

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

HARRIET THOMPKINS,

Plaintiff,

vs.

Case No. 8:10-cv-01518-SDM-TBM

GULF BEACHES PUBLIC LIBRARY, INC.,
a Florida Non-Profit Corporation,

Defendant.

**PLAINTIFF'S MEMORANDUM IN OPPOSITION TO
DEFENDANT'S MOTION TO STRIKE PUNITIVE DAMAGES**

Plaintiff hereby files her Memorandum opposing Defendant's Motion to Strike Plaintiff's punitive damages claims "[t]o the extent that such "punitive damages" are sought against GULF BEACHES pursuant to the Plaintiff's claims arising under Florida law." (Motion, pp. 1-2). As relief, Defendant requests that "the Plaintiff's prayer for punitive damages against Defendant, GULF BEACHES as contained within the Complaint should be stricken as a matter of law." (Emphasis added).

Defendant's Motion is not supported by any memorandum of law or even a single citation of authority. Plaintiff's Complaint does not allege a claim under the FCRA, which alone renders Defendant's Motion bogus. However, even if the Complaint included a FCRA claim, Defendant's Motion is frivolous. Section 768.72 motions are not required in federal court before a punitive damages claim can be alleged. See Cohen v. Office Depot, Inc., 204 F.3d 1069 (11th Cir. 2000) (holding that § 768.72 conflicts with and must yield to

the "short and plain statement" rule contained in Federal Rule of Civil Procedure 8(a)(3)).

Neither did the Florida legislature intend to burden recovery of punitive damages under the FCRA upon compliance with Chapter 768.72.¹ Section 768.71, Florida Statutes, provides:

(1) Except as otherwise specifically provided, this part applies to any action for damages, whether in tort or in contract.

(2) This part applies only to causes of action arising on or after July 1, 1986, and does not apply to any cause of action arising before that date.

(3) If a provision of this part is in conflict with any other provision of the Florida Statutes, such other provision shall apply.

Id. (emphasis added).

"When a statute is self-contained, it covers only those subjects within its self-contained limitations and does not affect rights which are not within its purview or specifically excluded from its provisions." Grice v. Suwannee Lumber Mfg, 113 So.2d 742, 742 (Fla. 1st DCA 1959); Laborers' Int'l Union of North America v. Burroughs, 541 So. 2d 1160, 1164 (Fla. 1989). A "specific statute covering a particular subject area always

¹Under the procedures described in section 768.72, no hearing is even required on a motion for leave to amend a complaint for punitive damages, much less an evidentiary proceeding. In Strasser v. Yalamanchi, 677 So. 2d 22 (Fla. 4th DCA 1996), the Fourth District stated that "contrary to petitioner's contention, an evidentiary hearing is not mandated by the statute before a trial court has authority to permit an amendment. Pursuant to section 768.72, a proffer of evidence can support a trial court's determination." In Solis v. Calvo, 689 So.2d 366 (Fla. 3d DCA 1997), the Third District held that pursuant to 768.72, "a punitive damage claim can be supported by a proffer of evidence. A formal evidentiary hearing is not mandated by the statute." The required level of proof required at this stage was discussed in State of Wis. Inv. Bd. v. Plantation Square Assoc., 761 F. Supp. 1569, 1580-81 (S.D. Fla. 1991) ("[T]he standard of proof required merely to assert plaintiff's punitive claim must be lower than that needed to survive a summary adjudication on its merits").

controls over a statute covering the same and other subjects in more general terms.”
Stoletz v. State, 875 So. 2d 572, 575 (Fla. 2004).

In Speedway SuperAmerica, LLC v. Dupont, 955 So. 2d 533 (Fla. 2007), the court declined to address whether to adopt federal law or state common law principles with respect to future claims under the FCRA. In Dupont, the jury was charged with federal law standards from Kolstad v. American Dental Association, 527 U.S. 526, 536 (1999). Florida has a well-settled rule of statutory construction that the legislature is presumed to know the existing law when a statute is enacted, including judicial decisions on the subject. Wood v. Fraser, 677 So. 2d 15, 18 (Fla. 2d DCA 1996). Thus, when the legislature reenacts a statute which has a judicial construction placed upon it, it is presumed that the legislature is aware of the construction and intends to adopt it, absent a clear expression to the contrary. Gulfstream Park Racing Ass'n, Inc. v. Dept. of Bus. Regulation, 441 So. 2d 627, 628 (Fla. 1983).²

