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## Labor and Employment Law

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# Labor and Employment Law: 1994 Survey of Florida Law—A Confluence of Streams

Clement L. Hyland\*

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## I. INTRODUCTION

The purpose of this survey is to examine recent developments in labor and employment law in Florida. However, unlike other substantive areas surveyed in this volume, a survey of labor and employment law in the State of Florida requires a broader analysis than just Florida cases, regulations and statutes. Florida employment and labor law is a confluence of many streams including federal statutes and case law, federal and state governmental regulations, and written policies issued by various administrative agencies responsible for administering labor statutes.

A Florida employer or employee, whether public or private, faced with an employment question, must examine decisions from the United States Supreme Court, the Eleventh Circuit Court of Appeals, the Florida Supreme Court, Florida District Courts of Appeal, federal administrative agencies, such as the Equal Employment Opportunity Commission, Department of Labor, Occupational Safety and Health Administration, National Labor Relations Board, and state agencies such as Florida Department of Labor and Security, Florida Department of Unemployment Compensation, Florida Commission on Human Relations, and the Florida Division of Workers' Compensation. Additionally, labor and employment law not only encompasses the well-known area of discrimination, but also contract and negligence actions.

Accordingly, to help the reader effectively navigate the headwaters of these many and varied streams of law, this article will first provide an overview of the law that defines what labor and employment practice is today. It will then survey the recent developments that have added new currents to the sometimes murky water within this confluence. This article begins with this overview and survey, so that the reader will gain a clearer insight into the myriad of sources that comprise the area of labor and employment law. By discussing new developments, the hope is that the waters at the point of convergence will be clearer through an understanding of the many streams that make up "Florida" labor and employment practice.

## II. NAVIGATING THE STREAMS: AN OVERVIEW

### A. *Federal Statutes and Regulations*

One of the problems faced by employers in complying with the myriad of statutes and regulations governing employer/employee relations is that some overlap, some contradict each other on their faces, and some are applicable to certain employers and not to others. The following summarizes federal statutes and regulations demonstrating the problems.

#### 1. Age Discrimination Employment Act of 1967 ("ADEA")<sup>1</sup>

The ADEA prohibits age-based discrimination in various employment practices. It covers both private and governmental employers (federal and state), and affects employees or applicants for employment over forty years

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1. 29 U.S.C. §§ 621-634 (1988 & Supp. IV 1992). The Florida Civil Rights Act has no minimum age for purposes of age discrimination. *See* FLA. STAT. § 760.10(1)(a) (1993).

of age. The statute prohibits discrimination in all employment practices including hiring, termination, terms and conditions of employment, and reductions in force. The Act also prohibits an employer from retaliating against an employee for enforcement of his or her rights under the statute.<sup>2</sup>

## 2. Americans with Disabilities Act of 1990 (“ADA”)<sup>3</sup>

The ADA prohibits discrimination against any qualified individual with a disability with regard to any term, condition, or privilege of employment. This law sweeps very broadly. It covers both employees and applicants, and affects them in recruiting, hiring, promotion, tenure, demotion, termination, layoffs, pay rates, assignments, and other terms and conditions of employment.<sup>4</sup>

The Act simply is an extension of what began in 1973 with the Federal Rehabilitation Act<sup>5</sup> and continued with the passage, in 1988, of Title VII of the Civil Rights Act of 1964.<sup>6</sup> The ADA’s purpose, like other legislation, is to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities.

## 3. Civil Rights Act of 1866<sup>7</sup>

The Civil Rights Act of 1866 protects non-white citizens from discriminatory treatment. Section 1981 is part of the civil rights legislation enacted by Congress following passage of the Fourteenth Amendment to the United States Constitution and provides that all persons within the jurisdiction of the United States shall have the right to make and enforce contracts, sue, be parties, give evidence, and own property as is enjoyed by white citizens.<sup>8</sup>

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2. See 29 U.S.C. § 623(d) (1988 & Supp. IV 1992).

3. 42 U.S.C. §§ 12201-12213 (1988 & Supp. IV 1992) (effective July 26, 1992). The Act initially applied to all employers in industry affecting commerce who have 25 or more employees. *Id.* § 12111(5)(A) (Supp. IV 1992). Effective July 26, 1994, the statute applies to all employers who have 15 or more employees. *Id.*

4. *Id.* § 12112(a).

5. Pub. L. No. 93-112, 87 Stat. 357 (1973) (codified at 29 U.S.C. §§ 701-797 (1988 & Supp. IV 1992)).

6. 42 U.S.C. § 2000 (1988). The Florida Civil Rights Act prohibits discrimination on the basis of handicap. FLA. STAT. § 760.10(1)(a) (1993).

7. 42 U.S.C. § 1981 (1988).

8. *Id.*

#### 4. Civil Rights Act of 1991<sup>9</sup>

Congress passed the Civil Rights Act of 1991, expanding the rights of employees and providing for additional damages that might be recovered in a discrimination lawsuit. The Act provides for a jury trial and recovery of compensatory and punitive damages. It also sets limits between \$50,000 and \$300,000 maximum, depending upon the size of the employer.<sup>10</sup>

The Act also effectively overturned the Supreme Court's rulings in *Wards Cove Packing Co. v. Atonio*,<sup>11</sup> relating to disparate impact, and *Price Waterhouse v. Hopkins*,<sup>12</sup> involving a mixed-motive case. Many observers felt that these cases, along with others, limited employees' rights.

#### 5. Federal Civil Service<sup>13</sup>

Federal Civil Service employees are protected by this federal statute, which permits their removal from employment only for such cause as will promote the efficiency of the service.

#### 6. Consolidated Omnibus Budget Reconciliation Act ("COBRA")<sup>14</sup>

In 1985, Congress passed this Act requiring private and public employers of twenty or more people to provide employees with the opportunity to continue to receive, after the occurrence of certain events, the

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9. *Id.* § 1981(a) (Supp. III 1991).

10. *Id.* § 1981a(b)(3)(A)-(D) (Supp. IV 1992).

11. 490 U.S. 642 (1989). Section 2(2) of public law 102-166, entitled "Congressional Findings" states that the decision of the Supreme Court in *Wards Cove* has weakened the scope and effectiveness of Federal Civil Rights protection. Pub. L. No. 102-166, 105 Stat. 1071 (1991).

12. 490 U.S. 228 (1989). The Civil Rights Act departs from the reasoning set forth in *Price Waterhouse*, which held that a defendant could avoid liability if it was capable of demonstrating that it would have reached the same employment decision in the absence of any illegal discriminatory motives. Under section 107(b) of the Act, a defendant cannot escape liability even if demonstrated, through clear and convincing evidence, that other non-discriminatory reasons would have resulted in the adverse employment decision.

13. 5 U.S.C. §§ 7501-7543 (1988 & Supp. V 1993).

14. Pub. L. No. 99-272, 100 Stat. 82 (1986). COBRA is contained in both the Internal Revenue Code, 26 U.S.C. § 4980(b) (1988 & Supp. IV 1992), and in title 1, part VI of Employee Retirement Income Security Act ("ERISA"). See 29 U.S.C. §§ 1001-1461 (1988 & Supp. IV 1992). Pertinent sections of COBRA are codified at 29 U.S.C. §§ 1161-1168 (1988 & Supp. IV 1992); 26 U.S.C. §§ 162(k), 4980(b) (1988 & Supp. IV 1992); and 42 U.S.C. § 300bb-1 (1988 & Supp. IV 1992).

same group health coverage they received before the event.<sup>15</sup> COBRA amended Title 1 of the Employee Retirement Income Security Act (“ERISA”)<sup>16</sup> and placed certain requirements on a plan administrator to notify each covered employee of the availability of such coverage.<sup>17</sup>

### 7. Employee Retirement Income Security Act of 1974 (“ERISA”)<sup>18</sup>

ERISA applies to private employers who maintain employment benefit plans. It prohibits an employer from engaging in certain discriminatory practices against an employee when that person exercises any right to which he or she is entitled under ERISA. Covered employees generally have the right to fair and nondiscriminatory treatment under the benefit plans.

### 8. Equal Pay Act<sup>19</sup>

The Equal Pay Act was enacted in 1963 to prohibit sex-based discrimination in wages paid to employees, whether male or female.

### 9. Executive Order 11246<sup>20</sup>

Executive Order 11246 added certain protection for federal employees. The Order prohibits discrimination on the basis of race, color, religion, sex, or national origin and also applies to government contractors.<sup>21</sup>

### 10. Fair Labor Standards Act of 1938 (“FLSA”)<sup>22</sup>

FLSA sets minimum wage, overtime pay, equal pay, record keeping, and child labor standards for employees who are covered by the Act and who are not exempt from specific provisions. Congress originally enacted

15. 29 U.S.C. § 1132(c) (Supp. IV 1992).

16. 29 U.S.C. §§ 1001-1461 (1988 & Supp. IV 1992).

17. *Id.* § 1166.

18. *Id.* §§ 1001-1461 (1988 & Supp. IV 1992). Section 510 of ERISA prohibits an employer from discharging an employee because the employee makes a claim for benefits under a plan covered by title 1 of ERISA. *Id.* § 1140.

19. *Id.* § 206(a)-(f) (1988 & Supp. IV 1992). This Act is part of a section of the Fair Labor Standards Act. *See* 29 U.S.C. § 201 (1988 & Supp. IV 1992).

20. Guidelines are promulgated by the Office of Federal Contract Compliance with respect to the implementation and administration of Executive Order 11246. *See* Exec. Order No. 11,246, 30 Fed. Reg. 12,319 (1965).

21. *Id.*

22. 29 U.S.C. § 201 (1988 & Supp. IV 1992).



FLSA to facilitate economic recovery from the Great Depression. FLSA was designed to provide a maximum number of jobs and to ensure that all covered employees were paid a minimum, liveable wage. The Act was not intended to preempt state legislation providing additional benefits to employees.

### 11. Family and Medical Leave Act ("FMLA")<sup>23</sup>

Recent Federal legislation affording protection to employees came into effect on February 5, 1993, when President Clinton signed FMLA. The law requires employers of fifty or more employees to provide up to twelve weeks of leave to eligible employees for their own serious illnesses, to care for newborn or newly adopted children, or to care for seriously ill, close family members.<sup>24</sup>

### 12. Immigration Reform and Control Act<sup>25</sup>

This Act prohibits discrimination on account of national origin or citizenship status.

### 13. Labor Management Relations Act<sup>26</sup>

This Act addresses suits by and against labor organizations. Section 185(a) provides:

Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.<sup>27</sup>

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23. Pub. L. No. 103-03, § 405(b)(2), 107 Stat. 26 (1993) (to be codified at 29 U.S.C. § 2612).

24. *Id.* § 102(a)(1)(A)-(D).

25. 8 U.S.C. §§ 1101-1525 (1988 & Supp. V 1992).

26. 29 U.S.C. § 185 (1988).

27. *Id.* § 185(a).

#### 14. National Labor Relations Act<sup>28</sup>

The National Labor Relations Act was passed in 1935 and is administered by the National Labor Relations Board (“NLRB”). This statute prohibits discrimination based upon union membership, union activity, or other protected concerted activity.<sup>29</sup> Additionally, it protects employees from employer retaliation for filing charges or giving testimony under the Act.<sup>30</sup>

#### 15. Occupational Safety and Health Act of 1970 (“OSHA”)<sup>31</sup>

OSHA prohibits the discharge of employees in reprisal for exercising rights under the Act.

#### 16. Older Workers Benefit Protection Act of 1990 (“OWBPA”)<sup>32</sup>

The Age Discrimination and Employment Act was amended to provide protection for older workers. OWBPA applies to all employers covered by the ADEA and protects against age discrimination for early retirement incentive programs and severance pay set-offs meeting OWBPA’s requirements. It also addresses waivers and releases, affording older workers certain minimum criteria for their retirement or settlement of any claim.<sup>33</sup>

#### 17. Rail Safety and Improvement Act<sup>34</sup>

This Act prohibits railroad companies from discharging employees with respect to certain employment conditions, including retaliation, for making claims, testifying, or refusing to work under conditions reasonably believed to be dangerous.

28. *Id.* §§ 151-169.

29. *Id.* § 157. Additionally, the Act prohibits employers from questioning applicants or employees concerning their union and/or concerted activity. *Id.*

30. 29 U.S.C. § 158(a)(4) (1988).

31. *Id.* §§ 651-678 (1988 & Supp. IV 1992).

32. Pub. L. No. 101-433, 104 Stat. 978 (1990) (amending 29 U.S.C. §§ 623, 626, 630 (1988)).

33. *Id.* § 201, 104 Stat. 983.

34. 45 U.S.C. § 441(a) (1988).

### 18. Rehabilitation Act of 1973<sup>35</sup>

The Rehabilitation Act of 1973 prohibits federal contractors, and any program or activity receiving financial assistance, from discriminating against handicapped persons. Prior to the passage of the Americans with Disabilities Act, the Rehabilitation Act was the primary civil rights act for the disabled.

### 19. Title VII of the Civil Rights Act of 1964<sup>36</sup>

In a comprehensive piece of legislation, Congress passed Title VII of the Civil Rights Act of 1964. This statute applies to employers with fifteen or more employees, and prohibits discrimination in all employment practices, including hiring, job reductions, terminations, and retaliations, because of race, color, religion, sex, or national origin.

### 20. Vietnam Era Veteran's Readjustment Assistance Act of 1974<sup>37</sup>

The Vietnam Era Veteran's Readjustment Assistance Act of 1974 applies to all federal contractors and subcontractors, on contracts in excess of \$10,000, and prohibits discrimination in employment practices.

