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the Checkoff

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The Labor & Employment Law Section

INSIDE:

Seminar:

4th Annual Labor & Employment Law Certification Review

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Rosen Plaza Hotel
Orlando

See pages 13-14.

The Eleventh Circuit Refuses to Tolerate the EEOC's "All or Nothing" Approach to Conciliation

by Natalie Zindorf, Esq.

In a recent decision, the Eleventh Circuit criticized the Equal Employment Opportunity Commission's (EEOC) failure to conciliate in good faith. "[C]onciliation is at the heart of Title VII. In its haste to file the instant lawsuit, with lurid, perhaps newsworthy, allegations, the EEOC failed to fulfill its statutory duty to act in good faith to achieve conciliation, effect voluntary compliance, and to reserve judicial action as a last resort."[1] The Eleventh Circuit affirmed the lower court's sanctions of dismissal and award of attorney's fees to Asplundh Tree Company (Asplundh).[2]

Title VII of the Civil Rights Act of 1964 (Title VII), gives the EEOC authority to file suit only after its efforts "to secure from the respondent a conciliation agreement acceptable to the Commission" have failed.[3] The EEOC has a statutory obligation to respond reasonably to the employer's requests before filing suit. "To satisfy the statutory requirement of conciliation, the EEOC must: (1) outline to the employer the reasonable cause for its belief that Title VII has been violated; (2) offer an opportunity for voluntary compliance; and (3) respond in a reasonable and flexible manner to the reasonable attitudes of the employer."[4]

What Conduct May Demonstrate the EEOC's Failure to Conciliate in Good Faith?

1. Setting Arbitrary Deadlines.

The EEOC spent three years investigating the charge of discrimination before issuing its determination. One week after the EEOC finally wrapped up their investigation, the agency sent Asplundh a proposed conciliation agreement and asked him to respond within twelve business days. The Court called the EEOC's deadline "grossly arbitrary" and unreasonable.[5]

2. Failure to Respond to Employer or Employer's Attorney.

Five days after the EEOC's brief deadline to respond had lapsed, Asplundh's newly retained local attorney faxed a letter to the EEOC, requesting an extension of time to respond to the proposed conciliation agreement. Asplundh's attorney wanted to understand the basis for the EEOC's determination so he could adequately respond to their proposed conciliation agreement. In his let-

see "11th Circuit," page 11

Chair's Report

Member involvement is critical to the continued success of our Section. There are many benefits to being a member. Increased involvement will allow us to provide greater benefits to our members and more effectively communicate those benefits to our membership. The following article by Marcus Snow, Chairperson of the New Membership/Outreach subcommittee, explains how members can become more involved (See page 2). I hope that everyone will consider becoming more active in the Section.

– Cathy J. Beveridge, Chair

Do Not Miss the Opportunity To Be Involved in the Section's Success

by Marcus Snow, Jr., Esq.

Several Labor and Employment Law Section members have recently expressed interest in becoming more involved in the Section's activities. Of those expressing interest, many have indicated that they would like to serve on the Section's Executive Council or serve on one of the Section's committees. It is exciting to see such interest from members who are not presently involved in the Section, or from members whose involvement in our activities has been minimal. Involvement by *all* members in our Section is always encouraged.

Significantly, there are several ways that members can become more involved in Section activities. Often, however, individuals indicate that they do not know what they should do to become more involved in Section issues. Honestly, it is not difficult. You only need to express your interest and be willing to devote the time to our membership. We hope that we have made member involvement easier by changes that the Section has made in our committee structures. These issues were discussed in the September 2003 *Checkoff* in both the Chair's Report from our past Chair, Courtney Wilson, and the report from our present Chair, Cathy Beveridge. Both Courtney and Cathy emphasized inclusion of all Section members in Section activities and decision-making. An important aspect of this new committee structure is the new Membership/Outreach Committee. This committee's goal is to maximize the benefits of being a Section member. The committee is attempting to meet this challenge by increasing our communication with the judiciary, bar associations, law schools and Section members. The Membership/Outreach Subcommittee was formed specifically to increase member involvement in Section matters. As Chair of this new subcommittee, I am inviting you to contact me to discuss ways that you believe that you can become more involved in the Section. Moreover, our Membership/Outreach Subcommittee needs to understand exactly what it is that you, the membership, want the Section to undertake so as to better benefit you and our practice area. Remember, this is your Section and we all need to communicate our needs and desires so that membership in our Section is meaningful, beneficial and pleasurable. Consequently, if there are issues you think need to be addressed, or if you believe there are matters where you would like to become involved with other Section members, please contact me so that I can attempt to facilitate this process.

As this new Bar year began, we asked that all Section members who were interested in serving on committees or in other leadership roles, including service on the Executive Council, complete Self-Nomination forms that indicated your area of interest and to provide the forms to our Section Coordinator. Many members responded. However, not as many members responded as we would like considering the size of our Section, over 2,100 members, and the quality attorneys who make up our Section's membership. In response to the Self-Nomination forms that were received, the Section's Nomination Committee attempted to appoint interested persons to work on committees where they expressed interest. Additionally, I have sent individual correspondence to each member who indicated on the form that they were interested in service on the Section's Executive Council. This correspondence discussed how individual members who desired Council service could demonstrate their interest in the Section. For those of you who did not complete Self-Nomination forms, but are interested in serving on the Executive Council, again, we encourage you to demonstrate your interest to our membership. There are many ways to accomplish this; however, the best method to gain an understanding of the short and long-term issues that the Executive Council addresses is to attend the meetings of the Executive Council. Our meetings are held throughout the State at the site of our CLE seminars. Council meetings are generally scheduled for the Thursday evenings at the conference center where seminars are conducted. Section meetings are noticed in the *Florida Bar News* and in our Section publication, *The Checkoff*. Additionally, the time and location of the Executive Council meetings are discussed in our CLE seminar brochures. At Section meetings, all members in attendance are encouraged to participate in topics of discussion relative to our Section's governance. After meetings, the Section sponsors receptions where members have the ability to network and simply get to know colleagues from

See "Don't Miss The Opportunity," page 16

The CHECKOFF

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Committee Restructuring

by Damon Kitchen, Esq.

After reading both the outgoing and incoming Chair's Reports in the last *Checkoff* many of you are already aware that the Executive Council's prior committee structure has undergone a substantial restructuring process. Many of you may also be wondering: why has this restructuring occurred, and what will be the function and purpose of the new committees? Hopefully, the following information will provide you with answers to these questions.

What Was Wrong with the Previous Committee Structure and Why Was It Changed? The past committee structure, which had been in place since 1996, consisted of the following committees: Continuing Legal Education ("CLE"); Employment Opportunity; Employee Benefits; Federal Labor Standards; Individual Rights; Labor Relations; Legislative; Litigation/Alternative Dispute Resolution; Long Range Planning; Pro Bono/Special Projects; Publications; and Judicial Education. As is readily apparent, with only a few exceptions, the previous committee structure was representative of the practice areas within the field of labor and employment law. Although at first blush, having a committee structure based upon practice areas might seem logical, in reality, the structure proved to be both impractical and largely ineffective.

The Executive Council convenes a total of five (5) times throughout each year. At these meetings the committee chairpersons for the various committees are responsible for reporting to the Executive Council on the activities that their committees have undertaken for the benefit of Section Members since the last meeting. Unfortunately, under the previous committee structure, more often than not, the reports rendered at meetings by the chairs of the various practice area-based committees consisted of one of the following statements: "we had a conference call with our committee members about developments in the individual rights practice area," "we are planning a luncheon with the local office of the Department of Labor," and/or "we are planning to author an article for the *Checkoff* or *Bar Journal*." With the exception of producing *Checkoff* and *Florida Bar Journal* articles – which every committee is expected to accomplish – these committees were providing little, if any, meaningful service or benefit to the Section Membership in general.

