the Checkoff
The Florida Bar
Vol. XL, No.2 November 2001
The Labor & Employment Law Section

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In Defining The Term "Similarly Situated," Eleventh Circuit Forges Two Divergent Roads

by David H. Spalter

When Robert Frost faced two divergent roads in the yellow wood, he chose the one less traveled.[1] Employment counsel seeking the Eleventh Circuit Court of Appeals' interpretation of the term "similarly situated" in disparate discipline cases likewise faces two divergent roads. However, the choice between these roads is a more difficult one, as they are equally traveled by the justices of the Eleventh Circuit.

The first road was paved in the Court's decision in *Mannicci v. Brown*, 171 F.3d 1364 (11th Cir. 1999). There, in an April 9, 1999, opinion authored by Circuit Judge Black, the Court held that to be regarded as similarly situated, the comparator's misconduct must be "nearly identical to prevent courts from second guessing employers' reasonable decisions and confusing apples with oranges." *Id.* at 1368.[2]

Almost one year later, in *Alexander v. Fulton County, Georgia*, 207 F.3d 1303 (11th Cir. 2000), the Eleventh Circuit appeared to reverse its position. There, in a March 30, 2000, opinion Authored by Circuit Judge Marcus, the following statement was made: "the laws does not require that a 'similarly situated' individual be one who 'engaged in the same or nearly identical conduct' as the disciplined plaintiff. Instead, the law only requires 'similar' misconduct from the similarly situated comparator." *Id.* at 1334. [3] Notably, while this statement seems to be designed to directly refute the position taken in *Maniccia*, the opinion makes no citation or reference to *Maniccia*.

The dichotomy created by these two de-

See "Similarly Situated," page 13

Contraception Conundrum

by Jennifer Fowler-Hermes

Women of reproductive age pay 68% more then men on out of pocket health costs.[1] Contraceptives and reproductive health care services account for much of this disparity.[2] Since the creation of prescription contraceptives, and arguably even before then, the burden of preventing unwanted pregnancies has fallen on women. This burden is due, at least in part, to the fact that only women are biologically capable of becoming pregnant, prescription contraceptives for men do not exist and oral prescription contraceptives are the only class of FDA-approved prescription drugs that are routinely excluded from insurance coverage.[3]

Traditionally, employer sponsored health care benefit programs have not provided for prescription contraceptives.[4] Although women have griped about this lack of coverage for years, it did not become a prominent issue until recently when two women filed charges of discrimination with the Equal Employment Opportunity Commission ("EEOC") in Seattle, Washington. In their charges, the women asserted that, by failing to cover the cost of prescription contraceptives, their employers had violated the Pregnancy Discrimination Act and the Civil Rights Act of 1964.[5] The healthcare plan that both Charging Parties took issue with covered numerous medical treatments and services, including, but not limited to: vaccinations, pap smears, routine mammograms, vasectomies, tubal ligations, prenatal vitamins, drugs to lower or main-

see "Contraception" page 13

Chair's Report

by Stuart A. Rosenfeldt, Esq.

STUART ROSENFELDT

Since the last time I wrote this column, we have collectively experienced what most of us would consider the worst tragedy of our lifetimes. My parents often speak of Pearl Harbor and its impact on our country, but the acts of evil that occurred on September 11th have irretrievably changed our lives as well as our profession.

As Americans, we are experiencing anger and fear; a loss of that sense of security that comes from being a citizen of the greatest country in the history of the world. Yet, if someone is willing to give their life to perpetrate acts of incomprehensible viciousness, then none of us are truly safe from harm.

From a personal perspective, my mood is similar to when I lost my brother a decade ago. But it is worse in many respects because, for the first time in my life, I fear for the safety of my children. I am sure my personal experience is similar to that of most residents of our country. Nevertheless, our culture, history, Constitution and national character will make us persevere.

Each member of our society has to realize their personal potential to contribute to the safety of our society and the justness of our beliefs. As a nation, and as a profession, we will have to accept our newly "rerecognized" obligations towards each other. 911 has truly given us a collective sense of purpose.

As we all know, our national priorities have necessarily changed. Those changes will filter down to all aspects of our lives, including our professional lives.

As these changes sink in, we all need to reflect on how our clients and our own practices may be impacted. I have spoken to many labor and employment law practitioners across the state, and, based on those consultations, I offer my opinions regarding changes that we can expect in the near future in the labor and employment law field. These are my opinions, so please do not take offense at anyone but me if you disagree.

I believe that we will see the following changes in our practice area:

1. Security is now a much higher agenda item in every workplace. While workers' compensation immunity may limit the risk management exposure to our clients, the loss of a sense of security in the workplace can be extremely damaging to morale. Moreover, if there is a workplace tragedy, the damages to a business can be beyond measure in human and economic toll. Our Section will be addressing this issue at our Advanced Topic Seminar in New Orleans this May.

2. As a corollary to the increased focus on security, I believe we will see more issues relating to privacy rights of employees, alcohol and drug abuse and the need for employee-assistance plans. Moreover, our clients are going to need assistance in helping their employees avoid the paralysis created by fear.

3. I believe we will be seeing lower verdicts and, consequently, lower settlements in individual rights cases because juries will have a different sense of perspective as to the psychological damages that come from employment-related disputes. They cannot help but say to themselves, "At least he/she is alive."

4. I believe that challenges to racial profiling are going to be dead or dying. This is unfortunate from my point of view, but, nevertheless, I believe that security concerns may create a different societal and judicial evaluation of that practice. As employment law practitioners, we need to be sensitive to the fact that the forces that threaten our country are small in number; and that the vast majority of Americans in the United States who have immigrated from the Middle East and Central Asia are decent, law abiding, non-threatening people; no different than the rest of us. Plaintiffs' lawyers will have to accept the challenge of representing persons who have been victims of stereotypical thinking in this regard; and those practitioners who represent employers need to be careful to counsel against such stereotypes.

5. If the economy continues its downturn, especially in the travel and entertainment sectors, we will see an increase in the amount of termination cases, especially ADEA claims.

6. We all need to refresh ourselves on the rights of reservists and veterans, since there are going to be a lot more of them. Our Section will be addressing this at our November Seminar in Fort Lauderdale. These issues were also discussed at the Stetson Seminar that we held in late September in Clearwater.

7. As a matter of professional, ethical and human responsibility, we will come together as a profession to be more civil and conciliatory in our relationships. We have a common enemy, and that tends to create unity. While I would have preferred that this trend had developed under completely different circumstances, at least there is a touch of a silver lining in our Nation's tragedy. As hard as it is, we need to find whatever good comes with the bad.

I hope that the tone of this column has not been too pessimistic. I believe that we have significant challenges ahead of us as a country which will impact us both personally and professionally. I have faith in our country and its people, as well as its leaders. I have faith in our profession. I hope you share that faith.

The CHECKOFF

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

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Enforcement Of Restrictive Covenants By An Assignee Or Successor Under Florida Law

by Scott T. Silverman

Section 542.335(f), Fla. Stat., provides that "a court shall not refuse enforcement of a restrictive covenant on the ground that the person seeking enforcement is a third-party beneficiary of such contract or is an assignee or successor to a party to such contract, provided . . . in the case of an assignee or successor, the restrictive covenant expressly authorized enforcement by a party's assignee or successor." Although the statutory language suggests that a corporate entity that did not actually contract with the former employee may not enforce a restrictive covenant where the covenant does not expressly authorize enforcement by an assignee or successor, some Florida courts have defined limited circumstances under which enforcement will be permitted. However, in the recent case of *Phillips v. Corporate Express Office Prods., Inc.*, 2001 Fla. App. Lexis 11496, 26 Fla. L. Weekly D 2012 (Fla. 5th DCA August 17, 2001), the Fifth District Court of Appeal held that enforcement of a restrictive covenant by a subsequent employer is absolutely prohibited where the contract does not expressly authorize enforcement by an assignee or successor and the employee does not consent to enforcement or ratify an assignment of rights. This article will analyze the current state of Florida law on this critical issue.

