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the Checkoff

The Florida Bar
Vol. XLIV, No.2 April/May 2005

The Labor & Employment Law Section

INSIDE:

Seminar:

Advanced Labor Topics

April 29 - 30, 2005
Hawk's Cay Resort
Duck Key, FL

See pages 6 - 7.

Section Website – A Resource?

The Labor and Employment Law Section's Website Subcommittee is in the process of modifying and enhancing the Section's website. The goal is to make the site more of a resource for our membership. Traditionally, the site, located at www.laboremploymentlaw.org, has not been widely used by our membership. We would like to change that. Currently, the website contains a calendar of CLE activities, legal resource links, contact information for the Section's officers, online versions of all recent publications of *The CheckOff*, and other resources.

The planned modifications include adding more detail regarding the work of the Section's different committees and providing additional legal links among other enhancements. However, to truly make the site a benefit to you, we would like to know what you would like to see added or modified. For example, important legal sites or other online resources that you believe are beneficial to labor and employment law practitioners. You also may have ideas for modifying the present calendar or online chat features.

To let us know what changes to the website that you would like to see, please contact me: Marcus L. Snow, Jr., Chair of the Website Subcommittee by e-mail at msnow@unf.edu or at (904) 620-2828.

Chair's Report

This year, the L & E Section's focus was on outreach, primarily to the judiciary and fellow bar associations, as well as to our membership. In that connection, our Section has experienced some noteworthy "firsts."

Inasmuch as significantly higher numbers of l & e claims are being filed in the State, rather than the federal, courts, we forwarded to each of the Florida Circuit Courts CLE materials used at the Certification Review course in an effort better to acquaint our State judges with this area of the law. The Certification Review course has, since the advent of certification in 2001, provided participants with the basics of the full panoply of laws covered by our area; it was our intention that all of our State judges have this basic resource available to them for ready reference. Thus, the Courts were supplied both with hard copy and CD-Rom versions. Many thanks to Dave Linesch for his help on this project.

Stan Kiszkiel and Karen Buesing helped us with another "first" in planning a joint CLE conference with the ABA's Labor and Employment Law Section, which our Section co-sponsored. They also worked with Rochelle Kentov, the Regional Director of Region 12 of the National Labor Relations Board, to hold a Board-Bar conference teleconferenced to several different locations at once. Thanks also to Rob Eschenfelder for his subcommittee's connection to the State's various law schools and raising the issue of law student membership possibilities in the Section. I look forward to further addressing this issue in the coming year, under Damon Kitchen's leadership. Thanks also go to Shane Munoz for his work with attempting to improve services and communication with new Section members.

Under the stellar leadership of Steve

See "Chair's Report," page 12

Florida's New Mediation Confidentiality and Privilege Act: What the Litigator Needs to Know

By Cary R. Singletary, Arbitrator/Certified Circuit Civil Mediator

On July 1, 2004, Florida's new Mediation Confidentiality and Privilege Act, §§44.401-44.406, Florida Statutes (2004) went into effect. The Act specifies which mediations fall within its coverage and provides opt-outs from coverage. It specifies when a mediation begins and ends and defines "mediation communication," "mediation participant," and "mediation party." The Act creates numerous exceptions to the otherwise confidential and privileged nature of mediation communications. Finally, the Act creates meaningful civil remedies for a party against a mediation participant who knowingly and willfully discloses a mediation communication.

Which Mediations are covered?

Before the new Act, it was only in court ordered mediations that communications were protected under the statutory umbrella of confidentiality and privilege. If parties engaged in mediation without a court order, the protections were limited to those provided by the common law pertaining to settlement negotiations or any confidentiality agreement the parties and the mediator may enter.

Section 44.402 of the new Act specifies, except as otherwise provided, that the Act applies to any mediation that is: 1) required by statute, court rule, agency rule or order, oral or written case-specific court order, or court administrative order; 2) conducted under ss.44.40-44.406 by express agreement of the mediation parties; or 3) facilitated by a mediator certified by the Supreme Court, unless the mediation parties expressly agree not to be bound by the Act. These new coverage provisions eliminate the necessity to obtain a case specific court order to gain statutory protections and benefits if any of the other identified circumstances exist.

Perhaps one of the most helpful changes is that pre-suit mediations are now automatically covered under the Act when facilitated by a mediator certified by the Supreme Court, unless expressly agreed otherwise. The Act provides, in §44.402 (1) (c) for parties to completely opt-out of its provisions if a mediator certified by the Supreme Court facilitates the mediation. Under this circumstance, the parties can expressly agree not to be bound by the Act.

The Act also contains a flexible partial opt-out provision. Section 44.402 (2) permits the parties to agree in writing that: 1) any or all of the confidential mediation communications may be disclosed or that confidentiality will not apply to all or part of the mediation; 2) that any or all of the privilege to refuse to testify and to prevent any other person from testifying in a subsequent proceeding regarding mediation communications will not apply to all or part of the mediation and 3) that any or all of the court sanctions and civil remedies for knowingly and willfully disclosing a mediation communication will not apply to all or part of the mediation. This partial opt-out provision will be helpful in mediations when parties or their attorneys need to confer with third persons such as lien holders, experts, financial institutions or insurance companies to get information or make decisions needed to resolve disputes.

When Does the Mediation Begin and End?

