

the Checkoff

The Florida Bar
Vol. XII, No.1 March 2003

The Labor & Employment Law Section

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Florida Supreme Court Issues Ruling Removing Two Options for Employers to Obtain Dismissal of Claims Under the Florida Civil Rights Act

by Ryan D. Barack

In *Woodham v. Blue Cross & Blue Shield*, 829 So. 2d 891 (Fla. 2002), the Florida Supreme Court made two determinations which will have a significant impact upon suits brought under the Florida Civil Rights Act ("FCRA"). First, the Florida Supreme Court held that the standard language in the Equal Employment Opportunity Commission ("EEOC") Dismissal and Notice of Rights form that the EEOC is "unable to conclude that the information obtained establishes a violation of the statutes" is not the equivalent of a determination there is not reasonable cause to believe discrimination has occurred as required by the FCRA to trigger certain administrative prerequi-

sites to filing suit. Second, the Florida Supreme Court held that if the Florida Commission on Human Relations ("FCHR") fails within 180 days to make a determination either way regarding whether reasonable cause exists, the claimant may proceed to file suit regardless of whether a later no cause determination is made.

In order to evaluate the *Woodham* decision, this article will begin with a brief discussion of basic FCRA procedure. It will then discuss the facts of the case. The discussion will then shift to the Supreme Court's decision and conclude with a brief discussion of the likely impact of *Woodham*.

See "Dismissal of Claims" page 18

Military Reserve Personnel: The Rights of Employees and Employers During Active Duty Deployments

by Robert L. Martin, J.D.

In the year 2000, the United States military had approximately 875,929 part-time reserve members.¹ During the Persian Gulf War, more than 250,000 part-time military personnel were called to active duty.² Following the September 11, 2001, attacks, active duty deployments became more frequent for the part-time military. The military buildup in the Persian Gulf region that began in December of 2002 brought a rapid and dramatic increase in reserve mobilizations and by February 2003, more than

151,348 reservists had been called to active duty.³

Prior to the war on terrorism, reservists were frequently mobilized due to service downsizing and the heavy reliance on the reserves in the total military structure. For example, the Army Reserve and National Guard make up about 55 percent of the Army's combat units.⁴ Because of the current military structure and world events, it is likely that active duty deployments of reserve personnel will continue to increase in

see "Military" page 19

Seminar:

ADVANCED LABOR TOPICS

May 9-10, 2003
Casa Monica Hotel
St. Augustine

See pages 26-27.

Chair's Report

by Courtney B. Wilson



As I assume the leadership of our Section from my good friend and predecessor, Stuart Rosenfeldt, I am daunted and humbled by the task of "serving" nearly three-thousand members.

What makes this all the more challenging is the fact that in a number of years of active involvement in Section seminars, activities and finally leadership, I have only had the opportunity to become acquainted with a small fraction of our growing Section membership. As a result, my goal as Section Chair is to continue or renew outreach efforts to new and diverse Section members and to identify and implement new ways of involving our growing membership in the Section. I need your help in making the Section more visible and relevant to more of its members and also in making more members relevant to the functioning of the Section.

This is all mission-statement fodder without an example. My own experience is my best guide. When I began my involvement in the Section leadership it was through the invitation and encouragement of the then Section Chair, Terry Connor. At that time, each Executive Council meet-

ing was followed with a Long Range Planning Committee dinner. The dinners were fairly informal, "dutch treat" affairs, usually with an invited guest such as a local judge, professor, or government official. Most importantly, the dinners were not limited to the "usual suspects" of longstanding involvement but included newer members, such as yours truly. This was a particularly meaningful for this developing employment lawyer as I was the only lawyer at my firm whose practice was focused on labor & employment litigation and thus, I benefitted all the more from the shared experiences of my fellow Section members. After attending the first of these dinners I made it a point to locate and attend each successive dinner.

Although the Long Range Planning dinners were eventually discontinued, I am thrilled to report that they are being revived during my term. At the September meeting, the Executive Council voted to renew the dinners in much the same format. These dinners are open to all Section members and are particularly convenient opportunities to meet and get involved with the current Section leadership in conjunction with our concurrent CLE seminars and Executive Council meetings around the state. We had our inaugural Long Range Planning dinner in conjunction with the Public Employment

Labor Relations Forum in Orlando, October 24-25, 2002, with Dean Percy Luney Jr., of our new Florida A & M law school, our honored guest. If you are interested in attending and/or helping to plan a subsequent dinner, check-out our website or call/e-mail me!

Speaking of law schools, back to my story. The first project I undertook with the Section was arranging an "Inns of Court" style dinner/discussion at the University of Miami with the assistance of Professor Michael Fischl. Truthfully, I don't even remember who came up with the idea. But what followed for the next couple of years was a truly great opportunity to invite experienced and well known L & E lawyers, newer lawyers in the field, and interested law students to join for socializing, networking and spirited discussion of our chosen L & E topic. These dinners ultimately earned the catchy moniker "issue focus dinners," which may or may not have led to their eventual demise. (Bob Turk suggested calling them "Inns of Courtney" but my ego had not yet reached its current proportions [see the website], so I scuttled the idea.)

The point is, any Section member could come up with an equally good project or simply assume the mantle and renew this enjoyable collaboration with any one (or more!) of our State's fine law schools, each no doubt brimming with eager future L & E lawyers. Though the dinners were largely self-supporting, with the law school usually more than eager to provide a venue and other support, the Section is ready, willing and able to support such projects financially and to lend any expertise and experience the current leadership may have. In fact, I still have copies of the topic outlines and invitations from past programs just waiting to be dusted off and serve as templates for a renewed and improved program anywhere in the state.

But merely scheduling events hypothetically open to the Section membership is not enough. We must get the word out and be accessible.



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

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Statements or expressions of opinion or comments appearing herein are those of the editor and contributors and not of The Florida Bar or the Section.

Obviously, our vastly improved Section newsletter, The Checkoff, is one method. But as much as The Checkoff has improved in form and substance over the past several years, the Section's future is in its website. [laboremploymentlaw.org] And, at least for this year, the website must be more than just a "pretty face." [Check out the site or you won't get these attempts at humor.] Accordingly, at our June annual meeting the Executive Council approved a contract and funding to develop a first-class website. Along with Walter Aye's tireless efforts, I have been working with our Website Subcommittee and the designers to get the Section's website up and running within the first half of my term. We have now been able to provide a professional looking "starter" site containing the Section's calendar of CLE and other events/activities, contact information for Executive Council, committees, and members at-large, and of course our meeting minutes, by-laws and budget information. In addition, we have begun to provide links to other resources for L & E practitioners, including legal research sources and sites maintained by relevant agencies. Eventually, we would like to create some bulletin board/e-discussion group capabilities to permit easier access to other Section members, our greatest resource.

Improved technology and acceptance of it, has also manifested it-

self in a small step to facilitate involvement in Section leadership. At our September meeting we agreed to permit telephonic appearance at Executive Council meetings. While this had been attempted some years ago without much success, advances in technology and the fact that teleconferencing has become routine in our practices and our committee meetings, convinces me that the time for increased reliance on telephonic participation has truly come. Of course we will remain vigilant against the notion that "phoning it in" is always sufficient. It is not. But it is worth taking some risk if we are to truly open the Section to more of

its members. Hopefully, continued use and development of technology can eliminate some of the geographic and economic barriers to involvement in the Section.

As I began, my goal is to encourage and facilitate more and diverse Section members to become involved in the Section, its activities and its stewardship. To do this I need your help, your initiative and your ideas. All I can promise you is that I will try to be available and I will be grateful for your efforts to help me accomplish my goals. The best way to reach me is via e-mail at cbwilson@shb.com. I look forward to hearing from you.

WANTED: ARTICLES

The Section needs articles for the *Checkoff* and the *Bar Journal*. If you are interested in submitting an article, contact either Michael Spellman (850/891-8554) or (SpellmaM@talgov.com) or Stuart Rosenfeldt (954/522-3456) or (srosenfeldt@rrdplaw.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 10, 2003.

Advanced Labor Topics Seminar May 9 and 10

The Advanced Labor Topics will be held on May 9-10 in St. Augustine at the Casa Monica Hotel. The program, *The Dysfunctional Workplace: Rising Problems With Violence and Aberrant Behavior in Employment*, will focus on all aspects of dangerous employees in the workplace, including the root causes, how to spot them, what to do about them, and how to get them out of the workplace with as little risk as possible.

As in past years, the program will include updates in the substantive areas of labor and employment law, together with national speakers on the topics of the main theme. The program's featured speaker is **John Douglas**, formerly of the FBI and one of the pioneers of criminal profiling and the FBI's famed Behavioral Sciences Unit in Quantico, Virginia. Mr. Douglas was the model for the character of Jack Crawford in *The Silence of the Lambs*.

In addition to Mr. Douglas, the program will include nationally renowned experts **Ken Kleinman** (OSHA), **Craig Cornish** (employee privacy and references), **David Fram** (ADA), and **Julie Goldscheid** (legal implications of workplace violations and gender-specific violence).

Supreme Court Addresses Timeliness of Filing of Title VII Charges

by Donald J. Spero

I. When Must A Charge Be Filed With The EEOC?

The current version of Title VII of the 1964 Civil Rights Act¹ requires an aggrieved individual, or someone on the individual's behalf, to file an administrative charge with the EEOC within 180 days of an alleged unlawful employment practice. In a location where there is a state or local agency that has "...authority to grant or seek relief from such practice or institute criminal proceedings with respect thereto such charge shall be filed within three hundred days after the alleged unfair employment practice occurred..."² While these time limits are greater than they were when Title VII was originally enacted the question of whether a claim has been timely filed is one that the courts continue to have occasions to consider.

An early Supreme Court decision on the requirement for a timely charge be filed is *United Airlines, Inc. v. Evans*.³ Due to a rule prohibiting married women from working as flight attendants the plaintiff was forced to resign from her flight attendant position when she married in 1968. This rule did not apply to males. Miss Evans did not file a charge with the EEOC at that time. She resumed working as a flight attendant in 1972 at which time Ms. Evans was not given credit for her prior service. In her suit, based on a charge filed after her return to work, Ms. Evans claimed discriminatory denial of seniority. She contended that the airline's action gave present effect to a past discriminatory act. In denying Ms. Evans claim the Court held that:

...United was entitled to treat that past act as lawful after respondent failed to file a charge of discrimination within the 90 days then allowed by 706(d). A discriminatory act which is not made the basis for a timely charge is the legal equivalent of a discriminatory act which occurred before the statute was passed. It may constitute relevant background evidence in a proceeding in which the status of a current practice is at issue, but separately considered, it is merely an unfortunate event in history which has no present legal consequences.⁴

The Supreme Court has consistently rejected claims based on the continuing effects of single acts of discrimination which have not been the subject of a timely filed administrative charge. In *Delaware State College v. Ricks*⁵, the court declined to consider the claim of a college professor who was denied tenure. He filed his charge more than the applicable time limit of 180 days after he was notified of the denial of tenure. Consistent with college policy Mr. Ricks was permitted to work for one year after the year in which he was notified of the tenure decision. The Court held that the time for filing the charge began to run when he was informed that tenure was denied, not when his employment ended. The Court commented that "...the only alleged discrimination occurred – and the filing limitations periods therefore commenced – at the time the tenure decision was made. That is so even though one of the effects of the denial of tenure – the eventual loss of a teaching position – did not occur until later."⁶ (internal footnote omitted).

The Court reasoned similarly in *Lorance v. AT & T Technologies, Inc.*⁷, where a company's seniority system was changed to provide that an employee moving to a position as a "tester" lost her plant wide seniority for competitive purposes until she was on the new job for five years. In the interim the individual's seniority within the department was counted

from the date of the new assignment. The plaintiffs, long service employees, bid into the more skilled, higher paying tester position after the change. In a subsequent reduction in force they were laid off due to their low seniority in the new position. They claimed that the change in the seniority system was adopted to discriminate against women who moved into the more remunerative job which was traditionally held by males. Their administrative charges, which were filed when they were laid off some three years after the change in the seniority system, were found to be untimely. The Court held that the charges should have been filed within the filing period subsequent to the change in the seniority system. Following its reasoning in *United Air Lines v. Evans* and *Delaware State College v. Ricks*, the Court declined to treat the maintenance of the seniority system as a continuing violation.⁸ The Court held that the time limitation for filing a charge runs from the time an intentionally discriminatory seniority system is adopted rather than when its effects are felt.⁹

The Supreme Court did, however, find a continuing violation in *Bazemore v. Friday*¹⁰, which involved historic discriminatory discrepancies in the pay of black and white state Agricultural Extension Service workers. The disparities predated the 1972 amendments that brought these state workers within the coverage of Title VII. Determining that the plaintiffs were not time barred from asserting the right to comparable pay the Court stated that "Each week's paycheck that delivers less to a black man than to a similarly situated white is a wrong actionable under Title VII, regardless that this pattern was begun prior to the effective date of Title VII."¹¹

In *Beavers v. American Cast Iron Pipe Co.*¹², the Eleventh Circuit followed *Bazemore*. The plaintiffs in *Beavers* challenged their employer's health insurance plan which denied dental and medical coverage to em-

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ployees' children if the children were not living with the parent/employee. They claimed that the plan disparately impacted male employees in violation of Title VII as wives are more likely to have custody of children after a divorce. Referring to *Delaware State College v. Ricks* and *Bazemore v. Friday*, the panel observed that "...the Supreme Court recognizes the distinction this court has drawn between the present effects of a one time violation – as in *Ricks* – and the continuation of the violation into the present – as in *Bazemore*."¹³

The *Beavers* court rejected the employer's contention that the action was untimely as no administrative charge had been filed with the EEOC within 180 days of the institution of the health plan. It found a continuing violation in that "...each week in which divorced men are denied insurance coverage for their nonresident children while similarly situated divorced women, who apparently are far more likely to have custody of their children, receive such coverage constitutes a wrong arguably actionable under Title VII."¹⁴ Notably the court ruled that Mr. Beavers' EEOC charge "...was timely as to any application of [the employer's] allegedly discriminatory insurance benefits policy within the preceding 180 days."¹⁵ The ruling did not revive claims for anything occurring more than 180 days before the filing of the charge.