After carefully studying this development, the Executive Counsel concluded that the problem did not lie with the committee chairpersons, for in most instances, these individuals were quite capable and industrious people. Instead, the Executive Council noted that unlike committees such as CLE, Publications and Long Range Planning, the practice area committees lacked a defined purpose, specific tasks to accomplish, and/or precise timetables in which to accomplish those tasks. As a result, the Executive Council dismantled the practice area committees in favor of function-based and task-oriented committees.

What Is the New Committee Structure and How Does It Operate? The Section's new committee structure is as follows: Legal Education; Special Projects; Long Range Planning; and Membership/Outreach. Within the committees of Legal Education and Membership/Outreach, however, are a variety of subcommittees. Within Legal Education, these subcommittees are: Continuing Legal Education ("CLE"); Publications; Website; Current Legal Developments; and Judicial Education. Likewise, under Membership/Outreach are the following subcommittees: Law School Liaison; Local/Voluntary Bar Association Liaison; ABA Liaison; and New Membership/Outreach.

The Legal Education Chair's job is to ensure that the various subcommittees under his charge operate effectively and efficiently. For the 2003-2004 year term, I have been entrusted with the position of Legal Education Chair.

As in the past, the CLE Subcommittee will still be responsible for arranging and producing continuing legal education programs and materials throughout the year. This year's CLE Subcommittee Chair is Cynthia Sass.

Also, as in years past, the Publication Subcommittee will be responsible for submitting articles to the *Florida Bar Journal* for publication on behalf of the Section, as well as assembling, editing and producing the *Checkoff* on a quarterly basis. This year's Publications Subcommittee Chair is Frank Brown. Frank will be directly responsible for editing and submitting articles to the *Florida Bar Journal* for publication and will indirectly oversee the publication of the *Checkoff*. Publication Subcommittee members Ray Poole and Scott Fisher will be directly responsible for editing and publishing the Checkoff each calendar quarter.

Although the Section has had a website for a couple of years, no person or group of people had been assigned to update it on a consistent basis. As a result, the website languished. The new Website Subcommittee will be responsible for updating and enhancing the Section's existing website so that it will be a useful resource for the Section's Membership. The Current Website Committee Chair is Walter Aye.

The Judicial Education Subcommittee's function is to serve as a resource to the judiciary throughout the state by providing balanced, nonpartisan programs and materials related to labor and employment law issues upon request. The Judicial Education Subcommittee is chaired by Michael Spellman.

The Continuing Legal Developments ("CLD") Subcommittee possesses the unique, yet important task of serving as a "think tank" for the other subcommittees within the Legal Education Committee. As a result, these subcommittee members are responsible for thinking of new programs, services, and ideas that can benefit the Membership. For example, CLD subcommittee members might assist the Website Committee in developing a more user-friendly

See "Restructuring," page 4

Judicial Outreach Subcommittee UpDate

by Michael Spellman, Esq.

When Stuart Rosenfeldt became Chair of the Labor and Employment Law Section in 2001, he had at least two strong initiatives: one, to schedule a CLE conference in Europe; and two, to establish an outreach program between the Section and the judiciary. Although the CLE goal fell short – a conference was held in New Orleans, today the Section is establishing a strong outreach program, especially with the State's Circuit Courts. In the two years that have passed since Stuart's introduction of the idea, a solid foundation has been laid, and from that, the Section's Judicial Outreach Subcommittee is attempting to provide the judiciary, and especially the State's Circuit bench, with resources and information which will assist judges in their efforts to identify, analyze and resolve issues which commonly arise in labor and employment cases.

In previous years, this group within the Section developed a curriculum and taught a course at the State's Circuit Judge's Conference, and attempted to schedule luncheons within various Circuits for a "brown-bag lunch seminar." This year, the committee is again attempting to secure a course at the Circuit Judge's Conference, as well as the Advanced Judicial Studies conference. We are also establishing relationships with each Circuit Court, through the Chief Judge of each Circuit. Through these relationships, we intend to provide each Circuit's library with tapes of each of our Section's CLE courses, written material, including a nuts-and-bolts primer on employment discrimination, and a copy of each *Checkoff*. We are also continuing to look at the feasibility, and, more importantly, the interest in having lunch seminars for Circuit judges assigned to the civil bench.

The committee charged with judicial outreach has been working hard to accomplish our goals. However, we are always looking for new ideas. If you have any ideas or would like to contribute to this endeavor, please feel free to email me at *spellmam@talgov.com*.

RESTRUCTURING
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website format, or help line up speakers for CLE programs. This year's CLD Subcommittee Chair is Steve Meck.

The Membership/Outreach Committee is headed up by the Section's Immediate Past Chair, Courtney Wilson. Courtney's job is to ensure that the various subcommittees under his charge operate smoothly and efficiently.

The Law School, Local/Voluntary Bar and ABA Liaison Subcommittees are fairly self-explanatory. These subcommittees are tasked with the responsibility of finding and exploring opportunities to partner with law schools, the ABA and other voluntary bar organizations in order to provide services for the Section Members and to increase both an awareness and an interest in the Section among other individuals within the legal community. The Law School Liaison Subcommittee is chaired by Jeff Mandel, whereas the Local Voluntary Bar Organization Liaison Subcommittee is chaired by Marilyn Holifield and the ABA Liaison Subcommittee is chaired by Karen Buesing.

Marc Snow chairs the New Membership/Outreach Subcommittee. The twin goals of this subcommittee are to stimulate an interest in Section Membership among attorneys who are presently not in the Section, and to increase participation and involvement among the current Section Members.

In addition to the foregoing new committees and subcommittees, are the Long Range Planning and Special Projects Committees, which survived the restructuring process fully intact. The Long Range Planning Committee, chaired by Cary Singletary, will continue to forecast future trends and developments affecting both the Section and our areas of practice. Likewise, the Special Projects Committee, chaired by Susan Dolin, will continue to address present issues and concerns impacting the practice of labor and employment law such as the unauthorized practice of law and employment practices liability insurance ("EPLI").

As stated above, it is the Executive Council's hope that the newly restructured committees will be of greater use to the Members of the Section than those that preceded them. Ultimately, however, the success or failure of these committees will depend on the Section Members who serve within them. Accordingly, if you are in the Section and are not currently plugged into a committee or subcommittee, I urge you to contact Marc Snow, New Member/Outreach Subcommittee Chair (or any of the other chairs of a committee or subcommittee which you may be interested in) and get involved. You won't regret doing so.

Know Your Enemy in Employment Mediation

by Alexandra K. Hedrick, Esq.

Have you ever had a sales job? If so, you understand the phrase "know your customer." You cannot sell your product if you do not understand your customer's needs. Flip through any book about how to sell, and you will find some reference to this idea.

Mediation is like sales. A party wants to buy (or sell) financial gain, finality, emotional satisfaction, dignity, honor, and confidentiality, to name a few things. An attorney who goes to an employment mediation thinking, "it is just about the money" is often wrong.

In my experience as a mediator and as an attorney who has represented both employer and employee, I offer the following suggestions for successful mediation.

Some lawyers who are very good at litigating cases are not good at mediation. To be good at mediation, a lawyer has to recognize he is buying or selling something and must persuade the other party about the value of the trade. An added challenge is that the other party is both a "customer" and an "enemy." This is why "know your enemy" in an employment mediation is good advice.

