005)). Finally, the Court determined that the (unwaivable) duty of loyalty pursuant to Florida Statutes § 608.4225(1) (a) was not compromised by the effect of this provision in the LLC's operating agreement. A duty of loyalty, the Court opined, is limited to the manager's obligation to refrain from dealing with the LLC "as or on behalf of a party having an interest adverse to the limited liability company." The Court found that even though the retention may be a conflict of interest, it did not trigger a breach of a duty of loyalty because it was "fair and reasonable as to the limited liability company at the time" it was authorized.

Members and managers of an LLC should not always assume that corporate statutory protections will shield an LLC from the consequences of a conflict of interest, even one as apparent as the one at issue in this case. Conflicts of interest can be waived, and absent a blatant disregard of the duty of care or the duty of loyalty, courts are inclined to defer to the plain terms of an operating agreement rather than fashion what may sometimes be a more "equitable" solution. ■

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

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Mitchell W. Berger	MBerger@bergersingerman.com	Melanie A. Hines	MHines@bergersingerman.com
Leigh-Ann A. Buchanan	LBuchanan@bergersingerman.com	Elaine Johnson James	EJames@bergersingerman.com
Anthony J. Carriuolo	ACarriuolo@bergersingerman.com	Sharon Kegerreis	SKegerreis@bergersingerman.com
Samuel C. Cozzo	SCozzo@bergersingerman.com	Charles H. Lichtman	CLichtman@bergersingerman.com
James C. Cunningham, Jr.	JCunningham@bergersingerman.com	Etan Mark	EMark@bergersingerman.com
Amos Elberg	AElberg@bergersingerman.com	Stefanie C. Moon	SMoon@bergersingerman.com
Andrew M. Hinkes	AHinkes@bergersingerman.com	Kelly A. O'Keefe	KOKeefe@bergersingerman.com
James D. Gassenheimer	JGassenheimer@bergersingerman.com	Monica Rossbach	MRossbach@bergersingerman.com
David L. Gay	DGay@bergersingerman.com	Leonard K. Samuels	LSamuels@bergersingerman.com
Gavin C. Gaukroger	GGaukroger@bergersingerman.com	Frank Scruggs	FScruggs@bergersingerman.com
Fred O. Goldberg	FGoldberg@bergersingerman.com	Daniel H. Thompson	DThompson@bergersingerman.com
Rita Goldberg	RGoldberg@bergersingerman.com	Laurie Weinstein	LWeinstein@bergersingerman.com
Gregory A. Haile	GHaile@bergersingerman.com	Michel O. Weisz	MWeisz@bergersingerman.com
		Jeffrey S. Wertman	JWertman@bergersingerman.com