



Broward County Commission Regular Meeting

109.

Meeting Date: 06/26/2012

Director's Name: Joni Armstrong Coffey

Department: County Attorney

Information

Requested Action

MOTION TO ADOPT Resolution directing the County Administrator to publish Notice of Public Hearing to be held on Tuesday, August 28, 2012, at 2:00 p.m., in Room 422 of the Governmental Center to consider enactment of a proposed Ordinance, the title of which is as follows:

AN ORDINANCE OF THE BOARD OF COUNTY COMMISSIONERS OF BROWARD COUNTY, FLORIDA, CREATING CHAPTER 20½ OF THE BROWARD COUNTY CODE OF ORDINANCES ("CODE") TO PROHIBIT WAGE THEFT; PROVIDING FOR AN ADMINISTRATIVE COMPLAINT, ADMINISTRATIVE HEARING AND ADMINISTRATIVE PROCEDURES FOR WAGE THEFT CLAIMS; PROVIDING FOR ENFORCEMENT OF ADMINISTRATIVE ORDERS IN A COURT OF COMPETENT JURISDICTION; AND PROVIDING FOR SEVERABILITY, INCLUSION IN THE CODE, AND AN EFFECTIVE DATE.

(Sponsored by Vice-Mayor Kristin Jacobs)

Why Action is Necessary

The proposed Ordinance was prepared by the Office of the County Attorney at the direction of the Board of County Commissioners at its Commission meeting of June 12, 2012.

What Action Accomplishes

Amends the Code to prohibit wage theft and provide for administrative procedures for wage theft claims.

Is this Action Goal Related

Previous Action Taken

Summary Explanation/ Background

This Ordinance was drafted at the direction of the Board on June 12, 2012. It substantially tracks Miami-Dade County's wage theft ordinance that was enacted in 2010. It would create an administrative claim for wage theft in excess of \$60. Any claim not resolved voluntarily would be referred to a County hearing officer, who would issue a final order finding in favor of the employee or the employer. Prevailing employees would be awarded damages equal to three times the unpaid wages, and would be entitled to recover attorney's fees and costs. If an employee prevails, the employer would also be required to reimburse the County for its administrative costs and the hearing officer costs.

The draft includes a provision allowing the County and the employer to recover expenses incurred in connection with a frivolous wage theft claim.

Fiscal Impact

Fiscal Impact/Cost Summary:

Fiscal Impact Statement by Office of Management and Budget to be distributed as additional material.

Attachments

Exhibit 1 - Copy of Resolution

Exhibit 2 - Copy of Proposed Ordinance

Exhibit 3 - Copy of Fiscal Impact Statement

Additional Material - Information

Additional Material - Information

Item # 109

**ADDITIONAL MATERIAL
10:00 a.m. Regular Meeting
JUNE 26, 2012**

**SUBMITTED AT THE REQUEST OF
VICE MAYOR KRISTIN JACOBS**

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Florida Flunks Wage Theft Test -- South Florida Leads the Class

Posted: 06/13/2012 4:54 pm

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On the heels of a report stating that Florida is the 15th worst state in the nation for workers trying to recover stolen wages, the [Broward County Commission](#) directed the county attorney to draft a wage theft ordinance, following the examples of Miami-Dade and Palm Beach Counties. The [report](#) issued by the Progressive States Network graded states based on how well they protect workers ability to receive their earned wages. According to the report, if this were school, Florida would have flunked out by now.

In particular, Florida has exactly zero laws on the books that would incentivize employers to stay honest. Transparency and accountability measures such as notice to employees of wages and paydays, record-keeping, pay stubs with each pay period, and the right for enforcement agencies to inspect records also help workers keep abreast of their terms of employment. In this category, Florida held the shameful honor of scoring 0, a score that only Alabama and Mississippi -- two states that have never had wage and hour laws -- can also share.

