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the Checkoff

The Florida Bar
Vol. XLII, No. 3 May 2004

The Labor & Employment Law Section

INSIDE:

Florida Bar Annual Meeting

Boca Raton Resort & Club

Thursday, June 24, 2004

3:00 - 6:00 p.m.
Executive Council Meeting

6:00 - 8:00 p.m.
Reception

ALL MEMBERS INVITED!

Please make plans to attend.

See page 6 for hotel / travel information

Supreme Court Reviews Employer's Obligation Under the ADA to Rehire Employee Previously Dismissed for Violating Employer's Drug and Alcohol Policy

By Brian Koji

Continuing its recent trend[1] of addressing a variety of issues arising under the Americans With Disabilities Act ("ADA"),[2] the United States Supreme Court in *Raytheon Co. v. Hernandez*[3] provided additional guidance for employers and employees confronting difficult issues involving discipline, dismissal and hiring in the context of employees and applicants with legally-cognizable disabilities. In particular, in *Hernandez*, the Court held that a neutral no-rehire policy constitutes a legitimate, non-discriminatory reason not to hire an individual previously discharged for prior drug use. However, the Court's decision left undecided whether the application of such a policy to a recovered drug addict or alcoholic would survive ADA scrutiny under a disparate impact theory. Thus, the Court's decision, while providing meaningful guidance on employee discipline, dismissal and rehiring issues, also left significant issues unresolved to be developed by further case law.

I. Factual Background Giving Rise to the Court's Decision

As of 1991, Joel Hernandez, had been employed with Hughes Missile Systems Company (which was subsequently acquired by Raytheon) for approximately twenty-five years.[4] Hernandez began his employment with Hughes as a janitor and ultimately worked his way up to the position of calibration service technician.[5]

On July 11, 1991, the company suspected that Hernandez might be under the influence of drugs or alcohol as a result of his appearance and behavior at work.[6] In accordance with company policy, Hernandez was instructed to take a drug test. The results

See "Rehire Employee" page 12

Chair's Report

In our last edition, we outlined some of the initiatives for outreach to our Section members for both participation opportunities and Section information. At our meeting on February 26, 2004, the Executive Council approved the adoption of a new tool in the arsenal of the Membership/Outreach Subcommittee to provide information to the Membership. The Section is creating a Listserv for all members. This Listserv will enable members to communicate with each other through e-mail.

You can expect to receive a letter from Mark Snow, Chair of the Membership/Outreach Subcommittee. This letter will detail how the Listserv will work and give each Section member the option to participate in the Listserv or to decline to participate. This technology will give our membership the

see "Chair's Report," page 16

Employee Organization Must Disclose Financial Information to its Members

By John G. Showalter, Hearing Officer.

In the case of *Rick Reed v. Florida Education Association*, Case No. CB-2003-002 (Fla. PERC Nov. 14, 2003), the Commission resolved several issues relating to the financial disclosure requirement in Section 447.305(5), Florida Statutes (2003), and its application to unions and private corporations formed by unions. Reed, an FEA member, filed an unfair labor practice charge alleging that the FEA refused to allow him to inspect its financial records and the records of the Florida Education Association Quality Public Education Corporation, Inc. (QPEC). Section 447.305(5) requires an employee organization to keep accurate accounts of its income and expenses and mandates that its accounts be open for inspection at all reasonable times by any member of the organization or the Commission.

The hearing officer determined that the FEA is an employee organization within the meaning of Section 447.203(11), Florida Statutes (2003), and that the inspection requirement in Section 447.305(5) is not limited to those employee organizations which have registered with the Commission or seek to become a certified bargaining agent. Thus, the FEA committed an unfair labor practice by failing to permit Reed to inspect its accounts within a reasonable time after he made his request. The hearing officer also concluded that Reed was not entitled to inspect the accounts of QPEC because it is not an employee organization.

In its exceptions, the FEA asserted that it is not an employee organization because it has not registered with the Commission and has not sought to be certified as a bargaining agent for a unit of employees. Rather, its local affiliates register with the Commission and have become certified as bargaining agents for numerous units. Nevertheless, employees who become members of a local FEA affiliate also become members of the FEA. The FEA then provides numerous employment-related services to the local affiliates, if requested. The Commission agreed with the hearing officer that these activities undertaken by the FEA in support of its local affiliates demonstrate that it is an employee organization within the meaning of Section 447.203(11).

The FEA next asserted that, even if it is an employee organization, the inspection requirement does not apply to it because it has never registered with the Commission or sought to become a certified bargaining agent. In resolving this exception, the Commission agreed with the hearing officer that Section 447.305(5) is plain and unambiguous and should not be read to mean that the inspection requirement only applies to employee organizations which are registered and/or certified. The Commission rejected the FEA's argument that it is illogical to require an employee organization which does not register or seek to become a certified bargaining agent to comply with the inspection requirement. The Commission noted that employees who join a local FEA affiliate also become members of the FEA, and that a portion of the dues paid by a member to the local affiliate is transmitted to the FEA. Thus, it is both logical and reasonable that FEA members, who contribute to the financial well-being of the FEA, would have the right to inspect the FEA's financial records.

The Commission next addressed Reed's contention that he should be allowed to inspect the financial records of QPEC, a corporation registered pursuant to Chapter 607, Florida Statutes (2003). QPEC was formed for the purpose of conducting "any lawful business" permitted by law, and it is a vehicle for political advocacy whereby the FEA's officers can promote the FEA's cause within the political arena to its membership and the general public. The hearing officer determined that Reed was not entitled to inspect the financial records of QPEC because it is not an employee organization within the meaning of Section 447.203(11) but, rather, is a corporation formed to conduct the business of political advocacy.

The Commission agreed with the hearing officer that QPEC is not an employee organization. Thus, the plain language of Section 447.305(5) did not grant Reed the right to inspect its financial records. Furthermore, the Commission concluded, as

see "Employee Organization," page 9

Supreme Court to Decide if States Are Immune to Damage Actions by Individuals Under Title II of the Americans With Disabilities Act

By Donald Spero

In *Garrett v. Alabama*[1] the Supreme Court held that the Eleventh Amendment[2] immunizes states from suits in Federal Court by individuals for employment discrimination due to disability under Title I of the Americans with Disabilities Act (the "ADA")[3] In reaching its decision the Court acknowledged that the statute by its tests applies to states thereby showing that Congress intended to override States Eleventh Amendment Immunity. The Court determined, nevertheless, that Congress did not have the power to do so. In the pending appeal of *Lane v. State of Tennessee*[4] the Supreme Court has before it the question of whether Congress has the power to subject states to damage suits by individuals under Title II of the ADA, Title II, like Title I, applies to "public entities." It defines the term public entities to include state or local governments and any of their arms, instrumentalities or agencies.[5]

Title II of the ADA requires that:

> ... no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a *public entity*, or be subjected to discrimination by any such entity.[6] (emphasis supplied)

A qualified person with a disability for purposes of Title II is one who "... meets the essential eligibility requirements for the receipt of services or the participation in programs or activities provided by a public entity.[7] The person may be one who meets these requirements with or without modification to rules, removal of barriers to mobility or communication or the provision of auxiliary aids or services.

The question now before the Court is of special importance because Title II has been broadly construed to include practically any offering of a public entity. In *Barden v. City of Sacramento*[8] the court held that city sidewalks were covered by Title II. In *Lee v. City of Los Angeles*,[9] Title II was found to be violated where a severely mentally disabled individual was arrested and incarcerated for two years when he was mistaken for another individual who was a fugitive from a correctional institution. In some circuits Title II has even been found to bar covered entities from discriminating in employment. See *Bledsoe v. Palm Beach Soil and Water Conservation District* [10] (employment discrimination barred by Title II in the Eleventh Circuit) but see *Zimmerman v. Oregon*[11] (employment discrimination not prohibited by Title II in the Ninth Circuit).