Governing Standard

The general rule in Florida has been that non-compete agreements are considered personal services contracts and are not assignable without the employee's consent or ratification. *Schweiger v. Hoch*, 223 So.2d 557, 558 (Fla. 4th DCA 1969) (citing *Orlando Orange Groves Co. v. Hale*, 161 So. 284 (Fla. 1935)). Further, at the time of enactment of the 1996 statute, Florida cases had rejected the argument that an employee's continued employment may be construed as sufficient consent or ratification of an assignment to permit enforcement by an assignee or successor. Express consent or ratification was necessary. *See Johnston v. Dockside Fueling of North America, Inc.*, 658 So.2d 618 (Fla. 3d DCA 1995) (mere continued employment with a new, successor corporation was not, in and of itself, sufficient to constitute consent to allow assignment of restrictive covenant and enforcement by successor); *Schweiger*, 223 So.2d at 559 (continued employment with new partnership could not in itself be construed as sufficient knowledge and consent to conclude that the parties intended the contract to be assigned or that the assignment was consented to or ratified by the defendant). The 1996 statute codified the pre-existing law in Florida that a noncompete agreement may not be enforced by a successor or assignee, unless the covenant so provides, or the employee expressly consents to enforcement or ratifies an assignment of contractual rights.

In sum, where the corporate entity that wishes to enforce a restrictive covenant is an assignee or successor of the original employer, the covenant must provide for such enforcement, or the employee must expressly consent to or ratify the assignment of contractual rights. Accordingly, where the agreement is silent as to enforcement by a subsequent employer, and the employee does not expressly consent to or ratify an assignment of contractual rights, the salient issue is whether an entity is an assignee or successor for purposes of Section 542.335(f), Fla. Stat. As discussed below, Florida courts disagree about the answer to this pivotal question.

View of the First District

In *Sears Termite and Pest Control, Inc. v. Arnold*, 745 So.2d 485 (Fla. 1st DCA 1999), the defendant had entered into a non-compete agreement with All America Termite and Pest Control ("All America"). Sears, Roebuck and Co. then purchased 100 percent of the stock of All America and subsequently changed the name of the business to Sears Termite and Pest Control ("Sears"). Defendant argued that the agreement was not enforceable by Sears, because there was no valid assignment of the agreement.

The court held that assignment was not required, because Sears, Roebuck and Co.'s acquisition of All America's stock did not affect All America's contractual rights and obligations. *Id*. at 486 (*citing* 18 C.J.S. § 283 Corporations (1990) ("The fact that there is a change in the ownership of corporate stock does not affect the corporation's existence or its contract rights, or its liabilities.")). The subsequent change from All America to Sears was merely a name change, and did not affect the corporate identity. *Id*.

The court contrasted the above facts to those in *Johnston v. Dockside Fueling of North America, Inc.*, 658 So.2d 618 (Fla. 3d DCA 1995). In that case, the corporation with which the employee had entered a covenant not to compete was actually dissolved, and a new, successor corporation was incorporated, to which all assets of the dissolved corporation were transferred. When the successor corporation attempted to enforce the covenant not to compete, the court held that, without the employee's consent, the contract was not enforceable by the successor corporation.

Similarly, in *Schweiger v. Hoch*, 223 So.2d 557 (Fla. 4th DCA, 1969), the partnership that originally employed the defendant was dissolved by the withdrawal of one of the partners, which resulted in the creation of a new partnership. The defendant did not consent to assignment of the employment contract to the new partnership. The court refused to permit the new partnership to enforce the covenant not to compete. The court reasoned that contracts for personal services are not assignable

by either party unless the contract so provides, or unless the other party consents thereto or ratifies the assignment. Because mere continued employment was insufficient for consent or ratification of an assignment of rights, it was incumbent on the new firm to initiate a new contract with the defendant.

However, unlike *Johnston* and *Schweiger*, in *Sears*, the business entity had never been dissolved and a new one formed. Rather, there had merely been a change in stock ownership and name. *Sears*, 745 So.2d at 486. "A 100 percent stock purchase does not involve a dissolution of the corporate entity." *Id*. *See also Superior Uniforms, Inc. v. Brown*, 211 So.2d 50 (Fla. 3d DCA 1968) (In connection with the sale of his uniform rental business to BLH Inc., Brown entered into a non-compete provision. Thereafter, B.L.H.'s business was merged into Superior Uniforms, Inc. Superior Uniforms, Inc. was permitted to enforce the non-compete agreement against Brown).

View of the Second District

As in *Sears*, in *Nenow v. L.C. Cassidy & Son of Florida, Inc.*, 141 So.2d 636 (Fla. 2d DCA 1962), the court held that a mere change in corporate structure would not serve to abrogate an employment contract. The employee had signed a covenant not to compete with the parent company, which subsequently assigned its assets, including the employment contract, to a subsidiary in an exchange of stock for assets. The court held that the covenant not to compete was enforceable by the subsidiary because the parties were substantially identical, thereby negating the argument that the contract of employment was repudiated due to a change in corporate form. The court cited 35 Am. Jur., Master and Servant, Sec. 33, which states that "the incorporation of the employer's business without other change does not abrogate the contract of employment, or alter the liability of the parties one to the other. The same is true of a merging or combining of the business with those of others." *Id*. at 639.

View of the Fourth District

In *Strehlow v. Legend Equities Corp.*, 727 So.2d 1076 (Fla. 4th DCA 1999), the court held that a non-solicitation clause could not be enforced because the employees never consented to the assignment of the clause to the purchaser of the business. The court stated that under Florida law, a covenant that restricts competition is unenforceable by the assignee unless the party who is burdened by the restriction specifically agrees. However, the opinion did not make clear the nature of the purchaser or purchase at issue, or the nature of the assignment to the purchaser.

View of the Fifth District

In *Phillips*, one defendant had signed a non-compete agreement with Ciera Office Products ("Ciera"). 2001 Fla. App. Lexis 11496 at *2. The other two defendants had signed non-compete agreements with Bishop Office Furniture Co. ("Bishop"). *Id*. None of these agreements contained clauses authorizing enforcement by an assignee or successor. *Id*.

After the employees entered into the non-compete agreements, Corporate Express of the South, Inc. ("CES"), purchased the assets of Ciera. *Id*. As part of the transaction, CES required Ciera's employees to execute consents to the assignment of their non-compete agreements to CES. *Id*. Thereafter, CES purchased 100% of Bishop's stock and continued to operate the business under the Bishop name. *Id*. Subsequently, Bishop was merged into its parent company, CES. *Id*. Finally, CES merged into its parent company, Corporate Express of the East, Inc. ("CEE"), which then changed its name to Corporate Express Office Products, Inc. ("Corporate Express"). *Id*. at *3.

After the asset purchase, stock purchase, mergers and name changes, the three employees terminated their employment with Corporate Express and began working for a competitor, allegedly in violation of their non-compete agreements. Corporate Express sued to enforce the agreements. Relying on *Sears*, the trial court granted a preliminary injunction against the former employees and their new employer. The trial court reasoned that, under *Sears*, a change in ownership of corporate stock does not affect the corporation's existence, contract rights or liabilities, nor does it involve dissolution of the corporate entity. *Id*. at *4 - *5. Therefore, Corporate Express, the holder of CES's and Bishop's rights under the non-compete agreements through stock purchase mergers and a name change, had the right to enforce the non-compete agreements at issue. *Id*.

The Fifth District Court of Appeal reversed. Rejecting the rationale of *Sears*, the court held that Corporate Express could not enforce the agreements against the employees because the agreements did not contain assignment clauses and the employees never expressly consented to enforcement by Corporate Express. The court noted that the employer identified in the agreements was not Corporate Express, but rather Bishop and Ciera. Further, the agreements did not contain assignment clauses, and the employees never consented to enforcement by Corporate Express. Thus, Corporate Express was not the entity authorized to seek enforcement under the contracts and the statute.

The court also reasoned that the culture and mode of operation of Corporate Express was different from Bishop and Ciera, negating any reason to allow Corporate Express to enforce the agreement. Citing *Schweiger*, the court opined that the employees might have been willing to restrain themselves for the benefit of Bishop and Ciera, but that the employees may not have been willing to do so for the benefit of Corporate Express. Thus, if Corporate Express wished to have restrictive covenants with the employees, it was incumbent on Corporate Express to obtain consents from the employees or to have new agreements entered into. *Id*. at *7- *8.

Finally, although *Schweiger* involved the dissolution of the former employer, the court held that its reasoning applied to the stock purchase and mergers in the case at bar. The court acknowledged that its position directly conflicted with *Sears* on this point. However, for the previously identified reasons, it refused to follow *Sears*.

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What America Means To Me

by Jennifer Fowler-Hermes

> "America is my home in which I have pride. I am proud to live in a country so vast and beautiful, the bastion of freedom, the land of choices, and the keeper of dreams."