Other ways in which Florida's wage theft laws are insufficient:

- The state has decent provisions in place that protect workers from employers who fire, demote, or otherwise discriminate against an employee who has taken action to recover wages. However, the laws only apply to minimum wage and overtime cases; if someone is trying to recover wages beyond the minimum wage, they remain unprotected.
- Workers are entitled to recover an additional amount equal to the amount of wages owed (single liquidated damages) in minimum wage, overtime, and retaliation violations, an important provision that can help them pay off interest on credit card debt or loans that had to be taken in order to cover living expenses during the process of recovering stolen wages. However, this right is revoked if employers can prove that they erred in good faith. Workers are not eligible for liquidated damages at all in wage payment cases.
- Civil penalties in the form of fines or jail time are possible under the minimum wage, overtime, and retaliation law when action is brought by the Attorney General. However, in practice, the law fails. According to the Research Institute on Social & Economic Policy, the Florida Attorney General did not bring a single civil action to enforce the state's minimum wage law since the law's inception in 2004 and the report's research period ending in December 2011. The Attorney General's recalcitrance is made even more egregious by the fact that, though Florida enacted its first minimum wage law in 2004, it was not actually achieved because of any action on the legislature's part. Rather, the law was overwhelmingly passed by Florida's citizens through a ballot initiative.
- Finally, the state does not have any statutes that address misclassification of employees, a growing problem that is already rampant in several low-wage industries. The most common form allows employers to skirt an array of labor standards and taxes by misclassifying employees as "independent contractors," which allows employers to profit on the backs of both their employees and the general public.

Fortunately for South Floridians, Miami-Dade County passed the state's first wage theft ordinance in February 2010, fully implementing the ordinance late that year and securing through conciliation or hearings almost a million dollars for over 600 workers during the first year and a half of the program. Although the Florida Retail Federation (FRF) and [Associated Builders and Contractors](#) have pushed back against the successful wage theft ordinance both in court and at the legislative level, the ordinance has withstood the pressure. In April 2012, a judge threw out the lawsuit brought by the FRF, calling the Miami-Dade Wage Theft Program "a responsible and reasonable exercise of government authority."

Small business owners in particular have spoken out in favor of the ordinance with one arborist commenting that it's tough

enough to do business in this economy without having to stand next to a pirate while you do it. Palm Beach County is currently drafting its own wage theft ordinance after piloting a Legal Aid Society Wage Theft Program, which was not as successful as sponsors had hoped. Hopefully, the rest of the state will soon follow the example set by South Florida and we'll begin to see passing grades throughout the state. Florida needs economic enhancement not economic hindrance.

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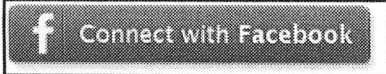
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Item # 109 (2)

**ADDITIONAL MATERIAL
10:00 a.m. Regular Meeting
JUNE 26, 2012**

**SUBMITTED AT THE REQUEST OF
VICE MAYOR KRISTIN JACOBS**

IN THE CIRCUIT COURT OF THE 11TH
JUDICIAL CIRCUIT IN AND FOR
MIAMI-DADE COUNTY, FLORIDA

CIRCUIT CIVIL DIVISION

CASE NO.: 10-42326 CA 30

FLORIDA RETAIL FEDERATION,

Plaintiff,

v.

MIAMI-DADE COUNTY, FLORIDA,

Defendant.

ORDER ON DEFENDANT'S MOTION TO DISMISS

THIS CAUSE came on to be heard at multiple hearings beginning in October, 2010. The Court has received many volumes of arguments and memorandums and case law on the issues addressed in the Florida Retail Federation's Complaint against Miami-Dade County, as to Chapter 22, of the Miami Dade County Code, known as the Wage Theft Ordinance. After an extensive review of all of the submissions, the Court finds as follows:

On or about August 4th, 2010, the Plaintiff, Florida Retail Federation, Inc. sued Miami-Dade County for declaratory and injunction relief.