### 21. Worker Adjustment Retraining Notification Act ("WARN")<sup>38</sup>

In WARN, Congress provided certain protection for employees, with respect to plant closings and mass layoffs. It applies to employers with 100 or more employees, and requires that an employer provide sixty days advance notice, subject to certain exceptions.<sup>39</sup>

35. Pub. L. No. 93-112, 87 Stat. 357 (codified at 29 U.S.C. §§ 701-796(f) (1988)). Amendments to the Rehabilitation Act of 1973 changed sections of the Act by inserting the provision that disability does not include an individual who is currently engaging in the illegal use of drugs. 29 U.S.C. § 706(c)(i) (Supp. II 1990).

36. 42 U.S.C. §§ 2000a-2000n (1988). Title VII is administered and enforced by the Equal Employment Opportunity Commission ("EEOC"). *Id.* § 2000e. Some courts have held that a no-cause determination by the EEOC may be admitted into evidence in a trial on the merits of the individual claim of discrimination. *See Eason v. Fleming Co.*, 4 F.3d 989 (5th Cir. 1993).

37. 38 U.S.C. §§ 2011-2014 (1988).

38. 29 U.S.C. §§ 2101-2109 (1988).

39. *Id.* § 2102(a)-(b).

## 22. Federal Retaliation Statutes

In addition to the statutes above, there are a number of statutes dealing specifically with individual aspects of discrimination. Primarily, these statutes prohibit retaliation for either filing charges, testifying at proceedings, or complaining about certain working conditions.<sup>40</sup>

### B. *Florida Legislation*

The following Florida statutes and regulations govern an employer/employee relationship and affect decision making.

#### 1. AIDS Legislation

In 1988, Florida passed a comprehensive AIDS statute<sup>41</sup> prohibiting employers and co-employees from harassing or discriminating against an AIDS infected employee. Employers must allow employees with AIDS, or any of its related conditions, to continue to work and to reasonably

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40. The Asbestos School Hazard Detection and Control Act of 1980, 20 U.S.C. §§ 3601-3611 (Supp. III 1991), prohibits retaliation against employees who bring school asbestos problems to the public's attention; the Clean Air Act, 42 U.S.C. § 7622 (1988 & Supp. IV 1992), prohibits the discharge of employees who commence, cause to commence, or testify at proceedings against an employer for violation of the Act; the Energy Reorganization Act of 1974, 42 U.S.C. § 5851 (1988), prohibits the discharge of employees who assist, participate, or testify in any proceeding to carry out the purposes of the Atomic Energy Act of 1954; the Federal Employee's Liability Act, 45 U.S.C. §§ 51-60 (1988), prohibits retaliation for providing information regarding injury or death of employees; the Federal Mine Safety and Health Amendments Act, 30 U.S.C. §§ 801-962 (1988 & Supp. IV 1992), prohibits retaliation for commencing, testifying, or assisting in enforcement proceedings; the Federal Water Pollution Control Act Amendments of 1972, 33 U.S.C. §§ 1251-1387 (1988 & Supp. IV 1992), prohibit retaliation for commencing, testifying, or assisting in enforcement proceedings; the Hazardous Substances Release Act, 42 U.S.C. § 9610(a) (1988), prohibits retaliation for assisting in enforcement proceedings; the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. §§ 901-950 (1988), prohibits retaliation for seeking workers' compensation or for testifying in proceedings; the Migrant, Seasonal and Agricultural Worker Protection Act, 29 U.S.C. §§ 1801-1872 (1988 & Supp. IV 1992), prohibits retaliation against migrant workers who exercise their rights under the Act; and the Consumer Credit Protection Act, 15 U.S.C. § 1674(a) (1988), prohibits discharge of employees because of garnishment of wages for anyone's indebtedness. *See also* 28 U.S.C. § 1875 (1988) (protecting against discharge of permanent employees for serving on a federal jury); 38 U.S.C. § 2021 (1988) (protecting against discharge or discrimination based upon military service); 45 U.S.C. § 41 (1988) (protecting employees who refuse to work under conditions reasonably believed to be unsafe).

41. FLA. STAT. § 760.50 (1993).

accommodate these employees as long as they are medically able to perform and do not pose a danger to their own health and safety, or the health and safety of others.

## 2. Florida Constitution Article III<sup>42</sup>

Article III, paragraph 14, of the Florida Constitution authorizes the creation of local civil service law, affording public employees rights in employment.

## 3. Florida Civil Rights Act<sup>43</sup>

In 1992, Florida passed the Civil Rights Act, expanding the state's Human Relations Act of 1977, which prohibited employment discrimination on the basis of race, color, religion, sex, national origin, age, handicap, or marital status. The Civil Rights Act expanded the types of discriminatory practices that may be addressed by the Human Relations Act and the types of damages that can be awarded.

## 4. Equal Pay Act<sup>44</sup>

Florida also has enacted an Equal Pay Act which is strikingly similar to the federal statute. It differs in the time frames allowed for filing claims for unpaid wages, and it is not applicable to any employer that is subject to the Federal Fair Labor Standards Act.<sup>45</sup>

## 5. Florida Jury Service Exemption

Employees who are called for jury service are protected by Florida statutes prohibiting discharge or discrimination based upon jury service.<sup>46</sup>

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42. FLA. CONST. art. III, § 14.

43. FLA. STAT. §§ 760.01-.11 (1993).

44. *Id.* § 448.07. Section 725.07 of the *Florida Statutes* also prohibits discrimination on the basis of sex, marital status, or race in the areas of loaning money, granting credit, or providing equal pay for equal services performed. *Id.* § 725.07.

45. *Id.* § 448.07(4).

46. *Id.* § 40.271. Florida also prohibits the discharge of individuals who are called to active service in the Florida National Guard. FLA. STAT. § 250.482 (1993).

## 6. Public Employees Relations Act<sup>47</sup>

Public employees are protected in Florida under the Public Employees Relations Act. The Act protects the right of organization and representation, creates a Public Employees Relations Commission to assist in resolving disputes, and provides remedies against public employees who interrupt the operation and functions of the government. This policy provides:

- (1) Granting to public employees the right of organization and representation;
- (2) Requiring the state, local governments, and other political subdivisions to negotiate with bargaining agents duly certified to represent public employees;
- (3) Creating a Public Employees Relations Commission to assist in resolving disputes between public employees and public employers; and
- (4) Recognizing the constitutional prohibition against strikes by public employees and providing remedies for violations of such prohibition.<sup>48</sup>

## 7. Sickle Cell Trait Discrimination Statute<sup>49</sup>

This statute prohibits any denial or refusal to employ a person solely because he or she has the sickle cell trait.

## 8. Florida Toxic Substances Legislation<sup>50</sup>

Florida employees are also protected by statutes which prohibit discharge, discipline, or discrimination against employees who exercise their rights under the toxic substances law, including the requesting of information, testifying, planning to testify, or exercising any other right.

## 9. Voting Discrimination

Florida prohibits employers from discharging or threatening to discharge an employee based upon whether the individual votes or does not vote.<sup>51</sup>

47. *Id.* § 447.201.

48. *Id.* § 447.201(1)-(4).

49. *Id.* § 448.075.

50. *Id.* § 442.116.

51. FLA. STAT. § 104.081 (1993).

## 10. Whistle-blower's Act<sup>52</sup>

The Florida Whistle-blower's Act prohibits employers from taking retaliatory action against an employee who reports violations of law by prohibiting discharge, dismissal, discipline, suspension, transfer, demotion, withholding bonuses, and reduction in salary or benefits.

## 11. Florida Workers' Compensation Statute<sup>53</sup>

The Florida Workers' Compensation Statute prohibits the discharge of or retaliation against an employee based upon a valid claim or attempt to claim workers' compensation benefits. The Workers' Compensation Statute was significantly amended as of January 1, 1994.

### III. LABOR AND EMPLOYMENT AND THE LAW OF CONTRACTS

Historically, Florida has been known as an "at will" state. An "at will" employee is one who is employed, literally, at the will of the employer and who works without fixed employment. Absent a fixed contract for employment, an employee will not have an action for wrongful termination. However, once an employer and employee do enter into an employment contract, the issues that arise involve arbitration provisions, compensation, breaches of contract, fraud, and the applicability and enforceability of non-compete agreements.

#### A. Arbitrations

The United States Supreme Court, in *Gilmer v. Interstate/Johnson Lane Corp.*,<sup>54</sup> upheld an employer's right to compel arbitration of a statutory age discrimination claim where the employee had executed a security registration application requiring arbitration of employment related disputes. Since the Supreme Court's decision in *Gilmer*, various courts,<sup>55</sup> including Florida

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52. FLA. STAT. §§ 112.3187-31895 (1993). The Act was amended by the Government Efficiency Act of 1992. Subsection (3) and (4) of § 112.3187 describe the conduct which is prohibited by the Act. In the 1991 legislative session, the Whistle Blower protection was extended to private sector employees. See Act of June 7, 1991, 91-285, §§ 1, 4, 1991 Fla. Laws 2747, 2748, 2749 (codified at FLA. STAT. § 448.101 (1993)).

53. FLA. STAT. § 440.205 (1993).

54. 500 U.S. 20 (1991).

55. See, e.g., *Willis v. Dean Witter Reynolds, Inc.*, 948 F.2d 305, 307 (6th Cir. 1991) (holding that a discrimination claim is subject to an arbitration agreement); *Boogher v. Stifel, Nicholas & Co.*, 764 F. Supp. 574, 576 (E.D. Mo. 1991) (holding that an age discrimination

courts, have continued to expand the *Gilmer* rationale to require arbitration of other causes of action such as Title VII and state law claims.<sup>56</sup>

Following the ruling in *Gilmer*, the United States District Court for the Southern District of Florida issued an order requiring an employee to pursue arbitration based upon an agreement signed by the employee with her employer. In *Nazon v. Shearson Lehman Bros., Inc.*,<sup>57</sup> a stockbroker with Shearson Lehman filed a lawsuit based upon a Florida Human Rights Act and certain state law claims. Shearson Lehman filed a Motion to Compel Arbitration relying upon an agreement the employee had signed with Shearson Lehman entitled "Uniform Application for Securities Industry Registration or Transfer." The employee claimed that the arbitration was not applicable because Florida law claims are not subject to arbitration. The court rejected this argument and, following the Supreme Court's decision in *Gilmer*, compelled arbitration. The Southern District was following the lead of a number of state and federal courts around the country upholding agreements that require employees to submit employment disputes to arbitration.<sup>58</sup> Though most of the litigation in this area has been with stock brokerage firms, it would be expected that employers in other industries would start including arbitration provisions in their employment agreements.

In *Bender v. A.G. Edwards & Sons*,<sup>59</sup> the Eleventh Circuit held that the state law claims were subject to arbitration in cases of battery, intentional infliction of emotional distress, and negligent retention, and that the Title VII claim was also subject to compulsory arbitration with the plaintiff's employer (relying on *Gilmer* rationales).

In *Warrior & Gulf Navigation Co. v. United Steelworkers of America*,<sup>60</sup> an employee was terminated because of the results of a drug test. The case was sent to arbitration, and the arbitrator, in response to the union grievance, found that the employee had in fact violated his contract with the employer by a second positive drug test. However, the arbitrator reduced the discipline to a suspension because of the agreement's "just cause" provisions, which require the company to use just and equitable procedures in

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claim is subject to an arbitration clause).

56. *Id.* at 23. *Gilmer* left several issues unresolved, including whether arbitration agreements located in documents other than security registration applications are enforceable and whether employment claims under statutes other than the ADEA are arbitrable.

57. 832 F. Supp. 1540, 1541 (S.D. Fla. 1993).

58. *See, e.g., Mago v. Shearson Lehman Hutton, Inc.* 956 F.2d 932, 935 (9th Cir. 1992); *Alford v. Dean Witter Reynolds, Inc.*, 939 F.2d 229, 230 (5th Cir. 1991).

59. 971 F.2d 698, 700 (11th Cir. 1992).

60. 996 F.2d 279, 280 (11th Cir. 1993), *cert. denied*, 114 S. Ct. 1834 (1994).



termination decisions. The arbitrator found that the company had changed the rules of the game by requiring the second drug test.<sup>61</sup> The district court and the Eleventh Circuit disagreed with the arbitrator's finding and, based upon the clear language of the contract, found that the employer had the discretion to terminate an employee for a second positive drug test; thus, the arbitrator's remedy contradicted the express language of the agreement.<sup>62</sup>

At the state court level, in *Bachus & Stratton, Inc. v. Mann*,<sup>63</sup> an employee argued that her claims against the defendant alleging sexual discrimination, assault and battery, breach of contract, and a number of other tort claims, were not subject to arbitration. The Fourth District Court of Appeal disagreed and found that both her Title VII claims and her state tort claims were subject to arbitration.<sup>64</sup>

### B. *At Will*

Under the common law rule, when a term of employment is for an indefinite period of time, either party may terminate the employment relationship for any cause, or for no cause at all, without incurring liability. While many other jurisdictions have carved out exceptions to the "at will" doctrine, Florida has essentially resisted any changes. For example, in *Ross v. Twenty-Four Collection, Inc.*,<sup>65</sup> an employee filed an action for breach of a written contract. The court held that the breach of contract claim was not actionable as a matter of law because it was based on a contract of employment that did not provide for a definite term of employment and was, therefore, terminable at will.<sup>66</sup>

In *Lozano v. Marriott Corp.*,<sup>67</sup> the United States District Court for the Middle District of Florida upheld the principle that a contract for employment of indefinite duration is terminable at the will of either party and as such, an action for wrongful termination will not lie. In *Lozano*, an employee alleged that his discharge was in violation of the progressive discipline policy in the employer's handbook.<sup>68</sup> The court rejected this theory and dismissed the case based on applicable Florida law. It is

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61. *Id.*

62. *Id.* at 281.

