



CYPEN & CYPEN
NEWSLETTER
for
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Never Forget September 11, 2001
and
Always Remember May 2, 2011

1. FLORIDA PUBLIC EMPLOYEES RELATIONS COMMISSION

HAS EXCLUSIVE JURISDICTION TO RESOLVE DISPUTES WITH PUBLIC EMPLOYERS AND PUBLIC EMPLOYEES INCLUDING THOSE ACTIVITIES THAT ARGUABLY CONSTITUTE UNFAIR LABOR PRACTICES AS DEFINED BY FLORIDA STATUTE: Amato

and Bouchard appealed the trial court's final order granting appellees' motion to dismiss with prejudice appellants' amended complaint based on its findings that: (1) as to some of the appellees, the trial court lacked subject matter jurisdiction; and (2) as to all appellees, appellants' claims were banned by the statute of limitations. The Third District Court of Appeal affirmed. Appellants, are retired City of Miami Beach firefighters, who filed a lawsuit on March 2, 2015, and an amended complaint on April 27, 2015, against fourteen defendants, including the City of Miami Beach, the City's former Manager, the City's Director of Human Resources, an outside consultant, and ten members of the union. Appellants allege that in the summer of 2009, the city and the union engaged in secret talks during their collective bargaining negotiations to target and dupe appellants into believing that the three-year Deferred Retirement Option Plan would be eliminated in the 2012 collective bargaining agreement in order to entice appellants to retire early, which would create promotion opportunities within the city's firefighter department. What appellants alleged they were not told was that the new CBA would offer a five-year DROP to replace the three-year DROP. Appellants allege they elected the three-year DROP option on August 31, 2009; they learned about the five-year DROP option on or about April 29, 2010; and the five-year DROP option was ratified by a majority of the union

members on or about July 14, 2010. Public Employees Relations Act governs labor relations and collective bargaining activities among public employees, public employers, and employee organizations (unions) representing employees in Florida. Under PERA, the Florida Legislature created Florida Public Employees Relations Commission, and empowered PERC to settle disputes regarding unfair alleged labor practices. The law interpreting jurisdictional scope of PERA has broadly included, as falling within PERC's exclusive jurisdiction, those activities that arguably constitute unfair labor practices as defined by section 447.501, Florida Statutes, or the type of labor matter or dispute within the contemplation of Part II, Chapter 447, Florida Statutes. Whether a claim is within PERC's exclusive jurisdiction depends on the nature and substance of the claim, not on how the claims are labeled. Appellants allege they were duped into selecting the three-year DROP option, which prevented them from selecting the five-year DROP option subsequently agreed to by the city and the union in the 2009-2012 CBA, in order to create vacancies so that certain union officials could be promoted. They alleged that these "side agreements" were not entered into in conformity with PERA and PERC regulations. Because the complained-of conduct allegedly occurred during the collective bargaining process and while the union officials were engaging in the scope of their official duties and responsibilities as union officials, and the actions alleged by the city defendants and union officials, if true, would constitute unfair labor practices, the appellees' claimed were subject to exclusive jurisdiction of PERC. Because Florida law requires exhaustion of administrative

remedies before any court may consider matters within the purview of an administrative agency, and the appellants failed to file a PERC complaint before bringing the instant lawsuit. The court also found that the jurisdictional statute of limitations to file a PERC complaint under section 447.503(6)(b), Florida Statutes, is six months. Which clearly ran. The claims against the outside consultant were for breach of fiduciary duty. Breach of a fiduciary duty claim may be based on negligence or intentional conduct, but under either alternative, the statute of limitations is four years. Thus, the claims against outside consultant were also time-barred. *Amato v. City of Miami Beach*, Case No. 3D-16-957 (Fla. 3d DCA December 07, 2016).