II. Enforcement Of Claims Based On Charges Filed Beyond The Filing Period

A. Equitable Estoppel

Various doctrines have been advanced to allow a judicial action to proceed in the face of a charge that has been filed more than the applicable number of days after some or all of the allegedly discriminatory conduct that is the subject of the action. In *Zipes v. Transworld Airlines*¹⁶, the Supreme Court allowed a case based on an untimely charge to proceed in a decision that laid the foundation for equitable considerations to be taken into account. The Court ruled for the plaintiff because the employer did not properly raise the defense of untimeliness. The Court held that the failure to file a

charge was not a jurisdictional defect that barred an action from proceeding and that could be raised at any time. The Court ruled that "...filing a timely charge of discrimination with the EEOC is not a jurisdictional prerequisite to filing a suit in federal court, but a requirement that, like a statute of limitations, is subject to waiver estoppel and equitable tolling." (footnote in the original omitted).¹⁷

Even before *Zipes* the Fifth Circuit held in *Reeb v. Economic Opportunity Atlanta, Inc.*¹⁸, that the time limit for filing an EEOC charge was analogous to a statute of limitations that is susceptible of being waived rather than a jurisdictional prerequisite to a suit. In that case the plaintiff was told that her position was abolished due to a lack of funding. Several months later Ms. Reeb learned that a male had been hired for the position shortly after her dismissal. She promptly filed a charge with the EEOC. The court held that "Equitable modifications, such as tolling and estoppel that are applied to [statutes of limitations] should also be applied..." to the present case.¹⁹ The court ruled that the filing period does not begin to run "...until the facts that would support a charge of discrimination under Title VII [are] apparent or should have been appar-

ent to a person with reasonably prudent regard for his rights similarly situated to the plaintiff."²⁰

The Eleventh Circuit found the doctrine of "equitable tolling" inapplicable to an untimely EEOC charge in *Ross v. Buckeye Cellulose Corporation*.²¹ The plaintiffs challenged a pay evaluation system (the "P & P System") as allegedly having a negative disparate impact on black employees. The plaintiffs filed their EEOC charges more than the applicable 180 days after all employees' wages were frozen and the P & P System was no longer in effect. The court declined to apply equitable tolling, finding that the plaintiffs failed to meet their burden of proof that there was an equitable basis to waive the limitation. The court pointed out that "The trial transcript is devoid of evidence that appellants actually were – or that similarly-situated people with a reasonably prudent regard for their rights would be – unaware that they were victims of unlawful discrimination in the period more than 180 days prior to filing their complaints with the EEOC."²² The Eleventh Circuit reasoned similarly in *Carter v. West Publishing Co.*²³, where the plaintiffs challenged the employers practice of favoring male employees over female

See "Title VII Charges," page 22



Supreme Court to Review Disability Case

The U.S. Supreme Court will consider whether companies that refuse to rehire rehabilitated drug addicts can be sued under the Americans with Disabilities Act. *Raytheon Co. v. Hernandez*, will test company employee policies that make lifetime bans against people who break rules, like using drugs, then want a second chance at a job after receiving addiction treatment.

Joel Hernandez lost his job as a technician working on missile systems after he tested positive for cocaine. When he tried to get rehired at Hughes Missile Systems, now part of Raytheon Co., he was rejected because the company does not hire back employees terminated for breaking misconduct rules.

A divided panel of the 9th Circuit ruled that the company's policy violated the ADA because the policy hurts people who have been successfully rehabilitated and are protected by the ADA.

Corporate Misdeeds and Their Impact Upon Enforceability of Executive Employment Agreement Indemnification Provisions

by Jay P. Lechner

"An infectious greed" has caused the recent breakdown of "corporate governance checks and balances," according to Federal Reserve Chairman Alan Greenspan.¹ This greed, Greenspan suggests, stems in part from employment agreement provisions that have "perversely created incentives to artificially inflate reported earnings in order to keep stock prices high and rising."

Although Greenspan was specifically referring to stock option provisions, another common controversial feature of many executive employment agreements is the "indemnification" provision.² Indemnification is the practice by which corporations pay expenses of officers or directors who are named as defendants in litigation relating to corporate affairs.³ For example, L. Dennis Kozlowski's Executive Employment Agreement with Tyco International Ltd. contained a standard indemnification provision, providing:

To the fullest extent permitted by law, the Company shall indemnify Executive (including the advancement of expenses) for any judgments, fines, amounts paid in settlement and reasonable expenses, including attorneys' fees, incurred by Executive in connection with the defense of any lawsuit or other claim to which he is made a party by reason of being an officer, director employee or consultant of the Company or any of its subsidiaries or affiliates.⁴

Dick Cheney's employment contract with Halliburton Company contained an even more extensive indemnification agreement.⁵

In light of the recent and much-publicized failings of corporate boards and top executives of the country's largest companies, it is unclear to what extent Florida courts will enforce indemnification provisions. Particularly uncertain is whether courts will uphold employment agreement clauses that pur-

port to indemnify executives for punitive damages based on the executive's own wrongdoing. Florida statutes are ambiguous on this point and Florida courts have yet to address the issue.

I. Common Law Fiduciary Duties

Corporate executives have historically been bound by certain fiduciary duties.⁶ According to 3 Fletcher Cyclopaedia of the Law of Private Corporations, "a director . . . must be loyal to his trust, use ordinary and reasonable care, must not exceed the powers of the corporation nor his powers as an officer, and must otherwise act in good faith, and is liable for fraud or misappropriation or conversion of corporate assets, and generally is liable for negligence. . . ."⁷ For instance, the landmark decision *Smith v. Van Gorkum*⁸ emphasized that directors' objective fiduciary duties include those of loyalty, care and candor and imposed liability on directors who acted in grossly negligent manner in approving a sale of a corporation and established procedures to allow boards to properly evaluate management proposals.

II. Indemnification Statutes

In response to *Van Gorkum*, many states, including Florida, adopted statutes designed to limit director and officer liability.⁹ Among those reforms, indemnification provisions have become one popular method whereby states have limited traditional core fiduciary duties of corporate law.¹⁰ Florida Statute §607.0850, for instance, provides corporations with certain powers and certain duties regarding indemnification of officers, directors, employees, and agents. The statute makes indemnification mandatory in certain circumstances, such as when the director or officer has been successful on the merits in defense of a claim. The

statute also identifies certain circumstances in which corporations may, but are not required to, indemnify directors and officers, such as in any proceeding where the executive acted in good faith and in a manner reasonably believed to be in the best interests of the corporation.

In addition, Florida's indemnification statute prohibits a corporation from providing indemnification if a judgment or other final adjudication establishes that the director's or officer's actions, or omissions to act, were material to the cause of action so adjudicated, and constituted one of the following:

- (a) A violation of the criminal law, unless the director, officer, employee, or agent had reasonable cause to believe his or her conduct was lawful or had no reasonable cause to believe his or her conduct was unlawful;
- (b) A transaction from which the director, officer, employee, or agent derived an improper personal benefit;
- (c) In the case of a director, a violation of statutory provisions concerning the declaration of a dividend or other distribution or the purchase of the corporation's own shares; or
- (d) Willful misconduct or a conscious disregard for the best interests of the corporation in a proceeding by or in the right of the corporation to procure a judgment in its favor or in a proceeding by or in the right of a shareholder.¹¹

Significantly, the statute further provides that, other than in these four limited situations, corporations may make any other indemnification or advancement of expenses of its directors and officers under any bylaw, agreement, vote of shareholders or disinterested directors, or otherwise.¹² Prior to this statute's enactment, Florida common law generally pro-

hibited agreements to indemnify parties against their own willful wrongful acts, at least where the willful act demonstrated “such callous or willful disregard of the rights of others as to make an indemnity agreement relating to it too shocking to be permitted under enlightened public policy.”¹³

Although indemnifying against punitive damages would likely be prohibited in certain circumstances under this statute, the statute does not expressly prohibit indemnification of punitive damages arising from an officer’s or director’s wrongdoing, particularly in a civil case brought by the government or a third party. Consequently, under the terms of the statute, it would appear that, unless the director’s or officer’s acts specifically fall within one of the four enumerated exceptions, the corporation may indemnify the executive for punitive damages caused by his or her malfeasance.

III. Public Policy

Despite the statutory approbation of indemnification, courts are likely to reject, as violative of public policy, a corporation’s efforts to indemnify a rogue director or officer against punitive damages arising from his or her own wrongful acts. Under general contract law, parties may incorporate into their agreements any provisions unless they are illegal or violative of public policy, however, contracts that violate public policy will not be enforced.¹⁴ Florida’s indemnification provisions express public policy in that they attempt to reconcile two competing public interests: (1) attracting quality corporate leaders by limiting their expense and risks of litigation, and (2) deterring unacceptable behavior by corporate leaders.¹⁵

The policy supporting indemnification is based on the fact that, in many instances, corporate executives could be held personally liable for the tortious acts of the corporation, such as for violations of certain hazardous waste laws, RICO, ERISA, or other statutes, or where the executive is found to have participated in, sanctioned or ratified the tortious acts.¹⁶ Accordingly, officers and directors potentially expose themselves to litigation expenses and liability measured not merely in terms of their own personal fortunes, but rather by

the vastly larger scale of the corporation’s operations.¹⁷ Indemnification assists corporate officers and directors in resisting unjustified lawsuits and encourages corporate service by assuring individuals that the risks incurred by them as a result of their efforts on behalf of the corporation will be met, not through their personal financial resources, but by the corporation.¹⁸ As a consequence, without indemnification, many corporations would likely find it difficult to attract quality executives.

However, recent headlines highlighting the malfeasance of certain corporate leaders underscore the off-setting policy consideration of deterrence and are likely to influence a court’s interpretation of “public policy.” Today, it is commonly believed that many of today’s corporate boards lack independence from management, directors frequently receive large cash payments authorized by corporate officers, and prosecutions or civil judgments against even the worst-performing directors are rare.¹⁹ The WorldCom and Enron breakdowns, for example, have drawn the attention of President Bush, who has declared that “[t]he misdeeds now being uncovered in some quarters of corporate America are threatening the financial well-being of many workers and many investors. At this moment, America’s greatest economic need is higher ethical standards -- standards enforced by strict laws and upheld by responsible business leaders.”²⁰

Consequently, although it is not expressly illegal under Florida statute to indemnify officers, directors, employees, and agents against punitive damages arising from their own wrongful acts, courts in today’s political climate may favor deterrence and hold indemnification against such punitive damages violative of public policy.

IV. Case Law

Although there are no reported Florida cases precisely on point, Florida courts wishing to limit indemnification of corporate executives can find support in the case law of other states.²¹ For instance, in *Biondi v. Beekman Hill House Apt. Corp.*, a New York court interpreting New York law based on the Model Business Corporation Act held that “indemnification [of a corporate of-

ficer by the corporation] for punitive damages is prohibited by public policy.” In that case, a president of the board of directors of an apartment corporation was found liable, including for punitive damages, to a shareholder and prospective tenants for discriminatory leasing practices. After judgment was entered against him, the president sought indemnification by the corporation.

The *Biondi* court reasoned that “indemnification defeats the purpose of punitive damages, which is to punish and deter others from acting similarly.”²² The court noted that although the nonexclusivity language in the New York corporate indemnification statute “broaden[ed] the scope of indemnification, its ‘bad faith’ standard manifest[ed] a public policy limitation on indemnification.”²³ The “bad faith” standard derived from language in New York’s statute that prohibited indemnification of directors or officers if a judgment “establishes that his acts were committed in bad faith or were the result of active and deliberate dishonesty. . . .” Similarly, the Second Circuit has recognized public policy restrictions on indemnification of punitive damages under Delaware’s analogous nonexclusivity and bad faith provisions.²⁴ Notably, Florida’s indemnification statute does not contain a “bad faith” provision such as those found in the indemnification statutes of New York and Delaware.²⁵ Yet, the statute as a whole could be read as proscribing indemnification for an executive’s bad faith or deliberately dishonest acts, however the statutory language is ambiguous on this point.

The *Biondi* court also stressed the principle that because insurability of punitive damages was against public policy in New York, so was indemnification.²⁶ In Florida, it is likewise generally against public policy to insure against punitive damages arising out of one’s own conduct.²⁷ This is so because the primary purposes of punitive damages are not to compensate a plaintiff for his or her injury, since compensatory damages already have made the plaintiff whole, but rather punishment and deterrence. Therefore, to be effective, punitive damages must rest ultimately on the party actually responsible for the wrong - if a party against whom punitive damages were as-

See “Corporate Misdeeds,” page 24

The Arbitrability of Employment Disputes: When Process Matters

by Leslie W. Langbein, Esq.

Once reserved for key executives, arbitration has quickly become *the* method corporations use to resolve *all* their personnel disputes. The trend began as companies turned to arbitration as more private, expeditious (and hopefully less costly) means to avoid runaway jury verdicts. Arbitration promised a highly trained cadre of neutrals who would determine disputes on the law rather than raw emotion. Best yet, companies could craft their own process and require employees to use it.