63. 639 So. 2d 35 (Fla. 4th Dist. Ct. App. 1994).

64. *Id.* at 37.

65. 617 So. 2d 428 (Fla. 3d Dist. Ct. App. 1993).

66. *Id.* at 428.

67. 844 F. Supp. 740, 742 (M.D. Fla. 1994).

68. *Id.*

doubtful that these attempts to make inroads into this doctrine will meet with much success in the near future. Yet, the theory in *Lozano* is not without merit.

### C. *Contract Action*

In *Weisfeld v. Peterseil School Corp.*,<sup>69</sup> the Third District Court of Appeal reversed a judgment entered in favor of a private school on a breach of employment contract claim brought by a former teacher. The teacher, Ms. Weisfeld, signed an employment contract and subsequently received an offer to teach in the Dade County school system. She discussed the matter with the headmaster of the private school, who, following the discussion, called the Dade County School. As a result, the Dade County job offer was withdrawn. The headmaster then interviewed and hired a replacement art teacher and fired Ms. Weisfeld. Dade County filled the position it had offered Weisfeld and, as a result, she had no job.<sup>70</sup>

The Third District held that the headmaster, by contacting Dade County, had acted within proper grounds to protect the school's contract. However, once the headmaster caused Dade County to withdraw its job offer, the school was obligated to allow Ms. Weisfeld to perform her original contract. Thus, because the private school was estopped from terminating Ms. Weisfeld, the school breached its contract.<sup>71</sup>

In *Warshall v. Price*,<sup>72</sup> a cardiologist, employed by a fellow doctor, brought an action against the doctor for bonuses. The doctor counterclaimed for conversion and civil theft of his patient list. The Fourth District Court of Appeal held that the doctor was denied the benefit of this confidential patient list when the cardiologist took a copy from the doctor's computer and thus, an action for conversion was appropriate.<sup>73</sup>

### D. *Fraud*

Florida's Second District Court, in *Wilson v. Equitable Life Assurance Society of the United States*,<sup>74</sup> was faced with the issue of whether an em-

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69. 623 So. 2d 515, 517 (Fla. 3d Dist. Ct. App. 1993).

70. *Id.* at 516.

71. *Id.* at 517.

72. 629 So. 2d 903, 904 (Fla. 4th Dist. Ct. App. 1993).

73. *Id.* at 905. The Fourth District Court of Appeal noted that there was no applicable Florida case law and relied upon the case of *Conant v. Karris*, 520 N.E.2d 757 (Ill. App. Ct. 1987). *Id.* at 905 n.4.

74. 622 So. 2d 25, 27 (Fla. 2d Dist. Ct. App. 1993).

ployee can allege fraud when there is a merger clause in an employment contract. An insurance agent brought suit against an insurance company and its regional manager, claiming they fraudulently induced him into resigning from his employment as a public school teacher to become an insurance agent. The trial court granted summary judgment for the defendant because it found a merger clause in the employment contract. The court reasoned that the employee could not justifiably rely on any promises because of the merger agreement.<sup>75</sup>

The Second District reversed and remanded, finding that allegations of fraud may be introduced into evidence to prove fraud, notwithstanding the presence of a merger clause in a related contract. The court found that the case of *Nobles v. Citizens Mortgage Corp.*<sup>76</sup> was the controlling authority and that the trial court had improperly applied the case of *Saunders Leasing System, Inc. v. Gulf Central Distribution Center, Inc.*<sup>77</sup>

### E. Non-Compete Agreements

One of the main issues relating to contracts between an employer and an employee that is litigated extensively in Florida is non-compete agreements. In 1953, Florida enacted section 542.33 of the *Florida Statutes*, which basically prohibits an employee from engaging in a similar business or soliciting his or her own customers if the employment contract contains a specific non-compete clause.<sup>78</sup> In 1990, the Florida Legislature amended the statute, requiring evidence of irreparable injury and made available a defense of unreasonableness in a general sense, rather than the heretofore limited defenses of unreasonableness as to time and area.<sup>79</sup>

75. *Id.* at 28.

76. 479 So. 2d 822 (Fla. 2d Dist. Ct. App. 1985). In *Nobles*, the court applied the rule that alleged fraudulent misrepresentations may be introduced into evidence to prove fraud notwithstanding a merger clause in a related contract. *Id.* at 822.

77. 513 So. 2d 1303 (Fla. 2d Dist. Ct. App. 1987), *review denied*, 520 So. 2d 584 (1988).

78. See FLA. STAT. § 542.33 (1993). Common law contracts and restraint of trade (including non-competes) were not favored and Florida, in derogation of the common law, enacted § 542.33, entitled "Contracts in restraint of trade valid." *Id.* § 542.33(2)(a) (effective June 28, 1990). The 1990 amendment made a substantial change in the law by requiring evidence of irreparable injury. *Id.*

79. *Id.* § 542.33. For a discussion of the statute concerning non-compete agreements, see Kendall B. Coffey, *Non compete Agreements by the Former Employee: A Florida Law Survey and Analysis*, 8 FLA. ST. U. L. REV. 727 (1980). For discussion of the 1990 statutory amendment, see Kendall B. Coffey & Thomas F. Nealon III, *Non compete Agreements Under Florida Law: A Retrospective and a Requiem?*, 19 FLA. ST. U. L. REV. 1105 (1992).

The Fifth District Court of Appeal addressed the new amendment in *Jewett Orthopaedic Clinic, P.A. v. White*.<sup>80</sup> Jewett Orthopaedic Clinic appealed a final declaratory judgment that held that a covenant not to compete executed by one of its physician's shareholders is unenforceable. The trial court apparently grounded its decision whether Dr. White's opening a competing practice would be unfair.<sup>81</sup>

The Fifth District reversed and held that the controlling question was not whether allowing the competing practice would be unfair, but rather, how the provisions of section 542.33 applied. The court stated that the amended statute did not prohibit all agreements restricting subsequent employment by physicians, and that the clinic had necessary legitimate business interests to be protected by enforcement of the covenant. The court reversed the trial court's finding, and remanded the case.<sup>82</sup>

In analyzing the 1990 amendment, the *Jewett* court found that an employer would have to offer evidence of actual harm not readily, accurately calculated or compensated by money damages. The employer would also have to establish that the covenant he or she seeks to enforce does not threaten the health, safety, or welfare of the public, and under all relevant circumstances is reasonable.

In *Coastal Computer Corp. v. Team Management Systems, Inc.*,<sup>83</sup> the court held that an employment agreement providing that a violation of a non-compete clause could result in forfeiture of remaining settlement benefits. This, however, was not an exclusive remedy. In the absence of an exclusive, stipulated remedy set forth in the agreement, the court found a party may elect to pursue any remedy that the law affords, which includes enjoining the enforcement of a non-compete agreement.<sup>84</sup>

#### IV. EMPLOYER LIABILITY TO THIRD PARTIES

In addition to responsibilities and resulting liabilities to its own employees, an employer may also face liability to third parties as a result of an employee's actions or inactions. In order to find a deep pocket in terms of contract or tort actions, many attorneys file claims not only against an employee, but also against the employer. An employer may face claims by

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80. 629 So. 2d 922 (Fla. 5th Dist. Ct. App. 1993).

81. *Id.* at 924.

82. *Id.* at 925.

83. 624 So. 2d 352, 353 (Fla. 2d Dist. Ct. App. 1993).

84. *Id.*

both employees and third parties with respect to negligent hiring, retention, and supervision.

#### A. *Negligent Hiring, Retention, and Supervision*

An employer may face liability for injuries or damages to a third party as a result of the actions of an employee. Plaintiffs may bring claims of negligence for the hiring, retention, and supervision of an employee. Both employees and third parties are asserting negligent hiring, retention, and supervision claims in an attempt to hold employers liable for the assaults and sexual harassment by employees in the work place (i.e. finding the deep pocket).

In *Byrd v. Richardson-Greenshields Securities, Inc.*,<sup>85</sup> the Florida Supreme Court recognized that a female plaintiff, who alleged repeated touching and verbal sexual advances by her supervisor, had stated a viable case for liability in negligent supervision, hiring, or retention.

In *Williams v. Feather Sound, Inc.*,<sup>86</sup> the theory was that the employer knew of the particular employee's propensity to engage in conduct that could endanger co-employees and yet failed to address this conduct. The court recognized the basic rule that an employer is liable for the willful torts of his employee committed against third persons if the employer knew or should have known that the employee was a threat to others.<sup>87</sup>

Likewise, in *Nuta v. Genders*,<sup>88</sup> the plaintiff sued a boatyard owner for injuries he received when a security guard struck him in the head with an iron bar. The court found that there was sufficient evidence to support a jury's finding of negligent hiring or retaining of the security guard. The evidence apparently showed that the security guard had threatened the plaintiff two months earlier and had been investigated for his involvement in another earlier assault. It is clear in this case that there was sufficient evidence indicating that the employer knew of the employee's prior conduct or propensity to engage in certain actions, and the employer could therefore be held liable.<sup>89</sup>

In *Spancrete, Inc. v. Ronald E. Frazier & Associates, P.A.*,<sup>90</sup> a subcontractor on a community college construction project brought an action

85. 552 So. 2d 1099, 1100 (Fla. 1989).

86. 386 So. 2d 1238 (Fla. 2d Dist. Ct. App. 1980), *review denied*, 392 So. 2d 1374 (1981).

87. *Id.* at 1239-40.

88. 617 So. 2d 329, 330 (Fla. 3d Dist. Ct. App. 1993).

89. *Id.* at 331.

90. 630 So. 2d 1197 (Fla. 3d Dist. Ct. App. 1994).

against a consultant architect for injuries incurred as a result of negligent supervision. The court found that a supervising architect has no liability to a subcontractor and that a duty of care is only owed by a supervising architect to a general contractor.<sup>91</sup>

The Fifth District, in *Winn Dixie Stores, Inc. v. Harris*,<sup>92</sup> considered a claim that Winn Dixie was negligent in instructing one of its employees on how to deal with a suspected trespasser. Winn Dixie had a policy of hiring only trained police officers and the court found that it could not “be faulted for assuming such an officer would know how to detain trespassers.”<sup>93</sup> The court also noted that there was no evidence in the case of any prior misconduct by his officer. The court said that the test is one of reasonableness, and it is simply unreasonable, as a matter of law, to require Winn-Dixie to retrain already trained police officers in the law of arrest and detention.

This author expects that employers will see more and more cases dealing with negligent hiring, retention, and supervision as attorneys are looking more and more for the deep pocket.

#### B. *Liability to Employees of Independent Contractors*

The Fourth District Court of Appeal, in *St. Lucie Harvesting & Caretaking Corp. v. Cervantes*,<sup>94</sup> considered the issue of whether or not a grove owner was liable to the employee of an independent contractor hired to harvest the grove owner’s fruit. The employee was injured while allegedly using his employer’s defective equipment. The plaintiff charged that the grove owners, in exercising direction and control over the manner in which they performed their job, were negligent, thus causing the injuries.

The court noted, as a general rule, that a person who hires an independent contractor is not liable for injuries sustained by employees of the independent contractor. The court cited an exception, however, in *Conklin v. Cohen*,<sup>95</sup> which held that if an “owner actively participates ‘to the extent that he directly influences the manner in which the work is performed’ and negligently creates or allows a dangerous condition to exist resulting in injury to the employee of the independent contractor[,]” the employer may

91. *Id.* at 1198.

92. 620 So. 2d 1032 (Fla. 5th Dist. Ct. App. 1993).

93. *Id.* at 1032.

94. 639 So. 2d 37 (Fla. 4th Dist. Ct. App. 1994).

95. 287 So. 2d 56, 60 (Fla. 1973).

be liable.<sup>96</sup> In this particular case, the Fourth District did not find the employers within the *Conklin* exception.

### C. Punitive Damages

Employers constantly fear vicarious liability for an employee's outrageous conduct since a jury could award punitive damages for that employee's actions. In one of the more interesting and noteworthy decisions of the last year, the Fourth District in *Carroll Air Systems, Inc. v. Greenbaum*<sup>97</sup> affirmed a judgment against an employer for \$85,000 in compensatory damages and \$800,000 in punitive damages for the wrongful death of the plaintiff's son, caused by the drunk driving of a Carroll Air employee.<sup>98</sup> The court found it significant that the employee became drunk while on the job. He was at a meeting, where he paid for the drinks from an expense account. There was evidence that the employee was slurring his words while company officers were present.

The court noted there were cogent policy reasons for fixing liability on the employer for injuries to third persons in cases like *Carroll Air* and noted that "[t]he law now recognizes that the entire subject of torts is a reflection of social policies which fix financial responsibility for harm done."<sup>99</sup> The *Carroll* court further noted that "the underlying philosophy which allows a plaintiff to hold an employer liable for an employee's negligent acts is a deeply rooted sentiment that a business enterprise should not be able to disclaim responsibility for accidents which may fairly be said to be the result of its activity."<sup>100</sup>

In *Crown Eurocars, Inc. v. Schropp*,<sup>101</sup> a customer who was dissatisfied with his new automobile brought an action in fraud against the automobile dealer and the dealer's employee. The Second District held that there

96. *St. Lucie*, 639 So. 2d at 39 (quoting *Conklin*, 287 So. 2d at 60).

