

IN THE SUPREME COURT OF FLORIDA

DCA Case No.: 3D07-1861  
L.T. Case No.: 03-2178

IMPEX OF DORAL LOGISTICS, INC.,

IMPEX OF DORAL, INC.,

Defendants/Petitioners

vs.

LUIS O. DIAZ,

Plaintiff/Respondant

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**PETITIONER'S/DEFENDANTS'  
BRIEF ON JURISDICTION**

On Appeal from the Third District Court of Appeal,  
In and for Miami-Dade County, Florida

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### **PRELIMINARY STATEMENT**

This Honorable Court has discretionary review jurisdiction to consider the present matter pursuant to **Rule 9.030(a) (2) (iv), Florida Rules of Appellate Procedure, (Fla.R.App.P).**

Petitioner/Corporate Defendant Impex Logistics was conclusively shown to utilize the services of no more than four (4) leased employees of the subject licensed employee leasing company, ADP TotalSource (inclusive of Respondant/Plaintiff Diaz) thereby establishing Petitioner/Corporate Defendant Impex Logistics as a non-employer, not otherwise subject civil employer liability under the FWA. *See statutory definition of “Employer” under the FWA, Section 448.101(3), Florida Statutes.* Petitioner/Corporate Defendant/Client Company, Impex Export, utilized the services of sufficient leased employees of the licensed employee leasing company (i.e. ADP TotalSource) to potentially meet the statutory definition of an “Employer”, assuming the same to have been direct employees of Corporate Defendant/Petitioner Impex Export, as defined in Section 448.101 (3), Florida Statutes. In the underlying action the leased employee, Diaz, failed to join in the action Plaintiff’s/Respondant’s legal/statutory employer , the licensed employee leasing company, ADP TotalSource, in Plaintiff’s exclusive, employer

based action under the Florida Whistleblower Act (Section 448.101—Section 448.105, Florida Statutes).

For purposes of the present jurisdictional pleading, Corporate Defendant/Petitioner, Impex of Doral, Inc shall be referred to as “*Impex Export*”, Corporate Defendant/Petitioner, Impex of Doral Logistics, Inc., shall be referred to as “*Impex Logistics*”, and the leased employee, Diaz, as either the “*Plaintiff*” or “*Respondant*”. Any references to the Florida Whistleblower Act shall be cited as the “*FWA*” herein.

The Florida District Court of Appeals, Third District, which rendered the subject Opinion at issue (dated March 18<sup>th</sup>, 2009; *See Appendix **Tab 1***) shall hereinafter be respectfully referenced and/or cited as the “*3<sup>rd</sup> DCA*” throughout the present pleading

### **STATEMENT OF FACTS**

The underlying action concerns claims brought by a leased employee, Plaintiff/Respondant Diaz, exclusively against two (2) separate and independent Client Companies (Petitioner/Defendant Impex Export and Petitioner/Defendant Impex Logistics) under the FWA, for alleged factually nonspecific violations of some unidentified, purported OSHA regulation related to general public policy considerations associated with maintenance of industrial vehicles (i.e.

forklifts/clamp vehicles), otherwise not directed nor otherwise directly pertaining to the business of either Corporate party Defendant/Corporate Client of ADP TotalSource named in this case. Significantly Respondant/Plaintiff Diaz, despite being a leased employee of a licensed employee leasing company, ADP TotalSource, providing leased employee services to named Client Companies (i.e. Petitioners/Corporate Defendants Impex Export and Impex Logistics), under a formal written employee leasing agreement under Section 443.1216 (2), Section 468.525 (4), and Section 468.529 (1), Florida Statutes, the Plaintiff/Respondant leased employee (Diaz) failed to join the licensed employee leasing company (ADP TotalSource) as a name party employer to Plaintiff's exclusively based employer action under the FWA.

Petitioners'/Corporate Defendants' joint pretrial motion for judgment on the pleadings asserting Plaintiff's failure to join and indispensable party legal employer (ADP TotalSource) to Plaintiff's employer based action under the FWA was denied by the trial court. At trial, the trial court granted Petitioner/Corporate Defendant Logistics' motion for a directed verdict on grounds the evidence unequivocally established Defendant Impex Logistics did not statutorily qualify as an "*Employer*", as defined in Section 448.101 (3), subject to civil liability under the FWA. The trial court denied Petitioner/Corporate Defendant Impex Export's motion for directed verdict on evidentiary grounds and/or the legal insufficiency of

Plaintiff's Amended Complaint (pursuant to Rule 1.140 (c), Rule 1.480, Fla.R.Civ.P., and/or based on the definition of any applicable "*law, rule, or regulation*" as defined in Section 448.101(4) of the FWA) and allowed Plaintiff's claim against Defendant Impex Export under the FWA to go to the jury.