This halcyon vision, however, soon became a corporate nightmare. What began as a method to contain employment litigation only spawned more lawsuits. Employees flocked to court to challenge the legality and fairness of mandatory arbitration programs that waived their jury rights. The legal detritus left by successful challenges to these programs now guide practitioners who may represent parties in mandatory arbitration. This outline explores the necessary elements of a viable, workable arbitration process.

Who Can be Bound to Arbitrate?

Mandatory arbitration is a creature of contract law, i.e., to be binding, there must be an offer for, and acceptance of, arbitration and ad-

equate consideration to support the waiver of judicial remedies. The promises must be mutual; both parties must be bound to arbitrate under the same terms and conditions. See, *Smith v. Chrysler Financial Corp.*, 101 F. Supp 2d 534 (E.D. Mich. 2000) [arbitration provision deemed unenforceable since employer reserved the unilateral right to change arbitration terms] and *Heurtebise v. Reliable Business Computers, Inc.*, 452 Mich. 405; 550 N.W.2d 243 (1996).

Prospective and current employees can be bound to arbitration. The "agreement" to arbitrate may be set out in either the employment application, a separate written agreement, or in an employee handbook. For example, in *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 111 S. Ct 1647, 114 L. Ed. 2d 26 (1991), the agreement to arbitrate was contained in a Form U-4, a broker's registration application which is a separate document from an application for employment. In *Circuit City, Inc. v. Adams*, 531 U.S. ____, 121 S. Ct. 1302, 149 L. Ed. 2d. 234 (2001), the employment application included language which signified agreement to submit "any and all previously unasserted claims, disputes or controversies arising out of or relating to [his] application or candidacy for

employment, employment and/or cessation of employment with Circuit City, exclusively by final and binding arbitration before a neutral arbitrator." And in *Blair v. Scott Specialty Gases*, 283 F.3d 595, (3rd Cir. 2002), the plaintiff, a current employee, signed a receipt for a revised employee handbook that referenced the newly created mandatory arbitration program. Thus, employees' waiver of judicial remedies have been deemed supported by acceptance, or continuation, of employment.

Even if an employee handbook disclaims the existence of a "contract" for employment, its arbitration provisions may be independently enforced where supported by the company's mutual agreement to arbitrate. *Patterson v. Tenet Healthcare, Inc.*, 113 F.3d 832, (8th Cir. 1997) [arbitration provision a separate and distinct contract]; *Johnson v. Travelers Prop. Cas.*, 56 F. Supp. 2d 1025; 1999 U.S. Dist. LEXIS 10576 (N.D. Ill. 1999). But see, *Diaz v. Arapahoe (Burt) Ford, Inc.*, 68 F. Supp. 2d 1193 (D. Colo. 1999). [disclaimer in handbook also negated agreement to arbitrate].

Despite clear judicial precedent favoring arbitration, employees have challenged most every aspect of the programs to avoid enforcement of pre-dispute arbitration agreements.



Section Bulletin Board

Seminars

Advanced Labor Topics (5263R)
May 9-10, 2003
Casa Monica Hotel, St. Augustine, FL

Executive Council Meetings

Friday, May 9, 2003
5:15 p.m. - 6:15 p.m.
Casa Monica Hotel, St. Augustine, FL

Thursday, June 26, 2003
3:00 p.m. - 6:00 p.m.
Orlando World Center Marriott, Orlando, FL

While some challenges are grounded in contract law, others dispute lack of fairness in the process.

Challenges based on Contract Law

Basic contract law holds that before an agreement will be deemed enforceable, there is a meeting of the minds. The same holds true for mandatory arbitration agreements. Before employees can be bound to submit employment claims to arbitration, they must understand all aspects of the program and the legal rights that are being waived, i.e. they must “knowing and voluntarily” waive their rights. The employee must have an opportunity to review the program provisions prior to signing and must show actual consent. To determine whether an arbitration agreement is valid, courts look to the state law that governs contract formation. *Gibson v. Neighborhood Health Clinics, Inc.*, 121 F.3d 1126, 1130 (7th Cir. 1997)

In *Bailey v. Fed. Nat’l Mortgage Ass’n*, 209 F.3d 740 (D.C. Cir. 2000), the employee defeated a motion to compel arbitration on the basis that he had not agreed to the pre-dispute mandatory arbitration program instituted by his employer. In *Bailey*, the employer introduced the dispute resolution program while the employee was already employed. The employee would not sign a form acknowledging he agreed to the program. While he was not fired for doing so, when a dispute later arose the employer took the position that the employee’s continued work after the program was introduced indicated his implicit assent to be bound by it.

On review, the court noted “the legal battle here is over the existence of a contract, not its meaning. In fact, both sides seem to agree that if the Dispute Resolution Policy constitutes an enforceable agreement, there is no disagreement over the meaning of the arbitration policy.” However, it also noted:

“ It is undisputed that Mr. Bailey never executed any written agreement with Fannie Mae to arbitrate statutory claims of employment discrimination. Indeed, it is uncontested that the parties never purported to reach an understanding by oral agreement. It is also un-

questioned that Mr. Bailey never said or wrote anything after Fannie Mae issued its new arbitration policy, either to rescind what he had said in his written complaint or to otherwise indicate that he subscribed to the Dispute Resolution Policy. In fact, after the new policy was issued, Mr. Bailey’s counsel wrote to officials at Fannie Mae to make it clear that Mr. Bailey was not bound to pursue his claims in arbitration.”

Given the substantial evidence of record showing Bailey’s lack of consent, the Court refused to compel arbitration.

Challenges based on the employer’s failure or refusal to inform employees about the terms of a mandatory arbitration program have also proven successful. As an example, in *Rosenberg v. Merrill Lynch, Pierce, Fenner & Smith Inc.*, 170 F.3d 1, (1st Cir. 1999), the Court invalidated an arbitration agreement when it determined the employer was required to provide the plaintiff with the New York Stock Exchange Rules concerning arbitration and failed to do so. See also, *Kummetz, v. Tech Mold, Inc.*, 152 F.3d 1153 (9th Cir. 1998) [acknowledgment for handbook did not reference an arbitration provision and therefore did not inform employee of the waiver of rights] ; *Renteria v. Prudential Ins. Co. of America*, 113 F.3d 1104, 1105-06 (9th Cir. 1997). Similar results were obtained in *Walker v. Air Liquide America Corporation*, 113 F. Supp. 2d 983; 2000 U.S. Dist. LEXIS 13982 (M.D. La. 2000) and *Phox v. Allied Capital Advisers, Inc.*, 1997 U.S. Dist. LEXIS 5709; 74 Fair Empl. Prac. Cas. (BNA) (D.C. Cir. 1997).

On the other hand, courts have upheld mandatory arbitration provisions when the employee has been placed on notice that the handbook contains a waiver and agreement but the employee failed to actually read it. In *Medina v. Hispanic Broadcasting Corp.*, 2002 U.S. Dist. LEXIS 4059; 88 Fair Empl. Prac. Cas. (BNA) 654 (ND Ill. 3/12/02), the employee argued that she was denied the opportunity to read a form before she signed it and had been told the document’s purpose was simply to show that she had received an employee handbook. She also claimed

she would not have signed the acknowledgment if she had been informed that by doing so she gave up her right to a judicial forum. The Court found these arguments, “ unpersuasive.... It is a basic principle of contract law that an individual’s failure to read a document before signing it does not render the document invalid” citing, *Heller Fin., Inc. v. Midwhey Powder Co.*, 883 F.2d 1286, 1292 (7th Cir. 1989). It also held that even if the employee relied on a misrepresentation, it was unreasonable as a matter of law where the fraud could have been discovered by simply reading the document. ¹ (But see, *Owen, v. Mbppl Corporation*, 173 F. Supp. 2d 905 (ND Iowa 2001)).

Certainly, one factor considered by courts on the issue of a “knowing and voluntary waiver” is the prominence of the actual waiver language. In *Bradford v. Kentucky Fried Chicken, Inc.*, 5 F. Supp. 2d 1311 (MD Ala 1998), the court noted that the waiver language was “set off in a box; has a broad black border at the top; and is labeled in all capitals, in reverse color, large type “AGREEMENT.” Within the agreement section, there is a subsection, labeled in centered, all capitals letters” ARBITRATION OF EMPLOYEE RIGHTS.”

Courts have refused to enforce mandatory arbitration provisions that have been introduced into the employment relationship by stealth. (“The court might think differently if the only arbitration clause was buried somewhere in the handbook, and the employee had only signed a general receipt acknowledging that she was given the handbook.”) See, e.g., *Ex parte Beasley*, 712 So. 2d 338, 1998 Ala. LEXIS 95, 1998 WL 122731 (Ala. 1998) [refusing to enforce arbitration clause included in employee handbook where employee only signed a general receipt for the handbook, and had not signed “a document that contains a valid arbitration clause.”)].

Once an employer demonstrates the existence of a pre-dispute arbitration agreement, the burden shifts to the employee to demonstrate lack of mutuality, adhesions or some other reason for its unenforceability. *Haskins v. Prudential Insurance Co. of America*, 230 F. 3d 231 (6th Cir. 2000), cert. den. 121 S. Ct. 859 (2001).

continued. . .

WHEN PROCESS MATTERS

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This burden will become increasingly difficult as current employers learn from the past mistakes of others.

Challenges based on Process

It is now well settled that agreements requiring arbitration of statutory claims, including discrimination claims brought pursuant to Title VII, are enforceable under the FAA. See *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 111 S. Ct. 1647, 114 L. Ed. 2d 26 (1991); *Koveleskie v. SBC Capital Markets, Inc.*, 167 F.3d 361, 362 (7th Cir. 1999); *Paladino v. Avnet Comp. Tech., Inc.*, 134 F.3d 1054, 1062 (11th Cir. 1998) (“Federal statutory claims are generally arbitrable because arbitration, like litigation, can serve a remedial and deterrent function, and federal law favors arbitration”); see also *Bender v. A.G. Edwards & Sons, Inc.*, 971 F.2d 698 (11th Cir. 1992).² Therefore, a properly crafted and implemented mandatory arbitration program will generally be upheld and be deemed the forum for “any and all” disputes arising out of the employment relationship, including civil rights or other rights created by statute.³

Courts have sanctioned arbitration of statutory claims on the premise that arbitration simply constitutes a change of forum for the dispute and not a waiver of remedies. *Bender v. A.G. Edwards & Son, Inc.*, *supra*. Accordingly, courts have steadfastly overseen arbitration processes accorded by employers. In general, the courts have upheld the validity of mandatory arbitration programs that: 1) maintain a corp of independent arbitrators, see *Floss v. Ryan's Steak Houses, Inc.* 211 F. 3d 306 (6th Cir. 2000), cert. den., 121 S. Ct. 763 (2001) [arbitrators not truly independent]; 2) allow some discovery of pertinent documents and depositions of important witnesses; 3) do not require bar access to the forum for employees based on the fees and costs of arbitration, *Randolph v. Green Tree Financial Corp.*, 178 F.3d 1149 (11th Cir. 1999), *aff'd in part, rev'd in part*, *Green Tree Financial Corp.-Alabama v. Randolph*, 531 U.S. 79, 121 S. Ct. 1589, 149 L. Ed. 2d 373

(2000); 4) permit the employee to be represented; and 5) allow the arbitrator to award all remedies allowed by law, *Cole v. Burns Int'l Sec. Servs.*, 105 F.3d 1465, 1482-85 (D.C. Cir. 1997). For a case discussing an poorly crafted program see, *Hooters of America v. Phillips*, 173 F. 3d 933 (4th Cir. 1999) [arbitration process a sham].⁴

Cole supra, was among the first cases to address issues of process. The opinion in *Cole*, harkened the reasons why the U.S. Supreme Court in *Alexander v. Gardner-Denver*, 415 U.S. 36 (1974) held that individual statutory claims were ill-suited for the labor arbitration process. Among the expressed concerns were “... the records of arbitration proceedings are incomplete, discovery is abbreviated, cross-examination and testimony under oath may be limited or unavailable, and arbitrators need not give the reasons for an award...” And, the primary focus of a labor arbitration is the industrial relationship and contract compliance, not an individual's statutory rights.

The *Cole* court also noted similar concerns by the EEOC about potential abuses of process in mandatory arbitration. In *Gilmer*, the EEOC argued that arbitration (1) is not governed by the statutory requirements and standards of Title VII; (2) is conducted by arbitrators given no training and possessing no expertise in employment law⁵; (3) routinely does not permit plaintiffs to receive punitive damages and attorneys' fees to which they would otherwise be entitled under the statute [see the later case of *Gannon v. Circuit City Stores, Inc.* 2001 WL 930550 (8th Cir. 2001); and (4) forces them to pay exorbitant “forum fees” in the tens of thousands of dollars, greatly discouraging aggrieved employees from seeking relief.

The court then reviewed Burns International's mandatory arbitration program against this background and found it to an adequate alternative forum. The program provided mutually selected neutral arbitrators from AAA's panels, allowed for discovery, required a written and reasoned award, and made no attempt to limit the full panoply of Title VII remedies which an arbitrator could award. It also did not require employees to pay exorbitant

fees or expenses to access the arbitral forum.⁶ The court concluded that an employee who had to use arbitration as a condition of employment “effectively may vindicate [his or her] statutory cause of action in the arbitral forum.”