2. IS 401(K) BAD DEAL FOR CITY WORKERS COMPARED TO

SOCIAL SECURITY?: Recently, The Florida Times-Union's editorial board asked this question: "Would you accept a 401(k) match of 10% or more in return for not having Social security?" The board's response was that "most of us would jump at the chance." Not so fast. As an expert in employee benefits for 25-plus years, I know that jumping at that chance would be a very poor decision. Although trading your Social Security benefits for an employer pension with a guaranteed payment can be good (think railroad pensions), trading your Social Security benefits for a 401(k) is absolutely not comparable -- even with a 10% match! Here is just one example of two very different programs: say you're a married 30-year-old Jacksonville firefighter with a couple of kids, and you die serving your community. Sadly, your 401(k) will not be enough to take care of your family

because you simply have not contributed long enough for the 401(k) to be your family's nest egg. Your loved ones will be lucky to make it one year on your 401(k) savings and only if you have diligently deducted enough from your take home pay to get the match. In contrast, your Social Security would kick in and actually cover your family. That is because it is insurance. See that deduction on your paystub labeled OASDI? That stands for Old Age, Survivor and Disability Insurance. That benefit goes to your widowed spouse and kids under 18. A 401(k) is nothing like that. Not even close. And we are talking about risking the welfare of our youngest first responders' families, the people who risk their lives for our safety every day. So, no I would not jump at the chance for that benefit, and neither should our city employees. Shame on Mayor Lenny Curry and this newspaper for suggesting that this 401(k) is even remotely comparable to Social Security or a pension plan.

3. TREASURY APPROVES FIRST MPRA APPLICATION FOR IRON WORKERS LOCAL 17:

Iron Workers Local 17 Pension Fund, Cleveland, has received permission from the Treasury Department to cut benefits for participants, including retirees, as part of a proposed rescue plan. It is the first application approved by Treasury under the Multiemployer Pension Reform Act of 2014, which allows trustees of deeply underfunded pension plans that would be insolvent within 15 years from the time the plan is implemented to reduce benefits after they have tried all other means. The pension fund had \$91.9 million in assets and \$223.2 million in liabilities as of April 30, 2014, for a

funding ratio of 41%, according to its most recent Form 5500 filing. Of its 2,064 participants, 640 are active. The plan is projected to become insolvent in 2032. The MPRA application submitted to the Treasury Department on December 23, 2015, called for reducing benefits “indefinitely” to allow the plan to remain solvent with enough assets to pay the reduced level of benefits. Kenneth Feinberg, Treasury's special master overseeing the MPRA application process, said recently in a letter to trustees that the notice is not final authorization to make the changes, and that the next step is for pension fund participants to vote on the proposed plan. MPRA cuts can be no lower than 110% of the Pension Benefit Guaranty Corp.'s guarantee, which is less than \$13,000 per retiree per year. Disabled or older retirees have further protections.

4. FLORIDA HOUSE SPEAKER SUES PITBULL OVER CONTRACT

DISCLOSURE: The Speaker of the Florida House is suing music star Pitbull's production company to force the company to allow the state to publicly disclose what the state's tourism agency is paying the Miami celebrity to promote Florida's beaches. In Pitbull's Sexy Beaches music video and on social media, he promotes Florida destinations and uses the hashtag #ILoveFL. But how much the state is paying him to do so has been a mystery. Visit Florida's CEO Will Seccombe said under terms of the contract with PDR Productions, they are not allowed to discuss the deal because it contains "trade secrets." But in the lawsuit filed in the 2nd Judicial Circuit in Leon County, House Speaker Richard Corcoran, R-Land O'Lakes, argues

that the terms of the contract with Pitbull should not be considered a trade secret and should not be protected from public view. In a sternly worded email sent to the Florida House last week, an attorney for Pitbull, whose real name is Armando C. Perez, warned that disclosing the contract would violate trade secret protections, which is a felony in Florida. "In the event of a violation of the trade secrets provision of this Agreement and the confidentiality provision under which the legislature is reviewing this, we reserve all rights against any individuals violating this," attorney Leslie Jose Zigel of Greenspoon Marder wrote. Corcoran however is pressing on. "We operate from fundamental and immovable principles in the House," he said in a statement to the media. "Two of those principles are that taxpayers have a right to hold those who spend their money accountable and that when asked, those responsible for that spending are transparent. This suit is not about Pitbull or his compensation. This is about the audacity of government entities who are under the false impression that they are above the law or believe somehow that taxpayer money is a never ending river of riches they get to play with. The House will protect the taxpayers and will utilize all means at our disposal to hold government accountable."