Following the events of September 11, 2001, I found myself turning inward, contemplating life, my role and what I believed it meant to be an American. I began to see the future as uncertain. I wondered if the repercussions of the horrible acts I had witnessed on television would end the world that I have known my entire life, a world filled with hope and dreams.

It was with these thoughts that I recalled ~~after years of forgetfulness,~~ the hope and idealism that I had at fourteen. I remembered writing an essay about America, but I could not remember anything about that essay except for the following phrase "the bastion of freedom, the land of choices, and the keeper of dreams." I wanted to remember. I wanted to read my essay and recall the way I viewed the world before law school, college, high school and even before my first kiss. I asked my mother if she still had the essay. She did.

When I read the essay, I laughed and then shed a happy tear. As my mother observed before faxing me a copy of the essay, it was obviously written by an eighth grader. But, as I reviewed my work from fifteen years ago, I realized that although the events of September 11, 2001, would inevitably change America, they would not and could not change the backbone of American society. For although the terrorists shoved fear into our everyday lives, a fear that will forever be with us, we will still live the American dream. We will set goals, work toward our dreams and will support the dreams of others. We still have ambition, strength, courage, love and hope. And, although we now know a fear unlike any other, we still believe in the promise of tomorrow.

I realized that, although my feet are more firmly planted on the ground and my perspective clouded at times by the stresses of adult life, the hope and idealism that defined my world in eighth grade is still very much a part of who I am and the life I lead. Although my sentence structure and word choice may be different today, the underlying message conveyed by my essay accurately describes what America means to me today and more importantly, the America I hope I will be able to pass on to my children.

WHAT AMERICA MEANS TO ME
Jennifer Marie Fowler, 1986

America is a wonderful country filled with many different people each with different ideas and values. America began when our ancestors crossed the seas to start a new life. They arrived from France, Portugal and Spain, from Britain, Ireland and Germany. All of these people brought with them their customs, the kind of food they cooked, the clothes they wore, the language they spoke, and the way they worshipped. These people married and adopted ideas and beliefs from each other. The product of this is the America we know today.

America is freedom; the freedom to worship and the freedom to assemble peacefully. America gives us the freedom to express our opinion and to express it in a public place. In America there is freedom to love or marry whom we choose and to live with that person and have our belongings secure and private.

America is choices. America is a country where you can make choices. In America you can choose from what you are going to wear each day, to the people that are selected to lead the country. America lets you choose what school you want to attend, what job you want to apply for or accept, and where you want to live and how you want to live.

In America there is more than one political party, and you have the freedom to choose which party you want to support. You also have the choice to vote for the candidate representing your party. The Revolutionary War was fought by the thirteen colonies so that they would no longer have to obey King George, but have a government where they could govern themselves. The Revolutionary War was fought for the right of each citizen to be equally represented in the government.

America is hope. America believes in hopes and dreams. I believe that America turns many people's hopes and dreams into reality. Many people in other countries come to America hoping to be accepted as citizens, so that they can better their lives; and have the choices and freedoms that Americans have.

America is my home in which I have pride. I am proud to live in a country so vast and beautiful, the bastion of freedom, the land of choices, and the keeper of dreams.

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Summary of the Law

There are at least five different situations in which enforcement of a restrictive covenant by a subsequent employer may arise. As demonstrated below, in only one of these circumstances do Florida courts differ as to the correct result.

Scenario #1 - Corporation A enters into a restrictive covenant with its employee. The restrictive covenant provides that it may be enforced by an assignee or successor. Thereafter, Corporation B purchases the stock of Corporation A, and operates the business under Corporation B's name. The employee remains employed, but then resigns to work for a competitor. Corporation B seeks to enforce the non-compete agreement.

RESULT: Because the non-compete agreement provided for enforcement by an assignee or successor, it is enforceable by Corporation B. Note that it doesn't matter whether Corporation B acquired Corporation A by asset purchase or stock purchase. All Florida courts would allow enforcement by Corporation B.

Scenario #2 - Corporation A enters into a restrictive covenant with its employee. The restrictive covenant does not contain a clause authorizing enforcement by an assignee or successor. Thereafter, Corporation B purchases the stock of Corporation A. The employee remains employed and expressly consents to or ratifies an assignment of Corporation A's rights to enforce the agreement to Corporation B. The employee then resigns to work for a competitor. Corporation B seeks to enforce the non-compete agreement.

RESULT: Although the non-compete agreement did not contain an assignment clause, the employee consented to an assignment of Corporation A's rights to Corporation B. In this situation, all Florida courts would permit enforcement by Corporation B.

Scenario #3 - Corporation A enters into a restrictive covenant with its employee. The restrictive covenant does not contain a clause authorizing enforcement by an assignee or successor. Thereafter, Corporation B purchases the assets of Corporation A, including the restrictive covenant, and all of Corporation A's assets are transferred to Corporation B. The employee remains employed, but does not expressly consent to or ratify an assignment of Corporation A's rights to Corporation B. The employee then resigns to work for a competitor. Corporation B seeks to enforce the non-compete agreement.

RESULT: Even under *Sears, Superior Uniforms* and *Nenow*, because Corporation B purchased the assets of Corporation A, not the stock of Corporation A, and there was no subsequent merger or stock purchase, there was a significant change in the corporation seeking enforcement. Therefore, all Florida courts would hold that Corporation B cannot enforce the non-compete agreement. Note that it doesn't matter whether Corporation A is actually dissolved (which it most assuredly would be). The key is that Corporation B, a stranger to the original contract, has taken over Corporation A's rights and did not obtain consent to enforcement of those rights.

Scenario #4 - Same as Scenario #3, except that Corporation B convinces the employee to sign a new restrictive covenant with it after the asset purchase.

RESULT: The new covenant is, of course, enforceable by Corporation B. This illustrates that a purchaser always has the option of convincing the employee to execute a new restrictive covenant.

Scenario #5 - Corporation A enters into a restrictive covenant with its employee. The restrictive covenant does not contain a clause authorizing enforcement by an assignee or successor. Thereafter, Corporation B purchases 100% of the stock of Corporation A and operates the business under a different name. The employee remains employed, but does not expressly consent to or ratify an assignment of Corporation A's rights to Corporation B. The employee then resigns to work for a competitor. Corporation B seeks to enforce the non-compete agreement.

RESULT: This is the scenario where different Florida courts reach different results. In the First, Second and Third Districts, under *Sears, Nenow and Superior Uniforms,* Corporation B may enforce the covenant, because the mere change in stock ownership did not constitute a sufficient change in the employing entity to bring 542.335(f) into operation. Rather, under *Sears*, the purchase of stock by Corporation B did not affect the employer's corporate identity, did not result in any dissolution of the corporation and did not affect contractual rights. As held in *Nenow*, the mere merging or combining of the business with those of others, or other similar change in corporate form, does not work to abrogate the contract of employment or alter the liability of the parties one to the other. In such cases, insofar as the employee is concerned, there is a mere change in ownership, and the parties to the employment contract remain the same. *See also Superior*, 211 So.2d at 51 (mere merger was insufficient to abrogate noncompete covenant). In contrast, in the Fourth and Fifth Districts, under *Strehlow and Phillips*, Corporation B could not enforce the covenant, because it was not the contracting employer, there was no assignment clause, there was no employee consent to or ratification of assignment, and the difference in companies would negate the purpose of enforcing the non-compete agreement.

SCOTT T. SILVERMAN *is an associate with Zinober and McCrea in Tampa, Florida. Mr. Silverman received his B.A. degree from Washington & Lee University in 1990 and his J.D. (with highest honors) from Washington University School of Law in 1994.*

Career Service Employees: Significant Changes Ahead for Career Service Appeals

by Eric Dunlap

During the 2001 legislative session, Chapters 110 and 447, Florida Statutes, underwent substantial revisions that will impact the way practitioners litigate cases before the Public Employees Relations Commission (PERC). See Ch. 2001-43, at 126, Laws of Florida. Many of these revisions streamline the disciplinary process applicable to Career Service employees and eliminate PERC's authority to mitigate disciplinary penalties. This article will address some of the most significant changes.

Pursuant to Section 110.227(1), Florida Statutes, Career Service employees may be suspended, dismissed, demoted, transferred, or experience a reduction in pay or a layoff only for cause. Included in the revised definition of "cause" is "poor performance." The legislature further revised Section 110.227 by eliminating intent as an element of cause for violations of law or agency rules. *See* Ch. 2001-43, § 22, at 140, Laws of Florida.

