

Case Law Update

Legislative Law Changes: Joint and Several Liability/Law Enforcement Pursuit

The 2006 Legislature passed two laws that will have a significant impact on tort claims filed against state agencies.

House Bill No. 145 eliminates joint and several liability in Florida. This bill applies to causes of action that accrue on or after April 26, 2006. This legislation should be of great benefit to state agencies who are involved in claims or lawsuits where there are co-defendants or joint tort-feasors involved.

Senate Bill No. 124 provides that a law enforcement agency is not liable for injury, death, or property damage effected or caused by a person fleeing a law enforcement officer under certain circumstances. This law applies to causes of action that accrued on or after June 20, 2006.

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2006 Helen Neubauer Memorial Scholarships



Scholarship winners Francesca Valeriano and Sharon Harrison

Winners of the 2006 Helen Neubauer Memorial Scholarships were Francesca Valeriano and Sharon Harrison. Each received a \$5,000 scholarship check from the Florida Workers' Compensation Institute (FWCI). Francesca is the daughter of Melanie Valeriano, Workers' Compensation Specialist, Division of Risk Management. She will start college in the fall at Tallahassee Community College and work toward a bachelor's degree. Francesca would like to someday own and operate her own restaurant. Sharon is the daughter of Barbara Cutts, Workers' Compensation Specialist Supervisor, Division of Risk Management. She is enrolled in the Tallahassee Community College Nursing Program and is studying to become a registered nurse. The scholarship is open to children of employees of the Division of Risk Management and the Division of Workers' Compensation. Helen Neubauer was a long-time employee of the Division of Risk Management, joining the Department on September 16, 1974 until her untimely death January 14, 2004.

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Six Ways to Get Yourself Sued

Many employers get sued, not because they did anything illegal, but because their poor management practices invited employee lawsuits. Here are the top six employer actions or omissions that lead employees to believe that litigation is their only recourse.

No. 1: Tolerate poor performance, and then abruptly fire the employee when you've had enough. When an employee is suddenly discharged for unsatisfactory job performance after receiving consistently positive appraisals, they tend to suspect (understandably) that there is an ulterior motive for the termination – such as discrimination, retaliation, or some other unlawful motive.

No. 2: Don't explain now; explain later. Employers who fail to offer any explanation for their employment decisions frequently end up explaining anyway... to a judge or jury. Employees do not assume that “no news is good news.” To the contrary, they usually view silence as a sign that there was no legitimate explanation for the decision. And the impact of employer silence on the employee rumor mill should go without saying.

No. 3: Don't let little things like policies and procedures get in your way. Deviation from an established policy or procedure usually makes employees feel that they've gotten the shaft. Once you break your rule, you set a new precedent unless you're very careful (see No. 4).

No. 4: Slavishly follow your policies and procedures to the letter in every instance, regardless of your common sense and sense of fairness, no exceptions, ever. Normally, it's best to follow your policies and procedures. However, sometimes you may get into trouble for being too rule-bound. For example, “reasonable accommodation” may legally require you to make

exceptions to your normal rules. Moreover, you generally should feel free to exercise your good judgment when a rule seems too harsh when applied to a given situation. To protect your company from claims of discrimination, be sure that you have carefully documented the reasons for the exception, and apply the same exception to comparable situations that arise in the future.

No. 5: Blow off those silly internal complaints! Employees who believe their work-related complaints have fallen on deaf ears feel compelled to take their complaints elsewhere – to a lawyer, a government agency, or a court. Even baseless complaints allow you to satisfy the employee's desire to be heard, which can mean a lot. Most people will accept decisions they don't like, as long as the rationale is explained to them (See No. 2).

No. 6: Love means never having to say you're sorry. In fact, love does mean saying you're sorry. Apologizing for employer mistakes or employer created hassles and burdens, acknowledges the employee's dignity and is a sign of respect. This might run counter to what you've previously been told by attorneys, who used to warn that an apology was an admission of fault. They are right, but employees usually appreciate the acknowledgement and don't take their grievances any further. A few tips: Don't apologize if you don't mean it (the employee will always know if you're extending a phony apology), and try to back up your apology with meaningful action if appropriate. If the offending situation cannot be corrected, at least continue to follow up as best you can. In most cases, you can apologize without compromising your company's legal position or making unwarranted concessions.