5. WHEN ACTING IN CAPACITY AS CHIEF CORRECTIONAL OFFICER, FLORIDA SHERIFF IS NOT ARM OF THE STATE ENTITLED TO BENEFIT OF THE STATE'S ELEVENTH AMENDMENT IMMUNITY FROM SUIT IN FEDERAL COURT:

Florida law requires the counties of the state to designate a chief

correctional officer, but gives counties broad discretion to decide who that officer may be. Thus, for example, a county may (but need not) choose to designate its sheriff as its CCO, so long as it selects someone for that position. The sheriff, as CCO, may then hire and fire deputies to assist him with his responsibilities, and he may therefore face liability for personnel actions that violate an employee's constitutional rights. However, if the sheriff was acting as an arm of the state, he will be immune from suit in federal court on account of the Eleventh Amendment. Whether a sheriff acts as an arm of the state is a function-specific determination based heavily on a detailed analysis of state law, and is often a difficult question, as it was in a recent case arising from Broward county (Florida) sheriff's potential liability under §42 USC 1983 for failing to rehire a former deputy allegedly due to his political loyalties and in violation of his First Amendment rights. Broward County has expressly designated its sheriff as its CCO; thus, at issue in the case was the basic question of whether a Florida county sheriff, acting in his capacity as chief correctional officer in hiring and firing of his deputies, is an arm of the state entitled to the benefit of the state's Eleventh Amendment immunity from suit in federal court. After careful review, the Eleventh U.S. Circuit Court of Appeals concluded that a Florida sheriff is not an arm of the state when acting in such capacity. Therefore, the appellate court reversed the district court's grant of summary judgment for the sheriff, and remand to the district court for further proceedings consistent with this opinion. *Stanley v. Broward County Sheriff*, Case No. 15-13961 (U.S. 11th Cir. December 14, 2016).

6. A TALE OF TWO RETIREMENTS: Institute for Policy Studies has issued a new report entitled “*A Tale of Two Retirements -- As Working Families Face Rising Retirement Insecurity, CEOs enjoy Platinum Pensions.*” The presidential election put a spotlight on the decline of American manufacturing and the related economic insecurity among white working class males. In recent decades, this demographic group lost millions of unionized factory jobs that were once a major source of both decent pay and retirement benefits. But they are not the only ones with reason to be concerned about their economic futures. White working class families, families of color, and female-headed households share common worries about whether they will be able to afford to retire and whether their golden years will be tarnished by financial stress. Our country’s real retirement divide is between those at the top of corporate America and nearly all the rest of us. The report provides a detailed analysis of this CEO-worker retirement benefit gap. As our numbers make startlingly clear, big company CEOs are continuing to enjoy colossal nest eggs while many of these leaders are further eroding their own employees’ retirement security. Why has the CEO-worker retirement benefit gap become such a chasm? This is not the result of executives working harder or investing more wisely. Instead, this gap is one more example of rule-rigging in favor of the 1%.

- Pension rules: ordinary workers face strict limits on how much pre-tax income they can invest each year in tax-deferred plans

like 401(k)s. But most Fortune 500 firms set up special unlimited tax-deferred compensation accounts for their executives where their money can grow, tax-free, until they retire and withdraw it.

- Compensation rules: since more than half of executive compensation is now tied to the company's stock price, CEOs have a powerful personal incentive for slashing worker retirement benefits in order to boost the short-term bottom line. Every dollar not spent on employee retirement security is money in the CEO's pocket.
- Tax rules: CEO retirement funds are growing because CEO pay is growing and much of it is stashed in executive tax-deferred retirement accounts.