In *Garrett* a five to four majority of the Court held that in order for Congress to abrogate states' immunity by statute it must unequivocally express its intention to do so and it must act pursuant to a great of power found in the Constitution.[12] While there is no doubt that Congress intended to override Eleventh Amendment Immunity to Title I actions the Court held that the Constitution did not grant it the power to do so. The Court took into account that Congress' only authority to override Eleventh Amendment immunity is that contained in Section 5 of the Fourteenth Amendment.[13] The Court found that the disabled are a "quasi suspect" class and as such legislation affecting the disabled must merely meet the "rational basis" test to withstand constitutional scrutiny.[14] It noted that "'Such a. classification cannot run afoul of the Equal Protection Clause if there is a rational relationship between the disparity of treatment and some legitimate governmental purpose.[15] The Court further stated:

> ... in order to authorize private individuals to recover money damages against the States, there must be a pattern of discrimination by the States which violates the Fourteenth Amendment; and the remedy imposed by Congress must be congruent and proportional to the targeted violations. Those requirements are not met here.[16]

The Court found that Congress did not establish a pattern of unconstitutional employment discrimination against disabled individuals by states that would justify invoking its legislative powers derived from the Equal Protection Clause of the Fourteenth Amendment.[17] As Justice Kennedy stated in his concurring opinion, in which he was joined by Justice O'Connor, ... an equal protection violation has not been shown with respect to the several states in this case.[18] The *Garrett* Court specifically declined to decide whether states are

See "Damage Actions" page 15

The CHECKOFF

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

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Fiscal Problems and Unilateral Changes

By Jack E. Ruby

In the past twelve years there have been significant decisions by the Public Employees Relations Commission, the Florida District Courts of Appeal, and the Florida Supreme Court, as well as legislation as a result of those decisions, regarding fiscal problems and the duty of public employers to collectively bargain. Recently, there have been three Florida Circuit Court lawsuits involving recent legislation addressing the duty to bargain changes caused by fiscal problems. One of the Circuit Court lawsuits has resulted in a decision, discussed below. A preliminary discussion of the background of the recent legislation is necessary to determine the importance of the recent Circuit Court decision.

Background Prior to 1991, Without Consideration of "Underfunding"

Article I, Section 6, of the Florida Constitution is both simple and succinct: "The right of employees, by and through a labor organization, to bargain collectively shall not be denied or abridged." The Florida Supreme Court has held that public employees have the right to "effective collective bargaining."[1] As an integral part of the constitutional right, a public employer must maintain the established status quo during the collective bargaining process.[2] A unilateral change in terms and conditions of employment during the status quo period may be a violation of the statutory duty to negotiate in good faith.[3]

By statute, the subjects of wages and other economic terms and conditions of employment are mandatory subjects of negotiations.[4] A public employer may take unilateral action to change these and other mandatory subjects of negotiations pursuant to the impasse resolution mechanism of Section 447.403, Florida Statutes, to change terms and conditions of employment, but only after (1) completion of negotiations which fail to end in an agreement and (2) exhaustion of the statutory impasse procedures. This provision only applies after the completion of the impasse process, and it does not authorize unilateral action during pending negotiations.[5] In addition to legislative body action, a public employer may lawfully take unilateral action where there has been a waiver by the employee organization or where there are exigent circumstances.[6] Absent such defenses, a public employer's unilateral change is a per se unfair labor practice violating the duty to bargain in good faith.[7]

The "Underfunding" Cases of 1991

Section 447.309(2), Florida Statutes (1991), stated:

> Upon execution of the collective bargaining agreement, the chief executive officer shall, in his annual budget request or by other appropriate means, request the legislative body to appropriate such amounts as shall be sufficient to fund the provisions of the collective bargaining agreement. If less than the requested amount is appropriated, the collective bargaining agreement shall be administered by the chief executive officer on the basis of the amounts appropriated by the legislative body. The failure of the legislative body to appropriate funds sufficient to fund the collective bargaining agreement shall not constitute, or be evidence of, any unfair labor practice.

In 1991, two school districts, Sarasota County School District and Martin County School District, were the subject of unfair labor practice charges filed by employee organizations for unilateral acts allegedly taken pursuant to the underfunding provision of Section 447.309(2), because of admittedly significant revenue shortfalls during the recession that year. In both cases, the Commission held that the underfunding provision did not apply and that exigent financial circumstances were not alleged or shown. In both cases, the Commission was reversed and the Courts of Appeal held that the underfunding statute did apply.[8]

1992-1993 Florida Supreme Court Decisions on Collective Bargaining

In 1992, the Florida Supreme Court decided a case in which the Florida Legislature decided in the general appropriations act to alter certain state employee leave benefits during the middle of the term of a collective bargaining agreement.[9] A divided Court reversed lower holdings that the changes were unlawful and held that, unlike the private employer, a public employer's signature of the executive cannot bind the appropriation of funds by the legislature.[10]

In addition to concluding that Section 447.309(2) allowed underfunding, the Second District Court of Appeals reversed the Commission citing to the *Florida PBA* Supreme Court decision in also reversing the Commission:

> Under the separation of powers doctrine, the right to bargain must be considered along with Article VII, Section 1(c) of the Florida Constitution, which provides that "no money shall be drawn from the treasury except in pursuance of appropriation made by law." Accordingly, even though school board employees have the right to bargain with their employer, the school board in its capacity as the legislative body has the absolute right and obligation under the Constitution to fund or not fund any agreement entered into between the employees and the school board as employer. The Legislature clearly reserved this right when it enacted Section 447.309(2) and made it clear that underfunding an agreement was not an unfair labor practice. Any other rule would permit the executive branch of government, by entering into collective bargaining agreements calling for additional appropriations, to invade the legislative branch's exclusive right to appropriate funds.

Sarasota County School District, 614 So.2d at 1148.

Subsequent to this opinion, how-

See "Fiscal Problems," page 7

Voluntary Trial Resolution: Tailor-Made for Employment Claims

By Christopher Shulman, Esq.

I. Introduction

Created by the Florida Legislature in 1999 in response to concerns about dwindling judicial resources and increasing delays in getting trial dates, Voluntary Trial Resolution (also sometimes referred to as "private trials") provides a process likely to address most employment litigators' concerns nicely. Voluntary Trial Resolution, at its base, is an alternative dispute resolution process where the parties agree to have someone other than a sitting judge hear and decide the dispute.

Here's how it works, at least in the Thirteenth Judicial Circuit/ Hillsborough County.[1] Once the parties/counsel have agreed to have the matter heard by a Trial Resolution Judge (which would usually occur presuit, but which could, presumably, occur after suit is filed), the case is assigned to a Circuit or County Judge, whose Judicial Assistant serves as the Trial Resolution Judge's JA for the matter, coordinating with other court resources for the trial: arranging for bailiffs, clerks, reporters, courtrooms, and, if demanded, a jury venire. However, the selected Trial Resolution Judge presides over the pretrial litigation and the trial itself in the same manner as a Circuit or County Judge who would otherwise have heard the case.[2] The Trial Resolution Judge has the authority to enter orders on motions to dismiss and for summary judgment, resolve discovery disputes, and the like.[3] While the Trial Resolution Judge does not have contempt powers as such, he or she does have the power to sanction parties pursuant to Rule 1.380 for discovery violations and the like.[4] Once the Trial Resolution Judge has ruled on the dispute, judgment is entered thereon, upon application of the prevailing party to the assigned Circuit or County Judge.[5]

II. Voluntary Trial Resolution Contrasted with Binding Arbitration.

So far, Voluntary Trial Resolution sounds like another form of arbitration, but, at its base, it is not. True, both arbitration and Voluntary Trial Resolution are forms of ADR, where a neutral third party is chosen by the parties, and compensated by the parties, to decide the dispute. Plus, Voluntary Trial Resolution shares with arbitration the advantage of getting to choose your decision-maker: the parties have the ability to choose a provider with employment-law subject matter expertise, sometimes lacking among appointed or elected circuit or county judges whose pre-bench practice may not have focused on that area of the law. However, Voluntary Trial Resolution and arbitration are fundamentally different in at least three ways.

First, Voluntary Trial Resolution culminates in an actual trial, with the full rules of procedure and evidence in effect, whereas arbitration culminates in a hearing, where the rules may apply only to a limited extent, notwithstanding the statutory requirement that the rules of evidence shall apply.[6] Even in those arbitral fora with extensive rules of procedure, such as the American Arbitration Association or National Association of Securities Dealers Dispute Resolution, which provide for greater adherence to rules of evidence in statutory employment claims, there is still a criticism that some arbitration panels do not strictly apply evidence codes.

Second, Voluntary Trial Resolution can entail a jury trial. While the statute itself is silent on the issue, at least the Thirteenth Judicial Circuit has read into the statute the availability of jury trial. Of course, as those of us who arbitrate or who litigate before arbitrators know, there is no jury as such in arbitration.