The word enemy ("one who feels hatred toward, intends injury to, or opposes the interests of another; a foe"[2]) describes the way many clients view one another. Just what are these litigation enemies thinking, and how does understanding this create success at mediation?

Knowing the Enemy in Employment Mediation: the Plaintiff.

Imagine being fired. You feel the reason was not only unfair, but also illegal. You go to see a lawyer. If the lawyer accepts your case, you enter the mysterious and seemingly endless litigation journey.

When you file a complaint with an agency or a court, you may expect to get an "I'm sorry" or "I'll make this right." Think again. Instead you are told that you were a terrible employee and a liar! Your former coworkers are afraid to talk to you, and you are not welcome at a place where you may have worked for 20 years. Your spouse either shares your anger or has his or her own suspicions about the claims raised.

Meanwhile the bills pile up. You hope to be saved, but your lawyer may eventually convince you that the likelihood of restoring you to your pre-termination economic condition is low. Your dreams of punishing the bad guy and perhaps putting a little extra away for a down payment on a house or to restore your dwindling savings account are shattered.

Mediators in private caucus with the plaintiff confront a lot of emotion. Frustration with the legal process – and particularly the length of time involved – is understandably high. The plaintiff feels hurt and angry, often to the point of tears. The plaintiff explains that he or she gave up time with family and friends to work long hours and do a good job – only to be rewarded with this!

Some plaintiffs (our ideal clients) are mature, patient and realistic. They trust their lawyers and take their advice. But even these ideal clients are disappointed at the situation and the inability to obtain timely justice.

Knowing the Enemy in Employment Mediation: the Defendant.

You are accused of breaking the law. You are even accused of prejudice. You are allegedly a bad person or company. The case is completely frivolous, and the plaintiff is trying to get "something for nothing." Perhaps you even treated this plaintiff *better* than others. You made all kinds of exceptions to help him or her and look what it got you!

You hire a good lawyer. Your lawyer sympathizes more than once by wisely saying, "No good deed goes unpunished." The lawyer tells you he believes you. But if you win the case, you will pay him thirty, fifty, maybe a hundred thousand dollars. If you lose you will pay your lawyer and the plaintiff's lawyer too. Are you going to win? Your lawyer says that you have a strong case, but these things are hard to predict. The mediator makes you even more nervous – and angry – about the uncertainty of a litigated result.

This is the perspective of a small to medium-sized business owner, where the settlements (and attorneys' fees) have a very significant impact on profitability. The business may literally be unable to pay a settlement in the normal range for the case at issue. Losing the case is an unthinkable "break the bank" proposition.

Many of these same considerations are at play for larger companies – even those on the Wall Street Journal's 100 largest public companies in the world – and those with insurance coverage. In contrast, these defendants can afford the settlement. They may not be burdened with emotions like anger, unless the original decision maker is present. Nevertheless, these defendants and claims representatives are cynical about the plaintiff's story and sincerity. They pick holes in the facts alleged, criticize the plaintiff's mitigation efforts, and put little value on emotional distress damages.

Some mediation representatives will get in trouble back at the office if they settle the case. They will also get in trouble if they don't settle the case. If they settle the case, they better have a very good explanation. They need help from plaintiff's counsel and the mediator to do this.

Knowing the Enemy Creates Successful Mediations.

The perspectives described above are just the tip of the iceberg. But there is one principle that will not change in 90 percent of all employment suits, which is that neither side will ever see the case from the other's point of view. The parties may as well focus on selling the settlement. When are plaintiffs most receptive to a reasonable settlement? When they are respected. When are defendants most receptive? When they are convinced that their potential exposure makes the deal a good one.

Respect the Plaintiff.

In a defendant's dream scenario, its lawyer gives the plaintiff a good talking-to about what a bad em-

See "Know Your Enemy," page 15

CASE NOTES

Supreme Court

Use Of Mixed Motive Defense In Circumstantial Evidence Case

A female warehouse worker and heavy equipment operator was terminated from her job after being involved in a physical altercation with a male employee. She then brought suit against her former employer under Title VII for sexual harassment and gender discrimination. At trial, the district court granted the plaintiff's request for a mixed motive instruction, even though the plaintiff had no direct evidence of gender discrimination. The jury subsequently returned a verdict in favor of the plaintiff. The Ninth Circuit, sitting en banc, ruled that the mixed motive instruction was appropriate, even though the plaintiff had no direct evidence of discriminatory intent. The Supreme Court concluded that both direct and circumstantial evidence would be capable of shifting the burden of proof to an employer in a mixed motive case. In reaching its conclusion, the Court determined that Congress' 1991 amendments to Title VII were unambiguous and required no heightened showing that a plaintiff could only shift the burden of proof via the use of direct evidence. *Desert Palace v. Costa*, ____ U.S. ____, 123 S.Ct. 2148 (2003).

Eleventh Circuit

FLSA Plaintiff Who Settles Claims Can't Appeal Denial of Opt-in Certification

A plaintiff who brings an action under the Fair Labor Standards Act on behalf of himself and other similarly situated employees, but who settles his own claims, may not appeal the district's order denying his motion to notify other potential plaintiffs of the FLSA action, according to a recent decision by the U.S. Court of Appeals for the Eleventh Circuit.

The Eleventh Circuit's opinion in *Cameron-Grant v. Maxim Healthcare Services* (11th Cir., October 20, 2003) addressed the claims of Ross Basil, Maxine Cameron-Grant and two other nurses employed by Maxim Healthcare, seeking unpaid back wages, unpaid overtime compensation, liquidated damages, and attorney's fees and costs on behalf of themselves and other "similarly situated" employees. During the case, the plaintiffs filed a motion to proceed as a collective action under the FLSA, and for an order permitting court supervised notice to employees of their right to opt in to the collective action as plaintiffs. Subsequently, Maxim agreed to pay Basil his unpaid wages and overtime pay, and all the named plaintiffs dismissed their FLSA claims. The court then denied the plaintiffs' motion to allow notification to other potential FLSA plaintiffs, finding that the plaintiffs failed to set forth any evidence that other employees desired to opt in. Basil appealed the district court's order.

In its opinion, the Eleventh Circuit began by noting that the named plaintiff in a Rule 23 class action has the procedural right to represent other class members, even after the named plaintiff has settled his claims. The court framed the issue as whether the named plaintiff in an FLSA collective action has the same right.

After examining the history and purposes of collective actions under the FLSA, and how they differ from Rule 23 class actions, the Court held that the named plaintiff in an FLSA collective action does not have a right to represent other plaintiffs. To the contrary, the Court noted, an FLSA action does not become a collective action until other plaintiffs affirmatively opt in to the class by giving written and filed consent; until such consent is given, that person will not be bound by a judgment. Since a named plaintiff has no right to represent other plaintiffs, it follows that once a named plaintiff settles his own claims under the FLSA, the action is moot, and there is no right of appeal.

For management side lawyers, *Maxim Healthcare* reinforces what should already be a rule of thumb: if there is a strong likelihood of liability in an FLSA action, encourage your client to settle early, before the case becomes a collective action. Once settled, the named plaintiffs' claims become moot, and the plaintiffs have no right to pursue a collective action on behalf of other similarly situated employees.

This case summary was provided by Richard Tuschman, Esq. with Becker & Poliakoff P.A.

Acceptance of Federal Funding Constitutes Waiver of Eleventh Amendment Immunity -

Former state employees brought suit under Section 504 of the Rehabilitation Act. The former employers, which were all state agencies, moved for summary judgment based upon Eleventh Amendment immunity. The former state employees argued that the state agencies had waived their Eleventh Amendment immunity from suit under the Rehabilitation Act by virtue of their acceptance of federal funds. The Eleventh Circuit ruled that 42 U.S.C. § 2000d-7 conditions the receipt of federal funds on a waiver of Eleventh Amendment immunity to claims under the Rehabilitation Act. By accepting federal funds, the state agencies had waived that immunity. *Garrett v. University of Alabama at Birmingham Bd. of Trustees,* 16 Fla. L. Weekly Fed. C1085 (11th Cir. 2003).