The tax code encourages excessive CEO pay by allowing corporations to deduct unlimited amounts of executive compensation off their federal income taxes, as long as it is "performance-based." The more corporations pay their CEO, the less they owe in taxes. The rest of us make up the difference. On top of their massive annual paychecks, CEOs of most large U.S. corporations have amassed gilded retirement fortunes. These fortunes come from two pots:

- Pension plans: CEOs often participate in both a regular employee plan (if it's available) and a far more lucrative Supplemental Executive Retirement Plan. SERPs can be designed as defined benefit plans, which guarantee a monthly check after retirement, or as defined contribution plans, which may include variable or performance-based features.

- Non-qualified Deferred compensation plans: whereas ordinary workers face limits on how much of their pay they can set aside each year in a 401(k) or other defined contribution plan (currently \$24,000 for employees approaching retirement), CEOs face no such limits on special deferred compensation plans set up by their companies. Based on SEC filings, the 100 largest CEO nest eggs in the Fortune 500 in 2015 amounted to a combined total of \$4.7 billion.

Here are some of the key findings:

Just 100 CEOs have company retirement funds worth \$4.7 billion -- a sum equal to the entire retirement savings of 41% of U.S. families with the smallest nest eggs. This \$4.7 billion total is also equal to the entire retirement savings of the bottom:

- 59% of African - American families
- 75% of Latino families
- 55% of female-headed households
- 44% of white working class households

On average, the top 100 CEO nest eggs are large enough to generate for each of these executives a \$253,088 monthly retirement check for the rest of their lives.

- Among ordinary workers, those lucky enough to have 401(k) plans had a median balance at the end of 2013 of \$18,433, enough for a monthly retirement check of just \$101.

- Of workers 56-61 years old, 39% have no employer-sponsored retirement plan whatsoever and will likely depend entirely on Social Security, which pays an average benefit of \$1,239 per month.

With nearly \$3 billion in special tax-deferred accounts, Fortune 500 CEOs stand to gain enormously from Trump's proposed tax cuts on top earners.

- If President-elect Donald Trump succeeds in cutting the top marginal tax rate from 39.6% to 33%, Fortune 500 CEOs would save \$196 million on the income taxes they would owe if they withdrew their tax-deferred funds.
- Unlike ordinary 401(k) holders, most top CEOs have no limits on annual contributions to their tax-deferred accounts. In 2015 alone, Fortune 500 CEOs saved \$92 million on their taxes by putting \$238 million more in these accounts than they could have if they were subject to the same rules as other workers.

The retirement asset gap between CEOs mirrors the racial and gender divides among ordinary Americans.

- The 10 white male CEOs with the largest retirement funds hold a combined \$1.4 billion, more than eight times more than the 10 CEOs of color with the largest retirement assets and nearly five times as much as the top 10 female CEOs.

To read the entire report please visit: <http://www.ips-dc.org/wp->

<content/uploads/2016/12/IPS-Two-Retirements-Report-final-for-dec-15.pdf>. December 2016.

7. REPORT FINDS WEALTH GAP CONTINUES INTO

RETIREMENT: We hear a lot about the income gap between top executives and workers, and it turns out that gap continues after retirement, too. The *Institute for Policy Studies* reports the 100 CEOs with the biggest retirement plans each have anywhere from \$25 million to nearly \$1 billion set aside by their employers in individual pension and tax-deferred accounts. But among American workers with a 401(k), said report author Sarah Anderson, the median retirement-account balance is just \$18,433. That is a stark contrast, but not entirely relevant, said Olivia Mitchell, who directs the Pension Research Council at the Wharton School. Mitchell believes the more important question to ask is whether the national retirement system is failing or doing well. Mitchell said many professional workers are saving enough for retirement in 401(k) (defined contribution) plans with an employer contribution. But she said guaranteed company pension plans (defined benefit plans), which used to be common among union workers, especially at large companies, are going by the wayside. And she said most low-income workers do not earn enough to save for retirement, leaving them entirely dependent on Social Security. (See Item 6 above).

