

IN THE SUPREME COURT
STATE OF FLORIDA

IMPEX OF DORAL, INC., et. al.,

Petitioners,

vs.

Fla.Sup.Ct. Case No.	SC09-1054
DCA Case No.	3D07-1861
L.T. Case No.	03-2178

LUIS O. DIAZ,

Respondent.

RESPONDENT'S JURISDICTIONAL BRIEF

On Review from the District Court of Appeal, Third District, State of Florida.

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PRELIMINARY STATEMENT

The Petitioners, IMPEX OF DORAL, INC., and IMPEX OF DORAL LOGISTICS, INC., will be referred to in this brief collectively as “IMPEX” or “Petitioners”. The Respondent, LUIS O. DIAZ, will be referred to in this brief as the “EMPLOYEE” or Respondent. The opinion of the District Court below (the “instant case”) is reported at *Diaz v. Impex of Doral, Inc.*, 7 So.3d 591 (Fla. 3d DCA 2009) and citations to the instant case will be to the reported page number as follows: “*Diaz*, at ____.” IMPEX’s Jurisdictional Brief shall be cited to by page number as follows: “IMPEX Brief at ____.”

STATEMENT OF THE CASE AND FACTS

The EMPLOYEE does not take issue with IMPEX’s statement of the case and facts for the purposes of the jurisdictional briefs only. Even though many of the matters set out therein are inaccurate, incomplete or inappropriate they should not effect the court’s determination of whether to grant review. Should the court grant review, the EMPLOYEE will take issue with many matters set forth therein in the briefs on the merits.

SUMMARY OF ARGUMENT

IMPEX has failed raise any basis for this court to exercise discretionary jurisdiction. Specifically, IMPEX has failed to show any decision of this court or a

district court which conflicts with the instant case.

ARGUMENT

IMPEX HAS FAILED TO SHOW THAT THE INSTANT CASE CONFLICTS WITH ANY OPINION OF THIS COURT OR ANY OTHER DISTRICT COURT THUS THIS COURT DOES NOT HAVE DISCRETIONARY JURISDICTION TO REVIEW THIS MATTER

In its Jurisdictional Brief, IMPEX asserts that this court has jurisdiction to review the instant case under its “conflict jurisdiction” as set forth in Fla.R.App.P.

9.030(a)(2)(A)(iv). (IMPEX Brief at page 1)

Under such provision, jurisdiction exists if:

Discretionary Jurisdiction. The discretionary jurisdiction of the supreme court may be sought to review

(A) decisions of district courts of appeal that

- (i) expressly declare valid a state statute;
- (ii) expressly construe a provision of the state or federal constitution;
- (iii) expressly affect a class of constitutional or state officers;
- (iv) expressly and directly conflict with a decision of another district court of appeal or of the supreme court on the same question of law;
- (v) pass upon a question certified to be of great public importance;
- (vi) are certified to be in direct conflict with decisions of other district courts of appeal;

Fla.R.App.P. 9.030(a)(2)¹ (Emphasis supplied)

Therefore, for the court to grant review, IMPEX must show the court that the instant case directly and expressly conflicts with the decision of another district court of appeal or of this court on the same question of law. The only state court appellate opinions cited in IMPEX's Jurisdictional Brief as providing conflict are as follows:

Forrester v. John H. Phipps, 643 So.2d 1109 (Fla. 1st DCA 1994)

New World v. AKRE, 866 So.2d 1231 (Fla. 2d DCA 2003)

Snow v. Ruden, McClosky, 896 So.2d 787 (Fla. 2d DCA 2005)

Susan v. Nova Southeastern, 723 So.2d 933 (Fla. 4th DCA 1999)

(IMPEX Brief at 8-9) these cases will be each addressed in turn.²

Forrester v. John H. Phipps

Forrester v. John H. Phipps, 643 So.2d 1109 (Fla. 1st DCA 1994)

considered a claim by an employee brought against an employer for violation of § 448.102(3), Fla.Stat., of "Florida's Private Sector Whistleblower Act". This is the same section of "Florida's Private Sector Whistleblower Act" that is at issue in the

¹This rule provision tracks the language contained in Art. V, § 3(b)(3), Fla.Const.

²IMPEX does suggest that the instant case conflicts with a Federal case and several statutory and rule provisions. The EMPLOYEE disagrees that there is any such conflict. However, conflict with Federal cases, statutes and/or rules does not give this court conflict jurisdiction. Fla.R.App.P. 9.030(a)(2); Art. V, § 3(b)(3), Fla.Const. And therefore any possible

instant case. *Diaz*, at 594-595. This statute provides in pertinent part:

An employer may not take any retaliatory personnel action against an employee because the employee has:

*

*

*

(3) Objected to, or refused to participate in, any activity, policy, or practice of the employer which is in violation of a law, rule, or regulation.