Prior to the Act, it was uncertain when the mediation actually began and ended. This is a crucial point because only communications made during the mediation are confidential and privileged. Attorneys were concerned whether communications made to a mediator in advance of the mediation conference were confidential and privileged. Mediators have been concerned about communications made to them after the end of the mediation. The new Act resolves this uncertainty by defining the beginning and ending of mediations.

Section 44.404 (1) specifies that a court ordered mediation begins when the court issues an order. Section 44.404 (2) provides all other mediations begin when the parties agree to mediate or as required by agency rule, agency order, or statute, whichever occurs earlier.

Section 44.404 (1) specifies that a court ordered mediation ends when:

(a) A partial or complete settlement agreement, intended to resolve the dispute and end the mediation, is signed by the parties and, if required by law, approved by the court;

See "Mediation Confidentiality," page 8

Courts Expand Employees' Rights and Protections for Workers' Compensation Retaliation Claims

by Kelly M. Fisher, Esq.

Two recent court decisions have expanded employees' rights and protections regarding workers' compensation retaliation claims. Both decisions result in new hurdles for employers and their counsel to limit workers' compensation retaliation liability. The workers' compensation retaliation provision is found in Florida Statute §440.205. This section provides: "[n]o employer shall discharge, threaten to discharge, intimidate or coerce any employee by reason of such employee's valid claim for compensation or attempt to claim compensation under the workers' compensation law."[1]

In *James W. Bruner v. GC-BW, Inc. d/b/a Jackson Cook*, 880 So.2d 1244 (Fla. 1st DCA 2004), the First District Court of Appeals expanded the application of workers' compensation retaliation claims beyond past employers. The Court held that Florida Statute §440.205 provides a civil cause of action when an employer discharges an employee for filing a workers' compensation claim against a previous employer.[2]

James Bruner sustained a compensable workers' compensation injury with his previous employer, Ceco Corporation.[3] Later, Bruner became employed with GC-BW, Inc. d/b/a Jackson-Cook ("Jackson-Cook").[4] Shortly after Jackson-Cook hired Bruner, the company discharged Bruner because he was a "W/C Risk" since he had filed a workers' compensation claim against his previous employer.[5] Subsequently, Bruner filed suit against Jackson-Cook pursuant to Florida Statutes §440.205, alleging Jackson-Cook wrongfully discharged Burner because he filed a previous workers' compensation claim.[6] The trial court granted Jackson-Cook's motion for summary judgment and Bruner's appeal to the First DCA followed.[7]

Jackson-Cook argued the statute should be limited to the employer against whom a workers' compensation claim had been filed. However, the Court concluded the language "no employer" contained in the statute was clear and unambiguous and disagreed with the restrictive interpretation advocated by Jackson-Cook.[8] Additionally, the First DCA reasoned that §440.205 was not only intended to punish employers who discharge an employee for filing a workers' compensation claim, but also to insure employees against the fear of reprisal from their employers when employees file a workers' compensation claim.[9]

Also, the Court examined Florida Statute §440.105(2)(a)2, which prohibits an employer from knowingly "discharg[ing] or refus[ing] to hire an employee or job applicant because the employee or applicant has filed a claim for [workers' compensation] benefits. . . ." In October 2003, the Florida Legislature amended this Section providing a violation constitutes a first-degree misdemeanor. Jackson-Cook argued the Legislature's failure to amend §440.205 demonstrated legislative intent to eliminate a civil cause of action against subsequent employers.[10] However, the First DCA found that the Legislature's failure to provide a civil cause of action for refusal to hire did not equate to eliminating a civil cause of action against an employer who discharges an employee for filing a past workers' compensation claim.[11]

This issue was a matter of first impression for Florida courts. The First DCA reviewed the case law from Oklahoma, Illinois and Kentucky in its decision. Judge Kahn dissented, favoring a narrow interpretation of the statutory language. Judge Kahn found the majority's interpretation to be inconsistent with Florida's doctrine of at-will employment and the general freedom to contract. However, this case has not been appealed to the Florida Supreme Court.[12]

In *Borque v. Trugreen, Inc.*, 389 F.3d 1354 (11th Cir. 2004), the Eleventh Circuit Court of Appeals addressed whether the employer's workers' compensation general release barred the employee's claim for workers' compensation retaliation. Borque was injured in a compensable accident at Trugreen.[13] Borque claimed after received medical treatment management questioned his injury and threatened to take away his route.[14] A month later, Borque was terminated.[15] Subsequently, Borque filed a wrongful discharge claim in state court pursuant to Florida Statute §440.205 alleging Trugreen terminated Borque because he pursued a claim for workers' compensation benefits.[16]

In the meantime, Borque retained a workers' compensation attorney and attended a mediation.[17] Eventually, Borque reached an agreement to settle his workers' compensation case.[18] Borque signed a general release settling his workers' compensation case.[19] The court's opinion does not address whether the wrongful discharge claim was discussed in the settlement negotiations. Nevertheless, the general release contained fairly typical "boilerplate" language releasing any and all claims under Florida Statutes Chapter 440.[20]

Trugreen moved for summary judgment, contending Borque settled his wrongful discharge claim by signing the general release waiving all claims under Chapter 440.[21] The district court concluded Borque's retaliatory discharge claim was foreclosed by the general release language in the settlement agreement, citing *Taylor v. Camillus House, Inc.*, 149 F. Supp. 2d 1377, 1379 (S.D. Fla. 2001).[22] The district court reasoned Borque entered into the settlement agreement with the intent to discharge the retaliatory discharge claim.[23]