The changes to section 447.207(8), Florida Statutes eliminated PERC's jurisdiction over Career Service layoffs and transfers. *See* Ch. 2001-43, § 37, at 147, Laws of Florida. Recent PERC decisions hold that PERC lost its jurisdiction over layoffs on the effective date of the legislation. (*Betts v. Department of Citrus*, 16 FCSR 369 (Fla. PERC August 28, 2001); *Fisher v. Department of Citrus*, 16 FCSR 357 (Fla. PERC August 17, 2001); *Schneider v. Department of Legal Affairs, Office of the Attorney General*, Case No. CS-2001-230 (Fla. PERC July 31, 2001).

In an effort to streamline the appeal process, the legislature revised section 110.227(6), formerly subparagraph (5), so that PERC must conduct a hearing within 30 calendar days following the filing of a notice of appeal. *See* Ch. 2001-43, § 22, at 140, Laws of Florida. This time frame may only be extended beyond 30 calendar days in exceptional circumstances and only with the consent of all parties. Any party filing a motion for a continuance must demonstrate the extraordinary circumstances justifying a continuance beyond the 30 days and must indicate in the motion that the opposing party consents to the continuance.

Pursuant to the new legislation, a hearing officer must issue a recommended order within 30 days following the hearing. A party that files exceptions to the recommended order must now file the exceptions within 5 business days after the recommended order is issued. *See* Ch. 2001-43, § 22, at 140, Laws of Florida.

Perhaps the most significant changes to the statutes pertaining to Career Service appeals are found in sections 110.227(6)(c) and section 447.208, Florida Statutes. Pursuant to the revisions to these two sections, PERC lost its ability to mitigate the penalty imposed by the agency. The new section 110.227(6)(c) reads, in part, as follows: "If the commission finds that cause existed for the agency action, the commission *shall affirm* the decision of the agency head." [Emphasis added] *See* Ch. 2001-43, § 22, at 140, Laws of Florida. The legislation clearly eliminated PERC's authority to reduce the penalty imposed by the agency head, except in the case of law enforcement or correctional officers, firefighters, and professional health care providers, if the commission makes specific written findings of mitigation. Consistent with the revisions to section 110.227(6)(c), the revised section 447.208 eliminates all of the mitigation criteria that PERC was previously required to consider in all cases where the agency proved that there was cause to discipline a Career Service employee. *See* Ch. 2001-43, § 38, at 147, Laws of Florida.; *Floyd v. Department of Juvenile Justice*, 16 FCSR 370 (Fla. PERC August 29, 2001)(PERC may not mitigate the disciplinary penalty selected by the Agency).

Elimination of the threat of mitigation may cause agencies to impose harsher disciplinary penalties than might have been imposed prior to the statutory revisions. Previously, harsh disciplinary penalties imposed for relatively minor infractions or on employees with excellent employment records were often mitigated. Under the new statutory provisions, an agency's decision to dismiss an employee must be upheld provided there is cause for the discipline and the penalty imposed is within the range of penalties set forth in the employee handbook or agency procedures.

Another significant revision to section 110.227 appears in subparagraph (7) which now provides as follows: "Other than for law enforcement or correctional officers, firefighters, and professional health care providers, each suspension, dismissal, demotion, or reduction in pay must be reviewed without consideration of any other case or set of facts." This change, along with the elimination of the specific mitigation criteria, eliminates PERC's authority to consider any disparate treatment. The change also leaves one in doubt as to whether a substantial body of PERC case precedent upon which practitioners have grown to rely is now rendered meaningless. It will be interesting to monitor PERC decisions to see how this change is interpreted and to what extent PERC precedent is utilized.

Finally, pursuant to the revisions to section 447.208, PERC may only award attorneys fees and costs in cases relating to the termination or transfer of Career Service employees age 65 or older, age discrimination of State employees, and reasons for not employing a preferred veteran applicant. *See* Ch. 2001-43, § 38, at 147, Laws of Florida. Attorney's fees and costs may not be awarded in appeals arising out of any suspension, reduction in pay, demotion, or dismissal of any permanent employee in the State Career Service System. The practical effect of eliminating any prospect of obtaining an award of attorney's fees and costs is that Career Service employees may find it difficult to obtain legal representation in Career Service appeals.

Over the coming months, it will be important for practitioners to take note of PERC's decisions interpreting these significant revisions to Chapters 110 and 447, Florida Statutes.

Eric Dunlap *is the Deputy Chief Legal Counsel for the Department of Children and Families, District 7, representing the Department in employment related disputes. Mr. Dunlap received his Bachelor of Arts from the University of Central Florida in 1988, his Juris Doctor from Cumberland School of Law in 1991, and his Masters in Business Administration from Samford University in 1991. Mr. Dunlap is also a Florida Civil-Law Notary authorized to perform "authentic acts" as defined in Chapter 118, Florida Statutes.*

CASE SUMMARIES

Eleventh Circuit

Wilkerson v. Grinnell Corp. (11th Cir. October 22, 2001)

Verified intake questionnaire that includes the basic information suggested by 29 C.F.R. § 1601.12(a) may constitute a charge for purposes of Title VII statute of limitations when the circumstances of the case would convince a reasonable person that the charging party manifested an intent to activate the administrative process by filing the intake questionnaire with the EEOC.

Lipphardt v. Durango Steakhouse of Brandon, Inc. (11th Cir. September 28, 2001)

In order to recover for retaliation, plaintiff is required to show a good faith, reasonable belief that she was a victim of hostile environment sexual harassment which led her to report her co-worker's conduct to her employee, not that co-worker's legally constituted harassment. Employee could have objectively believed she was victim of sexual harassment, despite her prior intimate relationship with the alleged harasser because a prior intimate relationship, while important, is not a determinative factor in sexual harassment analysis.

Pipkins v. City of Temple Terrace (11th Cir. September 28, 2001)

Employee failed to establish harassment as a result of her gender, rather than disappointment in failed relationship, where, following personal consensual relationship with supervisor, employee's job evaluations continued to deteriorate.

O'Neal v. Garrison (11th Cir. August 29, 2001)

Judgment entered against plaintiff on § 1985(2) conspiracy claims reversed in light of Supreme Court's ruling in *Haddle v. Garrison* that the gist of the wrong at which § 1985(2) is directed is not deprivation of property but intimidation and retaliation against witnesses in federal court proceedings.

Pennington v. City of Huntsville (11th Cir. August 17, 2001)

Where initial promotion decision by subordinate employee may have been tainted by retaliatory enamis, that decision was rescinded and final decision maker conduct his own evaluation and independently reached decision that plaintiff should not be promoted to certain position, denial of requested promotion by final decision maker was free of bias of subordinate employee.

The Waldinger Corp. v. NLRB (11th Cir. August 24, 2001)

Supervisor's vocal support for union without more, was insufficient to demonstrate supervisory taint and incompetence of substantial evidence supported finding by NLRB that there was no supervisory taint.

Griffin v. City of Opa-Locka (11th Cir. August 17, 2001)

Based on totality of facts and circumstances there was sufficient evidence from which a jury could conclude that city manger's actions in harassing and ultimately raping plaintiff occurred while he was acting under color of law where defendant utilized his authority as city manager and as plaintiff's boss to create the opportunity for and to facilitate sexual assault on plaintiff. Evidence of defendant's prior bad acts, that he had harassed other women both prior to and during his employment with the city, was relevant to claims that city had custom or policy of condoning sexual harassment and that city was deliberately indifferent manager.

Klinedinst v. Swift Investments, Inc. (11th Cir. August 6, 2001)

In determining number of hours employee actually worked for purposes of determining regular rate of pay, district court erred in assuming that employee never worked more hours than the number of hours paid under flat rate system where employee and employer agreed that hours actually worked could have been greater or less than hours paid.

NLRB v. Glades Healthcare Center (11th Cir. July 20, 2001)

Union did not violate *peerless plywood* rule by holding off-premises rally, during which loud speakers were used to broadcast music and speeches, close enough to employees' place of business so that some peripheral sounds could be heard in the facility.

Wascurav v. City of South Miami (11th Cir. July 17, 2001)

In light of ample legitimate reasons for termination decision proffered by city, the truth of which was never effectively challenged, in light of fact introduced no evidence of discrimination, appellate court could not conclude that reasonable jury could find for employee based merely on three and one-half month period between employee's notification to defendants of her son's illness and her subsequent termination and mayor's alleged comment that employee could use son's illness as a face saving excuse for her termination.