Joint Employers -

Farm labor contractors provided workers to plant seedlings for paper goods manufacturers. Migrant workers who were provided to plant seedlings on behalf of the manufacturers brought suit against both the farm labor contractors and paper goods manufacturers for minimum wage and overtime pay under the FLSA, as well as damages under the Migrant and Seasonal Agricultural Worker Protection Act. The migrant workers contended that the farm labor contractors and paper goods manufacturers were their joint employers. The Eleventh Circuit concluded that the paper goods manufacturers were not the migrant workers' joint employer. Although the manufacturers

had created planting specifications, the manufacturers exercised very little direct supervision over the migrant workers. Instead, the migrant workers followed the specifications set forth by the farm labor contractors. In addition, the migrant workers did not have a long term relationship with the manufacturers and, in fact, "generally never even knew that [the manufacturers were] the recipient[s] of their efforts." Finally, the manufacturers did not prepare the migrant workers' payroll checks, did not provide workers' compensation insurance, and did not provide tools or materials for the migrant workers' jobs. *Martinez-Mendoza v. Champion International Corporation*, 16 Fla. L. Weekly Fed. C945 (11th Cir. 2003); *Gonzalez-Sanchez v. International Paper Company*, 16 Fla. L. Weekly Fed. C1172 (11th Cir. 2003).

"Serious Health Condition" Defined

Addressing an issue never before decided by a U.S. appellate court, the U.S. Court of Appeals for the Eleventh Circuit has concluded that that in order to qualify as a "serious health condition" involving "continuing treatment" under the Family and Medical Leave Act, the health condition must result in a period of incapacity of more than 72 *consecutive* hours, rejecting the employee's argument that partial days of incapacity over a three day period satisfy the statutory definition.

The Eleventh Circuit's opinion in *Russell v. North Broward Hospital* (11th Cir., October 2, 2003) involved a hospital employee, Margaret Russell, whose employment was terminated for excessive absenteeism. Russell contended that her absences were medically-related and protected by the FMLA. The hospital did not dispute that Russell's absences were medically-related, but contended that they were not protected by the FMLA and that it was therefore free to terminate Russell's employment. The legal issue in the case was whether the medical condition that caused Russell's absences was a "serious health condition" involving continuing treatment, as that term is used in the FMLA. 29 U.S.C. § 2611(11). A Department of Labor regulation, 29 C.F.R. § 825.114, provides that in order to qualify as a serious health condition involving continuing treatment under the FMLA, the health condition must result in a period of incapacity of "more than three consecutive calendar days."

Russell, who was never incapacitated *all day long* for more than three consecutive calendar days, argued that partial days of incapacity should count under the regulation. Alternatively, Russell argued that if the regulation purports to require more than 72 hours of consecutive incapacity, it is invalid and should be struck down.

The Eleventh Circuit rejected both of these arguments. The court reasoned that requiring full days of incapacity "ensures that 'serious health conditions' are in fact serious and are ones that result in an extended period of incapacity, as Congress intended." Under any lesser requirement, the court noted, "courts and juries would continually confront confounding issues about how much incapacity on a given day is enough for that day to count toward the regulatory requirement." The court also held that the regulation at issue was a permissible exercise of the Department of Labor's rulemaking authority because it is "reasonable and consistent with the underlying intent behind the FMLA."

This case summary was provided by Richard Tuschman, Esq. with Becker & Poliakoff P.A.

EEOC's Failure To Conciliate Mandates Dismissal -

Asplundh entered into a three year contract with Gainesville Regional Utilities ("GRU") to lay underground cable. Six months before expiration of the contract, an Asplundh employee who was working on the project complained that a GRU employee made offensive racial jokes and put a noose on his neck. Shortly thereafter, Asplundh laid off the crew member as its work under the contract with GRU began to wind down. The former Asplundh employee then filed a charge of discrimination with the EEOC and alleged that he had been subjected to a racially hostile work environment and retaliation. The EEOC launched a 32 month investigation, during which Asplundh fully cooperated. The EEOC eventually issued a reasonable cause determination. Several days later, the EEOC issued a "conciliation agreement," which proposed both reinstatement and front pay for the former employee, nationwide notice of the former employee's allegations, and nationwide anti-discrimination training — within 90 days — to all Asplundh employees. The EEOC gave Asplundh 12 working days to respond. Asplundh promptly hired local counsel, who attempted to reach the EEOC investigator by letter and by phone. The calls and letter went largely ignored, and the EEOC filed suit against Asplundh. The district court dismissed the action and awarded fees and costs to Asplundh. On appeal, the Eleventh Circuit concluded that the EEOC did not make a good faith attempt to conciliate the matter before initiating suit. To the contrary, the EEOC's conduct "smack[ed] more of coercion than of conciliation." For that reason, the Eleventh Circuit ruled that dismissal of the action, together with an award of fees and costs to Asplundh, was not an abuse of discretion. *Equal Employment Opportunity Commission v. Asplundh Tree Expert Company*, 16 Fla. L. Weekly Fed. C972 (11th Cir. 2003).

Race Discrimination - Qualified Immunity - Clearly Established Law

Four white lieutenants in the fire department brought suit under Section 1983 against the Chief of the fire department and alleged that they had been passed over for promotion due to their race. They asserted that they were the top four candidates for promotion based upon an eligibility list. The eligibility list, which is created every two years based upon results of a race-neutral examination, was set to expire within a few days. The lieutenants asserted that the fire department chief wanted to create four new captain positions, but wanted to wait for a new eligibility list because he had "already promoted eight white men from the [existing] list." The district court denied the fire department chief' motion for summary judgment based upon the defense of qualified immunity. On interlocutory appeal, the Eleventh Circuit ruled that the fire department chief was entitled to qualified

continued, next page

immunity. The Court concluded that "a decision not to create new positions that is based solely upon the race and gender of the next eligible candidates for promotion, in the absence of a valid affirmative action plan, violates the Equal Protection Clause" of the Fourteenth Amendment. However, the law was not clearly established at that time that such action violated constitutional principles. *Williams v. City of Jacksonville*, 16 Fla. L. Weekly Fed. C979 (11th Cir. 2003).

ERISA Preemption

Employee resigned and collected benefits from an Employee Stock Ownership Plan ("ESOP"). At that time, the employer — Flexible Products Company ("Flexible") — was engaged in merger discussions with Dow Chemical Company but did not reveal that information to the employee. Three months after the employee received his payout from the ESOP, Flexible merged with Dow Chemical. As a result of the merger, the value of shares under the ESOP rose. The employee argued that he was entitled to information about the merger discussions before he decided to liquidate his account in the ESOP. He brought suit in state court and alleged a state law cause of action for breach of corporate fiduciary duty. The employer removed the action to federal court. The district court refused to remand the case to state court by reason that the claims were "related to Defendants' administration of an ERISA plan" and that the employee's "claims were super preempted by ERISA." On appeal, the Eleventh Circuit concluded that ERISA did not super preempt the employee's state law claim and that remand to state court was required. The Eleventh Circuit explained that the employee's suit was not for a clarification or enforcement of rights under the terms of the ESOP, but was instead a claim that he was entitled to information that, if know, would have changed his decision regarding the time he sought to collect his benefits. *Ervast v. Flexible Products Company*, 16 Fla. L. Weekly Fed. C1169 (11th Cir. 2003).