Third, once complete, parties participating in Voluntary Trial Resolution have the full range of appellate remedies available to them, including a plenary appeal to the appropriate court, just as if the case had been tried before a sitting Circuit or County Judge; the only limitation is that factual determinations made by the Trial Resolution Judge are not appealable.[7] In contrast, the bases to "appeal" an arbitration decision are very few, and rarely have anything to do with the merits of the decision.[8]

These three distinctions make Voluntary Trial Resolution a viable alternative to arbitration, addressing the principal bases for denying enforcement of pre-dispute agreements to arbitrate statutory employment claims.[9] These features also make Voluntary Trial Resolution an ADR mechanism that comports with the Due Process Protocol for statutory employment disputes.[10]

III. State Court – Why Use?

Once commenced, the Trial Resolution Judge handles this as the judge of the case. The matter proceeds as it would in state court, except that the parties may, at their agreement or upon order of the Trial Resolution Judge, agree to a discovery schedule. These are very helpful to keep the matter on track.

Further, if there are discovery disputes or the like (and when aren't there?), counsel need not attend a cattle-call type Uniform Motion Calendar hearing; instead, since the Trial Resolution Judge is "your" judge, you are generally able to get these matters heard quickly and expeditiously. If appearance is required, rather than a telephonic hearing, the hearing need not occur at the Courthouse; it can occur at either side's office or at the office of the Trial Resolution Judge, or some other location. The Trial Resolution Judge, compensated by his or her "customers" is likely able to be more accommodating in this regard than most sitting judges, who simply do not have the time or resources to schedule such hearings in a manner more conducive to the parties' schedules.

Finally, one can get a trial date certain with a Trial Resolution Judge. Unlike state court dockets, where counsel are at the mercy of the several other cases set for trial on the same docket (those of us who litigate

See "Employment Claims," page 11

2004 Annual Meeting

The Florida Bar

June 23 - 26, 2004

HOTEL RESERVATION CUT-OFF DATE: MAY 24, 2004

Boca Raton Resort & Club
501 East Camino Real
Boca Raton, FL 33432
561/447-3000

For reservations, call:
800/327-0101 or 888/503-2622
(Identify yourself as an attendee of the Florida Bar's Annual Meeting for group rate. Deposit required at time of reservation)

A daily service charge of $10.00, plus tax, covers valet parking, maids and bell staff. Please select choice of hotel room from the following categories (plus state and local taxes).

Category	Addison Court	Villa room	Villa apartment	Cloister room	Tower room	Beachclub waterway	Beachclub oceanview
Single or Double occupancy	$135	$119	$195	$150	$160	$165	$195

- Children under 16 free in same room with parents.
- Third adult in room is additional $30 per day.
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For reservations call
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Travel Information

Airline Travel

Delta is offering special rates which allow you a 5% discount off published round-trip fares within the continental U.S. Ask about "zone fares" to compare with the regular published rates. You or your agent must call the appropriate number for Delta.

DELTA AIR LINES

Delta File No. 200516A, Meeting Network, **800/241-6760**, Monday - Sunday, 8:00 a.m. - 11:00 p.m., eastern time.

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Directions to the Boca Raton Resort & Club

From the south on I-95

1. Turn right on **Hillsboro Blvd.,** drive approximately 1 1/2 miles
2. Turn left on **Federal Hwy. (US 1),** drive approximately 1 3/4 miles
3. Turn right on **Camino Real** to the Resort (on the left)

From the North on I-95

1. Turn left on **Palmetto Park Road,** drive approximately 2 miles
2. Turn right on **Federal Highway (US 1),** drive 1/2 mile
3. Turn left on **Camino Real** to the Resort (on the left)

FISCAL PROBLEMS
from page 4

ever, the Florida Supreme Court issued an opinion that called this reasoning into question, *Chiles v. United Faculty of Florida,* 615 So.2d 671 (Fla. 1993). In that case, the state Legislature refused to fund pay increases under a collective bargaining agreement because of a shortfall in funds. The Court held that to be unlawful, distinguishing its prior opinion:

> We begin by noting that the present case is factually quite different from our recent opinion in *State v. Florida Police Benevolent Association,* 613 So.2d 415 (Fla. 1992). There we dealt with a situation in which no final agreement had been reached between the parties, unlike here where an agreement was reached and funded, then unilaterally modified by the Legislature, and finally unilaterally abrogated by the Legislature. Accordingly, we do not believe that the result in *Police Benevolent Association* dictates the result here.
>
> The state now argues that whatever agreement was reached between it and the unions somehow failed to reach the level of a fully enforceable contract. Indeed, the logical conclusion of the state's position is that public-employee bargaining agreements cannot ever constitute fully binding contracts, even after they are accepted and funded. We cannot accept this position.[11]

The Court then stated ground rules for the abrogation of an agreement where there are revenue shortfalls:

> We recognize that in the sensitive area of a continuing appropriation obligation for salaries, and perhaps in other contexts as well, the Legislature must be given leeway to deal with bona fide emergencies. Accordingly, we agree with the trial court that Legislature has authority to reduce previously approved appropriations to pay public workers' salaries made pursuant to a collective bargaining agreement, but only where it can demonstrate a compelling state interest. Art. I, §§ 6, 10, Fla. Const.; *Hillsborough County Governmental Employees Ass'n v. Hillsborough County Aviation Authority,* 522 So.2d 358 (Fla. 1988).
>
> Before that authority can be exercised, however, the Legislature must demonstrate no other reasonable alternative means of preserv-

See "Fiscal Problems," page 10

Section Bulletin Board

Section Seminars & Executive Council Meetings

SEMINARS:

SMU Conference
June 9-12, 2004
Hyatt Regency Coconut Point, Bonita Springs

Stetson Advanced Trial Skills Program (5540R)
July 21-25, 2004
Stetson University College of Law campus in Gulfport, FL

SEMINARS:	EXECUTIVE COUNCIL MEETINGS:
Public Employment Labor Relations Forum (5574R) October 21-22, 2004 Rosen Centre Hotel, Orlando Group Rate: $135 Cut-off date: September 30, 2004 Reservation Number: 407/996-9840	**Thursday, October 21, 2004 - Orlando** 5:00 p.m. - 5:15 p.m. Joint Meeting 5:15 p.m. - 6:15 p.m. Labor Meeting 6:00 p.m. - 7:30 p.m. Reception Rosen Centre Hotel, Orlando
Labor Certification Review (5541R) February 24-25, 2005 The Rosen Plaza, Orlando Group Rate: $105 Cut-off date: January 28, 2005 Reservation Number: 407/996-9700	**Thursday, February 24, 2005 - Orlando** 5:00 p.m. - 6:00 p.m. Meeting 6:00 p.m. - 7:30 p.m. Reception The Rosen Plaza, Orlando

CASE NOTES

FEDERAL COURT

Gregory v. Georgia Dept. of Human Resources, 17 Fla. Law Weekly Fed. C171a (11th Cir. 2004). The court held that the Plaintiff's retaliation claim was not time barred even though the Plaintiff did not check the retaliation box on the EEOC Charge template form. The Court stated that Plaintiff's retaliation claim was inexorably intertwined with Plaintiff's race and sex discrimination claims. Since all three claims were based on Plaintiff's termination, Plaintiff's retaliation claim was related to or could reasonably have grown out of an investigation into Plaintiff's race and sex discrimination charge.

Carruthers v. BSA Advertising, Inc., 17 Fla. Law Weekly Fed. C180b (11th Cir. 2004). Plaintiff claimed that the Defendant perceived her as disabled in violation of the Americans with Disabilities Act. In a perceived disability case, the perceived impairment must be one that would substantially limit a major life activity of the individual. Plaintiff admitted that the Defendant's knowledge of her medical condition was limited to the physician's diagnosis and her work restrictions. The Court found this was insufficient to establish that the Defendant perceived Plaintiff as being incapable of doing a broad range of jobs in various classes.

Barger v. City of Cartersville, Georgia 17 Fla. Law Weekly Fed. C19a (11th Cir. 2003). Plaintiff brought Family and Medical Leave Act and Age Discrimination in Employment Act claims against her employer. After the Plaintiff filed her lawsuit, she filed for bankruptcy. The Plaintiff did not disclose her lawsuit in the Statement of Financial Affairs that she filed with the bankruptcy court. The Eleventh Circuit held that judicial estoppell barred Plaintiff's claim for monetary relief in her employment discrimination lawsuit because she did not disclose the existence of the lawsuit to the bankruptcy court. However, the court held that Plaintiff was not judicially estopped from pursing a claim for injunctive relief.