Lucas v. W.W. Grainger, Inc. (11th Cir. July 17, 2001)

Failure to reassign employee to customer service representative position was not unreasonable by reassignment would have required employer to bump another employee from the position which ADA does not require. Further, employer not required to restructure "bins sorter" position to accommodate employee where positions struck squatting, kneeling, lifting and caring from the essential job functions listed on employer's job description form, and eliminating those functions would have completely changed the nature of the position.

Florida

Webb v. Florida Healthcare Management, Corp. (4th DCA, October 10, 2001)

Although plaintiff was informed on day she returned to work that she would have different job responsibilities and would be working from her car rather from her former office at corporate headquarters, plaintiff admitted that no one had told her that her job title would be changed, that her salary had not been changed and that discussion about her bonus that it would be re-evaluated, thus, trial court did not err in entering summary judgment in favor of employer on Title VII, FMLA and FCRA claims.

Nabors v. Miami-Dade County (3d DCA October 10, 2001)

There is no common law of Florida requiring good standing as preconditioned to receiving crude benefits. Because county leave manual did not contain any provision requiring good standing and as condition as receiving accrued unpaid annual leave, court erred in entering summary judgment finding that employee was not eligible to receive payment of accrued annual leave.

Kentz v. Escambia County Utilities Authority (1st DCA October 2, 2001)

There is no requirement to exhaust administrative remedies prior to bringing action against non-federal employer under Rehabilitation Act, thus allowing complaint to be amended to state claim under Rehabilitation Act.

Florida Public Employee's Council 79 v. Department of Children and Families (1st DCA September 19, 2001)

Parties lack standing to raise issue of facial constitutionality of Chapter 435, Florida Statutes, where their offenses were committed prior to effective date of statute.

Doyle v. Department of Business Regulation (1st DCA September 6, 2001)

PERC erred in interpreting § 447.208(3)(e) as giving it responsibility to protect state coffers not only from claimant's lawyers, but also from the decisions sister agencies and further erred in rejecting stipulation from additional back pay to compensate income tax liability without illegally sufficient rejection.

Rayborn v. Department of Management (3d DCA September 5, 2001)

Fact that employee was mistakenly enrolled in FRS for a period when he was not eligible does not estopp agency from denying his entitlement to benefits where employee has not established that he changed his position and reliance on any representation by his employer or agency or that any such reliance was detrimental to him.

Browning v. Marc Brody (5th DCA September 14, 2001)

Unlike federal scheme where concurrent jurisdiction is necessary to insure that injured private sector employees could receive impartial review of their administrative complaints in light of unreviewable discretion of general counsel of NLRB to refuse to institute an unfair labor practice complaint, Florida Act contains to analogous provision for unreviewable discretion. Florida's Act confers jurisdiction in circuit court in a few specific instances, none of which reference claims of breach of duty of fair representation.

City of Pembrook Pines v. Zitnick, (4th DCA August 29, 2001)

Where collective bargaining agent retained control over grievance process through provision of collective bargaining agreement, and CBA declined to process grievance to arbitration because it believed the grievance to be without merit, and employee submitted the dispute to arbitration directly, city was not obligated to arbitrate.

Bach v. United Parcel Service, (4th DCA August 29, 2001)

Complainant who receives "no cause" determination after expiration of 180 day period for Florida Commission on Human Relations action is required to exhaust administrative remedy provided by § 760.11(7) prior to filing lawsuit in Florida court.

Other Courts

Bills v. United States Steel LLC (8th Cir. October 4, 2001)

Employee's suit to vacate arbitration award was subject to dismissal where action was against employer only and contained no allegation that union failed duty of fair representation.

Greer v. Board of Educ. of the City of Chicago, Illinois (7th Cir. October 3, 2001)

Summary judgment in favor of defendant in reverse racial discrimination suit affirmed because plaintiff failed to demonstrate that Board treated him differently from other similarly situated employees of another race.

Merheb v. Illinois State Toll Highway Auth. (7th Cir. October 3, 2001)

Summary judgment in favor of employer in gender and national origin discrimination suit affirmed; plaintiff failed to show that the stated ground for his discharge was a mere pretext; plaintiff was not entitled to rely upon prior settlement agreement promising non-retaliatory treatment because, in firing plaintiff for threatening behavior, employer did not treat plaintiff differently than any other employee would have been treated.

Bejil v. Ethicon, Inc. (5th Cir. October 2, 2001)

Where the union and employer discuss an issue, the result may be custom or practice, even if the collective bargaining agreement is silent on the issue.

Marion Stafne v. Unicare Homes (8th Cir. October 1, 2001)

Verdict for employer in ADA suit arising from termination affirmed; plaintiff failed to demonstrate that she could have performed her job, with reasonable accommodations, despite her disability; court's refusal to allow jury to hear answering machine message left by plaintiff's supervisor was not in error because statement was irrelevant and unfairly prejudicial.

Conner v. Lavaca Hospital Dist. (5th Cir. September 28, 2001)

To satisfy the statute of frauds, an oral agreement must be evidenced by a written memorandum that is complete within itself in every material detail, and which contains all of the essential elements of the agreement; the altering of a doctor's schedule from
a partial work week to a full work week effected an essential term.

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Sinyard v. Commissioner of Internal Revenue (9th Cir. September 25, 2001)

Attorney's fees award ordered pursuant to fee-shifting provision of Age Discrimination in Employment Act paid directly to taxpayer's counsel on taxpayer's behalf by an adverse party was taxable income to taxpayer.

Olsen v. Marshall & Ilsley Corp. (7th Cir. September 25, 2001)

In Title VII sex discrimination and retaliation suit, plaintiff's job performance evidence was insufficient to conclude employer's articulated reason for termination was a pretext for intentional discrimination; failure to name parent company in EEOC complaint was fatal to claims against parent.

Brotherhood of Maintenance Way Employees v. Soo Line Railroad Co. (8th Cir. September 24, 2001)

National Railroad Adjustment Board's mention of inapplicable CBA as evidence of past practices was not grounds for reversal where Board's ultimate decision drew its essence from proper CBA as reflected by Board's independent review and analysis of record.

Regula v. Delta Family-Care Disability Survivorship Plan (9th Cir. September 24, 2001)

"Treating physician rule" used in Social Security cases is appropriate for use under ERISA to determine reasonableness of administrator's decision.

Equal Employment Opportunity Comm'n v. Harbert-Yeargin, Inc. (6th Cir. September 21, 2001)

In a same-sex sexual harassment case, judgment as a matter of law in favor of employer with regard to one complaining employee affirmed because EEOC failed to show that employer knew or should have known of one employee's harassing behavior towards complaining employee; denial of employer's motion for JMOL with regard to second complaining employee reversed.

Baldwin v. Trailer Inns, Inc. (9th Cir. September 20, 2001)

Employee who had authority and discretion to manage employer's business on day-to-day basis without employer supervision was not entitled to overtime pay even though employee did not spend more than half his work time on managerial duties.

Swanson v. University of Cincinnati (6th Cir. September 20, 2001)

Summary judgment in favor of employer in disability discrimination case affirmed because employee suffering from major depression was not substantially limited in any major life activity asserted and did not qualify as disabled under the Rehabilitation Act, Ohio law or the ADA.

Sprewell v. Golden State Warriors (9th Cir. September 14, 2001)

Arbitrator's approval of discipline imposed against professional athlete who attacked his coach was in accord with governing collective bargaining agreement.

Gibson v. Arkansas Department of Correction (8th Cir. September 12, 2001)

Ex Parte Young permits private individuals to sue state officials in their official capacity for injunctive relief under ADA.

Bowles v. Quantum Chem. Co. (7th Cir. September 11, 2001)

Judgment in favor of executive for severance plan benefits pursuant to plan's diminution trigger affirmed because diminution in plaintiff's authority, duties, responsibilities, and status was significant; denial of supplemental bonus affirmed because plaintiff failed to demonstrate that provision of plan granting eligible employees an annual incentive bonus award encompassed supplemental bonus.

Beard v. Flying J, Inc. (8th Cir. September 11, 2001)

Reasonable jury could conclude that supervisor's harassment of female worker was based on sex despite supervisor's practice of harassing male workers by occasionally giving "titty twisters" and speaking in sexual terms.

Equal Employment Opportunity Comm'n v. North Gibson School Corp. (7th Cir. September 11, 2001)

In action alleging that defendant's early retirement plan discriminated on the basis of age, grant of summary judgment in favor of defendant affirmed because the EEOC was barred from seeking individual benefits that employees would have been unable to pursue on their own due to untimely filing of claims; dismissal of claims for injunctive relief as moot affirmed because the EEOC did not identify a currently discriminatory plan.