Airline Deregulation Act Does Not Preempt Whistleblower Claim

Plaintiff, who had been employed by Airtran as an aircraft inspector, informed the FAA of what he perceived to be Airtran's violations of FAA regulations. More specifically, he reported Airtran's allegedly improper testing, maintenance, and use of a faulty engine on one of its airplanes. Three weeks later, Airtran accused the plaintiff of falsifying his time cards, stealing approximately two hours of pay, and terminated his employment. Plaintiff sued Airtran for wrongful discharge under Florida's private sector whistleblower's act. The district court granted Airtran's motion for summary judgment on the basis that the federal Airline Deregulation Act preempted the plaintiff's state law whistleblower claim. The Eleventh Circuit reversed and explained that the "claim is fundamentally an employment discrimination claim" that "does not relate to the services of an air carrier" as contemplated by the Airline Deregulation Act. Consequently, the Court ruled, the whistleblower claim was not preempted. *Branche v. Airtran Airways, Inc.*, 16 Fla. L. Weekly Fed. C1028 (11th Cir. 2003).

Sexual Harassment - Faragher Defense

A pharmaceutical sales representative brought suit under Title VII for sexual harassment allegedly committed by her supervisor. The plaintiff alleged that she had been subjected to multiple incidents of fondling and rape. However, she did not attempt to report the matter to her employer until nearly three months after the inappropriate activity began, and she did not report the alleged rapes until after the supervisor's wife discovered — during the course of divorce proceedings — that the plaintiff and the supervisor had been sexually active. The plaintiff subsequently went on long term disability leave, and her employment was terminated. On appeal, the Eleventh Circuit first determined that the plaintiff was not discharged because of her sex, but because she elected to take disability rather than return to work. The Court next determined that the employer was entitled to a judgment in its favor on the basis of *Ellerth* and *Faragher*. The employer had a sexual harassment policy, promptly investigated the plaintiff's report of sexual harassment, and suspended the supervisor. The plaintiff, on the other hand, failed to avail herself of remedial measures or to otherwise avoid harm where she repeatedly went to the supervisor's apartment, had wine with him, accepted a massage from him, and did not report the sexual harassing activity until nearly three months after it began. *Walton v. Johnson & Johnson Services, Inc.*, 16 Fla. L. Weekly Fed. C1219 (11th Cir. 2003).

District Courts

Limited Relief Under The Rehabilitation Act

A student brought an action against the university under Section 504 of the Rehabilitation Act and alleged that the university failed to accommodate his learning disability. Among other things, the student sought punitive damages and damages for mental anguish. The university moved for partial summary judgment with respect to the student's claims for punitive damages and damages for mental anguish. The district court noted that "relief under

the Rehabilitation Act is akin to damages stemming from a breach of contract." The court therefore ruled that the student was not entitled to punitive damages or damages for mental anguish. Instead, his potential damages were "limited to compensatory damages such as expenses and attorney's fees." *Witbeck v. Embry-Riddle Aeronautical University, Inc.*, 16 Fla. L. Weekly Fed. D690 (M.D. Fla. 2003).

Arbitration Of FLSA Claims

A former employee brought a collective action for unpaid overtime under the FLSA on behalf of herself and other "similarly situated" employees. The employer then moved to dismiss or, alternatively, to stay the action and to compel arbitration pursuant to an arbitration agreement signed by the employee. The employee countered that the arbitration rules of the NASD, NYSE, and AMEX, any of which would govern the arbitration, prohibited arbitration of class actions. The district court began its analysis by pointing out the "strong federal policy in favor of enforcing arbitration agreements." The court then noted the differences between Rule 23 class actions and collective actions under the FLSA, such as the procedural complexities and binding effect of a judgment, and concluded that the collective action was subject to mandatory arbitration. *Chapman v. Lehman Brothers, Inc.*, 16 Fla. L. Weekly Fed. D638 (S.D. Fla. 2003).

Offer of Judgment Moots FLSA Claim - No Standing to Pursue Opt-in Notice to Putative Class Members

A pharmacist brought a collective action against his former employer for unpaid overtime under the FLSA on behalf of himself and other "similarly situated" employees. The employer served an offer of judgment that, if accepted, would have compensated the pharmacist in full for all unpaid overtime, liquidated damages, and reasonable attorney's fees and costs. The pharmacist rejected the offer of judgment, and the employer then moved to dismiss for lack of subject matter jurisdiction. In support of its motion to dismiss, the employer argued that the pharmacist's individual claims were moot because the offer of judgment would have fully compensated the pharmacist for his claims. In response, the pharmacist moved the district court to approve an opt-in notice to putative members of the class. The district court granted the employer's motion to dismiss for lack of subject matter jurisdiction. The court first noted that an offer of judgment is appropriate in an action for overtime under the FLSA. The court then concluded that the offer of judgment rendered the pharmacist's claims moot, because the offer would fully compensate the pharmacist. The district court then denied the pharmacist's motion for court approval of an opt-in notice to putative class members. The primary reason given for that ruling was that the pharmacist failed to present evidence that others wished to join the lawsuit. *Mackenzie v. Kindred Hospitals East, LLC*, 16 Fla. L. Weekly Fed. D571 (M.D. Fla. 2003).

Retaliation Under Title VII - No Adverse Employment Action - No Causal Connection

Employee brought an action against his employer under Title VII for unlawful retaliation. Employee asserted that he had lodged an internal discrimination complaint with his employer, as well as a charge of discrimination with the EEOC, and that as a result he had received a disciplinary warning, was reassigned to another work location, and received a downgraded performance evaluation. The district court granted the employer's motion for summary judgment. The court first concluded that the employee's internal complaint was not statutorily protected activity, because it was not in opposition to an unlawful employment practice under Title VII. Instead, the internal complaint alleged that the employee had been transferred years earlier for filing a union grievance and for "stealing a suggestion." Although the employee's EEOC charge of discrimination was protected activity, the disciplinary warning, job transfer, and "downgraded" performance evaluation that followed did not constitute adverse employment action. Finally, there was no causal connection between the EEOC charge and the alleged adverse employment action where two of the three alleged adverse events took place before the employee filed his charge and the third took place six months after the charge was filed. *Azoy v. Miami-Dade County*, 16 Fla. L. Weekly Fed. D609 (S.D. Fla. 2003).

Calculation Of Attorney's Fees

Intervenor filed motion for an award of attorney's fees. Intervenor's attorney asserted that he and his staff spent a total of 989 hours prosecuting the intervenor's claims in three stages: phase one - time spent before the EEOC filed suit; phase two - time spent after the EEOC filed suit, but before filing the motion to intervene; and phase three - time spent after filing the motion to intervene. Intervenor's attorney sought to recover a $300.00 hourly rate for his time. When calculating the lodestar, the court first concluded that $200.00, rather than the $300.00 sought, was a reasonable hourly rate because the case was a "simple, single plaintiff/single defendant employment discrimination case," and the attorney typically charged $125.00 to $250.00 per hour to his fee paying clients. In addition, $100.00 was a reasonable hourly rate for work that could have been delegated to associate or paralegal. The court awarded no fees to the intervenor's attorney for time spent on the case during phase one, i.e., before the EEOC filed suit, and reduced the attorney's recovery for time spent during phase two to efforts related to the motion to intervene. *Equal Employment Opportunity Commission v. Enterprise Leasing Company, Inc.*, 16 Fla. L. Weekly Fed. D640 (M.D. Fla. 2003).