97. 629 So. 2d 914, 917 (Fla. 4th Dist. Ct. App. 1993). The court in *Carroll Air* noted that "[c]ourts across the country are divided on the issue of whether an employer is liable for injuries to third parties under similar circumstances." *Id.* at 916.

98. *Id.* at 917.

99. *Id.* at 916 (quoting *Harris v. Trojan Fireworks Co.*, 174 Cal. Rptr. 452 (Ct. App. 1981)).

100. *Id.* at 916-17.

101. 636 So. 2d 30 (Fla. 2d Dist. Ct. App. 1993). The court in *Crown Eurocars* analyzed the case under *Winn Dixie Stores, Inc. v. Robinson*, 472 So. 2d 722 (Fla. 1985) (discussing managing agent) and *Mercury Motors Express, Inc. v. Smith*, 393 So. 2d 545 (Fla. 1981), and concluded that under any analysis there were no grounds for punitive damages against the employer. *Crown Eurocars*, 636 So. 2d at 35.

was sufficient evidence to support a compensatory damage award on the fraud claim, but the dealer could not be held liable for punitive damages. The court found the exoneration of the employee from an award of punitive damages precluded the assessment of punitive damages against the employer absent any evidence that the employer itself behaved outrageously.<sup>102</sup>

## V. FEDERAL STATUTES, REGULATIONS, AND CASE LAW

Federal statutes, regulations, and case law have a major impact on employer/employee relations in Florida. Cases decided by the Eleventh Circuit Court of Appeals for states other than Florida, and decisions of the United States Supreme Court may have as much impact on employer/employee relations as a decision by either a Florida state or federal court.

### A. *Age Discrimination in Employment Act ("ADEA")*

In one of the more recent significant decisions, the United States Supreme Court in *Hazen Paper Co. v. Biggins*<sup>103</sup> addressed the issue of the standard of proof in a disparate treatment case. In *Hazen*, the plaintiff was fired a few weeks before reaching the ten-year vesting level in a pension plan. The Court first reviewed conflicting lower court cases concerning whether firing someone to avoid a pension, to save salary costs, or because of seniority, violates the ADEA. The Court then stated:

We now clarify that there is no disparate treatment under the ADEA when the factor motivating the employer is some feature other than the employee's age . . . [w]hatever the employer's decision making process, a disparate treatment claim cannot succeed unless the employee's protected trait actually played a role in that process and had a determinative influence on the outcome . . . . It is the very essence of age discrimination for an older employee to be fired because the employer believes that productivity and competence decline with old age.<sup>104</sup>

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102. *Id.* at 36.

103. 113 S. Ct. 1701, 1703 (1993). In *Anderson v. Baxter Healthcare Corp.*, 13 F.3d 1120, 1125-26 (7th Cir. 1994), the court adopted the reasoning of *Hazen* and found that discharging an employee solely to reduce salary cost is not age discrimination under the ADEA.

104. *Hazen Paper Co.*, 113 S. Ct. at 1705-06. The Court noted that it did not mean to suggest that an employer could lawfully fire an employee in order to prevent his pension benefits from vesting. This would be a violation under § 510 of ERISA. *Id.* at 1707.



In *Hazen*, the Court also reemphasized the distinction between willful and non-willful violations of the ADEA. In order to show willfulness, there is no requirement that the conduct be outrageous. The Court stated that an employer would not be liable for liquidated damages if it incorrectly, but in good faith, believed that its age-based decision was permitted by the ADEA.

The Eleventh Circuit in *Sturniolo v. Sheaffer, Eaton, Inc.*<sup>105</sup> addressed the issue of whether a complaint under the ADEA was barred as being untimely. The employee was told, at the time of the discharge, that his position was being eliminated to obtain financial savings. He later learned that it was a discharge and he was replaced by a younger person. The Eleventh Circuit held that the time period for filing an age discrimination charge with the EEOC was tolled until the terminated individual learned or should have learned of the fact that he was being replaced by a younger person.<sup>106</sup> Mere suspicion of age discrimination is not sufficient to start the running of the statute.

In *Perkie v. Group Technologies, Inc.*,<sup>107</sup> Judge Kovachevich of the United States District Court for the Middle District of Florida, discussed the various burdens of proof required in a reduction of force case where the plaintiffs allege age and sex discrimination. The defendant in *Perkie* claimed that the ADEA did not allow for punitive damages. Judge Kovachevich noted that the Eleventh Circuit, as well as a number of other jurisdictions, allows plaintiffs to claim appropriate punitive damages under the ADEA.<sup>108</sup>

One interesting state court case also addressed issues under the ADEA. In *Bolves v. Hullinger*,<sup>109</sup> Florida's Fifth District Court of Appeal addressed a malpractice claim alleging that the plaintiff's former attorneys negligently failed to timely file a federal age discrimination suit against the plaintiff's former employer. The court looked at the merits of the ADEA claim to determine whether or not there was any malpractice. The jury had found that there was negligence in failing to timely file the ADEA claim, but the Fifth District Court of Appeal reversed.<sup>110</sup>

The employee's evidence showed that the violation was willful. However, it also showed that the decision to fire him was made quickly, and

105. 15 F.3d 1023 (11th Cir. 1994).

106. *Id.* at 1026.

107. 845 F. Supp. 852, 856-58 (M.D. Fla. 1994).

108. *Id.* at 858; *see also* *Wilson v. S & L Acquisition Co., L.P.*, 940 F.2d 1429 (11th Cir. 1991).

109. 629 So. 2d 198, 201 (Fla. 5th Dist. Ct. App. 1993).

110. *Id.* at 200.

one of the employers admitted that the procedures in the personnel manual for termination were not followed. Additionally, the personnel office was not contacted and neither of the employee's supervisors ever considered the ADEA when terminating the employee. The court noted the fact that the supervisor made a pure business decision, necessitated by corporate organization, was never rebutted. Citing federal case law, the Fifth District Court found that "[r]eorganization of a business and the elimination of an older employee based on the employee's poor performance relative to younger peers is a nondiscriminatory basis for discharge . . . ."<sup>111</sup> In this case, the court found that any alleged negligence in allowing the statute of limitations to expire in the federal claim did not result in damage to Hullinger.<sup>112</sup>

In *Maleszewski v. United States*,<sup>113</sup> a taxpayer sued the United States seeking a refund of income taxes paid on money received in settlement of an employment discrimination lawsuit. The district court held that the settlement was not damages received on account of personal injuries and, under the Internal Revenue Code, it was not excluded from gross income. The ADEA does not redress tort-like personal injuries for purposes of exclusion. Judge Vinson, the United States district judge, noted in his decision that the result was contrary to that reached by three circuit courts of appeals.<sup>114</sup>

### B. *Americans with Disabilities Act ("ADA")*<sup>115</sup>

The ADA is an attempt to impose an all-inclusive ban on discrimination against disabled individuals in every sector of society, including: employment, public services, public accommodations, and services operated by private entities. Title I of the ADA became effective on July 26, 1992 for employers of twenty-five or more employees and was amended on July 26, 1994 to bring employers with fifteen to twenty-four employees within its purview.<sup>116</sup> The Equal Employment Opportunity Commission ("EEOC-") has enacted regulations interpreting the ADA.<sup>117</sup>

111. *Id.* at 201.

112. *Id.*

113. 827 F. Supp. 1553, 1554 (N.D. Fla. 1993).

114. *Id.* at 1557. *See, e.g.,* Rickel v. Comm'r of Internal Revenue, 900 F.2d 655 (3d Cir. 1990) (holding that ADEA action is excusable under § 104(b)(2)); Pistillo v. Comm'r of Internal Revenue, 912 F.2d 145 (6th Cir. 1990); Redfield v. Insurance Co. of N. Am., 940 F.2d 542 (9th Cir. 1991).

115. 42 U.S.C. §§ 12101-12213 (1988 & Supp. IV 1992).

116. *Id.* § 12111(5).

117. 29 C.F.R. § 1630.1-16 (1993).

The EEOC recently issued an informative guide to the field of pre-employment disability related inquiries and medical examinations under the ADA.<sup>118</sup> The guide lists common acceptable and unacceptable pre-offer inquiries and examinations.<sup>119</sup>

In one of the more interesting decisions affecting disabled individuals, the First Circuit Court of Appeals addressed the issue of whether obesity is a disability. In *Cook v. State of Rhode Island Department of Mental Health, Retardation and Hospitals*,<sup>120</sup> the court held that discrimination based on an employer's determination that the job applicant is morbidly obese violates the Rehabilitation Act. The court endorsed the view stated by the EEOC in its amicus brief that obesity qualifies as a disability if it constitutes an impairment, and if it is of such a duration that it substantially limits a life activity, or is regard as so limiting. The EEOC's interpretive guidelines on the ADA state that excess weight may be classified as an impairment if it either falls outside the normal range (for example, morbid obesity) or falls within a normal range, but is a product of a physiological disorder. Thus, obesity could be a disability under the ADA and the Rehabilitation Act.

118. EEOC Enforcement Guidance on Pre-Employment Inquiries Under the Americans With Disabilities Act, No. 187 EEOC Compl. Man. (BNA) N: 2321 (May 19, 1994) [hereinafter EEOC Compliance Manual].

119. The following examples are inquiries which are not disability-related:

1. Can you perform the functions of this job (essential and/or marginal), with or without reasonable accommodation?
2. Please describe/demonstrate how you would perform these functions (essential and/or marginal).
3. Do you have a cold? Have you ever tried Tylenol for fever? How did you break your leg?
4. Can you meet the attendance requirements of this job? How many days did you take leave last year?
5. Do you illegally use drugs? Have you used illegal drugs in the last two years?
6. Do you have the required licenses to perform this job?
7. How much do you weigh? How tall are you? Do you regularly eat three meals per day?

The following examples *are* disability-related inquiries:

1. Do you have AIDS? Do you have asthma?
2. Do you have a disability which would interfere with your ability to perform the job?
3. How many days were you sick last year?
4. Have you ever filed for workers' compensation?
5. Have you ever been injured on the job?

*See id.*

120. 10 F.3d 17, 28 (1st Cir. 1993).

In *Kelsey v. University Club of Orlando, Inc.*,<sup>121</sup> Judge G. Kendall Sharp reversed a summary judgment for the plaintiff. A Florida man was fired from his job as a barber for the University Club of Orlando. Judge Sharp determined that he could not recover under the ADA because the University Club is a bona fide private club and thus exempt from the Act. The judge noted that the Orlando club did not allow guests unfettered use of its facilities, nor did the Orlando Club advertise its facilities to non-members or allow members to hold private parties during regular club hours. Judge Sharp noted that given the limited guest policy, the Orlando club is a private club.<sup>122</sup>

### C. *The Civil Rights Act of 1991*<sup>123</sup>

In 1991, Congress passed a compromise version of the Civil Rights Act of 1964. Section 3 of the Act outlines the purposes of the new Act, including the following:

(1) to provide appropriate remedies for intentional discrimination and unlawful harassment in the work place;

(2) to codify the concepts of "business necessity" and "job related" enunciated by the Supreme Court in *Griggs v. Duke Power Co.*, and in other Supreme Court decisions prior to *Wards Cove Packing Co. v. Atonio*;

(3) to confirm statutory authority and provide statutory guidelines for the adjudication of disparate impact suits under Title VII of the Civil Rights Act of 1964; and

(4) to respond to recent decisions of the Supreme Court by expanding the scope of relevant civil right statutes in order to provide adequate protection to victims of discrimination.<sup>124</sup>

Prior to the enactment of the Civil Rights Act, an employer could avoid liability for intentional discrimination if he or she established that he or she would have made the same decision without taking gender into account. However, the Act reversed the Supreme Court's holding in *Price Waterhouse v. Hopkins*<sup>125</sup> and now, once the complaining party demonstrates

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121. 845 F. Supp. 1526, 1531 (M.D. Fla. 1994).

122. *Id.* at 1529-30.

123. Pub. L. No. 102-166, 105 Stat. 1071 (1991).

124. *Id.* § 3, at 1071 (citations omitted).

125. 490 U.S. 228 (1989).

that sex was a motivating factor, the employer will lose even though he or she would have taken the same action without considering the unlawful factor.

Section 105 of the Act also rejected the Supreme Court's decision in *Wards Cove Packing Co. v. Atonio*.<sup>126</sup> Under section 105(a)(i)-(ii), a plaintiff can now establish disparate impact if:

(i) a complaining party demonstrates that a respondent uses a particular employment practice that causes a disparate impact on the basis of race, color, religion, sex, or national origin and the respondent fails to demonstrate that the challenged practice is job related for the position in question and consistent with business necessity; or

(ii) the complaining party makes a demonstration . . . [of an alternative employment practice] and the respondent refuses to adopt such alternative employment practice.<sup>127</sup>

The Civil Rights Act of 1991 also rejects the Supreme Court's holding in *EEOC v. Arabian-American Oil Co.*,<sup>128</sup> which held that Title VII does not apply to United States citizens employed by the United States outside the United States. Section 109 of the Act, however, specifically provides that, "[w]ith respect to employment in a foreign country, such term includes an individual who is a citizen of the United States."<sup>129</sup>

In *West Virginia University Hospitals, Inc. v. Casey*,<sup>130</sup> the United States Supreme Court considered the inclusion of expert fees within the definition of "reasonable attorney's fees" as contained in 42 U.S.C. § 1988. The Court held that fees for services rendered by experts in civil rights litigation may not be shifted to the losing party as part of a "reasonable attorney's fees" under § 1988, the Civil Rights Attorney's Fees Awards Act. Under the Civil Rights Act of 1991, section 118 specifically modifies section 1988 to include expert fees within the definition of attorney's fees in civil rights litigation.<sup>131</sup>

Possibly the most important change brought by the Civil Rights Act of 1991 is an individual's right to punitive and compensatory damages in cases of sex, religion, or disability discrimination. Section 102 of the new Act

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126. See Pub. L. No. 102-166, § 3, 105 Stat. at 1071; see also *supra* note 11 and accompanying text.