Summers v. Dillard's, Inc., 17 Fla. L. Weekly Fed. C92a (11th Cir 2003). Plaintiff sought to avoid arbitration of her Title VII claim on the basis that the arbitration agreement only allowed for attorney's fees if the Plaintiff completely won at arbitration. The Plaintiff argued that this violated her statutory rights to fees even if she prevailed on a portion of her claims. The Court disagreed and held that the potential impact of the fee shifting clause on Plaintiff's rights was too speculative. The Plaintiff must show more than a mere possibility of bearing additional costs to avoid arbitration.

Silva v. Bieluch, 20 IER Cases 1130 (11th Cir. 2003) Plaintiff's statements in support of a candidate for sheriff were not protected speech under the First Amendment of the United States Constitution. Personal loyalty to the sheriff is an appropriate job requirement for deputy sheriffs.

Smith v. J. Smith Lanier & Co., 17 Fla. L. Weekly Fed. C111a (11th Cir. 2003) Plaintiff claimed the Defendant violated the Age Discrimination in Employment Act by not transferring her to a vacant position when her original job was eliminated in a reduction in force. At the time of the reduction in force, the Plaintiff told Defendant that she would take any position in the company and was willing to relocate. The court held that Plaintiff's comment was not enough to establish a prima facie case. The Plaintiff needed to apply for a specific position before the Defendant had an obligation to consider Plaintiff for any specific open position.

Smith v. Tradesman International, Inc., 17 Fla. L. Weekly Fed. D9a (SD Fla 2003). Plaintiff filed a motion to permit Court supervised notice to employees of their opt in rights under the Fair Labor Standards Act. Plaintiff also asked the Court to order defendant to produce a computer readable data file containing the names, addresses, social security and telephone numbers of these employees so that the Plaintiff could send notice and consent to join forms. The Court has the authority and discretion to issue an order permitting a plaintiff to send notice of opt in rights to potential members of the plaintiff class. However, the Court first must determine (1) whether there are other employees who desire to opt in; and (2) whether these employees are similarly situated with respect to their job requirements and pay provisions. There are several factors that the Court should consider in making this similarly situated determination including (1) whether the plaintiff and all potential class members held the same job title; (2) whether they worked in the same geographic location; (3) whether the alleged violations occurred during the same time period; (4) whether the plaintiffs were subjected to the same policies and practices and whether these policies and practices were established in the same manner and by the same decision maker; and (5) the extent to which the alleged illegal actions are similar. Although the Court denied Plaintiff's motion to notify potential class members, the Court did order that the defendant produce a data file containing the names, addresses and telephone numbers of all recruiter/program coordinators.

Wilbur v. Correctional Services Corp., 17 Fla. Law Weekly Fed. D119a. (MD Fla. 2003). The Plaintiff alleged hostile work environment sexual harassment, quid pro quo sexual harassment and retaliation against her former employer. The jury found that the Plaintiff was subjected to a quid pro quo sexual harassment. However, the jury also found that Plaintiff was not fired because of any quid pro quo harassment. The Court held that the Plaintiff must suffer an adverse employment action to have an actionable quid pro quo claim.

Brown v. Sybase, Inc., 17 Fla. Law Weekly Fed. D143b (SD Fla 2003). The Plaintiff's subjective view of the significance and adversity of an em-

ployment action is not controlling. The employment action must be adverse as viewed by a reasonable person under the circumstances. The Court held that unequal sales lead distribution; lack of notice of territory assignment change; and placement on a performance improvement plan did not constitute adverse employment actions.

Dorrego v. Public Health Trust of Miami-Dade County, 17 Fla. Law Weekly Fed. D39a (SD Fla 2003). Plaintiff claimed that Defendant failed to promote him because of his national origin. The court granted Defendant summary judgment. Circumstantial evidence of a decision maker's anti-Hispanic remarks about other prior coworkers was not enough on its own to create a issue of material fact on pretext.

STATE COURTS

Caldwell v. Board of Trustees Broward Community College, 28 Fla. L. Weekly, D2600a (Fla 4th DCA 2003). The Florida Commission on Human Relations dismissed community college employee's whistleblower complaint based on lack of jurisdiction. The court affirmed the dismissal and held that community colleges are not state agencies. Thus, the Commission did not have jurisdiction to investigate the whistle blower complaint.

Fisher v. Carter and Assoc., Inc., 29 Fla. L. Weekly, D164a (Fla 4th DCA 2004). Defendant moved for attorney's fees and costs under Florida Statute 57.105 three months after the court dismissed Plaintiff's whistleblower complaint. Florida Rule of Civil Procedure 1.525 requires a motion for fees to be filed within thirty days after the filing of the judgment. The Court held that this thirty day period can be extended if the court reserves jurisdiction to award fees in the final judgment.

City of Lauderhill v. Rhaimes, et al., 28 Fla. L. Weekly D2412a (Fla. 4th DCA 2003) . Three officers sued over their failure to receive the rank of Sergeant when the city reorganized the police department. The Court held that officer's claim of substantive due process violations failed because an employee's property interest in an express of implied employment contract is not fundamental. Thus, the Defendant did not violate the officer's substantive due process

McGhee v. Sterling Casino Lines LP, 28 Fla. L. Weekly, D2438 (Fla 5th DCA 2003). The Court held that an appellant who successfully appeals an entry of Summary Judgment is not entitled to attorneys fees under the Florida Civil Rights Act. The Court based its ruling on a fact that the plaintiff had not yet prevailed on the merits of her employment discrimination case. Until such time as the plaintiff prevailed on the merits of the underlying claim, she is not a prevailing party under Fla. Stat. § 760.11(5).

Guerrero v. Florida Unemployment Appeals Commission et al., 28 Fla. L. Weekly D2261b, (Fla 3rd DCA 2003). The Florida Unemployment Appeals Commission dismissed Plaintiff's appeal of the decision denying Plaintiff unemployment benefits. The court reversed and held that Plaintiff was entitled to a evidentiary hearing on whether he received the notice of hearing on his unemployment benefits claim.

EMPLOYEE ORGANIZATION
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a matter of policy, that it is not appropriate to allow Reed access to the financial records of QPEC, notwithstanding that the FEA and QPEC are closely related entities. The fact that these two entities share many features does not demonstrate that QPEC is an employee organization or detract from its existence as a separate registered corporation. The Commission noted that the legislature has not decreed in Chapter 447, Part II, Florida Statutes (2003), that it has the authority to require a corporate entity associated with an employee organization to also divulge its financial records to a member of the employee organization. By permitting such inspections, the Commission stated that it would be improperly expanding the scope of Section 447.305(5) and to require entities that are not employee organizations to open their financial records to individuals who are not members of such groups. Therefore, the FEA did not commit an unfair labor practice by failing to permit Reed to inspect the financial records of QPEC.

> ing its contract with public workers, either in whole or in part. The mere fact that it is politically more expedient to eliminate all or part of the contracted funds is not in itself a compelling reason. Rather, the legislature must demonstrate that the funds are available from no other possible source. *Accord United States Trust Co. v. New Jersey, 431 U.S. 1, 97 S.Ct. 1505, 52 L.*Ed2d 92 (1977); *Association of Surrogates and Supreme Court Reporters v. New York,* 940 F.2d 766 (2d Cir. 1991); *Sonoma County Organization of Public Employees v. County of Sonoma,* 23 Cal.3d 296, 152 Cal. Rptr. 903, 591 P.2d 1 (1979). That has not happened here.[12]

Statutory Amendment of the Underfunding Statute

In 1995, Section 447.309(2)(b) was amended to state:

> If the state is a party to a collective bargaining agreement in which less than the requested amount is appropriated by the Legislature, the collective bargaining agreement will be administered on the basis of the amounts appropriated by the Legislature. The failure of the Legislature to appropriate funds sufficient to fund the collective bargaining agreement shall not constitute, or be evidence of, any unfair labor practice. All collective bargaining agreements entered into by the state are subject to the appropriations power of the Legislature and the provisions of this section shall not conflict with the exclusive authority of the Legislature to appropriate funds.[13]

The effect of this amendment was to limit the applicability of the underfunding statute to the State of Florida.