Cherry v. University of Wisconsin Sys. Bd. of Regents (7th Cir. September 7, 2001)

Public university board of regents did not enjoy Eleventh Amendment immunity against female professor's EPA and Title IX wage discrimination claims.

Yeager v. General Motors Corp. (6th Cir. September 7, 2001)

White male plaintiff not selected for apprenticeship lacked standing to challenge training program under Title VII where no causal connection existed between training program and decision not to hire plaintiff; plaintiff failed to establish a prima facie case of reverse discrimination where 80 percent of apprenticeships awarded to white males.

Zimmerman v. Direct Federal Credit Union (1st Cir. September 4, 2001)

Supervisor's unlawful retaliation for female executive's discrimination complaint supported finding of tortious interference with executive's relationship with employer.

Lovejoy-Wilson v. Noco Motor Fuel, Inc. (2nd Cir. August 31, 2001)

Epileptic employee was entitled to reasonable accommodation, if available, permitting employee to compete with nondisabled applicants on equal basis to become assistant manager at convenience store of employee's choice; thus employer did not reasonably accommodate employee by offering position at different store.

Bettcher v. Brown Schools, Inc. (5th Cir. August 31, 2001)

While the single filing rule permits a plaintiff to join individual ADEA actions, the rule does not allow a non-charging plaintiff to file a separate suit based upon the charge of a party that has not filed suit.

Sullivan v. Raytheon Co. (1st Cir. August 29, 2001)

Summary judgment for employer upheld on claims of age and disability discrimination, retaliation for filing discrimination and workers' compensation claims, and claims for denial of disability benefits, where employee did not demonstrate that he was "qualified handicapped person" in light of prior statements of total disability.

Cleveland Branch, NAACP v. City of Parma (6th Cir. August 28, 2001)

NAACP had associational standing to sue city for discriminatory employment practices where, at time suit was filed, individual member could sue in own right; city failed to give adequate notice regarding job openings and civil service exams.

Mauldin v. WorldCom, Inc. (10th Cir. August 28, 2001)

Human resources director could neither grant nor deny employee's request to accelerate stock options absent express or implied delegation of authority from compensation committee; thus denial of request was not entitled to deference on appeal, and summary judgment for employer was improvident.

Citizens Publishing and Printing Co. v. National Labor Relations Board (3rd Cir. August 24, 2001)

Petition for review of NLRB decision denied; substantial evidence supported NLRB's findings that plaintiff committed an unfair labor practice by unilaterally subcontracting night and weekend photography work to independent contractors, that labor strike was
an "unfair labor practice strike," and that plaintiff falsely informed union that striking employees had been permanently replaced, thereby failing to reinstate strikers immediately upon their unconditional offer to return to work.

Burzynski v. Cohen (6th Cir. August 23, 2001)

Limitations on federal employee's ADEA claims were not equitably tolled merely because letters from EEO officers stated that employee might have six years to file suit.

EEOC v. Roadway Express, Inc. (6th Cir. August 23, 2001)

Where EEOC charged employer with pattern and practice of race and sex discrimination, agency was entitled to subpoena employment records regarding job classifications or hiring situations other than those specifically targeted in charge.

Kirk v. Hitchcock Clinic (1st Cir. August 20, 2001)

Employee-doctor's gender discrimination claim was time-barred because she failed to raise claim within 300 days of supervisor's sexually discriminatory statement; supervising doctor's statement made more than a year prior to termination of employee-doctor was not direct evidence of retaliatory motive or retaliatory discharge.

Navarro v. Pfizer Corp. (1st Cir. August 20, 2001)

Fact questions existed as to whether pregnant adult child's high blood pressure was "disability" for which employee could seek leave under Family Medical Leave Act, and thus, summary judgment in favor of employer was improper.

Cripe v. City of San Jose (9th Cir. August 17, 2001)

City's policy categorically restricting jobs disabled officers can perform to small number of undesirable positions violated Americans with Disabilities Act.

Rheineck v. Hutchinson Technology, Inc. (8th Cir. August 16, 2001)

Since employer acted promptly and appropriately to confiscate and prevent further distribution of pornographic picture depicting woman with striking similarity to employee, trial court properly granted summary judgment against employee's sexual harassment claim under Title VII.

Consolidated Diesel Co. v. National Labor Relations Board (4th Cir. August 15, 2001)

Employer's petition for review of NLRB's decision that employer violated the NLRA denied, and Board's cross-application for enforcement granted because substantial evidence supported Board's finding that employees had done nothing more than legitimately exercise core section 7 rights and because confiscations of union literature were unlawful.

Huffman v. Office of Personnel Management (Fed. Cir. August 15, 2001)

Dismissal of petitioner's appeal of his removal from his position as Assistant Inspector General affirmed in part and vacated in part; complaints to supervisor about supervisor's own misconduct and reports made as part of employee's normal job responsibilities were not disclosures covered by the Whistleblower Protection Act, but complaints about other employees' misconduct may have been covered, so case remanded to Merit Systems Protection Board for further consideration.

Berry v. Delta Airlines, Inc. (7th Cir. August 14, 2001)

Co-workers' retaliatory acts against employee after she made sexual harassment complaint did not provide basis for hostile environment sexual harassment claim under Title VII, where retaliatory acts admittedly were not sexual in nature and employee had failed to plead or assert claim for retaliation under Title VII.

Bennett v. Watters (8th Cir. August 14, 2001)

Employee policy manual did not create property interest necessary to support procedural due process claim and employee's claim of violation of public policy by employer requiring second medical opinion did not give rise to procedural due process claim.

Equal Employment Opportunity Commission v. Karuk Tribe Housing Authority (9th Cir. August 13, 2001)

EEOC did not have regulatory jurisdiction over Indian tribe with respect to Age Discrimination Employment Act violations where employer functioned as arm of tribal government.

Dunn v. Nordstrom, Inc. (7th Cir. August 10, 2001)

Employee alleging racial discrimi-

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nation and retaliatory demotion sufficiently established material fact issue regarding demotion with evidence of increased responsibility and subsequent loss of responsibility after filing EEOC complaint.

Bechelder v. America West Airlines (9th Cir. August 8, 2001)

Employer who provided notice to employees concerning rights under Family and Medical Leave Act was required to give employees notice of employer's initial selection of method of calculating leave.

Motion Picture Industry Pension & Health Plans v. N.T. Audio Visual Supply, Inc. (9th Cir. August 7, 2001)

Employer bore burden of showing extent of unreported work by employees after trustee of ERISA plan showed that employer who was accused of failing to make proper contributions failed to keep accurate records and that some employees performed covered but unreported work.

Lancaster v. American & Foreign Ins. Co. (8th Cir. August 3, 2001)

Plaintiffs who settled sexual harassment suit not entitled to recover from employer's special excess insurance policy under reasonable expectation doctrine, where employer failed to list underlying policy, which covered sexual harassment on application for excess policy and where excess policy not ambiguous.

Kohls v. Beverly Enter. Wis. Inc. (7th Cir. August 1, 2001)

Former employee terminated at conclusion of maternity leave failed to show violation of Family and Medical Leave Act where employer provided sufficient evidence of poor job performance to support termination; court distinguishes pretext in FMLA context from McDonnell Douglas burden-shifting.

Bibby v. Phila. Coca Cola Bottling Co. (3rd Cir. August 1, 2001)

In a case where plaintiff alleged same-sex sexual harassment by his employer, summary judgment in favor of employer affirmed because plaintiff did not present sufficient evidence to demonstrate he suffered discrimination because of his sex; plaintiff was harassed because of his sexual orientation, not his sex, and such discrimination is not prohibited under Title VII.

Russell v. Principi (D.C.Cir. July 27, 2001)

Where plaintiff alleged she was the victim of reverse discrimination, grant of defendant's summary judgment motion reversed because plaintiff's loss of a bonus may have constituted an adverse employment action under Title VII and, therefore, plaintiff presented a prima facie case of reverse discrimination.

Wilder v. GL Bus Lines (2nd Cir. July 26, 2001)

Assessment of costs against employee's attorney improper in dismissed action against union and employer for wrongful termination and breach of collective bargaining agreement; under Rule 54, costs may be imposed at court's discretion against losing party, not counsel for that party.