8. LIFE INSURANCE GENDER GAP GROWS: New research on life insurance ownership rates presents producers with an opportunity to

help improve coverage for women when tailoring communications about the importance of this product line as reported by employeebenefitadviser.com. Just 56% of American women have life insurance coverage, compared with 62% of men, according to LIMRA's Life Insurance Ownership in Focus, U.S. Person-Level Trends: 2016. While the amount of coverage women purchased spiked nearly 21% since 2010, researchers say it is still inadequate relative to men at \$160,782 vs. \$206,357. Research director for LIMRA Insurance Research, was surprised that the ownership gap between men and women widened to a six-point differential from a four-point margin in 2010. There is no singular reason that drives this gap, adding that the group life ownership rate is 39% for men vs. 34% for women. One barrier is that women worry about being able to afford coverage, though LIMRA suggests that financial professionals can help dispel this concern. There is a misconception about the cost of life insurance. Most people simply believe it costs two to three times as much as it actually does. In addition, there is enough flexibility with this product that a life insurance agent can tailor a policy to fit every individual's budget. Other workplace and retirement research from LIMRA shows that women tend to gravitate toward jobs or careers in education or the nonprofit sector whose benefits are not as generous as men. These results reflect gaps not just with life insurance, but also retirement savings and other benefit products at both the individual and group level. Another issue worth considering is the potential for life insurance to get lost in the shuffle. For instance, a new LIMRA Secure Retirement study warns about the so-called benefits wallet

approach wherein each employee is given a certain amount of money each year toward the benefits they want. With nearly 90% of workers ranking health care coverage and retirement savings plans in their top five most important benefits, LIMRA researchers are concerned that that life insurance, disability insurance and other valuable benefits may be ignored. The fact that fewer women have life insurance coverage or are under-insured leaves many American families at risk if they should die prematurely.

9. FLORIDA WOMAN GETS 6 MONTHS FOR STEALING \$148G IN LATE FATHER'S NEW YORK PENSION BENEFITS: In a piece from nydailytimes.com, a 64-year-old Florida woman has been sentenced to six months in jail and five years' probation for stealing more than \$148,000 in New York pension benefits paid to her father after he died. According to the controller and attorney general's offices, Renee Kanas, of Tamarac, failed to notify the state workers' retirement system of her father's death in 2010. She took his benefits for almost five years through their joint bank account, spending some on Caribbean cruises. As part of her plea, she agreed to pay the \$148,000 back to the state authorities say she has already paid back \$45,000 through the sale of her Florida home.

10. ENTIRE POLICE DEPARTMENT QUILTS OVER ISSUES WITH TOWN'S COUNSEL: Leoaffairs.com reports that a small town in Miami-county, **Indiana**, is now without a police force. The entire department quit, citing multiple issues with the town board. Town

Marshal Michael Thomison and four other officers handed over their resignation letters. They blame the town council members for constantly scaling things back without communicating with the department. The officers were often asked to do illegal and immoral things, like run background checks on other council members to look into possible criminal history. The letters also mentioned that the officers were forced to share one set of body armor, putting their lives in danger.

11. FUN WITH WORDS: When fish are in schools, they sometimes take debate.

12. PARAPROSDOKIAN: If at first you do not succeed, skydiving is not for you.

13. TODAY IN HISTORY: In 1882, 1st string of Christmas tree lights created by Thomas Edison.

14. KEEP THOSE CARDS AND LETTERS COMING: Several readers regularly supply us with suggestions or tips for newsletter items. Please feel free to send us or point us to matters you think would be of interest to our readers. Subject to editorial discretion, we may print them. Rest assured that we will not publish any names as referring sources.

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16. REMEMBER, YOU CAN NEVER OUTLIVE YOUR DEFINED RETIREMENT BENEFIT.