127. Pub. L. No. 102-166, § 105(a)(i)-(ii), 105 Stat. at 1071 (1991).

128. 499 U.S. 244, 255 (1991).

129. Pub. L. No. 102-166, § 109, 105 Stat. at 1077.

130. 499 U.S. 83, 85 (1991).

131. Pub. L. No. 102-166, § 103, 105 Stat. at 1077.

entitled "Damages in Cases of Intentional Discrimination in Employment" specifically allows compensatory and punitive damages to victims of sex, religion, and disability discrimination under Title VII, the Americans with Disabilities Act, and section 501 of the 1973 Rehabilitation Act. Previously, compensatory and punitive damages were available only to victims of race, national origin, or ethnic discrimination within the parameters of § 1981.

Additionally, the Act places certain limits upon the total amount of compensatory and punitive damages. Compensatory and punitive damages are allowed only in cases of intentional discrimination under the Civil Rights Act of 1991. In addition, the Act places certain limits upon the total amount of compensatory and punitive damages an individual may recover. The limitation includes a \$50,000 ceiling for employers of 100 or fewer employees; a ceiling of \$100,000 for employers of more than 100 but fewer than 201 employees; a ceiling of \$200,000 for employers of more than 200 but fewer than 501 employees; and a ceiling of \$300,000 for employers of more than 500 employees. These caps, however, do not apply to claims of race discrimination. In addition, the Act explicitly states that courts will be unable to inform juries of the monetary limitations during their deliberations on punitive and compensatory damages.<sup>132</sup>

In *Landgraf v. USI Film Products*,<sup>133</sup> and *Rivers v. Roadway Express, Inc.*,<sup>134</sup> the United States Supreme Court ruled that sections 101 and 102 of the Act do not apply retroactively to cases based on conduct occurring before enactment on November 21, 1991. The Court noted that where Congress fails to clearly indicate whether the key provisions of the Act should be retroactive, fundamental concerns about fairness and notice to defendants dictate prospective application only.

Section 102 provides for jury trial, and compensatory and punitive damages for claims brought under Title VII of the Civil Rights Act of 1964. In *Landgraf*, the Court held that provisions for punitive damages are not retroactive because such damages have features that are similar to criminal statutes and, therefore, raise serious constitutional questions about applying the law retroactively.<sup>135</sup> Similarly, the Court found that compensatory damages should not be retroactively applied because they increase liability for past conduct and affect employers' planning. The jury trial provision, alone, might have been retroactively applied, but since it was enacted in

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132. Pub. L. No. 102-166, 105 Stat. at 1071.

133. 114 S. Ct. 1483 (1994).

134. 114 S. Ct. 1510 (1994).

135. *Landgraf*, 114 S. Ct. at 1497.

conjunction with the new damages provisions, the Court found that it should be applied prospectively as well.<sup>136</sup>

In *Rivers*, the Court also held that section 101 of the Act does not apply to cases based on conduct that occurred prior to enactment.<sup>137</sup> Section 101 amended 42 U.S.C. § 1981 to permit plaintiffs to sue for discrimination occurring during all phases of the employment relationship, including termination. This section was added specifically to reverse the 1989 United States Supreme Court decision in *Patterson v. McLean Credit Union*.<sup>138</sup> The Court rejected the argument that section 101 of the Act merely restored a long-accepted interpretation of § 1981 and, therefore, was intended to be retroactive.<sup>139</sup>

#### D. *The Equal Pay Act ("EPA")*<sup>140</sup>

The EPA prohibits the payment of different wages to employees of opposite sexes when they perform equal work or hold jobs whose performance requires equal skill, effort, and responsibility and which are performed under similar working conditions.

In *Meeks v. Computer Associates International*,<sup>141</sup> the Eleventh Circuit Court of Appeals addressed a claim brought under the EPA for discrimination and retaliation under Title VII. The jury found that the defendant had violated the EPA and the district court held that it was bound by that jury finding. The Eleventh Circuit, however, found that the jury's finding of the EPA liability did not support a finding of Title VII discrimination liability absent the additional finding of intentional discrimination.<sup>142</sup>

#### E. *Employee Retirement Income Security Act ("ERISA")*

*Seaman v. Arvida Realty Sales*<sup>143</sup> is a case which addressed whether a salesperson's termination was actionable under ERISA in the Eleventh Circuit. In *Seaman*, the court held that a real estate company violated section 510 of ERISA when it terminated a salesperson in order to eliminate

136. *Id.* at 1483.

137. *Rivers*, 114 S. Ct. at 1519-20.

138. 491 U.S. 164 (1989).

139. *Rivers*, 114 S. Ct. at 1521-22.

140. 29 U.S.C. § 206(d)(1) (1990).

141. 15 F.3d 1013 (11th Cir. 1994).

142. *Id.* at 1019.

143. 985 F.2d 543 (11th Cir.), *cert. denied*, 114 S. Ct. 308 (1993).

the cost of certain plan benefits, despite the fact that such benefits were not yet vested under the plan.<sup>144</sup> In this case, Patricia Seaman was entitled to health insurance coverage and to participate in a 401(k) plan under her employment contract. She was offered a new contract which did not provide for such benefits. When she refused the offer, she was terminated. At the time of her discharge, her rights in the plan benefits had not vested. She alleged in her suit that the employer had violated section 510 of ERISA because she was terminated in order to eliminate the costs of providing health insurance coverage and contributions under the 401(k) plan.<sup>145</sup>

The district court dismissed the suit, but the Eleventh Circuit found that the employer had violated section 510 of ERISA and that its determination did not depend on whether or not the benefits were vested or contingent. Instead, the court noted that the proper inquiry is the purpose of the discharge.<sup>146</sup>

#### F. *The Family and Medical Leave Act of 1993 ("FMLA")*<sup>147</sup>

FMLA became effective on August 5, 1993, and covers private or public employers who employ fifty or more employees within a seventy-five mile radius of the employer's facility. The Act requires covered employers to provide eligible employees with an unpaid leave of up to twelve weeks in any twelve month period for a number of circumstances. These include birth, adoption, foster care of a child, care of a spouse, son, daughter or parent of the employee with a serious health condition, and a serious health condition of the employee which prevents the employee from performing the functions of his or her position. Upon return from leave, an employee is entitled to reinstatement to his or her previous position or a position with the equivalent pay and benefits. The Act also works in conjunction with existing federal and state laws prohibiting discrimination.<sup>148</sup>

One of the interesting issues raised by FMLA is its interrelationship with the ADA. There are certain differences between the two statutes, including who is a covered employer and employee. An employee may be

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144. *Id.* at 544.

145. *Id.*

146. *Id.*

147. 29 U.S.C. § 2612 (1990). On February 5, 1993, President Clinton signed the Family and Medical Leave Act of 1993. The ADA applies to all private employees with 15 or more employees, while the FMLA applies to employers with 50 or more employees within a 75 mile radius of the work site. Florida's workers' compensation law, with limited exceptions, applies to all public and private employees. See FLA. STAT. §§ 440.01-.60 (1993).

148. 29 U.S.C. § 2612 (1990).



covered by the ADA, but not by the FMLA. The Department of Labor is responsible for interpreting and enforcing FMLA, and is in the process of issuing regulations.

### G. *Procedural Issues*

In *Griffin v. Singletary*,<sup>149</sup> the court addressed the issue of the timely filing of charges of discrimination with the EEOC and held that individuals who had not filed timely charges of discrimination with the EEOC were not entitled to intervene as class representatives in a Title VII action.

### H. *Rehabilitation Act*<sup>150</sup>

Section 504 of the Rehabilitation Act of 1973 provides that a qualified handicapped employee cannot be excluded from derived benefits under any program or activity that receives federal financial assistance. The Eleventh Circuit in *Jackson v. Veteran's Administration*<sup>151</sup> held that to prove discrimination under the Rehabilitation Act,<sup>152</sup> the plaintiff must show that he or she: 1) is handicapped within the meaning of the Act and relevant regulations; 2) is otherwise qualified for the position in question; 3) worked for a program or activity that received federal financial assistance; and 4) was treated adversely solely because of his or her handicap.<sup>153</sup> In *Jackson*, the plaintiff claimed he had a disability caused by rheumatoid arthritis. The VA hospital fired him for excessive absences. The court held that he was not otherwise qualified because he failed to satisfy the presence requirement of the job, and the VA did not have a duty to accommodate his unpredictable absences.<sup>154</sup>

In *Waldrop v. Southern Co. Services, Inc.*,<sup>155</sup> the Eleventh Circuit Court of Appeals held that, when requested, a jury trial is constitutionally required under the Act.<sup>156</sup>

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149. 17 F.3d 356, 359-61 (11th Cir. 1994).

150. 29 U.S.C. § 701 (1988).

151. 22 F.3d 277 (11th Cir. 1994).

152. 29 U.S.C. § 701 (1988).

153. *Jackson*, 22 F.3d at 278.

154. *Id.*

155. 24 F.3d 152 (11th Cir. 1994).

156. *Id.* at 156.

## I. Title VII—Sexual Harassment

In one of the more significant decisions in the last year, the United States Supreme Court spoke for only the second time in ten years on the issue of sexual harassment in *Harris v. Forklift Systems, Inc.*<sup>157</sup> In this case, Teresa Harris, a female employee claimed that the president of the company insulted her because of her gender and made her the target of unwanted sexual innuendos. When she complained of his behavior, he expressed surprise and apologized. Within a month after she had closed a major deal with a customer, the president asked her, in front of her co-workers, whether or not she had promised sex to close the deal. Ms. Harris quit her employment that next day.<sup>158</sup>

The Supreme Court held that federal law with regard to sexual harassment does not require the establishment of any psychological harm.<sup>159</sup> The Court further stated that there was no single factor that makes a working environment hostile or abusive, rather the nature of the environment must be determined by looking at all of the circumstances, including such things as the frequency of discriminatory conduct, the severity of the conduct, whether it is physically threatening or humiliating, and whether it unreasonably interferes with an employee's work performance.<sup>160</sup>

The decision produced a broader standard for liability than in the past and should make it more difficult for employers to win at trial. However, the *Harris* decision left many questions unanswered, including whether the objective standard in hostile environment cases should be the reasonable person, the reasonable victim, or the reasonable woman standard. The Court used the reasonable person terminology.<sup>161</sup> It is not clear what the lower courts will do with this issue, given the Court's failure to address the question specifically. The Court also fails to specifically address if or how compensatory damages can be awarded and measured in the absence of proof of psychological injury.

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157. 114 S. Ct. 367 (1993).

158. *Id.* at 369.

159. *Id.* at 371.

160. *Id.* at 370-71.

161. *Id.* at 371.

The Equal Employment Opportunity Commission has published a guide with respect to its interpretation and implementation of the *Harris* decision.<sup>162</sup> The enforcement guide sent out to its field staff analyzes *Harris* and its effect on the Commission's investigations of charges involving harassment.

The EEOC has taken the position that *Harris* reaffirmed *Meritor v. Vincent*<sup>163</sup> and clarified, rather than altered, the elements necessary for proving hostile environment sexual harassment. The EEOC also noted that the Court's rejection of the psychological injury requirement was consistent with the Commission's policy. The EEOC stressed that the Court did not elaborate on the definition of a reasonable person in *Harris*, but advised investigators that they should continue to consider whether a reasonable person in the victim's circumstances would have found the alleged behavior to be hostile or abusive.<sup>164</sup>

In a pre-*Harris* decision, the United States District Court for the Southern District of Florida addressed issues involving a workplace romance. In *Ayers v. American Telephone & Telegraph Co.*,<sup>165</sup> the manager of a retail store brought a claim under the Civil Rights Act and ADEA alleging that her supervisor transferred her to a less lucrative store and transferred his paramour to a more desirable store. Gladys Ayers claimed the romantic relationship between her supervisor and her replacement was in violation of Title VII and the ADEA.

The district court held that the hiring of the supervisor's lover did not violate Title VII. Any coercion used in placing the manager in a more desirable store where the supervisor and that manager resumed a sexual relationship did not violate Title VII.<sup>166</sup> The court noted the EEOC's policy that Title VII does not prohibit preferential treatment based upon consensual romantic relationships.<sup>167</sup>

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162. EEOC ENFORCEMENT GUIDANCE NO. 915002.

163. 477 U.S. 57 (1986).

164. See 29 U.S.C. § 701 (1988).

165. 826 F. Supp. 443 (S.D. Fla. 1993).

166. *Id.* at 447.

167. *Id.* at 443.

