

Fla. Ruling Raises Risk Of Discrimination Suits For Small Cos.

By **Shannon Murphy, Cheryl Wilke and Jonathan Beckerman** (August 1, 2022)

Miami-Dade County is home to over 220,000 businesses, with approximately 20% of those businesses employing five to 19 employees.[1] Such small businesses are a focal point of the Miami-Dade labor force, employing about 300,000 of the county's private sector employees.[2]

These smaller employers now face the threat of increased litigation regarding employment discrimination, harassment and retaliation claims.

Florida's Third District Court of Appeal recently expanded the rights of private employees by confirming that a private right of action against employers for workplace discrimination exists under a local Miami-Dade County ordinance.[3]

Article IV of the Miami-Dade County Code prohibits any employer from engaging in unlawful employment practices based on several protected characteristics, including race, color, religion, ancestry, sex, national origin, age, disability, marital status and gender identity.[4]

Until now, the procedure for bringing an action under this ordinance was limited. To bring a claim, employees of small employers with five or more employees had to file an employment discrimination complaint with the director of the Miami-Dade County Fair Employment Practices Section, who then had the right to pursue or not pursue the employer for the alleged violation.[5]

Employers have repeatedly argued that this is the exclusive method for private employees in Miami-Dade to seek relief for employment discrimination.

However, the Third District's recent decision in *White v. AutoZone Investment Corp.* has changed how Miami-Dade employers must approach employment discrimination complaints brought under this ordinance.

Third District's Decision

In *White*, an AutoZone employee, Andre White, alleged he was subjected to verbal abuse in the workplace due to his sexual orientation.[6] After filing a discrimination complaint with the Miami-Dade Commission on Human Rights, White received a notice of right to sue indicating the investigation into his complaint was terminated.[7]

White was told he could pursue his charge in accordance with Chapter 11A, Section 11A-28(10) of the Miami-Dade County Code.[8] Thereafter, White filed suit against AutoZone for sexual orientation discrimination and retaliation in violation of Chapter 11A of the Miami-Dade County Code.[9]

In response, AutoZone filed a motion to dismiss, asserting that section 11A-28(10) does not



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provide a private cause of action for employment discrimination.[10] Florida's Eleventh Judicial Circuit granted AutoZone's motion to dismiss with prejudice.[11]

On appeal, the Third District unanimously held on June 15 that the "plain and unambiguous language" of Section 11A-28(10) of the Miami-Dade County Code establishes a private cause of action for employees who file employment discrimination complaints under the ordinance.[12]

The Third District closely examined Section 11A-28(10), which states, "[F]ollowing receipt of the notice of right-to-sue, the aggrieved person may commence a civil action in a court of competent jurisdiction against the respondent."[13]

When read with the provision allowing courts to provide affirmative relief in "private enforcement proceedings under this Article," the Third District determined the right to private enforcement was expressly created.[14]

Takeaways

The White decision expands the rights of employees of small employers to sue their employers for workplace discrimination. Because the Miami-Dade Code defines "employer" as any person or nongovernment entity that employs five or more employees, the definition of "employer" under this ordinance extends beyond the state and federal definitions of employer.

Previously, these small employers rarely faced litigation, as employees could only rely on state and federal law, which limited private civil proceedings to employers with at least 15 or 20 employees. The state law, codified as the Florida Civil Rights Act, applies to employers with 15 or more employees, and federal anti-discrimination laws allow private enforcement actions against employers with at least 15 or 20 employees, depending on the statute.[15]

Until now, smaller employers in Miami-Dade County did not have concerns as they fell outside the jurisdiction of the equal employment issues. For employers with less than 15 employees, there was no private enforcement against employers.

As a result of this decision, businesses composed of five to 14 employees in Miami-Dade County will need to reevaluate their compliance requirements and invest in policy, training, notice and reporting requirements. For instance, smaller employers may need to hire human resources personnel, establish communication channels for resolving complaints, or conduct regular anti-discriminatory training programs.

To the extent small businesses may lack the resources to develop proper administrative procedures to deal with and prevent workplace discrimination, they may simply relocate to Broward, Monroe or another nearby county without the Miami-Dade ordinance concerns if their businesses do not require a local brick-and-mortar presence.

The costs required to develop efficient human resources departments to ensure, create, implement and enforce anti-discrimination practices may make relocation a more cost-effective option.

The requirements of the ordinance go beyond the actions of the small employers to encompass their vendors and employment agencies used for temporary staffing.

In addition to prohibiting well-established unlawful employment practices, such as hiring or

firing an individual based on a protected characteristic, Section 11A-26 of the Miami-Dade County Code also prohibits employers from "[utilizing] any employment agency or company providing employees which the prospective employer knows or has reasonable cause to know discriminates against individuals" based on the protected characteristics of Article IV.[16]

Smaller employers may not be aware this specific and unique practice is unlawful under the Miami-Dade County Code. Thus, they may not realize that under *White*, they are vulnerable to a private civil action if they were to contract with another company that engages in discriminatory hiring and employment practices.

In effect, this provision may require employers to familiarize themselves with other companies' employment practices and avoid certain employment arrangements with noncomplying companies, or face a lawsuit themselves.

Conclusion

Ultimately, the Third District's opinion in *White* has profound effects for smaller employers in Miami-Dade County. Employees may be encouraged to file workplace discrimination claims against employers with five or more employees since a private right of action has now been confirmed.

Smaller employers now face consequences such as injunctive and equitable relief, or actual and punitive damages if a court finds a discriminatory practice has occurred or even is about to occur.[17]

The nearly 45,000 small businesses employing between five and 15 employees in Miami-Dade County will soon recognize the impact of *White v. AutoZone* on their hiring and termination processes.

Smaller employers in Miami-Dade will need to allocate more attention and resources to anti-discrimination compliance measures in order to preempt private enforcement claims against them. There will be a financial cost to Miami-Dade businesses.

Following the *White* opinion, AutoZone filed a timely motion for rehearing on June 30. It is expected the *White* decision will become final after AutoZone's motion for rehearing is considered and disposed of by the Third District. Once final, it is likely small employers will see a significant increase in discrimination cases in Miami-Dade County.

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[1] [https://www.beaconcouncil.com/solutions/small-business/market-research/#:~:text=Miami%2DDade%20County%20has%20a%20total%](https://www.beaconcouncil.com/solutions/small-business/market-research/#:~:text=Miami%2DDade%20County%20has%20a%20total%20)

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[2] <https://www.beaconcouncil.com/solutions/small-business/market-research/#:~:text=Miami%2DDade%20County%20has%20a%20total%20of%20222%2C125%20businesses.,and%20Accommodation%20and%20Food%20Services.>

[3] White v. AutoZone Investment Corp., No. 3D21-598, 2022 WL 2135725, at *5 (Fla. 3d DCA June 15, 2022).

[4] Miami-Dade Cnty., Fla. Code of Ordinances § 11A-26(a) (2022).

[5] Id. § 11A-28(1) (2022).

[6] White, 2022 WL 2135725, at *1.

[7] Id.

[8] Id. at *2.

[9] Id.

[10] Id.

[11] Id.

[12] White, 2022 WL 2135725, at *1.

[13] Miami-Dade Cnty., Fla. Code of Ordinances § 11A-28(10).

[14] White, 2022 WL 2135725, at *3.

[15] Fla. Stat. § 760.02(7) (2022); e.g., 42 U.S.C. § 2000e(b); 29 U.S.C. § 630(b).

[16] Miami-Dade Cnty., Fla. Code of Ordinances § 11A-26(1)(c).

[17] Id. § 11A-28(10)(b).