The court, nonetheless in dicta, addressed the issue of forum fees and expenses. It noted that no plaintiff is ever required to pay for a judicial forum or services and therefore, opined that no employer could require an employee, forced into arbitration, to bear all or a portion of the arbitral fees. This portion of the *Cole* opinion has been repeatedly cited in subsequent holdings on the issue. See, *Shankle v. B-G Maintenance Mgmt. of Colorado, Inc.*, 163 F. 3d 1230 (10th Cir. 1999) [agreement that requires an employee to pay a portion of arbitrator's fees constitutes barrier to forum access]; *Perez v. Globe Airport Security Services, Inc.*, 263 F. 3d 1280 (11th Cir. 2001), [prevailing party attorney's fees, expert fees and costs invalidates agreement] *opinion vacated March 22, 2002*; *Paladino v. Avnet Computer Technologies, Inc.*, 134 F.3d 1054, 1062 (11th Cir. 1998) *Brooks v. Traveler's Insurance Co.*, *supra*.

But, other courts, most notably the U.S. Supreme Court in *Green Tree*, have rejected use of a *per se* rule. The appropriate inquiry is whether fee splitting prevents the claimant from effectively vindicating his/her statutory rights, not whether fee splitting can, in the abstract, deter some claimants from vindicating their rights regardless of the individual circumstances of each case. *Bradford v. Rockwell Semiconductor Systems, Inc.*, 238 F.3d 549 (4th Cir. 2001); *Williams v. Cigna Financial Advisors, Inc.*, 197 F.3d 752, 763-64 (5th Cir. 1999); *Rosenberg v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 170 F.3d 1, 15-16 (1st Cir. 1999) *Koveleskie v. SBC Capital Markets, Inc.*, 167 F.3d 361, 366 (7th Cir. 1999) (same), cert. denied, 528 U.S. 811, 145 L. Ed. 2d 40, 120 S. Ct. 44 (Oct. 4, 1999); *Arakawa v. Japan Network Group*, 56 F. Supp. 2d 349, 354-55 (S.D.N.Y. 1999). This is an evidentiary burden. *Green Tree*, *supra*.⁷

When faced with legal deficiencies in an arbitration program, courts have generally used the traditional contract remedies of reformation or

rescission. See *Gannon, supra*, and *Paladino, supra*, [contract that limits damages to those for breach of contract deemed to not to apply to discrimination claims]; *Mccaskill v. SCI Illinois Services, Incorporated*, 285 F.3d 623 (7th Cir. 2002) [entire agreement invalidated]. *Graham Oil Co. v. ARCO Products Co.*, 43 F.3d 1244 (9th Cir. 1994).

Parties to mandatory arbitration must understand the conflict arbitrators face when confronted with programs that do not meet legal standards. While arbitrators are bound to apply the parties' agreement as written, they are equally bound to provide the same types of process found in court. In a sense, their obligations to the court and to a fair process supercede the terms of the arbitration agreement. Trained arbitrators are aware of these obligations and consistent with ethical responsibilities, have refused to serve in cases where the mandatory arbitration program is perceived as deficient or one-sided.

Conclusion

Pre-dispute arbitration agreements are enforceable when it can be shown that a prospective or current employee knowingly and voluntarily waived their judicial rights. However, courts remain vigilant about the process to prevent employers from taking unfair advantage of employees. To be viable, mandatory arbitration programs must be no less than simply a difference in forum.

Endnotes:

¹ The Court found equally unpersuasive the plaintiff's argument that the mandatory arbitration provision was an adhesion contract. "[M]ere inequality in bargaining power...is not a sufficient reason to hold that arbitration agreements are never enforceable in the employment context." *Gilmer*, 500 U.S. at 33. For an additional discussion of challenges based on knowing and voluntary waivers, adhesion contracts and fraud in the inducement, see *Ramirez de Arellano v. American Airlines, Inc.*, 133 F.3d 89 (1st Cir. 1997) and *Kelly v. UHC Management Company, Inc.*, 967 F. Supp. 1240 (ND Ala. 1997).

² An exception may exist where a union has attempted to waive the statutory rights of its bargaining unit members through collective bargaining. See discussion, *infra* and *Doyle v. Raley's Inc.*, 158 F.3d 1012 (9th Cir. 1998); *Brisentine v. Stone & Webster Eng'g Corp.*, 117 F.3d 519 (11th Cir. 1997); *Pryner v. Tractor Supply Co.*, 109 F.3d 354 (7th Cir. 1997).

³ However, the breadth of the arbitration

provision may define what disputes must (or can) be taken to arbitration. For example in *Lepera v. ITT Corp.*, 1997 US Lexis 12328 (ED Pa. 1997), an arbitration provision did not bar a suit for battery against corporate officer in his individual capacity.

⁴ The American Bar Association, the American Arbitration Association and noted academic institutions have fashioned standards of fairness to guide corporations in the formation of ADR programs known as the "Due Process Protocols," (also available at AAA's web-site).

⁵ AAA's panel of employment arbitrators consists only of specialists who, despite their knowledge and background in employment law, are required to undergo routine and advanced training.

⁶ The Court noted that the employer had

adopted the AAA's Rules for the Resolution of Employment Disputes which require these safeguards and also give the arbitrator the authority to determine payment of fees and costs.

⁷ *Brown v. Wheat First Securities, Inc.*, 257 F.3d 821; 2001 U.S. App. LEXIS 17074 (DC DC 2001) held that the rationale in *Cole* does not apply to non-statutory claims.

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CASE SUMMARIES

Eleventh Circuit

Reynolds v. Butts
(11th Cir. Nov. 20, 2002)

Non-black employees who were not members of intervening class lacked standing to enforce parties' consent decree, and thus District Court lacked jurisdiction over their motion for contempt.

Kelliher v. Veneman
(11th Cir. Nov. 13, 2002)

On appeal of MSPB determinations on both discrimination and non-discrimination claims, district court should try discrimination claims de novo, but apply the arbitrary and capricious standard to its review of all other claims.

City of Hialeah, Fla. v. Rojas
(11th Cir. Nov. 8, 2002)

Reduced retirement compensation which Hispanic employee received, as result of city's prior policy of allegedly terminating its Hispanic employees every nine months and rehiring them for new nine-month terms, was merely a present consequence of its prior alleged acts of discrimination, that did not serve to extend time for employee to file complaint with the Equal Employment Opportunity Commission.

Jackson v. Birmingham Bd. of Educ.
(11th Cir. Oct. 21, 2002)

Neither Title IX itself nor regulation thereunder implies a private right of action for retaliation in favor of individuals who, although not themselves the victims of gender discrimination, suffer retaliation because they have complained about gender discrimination suffered by others.

Holmes v. West Palm Beach Housing Authority
(11th Cir. Oct. 8, 2002)

Misstatement contained in special verdict jury interrogatory regarding employer's defense to retaliatory termination claim did not support a back-pay/benefits award for gender discrimination in excess of difference in salary and benefits between

employee's position and that of higher position from the time of denial of the promotion to her termination.

Riccard v. Prudential Ins. Co.
(11th Cir. Sept. 24, 2002)

Under provision of National Association of Securities Dealers' (NASD's) Code of Arbitration Procedure making employment disputes between any member firm and associated person subject to arbitration at member's behest, membership status had to be determined at time of events giving rise to dispute.

Shields v. Fort James Corp.
(11th Cir. Sept. 19, 2002)

Claim alleging hostile work environment race discrimination had to be reviewed in its entirety, so long as at least one event comprising it fell within limitations period.

Arriaga v. Florida Pacific Farms, LLC
(11th Cir. Sept. 11, 2002)

In migrant farmworker case, court held that FLSA applied to farmworkers and therefore growers were required to provide weekly workers in "case or other facilities" "free and clear" of improper deductions, at a rate no lower than minimum wage. Further, growers were required to reimburse workers for visa costs, visa application fees, and immigration fees for entry documents up to amount needed to comply with minimum wage laws.

Brochu v. City of Riviera Beach
(11th Cir. Sept. 5, 2002)

Police chief's transfer of officer was mere coincidence and not retaliatory, and officer's role in creation and dissemination of virtually secret plan to overthrow existing police administration and put himself and his friends in charge was not protected public speech.

Williams v. Motorola, Inc.
(11th Cir. August 29, 2002)

ADA plaintiff was not terminated for refusing to undergo medical exam where employer merely offered exam

as alternative to discharge in light of plaintiff's insubordination, inability to work with others, aggressive behavior, and threats of violence.

E.E.O.C. v. Joe's Stone Crabs, Inc.
(11th Cir. July 12, 2002)

Continuing violation doctrine did not extend actionable time period beyond date 300 days before filing of EEOC charge; two applicants had real and present interest in food server position during actionable period but were effectively deterred from applying during actionable period by employer's discriminatory hiring practices.

Lubetsky v. Applied Card Systems, Inc.
(11th Cir. July 12, 2002)

In religious discrimination case, decision-maker who ordered rescission of employment offer did not know that applicant was Orthodox Jew, and applicant thus failed to establish prima facie case.

Matthews v. Columbia County
(11th Cir. July 19, 2002)

County could not be held liable for retaliatory termination under §1983 when some, but less than majority, of county commissioners voted to eliminate public employee's job for unconstitutional reason.

Burleson v. Colbert County-Northwest Alabama
(N.D. Ala. Sept. 25, 2002)

Former county employee's §1983 action in state court against county healthcare authority alleging he was terminated in retaliation for announcing his candidacy for county commission dismissed because employee's interest in seeking office was not protected by the First Amendment.

Walker v. Elmore County Bd. of Educ.
(M.D. Ala. Sept. 24, 2002)

Non-tenured teacher who had not been on payroll for 12 months at time her request for maternity leave was denied was not eligible employee under FMLA, but teacher could nonetheless bring FMLA retaliation

claim against school district.

McDaniel v. Fulton County School Dist.

(N.D.Ga. Sept. 13, 2002)

Female public school employee sufficiently alleged a "continuing violation" such that incidents of sexual harassment by male co-worker constituting a hostile work environment which occurred outside the 180-day limitations period were not time-barred.

Sermons v. Fleetwood Homes of Georgia

(S.D.Ga. Sept. 6, 2002)

In case under Pregnancy Discrimination Act, employee could not establish that she was "qualified" to perform any job for employer, including light-duty work; and employer's policy of only assigning light-duty work to employees suffering from on-the-job injuries was a legitimate, nondiscriminatory reason for terminating employee rather than assigning her to light-duty work.

Johnson v. Rice

(M.D. Fla. Sept. 5, 2002)

Plaintiff could not show that comments and jokes made over six month period were severe and pervasive enough to establish hostile work environment; nor could Plaintiff show that undesirable assignments were adverse employment actions.

Isaac v. School Bd. of Miami-Dade County

(S.D.Fla. Sept. 3, 2002)

Hispanic supervisor's alleged negative behavior and comments towards black social workers, which included incident in which she told Hispanic social worker not to help plan plaintiff's retirement party and to "let the black ones do it," and incident in which supervisor stated that she did not want to sit next to "that black woman," at luncheon, were not so severe or pervasive as to alter terms of plaintiff's employment and create racially discriminatorily abusive environment under Title VII.

Paraohao v. Bankers Club, Inc.

(S.D. Fla. August 28, 2002)

Defendant entitled to Summary Judgment on hostile work environment claim where record evidence revealed plaintiff's willingness in

developing personal, business and sexual relationship with alleged harasser outside workplace.

Wilkerson v. Florida Power & Light Co.

(M.D.Fla. Aug. 27, 2002)

Plaintiff failed to establish that a reasonable jury could return a verdict in his favor on the claim of an ERISA violation due to his failure to submit any evidence to show that FPL's decision to terminate him or cause him to resign was motivated by a desire to reduce its contributions to the pension and benefits plans.

Mauldin v. Wal-Mart Stores, Inc.

(N.D.Ga. Aug. 23, 2002)

In class action alleging violations of Title VII and PDA by employer's policy of denying its employees health insurance coverage for prescription contraceptives, court certified class, but determined that the class should be defined more narrowly such that class would include all female employees of Wal-Mart nationwide who are covered, or who have been covered, by Wal-Mart's health insurance plan at any time after March 8, 2001, and who used prescription contraceptives during the relevant time period; plaintiff's definition of the class was overbroad to the extent it sought to include women who merely "wish to use" prescription contraceptives, without actually having purchased them or using them at any time during the relevant time period.

Allocco v. City of Coral Gables

(S.D.Fla. Aug. 23, 2002)

Public safety officers formerly employed by university failed to demonstrate causal connection between their termination and protected activity of reporting city's alleged misrepresentations in connection with

pursuit of accreditation, as required to maintain claim under Florida public-sector whistleblower statute; officers could not establish that university or city were aware of protected activity, and other signatories to letter reporting alleged misrepresentations were still employed by university.

Sharp v. BellSouth Advertising & Publishing Corp

(N.D.Ga. Aug. 21, 2002)

Former employee failed to prove that employer's proffered reason for firing her, that she engaged in inappropriate touching of other employees after having been previously warned not to do so, was a pretext for unlawful age discrimination; although the employer may not have made an explicit finding that the employee had touched others in an overtly "sexual" manner, that did not lead to an inference that the proffered reason was pretextual, and even if the decision to fire her was unfair or unwarranted, she could not establish that it was done because of her age.

Crittenden v. International Paper Co. Wood Products

(M.D.Ala. Aug. 19, 2002)

African-American employee who was fully reinstated to his position and awarded back pay after he grieved his termination through union was not subject to adverse employment action for purposes of §1981 claim.

Palisano v. City of Clearwater

(M.D.Fla. Aug. 14, 2002)

Determination by the EEOC that it was "unable to conclude" that there was a violation of Title VII did not rise to the level of a finding of no reasonable cause to believe that a violation of Florida Civil Right Act (FCRA) occurred.

continued...