The determination of punitive damages under 42 U.S.C. § 1981 is governed by federal law, i.e., the preponderance of the evidence standard. See Karnes v. SCI Colo. Funeral Servs., 162 F.3d 1077, 1081 (10th Cir. 1998) (collecting cases). To recover punitive damages under federal law, a complaining party must show that the employer engaged in discriminatory practices with malice or with reckless indifference to federally protected rights. See 42 U.S.C. § 1981a(b)(1). Under this standard, “malice” and “reckless

²Remedial laws must be construed in a fashion that promotes access to the remedy provided in the statute. It matters not a whit whether the remedy is in derogation of the common law. The law will be read to favor the remedy. The Golf Channel v. Jenkins, 752 So. 2d 561, 565-66 (Fla. 2000); Arrow Air, Inc. v. Walsh, 645 So. 2d 422, 424 (Fla. 1994); Martin County v. Edenfield, 609 So. 2d 27, 29 (Fla. 1992).

indifference” refer not to the egregiousness of the employer's conduct, but rather to the employer's knowledge that it may be acting in violation of federal law. Kolstad v. American Dental Association, 527 U.S. 526, 536 (1999). The Supreme Court emphasized in Kolstad that the focus is on the actor's state of mind. Id. at 535. An employer would not have the requisite state of mind if he was “unaware of the relevant federal prohibition” or acted “with the distinct belief that its discrimination is lawful.” Id. at 537. Under Kolstad, malice may be imputed to the employer if the employee who committed the unlawful act is serving in a “managerial capacity” and “acting in the scope of employment.” Id. at 543.

The phrase “civil action” in section 768.72 must be construed to exclude all statutory causes of action that arise outside of section 768.71. Maggio v. Fla. DOL & Empl. Sec., 899 So. 2d 1074, 1081 (Fla. 2005) (pre-suit notice obligations with Chapter 768 do not apply to the FCRA). In construing a statute, a court must give effect to legislative intent. See Bautista v. State, 863 So. 2d 1180, 1185 (Fla. 2003). Florida courts begin statutory construction by looking to the actual language used. “If, and only if, the actual language is unclear, do Florida courts explore the legislative history or use rules of statutory construction to determine the legislature's intent in enacting a statute.” Joshua v. City of Gainesville, 768 So. 2d 432, 435 (Fla. 2000). Where possible, courts must give full effect to all statutory provisions and construe related statutory provisions in harmony with one another. Villery v. Florida Parole & Probation Comm'n, 396 So. 2d 1107, 1111 (Fla. 1980).

Maggio compels the conclusion that punitive damage claims under the FCRA are not burdened by section 768.72, Florida Statutes. In Yoder Bros. v. Weygant, 973 So. 2d 625 (Fla. Dist. Ct. App. 2d Dist. 2008), the court held that section 768.79, the offer of judgment statute, is inapplicable because it conflicts with the legislature's expressed intent

to limit when attorney's fees may be awarded to a prevailing defendant in an action brought under the FCRA. In Sanchez v. Degoria, 733 So. 2d 1103 (Fla. 4th DCA 1999), the court held that the trial court did not depart from the essential requirements of law when it concluded that an individual need not comply with Fla. Stat. § 768.72 before pleading a punitive damages claim for an alleged violation of federal law. In Moran v. City of Lakeland, 694 So. 2d 886 (Fla. 2d DCA 1997), the court addressed whether Florida's proposal for settlement statute could be used in an action under federal law, namely, 42 U.S.C. § 1983.

Chapter 768 predicates recovery of punitive damages upon clear and convincing evidence, which is contrary to the preponderance standard applicable to the FCRA. Section 768.72(2), Florida Statutes, provides: "A defendant may be held liable for punitive damages only if the trier of fact, based on clear and convincing evidence, finds that the defendant was personally guilty of intentional misconduct or gross negligence." Id.

WHEREFORE, Plaintiff requests that Defendant's Motion be denied.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing was served upon counsel for Defendant on this 18th day of November, 2010 through the CM/ECF system.

/s/ Craig L. Berman _____
Attorney