### J. Title VII—Civil Rights Act of 1964

In *St. Mary's Honor Center v. Hicks*,<sup>168</sup> the United States Supreme Court addressed the issue of whether a trier of fact must find for the plaintiff when it only rejects employer's asserted reasons for discriminatory actions. The Supreme Court overturned the Eighth Circuit's decision and found specifically that the "trier of fact's rejection of [an] employer's asserted, legitimate, non-discriminatory reasons for its actions does not entitle [an] employee to judgment as [a] matter of law under *McDonnell Douglas Corp. v. Green* . . . ."<sup>169</sup>

The court reviewed its holdings on burden of proof set forth in *McDonnell Douglas* and *Texas Department of Community Affairs v. Burdine*<sup>170</sup> and noted that the ultimate question is whether the plaintiff proved that the defendant intentionally discriminated against the plaintiff because of race. The Court noted that the fact finder's disbelief of the defendant's justification together with the elements of a prima facie case of discrimination, would be sufficient to show intentional discrimination. However, while mere rejection of the defendant's proffered reasons may allow the trier of fact to infer intentional discrimination, it does not compel judgment for the plaintiff.<sup>171</sup>

The United States District Court for the Middle District of Florida decided *Roberts v. University of South Florida*.<sup>172</sup> The trial judge deter-

168. 113 S. Ct. 2742 (1993). In *Newton v. CBS, Inc.*, 841 F. Supp. 19 (D.D.C. 1994), the court denied a defendant's summary judgment motion in an ADEA termination case on the grounds that material facts remained in dispute as to whether the defendant's proffered explanation was protection. The plaintiff raised questions about the level of her qualifications compared to other employees and about an ambiguous comment made at the time of termination which could have been construed to be direct evidence of age animus. In *Anderson v. Baxter Healthcare Corp.*, 13 F.3d 1120 (7th Cir. 1994), the Seventh Circuit Court of Appeals found that false evidence of the employer's only proffered explanation automatically raised a material issue of fact as to discriminatory intent, thus precluding summary judgment and requiring a trial. *Id.*

169. *St. Mary's*, 113 S. Ct. at 2742-43 (quoting *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1993)). Here, the Court established an allocation of the burden of production in Title VII discriminatory treatment cases. The employee makes out a prima facie case of discrimination and the employer articulates a legitimate non-discriminatory reason for the challenged action. The plaintiff then tries to discredit that reason and establish that the reason is protection. *McDonnell Douglas*, 411 U.S. at 792.

170. 450 U.S. 248 (1981).

171. *St. Mary's*, 113 S. Ct. at 2755-56.

172. 63 Empl. Prac. Dec. (CCH) ¶ 42,778 (M.D. Fla. June 3, 1993).

mined that in 1988 the University of South Florida improperly paid a female employee less money than a black male employee. The court considered the remedies available under Title VII, and noted it was inclined to direct that the plaintiff be granted tenure at the university relying on opinions from the Third Circuit<sup>173</sup> and the Sixth Circuit.<sup>174</sup> However, the trial court declined to grant tenure, indicating an opportunity remained for the plaintiff to be awarded tenure by the university. At the time of the lawsuit, she had not yet been denied tenure.<sup>175</sup>

In *Patricia Thompson v. Haskell Co.*,<sup>176</sup> the District Court held that a supervisor could not be sued individually under Title VII for alleged sex discrimination. The court noted that the relief granted under Title VII is against the employer, not individual employees who violate the Act.

In *Watson v. Bally Manufacturing Corp.*,<sup>177</sup> a number of employees brought an action against an employer under Title VII, as well as state tort law. The employer argued that the allegations of improper transfer and verbal harassment occurred more than 300 days prior to the administrative filing of the charge, and were therefore barred. The court noted that an allegedly improper transfer from Ohio to Florida is not the type of act that would appear to alert an employee to his duty to assert his rights and thus, a motion to dismiss was denied.

In *Griffin v. Singletary*,<sup>178</sup> the court held that the pending Title VII class action tolled the need for class members to file an administrative charge, when class certification is vacated because the representative failed to timely file with the Equal Employment Opportunity Commission.<sup>179</sup> However, the court further noted that the period is tolled for those class members wishing to bring individual suits, but is not tolled for members wishing to bring class action suits.

In *Williams v. City of Montgomery*,<sup>180</sup> the court faced a number of issues including whether or not the city of Montgomery and the Montgomery City/County Personnel Board were employers for purposes of Title VII. The evidence in the case demonstrated that the Board exercised certain duties traditionally reserved to an employer, such as establishing a pay plan,

173. See *Kunda v. Mullenberg College*, 621 F.2d 532 (3d Cir. 1980).

174. See *Gutzwuller v. Fenik*, 860 F.2d 1317 (6th Cir. 1988).

175. *Roberts*, 63 Empl. Prac. Dec. (CCH) ¶ 42,778.

176. 64 Empl. Prac. Dec. (CCH) ¶ 43,080 (M.D. Fla. Jan. 12, 1994).

177. 844 F. Supp. 1533, 1535 (S.D. Fla. 1993).

178. 17 F.3d 356 (11th Cir. 1994).

179. *Id.* at 360.

180. 742 F.2d 586, 589 (11th Cir. 1984).

formulating minimum standards for jobs, evaluating employees, and transferring, promoting, or demoting employees. The Eleventh Circuit found that because of these actions, the Board was an agent of the city for purposes of Title VII.

Though the case of *NAACP v. Seibels*<sup>181</sup> does not significantly impact more routine labor and employment issues, the court addressed litigation which began more than twenty years ago when the United States and private parties filed civil rights complaints against the city of Birmingham, the personnel board of Jefferson County, and other local governmental agencies and officials. The decision provides a fairly extensive discussion of affirmative action programs and promotion goals.<sup>182</sup>

## VI. SUMMARY OF FLORIDA REGULATIONS, STATUTES, AND CASE LAW

The following is a summary of a broad range of issues under Florida law involving employers and employees.

### A. AIDS

Florida Statutes prohibit discrimination by an employer on the basis of Acquired Immune Deficiency Syndrome ("AIDS"), Acquired Immune Deficiency Syndrome-related complex, and Human Immunodeficiency Virus ("HIV").<sup>183</sup> In *"X" Corp. v. "Y" Person*,<sup>184</sup> X Corporation filed an action for declaratory relief against one of its employees alleging that it was in doubt as to its rights, duties, and responsibilities concerning the AIDS statute. X Corporation alleged that Y Person informed several employees that he had tested HIV-positive and had AIDS. The complaint further alleged that X Corporation asked Y to voluntarily transfer to another position without a loss of pay or benefits, in order to reduce the risk of transmission of HIV. Y refused.

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181. 20 F.3d 1489 (11th Cir.), *opinion withdrawn*, *NAACP v. Seibels*, 31 F.3d 1548 (11th Cir. 1994).

182. For a history of related cases see *In re Birmingham Reverse Discrimination Employment Litig.*, 833 F.2d 1492 (11th Cir. 1987), *aff'd in part, rev'd in part*, 20 F.3d 1525 (11th Cir. 1994); *NAACP v. Seibels*, 13 Empl. Prac. Dec. (CCH) ¶ 11,504 (N.D. Ala. 1977), *aff'd in part, rev'd in part*, 616 F.2d 812 (5th Cir. 1980); *In re Birmingham Reverse Discrimination Litig.*, 36 Empl. Prac. Dec. (CCH) ¶ 35,022 (N.D. Ala. 1985).

183. FLA. STAT. § 760.50 (1993).

184. 622 So. 2d 1098 (Fla. 2d Dist. Ct. App. 1993).

The employer argued that a failure to transfer could create a significant risk because of exposure to situations involving lacerations or cuts. The court determined that a declaratory judgment would resolve the apparently conflicting duties of X Corporation to Y under the statute, and X's duty to other employees to provide a safe working environment given a known risk.<sup>185</sup>

### B. Attorney's Fees

In *Department of Education v. Rushton*,<sup>186</sup> the First District Court of Appeal refused to allow an attorney's fee award granted by the Florida Commission on Human Relations for representation in a collateral proceeding. The attorney represented the Florida Education Association, United and Florida Teaching Professors/National Education Association in an action pursuant to section 120.56 of the *Florida Statutes*, challenging teachers unions. The Florida Commission on Human Relations awarded the attorney's fees pursuant to section 760.10(13) of the *Florida Statutes*. The Department of Education challenged the fee award. The court reversed the award and directed that, since the attorneys did not represent the individual appellees in the rule challenge, the Florida Commission on Human Relations was to exclude from the full award, all amounts associated with the attorney's representation of the union and the separate rule challenging proceeding.<sup>187</sup>

### C. Collective Bargaining

In *City of Delray Beach v. Professional Firefighters of Delray Beach*,<sup>188</sup> the City of Delray Beach Public Employees Relations Committee held that the city violated its employees' rights when it failed to continue paying individual increases during the status quo period. The Fourth District Court of Appeal, noting it was a case of first impression, affirmed the final order entered by the Committee and held that the employees had a reasonable expectation that they would continue to receive individual performance increases during the period between collective bargaining

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185. *Id.* at 1101-02.

186. 638 So. 2d 100 (Fla. 1st Dist. Ct. App. 1994). In *Fogarty v. Fantasy, Inc.*, 114 S. Ct. 1023 (1994), the Supreme Court considered a claim for attorney's fees under the Copyright Act. The Court reviewed its decision in *Christianberg Garment, Co. v. EEOC*, 434 U.S. 412 (1978), which construed attorney's fees language under Title VII.

187. *Rushton*, 638 So. 2d at 100.

188. 636 So. 2d 157 (Fla. 4th Dist. Ct. App. 1994).

agreements. The city knew or should have known that it was violating well-established law when it stopped paying individual performance raises.<sup>189</sup>

In *Chiles v. United Faculty of Florida*,<sup>190</sup> the Florida Supreme Court held that the legislature's unilateral modification and abrogation of a funded collective bargaining agreement violated the right to collectively bargain and constituted an impermissible impairment of contract. The Florida Legislature can reduce previously approved appropriations if it demonstrates a compelling state interest.<sup>191</sup>

#### D. *Florida Civil Rights Act of 1992*

Initially, Florida enacted the Human Rights Act of 1977.<sup>192</sup> This was modeled after Title VII with additional prohibitions against age, handicap, and marital status discrimination. In 1992, the Florida Legislature amended section 760.01 to rename the Florida Human Rights Act of 1977, the Florida Civil Rights Act of 1992 ("FCRA"). FCRA generally authorizes a recovery of damages by complainants in certain cases, preserves the right to a jury trial on issues involving damages, enlarges the time for filing a charge, modifies procedures for the prosecution of claims, and extends the subpoena power of the Florida Commission on Human Relations. The 1992 amendments enlarge the time within which a complaint or charge of discrimination must be filed under FCRA from 180 to 365 days from the time of the alleged violation.<sup>193</sup> The Act also provides for unlawful discrimination in the areas of education, employment, housing or public accommodation. The Florida Civil Rights Act also added two additional

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189. *Id.* at 163.

190. 615 So. 2d 671 (Fla. 1993).

191. *Id.* at 673.

192. FLA. STAT. § 760.01 (1992). Section 13 of the FCRA originally provided that the amendment would apply to conduct occurring after October 1, 1992, while § 14 provided that the Act would take effect on July 1, 1992. Section 14 was amended by § 4 of chapter 92-282 to provide that the effective date of the Act shall be October 1, 1992.

193. FLA. STAT. § 760.11(1) (1992). Shorter time periods have also been provided for the investigation and handling of charges. The Florida Commission on Human Relations has 180 days to determine if there is reasonable cause to believe that a discriminatory practice has occurred. In cases where a reasonable cause determination has been issued, a civil action in court must be brought no later than one year after the date of the reasonable cause determination. *Id.* § 760.11(3).



exemptions. One relating to an anti-nepotism policy<sup>194</sup> and another relating to religious corporations.<sup>195</sup>

One of the most important modifications brought to FCRA is an expansion of the type and scope of damages available. The new Act provides that in any civil action brought pursuant to the revised chapter 760, the court may issue an order prohibiting the discriminatory practice at issue and provide affirmative relief from the effects of that practice, including back-pay. The court may also award compensatory damages, including, but not limited to, damages for mental anguish, loss of dignity, intangible injuries, and punitive damages. That section further provides that punitive damages, where allowed, shall not exceed \$100,000.

### E. Federal Civil Rights—State Decisions

There have been a number of state court decisions which examined an employee's claim under 42 U.S.C. § 1983. In *Tookes v. City of Riviera Beach*,<sup>196</sup> a city employee brought a civil rights action against the city alleging that he was discharged in violation of his due process rights under 42 U.S.C. § 1983. The district court ruled that the trial court erred in determining that it lacked jurisdiction over the action because the plaintiff had failed to exhaust his administrative remedies prior to filing suit. The Fourth District Court of Appeal noted that the exhaustion of administrative remedies is not a prerequisite to a § 1983 action.<sup>197</sup>

In *Sublett v. District School Board of Sumter County*,<sup>198</sup> an employee brought an action against the school district alleging that his termination violated § 1983. The trial court entered summary judgment for the school board concluding that the collective bargaining agreement waived Mr. Sublett's right to a section 120.57 hearing, and that his failure to take advantage of his rights under the collective bargaining agreement was fatal to his claim. The Fifth District reversed and ordered the school board to

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194. FLA. STAT. § 760.10(8)(d) (1992). Section 760.10(8) states as follows: Notwithstanding any other provision of this section, it is not an unlawful employment practice under §§ 760.01-10 for an employer, employment agency, labor organization, or joint labor-management committee to: . . . (d) [t]ake or fail to take any action on the basis of marital status if that status is prohibited under its anti-nepotism policy.

*Id.*

195. *Id.* § 760.10(9) (1993).

196. 633 So. 2d 566, 567 (Fla. 4th Dist. Ct. App. 1994).

197. *Id.* at 567-68.