Advanced Labor Topics

May 9 - 10, 2003

Casa Monica Hotel, St. Augustine, FL

See pages 26 & 27 for details.

CASE SUMMARIES

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Murray v. World Sav. Bank

(S.D.Fla. Aug. 7, 2002)

In Equal Pay Act claim, Employer's proffered reason for disparity in pay between female employee and male employees, experience handling appraisals or managing people, was not pretext for discrimination in violation of Equal Pay Act; although salary progression was based on performance, underlying salary itself was based on experience.

Pittman v. Moseley, Warren, Prichard & Parrish

(M.D.Fla. July 29, 2002)

A non-disabled employee is "not entitled to a modified work schedule as an accommodation to enable the employee to care for" someone with a disability. While the prohibition of "association discrimination" is intended to prevent, inter alia, an employer from declining to hire a qualified individual because the "employer believes that the applicant would have to miss work or frequently leave work early in order to care for" a disabled person, an employer's decision to terminate an employee based on an established record of absences to care for a disabled person and a clear indication that additional time off is needed for the same purpose does not violate the "association" provision of the ADA.

Terrell v. AmSouth Investment Services, Inc.

(M.D.Fla. July 24, 2002)

Standard arbitration clause from National Association of Securities Dealers (NASD) Code of Arbitration Procedure was unenforceable as to terminated employee's claim since it

limited or precluded remedies available under whistleblower statute.

Florida Courts

Razner v. Wellington Regional Medical Center, Inc.

(4th DCA November 20, 2002)

Assuming that alcoholism is a handicap, plaintiff did not establish that she was a handicapped person under Act where there was no evidence that plaintiff actually suffered from alcoholism, and she did not prove that employer regarded her as a person suffering an impairment that substantially limited one or more major life activities. Blood testing of employee who was suspected of drinking on the job was not discriminatory conduct and was not evidence that employer regarded her as an alcoholic.

SCI Funeral Serv. of Fla., Inc. v. Henry

3rd DCA November 20, 2002)

Judgment properly entered for plaintiff in action against plaintiff's former employer who caused plaintiff to be fired by his new employer by threatening to sue for violation of non-compete agreement where the twelve month non-compete period had expired before plaintiff was hired by his new employer. Where plaintiff was called to active military service, and employer refused plaintiff's request to resume his employment upon his return, twelve month non-compete period began when plaintiff was called to active military duty.

Amador v. Florida Board of Regents

(3rd DCA November 6, 2002)

Where initial judgment was rendered by federal court, federal rules of issue preclusion apply in subsequent litigation in Florida court, and complete identity of parties is not required for defensive use of collateral estoppel.

Winters v. Florida Board of Regents

(2nd DCA November 8, 2002)

ALJ did not err in failing to admit or to consider contents of report prepared by university's Office of Equal Opportunity Affairs where statements of various witnesses in EOA investigation were not made under

oath, and report consisted almost entirely of inadmissible hearsay. Agency did not err in concluding that coach's responses to university investigation were dishonest, nor that as matter of policy, coach's actions in falsifying certain answers were grounds for termination.

Simon, Pipes & Ross, Inc. v. Cuartas

(3rd DCA October 16, 2002)

Where plaintiff's employment contract had expired and did not govern his rights and obligations as a shareholder, court erred in allowing plaintiff to amend his promissory estoppel and breach of fiduciary duty claims at close of evidence over defendant's objection, and to argue that employment contract was basis for wrongful termination.

Henderson v. Idowu

(4th DCA October 16, 2002)

Intentional tort claims alleged in complaint are arbitrable under arbitration agreement included in Employee Acknowledgment Form signed by plaintiff where those claims were alleged to have resulted from plaintiff's loss of his job, and agreement provided for arbitration of claims related in any way to plaintiff's employment or termination thereof.

Woodham v. Blue Cross and Blue Shield of Florida, Inc.

(Fla. October 10, 2002)

Where claimant has filed complaint under Florida Civil Rights Act with Florida Commission on Human Relations and Equal Employment Opportunity Commission jointly, Equal Employment Opportunity Commission's dismissal and notice of rights which stated that agency was "unable to conclude that information obtained establishes violations of the statutes," does not amount to determination that there is not reasonable cause to believe that a violation occurred.

Dickens v. Department of Juvenile Justice

(1st DCA September 13, 2002)

Employee had right to appeal suspension that arose from his conduct as career service employee, even though employing agency initiated disciplinary action after position was reclassified to selected exempt ser-

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vice. PERC improperly found that it had no jurisdiction because employee was not career service employee at time of suspension.

Jenne v. Maranto
(4th DCA August 21, 2002)

When hiring employees and carrying out pay policies for sheriff's staff, sheriff acts as any other constitutional official of a county.

State Employees Attorneys Guild, etc. v. Bush
(1st DCA July 23, 2002)

Error to dismiss petition to represent certain attorneys employed in state's Selected Exempt Service, which hearing officer had concluded should be granted, on ground that previously defined separate bargaining unit for attorneys was no longer appropriate after enactment of "Service First" legislation because it would result in excessive fragmentation. Factual issues exist regarding effect of legislation on continued viability of proposed bargaining unit which had not been presented to, or considered by, hearing officer.

Florida Board of Regents v. Snyder
(2nd DCA July 19, 2002)

Board of Regents is immune from section 1983 claims in state and federal court, and trial court departed from essential requirements of law when it refused to recognize this immunity. Since speech by professor was not matter of public concern and because all of the alleged retaliatory actions that plaintiff complains of involve decisions related to transfers, promotions, performance reviews, pay increases, class schedules, and other departmental decisions which individual defendants made as part of their day-to-day duties, individual defendants were acting within scope of their employment and were entitled to qualified immunity.

Borino v. Publix Supermarkets, Inc.
(4th DCA June 19, 2002)

Statements that plaintiff was fired for dishonesty were published to plaintiff's fellow employees and were not privileged since there was evidence from which jury could have found that plaintiff did not receive disability payments from employer on any days on which he worked at other job; or that plaintiff was dis-

abled from working for employer, but not at other job, because of the nature of the work and, accordingly, did nothing improper if he had collected disability pay while working other job.

Littleford v. Department of Highway Safety and Motor Vehicles
(5th DCA May 3, 2002)

PERC order upholding dismissal of FHP officer affirmed based on series of incidents of verbal abuse, profanity, use of racist or sexist epithets and one incident of making a false statement under oath. Agency's failure to meet procedural benchmarks such as investigations deadlines does not prevent discipline unless delay has prejudiced employee. Employee's claim of mental distress and loss of confidence in FHP due to duration are not the substantive prejudice contemplated.

Other Courts

Wilkins v. St. Louis Housing Authority
(8th Cir. December 31, 2002)

There was sufficient evidence that plaintiff's conduct amounted to protected activity under anti-retaliation provision of False Claims Act to affirm denial of defendant's motion for judgment as a matter of law; court properly subtracted plaintiff's interim earnings from back-pay damages before doubling them.

Eckelkamp v. Beste
(8th Cir. December 31, 2002)

In case alleging breach of fiduciary duty under ERISA and state law and retaliatory discharge claim under ERISA, dismissal of state law claim and summary judgment in favor of defendants on ERISA claims affirmed; court did not abuse its discretion in rejecting plaintiffs' expert's report regarding compensation defendants approved for themselves; legitimate nondiscriminatory reasons were shown for termination of one plaintiff.

New York New York, LLC v. National Labor Relations Board
(D.C. Cir. December 24, 2002)

The D.C. Circuit granted a petition for review of National Labor Relations Board orders finding that em-

ployees of a contractor who regularly and exclusively work on an owner's property have the same rights to organize a union as employees of the owner; the court remanded the case for the Board to address a number of issues it had failed to consider.

Newport News Shipbuilding and Dry Dock Co. v. Director, Office of Workers' Compensation Programs
(4th Cir. December 27, 2002)

The 4th Circuit denied a petition for review of the Benefits Review Board's order directing an employer to pay an employee disability benefits and held that the employee's refusal of an offer of employment by the employer was not unreasonable because the employee was participating in a vocational rehabilitation program.

Farrell v. Department of the Interior
(Fed. Cir. December 18, 2002)

The Federal Circuit affirmed the Merit Systems Protection Board's final order denying review of a U.S. Park Police employee's demotion for conduct unbecoming an officer, on the grounds that the demotion was not unreasonable.

Johnson v. Henderson
(9th Cir. December 26, 2002)

Excuse of employee's failure to file timely sexual harassment complaint on equitable estoppel grounds required supportive evidence showing that deadline was missed because of employer's deception or misinformation.

National Labor Relations Board v. Wolfe Electric Company
(8th Cir. December 24, 2002)

Electrical contractor could not invoke "personal animosity" defense to unlawful labor practices where rejected union job applicants did nothing to upset contractor's terminally ill wife.

Lansdale v. Hi-Health Supermart Corporation
(9th Cir. December 19, 2002)

A federal statute limiting the amount of compensatory damages for future pecuniary losses, nonpecuniary losses, and punitive damages payable to the victim of intentional employment discrimination is not unconstitutional.

continued...

CASE SUMMARIES

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Raven Services Corp. v. National Labor Relations Board

(5th Cir. December 18, 2002)

The NLRB did not err in finding that the employer's unilateral Oct. 1, 1996, changes constituted an unfair labor practice because the NLRB's determination that the employer lacked good faith doubt as to the union's majority status is supported by substantial evidence on the record.

Finley Lines Joint Protective Board Unit 200 v. Norfolk Southern Railway Co.

(8th Cir. December 13, 2002)

Public Law Board did not unlawfully exclude polygraph evidence by disregarding test results before concluding that employee was subject to dismissal for giving false testimony.

Gu v. Boston Police Department

(1st Cir. December 2, 2002)

Plaintiffs' sex discrimination claims necessarily failed where appointment to newly created administrative position was legitimately awarded to more qualified male employee.

Bowen v. Missouri Department of Social Services

(8th Cir. December 2, 2002)

Employer was not entitled to summary judgment where black supervisor's alleged conduct could reflect racial animus toward white employee.

Staton v. Boeing Company

(9th Cir. November 26, 2002)

Class action settlement agreement may not provide for amount of attorney fees as percentage of common fund.

Chao v. Tradesmen International, Inc.

(6th Cir. November 15, 2002)

Employee's attendance at safety training course was "voluntary," and thus not compensable under FLSA, where training was precondition to employment but could be completed within reasonable time after employment began.

Lee Lumber and Building Material

Corp. v. NLRB

(D.C. Cir. November 15, 2002)

Denying a petition for review of a National Labor Relations Board order directing a company to cease and desist from committing unfair labor practices, the D.C. Circuit held that the Board's order was reasonable and supported by substantial evidence.

O'Keefe v. United States Postal Service

(Fed. Cir. November 6, 2002)

The Federal Circuit vacated the Merit Systems Protection Board's decision affirming an agency's removal of an employee for egregious conduct, and remanded on the grounds that the board's decision was not supported by substantial evidence.

Bond v. Cerner Corporation

(8th Cir. November 6, 2002)

Where former employer's plan administrator denied plaintiff's claim for total disability benefits, grant of summary judgment upholding denial affirmed; plaintiff was unable to show she was continuously unable to perform all duties of any occupation.

Maegdlin v. International Association of Machinists and Aerospace Workers, District 949

(8th Cir. November 5, 2002)

In an action brought by a member against his union, dismissal of complaint affirmed in part and reversed in part; court erred in determination that claims of gender discrimination did not relate back to original complaint; Title VII and MHRA retaliation claims were properly dismissed because they were not timely filed and did not relate to plaintiff's original complaint.

Ross v. Bryan

(4th Cir. October 31, 2002)

The Fourth Circuit affirmed the Eastern District of Virginia's decision not to substitute the United States as the defendant in a case where a defendant serviceman claimed he was acting within the scope of his employment when he was in a car accident on a military base; the court held that the serviceman's commute to his duty station did not fall within the scope of his employment.

Hatley v. Hilton Hotels Corp.

(5th Cir. October 1, 2002)

The trial court erred in granting judgment as a matter of law on sexual harassment claims; the district court could not substitute its own determination of the witnesses' credibility for that of the jury.

Vasquez v. County of Los Angeles

(9th Cir. September 30, 2002)

Title VII claimant must show objective adversity of discriminatory employment action in order to establish adverse employment action.

Crowley v. L.L. Bean, Inc.

(1st Cir. September 19, 2002)

In analyzing plaintiff's assertion of hostile work environment, jury could consider evidence of employer's behavior, which fell outside plaintiff's 300-day period for filing EEOC claim; evidence supported employer's liability for failing to remedy hostile work environment created by non-supervisory co-worker who stalked plaintiff.

Adirondack Transit Lines, Inc. v. United Transportation Union, Local 1582

(2nd Cir. September 18, 2002)

Employer was not required to arbitrate claim for arbitration-related attorneys' fees where CBA mandated only arbitration of "grievance" claims; employer could not recover fees, however, where CBA provided that each party would bear own expenses incurred in presenting case.

Corti v. Storage Technology Corp.

(4th Cir. September 18, 2002)

Title VII gender discrimination plaintiff could be awarded punitive damages even where jury refused to award compensatory damages.

Humble v. Boeing Company

(9th Cir. September 18, 2002)

Employment discrimination plaintiff's reasonable accommodation claim under Washington State's anti-discrimination law was not preempted by §301 of Labor Management Relations Act.

Jasch v. Potter

(9th Cir. September 12, 2002)

Employment discrimination plaintiff adequately exhausted administrative remedies where agency reached

merits of claim despite plaintiff's failure to respond to information request.