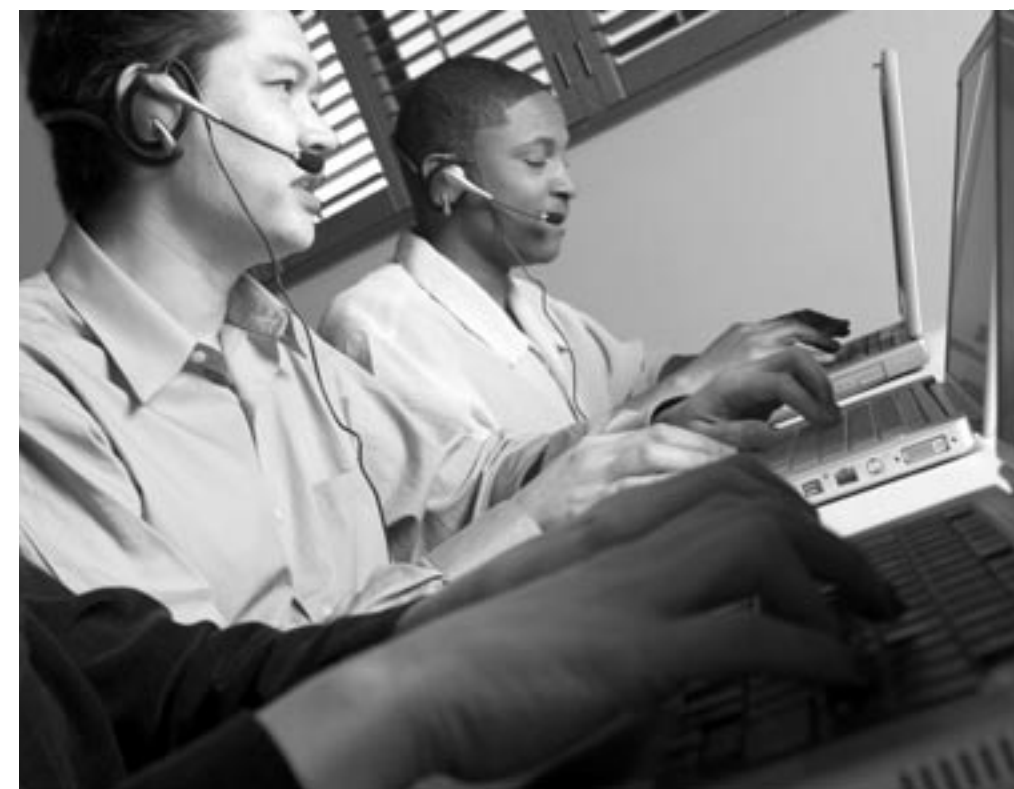
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Sovereign Immunity Update

In the consolidated opinion of Pollock v. Florida Dept. of Highway Patrol and Leeds v. Florida Dept. of Highway Patrol, 882 So. 2d 928 (Fla. 2004), the Florida Supreme Court addressed the sovereign immunity doctrine and those instances in which the government will be liable for its negligence. The doctrine of sovereign immunity bars negligence actions against governmental entities with respect to **planning** functions (that is judgmental or discretionary activities), but not **operational** functions. The Court recognized four categories of governmental functions and activities: **(I)** legislative, permitting, licensing, and executive officer functions; **(II)** enforcement of laws and the protection of public safety; **(III)** capital improvements and property control operations; and **(IV)** professional, educational, and general services for the health and welfare of the citizens. Notably, the Court found there is no governmental tort liability for the action or inaction in carrying out the discretionary functions described in categories **I** and **II** because there has never been a common law duty of care with respect to those legislative, executive, and police power functions. Moreover, statutory waiver of sovereign immunity did not create a new duty of care. On the other hand, there may be governmental tort liability under the operational categories **III** and

IV. However, an operational level duty to warn arises only with respect to a known hazard so serious and so inconspicuous to a foreseeable plaintiff that it virtually constitutes a trap. Additionally, in order to state a cause of action for failure to warn of a known dangerous condition, a Plaintiff must allege that (1) the government created a dangerous condition, (2) the condition was not readily apparent to someone who could be injured thereby, (3) the government had knowledge of the dangerous condition, and (4) the government failed to take steps to warn the public of the danger or to avert the danger. Lastly, like most case law, there are always exceptions. The Court noted that a “special tort duty” arises when you create circumstances which place people within a “zone of risk” by creating or permitting dangers to exist or otherwise subjecting them to danger. However, when no degree of control has been assumed, the “zone of risk” analysis has no application.

*Article written by Joseph F. Scarpa
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Comments, Questions...

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