However, the Eleventh Circuit concluded *Taylor*, a Title VII employment discrimination case, was inap-

See "Rights & Protection," page 11

Florida Voters Pass Minimum Wage Amendment

by Scott A. Fisher

In the last election, Florida voters passed the Florida Minimum Wage Amendment. This Amendment creates a State minimum wage that covers all employees in the State who are covered by the Fair Labor Standards Act. The new minimum wage will start at $6.15 per hour. This increased minimum wage is scheduled to take effect in May 2005. However, the $6.15 per hour wage is not permanent. The minimum wage will increase yearly depending on inflation. Specifically, on September 30th of each year, the Agency for Workforce Innovation is charged with calculating an adjusted minimum wage rate by increasing the then current minimum wage by an amount equal to the rate of inflation for the prior 12 months. The agency will use the consumer price index for urban wage earners and clerical workers, (or a successor index established by the United States Department of Labor.) to calculate the increase. The newly calculated rate will then take effect on the following January 1st of each year.

Employers will still be able to take a tip credit for tipped employees consistent with the tip credit provided for under the Fair Labor Standards Act. The allowable tip credit will be equal to the tip credit that existed under the Fair Labor Standards Act in 2003.

The Amendment also prohibits any retaliation. Specifically, it prohibits an employer or any other person from discriminating in any manner or taking any "adverse action" against any person in retaliation for exercising his or her protected rights under the Amendment. The Amendment protects certain specific activities including a person's right to file a complaint or to inform any other person about a party's **alleged** noncompliance with the new minimum wage. It also protects a person's "right to inform any person of his or her potential rights under this Amendment and to assist him or her in asserting such rights."

A private party or the Attorney General will have the right to file a lawsuit for any alleged violations. A party shall recover back wages, an equal amount as liquidated damages and attorney's fees and costs. He or she shall also be entitled to reinstatement or injunctive relief. The Amendment does not appear to allow discreation as to liquidated damages or attorney's fees. The Amendment also provides that anyone who willfully violates the Amendment **shall** be subject to a fine of $1,000.00. There is a general four (4) year Statute of Limitations and a five (5) year limitation for a willful violation.

Section Bulletin Board

2004 - 2005
Section Seminars & Executive Council Meetings

Seminars

Advanced Labor Topics (0223R)
April 29-30, 2005
Hawk's Cay, Duck Key
Group Rate: $175
Reservation Number: 305/743-7000

Annual Meeting

Executive Council Meetings

Friday, April 29, 2005 - Duck Key
5:15 p.m. - 6:15 p.m. Meeting
6:15 p.m. - 7:30 p.m. Reception
7:30 p.m. - 8:30 p.m. Dinner
Hawk's Cay, Duck Key

Thursday, June 23, 2005 - Orlando
5:00 p.m. - 6:30 p.m. Meeting
6:30 p.m. - 8:30 p.m. Reception
Orlando World Center Marriott

A Thirty Year Journey in Southern Public Labor and Employment Law

By Stephen A. Meck, PERC General Counsel

In 1974 the Florida Legislature enacted the Public Employees Relations Act (PERA) effective January 1, 1975, in response to two decisions of the Florida Supreme Court holding that Article 1, Sector 6 of the Florida Constitution provides a constitutional right for public employees to collectively bargain which must be implemented. Therefore, it is now the 30th anniversary of PERA and the Public Employees Relations Commission. This was, and still is, the only state-wide collective bargaining act in what is traditionally considered the "Old South." As originally enacted, PERA was patterned after the National Labor Relation Act, making PERC a regulatory entity that certified bargaining units throughout all levels of government and investigated and prosecuted unfair labor practices. The litigation of these cases was originally performed in the Division of Administrative Hearings (DOAH). The process proved to be cumbersome, with significant delays.

However, PERC notwithstanding slow case processing, PERC was striving to do things right, so that the parties would have notice of the policies that it was developing in its decisions. Notably, PERC was the first state agency to comply with the statutory requirement that all agency decisions must be published and indexed. Other agencies did not comply with requirement until a 1993 decision of the Fourth District Court of Appeal, later affirmed by the Supreme Court, held that the failure to comply with this requirement constitutes reversible error of agency action.

In 1977, Chairman Leonard Carson initiated Legislative reforms based upon PERC's short experience and evaluation of models of sister agencies throughout the United States. First, the Commission itself was changed from part-time to full-time, with a prohibition from other employment. The regulatory scheme was changed, so that PERC was designated to be quasi-judicial, with the parties advancing their cases to a neutral body. The Commissioners themselves started conducting hearings in ULP cases and, in 1977, PERC was given statutory authority to have its staff conduct hearings in representation cases. By policy which evolved through Commission decisions, discovery was generally not allowed, absent compelling reasons. This model proved to be so efficient that in 1979, PERC was given authority for its staff to conduct hearings in ULPs as well.