The Plaintiff prays several issues as follows:

The ordinance violates Article I Section 9 of the Florida Constitution; it violates Article II Section 3 of the Florida Constitution; it violates Section 22 of the Florida Constitution; it violates Article IV Section 1 of the Florida Constitution; the ordinance is preempted by the FLSA and the Florida Minimum Wage Act and is inconsistent with

general law. Primarily, the Federation alleges that it has associational standing to bring this action on behalf of its 632 members located in Dade County. Further, it alleges that its members are being denied or will be denied due process and that the ordinance violates the separation of powers of the Constitution and its member's right to a jury trial and in effect has created a Court as a result of the passing of this Ordinance. Miami-Dade County counters by filing its motion to dismiss.

The County asserts, the Plaintiff has no standing because there is no present controversy which affects its members. The County also claims that Ordinance does not violate due process because the Ordinance provides notice and an opportunity to be heard before an Administrative Hearing Officer and the parties have rights to discovery, right to subpoena witnesses, rights to cross examine, rights to a transcript and a right to an appeal to the Circuit Court Appellate Division. The Ordinance gives fair notice to a person of reasonable intelligence and provides a standard of proof by a preponderance of evidence.

The Defendant goes on to state that Count II should be dismissed because the Florida Constitution does not prohibit quasi judicial administrative proceedings. Article V Section 1 of the Florida Constitution, specifically authorizes, quasi-administrative proceedings.

This type of Ordinance has been repeatedly created throughout the State of Florida pursuant to the Florida Constitution. The complaint should be dismissed because the Constitution authorizes quasi judicial proceedings with hearing examiners such as that provided in the Ordinance.

The County argues that Count 5 should be dismissed because the ordinance is not preempted by the Federal Fair Labor Standards Act (FLSA) nor by the Florida Minimum

Wage Act (FMWA). Finally the Ordinance is not preempted by the FLSA nor by the FMWA.

Several hearings took place between October and December concerning all of the issues raised in the Complaint and the Motion to Dismiss. Several special set hearings took place on July 21, 2011, October 14, 2011, October 19, 2011, and October 24, 2011. The parties requested extensions of time to file various memorandums and briefs, the last of which was received on December 9, 2011.

After extensive review of all of the submissions the Court finds as follows:

The Plaintiff is a Statewide nonprofit Florida corporation and Trade Association representing the mutual interest of retail related business throughout the State with an approximately 352 large retail chain members and 280 small business numbers located in Miami, Dade County.

The Plaintiff believes the Wage Theft Ordinance will substantially impact its member's business operations. The County's Motion to Dismiss in general, test the legal sufficiency of the Complaint and not the factual issues contained therein. *Minor v. Brunetty*, 43 So.3d 178 (Fla. 3 DCA 2010). This Court in determining the merits of the Motion to Dismiss must consider only those allegations contained within the four corners of the Complaint and must accept those allegations as true, considering the allegations in the light most favorable for the non-moving party. *Susan Fixel, Inc. v. Rosenthal and Rosenthal, Inc.*, 842 S.2d (Fla. 3d DCA 2003). The test in this case is not whether the Plaintiff can prevail, but whether the Plaintiff is entitled to a declaration of rights at all. *N & D Holding, Inc. v. Town of Davie*, 17 So.3d 819 (Fla. 4th DCA 2009).

The main point of the Defendant's Motion to Dismiss asserts that the Plaintiff does not have standing to bring its Complaint because none of its members have been subjected to a hearing afforded by the Ordinance. The Defendant claims that a future or hypothetical threat of a Complaint does not constitute the basis for proper standing and therefore the controversy is not right for review. Further, the County alleges the Plaintiff's constitutional claims lack any merit and do not preempt the ordinance.

The Plaintiff states that they do have standing to contest a municipal ordinance because any person whose rights are affected by a municipal ordinance may have determined any question of validity arising under such municipal ordinance and obtain a Declaration of Rights there under. See, *National Rifle Association of America, Inc. v. City of South Miami*, 812 So.2d 504 (3rd DCA 2002).

The Plaintiff asserts that there is bonafide actual present and practical need for the Declaration. See, *Department of Environmental Protection v. Garcia*, 2011 W.L. 3300540 (Fla. 3d DCA – Aug. 2011).