Creation of New Statute on "Financial Urgency"

As a part of the statutory amendment to Section 447.309(2)(b), the Legislature created a new statute, Section 447.4095, which provides:

> Financial Urgency. In the event of a financial urgency requiring modification of an agreement, the chief executive officer or his representative and the bargaining agent or his representative shall meet as soon as possible to negotiate the impact of a financial urgency. If after a reasonable period of negotiation which shall not exceed 14 days, a dispute exists between the public employer and the bargaining agent, an impasse shall be deemed to have occurred and one of the parties shall so declare in writing to the other party and to the [Public Employees Relations] Commission. The parties shall then proceed pursuant to the provisions of Section 447.403 [to resolve the impasse]. An unfair labor practice charge shall not be filed during the 14 days during which negotiations are occurring pursuant to this section.[14]

Subsequent Case Law on Section 447.4095

In February 2002, the Commission received a request from the School Board of Miami-Dade County for the appointment of a special master to resolve impasses with employee organizations involving the application of Section 447.4095, Florida Statutes. Thereafter, two circuit court lawsuits and two unfair labor practice charges were filed concerning the application of the statute. The lawsuits and unfair labor practice charges involved the School Board of Miami-Dade County and the School Board of Madison County. Each case involved the alleged abrogation of existing collective bargaining agreement economic provisions because of significant shortfalls in revenues. The lawsuits filed by the various employee organizations alleged the facial unconstitutionality of Section 447.4095, using the Supreme Court's standard that the defendant school districts were allegedly unable to show that the "funds [to pay contractual benefits] are available from no other possible reasonable source." The parties resolved the lawsuits and unfair labor practice charges without any statutory interpretation in mid-2002. Therefore, neither the Commission nor the Florida Courts have had an opportunity to interpret Section 447.4095 and the circumstances in which it may be applied until a recent decision from the Florida Circuit Court for the Nineteenth Circuit.

The Circuit Court action was predicated upon a motion by the Indian River County School Board (School Board) to vacate an arbitrator's award in favor of the Communications Workers of America (CWA) relating to changes to benefit levels and employee contributions to the School Board's health insurance plan without negotiations. The School Board defended its changes by arguing that they were made pursuant to Section 447.4095. The Circuit Court held that the arbitrator incorrectly held that the remedy of arbitration was available and that the arbitrator could interpret the School Board's actions under Section 447.4095. The Circuit Court held that the unfair labor practice provisions of Sections 447.501 and 447.503 preempted the arbitrator's consideration of the issue of whether the School Board violated the provisions of Section 447.4095. The Court held that, if injunctive relief was necessary to prevent a change in the status quo, the injunction provisions of Section 447.503(3) were available.

In addition, the Circuit Court held that:

> Just as the activities at issue here were matters for PERC, that interpretation is also a matter clearly within the jurisdiction of PERC. For this same reason and because the Court must avoid reaching constitutional issues where it can resolve matters on other grounds such as the preemptive jurisdiction of PERC, the Court will not reach the CWA's claim that Section 447.4095, Florida Statutes, is unconstitutional.

Accordingly, the Circuit Court set aside the arbitrator's decision pursuant to Section 682.13(1)(c), Florida Statutes (2003) for exceeding the powers granted to the arbitrator and ruling upon matters arguably covered by Chapter 447, part II, Florida Statutes, and within the preemptive jurisdiction of the Commission.[15] The Commission did not participate as a party in the lawsuit. A representative of the Commission has been informed that the CWA intends to file an appeal of the Circuit Court's decision to a Florida District Court of Appeal.

Endnotes:

[1] Hillsborough County GEA v. Hillsborough County Aviation Authority, 522 So.2d 358, 363 (Fla. 1988).

[2] School Board of Orange County v. Palowitch, 367 So.2d 730, 731 (Fla. 4th DCA 1979).

[3] § 447.501(1)(a) and (c), Fla. Stat. (2003). Where the 2003 statutes are cited, this provision of the statute has remained unchanged since before 1991. If there has been a statutory change, an earlier version of the statute is cited.

[4] § 447.309(1), Fla. Stat. (2003). Nassau Teachers Association, FTP-NEA v. School Board of Nassau County, 8 FPER ¶ 13206 (1982).

[5] Palowitch v. Orange County School Board, 3 FPER 280 (1977), aff'd, 367 So.2d 730 (Fla. 4th DCA 1979) (the bargaining table is the legislatively mandated forum to determine wages, hours, and terms and conditions of employment).

[6] Florida School for the Deaf and Blind v. Florida School for the Deaf and Blind Teachers United, 483 So.2d 58 (Fla. 1st DCA 1986).

[7] Pasco County School Board v. Pasco County CTA, 3 FPER 9, 13 (1976), 353 So.2d 108 (Fla. 1st DCA 1977).

[8] Sarasota Classified Teachers Association v. Sarasota County School District, 18 FPER ¶ 23069 (1992), reversed, 614 So. 2d 1143 (Fla. 2nd DCA 1993), review dismissed, 630 So.2d 1095 (Fla. 1994); Martin County Teachers Association v. School Board of Martin County, 18 FPER ¶ 23061 (1992), reversed, 613 So.2d 521 (Fla. 4th DCA 1993).

[9] State of Florida v. Florida PBA, 613 So.2d 415 (Fla. 1992).

[10] 613 So.2d at 418-19.

[11] 615 So.2d at 672.

[12] 615 So.2d at 673.

[13] Ch. 95-218, § 1 at 1943, Laws of Florida.

[14] Ch. 95-218, § 2 at 1944, Laws of Florida.

[15] See Indian River County School Board v. Communications Workers of America, No. 20020354-CA-17 (Fla. 19th Cir. Ct. Aug. 28, 2003) (unpublished opinion).

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EMPLOYMENT CLAIMS

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know the hurry-up-and-wait, nail-biting anguish of the typical trial calendar), the Trial Resolution Judge schedules the trial to begin at a date and time for which you, your clients, and your experts can plan. This advantage of Voluntary Trial Resolution over traditional trial is underscored even further when we recall that, with Revision 7 to Article V of the Florida Constitution due to take effect this summer, many circuits are bracing for a relative lack of trial judges available to hear general civil cases. With the courts required to hear criminal and delinquency matters first (to avoid speedy trial rule dismissal), and many circuits giving next preference to dependency and family matters, at least one Circuit has warned that it may have only one Circuit Judge available to hear the rest of all civil trials. If this dire prediction should come true, then parties will have no choice but to embrace Voluntary Trial Resolution or something like it, or face years-long delay in getting cases tried.

IV. Conclusion

Voluntary Trial Resolution offers parties and counsel advantages over both binding arbitration and civil trial in Circuit or County Court.[11] The expense of the Trial Resolution Judge's services should be more than offset by the savings the parties would realize through reduced delay and attendant costs. With its combination of formality and flexibility, the involvement of a subject-matter expert as presiding neutral, and preservation of appellate remedies, Voluntary Trial Resolution may very well become the wave of the future.[12]

After practicing labor and employment law on behalf of employers, unions, and employees for more than ten years, ***Christopher M. Shulman*** *now limits his practice to mediation, arbitration, EEO investigation, and employee relations consulting. Chris is an FMCS Labor Arbitrator, an American Arbitration Association Employment Arbitrator and Mediator, an EEOC Contract Mediator, and an NASD Dispute Resolution Mediator and Arbitrator, with more than 900 cases arbitrated or mediated.*

Endnotes:

[1] Per Administrative Order S-2001-027 (13th Jud. Cir. Ct. May 3, 2001), www.fljud13.org/AO/DOCS/2001-027.pdf. The author believes this is indicative of how other circuits/counties that have addressed Voluntary Trial Resolution have handled it. *See, e.g.*, Administrative Order PA/PI-CIR-00-04 (6th Jud. Cir. Ct. January 26, 2000), available at http://www.jud6.org/legalpractice/aosandrules/aos/aos2000/ao04papi.html.

[2] Fla. Stat. § 44.104

[3] *Id.* § 44.104(7)-(8)

[4] *Id.*

[5] *Id.* § 44.104(11), (13)

[6] *See* Fla. Stat. § 44.104(9).

[7] *Id.* § 44.104(11).

[8] See Fla. Stat. § 682.13 (fraud, corruption, evident partiality of the arbitrator, exceeding scope of jurisdiction, or similarly egregious conduct usually required to vacate an award).

[9] *See* L. Langbein, "Arbitrability of Employment Disputes: When Process Matters", The Checkoff, XLI, No. 1, at 8 (March 2003).

[10] Task Force on Alternative Dispute Resolution in Employment, "A Due Process Protocol for Mediation and Arbitration of Statutory Disputes arising out of the Employment Relationship", Cornell Institute for Labor Relations, May 1995. http://www.ilr.cornell.edu/alliance/resources/Guide/Due_process_protocol_empdispute.html.