With these changes in place, with less than five years of experience PERC was organized in its current structure more than 25 years later. The next significant development at PERC was to add employment law jurisdiction to that of public sector labor law. This is unique in the continental United States. For years the Legislature had entertained complaints about the operations of the Career Service Commission (CSC), which conducted civil service appeals of state career service employees. It was a part-time per diem board that traveled throughout the state hearing multiple cases and ruling from the bench, comparable to a territorial judge riding circuit. The complaints centered on delays in case resolution, inconsistency in results, and reversals on appeal. After an extensive study the Legislature abolished the CSC in 1986, giving this jurisdiction to PERC, with a 230 case backlog and statutory requirement that the hearings be held within 30 days of filing.

PERC assumed this awesome task and, through an efficient organization and by marshalling its resources, eliminated the huge backlog bringing the docket current within one year, while maintaining the 30 day deadline. This accomplishment was rewarded with the legislative conferment of other jurisdictions upon PERC between 1987 and 1992, including drug testing cases, veterans' preference appeals, and state whistle-blowers' appeals. This resulted in a case increase from approximately 700 filings to more than 1700 filings per year. By attrition and an inability to replace staff due to legislative elimination of vacant positions, PERC's staff was also reduced from it original number of 42 positions to the current staff of 33.

The two most significant Legislative actions in the next decade were the repeated inquiries into the possibility of merging PERC with DOAH and the Service First legislation. The merger proposition apparently emanated from budget reviews and organizational changes necessitated by the abolishment of the Department of Labor and Security, in which PERC was organizationally housed since its inception. In the late 1990's, the Legislature determined that PERC would be moved into the Department of Management Services, which already had attached to it several other commissions, including DOAH. So, a series of studies were conducted to evaluate the possibility and correctness of merging quasi-judicial entities. This culminated in a report by the Office of Program Policy Analysis and Governmental Accountability (commonly referred to as "OPPAGA"), in the Florida Legislature in June 2004. OPPAGA found that merging PERC and DOAH would not result in savings or increased efficiencies.

The Service First reforms occurred in 2001, and it was the first revision of the Career Service rights of State employees in decades. It was introduced by the Governor the preceding year as his top priority of that session. The legislation ultimately enacted has a number of significant statutory changes, including the reclassification of thousands of Career Service employees into the Select Exempt Service class with no appellate right. It reduced the time for filing of the appeal of suspensions or dismissal of Career Service personnel from 20 to 14 days and strictly limited the time for conducting hearings and issuing final orders. It eliminated the Commission's ability to mitigate discipline for all employees, other than police, firefighters, correctional officers, and health care employees. Finally, it eliminated the

See "Thirty Year Journey" page 10

THE FLORIDA BAR CLE

The Florida Bar Continuing Legal Education Committee and the Labor and Employment Law Section present

Advanced Labor Topics

COURSE CLASSIFICATION: ADVANCED LEVEL

One Location: April 29-30, 2005
Hawk's Cay Resort • 61 Hawk's Cay Boulevard • Duck Key, Florida 33050-3756
305/743-7000 • www.hawkscay.com

Course No. 0223R

Friday, April 29, 2005

12:30 p.m. – 12:45 p.m.
Late Registration

12:45 p.m. – 1:45 p.m.
Short Term and Long Term Disability Issues for the Labor Lawyer
John Tucker, Anderson & Tucker, St. Petersburg, Florida

1:45 p.m. – 2:45 p.m.
EEO Update
Kevin Hyde, Foley & Lardner, Jacksonville, Florida

2:45 p.m. – 3:00 p.m.
Break

3:00 p.m. – 4:00 p.m.
NLRA Update, Including: Developments Under Section 7 (Protected Concerted Activity)
Gregory R. Hearing, Thompson, Sizemore & Gonzalez, Tampa, Florida

4:00 p.m. – 5:00 p.m.
Recent Developments in Wage & Hour Law, An Update on the New Regulations and Case Law
Samuel J. Smith, Burr & Smith, Tampa, Florida

5:00 p.m. – 6:00 p.m.
Labor & Employment Section Executive Council Meeting (all invited)

6:00 p.m. – 7:00 p.m.
Reception (included in registration fee)

7:00 p.m. – 8:30 p.m.
Dinner (included in registration fee)

Saturday, April 30, 2005

9:00 a.m. – 10:00 a.m.
Desert Palace – An Update
Richard C. McCrea, Jr., Zinober & McCrea, Tampa, Florida

10:00 a.m. – 10:15 a.m.
Break

10:15 a.m. – 11:15 a.m.
Mediation: What Lawyers Do Right and What Lawyers Do Wrong in Mediation
Cary R. Singletary, Tampa, Florida

11:15 a.m. – 12:15 p.m.
Professionalism: A View From the Bench
Honorable Nikki Ann Clark, Circuit Judge, Second Judicial Circuit, Tallahassee, FL
Honorable John E. Steele, U.S. District Judge, Middle District of Florida, Ft. Myers, FL
TBA

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CLE CREDITS

CLER PROGRAM

(Max. Credit: 8.5 hours)

General: 8.5 hours
Ethics: 1.0 hour

CERTIFICATION PROGRAM

(Max. Credit: 8.5 hours)

Labor & Employment Law: 8.5 hours

Seminar credit may be applied to satisfy both CLER and Board Certification requirements in the amounts specified above, not to exceed the maximum credit. Refer to Chapter 6, Rules Regulating The Florida Bar, for more information about the CLER and Certification Requirements.