The jury subsequently returned a verdict in favor of Plaintiff/Respondant Diaz, and against Corporate Defendant/Petitioner Impex Export, in the amount of \$24,808. On or about July 2<sup>nd</sup>, 2007, the trial court entered a final judgment incorporating the trial court's prior directed verdict in favor of Petitioner/Corporate Defendant Impex Logistics and against Respondant/Plaintiff Diaz, and incorporating the jury verdict in favor of Plaintiff/Respondant Diaz and against Petitioner/Defendant Impex Export in the amount of \$24,808. The trial court reserved jurisdiction to award attorney's fees and costs to the respective prevailing parties as authorized under the FWA.

Plaintiff/Respondant Diaz appealed the subject final judgment purporting to grant Petitioner/Corporate Defendant Impex Logistics a directed verdict in the underlying case. Petitioner/Corporate Defendant Impex Export cross-appealed the trial courts final judgment (i.e. jury verdict) in favor of Plaintiff/Respondant Diaz and against Petitioner/Corporate Defendant Impex Export.



On appeal Petitioner/Corporate Defendant Impex Export, not unlike before the trial court, argued the legally unspecific and directly relevant purported OSHA regulation underlying Plaintiff's FWA action was not an OSHA regulation cognizable under either the Official OSHA Whistleblower Program, or the Florida Whistleblower Act, subject to imposed civil employer liability where the same was never established by Plaintiff at trial or on appeal to have been ever "*adopted pursuant to any federal, state, or local statute or ordinance...*" or otherwise "*... applicable to the employer and pertaining to the business*" as required under the statutory definition of the term "*law, rule, or regulation*" is defined, for purposes of civil employer liability, under the FWA. *See Section 448.101(4), Florida Statutes.*

On or about March 18<sup>th</sup>, 2009, the 3<sup>rd</sup> DCA issued an Opinion reversing in part and affirming in part the trial court's July 2<sup>nd</sup>, 2007 Final Judgment. The 3<sup>rd</sup> DCA affirmed that part of the July 2<sup>nd</sup>, 2007 Final Judgment against Petitioner/Corporate Defendant Impex Export which held the same liable to Plaintiff /Respondant Diaz, in the amount of \$24,808, under the FWA, and reversed that part of the subject Final Judgment which granted Corporate Defendant/Petitioner Impex Logistics a directed verdict, as a statutory non-employer under the FWA, remanding the action to the trial courts for a new jury trial, solely on the issue of whether *Impex Logistics was a single/joint employer of*

*Plaintiff / Respondant Diaz for purposes of FWA. See 3<sup>rd</sup> DCA's March 18<sup>th</sup>, 2009 Opinion; Appendix Tab 1.* The subject appellate decision partially reversing the July 2<sup>nd</sup>, 2007 Final Judgment, favorable to Petitioner/Corporate Defendant Impex Logistics, was exclusively based on the 3<sup>rd</sup> DCA's questionable application of the common law doctrine of “*single employer/joint employer/separate employer agency relationship principles*” to a state non-common law statutory action involving employee leasing arrangements, the legal effect of which rendering meaningless all relevant state legislative enactments prescribing, as a matter of state law, a licensed employee leasing company (here ADP TotalSource) effectively rendering meaningless all state leased employee/employer based statutory enactments under Florida law. *See Section 468.529(1), Section 468.525(4), Section 468.520, Section 443.1216(2), and Section 440.11(2), Florida Statutes; See also OSHA Standard Industry Code, Industry Number 7363, Official OSHA Regulation.*

At issue in this case is the lower appellate court's inexplicable disregard for each and every independent state legislative enactment consistently prescribing, as matter of state law, an employee leasing company (here ADP TotalSource) to be the legal employer of a leased employee under a law and for all legal purposes other than that expressly excluded under the statutory provisions of Section 468.529(1), Florida Statutes, and blatant refusal to adhere to the express legislative

requirements mandating the applicability of common law related employment considerations in determining an employee-employer relationship not to be otherwise applicable in determining any potential employee-employer relationship when the subject employee is a leased employee of a licensed employee leasing company contracted to perform leased employee services to a client company under a formal employee leasing agreement. *See Section 443.1216(2), Section 468.525, Section 468.529, Florida Statutes.*