Florida Case Law has developed a three pronged test to determine whether a Complaint filed by an association on behalf of its members has standing. The elements are: (1) substantial number of the Association members although not necessarily a majority are substantially affected by the challenge rule; (2) the subject matter of the rule is within the associations general scope of interest and activity; and (3) the relief requested is the type appropriate for a trade association to receive on behalf of its members. See, *Florida Home Builders Association v. Department of Labor and Employment Section SCC.*, 412 So.2d 351 (Fla. 1982).

It appears that the Plaintiff does in fact have associational standing because it represents 632 retail establishments in Dade County. The subject matter of the Wage Ordinance which deals with under and over payments of wages is within the association's general scope of interest and activity and the relief requested by the Defendant is within the type of matters that are appropriate for the members of the Association. Under the standards set by the Home Builders case above, the Plaintiff argues that there is a bonafide actual present practical need for the declaration and that the declaration would deal with a present ascertain or ascertainable state of facts which their members are and will be subjected to. Therefore, as to the question of standing, the Court finds that the Plaintiff, Florida Retail Federation, DOES HAVE STANDING and the County's Motion to Dismiss on that ground, is denied.

The Plaintiff in this case has a heavy burden of overcoming the presumption that a duly enacted ordinance of local government is presumed to be valid. *Hesch v. Broward County*, 53 So.3d 1177 (Fla. 4th DCA 2011).

In reviewing the Plaintiff's Motion for Summary Judgment, the complaint and other pleadings, the Court must view all of the facts and inferences in the light most favorable to nonmoving party. See, *Valk v. JEM Distributors of Tampa Bay, Inc.*, 700 So.2d 416 (Fla. 2d DCA 1997). The Court must determine that there is no genuine issue as to any material fact that the moving party is entitled to a judgment as a matter of law.

The FLSA is a Federal Statute that establish a national minimum wage. In Florida the right to honor a minimum wage is clarified within the Florida Constitution, Florida Constitutional Article 10, Section 24. Article 10, Section 24(e) in pertinent part states... this Amendment provides for payment of a minimum wage and shall not be

construed to preempt or otherwise limit the authority of the State Legislature or any other public body to adopt or enforce any other law or regulation, requirement, policy or standard that provides for payment of a higher or supplemental wages or benefits where the extent is such protection to employers or employees not covered by this amendment. The Florida Legislature went on to pass Florida's Minimum Wage Act, the FMWA in order to provide measures appropriate to implement Article 10 – Section 24. *Perez*, 548 Fed. Sup. 2d at 1346. The FMWA under Section 10 states in pertinent part that the ability to seek redress of a minimum wage violation has been expressly preempted such that the sole remedy for an aggrieved party may be obtained under this State Law and through the State Court system. *Stantum of Brevard, Inc. v. Brevard City*, 3 S.2d 309 (Fla. 2008). Therefore, there is an express preemption set forth in the Statute as it relates to minimum wage.

Unlike the FMWA, Miami Dade County's Wage Theft Ordinance declares that it is a violation for an employer to underpay (or fail to pay) any agreed to wage for services provided by an employee. The ordinance does not confine it's authority to payment controversy based on minimum wage rates. Instead the Wage Ordinance deals with the larger universe of all wages negotiated by parties but that are in dispute. Based on the expressed preemption in State Law and the expressed language of the wage ordinance, this Court finds that the Wage Theft Ordinance is NOT in violation of the FSLA or the FMWA.

Article 10 – Section 24 goes on to state... this Amendment provides for payment of a minimum wage and shall not be construed to preempt or otherwise limit the authority of the State Legislature or any other public body to adopt or enforce any other law,

regulation requirement policy or standard that provides for the payment of higher or supplemental wages or benefits or that extends such protections to employers or employees not covered by this amendment.