[11] Regrettably, nothing like Voluntary Trial Resolution is currently in place in the federal courts, at least those here in Florida. This is of great significance to employment lawyers since, as we know, most employment litigation, especially litigation of statutory claims, lands in federal court. While the "rocket docket" of several years ago helped clear the significant backlog of federal cases, at least in the Middle District, the reality is that it is still taking upwards of two years or more to get a trial. Even with the availability of trial by Magistrate Judge, with the advantage of a date certain for trial, these delays still abound. Further, discovery and pretrial disputes are still subject to the busy calendars of the federal bench, and delayed rulings are, regrettably, often the norm. Again, with a Trial Resolution Judge, dedicated to your case, such delays are likely to disappear, or at least to be greatly shortened.

[12] Those interested in learning more about Voluntary Trial Resolution are welcome to attend the seminar on that subject that the Hillsborough County Bar Association Alternative Dispute Resolution Committee is holding in Tampa on May 28, 2004. For further information, please contact the author, who is organizing the seminar on behalf of the Committee.

of the drug test revealed that Hernandez had cocaine in his system.[7] After testing positive for cocaine, Hernandez admitted that he had used cocaine the previous evening.[8]

As a result of his violation of the company's workplace conduct policy, Hernandez was given the option to resign in lieu of dismissal and he elected to do so.[9] At that time, the company completed an internal "Employee Separation Summary" which indicated that the reason for Hernandez' separation was "discharge for personal conduct (quit in lieu of discharge)."[10]

Following his resignation, Hernandez sought treatment and counseling for his substance abuse.[11] Thereafter, on January 24, 1994, Hernandez reapplied with the company. On his employment application, Hernandez indicated that he had previously worked for the company.[12] In response to this indication, Joanne Bockmiller, a labor relations employee with the company, reviewed the Employee Separation Summary from 1991.[13] As a consequence of the company's policy against rehiring employees previously dismissed for violating the workplace conduct policy, Bockmiller rejected Hernandez' application.[14] Importantly, Bockmiller specifically testified that she was not aware of the specific circumstances of Hernandez' 1991 separation from employment or the fact that Hernandez was a recovered drug addict.[15]

Following the filing of a charge of discrimination with the Equal Employment Opportunity Commission and the subsequent receipt of a right-to-sue notice, Hernandez brought suit against the company asserting a violation of the ADA. In particular, Hernandez claimed that the company unlawfully discriminated against him by not rehiring him in 1994 because of his record of drug addiction and/or because he was regarded as being a drug addict.[16]

II. The ADA Framework and the Lower Courts' Decisions

The ADA's proscription on disability discrimination provides that:

> No covered entity shall discriminate against a qualified individual with a disability because of the disability of such individual in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment.[17]

Importantly, as the Supreme Court in *Hernandez* confirmed, in addition to prohibiting intentional disparate treatment disability discrimination, the ADA also expressly prohibits unintentional disparate impact disability discrimination.[18] With respect to disparate impact claims, the ADA defines one form of impermissible discrimination as "utilizing standards, criteria, or methods of administration – that have the effect of discrimination on the basis of disability"[19] or "using qualification standards, employment tests or other selection criteria that screen out or tend to screen out an individual with a disability or a class of individuals with disabilities unless the standard, test or other selection criteria . . . is shown to be job-related for the position in question and is consistent with business necessity."[20]

The ADA defines "disability" as:

> (1) a physical or mental impairment that substantially limits one or more of the major life activities of such individual;
>
> (2) a record of such an impairment; or,
>
> (3) being regarded as having such an impairment.[21]

With respect to drug use, the ADA specifically provides that "any employee or applicant who is currently engaging in the illegal use of drugs" is not entitled to the protections of the ADA when the covered entity acts on the basis of such drug use.[22] Notwithstanding this limitation, however, the ADA further provides that:

> Nothing in [42 U.S.C. § 12114(a)] shall be construed to exclude as a qualified individual with a disability an individual who –
>
> (1) has successfully completed a supervised drug rehabilitation program and is no longer engaging the illegal use of drugs, or has otherwise been rehabilitated successfully and is no longer engaging in such use;
>
> (2) is participating in a supervised rehabilitation program and is no longer engaging in such use; or
>
> (3) is erroneously regarded as engaging in such use, but is not engaging in such use[.][23]

Similarly, with respect to an employer's regulation of illegal drugs and alcohol, the ADA provides, in pertinent part:

> A covered entity –
>
> (1) may prohibit the illegal use of drugs and the use of alcohol at the workplace by all employees;
>
> (2) may require that employees shall not be under the influence of alcohol or be engaging in the illegal use of drugs at the workplace;
>
> (3) may require that employees behave in conformance with the requirements established under the Drug-Free Workplace Act of 1988 (41 U.S.C. 701 *et seq*.);
>
> (4) may hold an employee who engages in the illegal use of drugs or who is an alcoholic to the same qualification standards for employment or job performance and behavior that such entity holds other employees, even if any unsatisfactory performance or behavior is related to the drug use or alcoholism of such employee;[24]

* * *

Addressing Hernandez' claim under this legal framework, the United States District Court for the District of Arizona granted summary judgment in favor of the company.[25] Significantly, throughout the discovery phase of the case, Hernandez proceeded on a disparate treatment theory — that the company rejected his application for rehiring based upon his record of drug addiction or because it regarded him as a drug addict.[26] Hernandez did not assert a disparate impact argument until the company submitted its summary judgment motion following discovery and, as such, the District Court considered it untimely.[27]

Upon Hernandez' appeal to the

Ninth Circuit, the Court reversed the grant of summary judgment and remanded it.[28] In particular, while agreeing with the District Court that the disparate impact claim was not timely raised by Hernandez,[29] the Court nonetheless held that the company's "policy against rehiring former employees who were terminated for any violation of its misconduct rules, although not unlawful on its face, violates the ADA *as applied* to former drug addicts whose only work-related offense was testing positive because of their addiction."[30]

In an attempt to explain the fact that Bockmiller did not have any actual knowledge of Hernandez' prior drug addiction or the reasons for his prior dismissal (and thus could not have had the requisite intent under a traditional disparate treatment theory), the Court simply noted that "her lack of knowledge would have been due solely to Hughes's unlawful policy which shields its employees from the knowledge that an employment decision may be illegal."[31] Accordingly, the Court concluded, "[m]aintaining a blanket policy against rehire of *all* former employees who violated company policy not only screens out persons with a record of addiction who have been successfully rehabilitated, but may well result . . . in the staff member who makes the employment decision remaining unaware of the 'disability' and thus of the fact that she is committing an unlawful act."[32] Based upon this reasoning, the Ninth Circuit held that the company's rationale for not rehiring Hernandez did not constitute a legitimate, non-discriminatory reason.[33]

III. The Supreme Court's Decision

After granting *certiorari* in the case, a unanimous Supreme Court[34] rejected the Ninth Circuit's analysis and reversed. In so holding, the Supreme Court found fault with the Ninth Circuit's determination that intentional disparate treatment discrimination could be found notwithstanding the undisputed testimony that the decisionmaker, Bockmiller, admittedly lacked any knowledge as to Hernandez' past record of drug addiction or the reason he was previously discharged from the company.[35] Contrary to the Ninth Circuit's holding, the Supreme Court specifically reinforced the well-settled principle that liability in a disparate treatment case turns on whether the decision was *actually* motivated by the employee's protected characteristic.[36]

The Court further rejected the Ninth Circuit's approach of seemingly imputing the necessary unlawful intent in a disparate treatment case by utilizing principles applicable to disparate impact claims. In this respect, the Court stated:

> In other words, while ostensibly evaluating whether petitioner had proffered a legitimate, nondiscriminatory reason for failing to rehire respondent sufficient to rebut respondent's *prima facie* showing of disparate treatment, the Court of Appeals held that a neutral no-rehire policy could never suffice in a case where the employee was terminated for illegal drug use, because such a policy has a disparate impact on recovering drug addicts. In so holding, the Court of Appeals erred by conflating the analytical framework for disparate-impact and disparate-treatment claims. Had the Court of Appeals correctly applied the disparate-treatment framework, it would have been obliged to conclude that a neutral no-rehire policy is, by definition, a legitimate, non-discriminatory reason under the ADA. And thus the only remaining question would be whether respondent could produce sufficient evidence from which a jury could conclude that "petitioner's stated reason for respondent's rejection was in fact pretext."[37]

As can be seen from the Court's holding, an employer's decision not to rehire an employee previously dismissed from employment based upon a violation of the employer's workplace misconduct policy does not constitute a violation of the ADA's proscription of intentional, disparate treatment discrimination. Nonetheless, the Court left undecided whether such a policy would violate the ADA's proscription of disparate impact discrimination, as that claim was not part of the facts of the case before it.