Kapche v. City of San Antonio
(5th Cir. August 30, 2002)

An individualized assessment of the person's "present ability to safely perform the essential functions of the job" is mandated by the ADA under the "direct threat" inquiry.

Steam Press Holdings, Inc. v. Hawaii Teamsters and Allied Workers Union, Local 996

(9th Cir. August 26, 2002)

Local union president's statements at union meeting that employer was "making money" and "hiding money" were not necessarily assertions of objective fact, were not defamatory, and were fully protected by federal labor law.

Koslow v. Commonwealth
(3rd Cir. August 21, 2002)

In disability discrimination case, summary judgment in favor of defendants affirmed in part and reversed in part; court erred in finding that Commonwealth had not waived sovereign immunity to Rehabilitation Act claims, and denial of ADA claim for prospective injunctive relief against superintendent was reversed; Pennsylvania Human Relations Act claims against present and past workers' compensation administrators were properly dismissed.

PolICASTRO v. Northwest Airlines, Inc.
(6th Cir. July 29, 2002)

Reassigned airline marketing employee suffered no adverse employment action where airline reimbursed all travel costs, even those exceeding budget, after employee chose not to relocate to new sales territory.

Costa v. Desert Palace, Inc.

(9th Cir. August 2, 2002)

Plaintiff in any Title VII case may establish violation through preponderance of evidence, whether direct or circumstantial, that protected characteristic played motivating factor.

Pike v. Osborne

(4th Cir. July 29, 2002)

Where plaintiffs alleged that sheriff failed to reappoint them because

they supported his opponent in an election and, thereby, violated their First Amendment rights, denial of sheriff's claim of qualified immunity reversed; a reasonable official in sheriff's position would not know that plaintiffs' interest in commenting on an issue of public concern outweighed sheriff's interest in maintaining a loyal and efficient sheriff's department.

General Committee of Adjustment, GO-386 v. Burlington Northern & Santa Fe Railway Co.

(DC Cir. July 19, 2002)

District court erred by applying subjective good faith test, rather than objective assessment of past bargaining practices, in determining whether railway employer or union could compel bargaining on national or local level.

Smith v. International Organization of Masters, Mates and Pilots

(5th Cir. July 17, 2002)

The six-month limitations period in NLRA §10(b) applies to an employee's duty of fair representation claim against a union standing alone.

Board of Trustees of Teamsters Local 863 Pension Fund v. Foodtown, Inc.

(3rd Cir. July 17, 2002)

Because grocery chain's pension withdrawal liability arose after bankruptcy filing and thus did not belong to bankruptcy estate, pension fund had standing to pursue claim against debtor's alleged alter ego.

Kang v. U. Lim America, Inc.

(9th Cir. July 15, 2002)

Definition of "employee" in Title VII of Civil Rights Act of 1991 does not prohibit counting foreign employees of U.S.-controlled corporations for purpose of determining coverage.

Department of the Air Force v. Federal Labor Relations Authority

(DC Cir. July 12, 2002)

Where defendant held that plaintiff committed an unfair labor practice by suspending an employee/union official, petition for review granted and decision reversed because conduct of union official was unprotected under applicable federal labor laws.

Reliable Home Health Care, Inc. v. Union Central Insurance Co.

(5th Cir. July 10, 2002)

In determining whether a plan is "funded" or "unfunded" under ERISA, a court must first look to the surrounding facts and circumstances, including the status of the plan under non-ERISA law and, second, a court should identify whether a policy is funded by a res separate from the general assets of the company; in so doing, the mere fact that a plan is funded through an insurance policy is not dispositive of a plan's status as funded or unfunded for ERISA purposes.

LeTourneau Lifelike Orthotics & Prosthetics, Inc. v. Wal-Mart Stores, Inc.

(5th Cir. July 10, 2002)

The court interprets ERISA plans' provisions as they are likely to be "understood by the average plan participant," consistent with ERISA's statutory drafting requirements; when the plan administrator is vested with discretion to review plan terms and decide claims for benefits, the court reviews the administrator's interpretation of a summary plan description's terms only for abuse of discretion.

Francisco v. Office of Personnel Management

(Fed. Cir. July 9, 2002)

Employee's report of publicly known information regarding alleged errors in adjudication of claim for civil service retirement benefits was not "protected disclosure" under whistleblower act.

AT Systems West, Inc. v. National Labor Relations Board

(DC Cir. July 2, 2002)

Union's requests for recognition by employer made no express demand for bargaining, and thus employer did not unlawfully refuse to "bargain" by offering no response.

Thomas v. Texas Department of Criminal Justice

(5th Cir. July 1, 2002)

A reasonable jury could not have concluded that the plaintiff's future emotional distress will be more than three times worse than the emotional harm she has already suffered.

DISMISSAL OF CLAIMS

from page 1

A. Basic FCRA procedure

As a prerequisite to bringing a civil action based upon an alleged violation of the FCRA, a potential plaintiff is required to file a complaint with the FCHR within 365 days of the alleged violation. The FCHR is then required to determine within 180 days whether or not reasonable cause exists to believe discrimination has occurred. If the FCHR makes a "reasonable cause" determination, the claimant has two options: he or she may (1) file suit in court or (2) request an administrative hearing. If the FCHR makes a determination that there is not reasonable cause ("no cause"), the claimant may request an administrative hearing, but must do so within 35 days of the date of the no cause determination. If the request is not made within 35 days, the claim is barred. If the FCHR fails within 180 days to make a determination either way regarding whether reasonable cause exists, the claimant may proceed as if the FCHR made a "reasonable cause" determination.

B. Facts Of The Case

Woodham filed a charge with EEOC, which, pursuant to the Worksharing Agreement between the FCHR and EEOC, acted as a dual filing with the FCHR. Woodham did not receive a determination letter from the FCHR within 180 days, as contemplated by the statute. Over 300 days after she filed her original complaint, she requested a right-to-sue letter from the EEOC. The EEOC issued a standard Dismissal and Notice of Rights (EEOC Form 161) which contained the following language: "The EEOC issues the following determination: Based upon its investigation, the EEOC is unable to conclude that the information obtained establishes a violation of the statutes. . . ."

Woodham then sued her former employer in state court. The trial judge dismissed the suit, holding that her claim was barred because

she failed to follow agency procedure after receiving the Dismissal and Notice of Rights, which the trial court considered equivalent to a no cause determination, by requesting an administrative hearing within 35 days as required by the FCRA. Woodham appealed. The Third District Court of Appeal affirmed the decision of the trial judge. The Third District also certified that the decision was in conflict with a decision of the Second District Court of Appeal on the same issue.

C. The Decision

The Florida Supreme Court reversed the decision of the Third District and held that Woodham was not required to request an administrative hearing within 35 days of receiving the EEOC Dismissal and Notice of Rights.¹

The Supreme Court construed the language of the FCRA to require a specific determination "that there is not reasonable cause" to believe a violation occurred. Consequently, the Court held that the EEOC's statement contained in the standard EEOC Dismissal and Notice of Rights that it was "unable to conclude that the information obtained establishes violations of the statutes," was not equal to a no cause determination.

The Court also noted that the EEOC Dismissal and Notice of Rights did not provide the notice required by the statute, that the FCHR was to "promptly notify the aggrieved person . . . of the options available under this section."

The Court also considered the impact of a no cause determination made after the 180 day period but before the claimant filed suit.² The Court held "that whenever the FCHR fails to make its determination within 180 days, even if the untimely determination is made before the filing of a lawsuit, the claimant may proceed to file a lawsuit."

D. Practical Impact Of Woodham

Previously, a number of courts had held that employees who received an EEOC Dismissal and Notice of

Rights were required to pursue administrative remedies prior to filing suit under the FCRA. These same courts had ruled that failure to do so within 35 days of the date of the Dismissal and Notice of Rights barred employees from suing under the FCRA and had dismissed those claims. Dismissal of an FCRA claim, even when a claim under another statute prohibiting employment discrimination based on the same employment action remained viable, was advantageous to an employer. For example, a plaintiff who proves his/her claim under the FCRA may be awarded unlimited compensatory damages (such as emotional damages), while such damages are capped under Title VII and the Americans with Disabilities Act. Moreover, under the Age Discrimination in Employment Act, compensatory damages are not available. In light of *Woodham*, this is no longer a viable argument. Employers now face the prospect of higher potential damages in lawsuits containing an FCRA claim and a claim based on a federal statute prohibiting employment discrimination.

In addition, unless the agency issues a no cause determination within 180 days of receipt of the charge, the claimant can now file suit without satisfying any additional procedural requirements. As a consequence, it is very likely that employers will be subjected to more frivolous litigation under the FCRA.

Endnotes:

¹ Justice Pariente wrote the opinion and was joined by Chief Justice Anstead, Justices, Lewis and Quince, and Senior Justice Harding. Justice Wells concurred in part and dissented in part and Justice Shaw was recused.

² Justice Wells felt that it was not necessary to address this issue to resolve the dispute and dissented from addressing this issue.

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the future.

The military reserves include part-time members of the Army, Navy, Marine Corps, Air Force and Coast Guard, who are under federal control. "Part-timers" may also be Army and Air National Guard personnel, who are members of the United States Army and Air Force, but remain under state control unless called into federal active duty. National Guard personnel deployed on state active-duty are generally afforded legal protection solely by state statute.

When called into active federal service, reservists, National Guard personnel, and members of the Commissioned Corps of the United States Public Health Service⁵, fall under the protection of certain federal laws. While this article discusses some of the employment-related rights, federal and state law provides rights encompassing credit and housing protection, insurance retention, and matters relating to civil actions in court. Both employers and employee-reservists should be aware of the rights and responsibilities related to an active duty mobilization.

Discrimination

A federal law entitled the "Employment and Reemployment Rights of Members of the Uniformed Services" (USERRA) provides protections for initial hiring and adverse employment actions by an employer if the actions relate, even in part, to the employee's military service.⁶ Service members cannot be denied initial employment, retention, promotion, or any other benefit on the basis of their military status.⁷ Retaliation against a service member who seeks enforcement of the USERRA is prohibited.⁸ "Whistle-blower" protection is also afforded to non-military witnesses under the USERRA.⁹

With regard to employment issues, Florida law is applicable to federal reservists as well as the National Guard. Under the Florida Statutes, "[n]o person can be denied employment or retention in employment, or any promotion or advantage of employment, because of any obligation as a member of a reserve com-

ponent of the Armed Forces."¹⁰ Specifically for National Guard members, the Florida Statutes provide that if they are ordered into active service, no employer, and no community college or university, "shall discharge, reprimand, or in any other way penalize such member because of his or her absence by reason of state active duty."¹¹

It is important to note that National Guard members on state active duty (i.e. natural disasters, riot control, etc.) are not covered by USERRA, but by state law.¹² However, National Guard personnel are covered by USERRA for federal service as well as training activities such as monthly drills or a two-week annual training period.¹³

Military Leaves of Absence

Reservists, when not on active duty, normally drill for two to three days a month and for at least one two-week annual training period. During these recurring periods, written orders may, or may not, be issued to individuals. Employers should understand that valid military "orders" are not necessarily a written document.¹⁴

All National Guard and Reserve members are encouraged by their respective services to provide a copy of orders, the annual drill schedule, or other types of documentation to employers and, if possible, before the commencement of military duty. However, when an employee has been on military leave for over 30 days, the employer has the right to request documentation of military service.¹⁵

If the employee does not provide documentation because it is not immediately available or does not exist, the employer still must promptly reemploy the person.¹⁶ However, if, after reemploying the reservist, documentation becomes available that shows any of the reemployment requirements were not met, the employer may terminate the person.¹⁷

Employers cannot require reservists to reschedule drills or annual training, nor can the reservist be required to find a replacement to cover their work schedule.¹⁸ Private employers are not required to grant paid leave for military leaves of absence nor do they have to allow an employee to "make-up" missed work

periods.¹⁹ Under Florida law, if a National Guard member is a public employee, that person is entitled to a leave of absence from his or her job, without loss of pay, time, or efficiency rating, on all days during which they are on active state duty, not to exceed 30 days at any one time.²⁰ For Florida public officials, as defined by the Florida Statutes, that are reservists, the Governor may grant up to thirty days of additional paid leave for "active military service."²¹ This same leave may be granted to city, county or state employees at the discretion of their agency.²²

Reemployment Rights

Under the USERRA, any person whose absence from a position of employment is by reason of military service is generally entitled to reemployment in that job and other employment benefits if:

- a. The person gave advance written or verbal notice of such service to their employer; and
- b. The cumulative length of the absence and of all previous absences from that employer, by reason of military service, does not exceed five years; and
- c. The person reports to, or submits an application for reemployment to his or her employer in accordance with the provisions of Federal law.²³

No notice is required if the giving of such notice is precluded by military necessity or, if the giving of notice is otherwise impossible or unreasonable.²⁴ The five-year cumulative total is applicable only to a single employer and previous active duty periods do not count if a reservist changes employers. The five year total is limited in scope and does not include such service as involuntary recall to active duty for a declared war or national emergency, monthly drills (inactive duty training), annual training, and additional training requirements certified by the head of the reservist's service branch as necessary for professional development or completion of skill training or retraining.²⁵

Federal law makes no distinction between voluntary and involuntary periods of active duty and USERRA protection is afforded to reservists who volunteer for active duty assign-

continued...

ments. USERRA protects temporary employees, but not independent contractors or those who are employed for a "brief, nonrecurrent period" with no expectation indefinite continued employment.²⁶ Employers are not required to reemploy a reservist if doing so is impossible, impractical or would place an "undue hardship" on the employer.²⁷ This would include such occurrences as a reduction-in-force that would have included the reservist if he or she were present.