Finally the subject March 18<sup>th</sup>, 2009 3<sup>rd</sup> DCA Opinion at issue inexplicably fails to judicially recognize or distinguish between a federal, and/or state administrative agency approved rule or regulation, and the legislative adoption of such an administrative agency rule or regulation by any legislative body, be it by any federal, state, or local statute or ordinance, as required to constitute a “*law, rule, or regulation*” cognizable under the state FWA, and subject to civil employer liability under the same. *See Section 448.101(4), Florida Statutes; See also Forrester v. John H. Phillips, Inc., 643 So. 2d 1109, 1112, (Fla. 1st DCA 1994); White v. Purdue Pharma, Inc., 369 F.Supp. 2d 1335, 1337 (M.D. Fla. 2005); New World Communications of Tampa, Inc. v. AKRE, 866 So. 2d 1231, 1234 (Fla. 2nd DCA 2003).*

Although the underlying March 18<sup>th</sup>, 2009 3<sup>rd</sup> DCA Opinion at issue raises numerous legal/statutory issues warranting review by this Court, it is the district

court's legally inexplicable disregard for the relevant and consistent legislative enactments and/or relevant judicial decisions of sister appellate courts on the issue, effectively rendering legally meaningless the practical legislative and/or judicial value of the same which renders the present cause subject to discretionary review by this Honorable Court, and compelling this Court's review of the same due to the several implicated legal issues of great public importance present herein.

**ISSUES PRESENTED FOR REVIEW AND/OR MATTERS OF  
GREAT PUBLIC/STATUTORY IMPORTANCE JUSTIFYING  
DISCRETIONARY REVIEW**

1. 3<sup>rd</sup> DCA's subject March 18<sup>th</sup>, 2009 Opinion purporting to find, per se, any and all purported OSHA Regulation, despite its clear and unequivocal exclusion from the official OSHA Whistleblower Program ( exclusively consisting of fourteen OSHA regulations, federally enacted by Congress, subject to civil employer liability under the OSHA Whistleblower Program), to include legally nonspecific and factually non-identified purported OSHA regulations not otherwise shown to be "*adopted*" by any federal, state, or local statute or ordinance applicable to the employer (i.e. Petitioners/Corporate Defendants) and *pertaining to the business*. See Section 448.101(4), Florida Statutes; *Conflicting with the prior decisions of state sister appellate courts rendered in Forrester v. John H. Phillips, Inc., 643 So. 2d 1109, 1112, (Fla. 1st DCA 1994); New World Communications*

*of Tampa, Inc. v. AKRE*, 866 So. 2d 1231, 1234 (Fla. 2nd DCA 2003); *Snow v. Ruden, McClosky* 896 So. 2d 787 (FLa. App. 2 Dist. 2005); *Susan v. Nova Southeastern University*, 723 So. 2d 933 (Fla. 4th DCA 1999); *White v. Purdue Pharma, Inc.*, 369 F.Supp. 2d 1335, 1337 (M.D. Fla. 2005).

2. The subject 3<sup>rd</sup> DCA Opinion purporting to apply common law employee/employer considerations to determine an employer relationship between a leased employee of a licensed employee leasing company with respect to an employment relationship between the leased employee and a client company under a formal employee leasing agreement, undermines and renders effectively meaningless all relevant leased employee related legislative enactments prescribed in Chapter 440, Chapter 443, Chapter 468, Florida Statutes, as well as all federal OSHA regulations, regulating the legal employment of leased employees providing work related services under a “*help supply services company*” as defined in OSHA Standard Industry Code, Industry Number 7363, OSHA Regulations.
3. The subject 3<sup>rd</sup> DCA Opinion purporting to ignore the numerous state legislative enactments prescribing a licensed employee leasing company (ADP TotalSource) to be the legal employer of leased employees under a formal employee leasing agreement, in favor of a common law employee/employer analysis to find a client company (i.e. Corporate

Defendant Impex Export/Corporate Defendant Impex Logistics) to be a “leased employee’s” legal employer or otherwise subject to civil liability under a *single employer/joint employer doctrine* impermissibly purports to interpret a clear and unambiguous statute in violation of law. *See Golf Channel v. Jenkins* 752 So. 2d 561 (Fla. 2000).

### **CONCLUSION**

For the above stated reasons and the presented legal issues of great public importance, this Honorable Court should accept discretionary appellate jurisdiction in this cause.

### **CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that a true and correct copy of the foregoing was mailed to: Max A. Goldfarb, Esq., 19 West Flagler, Suite 703, Miami, Fl 33130; Eddy Marban, Esq., Ocean Bank Bld. Suite 350, 782 N.W. LeJeune Road, Miami, Fl 33126 , on this 29<sup>th</sup> day of June 2009; and the original thereof filed with the Clerk of the Court.

Respectfully submitted,

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By: \_\_\_\_\_  
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## **CERTIFICATE OF COMPLIANCE**

The undersigned counsel hereby certifies that the subject appellate pleading complies with the font requirements prescribed in Rule 9.210 Florida Rules of Appellate Procedure and all other procedural appellate rules prescribed therein.

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