FMLA Leave Inquiry

Plaintiff was terminated six days before her one year anniversary with her employer and sixteen days after she advised her employer of her pregnancy and requesting information about her employer's medical leave policy. Plaintiff brought suit for retaliatory discharge under the FMLA. Former employer moved to dismiss. The district court noted that there is some authority for the proposition that "where the employee, before she becomes eligible for FMLA, is putting the employer on notice of her intent to take FMLA leave after she becomes eligible for FMLA coverage, then the FMLA should be read to al-

continued, next page

low a retaliation charge." However, the court did not reach that issue because the plaintiff did not give notice of her intent to take FMLA leave in the future, but merely requested information about medical leave. Accordingly, the district court dismissed the FMLA claim. *Wellenbusher v. National Linen Industries, Inc.*, 16 Fla. L. Weekly Fed. D585 (S.D. Fla. 2003).

Airline Deregulation Act Preempts Whistleblower Claim

Plaintiff, who had been a supervisor at a company that repaired aircraft parts for various airlines, filed suit for wrongful discharge under Florida's private sector whistleblower's act. Plaintiff alleged that his employment had been terminated in retaliation for his complaining about his employer's violations of federal aviation regulations. The employer moved for summary judgment and argued that the plaintiff's whistleblower claim had been preempted by the federal Airline Deregulation Act and that his claim was time-barred under the whistleblower provision of that act. The district court agreed that the Airline Deregulation Act preempted the plaintiff's state law whistleblower claim. The court further concluded that the plaintiff's claim was untimely under the whistleblower provisions of the Airline Deregulation Act. *Tucker v. Hamilton Sundstrand Corp.*, 16 Fla. L. Weekly Fed. (S.D. Fla. 2003).

State Courts

Arbitration Of FCRA Claim Required

An employee executed a "Key Employee Agreement" with her employer. Under the agreement, arbitration was to be the "sole and exclusive remedy for resolving any dispute" between the parties arising from or related to the employment relationship. The agreement provided two methods for selecting an arbitrator: first, the employer could unilaterally select an arbitrator from a list, provided that it pay the arbitrator's fee in full; second, the employee could participate in the selection of an arbitrator, provided that the employee pay half of the arbitrator's fee. Under the agreement, each party was to bear its own attorney's fees, expert witness fees, and other costs of arbitration. The employee subsequently brought an action for wrongful discharge under the FCRA and Whistleblower Act. The circuit court compelled arbitration pursuant to the terms of the "Key Employee Agreement" executed by the parties. On appeal, the First District Court of Appeal affirmed the order compelling arbitration. Arbitration did not deny the employee of the FCRA or Whistleblower Act fee-shifting provisions, because she could recover her costs and fees if she prevailed at arbitration. *Brasington v. EMC Corporation*, ___ So.2d ___, 2003 WL 22326664 (Fla. 1st DCA 2003).

State Employees Entitled to Challenge Reclassification to At-will Status

State Career Service employees, who previously could only be discharged for cause, were reclassified to at-will Selected Exempt status as a result of Florida's "Service First" legislation. Shortly thereafter, their employment was terminated without cause. Their subsequent request for administrative review was denied. On appeal, the First District Court of Appeal ruled that the former state employees were entitled to a "point of entry into the administrative process" to determine whether their positions met the statutory criteria for reclassification to Selected Exempt status. *Reinshuttle v. Agency for Health Care Administration*, 849 So.2d 434 (Fla. 1st DCA 2003).

Employee Not Estopped From Bringing Whistleblower Claim by Virtue of Prior Title VII And Section 1983 Claims

The City's former Affirmative Action Specialist alleged that the City wrongfully discharged her on the basis of her race and gender, and in retaliation for her exercise of free speech, and she brought suit in federal court pursuant to Title VII and Section 1983. The federal court entered summary judgment in favor of the City and, with respect to her Title VII claims, concluded that the City discharged the plaintiff due to insubordination rather than due to her race or gender. While the federal action was pending, the plaintiff also pursued a wrongful discharge claim against the City in state court pursuant to Florida's public sector Whistleblower Act, Section 112.3187, et seq., Florida Statutes. The state circuit court ruled that, in light of the federal court's determination that the plaintiff's discharge was due to insubordination, she was collaterally estopped from relitigating that issue in her whistleblower action. The circuit court then entered summary judgment in favor of the City. On appeal, the Fourth District Court of Appeal ruled that the plaintiff was not collaterally estopped from litigating whether her discharge was in retaliation for engaging in protected activity under the Whistleblower Act. The Fourth District Court of Appeal reasoned that the plaintiff's federal action focused upon whether the plaintiff was discharged based upon her race or gender, whereas "her state whistleblower claim is completely race and gender neutral." Therefore, the Court concluded, "the issues are entirely different." *Rice-Lamar v. City of Fort Lauderdale*, 853 So.2d 1125 (Fla. 4th DCA 2003).

Summary Judgment for Employee Improper - Employee Failed to Conclusively Refute Employer's Affirmative Defenses

Employee brought an action in county court for unpaid overtime under the FLSA. In its Answer, the employer denied the employee's allegations and raised several affirmative defenses, including expiration of the statute of limitations and good faith compliance with the Act. The county court entered summary judgment in favor of the employee and the circuit court, sitting in its appellate capacity, affirmed. The Fifth District Court of Appeal granted the employer's petition for certiorari and quashed the order granting summary judgment for the employee. The Court reasoned that summary judgment for the employee was inappropriate, because she failed to conclusively refute the employer's affirmative defenses. *Stop & Shoppe Mart, Inc. v. Mehdi*, 854 So.2d 784 (Fla. 5th DCA 2003).

ter, Asplundh's attorney asked the EEOC to discuss their reasoning with him over the telephone.[6]

The EEOC never responded to Asplundh's attorney, but sent a letter to Asplundh stating that "efforts to conciliate this charge . . . were unsuccessful . . . further conciliation efforts would be futile or non-productive."[7] The EEOC completely ignored Asplundh's attorney's request for additional time and information. Once the EEOC finally decided to take action, it refused to wait around. The Eleventh Circuit criticized the EEOC for closing conciliation when Asplundh's attorney clearly indicated an intention to keep negotiations open.[8]

3. Failure to Explain the Basis for Determination.

The EEOC never explained its theory of liability to Asplundh. At a minimum, the EEOC has a duty to clarify the basis for its determination. Employers are entitled to a meaningful explanation from the EEOC in order to evaluate their position for conciliation.[9]

4. Demanding Unreasonable Remedies.

The EEOC demanded remedies that were national in scope. Also, the EEOC demanded reinstatement, even though the charging party's labor project no longer existed.[10]

5. Haste to File Potentially Newsworthy Suit.

The Eleventh Circuit examined the chronology of events and concluded that the EEOC may have quickly pushed past conciliation because, unlike conciliation, litigation attracts media attention.[11]

Conclusion

The EEOC cannot avoid its statutory duty to conciliate in good faith. The Eleventh Circuit has clarified the EEOC's prerequisites to filing suit: At a minimum, the EEOC must explain the basis for its determination, keep negotiations open for a reasonable period of time, and respond to the employer's requests for information.

Natalie E. Zindorf *is an Associate in the Employment Law Practice Group with Fowler White Boggs Banker in Tampa, Florida. Ms. Zindorf defends management in all types of employment matters.*

Endnotes:

[1] *EEOC v. Asplundh Tree Expert Co.*, 340 F. 3d 1256, 1261 (11th Cir. 2003).
[2] *Id.*, at 1261.
[3] 42 U.S.C. §2000e-5(f)(1).
[4] *Asplundh Tree Expert Co.*, at 1259 (citing *EEOC v. Klinger Electric Corp.*, 636 F.2d 104 (5th Cir. 1981).
[5] *Id.*, at 1259.
[6] *Id.*, at 1259.
[7] *Id.*
[8] *Id.*, at 1260.
[9] *Id.*
[10] *Id.*
[11] *Id.*, at 1261.