Upon the completion of a period of service in the uniformed services, military personnel are required to report for work or notify their employer of their intent to return to work. There are time limits for reapplying that depend on the length of military service, which are:

For a period of service that is 30 days or less, the employee must report to work not later than the beginning of the first full regularly scheduled work period after the calendar day release from active duty or drill. Time is calculated after travel and an eight hour period of rest.

For a period of service more than 30 days but less than 181 days - not later than 14 days.

For a period of more than 180 days - not later than 90 days after the completion of the period of service.

There are exceptions to these time limits, such as for a person who is hospitalized or recovering from an illness or injury that occurred on active duty. At the end of the recovery period the service member must report to the employer or submit an application for reemployment. Nor-

mally, a period of recovery may not exceed two years, but there are some exceptions.²⁸

Under federal law, the "escalator principle" requires that the reservist step back onto the seniority escalator at the same point they would have occupied had they been continuously employed.²⁹ This does not necessarily mean the employee will step back into the same job previously held. If there is reasonable certainty that the reservist would have been promoted if they had not been absent, they may be entitled to that promotion when they return. However, the escalator goes both directions. Dependant upon the circumstances, the employee could also return to a lower position or even layoff status.

Upon reemployment, a returning reservist is entitled to any rights, based on seniority, as if they had not been absent from work.³⁰ This would include such benefits as longevity-based pay increases. Benefits that are accrued on the basis of performance, rather than seniority are not included. For example, an employee earning eight hours of vacation leave for every month worked would be a performance-based benefit. However, a reservist with a leave plan that provides additional vacation leave accrual based on seniority or longevity may be entitled to those benefits after returning to work under USERRA.

The law is very detailed and specific with regard to the various types of pension plans and employers should look to 38 U.S.C. § 4318 for specific guidance.

Disqualifying Service

Not all service members necessarily qualify for protection and benefits under the USERRA. Federal law provides that military service would be disqualifying under four circumstances:

- (1) Separation from the service with a dishonorable or bad conduct discharge.
- (2) Separation from the service under other than honorable conditions.
- (3) Dismissal of a commissioned officer in certain situations involving a court martial or by order of the President in time of war.

- (4) Dropping a individual from the rolls when the individual has been absent without authority for more than three months or who is imprisoned by a civilian court.³¹

There is no entitlement to USERRA protection for individuals discharged from military service under these circumstances.³²

Health Insurance

A service member who is called to active duty and protected by the Soldiers' & Sailors' Relief Act of 1940 (SSCRA), is also entitled to reinstatement of any health insurance when released from active duty, if (1) the policy was in effect on the day before active duty commenced, and (2) was terminated on a date during the period of active service.³³ No exclusion or waiting period may be imposed for coverage of a health or physical condition of a service member, or any other person covered by reason of the service member's coverage, if:

- (1) the condition arose before or during that person's period of military training or service in the Armed Forces; or
- (2) an exclusion or waiting period would not have been imposed for the condition during a period of coverage resulting from participation by such person in the insurance; and
- (3) the condition has not been determined by Veterans Affairs to be a disability incurred or aggravated in the line of military duty.³⁴

The service member must request reinstatement upon release from active duty.

Under USERRA, a service member on active duty for 30 days or less remains covered under the employer's health plan, at the employer's expense. For active duty periods greater than 30 days, the service member may be allowed to continue his or her insurance plan through the civilian employer for up to 18 months and cannot be required to pay more than 102% of the full premium.³⁵

Florida law also ensures that National Guard and reserve members do not lose their health insurance as a result of active service. Any health insurance policy which was in effect

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on or after April 30, 1991, that provides coverage to a member of the Florida National Guard called to active duty, must continue all coverage during active duty at the premium in effect for all insured under the same contract.³⁶ An exception exists if the insured requests coverage changes altering the premium being paid prior to military activation.³⁷

Under Chapter 250 of the Florida Statutes, insurance carriers are also required to reinstate coverage for any military reservist electing not to continue it while on active duty, at the insured's request upon return from active duty, without a waiting period or disqualification for any condition which existed at the time he or she was called to active duty.³⁸ Reinstatement must be requested within 30 days after returning to work with the same employer or within 60 days if the policy is an individual policy.³⁹ The reservist must notify his or her employer of his or her military status and the intent to invoke these rights prior to leaving for active duty.

Conclusion

These are only a few of the legal protections and rights pertaining to service members called to active duty, but are the more common issues that arise during military deployments. Service members as well as employers and others affected by a call to service have rights under the law. A basic understanding of applicable state and federal laws can ensure the rights of all parties concerned are protected. Both military personnel and those affected by that status should become familiar with their legal rights as well as the responsibilities associated with them.

Endnotes:

¹ Daniel P. Ray, *To Be in the Reserves, You Better Have Some*. Available at Bankrate.com.

² Id.

³ United States Department of Defense Press Release 074-03, February 19, 2003.

⁴ *History of the National Guard*, <http://www.arng.ngb.army.mil>; *History of the Army Reserve*, <http://www.usarc.army.mil>.

⁵ See e.g. 38 U.S.C. § 4303(16).

⁶ See generally, United States Code, Title 38, Chapter 43.

⁷ 38 U.S.C. § 4311(a).

⁸ 38 U.S.C. § 4311(b).

⁹ Id.

¹⁰ § 250.481, Fla. Stat. (2002).

¹¹ § 250.482(1), Fla. Stat. (2002).

¹² 38 U.S.C. § 4303(16); § 250.481, Fla.

Stat. (2002).

¹³ 38 U.S.C. § 4303(16).

¹⁴ *Information for Employers*, <http://www.esgr.org>.

¹⁵ 38 U.S.C. 4312(f).

¹⁶ 38 U.S.C. 4312(f)(3)(A).

¹⁷ Id.

¹⁸ *Information for Employers*, <http://www.esgr.org>.

¹⁹ Id.

²⁰ § 250.48, Fla. Stat. (2002).

²¹ §§ 115.09 & 115.10, Fla. Stat. (2002).

²² § 115.14, Fla. Stat. (2002).

²³ 38 U.S.C. § 4312.

²⁴ Id.

²⁵ 38 U.S.C. § 4312(c)(1-4).

²⁶ 38 U.S.C. § 4312(d).

²⁷ Id.

²⁸ Id.

²⁹ 38 U.S.C. 4316(a).

³⁰ Id.

³¹ 38 U.S.C. § 4304.

³² Id.

³³ 50 App. U.S.C. § 593.

³⁴ Id.

³⁵ 38 U.S.C. § 4317.

³⁶ § 250.341, Fla. Stat. (2002).

³⁷ Id.

³⁸ Id.

³⁹ Id.

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TITLE VII CHARGES

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employees in allowing the purchase of company stock. The court found that equitable estoppel did not apply to justify allowing the action to proceed where the charge was filed long after the program was discontinued. Although the employer sought to keep its stock purchase plan secret the plaintiff testified that she and other women knew of the plan.²⁴

B. Continuing Violations

The decision in *Ross, supra*, also declined to find the existence of a continuing violation. The challenged evaluation system had been discontinued more than 180 days before the filing of the EEOC charge. Therefore there was no discriminatory act within the filing period on which to base a continuing violation. The harm to plaintiff was found to be a present consequence of an earlier allegedly discriminatory act rather than the result of a continuing violation.²⁵ Similarly, in *Carter, supra*, the complained of sale of the employer's stock had been discontinued outside the filing period. The court found that the continued payment of dividends on that stock into the filing period did not make the sale a continuing violation.²⁶ It merely gave present effect to a past alleged violation.

In *Gonzalez v. Firestone Tire & Rubber Co.*²⁷, the use of an unvalidated test to determining eligibility for transfer or promotion was challenged as discriminating against Spanish-surnamed employees. The Fifth Circuit held that on remand the district court should find a continuing violation only if the test was used within 180 days prior to the filing of the plaintiff's administrative charge. The court further ruled that even if a continuing violation was found the plaintiff did not have standing to contest any failure to promote that took place more than 180 days prior to the filing of his charge.²⁸

In the recent decision in *National Railroad Passenger Corporation v. Morgan*²⁹ (the "Amtrak" case), the Supreme Court continued to hold that to be timely a charge must be filed with the EEOC within 180/300 days of a discrete retaliatory or dis-

criminatory act.³⁰ The plaintiff averred that he had been subject to ongoing racial harassment as well as to discrete discriminatory acts such as disparate discipline during the entire course of his employment. The court held that:

...discrete discriminatory acts are not actionable if time barred, even when they are related to acts alleged in timely filed charges. Each discrete discriminatory act starts a new clock for filing charges alleging that act. The charge, therefore, must be filed within the 180- or 300- day time period after the discrete discriminatory act occurred. The existence of past acts and the employee's prior knowledge of their occurrence, however, does not bar employees from filing charges about related discrete acts so long as the acts are independently discriminatory and charges addressing those acts are themselves timely filed. Nor does the statute bar an employee from using the prior acts as background evidence in support of a timely claim.³¹

The Court rejected the Ninth Circuit's view in the decision below that "serial violations" constitute a continuing violation.³² It held that "...discrete acts such as termination, failure to promote, denial of transfer, or refusal to hire are easy to identify. Each incident of discrimination and each retaliatory adverse employment decision constitutes a separate actionable 'unlawful employment practice.'"³³ Each triggers the running of the time for filing a charge. The Court distinguished hostile environment claims from discrete acts.³⁴ The Court reasoned that where there is a hostile environment "[t]he 'unlawful employment practice' ...cannot be said to occur on any particular day. It occurs over a series of days or perhaps years, and in direct contrast to discrete acts, a single act of harassment may not be actionable on its own."³⁵ The Court stated that:

A hostile work environment claim is comprised of a series of separate acts that collectively constitute one 'unlawful employment practice.' 42 U.S.C. 2000e-5(e)(1). The timely filing provision requires only that a Title VII plaintiff file a charge

within a certain number of days after the unlawful practice happened. It does not matter for the purposes of the statute that some of the component acts of the hostile work environment fall outside the statutory time period. Provided that an act contributing to the claim occurs within the filing period, the entire time period of the hostile environment may be considered by a court for the purpose of determining liability. (footnote omitted).³⁶

In finding that a hostile environment is a single discriminatory act the Court pointed out that such a claim is based on the entirety of the surrounding circumstances including the severity and pervasiveness of the conduct and whether it is humiliating or threatening.³⁷ The Court hypothesized a situation where acts contributing to a hostile environment occur during days 1 to 100 and the employee files a charge on day 401. The charge is untimely if no act comprising part of the hostile environment takes place within 300 days of the filing (i.e. on day 100 or thereafter). However if an act that is part of the same scenario is committed on day 401 the charge is timely as to the earlier acts even if nothing occurred from day 101 to day 400.³⁸ The Court concluded that:

A title VII plaintiff raising claims of discrete discriminatory acts must file within the appropriate time period – 180 or 300 days – set forth in 42 U.S.C. § 2000e-5(e)(1). A charge alleging a hostile work environment claim, however, will not be time barred so long as all acts which constitute the claim are part of the same unlawful employment practice and at least one act falls within the [applicable] time period. Neither holding, however, precludes a court from applying equitable doctrines that may toll or limit the time period.

While the *Amtrak* decision facially expands opportunities for plaintiffs to raise long past incidents as part of a hostile environment claim by invoking the continuing violation doctrine there are still limits. All acts must be "...part of the same unlawful employment practice." The acts must have sufficient relationship

with each other to be part of the same claim. Presumably among the ties would be the identities of the actors or the knowledge of management. Additionally equitable considerations such as laches may be a defense where an inordinate delay unduly prejudices the defense.

The expanded possibility of having to defend allegations of long past acts must be added to the reasons for employers to maintain a firm and well disseminated policy of prohibiting conduct that would contribute to a hostile work environment. Add to these a prompt and effective response to employees' complaints.

C. Relation Back

When the timeliness of an administrative charge is questioned there may be a dispute as to the date on which the charge has been effectively filed. The concept of "relation back" may save a charge or some of its allegations from being found to be untimely. The relation back regulation of the EEOC, 29 CFR § 1601.12(b), allows a charge to "...be amended to cure technical defects or omissions, including failure to verify the charge, or to clarify or amplify allegations made therein." Amendments, including those with additional allegations of unlawful employment practices "...related to or growing out of the subject matter of the original charge will relate back to the date that the charge was first received."

In *Edelman v. Lynchburg College*³⁹, the Supreme Court recently found this regulation to be "... an unassailable interpretation of § 706."⁴⁰ Edelman had faxed a letter to the EEOC within the applicable filing period complaining that he was denied tenure by the college on the basis of his gender, national origin and religion. The letter was not under oath or affirmation as required by the statute.⁴¹ Edelman submitted a verified charge form 313 days after the denial of tenure of which he complained in the fax. The Court held that the verified form could relate back to the faxed letter. The letter met the requirements of a charge and thereby stopped the clock from running. It found that a charge does not have to be verified when filed. If it is verified after the filing time has run, that verification can "relate back" to the original filing, at least

where the charging party and the EEOC regard the initial contact as a charge.⁴²

Relation back was allowed to amplify a charge in *Sanchez v. Standard Brands* where the Fifth Circuit held that the scope of a judicial action under Title VII "... is limited to the 'scope' of the EEOC investigation which can reasonably be expected to grow out of the charge of discrimination."⁴³ (internal citation omitted) The action "...may encompass any kind of discrimination like or related to allegations contained in the charge and growing out of such allegations during the pendency of the case before the Commission."⁴⁴ The plaintiff had filed a timely charge on the EEOC form on which she checked off the check block indicating discrimination on the basis of sex. After the time for filing she amended the charge to include national origin discrimination. The court ruled that the amendment was timely having related back to the original filing.