198. 617 So. 2d 374, 376-77 (Fla. 5th Dist. Ct. App. 1993).

afford Mr. Sublett a formal hearing before a hearing officer pursuant to chapter 120 to determine whether he is subject to discharge from employment.<sup>199</sup>

#### F. *Handicap Discrimination*

The Florida Commission on Human Relations recently found evidence of an employer's discrimination on the basis of a handicap, despite the fact that the employee's condition did not amount to a handicap under Florida law. In *Deane v. Fleet Transport Co.*,<sup>200</sup> the hearing officer decided whether the petition for relief charging the respondent with illegal discrimination on the basis of a perceived handicap (a history of back surgery and mild hypertension) should be granted. The hearing officer noted that it was not clear that the petitioner's history of back injury and mild hypertension amounted to a handicap. But, the petitioner did state a prima facie case showing the respondent perceived the petitioner to be handicapped as a result of the back injury and hypertension. Thus the employer's perception of Mr. Deane's medical condition as a handicap was deemed sufficient to support a finding of liability. The Florida Commission on Human Relations adopted the hearing officer's findings of fact.<sup>201</sup>

In *Hart v. Double Envelope Corp.*,<sup>202</sup> Ms. Hart alleged that Double Envelope Corporation unlawfully discriminated against her on the basis of a physical handicap (left wrist impairment). The Florida Commission on Human Relations adopted the findings of the hearing officer, which found that Ms. Hart had failed to present a prima facie case of handicap discrimination.<sup>203</sup> She did not establish that she was handicapped at the time that she was discharged or that the company knew she had a permanent handicap or disability at the time she was discharged. The hearing officer also noted that the employer articulated legitimate non-discriminatory reasons to terminate the petitioner. She had repeatedly left work or failed to attend when she was denied time off.

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199. *Id.* at 377.

200. 15 Fla. Admin. L. Rep. 5067 (1993). The hearing officer in his report noted that the petitioner had the burden to prove a prima facie case of illegal discrimination and decided the burdens of proof and production of the evidence as set forth in *Burdine*.

201. *Id.* at 5068.

202. 15 Fla. Admin. L. Rep. 1664, 1671 (1992). The Florida Civil Rights Act does not define disability or handicap.

203. *Id.* at 1665.

The First District Court of Appeal in *Brand v. Florida Power Corp.*,<sup>204</sup> addressed the burden of proof necessary to establish handicap discrimination. Prior to *Brand*, no state court had decided whether the *McDonnell Douglas/Burdine* test applied to a claim asserting handicap discrimination under Florida's Human Rights Act. The First District Court of Appeal concluded that the *McDonnell Douglas/Burdine* criteria was inapplicable and that the preferred criteria were those listed under section 504 of the Rehabilitation Act.<sup>205</sup> In a footnote the court also noted that, due to its recent enactment, the court was not clear what affect the American With Disabilities Act of 1990 would have on handicap discrimination claims prosecuted pursuant to Florida's Human Rights Act.<sup>206</sup> The court speculated that from the examination of certain key provisions in the ADA, paralleling § 504, Congress intended to extend protection against handicap discrimination, equal to or greater than that provided by § 504, to qualified individuals who are handicapped. The court noted that case law interpreting § 504 would be highly persuasive authority in actions brought under the ADA to the extent that the two provisions in the acts coincide.<sup>207</sup>

### G. *Military Leave*

The Florida Attorney General considered the question of whether section 295.09 of the *Florida Statutes* "require[d] a public employer to hold a position indefinitely for an employee who takes a leave of absence to serve on active military duty[.]"<sup>208</sup> The Attorney General interpreted the statute to require a "public employer to either reinstate a returning veteran to the same position held prior to the service in the armed forces or to an equivalent position, if the veteran exercises his or her reemployment rights within one year of an honorable discharge from his or her original enlistment."<sup>209</sup>

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204. 633 So. 2d 504, 506 (Fla. 1st Dist. Ct. App. 1994).

205. *Id.* at 507-09; *see* 29 U.S.C. § 791 (1988 & Supp. V 1993).

206. *Brand*, 633 So. 2d at 510 n.8.

207. *Id.*

208. 94 Op. Att'y Gen. 9 (1994).

209. *Id.*

## H. *Right to Privacy*

In *Kurtz v. City of North Miami*,<sup>210</sup> an applicant for a clerk/typist position with the city filed a complaint seeking to enjoin enforcement of a regulation requiring all job applicants to sign an affidavit stating that they had not used tobacco or tobacco products for at least one year immediately preceding application. The trial court entered summary judgment against the employee. The Third District Court of Appeal reversed and held that the regulation violated the individual's right to privacy under the state constitution.<sup>211</sup>

## I. *Public Employees*

In *McKinney v. Pate*,<sup>212</sup> the Eleventh Circuit stated that there is no substantive due process action available to a government employee who claims that reasons given for termination were a pretext. The decision appears to overrule prior law. *McKinney* involved a full-time and permanent employee of the Osceola County Building Division who claimed that he was fired because of personal animosity toward him by one of the Osceola County Commissioners. The claim was filed under 42 U.S.C. § 1983 and the jury awarded plaintiff \$145,000. The verdict was set aside by the trial judge, and the plaintiffs appealed. The Eleventh Circuit vacated the district court's opinion<sup>213</sup> and later reheard the case en banc.<sup>214</sup> Sitting en banc, the court determined that there was no substantive due process claim available to the plaintiff and that the court could not find that McKinney's state-created property right was deserving of substantive due process protection.<sup>215</sup>

## J. *Retaliation*

In *Wiggins v. Southern Management Corp.*,<sup>216</sup> Lenoria Wiggins appealed from an order dismissing her complaint. She alleged that she was

210. 625 So. 2d 899, 900 (Fla. 3d Dist. Ct. App. 1993), *review granted*, 640 So. 2d 1106 (1994).

211. *Id.* at 902; *see* FLA. CONST. art. I, § 23.

212. 20 F.3d 1550, 1560-61 (11th Cir. 1994).

213. *McKinney v. Pate*, 985 F.2d 1502 (11th Cir.), *vacated*, 994 F.2d 772 (11th Cir. 1993).

214. *McKinney*, 20 F.3d at 1550.

215. *Id.* at 1560-61.

216. 629 So. 2d 1022, 1023 (Fla. 4th Dist. Ct. App. 1993).

terminated because she had provided testimony adverse to her employer in an unemployment compensation hearing and, therefore, this termination violated section 92.57 of the *Florida Statutes*. The court noted that the statute prohibits dismissal of employees who testify in judicial proceedings in response to a subpoena, but that the statute is not applicable to an employee who testifies voluntarily and not under subpoena. The court dismissed the complaint since Ms. Wiggins had testified voluntarily. The court did state that the unemployment compensation hearings are judicial proceedings with respect to this statute.<sup>217</sup>

### K. *School Board Underfunding*

In two decisions, during 1994, the Florida Supreme Court denied both the Florida Education Association and Public Employee Relation petitions appealing decisions from the Second and Fourth District Courts of Appeal. In *Sarasota County School District v. Sarasota Classified/Teacher's Ass'n*<sup>218</sup> and the *School Board of Martin County v. Martin County Education Ass'n*,<sup>219</sup> the Florida Supreme Court's denial of review left in place the district court's decision that school boards have the authority, pursuant to section 447.309(2) of the *Florida Statutes*, to underfund employee contractual salaries.

### L. *Statute of Limitations*

Chapter 95 of the *Florida Statutes* establishes statutes of limitations relating to various causes of action. In *Ross v. Twenty-Four Collection, Inc.*,<sup>220</sup> the court held that a cause of action for intentional infliction of emotional distress occurred no later than the date when the employee allegedly was forced to resign her employment after enduring several years of sexual harassment on the job. In *Moneyhun v. Vital Industries, Inc.*,<sup>221</sup> the court held that the limitations period for an employee's quantum meruit claim began running on the date the employment ended.

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217. *Id.* at 1024.

218. 614 So. 2d 1143 (Fla. 2d Dist. Ct. App. 1993), *review dismissed*, 630 So. 2d 1095 (Fla. 1994).

219. 613 So. 2d 521, 523 (Fla. 4th Dist. Ct. App. 1993), *review denied*, 632 So. 2d 1027 (1994).

220. 617 So. 2d 428, 428 (Fla. 3d Dist. Ct. App. 1993).

221. 611 So. 2d 1316, 1322 (Fla. 1st Dist. Ct. App. 1993).

### M. *Unemployment Compensation*

In *Brown v. Unemployment Appeals Commission*,<sup>222</sup> the plaintiff was a legal assistant at an Orlando law firm where she alleged that she was sexually harassed by a male co-worker over a period of some five months. She did not report this to her employers, but when they learned of it through another employee, the firm met with Brown and placed her on paid administrative leave. They then asked her to return to work and offered to change her location to the firm's main building where the alleged perpetrator's wife worked.

She refused to return to work and quit her job after her leave of absence expired. The court established that an employee who voluntarily leaves her employment without a reason attributable to her employer, is not eligible to receive unemployment compensation benefits.<sup>223</sup> The court noted, however, that this protects workers of employers who wrongfully cause their employees to leave their employment. In this case, the court determined that Ms. Brown failed to show that her voluntary departure from employment was attributable to the wrongful conduct of her employer.

In *Alonso v. Arabel, Inc.*,<sup>224</sup> an employee appealed the decision of the Unemployment Appeals Commission barring his appeal as untimely. He argued that the appeal was untimely because all notices sent were in English and he did not speak, read, or write English. The court held that reasonable notice was satisfied when the notice is given in English, and that the employees had no due process right to notice in language comprehensible to him.<sup>225</sup>

The Fifth District in *Spangler v. Unemployment Appeals Commission*<sup>226</sup> also addressed the issue of whether or not a worker's resignation was a voluntary departure from work without cause attributable to the employer. In this particular case, Ms. Spangler was working at a Wal-Mart store as a night receiving stocker, and was required to work around goods that were covered with rodent droppings, blood, and urine. She developed a rash and an upper respiratory illnesses which she thought had been caused by the unsanitary conditions.

222. 633 So. 2d 36, 39 (Fla. 5th Dist. Ct. App. 1994).

223. *Id.* at 38; see FLA. STAT. § 443.101(1)(a) (1991).

224. 622 So. 2d 187, 188 (Fla. 3d Dist. Ct. App. 1993), *review denied*, 634 So. 2d 622 (Fla. 1994).

225. *Id.*

226. 632 So. 2d 98 (Fla. 5th Dist. Ct. App. 1994).

She eventually complained about the conditions, refused to work, and was sent home without pay. She then resigned from her job. The Unemployment Appeals Commission denied her unemployment compensation claim. The Fifth District reversed and remanded, finding that, in this case, there was nothing she could do to remedy the unsanitary and unhealthy working conditions which existed, and her employer failed to offer her any hope of a transfer or other remedy, such as using a mask and gloves.<sup>227</sup>

#### N. *Unfair Labor Practice*

In *Sarasota County School District v. Sarasota Classified/Teachers Ass'n*,<sup>228</sup> the Second District Court of Appeal found that a school board did not commit an unfair labor practice by unilaterally discontinuing payment of step-pay increases to classified and instructional employees during the pendency of negotiations with the union. The court said that the school board had the right to underfund the agreements and the superintendent properly offered to negotiate the impact of that underfunding.<sup>229</sup>

#### O. *Veteran's Preference*

Section 295.09 of the *Florida Statutes*, as amended in 1978, provides that veteran's preference points are to be awarded on promotional exams upon the employee's first promotion after reinstatement or reemployment. The legislature repealed the amendment effective July 5, 1980 and reenacted the former version of section 295.09 that awarded preference points only to a veteran's first promotion after reinstatement or reemployment without exception.<sup>230</sup>

In *Ramirez v. City of Miami*,<sup>231</sup> the Court of Appeal held that section 295.09 cannot be applied retroactively to award preference points to a veteran who took a promotional exam and was not promoted before the statutory amendment was enacted or became effective. In this case, Mr. Ramirez had been promoted to the rank of sergeant in 1981 and alleged that he was entitled to an award of veteran's preference points on the results of his 1977 promotion examination. He also argued that the City of Miami's failure to award him those points resulted in the wrongful denial of promo-

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227. *Id.* at 99.

228. *Sarasota County Sch. Dist.*, 614 So. 2d at 1143.

229. *Id.* at 1147-49.

230. *Ramirez v. City of Miami*, 627 So. 2d 48, 49 (Fla. 3d Dist. Ct. App. 1993); see FLA. STAT. § 295.09(1)(a) (1993).

231. *Ramirez*, 627 So. 2d at 49.

tion to sergeant until 1981. The court said that he was not entitled to veteran's preference points under section 295.09 of the 1977 *Florida Statutes*, and that section 295.09, as amended in 1978, could not be applied retroactively.<sup>232</sup>

#### P. *Whistle-blower*

In 1986, the Florida Legislature enacted a Whistle-blower's Act which was amended in 1991.<sup>233</sup> The statute prohibits employers with ten or more employees from retaliating against an employee if the employee has disclosed or threatened to disclose to a governmental agency some practice or policy the company has engaged in that violates a law or regulation. In 1991, the legislature amended the statute to include private employers.<sup>234</sup>

In *Walsh v. Arrow Air, Inc.*,<sup>235</sup> a flight engineer reported a hydraulic leak on an airplane, against his employer's wishes, and caused a flight to be grounded. The employee was discharged, and later brought an action for wrongful termination. The court determined that the statute applied retroactively, thus allowing the employee to pursue his claim for wrongful termination. The court also made some broad statements about the employment-at-will doctrine in Florida and noted that the Whistle-blower's Act is an exception to the at-will doctrine.<sup>236</sup> This may be indicative of the trend in other states that the at-will doctrine is at risk in Florida.