Prior to your CLER reporting date (located on the mailing label of your Florida Bar News) you will be sent a Reporting Affidavit or a Notice of Compliance. The Reporting Affidavit must be returned by your CLER reporting date. The Notice of Compliance confirms your completion of the requirement according to Bar records and therefore does not need to be returned. You are encouraged to maintain records of your CLE hours.

How to register:	ON-LINE: www.FLABAR.org * NEW * SECURE * FASTER *	MAIL the completed form w/check.	FAX: Completed form to 850/561-5816

REFUND POLICY: Requests for refund or credit toward the purchase of the course book/tapes of this program **must be in writing and postmarked** no later than two business days following the course presentation. Registration fees are non-transferrable, unless transferred to a colleague registering at the same price paid. A $15 service fee applies to refund requests. Registrants who do not notify The Florida Bar by 5:00 p.m., April 22, 2005 that they will be unable to attend the seminar, will have an additional $110 retained. Persons attending under the policy of fee waivers will be required to pay $110.

HOTEL RESERVATIONS: A block of rooms has been reserved at the Hawk's Cay Resort, at the rate of $175 single occupancy and double occupancy. To make reservations, call the Hawk's Cay Resort direct at (305) 743-7000. Reservations must be made by 03/31/05 to assure the group rate and availability. After that date, the group rate will be granted on a "space available" basis.

Register me for the "Advanced Labor Topics" Seminar

ONE LOCATION: (188) HAWK'S CAY RESORT, DUCK KEY, FLORIDA (APRIL 29-30, 2005)

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Name _____ Florida Bar # _____

Address _____

City/State/Zip _____ Phone # _____

ABF: Course No. 0223R

REGISTRATION FEE (CHECK ONE):

- ❑ Member of the Labor and Employment Law Section: $320
- ❑ Non-section member: $335
- ❑ Full-time law college faculty or full-time law student: $222.50
- ❑ Persons attending under the policy of fee waivers: $110
  Includes Supreme Court, DCA, Circuit and County Judges, Magistrates, Judges of Compensation Claims, Administrative Law Judges, and full-time legal aid attorneys if directly related to their client practice. (We reserve the right to verify employment.)

METHOD OF PAYMENT (CHECK ONE):

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- ❑ Credit Card (Advance registration only. Fax to 850/561-5816.) ☐ MASTERCARD ☐ VISA

Signature: _____ Exp. Date: _____/_____ (MO./YR.)

Name on Card: _____ Card No. _____

❑ Please check here if you have a disability that may require special attention or services. To ensure availability of appropriate accommodations, attach a general description of your needs. We will contact you for further coordination.

COURSE BOOK – AUDIOTAPES – PUBLICATIONS

Private taping of this program is not permitted. **Delivery time is 4 to 6 weeks after May 1, 2005. TO ORDER AUDIOTAPES OR COURSE BOOKS,** fill out the order form above, including a street address for delivery. **Please add sales tax to the price of tapes or books. Tax exempt entities must pay the non-section member price.**

_____ COURSE BOOK ONLY: Cost $30 plus tax TOTAL $ _____

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Cost: $320 plus tax (section member), $335 plus tax (non-section member) TOTAL $ _____

Related Florida Bar Publications can be found at http://bookstore.lexis.com/bookstore/catalog.
Click on "Jurisdictions," then "Florida" for titles.

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(b) The mediator declares an impasse by reporting to the court or the parties the lack of an agreement;

(c) The mediation is terminated by court order, court rule, or applicable law; or

(d) The mediation is terminated, after party compliance with the court order to appear at mediation, by:

1. Agreement of the parties; or

2. One party giving written notice to all other parties in a multiparty mediation that the one party is terminating its participation in the mediation. Under this circumstance, the termination is effective only for the withdrawing party.

Section 44.404(2) provides that all other mediations (i.e. non-court ordered mediations) end in the same manner as court ordered mediations except that the mediator reporting an impasse to the court is not a method for ending the mediation. In non-court ordered mediations the mediator declares impasse to the parties, not the court. Further, in non-court ordered mediations, the mediation can be terminated by agreement of the parties without appearing at the mediation.

Parties, attorneys and mediators now have bright lines which let them recognize when a mediation begins and ends. Pre-conference communications with the mediator occurring after either of the two circumstances, which commence the mediation, will be protected communications. It is important to remember that communications with the mediator after the mediation has terminated are not confidential or privileged.

Which communications are protected?

The Act defines mediation communications and specifies the boundaries within which communications must fall to be protected.

Section 44.403 (1) states:

"Mediation communication" means an oral or written statement, or nonverbal conduct intended to make an assertion, by or to a mediation participant made during the course of a mediation, or prior to mediation if made in furtherance of a mediation. The commission of a crime during the mediation is not a mediation communication.

The mediation communication must be made "by or to a mediation participant" to be protected. Section 44.403(2) defines "mediation participant," stating: "Mediation participant" means a mediation party or a person who attends a mediation in person or by telephone, video conference, or other electronic means.

Section 44.403 (3) defines "mediation party." It states:

"Mediation party" or "party" means a person participating directly, or through a designated representative, in a mediation and a person who: (a) is a named party; (b) is a real party in interest; or (c) would be a real party in interest if an action relating to the subject matter of the mediation were brought in a court of law.

This definition is very helpful because it is only parties who have the right to confidentiality and privilege. By defining the term "party" in such a broad manner, it provides coverage under the Act to persons typically involved in pre-suit mediation.