Section Bulletin Board

2003 - 2004
Section Seminars & Executive Council Meetings

Seminars

Labor Certification Review (5391R)
February 26-27, 2004
The Rosen Plaza, Orlando
Group Rate: $99
Cut-off date: January 30, 2004
Reservation Number: 407/996-9700

Advanced Labor Topics (5396R)
April 30 - May 1, 2004
The Pier House, Key West
Group Rate: $219
Cut-off date: April 2, 2004
Reservation Number: 305/296-4600

Executive Council Meetings

Thursday, February 26, 2004 - Orlando
5:00 p.m. - 6:00 p.m. Meeting
6:00 p.m. - 7:30 p.m. Reception
7:30 p.m. - 8:30 p.m. Dinner
The Rosen Plaza, Orlando

Friday, April 30, 2004 - Key West
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
The Pier House, Key West

Labor and Employment Law Section
Statement of Operation

REVENUE	2002-03 APPROVED BUDGET	Year End June 2003 ACTUALS	2003-04 APPROVED BUDGET
Dues	52,500	52,785	62,500
Affiliate Dues	110	110	210
Less Retained by TFB	(26,330)	(26,433)	(31,390)
Total Dues	**26,280**	**26,462**	**31,320**
Course Income	10,000	2,871	17,000
Videotape Sales	0	0	1,000
Audiotape Sales	10,000	9,514	10,000
Book / Material Sales	750	152	1,000
LRP Dinner	100	210	350
Trial Skills	100	0	300
Member Service Programs	3,500	0	7,000
Sponsorship	0	0	1,000
Investment Income	10,264	(1,061)	5,002
Miscellaneous	100	0	500
Total Revenues	**61,094**	**38,148**	**43,652**
EXPENSES			
Equipment Rental	0	3,225	o
Refreshment Break	0	1,412	0
Staff Travel	3,896	1,756	3,865
Postage	3,300	840	3,300
Printing	2,361	2,361	650
Officer/Council Office Expense	50	0	50
Newsletter	3,300	2,335	6,500
Membership Drive	500	0	500
Supplies	75	61	150
Photocopying	490	490	350
Officer Travel Expense	3,250	0	1,500
Meeting Travel Expense	22,500	20,581	22,500
Out of State Travel	5,000	3,446	2,500
CLE Speaker Expense	2,750	2,733	2,500
Committee Expenses	2,657	2,657	1,500
Cert. Committee Expenses	2,000	866	2,000
Board or Council Meetings	1,500	1,195	2,500
Bar Annual Meeting	4,500	4,546	4,500
Long Range Planning	4,000	4,746	4,000
Section Service Program	4,000	2,977	1,000
FL Labor Management	1,000	0	1,000
Gov't Lawyer Dir	2,000	0	2,000
Section Membership Directory	4,900	0	9,500
Awards	2,000	5,964	2,500
Scholarships	6,000	2,500	10,000
Trial Skills	11,000	7,883	11,000
Website	15,559	15,559	20,000
Council of Sections	300	0	300
Miscellaneous	1,000	268	1,000
CLER Credit Fee	150	150	150
SMU Speakers Expense	1,000	881	1,000
SMU Conference	3,000	600	1,000
Stetson Reception	1,500	139	1,500
Chair's Convention	1,300	406	1,300
Operating Reserve	0	0	12,412
Total Expenses	**116,838**	**90,577**	**136,527**
Beginning Fund Balance	**152,932**	**146,611**	**142,911**
Net Operations	**(55,744)**	**(52,429)**	**(61,555)**
Ending Fund Balance	**97,188**	**94,182**	**81,356**

SECTION REIMBURSEMENT POLICIES: General: All travel and office expense payments in accordance with Standing Board Policy 5.61. Travel expenses for other than Bar staff may be made if in accordance with SBP 5.61(e)(5)(a)-(i) and 5.61 (e)(6) which is available from Bar headquarters upon request.

THE FLORIDA BAR CLE

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

4th Annual Labor & Employment Law Certification Review

COURSE CLASSIFICATION: ADVANCED LEVEL

One Location:
February 26-27, 2004 • The Rosen Plaza Hotel
9700 International Drive • Orlando, FL 32819-8114 • 407/996-9700

Course No. 5391R

The Labor & Employment Law Certification Review course is an advanced level course intended to provide a comprehensive review of the subject matter, and it may help candidates prepare for a certification examination. Those who have developed the program, however, have had no communication with the certification committee that prepares and grades the examination and they have no information regarding the examination content or format other than the information contained in the exam specifications which are also provided to each examinee. Candidates for certification who take this course should not assume that the course material will cover all topics on the examination or that the examination will cover all topics in the course material.

THURSDAY, FEBRUARY 26, 2004

10:30 a.m. – 10:45 a.m.
Late Registration

10:45 a.m. – 11:00 a.m.
Opening Remarks
Cathy M. Stutin, Ft. Lauderdale
Gordon R. Leech, West Palm Beach

11:00 a.m. – 12:15 p.m.
NLRA and Collective Bargaining
Jennifer A. Burgess-Solomon, Miami

12:15 p.m. – 1:00 p.m.
Lunch (on your own)

1:00 p.m. – 2:00 p.m.
Title VII, FCRA, §1981, §1985, ADEA Claims & Defenses
Peter F. Helwig, Lakeland

2:00 p.m. – 2:30 p.m.
Administrative Procedures & Prerequisites of Title VII, ADA, ADEA & FCRA
Stanley Kiszkiel, Miami

2:30 p.m. – 3:30 p.m.
PERA, Public Employment, §1983 and Related Topics
Mike Mattimore, Tallahassee

3:30 p.m. – 3:45 p.m. **Break**

3:45 p.m. – 4:30 p.m.
Statutory & Common Law Protection of Business Interests
Walter E. Aye, Tampa

4:30 p.m. – 5:00 p.m.
Employee Polygraph Protection Act & Drug-free Workplace Programs
Don J. Spero, Palm Beach Gardens

5:00 p.m. – 6:00 p.m.
Labor & Employment Law Section Executive Council Meeting (All Invited)

6:00 p.m. – 7:30 p.m.
Reception (included in registration)

FRIDAY, FEBRUARY 27, 2004

8:15 a.m. – 8:30 a.m.
Opening Remarks
Cathy M. Stutin, Ft. Lauderdale
Gordon R. Leech, West Palm Beach

8:30 a.m. – 9:20 a.m.
Disability Discrimination Claims Under the ADA, FCRA & FMLA
Mark R. Cheskin, Miami

9:20 a.m. – 10:15 a.m.
ERISA
Rebecca H. Steele, Tampa

10:15 a.m. – 10:30 a.m **Break**

10:30 a.m. – 11:30 a.m
HIPAA & WARN
Teresa I. Sagaser, Coral Gables

11:30 a.m. – 12:00 noon
FMLA
David E. Block, Miami

12:00 noon – 1:00 p.m.
Lunch (included in registration)

1:00 p.m. – 1:50 p.m.
Common Law Claims, Including Workers' Comp Immunity
Jill S. Schwartz, Winter Park

1:50 p.m. – 2:45 p.m.
FLSA, Equal Pay Act & Florida Statutory Claim for Wages
David H. Spalter, Weston

2:45 p.m. – 3:00 p.m. **Break**

3:00 p.m. – 3:30 p.m.
USERRA & Florida Law on Reservists
Reginald J. Clyne, Coral Gables

3:30 p.m. – 4:20 p.m.
Private Whistle-blower Act, Public Whistle-blower Act, Sarbanes-Oxley Act, Other Whistle-blower Claims & Workers' Comp Retaliation
Craig L. Berman, St. Petersburg

4:20 p.m. – 4:50 p.m.
OSHA
Joan M. Spencer, Tampa

CLE CREDITS

CLER PROGRAM (Max. Credit: 15.0 hours)	CERTIFICATION PROGRAM (Max. Credit: 15.0 hours)
General: 15.0 hours Ethics: 0.0 hours	Labor & Employment Law: 15.0 hours Workers' Compensation: 1.0 hour

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.