The Plaintiff argues that there is an implied preemption which renders the Wage Theft Ordinance to be unconstitutional. However, the language in both the Florida Constitution and the Statutes in question indicates otherwise as set forth above. The only time that an implied preemption may be considered is when there is shown to be a danger of conflict between State Law and the County Ordinance. *Hillsborough County v. Florida Restaurant Association, Inc.*, 603 So.2d 587 (FLa. 2d DCA 1992). In the case before this Court, the subject matter of the FMWA and the Florida Constitution deals solely with minimum wage earners, while the Wage Theft Ordinance deals with a broader universe of wage earners, not necessarily just minimum wage earners. Therefore, the Defendant's Motion to Dismiss as to Count 5 is hereby GRANTED.

As to the other Counts where the Plaintiff argues that the Wage Theft Ordinance violates its members due process rights and it should be deemed unconstitutional, most of those arguments rely upon this Court concluding that the FLSA is applicable. In addition, under the Home Rule Charter the County has the right to create quasi-judicial administrative bodies to investigate and ascertain facts, hold hearings, and draw conclusions there from. These quasi-judicial administrative bodies are constitutional in Florida. *Verde v. Metropolitan Dade County*, 684 So.2d 870 (Fla. 3d DCA 1996). Article 8, Section 2 of the Florida Constitution gives in its entirety the authority to rule in a particular area such as wages unless there is an expressed statement of preemption. As

set forth above, there is not in this case. See, *City of Boca Raton v. Gidman*, 440 S.2d 1277 (Fla. 1983).

Miami Dade's Ordinance provides notice and opportunity to be heard, discovery, subpoena, cross examine of witnesses, the ability to retain counsel if one chooses to, and submit evidence and the hearings are transcribed. In addition, there is also an appellate process, a direct appellate review to the Circuit Court Appellate Division which is charged with a duty to ensure that the decisions under review have complied with due process and the essential requirements of law which would encompass all of the substantive and procedural due process concerns asserted by the Plaintiff.

Lastly, the Florida Constitution expressly authorizes quasi-administrative hearings. Again, the Plaintiff relies on the fact that the Court would overturn the ordinance based on the FLSA which it has not. The Florida Supreme Court has rejected the issue of back pay as Judicial damages in *Laborers International Union of North America - Local 478 v. Burrows*, 541 So.2d 1160 (Fla. 1989). There is also a long history of Miami Dade County establishing administrative procedures for employment discrimination claims, sexual harassment and civil rights, all of which have been upheld as being an appropriate creation of the administrative body pursuant to the police powers of Miami Dade County.

Therefore, based on the foregoing, the Court Orders as follows:

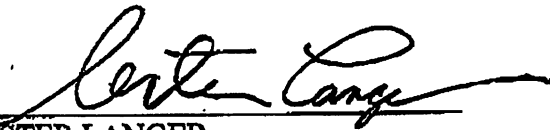
That the Plaintiff, Florida Retail Federation, does in fact have associational standing to bring this lawsuit and therefore the County's Motion to Dismiss as to that issue is **DENIED**. However, based on the fact that both the FLSA and the FMWA do not preempt this area of the law, the County had the right, pursuant to a proper exercise of its

police powers which are constitutionally guaranteed under the Home Rule Charter to enact the ordinance to prevent the theft of wages for working people in Dade County. This was a responsible and reasonable exercise of governmental authority. The ordinance as enacted, provides appropriate due process, equal protection procedures and meets the essential requirements of law as set forth in this Order.

Therefore the Defendant's Motion to Dismiss is hereby **GRANTED** as to Counts I, II, III, IV and V of the Complaint and the Plaintiff's Motion for Summary Judgment is hereby **DENIED** with prejudice.

DONE AND ORDERED in Chambers at Miami-Dade County, Florida this

23 day of March, 2012.


LESTER LANGER
Circuit Court Judge

Copies Furnished to:
Eric A. Rodriguez, Esq. - Via Fax #305-375-5634
H. Jacey Kaps, Esq. - Via Fax #305-371-7580

LESTER LANGER
CIRCUIT COURT JUDGE