Reading §§44.403 (1), 44.403 (2), 44.403 (3), 44.404 (1), 44.404 (2), of the Act together, one could conclude that after a court orders mediation or the parties have agreed to mediate, an oral or written statement, or nonverbal conduct intended to make an assertion, in furtherance of the mediation but prior to the mediation conference, with persons who later participate in the mediation, in person, by telephone, video conference or other electronic means, are confidential and privileged mediation communications, unless they fall within the Act's exceptions. Such broad protection enables parties, their attorneys, mediation participants and mediators to more fully engage in pre-mediation conference communications with more certainty about confidentiality and privilege. This can be very helpful when insurance adjusters, lien holders, family members, or other stakeholders are involved in the dispute.

What are the exceptions to confidentiality and privilege?

Section 44.405 (1) provides that "Except as provided in this section, all mediation communications shall be confidential. Section 44.405(2) provides that "A mediation party has a privilege to refuse to testify and to prevent any other person from testifying in a subsequent proceeding regarding mediation communications." Unless the parties agree otherwise, §44.405(4) (a) specifies six exceptions to the requirement that all mediation communications shall be confidential. Those six exceptions are mediation communications:

1. For which the confidentiality or privilege against disclosure has been waived by all parties;
2. That is willfully used to plan a crime, commit or attempt to commit a crime, conceal ongoing criminal activity, or threaten violence;
3. That requires a mandatory report pursuant to chapter 39 or chapter 415 solely for the purpose of making the mandatory report to the entity requiring the report;
4. Offered to report, prove, or disprove professional malpractice occurring during the mediation, solely for the purpose of the professional malpractice proceeding;
5. Offered for the limited purpose of establishing or refuting legally recognized grounds for voiding or reforming a settlement agreement reached during a mediation; or
6. Offered to report, prove, or disprove professional misconduct occurring during mediation, solely for the internal use of the body conducting the investigation of the conduct.

Exception 2 could be significant to employment attorneys when mediating a whistle blower case involving allegations of ongoing criminal activity. Communications made during such mediations will not be confidential or privileged if it is determined that the communications were used to conceal ongoing criminal activity. One should also keep in mind income tax and security law violations. Also significant is that communications, which threaten violence, are not confidential or privileged.

Exception 4 enables communications made during mediation to be used in professional malpractice claims or to report claims of malpractice. Therefore, if a party sues his attorney claiming malpractice, the communications are not entirely confidential or privileged. Further, an attorney or other mediation participant can use mediation communications as a basis for reporting professional malpractice.

Exception 5 is perhaps the most open-ended exception to confidentiality and privilege. If a party seeks to void or reform a settlement agreement for legally recognized grounds, mediation communications are not confidential or privileged. This exception opens the door to countless imaginative circumstances where mediation communications may lose their protected status.

Exception 6 permits a mediation communication to be used to report, prove or disprove professional misconduct. Therefore, if a mediation participant believes an attorney or other professional has engaged in professional misconduct in mediation, such conduct can be reported without violating the Act.

Although the Act specifies in §44.405 (4) (a) six exceptions to "mediation communications" being confidential and privileged, there are at least six other circumstances embedded in the Act where communications are not confidential or privileged.

Section 44.403 (1) provides two additional exceptions. The section states: "Mediation communication" means an oral or written statement, or nonverbal conduct intended to make an assertion…" If nonverbal conduct is not intended to be an "assertion," it is not a "mediation communication." The term "assertion" is not defined by the Act. Therefore, if a party in an ADA case is claiming he cannot bend or stoop, yet, during the mediation, that party is observed bending or stooping to pick something up from the floor that would be nonverbal conduct not intended to make an assertion and therefore not a mediation communication protected by the Act. Another exception contained in the same section is the sentence: "The commission of a crime during a mediation is not a mediation communication." Therefore, assault, battery, extortion or other criminal conduct during mediation is not a "mediation communication" and not protected by confidentiality or privilege.

Mediation communications made outside of the scope of the duration of the mediation are not protected. For example, if after an impasse has been declared, a party continues to make statements to the mediator, those statements would not be protected because the mediation is over.

Section 44.405 (4) (a) provides there is no confidentiality or privilege attached to a signed written agreement reached during a mediation, unless the parties agree otherwise.

Section 44.405 (5) provides: "Information that is otherwise admissible or subject to discovery does not become inadmissible or protected from discovery by reason of its disclosure or use in mediation."

Section 44.405 (6) provides: "A party that discloses or makes a representation about a privileged mediation communication waives that privilege, but only to the extent necessary for the other party to respond to the disclosure or representation."

What are the court sanctions and civil remedies for violation of the Act?

Section 44.405 (1) provides: " …If the mediation is court ordered, a violation of this section may also subject the mediation participant to sanctions by the court, including, but not limited to, costs, attorney's fees, and mediator's fees." This is a good reason to obtain an order from the court for the mediation even though it is no longer required to otherwise have the protections and benefits of the Act provided a certified mediator facilitates it.

Section 44.406 (1) provides a statutory cause of action by a party against a mediation participant (not just a party) who knowingly and willfully discloses a mediation communication in violation of §44.405. It provides that the application for the civil remedy can be made to a court of competent jurisdiction. Therefore, it does not have to be made in the court that originally had jurisdiction. Further, if the violation occurred in a pre-suit mediation, the party could apply to a court for the relief. The section states the remedies that can be sought include: equitable relief; compensatory damages; attorney's fees, mediator's fees, costs incurred in the mediation proceeding; reasonable attorney's fees and costs incurred in the application for remedies under the section.