### VII. TORTS

Another area of concern for employers in Florida is when an employer may be found liable for an employee's conduct on a vicarious liability or respondeat superior theory.

#### A. *Assault and Battery*

In *Caprio v. American Airlines, Inc.*,<sup>237</sup> an employee brought an action for battery, negligent retention and supervision, and violations of Title VII against an employer. The action stemmed from alleged sexual

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232. *Id.*

233. FLA. STAT. §§ 112.3187-31895 (1993).

234. *Id.* §§ 448.101-.102.

235. 629 So. 2d 144, 145-46 (Fla. 3d Dist. Ct. App. 1993), *review granted*, 639 So. 2d 975 (Fla. 1994).

236. *Id.* at 148.

237. 848 F. Supp. 1528, 1529 (M.D. Fla. 1994).



harassment. Judge Kovachevich indicated that there were sufficient issues of fact to preclude summary judgment, including the employer's alleged touching of the employee in an offensive manner. She further noted that in order to state a claim of battery against an employer, the conduct must be within the scope of employment and be activated, at least in part, by purposes to serve the employer.<sup>238</sup>

## B. Defamation

In *Wagner v. Flanagan*,<sup>239</sup> a construction contractor brought a defamation suit against a hospital and its law firm. The center's lawyer sent a letter to the insurer's lawyer commenting on a fraud committed by the construction contractor. The court, in addressing the issue of statute of limitations, stated that the cause of action for defamation accrues on publication rather than discovery, even where the defamation is private.<sup>240</sup>

Defamation suits normally involve an employee versus employer action based upon some comments made by the employer. In *Jackson v. BellSouth Mobility, Inc.*,<sup>241</sup> a former employee brought an action against an employer and a manager alleging defamation. The court held that the employee stated a cause of action against both entities.<sup>242</sup>

In *Tucker v. Resha*,<sup>243</sup> a taxpayer sued the executive director of the Florida Department of Revenue for defamation and invasion of their right to privacy. The court held that the statements that the executive director made to members of her staff about the taxpayer's "alleged activity in illegal gun sales, drugs, pornography, money-laundering, and organized crime involved activities which could include nonpayment of tax or violation of reporting requirements . . . ."<sup>244</sup> Because these disclosures were arguably within the scope of the executive director's office, and since there is an absolute privilege accorded this individual, the taxpayer could not recover for defamation.

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238. *Id.* at 1532.

239. 629 So. 2d 113, 114 (Fla. 1993).

240. *Id.* at 115.

241. 626 So. 2d 1085, 1086 (Fla. 4th Dist. Ct. App. 1993).

242. *Id.*

243. 634 So. 2d 756, 757 (Fla. 1st Dist. Ct. App. 1994).

244. *Id.* at 758.

### C. *Intentional Infliction of Emotional Distress*

In *Food Lion, Inc. v. Clifford*,<sup>245</sup> the assistant store manager observed an employee of Food Lion consuming food products from the deli. The employee admitted taking the food, and after concluding that he had engaged in theft, the store reported the incident to the sheriff's office. Food Lion terminated the employee and filed with the state an information charging him with petty theft. The prosecutor later dropped the case and the employee sued for malicious prosecution and intentional infliction of emotional distress. The court determined that the individual's employer, though attempting both to obtain civil damages and to bring a criminal complaint against the plaintiff for alleged theft of food, did not meet the required level of outrageousness necessary to sustain an action for intentional infliction of emotional distress.<sup>246</sup>

### D. *Negligent Hiring and Retention*

Third parties often try to bring a deep pocket into a lawsuit (i.e., an employer) by alleging that an employer is liable for the actions of their employees due to negligent hiring and/or retention. The elements of negligent hiring are:

1. [T]he employer was required to make an appropriate investigation of the employee and failed to do so;
2. [A]n appropriate investigation would have revealed the unsuitability of the employee for the particular duty to be performed or for employment in general; and
3. [I]t was unreasonable for the employer to hire the employee in light of the information he knew or should have known.<sup>247</sup>

The elements of negligent retention are:

- a. The employer was required to exercise reasonable care in the retention of the employee;

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245. 629 So. 2d 201, 202 (Fla. 5th Dist. Ct. App. 1993).

246. *Id.* at 203.

247. *Garcia v. Duffy*, 492 So. 2d 435, 440 (Fla. 2d Dist. Ct. App. 1986); *see also Tallahassee Furniture Co. v. Harrison*, 583 So. 2d 744 (Fla. 1st Dist. Ct. App. 1991). In 1993, the Florida Legislature amended section 400.141 of the *Florida Statutes* to require a nursing home facility to check the background of certified nursing assistance applicants.

- b. The employer received actual or constructive notice of problems with the employee's fitness for the particular duty to be performed; and
- c. It was unreasonable for the employer not to investigate or take corrective action such as discharge or reassignment.<sup>248</sup>

The claim of negligent hiring or retention centers around the legal duty of an employer to investigate an employee's background. This will vary from employer to employer depending upon the nature of the business and the jobs performed by the individual.

### E. *Negligent Investigation*

Recently, a federal district court decided *Vackar v. Package Machinery Co.*,<sup>249</sup> in which an employee claimed that the employer had been negligent in investigating the truth of allegedly defamatory statements. The court granted summary judgment and stated that the allegations of negligence were embraced by the plaintiff's defamation claim. The plaintiff, therefore, could not sue in negligence where the real claim sounded in defamation.<sup>250</sup> The court cited no existing case law relating to the tort of negligent investigation.

### F. *False Imprisonment*

In *Stockett v. Tolin*,<sup>251</sup> a female employee brought an action against her former employer alleging sexual harassment and violation of Title VII of the Civil Rights Act of 1964. An additional claim brought by the plaintiff under Florida law was the tort of false imprisonment which is the unlawful restraint of a person against his will, the unlawful detention of a person, and deprivation of a person's liberty. The court held that "the act of pinning the [p]laintiff against a wall and refusing to allow her to escape, even though only done for a short period of time, was false imprisonment."<sup>252</sup>

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248. *Garcia*, 492 So. 2d at 441.

249. 841 F. Supp. 310 (N.D. Cal. 1993).

250. *Id.* at 315.

251. 791 F. Supp. 1536, 1539 (S.D. Fla. 1992).

252. *Id.* at 1556. The court also noted that entering the ladies' restroom constituted an invasion of her privacy. *Id.*

### G. *Workers' Compensation*

As of January 1, 1994, the area in which the state made the most changes in employer/employee relationships, has been through the workers' compensation system. The Florida Legislature made significant changes in the workers' compensation law.

The definition of employer has been expanded to include parties in actual control of a corporation including, but not limited to, the president, officers, directors, and shareholders who directly or indirectly own a controlling interest in the corporation.<sup>253</sup> The definition of employee has been amended to include aliens and minors.<sup>254</sup> Additionally, this section specifically addresses independent contractors and, for all practical purposes, an independent contractor is deemed to be an employee unless he or she meets all of the nine specific separate criteria listed in the statute.<sup>255</sup>

In addition to the statutory changes, there were also a number of decisions concerning workers' compensation. The Supreme Court of Florida in *Zundell v. Dade County School Board*,<sup>256</sup> reviewed the following certified question:

Whether an employer is required to prove the existence of a preexisting condition in compensation cases involving heart attacks and internal failures of the cardiovascular system as a prerequisite to the application of the test for compensability established in *Victor Wine & Liquor, Inc. v. Beasley* and *Richard E. Mosca & Co., Inc. v. Mosca*.<sup>257</sup>

The court rephrased the question as follows: "Whether the rule announced in *Victor Wine & Liquor, Inc. v. Beasley* can ever apply to cardiovascular injuries occurring on the job when competent substantial medical evidence show no evidence of a preexisting condition relevant to the injury?"<sup>258</sup>

In this case, Mr. Zundell was an algebra teacher who suffered a hemorrhage of the brain, which he asserted was a result of dealing with a disruptive student. His subsequent disability forced him into retirement.

253. FLA. STAT. § 440.02(14) (1994).

254. *Id.* § 440.02(13). It should be noted that the new Act creates an exception to the criteria enumerated in the statute for certain job classifications listed in the Standard Industrial Classifications Manual of 1987.

255. FLA. STAT. § 440.02(13)(a) (1994).

256. 636 So. 2d 8, 9 (Fla. 1994).

257. *Id.* at 9 (citations omitted).

258. *Id.* (citation omitted).

Zundell sought workers' compensation benefits for the incident. His petition was denied by the Judge of Compensation Claims. A divided First District Court of Appeal, sitting en banc, affirmed, but certified the question. The Supreme Court found that the condition was compensable and said that the facts were essentially indistinguishable from a work place exertion resulting in a hernia.<sup>259</sup>

In *Eller v. Shova*,<sup>260</sup> the Florida Supreme Court upheld as constitutional the provision of the workers' compensation act that requires a plaintiff to establish culpable negligence on the part of the defendant in order to maintain a civil action against a supervisory or managerial level co-employee. In this case, Felecia Shova was manager of a Circle K convenience store and was killed during a robbery. Her husband filed a civil action alleging gross negligence against several management level employees of Circle K, claiming they knew the store was in a high crime area and had been robbed many times. The trial court dismissed the complaint with prejudice. The Second District Court of Appeal held that section 440.11(1) was unconstitutional, and mandatory jurisdiction was vested with the Florida Supreme Court.<sup>261</sup> The court reasoned that the worker's compensation statute is designed to be the exclusive remedy available to an injured employee as to any negligence on the part of the employer, and quashed the district court's decision affirming the trial court's dismissal with prejudice.<sup>262</sup>

The First District Court of Appeal recently decided *Rolemco Electrical Contracting v. Sellers*.<sup>263</sup> Mr. Sellers was involved in an automobile accident while in the course and scope of his employment with Rolemco. He had suffered back and neck injuries and an injury to his hip prior to the automobile accident. He was also suffering from a condition that was caused by his alcohol consumption but manifested no symptoms. The First District Court of Appeal reversed the workers' compensation judge's award of the cost of the employee's total hip replacement. The court held that the aggravation to the employee's pre-existing condition was not compensable under the Florida Worker's Compensation Act.<sup>264</sup> The court noted that under the statute "accident" means only an unexpected or unusual event or result that happens suddenly, and that "[d]isability . . . due to an accidental

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259. *Id.*

260. 630 So. 2d 537, 543 (Fla. 1993).

261. *Shova v. Eller*, 606 So. 2d 400 (Fla. 2d Dist. Ct. App. 1992).

262. *Eller*, 630 So. 2d at 539.

263. 637 So. 2d 315 (Fla. 1st Dist. Ct. App. 1994).

264. *Id.* at 316.

acceleration or aggravation of a disease due to the habitual use of alcohol . . . shall be deemed not to be an injury by accident arising out of the employment."<sup>265</sup> The court determined that since the employee's pre-existing condition was caused by his habitual use of alcohol, the resulting hip replacement surgery was not covered under the workers' compensation benefits.<sup>266</sup>

### VIII. MISCELLANEOUS

One issue that arises in the employment context is whether or not proceeds from a settlement or jury verdict with respect to an employment action are taxable. In 1992, the Supreme Court held that payment received in a settlement of a back-pay claim under Title VII was not excluded from gross income under section 104(a)(2).<sup>267</sup> Revenue Ruling 93-88 addressed the applicability of section 104(a)(2) to claims arising after the amendments to title VII of the Civil Rights Act of 1991.<sup>268</sup> The ruling states that because the amendments authorized the recovery of compensatory damages, such as emotional distress and mental anguish damages, in cases involving disparate treatment claims, back-pay, and compensatory awards, these claims were excluded from gross income. The ruling further states that awards received from disparate impact discriminations are not excluded.<sup>269</sup>

An issue may also arise when parties enter into settlement negotiations as to the tax implications of the allocations of the settlement proceeds. In *McKay v. Commissioner*,<sup>270</sup> the tax court upheld the parties' allocation of settlement proceeds in the context of a wrongful discharge action. The claims were brought for wrongful discharge, breach of an employment contract, RICO, and punitive damages. The jury awarded \$1.6 million for compensatory damages, and \$12.8 million for future damages that was trebled by the defendant's violation of RICO, and \$1.25 million in punitive damages. The parties negotiated a settlement in which the former employer agreed to pay \$16.7 million to settle all claims. This amount was split between the wrongful discharge tort claim, breach of contract, and

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265. *Id.* (citing FLA. STAT. § 440.02(1) (1991)).

266. *Id.*

267. *United States v. Burke*, 112 S. Ct. 1867, 1874 (1992). On December 20, 1993, the Internal Revenue Service issued a revenue ruling, which addressed the applicability of section 104(a)(2) of the Internal Revenue Code to claims arising after the amendments of Title VII by the Civil Rights Act of 1991.

268. Rev. Rul. 93-88, 1993-2 C.B. 61.

269. *Id.*

270. 102 T.C. 465 (1994).

reimbursement of litigation claims. None of the proceeds, however, were allocated to RICO or punitive damages. The tax court upheld the allocation of proceeds in the agreement and noted that the allocations were consistent with the taxpayer's pleadings and the verdict which reflected a lawsuit primarily in tort.<sup>271</sup> Thus, it is crucial for both employers and employees to receive tax planning advice with respect to the settlement of any action and the allocation of settlement proceeds.

## IX. CONCLUSION

The waters of employment law in Florida are potentially hazardous for both employees and employers. Both should be ever mindful that their actions or inactions are governed by local, state, or federal laws; decisions by local, state or federal court, and state or federal administrative agencies.

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271. *Id.* at 487.