§ 448.102, Fla.Stat. (Emphasis supplied)

The term “law, rule or regulation” is defined by statute as follows:

“Law, rule, or regulation” includes any statute or ordinance or any rule or regulation adopted pursuant to any federal, state, or local statute or ordinance applicable to the employer and pertaining to the business.

§ 448.101(4), Fla.Stat.

The *Forrester*, court ruled that the above statutory definition of “law, rule or regulation” did not include general “public policy”. Rather, the court found that the definition was limited to “enactments of a legislative or administrative forum” *Forrester*, at 1112.

The instant case held that the rules of the Federal Occupational Safety and Health Administration fell within the statutory definition of “law, rule or regulation” contained in § 448.101(4), Fla.Stat. The instant case held:

conflicts with Federal cases, statutes and/or rules have not been addressed herein.

Impex further claims on cross appeal that the Whistle Blower Act cannot be based on a violation of a regulation of the federal OSHA. We disagree. Under the Whistle Blower Act, the employer may not take retaliatory action against an employee because the employee, “[o]bjected to, or refused to participate in, any activity, policy, or practice of the employer which is in violation of a law, rule, or regulation.”§ 448.102(3). Section 448.101(4) defines “law, rule or regulation” as, “includ[ing] any statute or ordinance or any rule or regulation adopted pursuant to any federal, state, or local statute or ordinance applicable to the employer and pertaining to the business.” Consequently, an OSHA rule is covered by this statutory definition.

Diaz, at 594-595.

The instant case does not address whether OSHA rules are “enactments of a legislative or administrative forum” as stated in *Forrester, supra*. This is probably because it is well known that OSHA rules are promulgated by the Secretary of Labor pursuant to its legislative authorization contained in 29 U.S.C. § 657(g)(2). Regardless though, this issue was not addressed in the instant case and therefore *Forrester, supra* cannot conflict with the instant case.

New World v. AKRE

New World v. AKRE, 866 So.2d 1231 (Fla. 2d DCA 2003) held that an unadopted policy of the Federal Communications Commission, did not fall within the statutory definition of “law, rule or regulation” set out in § 448.101(4), Fla.Stat. *New World*, at 1233-1234. The instant cases does not address or even mention whether the OSHA rules at issue were adopted or unadopted. As this issue was not

addressed in the instant case *New World, supra* cannot conflict with the instant case.

Snow v. Ruden, McClosky

Snow v. Ruden, McClosky, 896 So.2d 787 (Fla. 2d DCA 2005) held that Florida Bar Rules do not fall within the statutory definition of “law, rule or regulation” set out in § 448.101(4), Fla.Stat., because they originate from the judicial branch.

The rules governing the conduct of members of The Florida Bar do not flow from either a legislatively enacted statute, ordinance, or administrative rule. Neither do they originate from any similar federal source. Rather, the rules are promulgated by the Florida Supreme Court, the head of the judicial branch of state government, under the authority given to it by article V, section 15 of the Florida Constitution. Thus, it cannot be said that the Bar rules are either laws, rules, or regulations as defined in section 448.104, despite their designation as “rules.”

Snow, at 791.

The instant case never ruled upon whether the subject OSHA rules were the product of the judicial process. Again, this is probably because it is well known that OSHA rules are promulgated by the Secretary of Labor pursuant to its legislative authorization contained in 29 U.S.C. § 657(g)(2). However, as this issue was not addressed in the instant case *Snow, supra* cannot conflict with the instant case.

Susan v. Nova Southeastern

Susan v. Nova Southeastern, 723 So.2d 933 (Fla. 4th DCA 1999) held that objecting to the unlawful acts of your fellow employees (as opposed to your employer itself) cannot form the basis of a Private Sector Whistle Blower Act Claim. *Susan*, at 934. The fellow employee vs. employer issue was not considered by the court in the instant case. As this issue was not addressed in the instant case *Susan, supra* cannot conflict with the instant case.

CONCLUSION

The court should deny review of this matter.

Respectfully submitted,
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above and
foregoing has been furnished to:

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by regular U.S. mail on July 17, 2009.

George T. Reeves

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this brief complies with the font requirements of
Fla.R.App.P. 9.210(a)(2).

George T. Reeves