If damages for violation are not capable of being determined with certainty, a party should consider placing in the settlement agreement a liquidated damages clause. However, such an agreement would not be binding on a "mediation participant" who was not a "party" in the dispute and did not sign the settlement agreement.

The civil remedy section has a two-year statute of limitations from the date on which the party had a reasonable opportunity to discover the breach of confidentiality, but in no case more than four years after the date of the breach.

Other Considerations

Because the Mediation Confidentiality and Privilege Act is a state statute, it is an open question what impact it may have on mediations occurring in pending federal court cases. In pre-suit mediations that may later be filed in federal court, it

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is likely that the Act will apply.

Further, it is presently uncertain whether other states will recognize the protections and benefits of the Act. For example, if there are similar claims pending against a corporation in Florida and in other states, it is unknown if mediation communications made in the Florida case will be recognized as confidential and privileged in the out of state courts. Also, if a "mediation participant," who is not a party, is participating by telephone from out of state, it is uncertain whether the Act's protections and benefits extend to such a person if confidentiality and privilege is breached in the other state.

Conclusion

The Mediation Confidentiality and Privilege Act strengthens the commitment the Florida Legislature made to voluntary dispute resolution in 1987 when it enacted the mediation provisions of Chapter 44, Florida Statutes. The Act provides practical solutions to many questions that have arisen over the years. Further, it keeps Florida at the leading edge in the implementation and enforcement of mediation as a voluntary dispute resolution process.

Cary R. Singletary *is a member of the Executive Council of the Labor and Employment Law Section of the Florida Bar and was chair of the section in 1995-96. He practiced labor and employment law for twenty-two years. He now devotes full time to serving as an arbitrator, certified circuit civil mediator and federal court mediator in Tampa, Florida.*

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award of attorney's fees. Although there has not been a sufficient track record for accurate prediction, these changes have resulted in a significant reduction in Career Service appeals.

Notwithstanding the reduction of cases in the Career Service arena, the Commission's case load has remained constant, if not grown, due to increases in its labor jurisdiction. This is a consequence of an effective expansion in PERC's jurisdiction by a Florida Supreme Court ruling holding for the first time that deputies of constitutional officers are public employees. This had not been the case since 1978, when the Court ruled that deputies are not "public employees" for the purpose of the act, because they are appointed personnel. This has resulted in numerous filings of representation cases affecting many thousands of employees of Sheriffs and other constitutional officers. Moreover, the changing of public employer of the 11 institutions of higher learning from one statewide body, the Board of Governors, to the 11 Boards of Trustees at each institution has generated massive labor activity.

With this brief overview, I would now like to give my personal assessment of PERC. Having come up to the plate on so many occasions that I cannot recall them all, I have always had the conviction to address those who would question PERC's operations by pointing to our track record. Year after year, PERC meets its legislatively set performance standards between 96% and 99% of the time. This includes meeting strict time limits, percentage of cases appealed, and percentage of appealed cases that are affirmed. I challenge any other comparable forum to even approach these numbers and the underlying standards. The effectiveness of PERC's processes is further validated by the fact that there have been no legally established strikes in Florida since 1982. This efficiency and the predictability of PERC's decisions minimizes workplace strife and results in huge savings of taxpayer dollars. I am proud to be an employee of this agency and have the greatest respect for the Commission and its dedicated staff.

WANTED: ARTICLES

The Section needs articles for the *Checkoff* and the *Florida Bar Journal*. If you are interested in submitting an article for the Checkoff, contact either Scott Fisher (813/229-8313) (*sfisher@fowlerwhite.com*) or Ray Poole (904/356-8900) (*rpoole@ejhlaw.net.com*). If you are interested in submitting an article for the *Florida Bar Journal,* contact Frank Brown (813/224-9004) (*brown@zmlaw.com*) to confirm that your topic is available.

REWARD: $150*

(*For each published article, a $150 scholarship to any section CLE will be awarded.)

Article deadline for next *Checkoff* is May 31, 2005.

plicable to a retaliatory discharge claim under Florida workers' compensation law.[24] While the Eleventh Circuit dismisses the district court's arguments as inapplicable because of the framework Florida workers' compensation law provides, the Court was unable to determine whether Borque entered into the settlement agreement with the intent to discharge his retaliatory discharge claim.[25] Thus, the Court analyzed the settlement agreement language to determine whether the release clearly manifested the intent to discharge the retaliatory discharge claim.