Interestingly, the Court, in a brief footnote which is arguably *dictum*, also noted:

> The Court of Appeals characterized respondent's workplace misconduct as merely "testing positive because of (his) addiction." 298 F.3d at 1036. To the extent that the court suggested that, because respondent's workplace misconduct is related to his disability, petitioner's refusal to

continued. . .

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*

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Article deadline for next *Checkoff* is April 30, 2004.

REHIRE EMPLOYEE
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> rehire respondent on account of that workplace misconduct violated the ADA, we point out that we have rejected a similar argument in the context of the Age Discrimination in Employment Act. *See Hazen Paper Co. v. Biggins*, 507 U.S. 604, 611, 113 S.Ct. 1701, 123 L. Ed. 2d 338 (1993).[38]

As noted above, the ADA specifically allows employers to hold employees who engage in illegal drug use or who are alcoholics to the same qualifications, standards and behavior that it applies to other employees "even if any unsatisfactory performance or behavior is related to the drug use or alcoholism of such employee."[39] Thus, interpreted narrowly, this footnote could be read as simply emphasizing this provision of the ADA. However, given that the Court referenced the *Hazen Paper* ADEA decision (and the omission of any reference to 42 U.S.C. § 12114(c)), this statement could be read more broadly and arguably be interpreted as manifesting the Court's stance that an employer is permitted under the ADA to take adverse action against an employee for misconduct that stems from or is related to a non-drug or alcohol disability.

Such a holding could affect how many courts have dealt with similar, often complex, issues involving the distinction between an individual's disability and misconduct related to the disability. To this end, the circuit courts have reached differing conclusions as to whether disability-related misconduct outside of the context of drug and alcohol cases may form the basis for adverse action without running afoul of the ADA.[40] The courts that have held that employers might need to tolerate certain disability-related misconduct unconnected with drug and alcohol issues have analyzed the issue under the ADA's reasonable accommodation mandate.[41] So long as the misconduct does not otherwise pose an undue hardship or direct threat, the employer, by virtue of its obligation to provide a reasonable accommodation, might need to overlook certain misconduct (such as absences or tardiness, for example) caused by a disability.[42] Viewed from this perspective, the ADA is unlike most other employment discrimination statutes in that, in certain instances, it imposes an affirmative obligation to provide preferential treatment to disabled employees rather than a simple directive not to treat similarly-situated employees differently. Indeed, the Supreme Court has recognized as much in its recent ADA precedence.[43]

Given this backdrop, the Supreme Court's statement that a discrimination claim, challenging an adverse personnel decision premised upon misconduct related to the protected characteristic, has been previously rejected by the Court in an ADEA case (which, of course, does not contain a reasonable accommodation mandate) is ambiguous. No doubt the important issue of disability vs. disability-related misconduct will continue to arise in ADA failure to accommodate cases. Accordingly, practitioners should continue to monitor the courts' treatment of this issue in light of the language in the Supreme Court's *Hernandez* decision.

IV. Conclusion

The Supreme Court's *Hernandez* decision provides meaningful guidance with respect to employers' obligations to rehire employees previously discharged for disability-related misconduct. In particular, the Court expressly noted that a "no-rehire policy is a quintessential legitimate, non-discriminatory reason for refusing to rehire an employee who was terminated for violating workplace conduct rules."[44] As such, it is clear that an employer would not be guilty of disparate treatment disability discrimination by applying such a policy in the context of a recovered drug addict or alcoholic.

Notwithstanding, the Court left undecided the validity of such a policy under a disparate impact theory — a theory the Court plainly held was cognizable under the ADA. As a consequence, employers should be mindful that neutral no-rehire policies could still subject them to ADA claims. Employers utilizing such policies in the context of cases involving drug and alcohol disabilities should be prepared to demonstrate that the policies are job related and consistent with business necessity.[45]

Brian Koji *is a shareholder in the Tampa office of Allen, Norton & Blue, P.A. Mr. Koji's practice is devoted entirely to representing management in labor and employment matters.*

Endnotes:

[1] *See e.g., Chevron U.S.A., Inc. v. Echazabal*, 536 U.S. 73, 122 S.Ct. 2045, 153 L. Ed. 2d 82 (2002) (upholding EEOC's ADA regulation authorizing refusal to hire an individual because the position would endanger the employee's own health); *US Airways, Inc. v. Barnett*, 535 U.S. 391, 122 S.Ct. 1516, 152 L. Ed. 2d 589 (2002) (finding that, generally, an employee's requested accommodation that conflicts with an employer's seniority rules, is not considered a reasonable accommodation); *Toyota Motor Manufacturing, Kentucky, Inc. v. Williams*, 534 U.S. 184, 122 S.Ct. 681, 151 L. Ed. 2d 615 (2002) (discussing the definition of disability); *Murphy v. United Parcel Service, Inc.*, 527 U.S. 516, 119 S.Ct. 2133, 144 L. Ed. 2d 484 (1999) (finding that mitigating measures must be taken into account in determining if an individual has a legally-cognizable disability); *Albertson's, Inc. v. Kirkingburg*, 527 U.S. 555, 119 S.Ct. 2162, 144 L. Ed. 2d 518 (1999) (discussing the definition of disability in the context of an employee that suffered from monocular vision); *Sutton v. United Air Lines, Inc.*, 527 U.S. 471, 119 S.Ct. 2139, 144 L. Ed. 2d 450 (1999) (finding that mitigating measures must be taken into account in determining if an individual has a legally-cognizable disability).

[2] 42 U.S.C. § 12101 *et seq*.

[3] 124 S.Ct. 513 (Dec. 2, 2003).

[4] 124 S.Ct. at 516.

[5] *Hernandez v. Hughes Missile Systems Co.*, 298 F.3d 1030, 1032 (9th Cir. 2002), *rev'd*, 124 S.Ct. 513.

[6] 124 S.Ct. at 516.

[7] *Id*.

[8] *Id*.

[9] 124 S.Ct. at 516; 298 F.3d at 1032.

[10] 124 S.Ct. at 516.

[11] *Id*.

[12] *Id*.

[13] *Id*.

[14] *Id*.

[15] *Id*.

[16] 124 S.Ct. at 517.

[17] 42 U.S.C. § 12112; *Sutton*, 527 U.S. at 477.

[18] 42 U.S.C. § 12112(b)(3), (6); 24 S.Ct. at 519 ("Both disparate-treatment and disparate-impact claims are cognizable under the ADA").

[19] 42 U.S.C. § 12112(b)(3).

[20] 42 U.S.C. §12112(b)(6).

[21] 42 U.S.C. § 12102(2); *Toyota Motor Manufacturing Kentucky*, 534 U.S. at 193-199; *Sutton*, 527 U.S. at 478.

[22] 42 U.S.C. § 12114(a); 29 C.F.R. § 1630.3(a).

[23] 42 U.S.C. § 12114(b); 29 C.F.R. § 1630.3(b).

[24] 42 U.S.C. 12114(c); 29 C.F.R. § 1630.16(b).

[25] 124 S.Ct. at 517; 298 F.3d at 1033.

[26] 124 S.Ct. at 517.

[27] *Id*.

[28] 298 F.3d 1030.

[29] 298 F.3d at 1037, n. 20.