III. Conclusion

Plaintiff's counsel can be certain that defense counsel will examine charges and judicial complaints as soon as they are received to determine if the charges are timely. Defense counsel must be aware that not every charge that is facially untimely will bar the charging party from recovering. Both must be aware of those situations in which a continuing discriminatory policy will revive claims for what occurred more than 180/300 days before the charge was filed. However even where an employer continues to maintain a discriminatory policy a charge filed after the applicable limitation period will not allow recovery for discrete acts about which the claimant knew or should have known.

Endnotes:

- ¹ 42 U.S.C. § 2000e *et seq.*
- ² 42 U.S.C. § 2000e-5(e)(1)
- ³ 431 U.S. 353 (1977)
- ⁴ Id. at 558
- ⁵ 449 U.S. 250 (1980)
- ⁶ Id. at 258 See also *International Union of Electrical Workers v. Robbins & Myers, Inc.* 429 U.S. 229 (1976) where the Court held that the time for filing a charge ran from the discharge date and not from the date of the conclusion of the grievance proceeding that the employee invoked. The grievance proceeding did not toll the time limit.

⁷ 490 U.S. 900 (1989)

⁸ Id. U.S. at 906

⁹ Id. at 911 The *Lorance* decision was reversed with the addition to Title VII of 42 U.S.C. § 2000e-5e(2) by the 1991 Civil Rights Act. That section provides that an unfair employment practice results from a seniority system that is adopted with the intent to discriminate "...when the seniority system is adopted, when an individual becomes subject to the seniority system, or when a person aggrieved is injured by the application of the seniority system or provision of the system."

¹⁰ 478 U.S. 385 (1986)

¹¹ Id. at 395 Recovery of back pay under Title VII is limited by 42 U.S.C. §5000e-5(g)(1) to no more than two years prior to the filing of a charge with the EEOC.

¹² 975 F. 2d 792 (11th Cir. 1992).

¹³ Id. at 797.

¹⁴ Id. at 798.

¹⁵ Id. at 800.

¹⁶ 455 U.S. 385 (1982).

¹⁷ 455 U.S. at 243.

¹⁸ 516 F.2d 924 (5th Cir. 1975)

¹⁹ Id. at 928.

²⁰ Id. at 931.

²¹ 980 F.2d 648 (11th Cir. 1993).

²² Id. at 661-62.

²³ 225 F.3d 1258 (11th Cir. 2000).

²⁴ Id. at 1266.

²⁵ 980 F.2d at 660.

²⁶ 225 F.3d at 1265.

²⁷ 610 F.2d 241 (5th Cir. 1980).

²⁸ Id. at 249-50.

²⁹ No. 00-1614, __ Sup. Ct. __, 15 Fla. L. Weekly Fed. s347(June 10, 2002).

³⁰ 15 Fla. L. Weekly Fed at s350.

³¹ Id.

³² Id.

³³ Id.

³⁴ Id.

³⁵ Id.

³⁶ Id. at s351.

³⁷ Id.

³⁸ Id. at s359.

³⁹ 122 S.Ct. 1145 (2002).

⁴⁰ Id. at 1152.

⁴¹ 42 U.S.C. § 2000e-5(b).

⁴² 122 S.Ct. 1152 It was argued below that the EEOC did not regard the faxed letter as a charge since it did not give the respondent notice of the charge within 10 days of receiving it as required by 42 U.S.C. §§ 2000e-5(b) and (e)(1).

⁴³ 431 F.2d 455, 466 (5th Cir. 1970). See also *Mulhall v. Advance Security, Inc.*, 19 F.3d 586 (11th Cir. 1994).

⁴⁴ 431 F.2d at 466 quoting *King v. Georgia Power Co.*, 295 F. Supp. 943, 947 (N.D. Ga. 1968).

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sessed "were permitted to shift the burden to an insurance company, punitive damages would serve no useful purpose."²⁸ Thus, insurability would allow an active wrongdoer upon whom a punishment is imposed to escape that punishment by shifting it to an insurance carrier.²⁹ As a result, those punished would ultimately be the insurance company and its customers, who would end up paying higher rates.

V. Applying The Case Law To Indemnification

The reasoning supporting Florida's policy against insurability of punitive damages arising out of one's own conduct applies equally to supporting a policy against shifting the burden of a director's wrongful conduct to corporate shareholders through indemnification. In fact, the *Biondi* court saw no distinction between the two. Like insurance, indemnification against punitive damages diverts punishment away from the wrongdoing executive to the shareholders, who are likely to actually be among the greatest victims of such acts. Moreover, corporate indemnification against punitive damages arising from an executive's own wrongful conduct, in essence, represents the corporation's condoning of such wrongful conduct. Accordingly, indemnification of punitive damages arising from an executive's own wrongful conduct does more than simply reimburse him or her for loss suffered by conducting corporate affairs, it lowers the standard of conduct which a corporation expects from its executives.³⁰

VI. Conclusion

In conclusion, in light of the recent wave of public sentiment against wrongdoing by corporate leaders combined with analogous case law, it seems likely that provisions in executive employment agreements purporting to indemnify officers or directors against punitive damages arising out of their own conduct would be found to violate public policy. Additionally, a Legislature influenced by voters' current dis-

satisfaction with the current state of corporate governance may decide to clarify the ambiguities in Florida's corporate indemnification statute.

Endnotes:

¹ Testimony Before the Committee on Banking, Housing, and Urban Affairs, U.S. Senate (July 16, 2002).

² See JOSEPH WARREN BISHOP, JR., LAW OF CORPORATE OFFICERS AND DIRECTORS: INDEMNIFICATION AND INSURANCE §1.02 (2000) ("Indemnification has become commonplace in corporate affairs").

³ BLACK'S LAW DICTIONARY, at 529 (6th ed. 1991).

⁴ Retention Agreement between Tyco International Ltd. and L. Dennis Kozlowski §13 (Jan 22, 2001).

⁵ See Executive Employment Agreement between Halliburton Company and Dick Cheney Exhibit A (Aug. 10, 1995). See also Agreement and Plan of Merger - Dynegy Inc. and Enron Corp. §7.13 (Nov. 9, 2001) (Newco . . . shall indemnify, defend and hold harmless to the fullest extent permitted under applicable law each . . . officer or director of Dynegy or Enron . . . against all losses, claims, damages, liabilities, costs or expenses (including attorneys' fees), judgments, fines, penalties and amounts paid in settlement in connection with any claim, action, suit, proceeding or investigation arising out of or pertaining to acts or omissions, or alleged acts or omissions, by them in their capacities as such, whether commenced, asserted or claimed before or after the Effective Time).

⁶ See *Orlando Orange Groves Co. v. Hale*, 144 So. 674, 677 (1932).

⁷ §990 (Perm Ed. 1990).

⁸ 488 A.2d 858 (Del. 1985).

⁹ See STUART R. COHN and STUART D. AMES, FLORIDA BUSINESS LAWS ANNOTATED §607.0831, Author Commentary (2000).

¹⁰ See John C. Coffee, Jr., *Contractual Freedom In Corporate Law: The Mandatory/Enabling Balance In Corporate Law: An Essay On The Judicial Role*, 89 COLUM. L. REV. 1618, 1650 (1989).

¹¹ FLA. STAT. §607.0850(7).

¹² FLA. STAT. §607.0850.

¹³ *Inland Container Corp. v. Atlantic Coast Line R. Co.*, 266 F.2d 857, 860 (5th Cir.1959).

¹⁴ 17A AM. JUR. 2d, Contracts §238 (1991).

¹⁵ COHN & AMES, *supra*, note 8, at 111.

¹⁶ *Id.* at §3.13.

¹⁷ BISHOP, *supra* note 2, at §1.02.

¹⁸ *Perconti v. Thornton Oil Corp.*, 2002 Del. Ch. LEXIS 51 at *9 (May 3, 2002).

¹⁹ See John Maggs, *Out of the Loop*, NATIONAL JOURNAL (March 8, 2002).

²⁰ Remarks by President Bush on Corporate Responsibility at the Regent Wall Street Hotel, New York, New York (July 9, 2002).

²¹ To interpret Florida corporation law, Florida courts will look to case law of other states with similar corporation statutes, including New York and Delaware. See *Greco v. Tampa Wholesale Co.*, 417 So. 2d 994, 996-97 (Fla. 2d DCA 1982) (referring to New York cases interpreting provisions of the New York Business Corporation Law); *Naples Awning & Glass, Inc. v. Cirou*, 358 So. 2d 211 (Fla.2d DCA 1978) (relying on Delaware case law to interpret Florida corporation law); *De La*

Rosa v. Tropical Sandwiches, Inc., 298 So. 2d 471 (Fla. 3d DCA 1974) (same). See also *International Ins. Co. v. Johns*, 874 F.2d 1447, 1459 n.22 (11th Cir. 1989) (observing that the Eleventh Circuit "rel[ies] with confidence upon Delaware law to construe Florida corporate law").

²² 731 N.E.2d 577, 578 (N.Y. Ct. App. 2000) (internal marks omitted).

²³ *Id.* at 580 (citing N.Y. Business Corporation Law §721). *Oladeinde v. City of Birmingham*, 118 F. Supp. 2d 1200, 1209 (N.D. Ala. 1999) (distinguishing, in dicta, "between compensatory damages (for which indemnification would certainly be appropriate), and punitive damages (for which indemnification arguably might not be appropriate)" (parentheses in original)); *National R.R. Passenger Corp. v. Consolidated Rail Corp.*, 698 F. Supp. 951, 971-72 (D.D.C. 1988) (under District of Columbia law, contract provision providing for indemnifying intentional wrongful conduct void as against public policy), *vacated on other grounds*, 892 F.2d 1066 (D.C. Cir. 1990); *Thomas v. Atlantic Coast Line R.R.*, 201 F.2d 167, 170 (5th Cir. 1953) (finding contract provisions which appear to indemnify against willful, wanton, reckless, or intentional misconduct by the indemnitee are contrary to public policy).

²⁴ *Waltuch v. Conticommodity Servs.*, 88 F.3d 87, 90-91 (2d Cir. 1996).

²⁵ Compare New York Business Corporation Law §721 with Fla. Stat. §607.0850(7), quoted in the text *supra*.

²⁶ 731 N.E.2d at 579.

²⁷ *Hartford Acci. & Indem. Co. v. U.S. Concrete Pipe Co.*, 369 So. 2d 451, 452 (Fla. 4th DCA 1979) ("It is well settled in Florida that one may not insure against liability for punitive damages as the result of his own misconduct which gave rise to such damages."); *Morgan Int'l Realty v. Dade Underwriters Ins. Agency*, 617 So. 2d 455, 459 (Fla. 3d DCA 1993) ("public policy in Florida prohibits liability insurance coverage for punitive damages assessed against a person because of his own wrongful conduct."); *Morrison v. Hugger*, 369 So. 2d 614, 615 (Fla. 2d DCA 1997) ("if the jury awarded punitive damages against Wright Fruit Company because of any act of wrongdoing or misconduct on the part of the employer/owner itself, there would not be insurance coverage for the punitive damages awarded against Wright Fruit Company."); *Northwestern Nat'l Casualty Co. v. McNulty*, 307 F.2d 432, 433 (5th Cir. 1962) ("We hold that under Florida law public policy prohibits insurance against liability for punitive damages.").

²⁸ *Nicholson v. American Fire & Casualty Ins. Co.*, 177 So.2d 52, 54 (Fla. 2d DCA 1965).

²⁹ *Travelers Ins. Co. v. Wilson*, 261 So. 2d 545, 549 (Fla. 4th DCA 1972). In contrast, Florida courts have not found public policy to be violated where one liable for punitive damages solely because of vicarious liability has shifted that burden to an insurance carrier. *Id.*

³⁰ BISHOP, *supra* note 2, at §7.16.

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Brenda A. Friedman, Ft. Lauderdale

12:00 noon – 1:00 p.m.

Lunch (on your own)

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Title VII Update

Stanley Kiszkiel, Miami

2:00 p.m. – 3:00 p.m.

OSHA and Workplace Violence: Update

Ken Kleinman, Washington, D.C.

3:00 p.m. – 3:15 p.m.

Break

3:15 p.m. – 4:15 p.m.

Employee Privacy and Job References: Concerns with the Violent Employee

Craig Cornish, Colorado Springs, CO

4:15 p.m. – 5:15 p.m.

The FCHR After Woodham

Jerry Rivera, Esq., Tallahassee

5:15 p.m. – 6:15 p.m.

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Reception (All Invited)

7:30 p.m. – 8:30 p.m.

Speakers Dinner

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Gregory A. Hearing, Tampa

9:30 a.m. – 10:30 a.m.

Basic Psychopathology and the Violent Employee

Dr. Walter Afield, Tampa

10:30 a.m. – 10:45 a.m.

Break

10:45 a.m. – 12:00 noon

The Psychological Edge: Understanding Your Opponent

John Douglas, Washington, D.C.

12:00 noon – 1:00 p.m.

Legal Problems With the Violent Employee

Julie Goldsheid, Washington, D.C.

1:00 p.m. – 2:00 p.m.

Lunch (included in registration)

The FBI Behavioral Science Unit and its Assistance to Lawyers

John Douglas, Washington, D.C.

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John Douglas, Washington, D.C.

Julie Goldsheid, Washington, D.C.

Dr. Walter Afield, Tampa

3:00 p.m. – 4:00 p.m.

ADA and the Mentally Ill Employee

David Fram, Denver, CO

4:00 p.m. – 4:15 p.m.

Break

4:15 p.m. – 5:15 p.m.

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
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