While *Edenfield v. B&I Contractors, Inc.*, 624 So.2d 389, 390 (Fla. 2d DCA 1993) confirmed the validity of utilizing a general release, the case did not address the reach of the general release.[26] Relying on the Florida Supreme Court's ruling in *Smith v. Piezo Tech. & Prof'l Adm'rs*, 427 So.2d 182, 184 (Fla. 1983), the Eleventh Circuit noted that mere reference to rights and benefits under the workers' compensation law is insufficient to waive a claim for retaliatory discharge.[27] Additionally, the Court concluded the general release provision of Florida Statute §440.20(11(c) references only "all rights to any and all benefits."[28] Therefore, the Eleventh Circuit held that a general release of benefits under Chapter 440 does not necessarily release a retaliatory discharge claim under §440.205 without evidence of the Claimant's intent to waive such claims.[29]

How will these decisions impact employers? While Bruner technically is not binding precedent outside the First District's jurisdiction, this case is the only published appellate Florida opinion on this point. Therefore, Florida employers may want to reconsider some of their employment screening practices. For instance, some employers run background checks that include workers' compensation injuries. Also, some employers may inquire on an application whether an applicant has a prior work-related injury. Given the First DCA's ruling in *Bruner* and the penalties of Florida Statute §440.105(2)(a)2, employees may argue these practices constitute evidence of retaliatory discharge and/or failure to hire warranting civil action or criminal penalties. An employee is not required to show an employer's specific retaliatory intent for a retaliatory discharge claim. Therefore, to reduce exposure for retaliatory discharge claims and/or possible criminal penalties associated with firing and/or refusing to hire employees with prior workers' compensation claims, employers should avoid these practices when possible.

Additionally, employers settling workers' compensation cases should consider the Eleventh Circuit's focus upon demonstrating the Claimant's intent to waive retaliatory discharge claims. Many employers already require general releases in addition to the workers' compensation settlement agreements. Most general releases should include a waiver of any and all employment causes of action, including retaliatory discharge claims. Because the Eleventh Circuit found the settlement agreement too ambiguous, the Court did not address whether the settlement provided sufficient consideration to waive the retaliatory discharge claim. This factor is important to consider when negotiating a settlement since nominal consideration for a general release may not be sufficient, particularly if there are additional pending employment claims. Given the Court's ruling in *Borque*, ensuring the employer's general release is sufficiently specific as to retaliatory discharge claims is prudent. Additionally, employers who do not utilize a separate general release should ensure their workers' compensation releases specifically reference §440.205 so there is no question regarding the parties' intent to discharge this cause of action.

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Endnotes:

1 Florida Statute §440.205 (2003).
2 *Bruner v. GC-BW, Inc. d/b/a Jackson Cook*, 880 So. 2d 1244, 1247 (Fla. 1st DCA).
3 *Bruner*, 880 So. 2d at 1245.
4 *Id.*
5 *Id.*
6 *Id.*
7 *Id.*
8 *Id.* at 1247.
9 *Id.*
10 *Id.*
11 *Id.*
12 *Id.* at 1252.
13 *Borque v. Trugreen, Inc.*, 289 F. 3d 1354, 1355 (11th Cir. 2004).
14 *Id.* at 1355-1356.
15 *Id.* at 1356.
16 *Id.*
17 *Id.*
18 *Id.*
19 *Id.*
20 *Id.*
21 *Id.*
22 *Id.* at 1357.
23 *Id.* at 1356.
24 *Id.* at 1357.
25 *Id.* at 1358.
26 *Id.*
27 *Id.*
28 *Id.*
29 *Id.* at 1358-1359.

The CHECKOFF

The Checkoff is prepared and published by the Labor and Employment Law Section of The Florida Bar.

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CHAIR'S REPORT
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Meck, the Section sponsored another year of well-received CLE programs, including the Advanced Trail Skills Seminar in July jointly sponsored by the Section and Stetson University Law School. I am proud to report that our CLE program was not only successful in the level of presentations, but also profitable as well.

Under the continued leadership of Frank Brown, Scott Fischer and Ray Poole, *The Checkoff* continued to deliver, slowly but surely, information to our members both in e-format and by snail mail, and the Section's contribution to the *Florida Bar Journal*.

Even though our Section experienced a near-disaster in an attempt to establish a List-Serv for the membership, it was done with the best of intentions to foster and improve communication. As the dust settles, we plan to revisit this issue. In the meantime, we have addressed setting goals and standards for more efficient and productive use of the Web Site. Thanks to Marc Snow and Walter Aye for their leadership in the technology department, and hopefully we can keep the interest going. One of the aspirations for the coming year is to continue to improve the Web Site, making it a source of current information and a worthwhile communication tool both for the Bar and the public.

The Section held our third retreat in Orlando in February, under the practiced guidance of Cary Singletary. Veterans and newbies got together to discuss the state of the Section and our future goals. We have finally achieved enough of a history as a Section to not only assess where we are in terms of the practice of labor and employment law, but also to identify current issues and their effects on future practice. Although the l & e field continues to face significant challenges, such as a reduction in the number of jury trials, EEO changes and a declining number of practitioners, we as a Section examined ways in which we might help mentor newer lawyers, such as through *pro bono* activities, more emphasis on preventive practice and maximizing the members we have.

Our Section also bid farewell to members and friends who served as an inspiration to us. Bill Sizemore, a founding member of the Section and a well-respected member of our profession, succumbed to illness early in the term, and Henry Latimer, one of the first African American judges in Broward County and an accomplished labor and employment lawyer, lost his life in a tragic automobile accident this past winter. Both gentlemen deeply touched the lives of those who knew them and were privileged to count them as friends. They are sorely missed.

Finally, I would like to express my appreciation to the Executive Counsel, Officers. Committee Chairs and Subcommittee Chairs, as well as the Committee members, for their participation. I look forward to helping Chair-Elect Damon Kitchen as we continue progressing toward our goals into next year.

— Susan L. Dolin, Chair

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