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How to register	MAIL	FAX:	PHONE:	ON-LINE: NEW!
	the completed form w/check.	Completed form to **850/561-5816**	**850/561-5831** M-F 8:00 - 5:30	**www.FLABAR.org**

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.

HOTEL RESERVATIONS: A block of rooms has been reserved at The Rosen Plaza Hotel, at the rate of $99 single occupancy and double occupancy. To make reservations, call the The Rosen Plaza Hotel direct at (407)996-9700. Reservations must be made by 01/23/2004 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 "4th Annual Labor & Employment Law Certification Review" Seminar

ONE LOCATION: (259) THE ROSEN PLAZA HOTEL, ORLANDO (FEBRUARY 26-27, 2004)

TO REGISTER OR ORDER COURSE BOOK/TAPES, BY MAIL, SEND THIS FORM TO: The Florida Bar, CLE Programs, 651 E. Jefferson Street, Tallahassee, FL 32399-2300 with a check in the appropriate amount payable to The Florida Bar or credit card information filled in below. If you have questions, call 850/561-5831. ON SITE REGISTRATION, ADD $15.00. **On-site registration is by check only.**

Name _____ Florida Bar # _____

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ABF: Course No. 5391R

REGISTRATION FEE (CHECK ONE):

- ❑ Member of the Labor & Employment Law Section: $335
- ❑ Non-section member: $350
- ❑ Full-time law college faculty or full-time law student: $212.50
- ❑ Persons attending under the policy of fee waivers: $75
  Includes Supreme Court, DCA, Circuit and County Judges, General Masters, 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

Name on Card: _____ Card No. _____

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

❑ 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

Private taping of this program is not permitted.

Delivery time is 4 to 6 weeks after February 27, 2004. TO ORDER AUDIO/VIDEO TAPES 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.**

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

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Please include sales tax unless ordering party is tax-exempt or a nonresident of Florida. If this order is to be purchased by a tax-exempt organization, the course book/tapes must be mailed to that organization and not to a person. Include tax-exempt number beside organization's name on the order form.

KNOW YOUR ENEMY
from page 5

out of greed and malice.

Don't do it – or any version of it. Lawyers who attack the plaintiff damage settlement efforts. Some defense lawyers are very good at talking about the employer's defenses without humiliating the plaintiff. Their opening statement includes a brief version of the theory of the case in a matter-of-fact way. This is very effective. In most cases, it is best to let the mediator find a way to discuss the really negative information with the plaintiff in a productive manner.

The defendant's goal is to reach a reasonable settlement that avoids the risk of exposure. The plaintiff wants essentially the same thing, but emotion can get in the way. Conveying respect for the plaintiff will advance the goal. Flaming the fires of anger, embarrassment and distress will not.

Show the Defendant Its Exposure.

On the defense side, most settlement decisions are economic. A critical consideration in weighing the economics of a settlement is exposure. This includes exposure to both legal fees and loss. Of the two, loss at trial is worse because it validates the plaintiff's claim, costs money, and sends a negative message to other employees and the community.

The defendant will never admit that it broke the law. Nor will it see the plaintiff as a deserving victim. Therefore, a plaintiff's mediation presentation should concentrate on how a jury will find that the defendant broke the law and award the plaintiff substantial damages.

The specific approach should take into account the nature of the defendant and the identity of the mediation representative. When a small company is the defendant, or the original decision maker is at the table, it may be best to skip the passionate finger-pointing version of the opening statement. Such mediation representatives take the matter more personally (like a plaintiff) and will be less likely to consider a settlement logically if distracted by personal attacks.

The best strategy with most defendants is to persuasively list the concrete evidence that would support a plaintiff's verdict. The most persuasive evidence is a document or deposition quote from which there is no retreat. Affidavits and testimony from corroborating witnesses are also very helpful. Even "he said, she said" evidence that creates a genuine issue of fact enhances the perception of exposure to loss.

Emphasize the Value of Closure.

Usually both parties want closure. This need increases as the litigation drags on. An understanding of the other party's perspective on the case can assist this process. For example, will an apology help the plaintiff accept what otherwise is an unacceptable monetary figure? Does the defendant need – more than anything – for its other employees to stop talking about this pending case and/or to stop spending valuable time defending it? How can these issues be raised the right way in the opening session or the private caucus time?

Help the Client Understand What Makes a Good Deal "Good."

As discussed above, the plaintiff and defendant in an employment case have litigation perspectives that are incompatible and create barriers to settlement. A plaintiff will often say, "No amount of money can make up for what happened to me." A defendant frequently would "rather pay my attorney a million dollars than give that plaintiff a cent." Both sincerely mean it on an emotional level.

To overcome this problem, each lawyer has to assist his or her client in reframing the concept of a "good deal." Taking into account the nature of the enemy, and the client's own needs, what can be reasonably achieved? It is never too early to help the client to understand the limitations of litigation and settlement. When mediation occurs, opposing counsel should each consider the nature of the enemy in preparing a persuasive mediation submission and opening statement. At mediation, the mediator can help convey the points of view of the opponent and the reasons why a greater – or smaller – settlement may be unavailable.

The best mediation settlements – which translate into satisfied clients – occur when each side is convinced that it achieved the best alternative to continued litigation. Knowing your enemy is a critical part of achieving this result.

Alexandra K. Hedrick *is a board certified labor and employment attorney and a certified civil mediator. She practices in Jacksonville with Hedrick Dewberry Regan & Durant P.A.*

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 Ray Poole (904/356-8900) (*rpoole@constangy.com*); or Scott Fisher (813/229-8313) (*sfisher@fowlerwhite.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 April 30, 2004.

DON'T MISS THIS OPPORTUNITY
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across the State. By attending meetings, members not only have the ability to make their positions heard about current issues, but also have the ability to become involved in our various committees and planning for future seminars and presentations. The Section strives to recruit quality presenters from our membership for seminars and other speaking opportunities. Another contribution we seek is for members to write articles for *The Checkoff* and the *Florida Bar Journal*. Agreeing to author articles for publication is beneficial to our membership as it enables our members to keep abreast of legal developments. These publications also provide members a forum to demonstrate their abilities. The Section makes a special effort to recognize article authors for their time and service to our membership.

Executive Council members are elected for two-year terms. Executive Council members' terms are staggered so that there are twelve council positions open each year. The Section's Nominating Committee attempts to recognize contributors to the Section by electing such members to serve on the Executive Council. Significantly, the present members of the Executive Council began their service to the Section by first attending meetings, serving on committees, presenting at seminars and contributing to the Section as described.

If you would like more information regarding Section meetings or other activities, or would like to contribute to the Section in another way, please contact me either by phone or by email (I prefer email). My email address is: *msnow@ admin.usf.edu*. My name and mailing address is: Marcus L. Snow, Jr., Office of the General Counsel, University of South Florida, 4202 East Fowler Avenue, ADM250, Tampa, FL 33620-6250. My phone number is: (813) 974-2131. We appreciate your membership in our Section and look forward to your future involvement in Section activities.

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