[30] 298 F.3d at 1036 (emphasis added).
[31] *Id*.
[32] *Id*. (emphasis in original).
[33] *Id*.
[34] The Court's 7-0 decision was unanimous with respect to those Justices that participated. Justices Souter and Breyer did not take part in the consideration and decision of the case.
[35] 124 S.Ct. at 518-19.
[36] *Id*. at 519; *see also* 129 S.Ct. at 520, n. 7 ("The Court of Appeals did not explain, however, how it could be said that Bockmiller was motivated to reject respondent's application because of his disability if Bockmiller was entirely unaware that such a disability existed. If Bockmiller were truly unaware that such a disability existed, it would be impossible for her hiring decision to have been based, even in part, on respondent's disability. And, if no part of the hiring decision turned on respondent's status as disabled, he cannot, *ipso facto*, have been subject to disparate treatment.").
[37] *Id*. at 518-19 (quoting *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 804, 93 S.Ct. 1817, 36 L. Ed. 2d 668 (1973)).
[38] 124 S.Ct. at 520, n. 6.
[39] 42 U.S.C. § 12114(c)(4).
[40] *Compare Spath v. Hayes Wheels Intern.-Indiana, Inc.*, 211 F.3d 392, 395, n.5 (7th Cir. 2000) (Stating that ADA does not require employer to disregard misconduct simply because it is connected with a disability) and *Jones v. Am. Postal Workers Union*, 192 F.3d 417, 429 (4th Cir. 1999) ("The law is well settled that the ADA is not violated when an employer discharges an individual based upon the employee's misconduct, even if the misconduct is related to a disability") with *Humphrey v. Memorial Hospitals Ass'n*, 239 F.3d 1128, 1140 (9th Cir. 2001), *cert. denied*, 535 U.S. 1011, 122 S.Ct. 1592, 152 L. Ed. 2d 509 (2002) ("For purposes of the ADA, with a few exceptions, conduct resulting from a disability is considered to be a part of the disability, rather than a separate basis for termination") and *Den Hartog v. Wasatch Academy*, 129 F.3d 1076, 1085-88 (10th Cir. 1997) (Holding that the District Court erred by "importing the 'disability v. disability-caused misconduct' dichotomy into a case in which neither drugs nor alcohol were involved").
[41] *See e.g.*, *Den Hartog*, 129 F.3d at 1085-88; *Humphrey*, 239 F.3d at 1140.
[42] *Id*.
[43] *US Airways*, 535 U.S. at 397 ("While linguistically logical, this argument fails to recognize what the [ADA] specifies, namely, that preferences will sometimes prove necessary to achieve the Act's basic equal opportunity goal. The Act requires preferences in the form of 'reasonable accommodations' that are needed for those with disabilities to obtain the *same* workplace opportunities that those without disabilities automatically enjoy.").
[44] 124 S.Ct. at 520.
[45] *See Echazabal*, 536 U.S. at 78; 42 U.S.C. 12113(a).

DAMAGE ACTIONS

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immune to suits under Title II of the ADA[19] while observing that the enforcement provisions of the two titles are "somewhat different."

In *Lane* the Sixth Circuit ruled that Congress effectively overruled State Eleventh Amendment immunity to Title II suits. The court distinguished the facts of that case from the situation in *Garrett*. *Lane* was an action by two disabled individuals who claimed that their inability to access courthouse physical facilities denied them access to court proceedings.[20] Finding that this could constitute a denial of due process rather than a denial of equal protection the Sixth Circuit remanded the case to allow a factual record to be developed.

The *Lane* court relied on the *en banc* Sixth Circuit decision in *Popovich v. Cuyahoga County Court of Common Pleas*.[21] Popovich was a hearing impaired individual who complained of the inability to meaningfully participate in a child custody proceeding due to the failure of the court to provide him with adequate hearing assistance.[22] The Sixth Circuit reasoned that *Garrett* held there was no Congressional finding of a pattern of discrimination by states against the disabled that would justify abrogating States Eleventh Amendment immunity on the basis of the Equal Protection Clause of the Fourteenth Amendment. It found that it was thereby obviated from finding that Mr. Popovich was denied equal protection of the law. Instead the *Popovich* court held that he was denied due process as guaranteed by the Fourteenth Amendment. The denial of due process was the failure to provide an oppportunity for the plaintiff to participate in a meaningful way in a proceeding that adjudicated his rights to custody and visitation with his daughter.[23]

In reaching its decision the Sixth Circuit observed that: "The Supreme Court has recognized the special nature of parental rights and has consequently imposed special due process guarantees so that states may not lightly terminate parents' relationships with their children."[24] It opined that this interest of parents is a "liberty interest." The Sixth Circuit pointed out the Supreme Court decision in *Lassiter v. Streater*, 452 U.S. 1, 27 (1981) "... makes it clear that in analyzing the safeguards needed in child custody proceedings, the Due Process Clause requires a balancing of the private interests at stake, the government's interests, and the risks that the procedures used will lead to erroneous decisions."[25]

The court vacated the jury verdict of $400,000 in Mr. Popovich's favor because the jury instructions would have permitted a finding in his favor based on a denial of equal protection, a basis the Sixth Circuit considered to be prohibited by *Garrett*. The case was remanded to be retried on a due process basis.[26]

The Supreme Court's decision in *Lane v. Tennessee* could give far reaching implications in light of the varied activities and programs of state entities that are subject to Title II. It is difficult to predict what the outcome will be or the basis on which the majority will rule. A five to four majority has with marked consistency declined to find abrogation of state immunity by a number of federal statutes.[27] The usual majority might predicate its finding using its customary approach, finding that Congress, in enacting Title II, did not find a history of denial of equal protection resulting from discrimination against the disabled. On the other hand a majority decision might follow the reasoning of Popovich by holding state immunity was justifiably set aside by Congress in Title II to bar denial of due process. Such a decision would leave numerous unanswered questions. It would seem to be limited in its application to matters relating to judicial proceedings or police actions which are the type

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DAMAGE ACTIONS

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of situations in which due process comes into play. It would not appear to apply to other state activities such as educational programs, parks, highways, structural facilities other than court houses and perhaps locations where legislative bodies meet Those of us who are concerned with the coverage of the ADA can only stand and wait.

Endnotes:

[1] 531 U.S. 356 (2001)

[2] The Eleventh Amendment states: "The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State." U.S. CONST. amend XI. The Amendment has been construed to prohibit suits in federal court against a state by its own citizens. See *Hans v. Louisiana*, 134 U.S. 1, 15 (1890).

[3] 42 U.S.C. § 12112 *et seq*.

[4] 315 F.3d 680 (4th Cir. 2003), *cert. granted* _____ U.S. _____ (June 23, 2003)

[5] 42 U.S.C. §12115.

[6] 42 U.S.C. §12132.

[7] 42 U.S.C. §12115.

[8] 292 F.3d 1073 (9th Cir. 2002)

[9] 250 F.3d 668 (9th Cir. 2001)

[10] 133 F. 3d 816 (11th Cir. 1999), *cert. denied*, 119 S.Ct. 72 (1998)

[11] 170 F.3d 1169 (9th Cir. 1999), rehearing denied 183 F.3d 1161 (1999), cert. denied 532 U.S. 1189.

[12] 531 U.S. at p. 364

[13] No State shall make or enforce any law which shall abridge the privileges or immunities of Citizens of the United States; nor shall any State deprive any person of life, liberty or property without due process of law; nor deny any person within its jurisdiction the equal protection of the laws. U.S. CONST. Amend 14, sec. 5.

[14] 531 U.S. at p. 366

[15] 531 U.S. at p. 367 quoting *Heller v. Doe*, 509 U.S. 312, 320 (1993) (citing *Noerdlinger v. Hahn*, 505 U.S. 1 (1992).

[16] 531 U.S. at p. 374

[17] 531 U.S. at p. 370, 374

[18] *Id*. at p. 375 (Kennedy, concurring opinion)

[19] *Id*. at p. 360, n. l

[20] 315 F.3d 683

[21] 276 F.3d 808 (6th Cir. 2002)

[22] *Id*. at 811

[23] *Id*. at p. 815

[24] *Id*. at p. 813

[25] *Id*. at p. 814

[26] *Id*. at pl 816

[27] See for example *Kimel v. Florida Board of Regents*, 528 U.S. 62 (2000) (No individual action allowed against states under the ADEA); *Alden v. Maine*, 527 U.S. 706 (1999) (No FLSA action allowed against a state in state court). An exception was *Nevada Department of Human Resources v. Hibbs*, No. 01-1368 (2003) in which a six to three majority found that states were subject to suits for money judgements under the Family and Medical Leave Act, 29 U.S.C. § 2601, et seq. Chief Justice Rehnquist and Justice O'Connor, departing from their prior stances, joined the four justices who had dissented in favor of abrogation in prior cases. The majority reasoned that the FMLA dealt with gender discrimination and that gender distinctions require heightened scrutiny.

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CHAIR'S REPORT

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opportunity to communicate with each other regarding substantive and procedural issues. It will also allow the Executive Council and the subcommittee chairs to timely convey information to the membership. I anticipate that, like any other new program, we will have to navigate our way over a few bumps. However, I believe this Listserv will grow into a valuable tool for Section members and increase the service we provide to our membership.

At the Executive Council meeting, we discussed how to more effectively communicate committee participation opportunities to the membership. So, I am again encouraging anyone who wants to participate in a committee to contact me. Even though our Bar year ends in June, we can always use another set of hands to work on projects and generate fresh ideas. At a minimum, I encourage anyone who attends our CLE programs to come to the Executive Council meetings, the times of which are always detailed in the brochures, and to attend the cocktail receptions after the meetings. These events are great membership networking opportunities that the Section provides free of charge to any Section member who wants to attend. Finally, I welcome any suggestions for additional ways that we can provide value for your membership dues.

– Cathy J. Beveridge, Chair

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