National Labor Relations Board v. Pepsi Cola Bottling Co. of Fayetteville (4th Cir. July 25, 2001)

Enforcement of order directing payment of backpay to two employees denied because employer was prevented from introducing relevant evidence at compliance proceeding that was necessary to evaluate amount of backpay liability to one employee, and NLRB failed to adequately explain its use of a "representative employee" formula to calculate amount of backpay due to second employee.

Lane v. BFI Waste Sys. of N. Am. (8th Cir. July 16, 2001)

Plaintiff in ADA action failed to offer sufficient evidence to support claim that he was able to perform essential job functions and reconcile statement in social security disability benefit application that he was unable to engage in any substantial work.

Baltimore Sun Co. v. National Labor Relations Board (4th Cir. July 18, 2001)

Employer's petition for review of NLRB's order granted because Board failed to follow its usual cautionary standard for bypassing a representation election and accreting employees to a unit by Board order.

SIMILARLY SITUATED
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cisions was further exacerbated in March of this year, when the Eleventh Circuit issued its opinion in *Silvera v. Orange County School Board*, 244 F.3d 1253 (11th Cir. 2001). In an opinion authored by Circuit Judge Carnes, the Court appeared to return to the *Maniccia* standard, stating "in order to satisfy the similar offenses prong, the comparator's misconduct must be nearly identical to the plaintiff's in order 'to prevent courts from second-guessing employers' reasonable decisions and confusing apples with oranges." *Id.* at 1259.[4] Again, this appears to be a direct reversal of the Court's most recent pronouncement. However, just as the *Alexander* opinion seemed to ignore *Maniccia*, the *Silvera* opinion does not refer to the *Alexander* opinion's rejection of the "nearly identical standard."[5]

The story does not end there. On June 5, 2001, the Court issued an opinion authored by Circuit Judge Barkett in *Anderson v. Parker Communications, Inc.*, 2001 U.S.App. LEXIS 11737 (11th Cir. 2001), and stated: "in arguing that the conduct of comparator employees must be the same or nearly identical, [defendant] takes the same position rejected by this Court in *Alexander*."[6] Again, the Eleventh Circuit ignored its earlier statements to the contrary, making no reference to either *Maniccia* or *Silvera*.

Thus, at this point, the score is tied. Two opinions and six judges support each definition of the term "similarly situated." Ultimately, the Court will have to turn its attention to these irreconcilable cases and chose a road for future courts to travel. Like Frost's choice, that choice will make all the difference.

Epilogue: In an unpublished decision issued on July 31, 2001, the Eleventh Circuit recognized the existence of two definitions of the term "similarly situated," stating: "We acknowledge that there appears to be a split in the circuit whether the law requires similar misconduct or nearly identical misconduct." *Dowling v. Neumann*, Case No. 01-11343, Note 2 (11th Cir., July 31, 2001). Though the decision in *Dowling* was made without resolving this conflict, this concession suggests that the 11th Circuit is mindful of the issue, and raises the hope that it will be resolved in the months to come.

David H. Spalter *is a Senior Associate with the law firm of Christine D. Hanley & Associates, P.A., in West Palm Beach. The firm limits its practice to labor and employment law and litigation, representing employers, exclusively. Mr. Spalter received his J.D., cum laude, from the University of Miami School of Law.*

Endnotes:

[1] *The Road Not Taken*, Robert Frost (1936).

[2] Judges Edmondson and Restani (sitting by designation) were also on the *Maniccia* panel.

[3] Judges Anderson and Hancock (sitting by desingation) were also on the *Alexander* panel.

[4] Judges Roney and O'Kelley (sitting by designation) were also on the *Silvera* panel.

[5] Notably, the *Silvera* opinion does cite to *Alexander* with respect to another issue. 244 F.3d at 1261.

[6] Judges Hill and Kravitch were also on the *Anderson* panel.

CONTRACEPTION CONUNDRUM
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tain blood pressure or cholesterol levels, anorectics and preventive dental care.[6] However, the plan failed to provide for prescription contraceptives, including both oral contraceptives and injectible contraceptives.[7]

The Respondents defended their healthcare plan by asserting that the exclusion of prescription contraceptives did not distinguish between men and women and therefore was a legal, gender neutral exclusion.[8] The EEOC rejected Respondents' argument and on December 14, 2000, issued its determination finding that there was reasonable cause to believe that Respondents had engaged in unlawful employment practices violating Title VII, as amended by the PDA, by failing to offer insurance coverage for the cost of prescription contraceptive drugs and devices.[9] The EEOC's analysis focused primarily on the PDA.[10] It found that, based on Congress' failure to specifically exempt prescription contraceptives from protection under the PDA as it did abortion, the PDA covered prescriptive contraceptives. It then made a quantum leap, concluding that Congress' failure to provide such an exclusion was evidence of "Congress' clearly expressed legislative intent."[11]

The EEOC's decision immediately met with disapproval. Critics pointed out that the EEOC's authority to address substantive employee benefit plan regulations was "dubious," and that the EEOC failed to consider comparability of benefits in its investigation and analysis.[12] More specifically, critics pointed out that, under the plan that the EEOC found to be discriminatory, women were not denied any healthcare benefit that men received. However, with respect to the dubious nature of the EEOC's authority to review the benefit plan, the EEOC was required to address the charges filed by the Charging Parties, as a notice of right to sue is generally required in order to bring a legal action asserting violations of Title VII. And, although the EEOC may not be the best entity to address issues relating to substantive employee benefit plans, if the EEOC had refused to investigate or make a determination in this case, it would have impaired the Charging Parties' ability to bring lawsuits under Title VII, and inevitably would have subjected them to a successful motion for judgment based on their failure to meet with the administrative prerequisites for suit.

It was by choice that the EEOC failed to address comparability of benefits, as it recognized that only women have the physical ability bear children. If men cannot bear children, they have no physical need for prescription medications that prevent pregnancy. So, a denial of prescription contraceptives does not impact the likelihood that they will suffer from the physical condition called pregnancy. An employer's decision not to cover prescription contraceptives does not have any impact

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on their healthcare coverage.

The EEOC's determination spurred action in both the judicial and legislative branches of government. On January 22, 2001, Olympia J. Snow (R-ME), on behalf of herself and others, introduced the EPICC.[13] The EPICC proposes amending the Employee Retirement Income Security Act of 1974 ("ERISA") and the Public Health Service Act to prohibit a group health plan, and a health insurance issuer providing group coverage, from:

- excluding or restricting benefits for prescription contraceptive drugs, devices, and outpatient services if the plan provides benefits for other outpatient prescription drugs, devices, or outpatient services;
- denying eligibility based on use or potential use of such items or services;
- providing monetary payments or rebates to a covered individual to encourage acceptance of less than minimum protections available;
- penalizing, reducing, or limiting a professional's reimbursement because the professional prescribed such drugs or devices or provided such services; or
- providing incentives to a professional to induce the professional to withhold drugs, devices, or services.

Further, the EPICC proposes an amendment to the Public Health Service Act, which would apply the foregoing prohibitions to coverage offered in the individual market.[14]

Next, Jennifer Erickson, one of the two women who filed the aforementioned charges with the EEOC, filed suit in the United States District Court for the Western District of Washington asserting that the her employer's, Bartell Drug Company ("Bartell"), failure to provide health insurance coverage for prescription contraceptives constituted illegal sex discrimination.[15] Both parties filed motions for summary judgment. In its motion, Bartell asserted six reasons why its decision to exclude prescription contraceptive drugs and devises was not a violation of Title VII:

- treating contraceptives differently from other prescription drugs is reasonable in that contraceptives are voluntary, preventive, do not treat or prevent an illness or disease, and are not truly a "healthcare" issue;
- control of one's fertility is not truly a "pregnancy, childbirth, or related medical condition" as those terms are used in the PDA;
- employers must be permitted to control the costs of employment benefits by limiting the scope of coverage;
- the exclusion of all "family planning" drugs and devices is facially neutral;
- in the thirty-seven years that Title VII has been on the books, no court has found that excluding contraceptives constitutes sex discrimination; and
- this issue should be determined by the legislature, rather than the courts.[16]

The court responded to each of the employer's defenses and in doing so set forth the basis for its decision denying defendant's motion and granting the plaintiff's motion. First, the court found that although some distinctions could be drawn between prescription contraceptives and other types of drugs covered under Bartell's healthcare plan, none of those distinctions justified Bartell's exclusion.[17] As with other preventive prescription drugs, some which Bartell's plan covers, contraceptives help prevent unwanted physical changes. For instance, the plan covers prescription drugs designed to prevent high blood pressure, a naturally occurring condition. And, although being pregnant is a "natural" state, so too are many of the conditions for which the plan provides coverage for preventive prescription medications. For example, weight gain is a natural occurrence, yet, Bartell's plan provides for coverage of anorectics.[18] Further, pregnancy is not a natural condition that is desired by all women.[19]

Second, the court found that, regardless of whether prescription contraceptives fall within the definition of a "pregnancy, childbirth, or related medical condition" as those terms are used in the PDA, the legislative history of the PDA supports an interpretation of Title VII that would not allow the exclusion of drugs made solely for women from a generally comprehensive prescription plan.[20] After reviewing the legislative history of the PDA, the court determined that Congress "had no specific intent regarding coverage for prescription contraceptives.[21] The court noted that Congress, in specifically overruling *General Elec. Co. v. Gilbert*, 429 U.S. 125 (1976), interpreted Title VII as requiring employers to, not only recognize that there are sex-based differences between men and women, but also to "provide women-only benefits or otherwise incur additional expenses on behalf of women in order to treat the sexes the same."[22] The court determined that the true issue was not whether the PDA was intended to embrace prescription contraceptives but "whether the decision to exclude drugs made for women from a generally comprehensive prescription plan is sex based discrimination under Title VII, with or without the clarification provided by the PDA."[23]

As for Bartell's ability to control costs, the court acknowledged that Bartell could "cut benefits, raise deductibles, or otherwise alter coverage options to comply with budgetary constraints," as long as its method of curbing costs did not discriminate.[24] Similarly, the court rejected Bartell's argument that its exclusions were facially neutral, finding that the exclusion of prescription contraceptives "reduces the comprehensiveness of the coverage offered to female employees while leaving the coverage offered to male employees unchanged.[25] The court spent substantial time considering the relative comprehensiveness of coverage. Through this analysis, the court found that the Bartell's prescription contraceptive exclusion solely impacts the comprehensive coverage offered to women, thereby penalizing female employees. It determined that Bartell's plan was not neutral, as the plan balanced Bartell's "benefit books at the expense of its female employees."[26]

The court also rejected Bartell's argument that the thirty-seven (37) year absence of litigation relating to coverage for prescription contraceptives was relevant to its analysis, finding that this lack of litigation did not alter the fact that Erickson prop-

erly filed her lawsuit bringing the issue before the court and that it was "constitutionally required to rule on the issue before it."[27]

Next, the court rejected Bartell's assertion that, because Congress was considering legislative enactments that would address prescription contraceptives, the court was precluded from making a determination. The court pointed out that its role is to interpret existing federal statutory law: "Contrary to defendant's suggestion, it is the role of the judiciary, not the legislature, to interpret existing laws and determine if they apply to a particular set of facts."[28]

Ultimately, the court ruled that the exclusion of prescription contraceptives, which adversely impacts the comprehensiveness of healthcare coverage for women, was discriminatory and violated Title VII.[29] The court directed Bartell to provide coverage for "contraception-related services, including the initial visit to the prescribing physician and any follow-up visits or outpatient services, to the same extent, and on the same terms, as it offers coverage for other outpatient services."[30]

The *Erickson* court was the first to address the issue of whether the "selective exclusion of prescription contraceptives from [an employer's] generally comprehensive prescription plan constitutes discrimination on the basis of sex."[31] As of the date this article was submitted for publication, the decision, that such exclusions do constitute discrimination is the only reported decision addressing the issue and it has not been appealed. However, both parties are still actively involved in the development of the law relating to health insurance coverage of prescription contraceptives. [32]

On September 10, 2001, the Senate Committee on Health, Education, Labor and Pensions concluded its hearings on EPICC. Jennifer Erickson and a representative from Bartell Drug Company, along with representatives from the University of California in Los Angeles, Department of Obstetrics and Gynecology, American College of Obstetricians and Gynecologists, the U.S. Chamber of Commerce and the National Women's Law Center provided testimony regarding coverage of prescription contraceptives.[33] Since September 19, 2001, no action has been taken on this bill.

It is likely at some point in the future, that the *Erickson* precedent or the EPICC, if it becomes law, will face a constitutional challenge on the basis that requiring religious employers to cover prescription contraceptives burdens the religious freedoms guaranteed by the United States Constitution. The Women's Contraception Equity Act,[34] which like EPICC, requires employers providing insurance coverage for prescription medications to provide health care coverage for prescription contraceptives, was recently challenged by the Catholic Church. In *Catholic Charities of Sacramento, Inc. v. Superior Court of Sacramento Cal., et. al*, 2001 Cal. App. LEXIS 515 (Cal. Ct. App. July 2, 2001) the court denied the church's motion for a temporary injunction prohibiting enforcement of California's Women's Contraception Equity Act against religious organizations.[35] If *Catholic Charities* is any indication of how a First Amendment challenge to either *Erickson*'s precedent or EPPIC, it appears that such a challenge will be unsuccessful.

In the wake of the recent legal activity relating to employer coverage of prescription contraceptives, many health insurance providers and self-insured employers are already changing their health care plans to provide coverage for prescription contraceptives. These providers, weary of the possibility of "copy-cat" lawsuits, believe that the potential cost of covering these drugs outweighs the potential costs of litigating a discrimination lawsuit similar to *Erickson*.[36] Regardless, defense lawyers are suggesting that self-insured employers and other health insurance providers start evaluating their prescription drug benefits to determine whether or not they are being offered in a manner that provides equal comprehensive coverage to both sexes. If any self-insured employers or other health insurance provider determines that women are adversely affected by its plan's exclusions, it should begin assessing what, if any, changes it would have to make to ensure comprehensive coverage.

Jennifer Fowler-Hermes *is an associate with KUNKEL MILLER & HAMENT, representing management in employment related disputes. Ms. Fowler-Hermes received both her Bachelor of Arts (1994, with highest honors) and her Juris Doctor (1997) from the University of Florida.*

Endnotes:

[1] *See* S. 104, 107th Cong. (2001), Equity in Prescription Insurance and Contraception Coverage Act of 2001 ("EPICC").

[2] *Id*.

[3] *Catholic Charities of Sacramento, Inc. v. Superior Court of Sacramento Cal., et. al*, 2001 Cal. App. LEXIS 515 (Cal. Ct. App. July 2, 2001).

[4] Almost one half of all fee-for-service large group health plans fail to provide coverage for any form of prescription contraceptive. See *NWLC (National Women's Law Center) Urges Congress to Support Contraceptive Bill*, http://www.nwlc.org/details.cfm?id=880=newsroom, September 10, 2001.

[5] http://www.eeoc.gov/docs/decision-contraception.html (July 24, 2001).

[6] *Id*.

[7] *Id*.

[8] *Id*.

[9] *Id*.

[10] *Id*.

[11] *Id*.

[12] *See* Frank E. Brown, Esq., *EEOC Determines Denial of Coverage for Contraceptives Violates Title VII and PDA*, THE HILLSBOROUGH COUNTY BAR ASSOCIATION LAWYER, 11: 16, March 2001 at 22.

[13] *supra*.

[14] *See* S. 104, Bill Summary at http://thomas.loc.gov.

[15] *See Erickson v. The Bartell Drug Company*, 141 F.Supp. 2d 1266 (W.D.Wa. 2001).

[16] Id. at 1272.

[17] *Id*. at 1274.

[18] *See* http://www.eeoc.gov/docs/decision-contraception.html (July 24, 2001).

[19] *Erickson*, at 1274.

[20] *Id*.

[21] *Id*. at 1276.

[22] *Id*. at 1270.

[23] *Id*. at 1274.

[24] *Id*.

[25] *Id*. at 1275.

[26] *Id*.

[27] *Id*. at 1275.

[28] *Id*. at 1276 (*citing Marbury v. Madison*, 5 U.S. (1 Cranch)).

[29] *Id*.

[30] *Id*.

[31] *Id* at 1268.

[32] *See* Summary of Committee Meeting, Cong. Rec. D878 (daily ed. September 10, 2001).

[33] *Id*.

[34] Cal. Health & Safety Code § 1367.25 and Cal. Ins. Code § 10123.196.

[35] The Catholic Church prohibits artificial contraception.

[36] Plus, the National Women's Law Center has started a national campaign to educate women on this disparity of coverage and informing them of how to go about convincing their employers to change their health care coverage to include prescription contraceptives. See http://www.nwlc.org (September 19, 2001.)

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Angelia B. Froelich
The Florida Bar
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