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2004-05 Survey of Florida Employment Law

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2004-05 SURVEY OF FLORIDA EMPLOYMENT LAW

JOHN SANCHEZ*

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I. INTRODUCTION

This survey maps out the key developments in the law governing public employment in Florida during 2004–05. Part II on hiring, privatization, screening, ethics, nepotism, and crime looks at such issues as background checks on applicants for employment and medical screening for HIV and genetic predisposition to certain illnesses. Privatization deals with the controversial process by which governmental functions are assumed by private entities in an effort to save money. Ethical issues may arise, for example, when a public official acquires a personal stake in city contracts. Nepotism is the practice of hiring relatives, which is generally against the law in Florida's public sector.

Part III on terms of employment explores a wide array of legal issues dealing with hours and wages, public employee pension plans, health insurance, the Family Medical Leave Act, drug testing, employee privacy, defamation, workers' compensation, unemployment compensation, and smoking in the workplace.

Part IV on employment discrimination is subdivided into constitutional challenges to workplace discrimination under the First and Fourteenth Amendments and statutory claims stemming largely from federal statutes outlawing discrimination on grounds of race, sex, national origin, religion, age, and disability.

Finally, Part V on arbitration, collective bargaining, and just cause takes a quick look at the role played by unions in the life of Florida's public sector.

II. HIRING, PRIVATIZATION, SCREENING, ETHICS, NEPOTISM, AND CRIME

A. *Background Checks: Genetic and HIV Screening*

Employers owe a duty to conduct background checks on applicants for employment if they are to avoid liability for the emerging tort of negligent hiring. For example, under this tort, third parties sue an employer for failing to discover an employee's previous history of violence. Before the employer

faces liability for this tort, “the plaintiff must first establish that the employee committed a wrongful act that caused the [plaintiff’s] injury.”¹ “[U]nlike vicarious liability, which requires that the negligent act of the employee be committed within the course and scope of the employment, negligent hiring may encompass liability for negligent acts that are outside the scope of the employment.”²

Some local police departments have come under fire by whistleblowers for failing to conduct adequate background checks on police applicants. One study “found that [forty] of [sixty-seven] Hollywood, [Florida] police officers hired within the [last] decade had ‘moderate to serious’ problems in their backgrounds, including arrest records, a history of abusing prisoners, suspended driver’s licenses and falsified employment applications.”³

One version of negligent hiring involves an injured employee suing the employer for failing to disclose, for instance, the violent tendencies of a co-worker. In Florida, however, an employer may owe no duty to an employee injured by a co-worker while the employees are off-duty.⁴ In one case, the court held that a Florida supermarket owed no duty to tell its employee that a co-worker she hired outside of work, as a day care provider, was a convicted sex offender.⁵

In 2005, the National Transportation Safety Board recommended that “the Federal Aviation Administration require commercial and small airlines to find out if a pilot has failed a flight test before hiring him or her.”⁶

In Florida, it is a first degree misdemeanor to disclose the results of an HIV test or the identity of the person tested except under certain circumstances.⁷ In one case, an employee was allowed to sue her employer for mental anguish and emotional distress after confidential HIV test results were publicly disclosed.⁸ The case is also noteworthy because damages for emotional distress ordinarily stem from a physical injury, but the court ruled

1. *Anderson Trucking Serv., Inc., v. Gibson*, 884 So. 2d 1046, 1052 (Fla. 5th Dist. Ct. App. 2004) (footnote omitted).

2. *Id.* at 1052 n.1 (citations omitted).

3. Jerry Berrios, *Ex-chief Again Wins \$201,100*, MIAMI HERALD, Jan. 26, 2005, at 1B.

4. *K.M. v. Publix Super Markets, Inc.*, 895 So. 2d 1114, 1120 (Fla. 4th Dist. Ct. App. 2005).

5. *Id.* at 1116.

6. Ina Paiva Cordle, *NTSB: Lines Should Know if Pilots Fail Tests*, MIAMI HERALD, Jan. 29, 2005, at 1C.

7. FLA. STAT. § 381.004(4)(d) (2004). Compare *id.* with *Melo v. Barnett*, 157 S.W.3d 596, 599 (Ky. 2005). In 2005, the Supreme Court of Kentucky ruled that a doctor who treated an employee for a workplace injury did not violate the employee’s state law privacy rights by disclosing his HIV-positive status to his employer because he signed a consent form authorizing the disclosure of relevant medical information. *Melo*, 157 S.W.3d at 599.

8. *Abril v. Dep’t of Corrs.*, 884 So. 2d 206, 213 (Fla. 2d Dist. Ct. App. 2004).

that the harm stemming from the disclosure of confidential information can only be “emotional in nature” in a case like this one.⁹

Legislative efforts at the federal level, with clock-work precision, have yet again aimed at restricting the use of genetic screening in employment. On February 7, 2005, the United States Senate passed a bill that prohibits employers from relying on an individual’s genetic information when making any employment-related decisions.¹⁰

B. *Privatization*

Under the leadership of Florida’s Governor, Jeb Bush, Florida is at the forefront of the movement aimed at converting formerly governmentally performed functions into private hands. In 2005, Florida became “the first state in the nation to fully privatize its child welfare programs.”¹¹

Florida’s seemingly unstoppable push to privatize every public function has come under heavy fire. A Supreme Court of Florida Justice has strongly inveighed against the state’s privatization of death-penalty appeals.¹² Instead of speeding up these appeals, he said that the shoddy quality of legal work by inexperienced private lawyers has slowed the process.¹³

At times, privatization is driven by cost-saving rather than by attempts at fixing a broken system. For example, in 2004, the Fort Lauderdale City Commission tentatively approved a plan to completely privatize city trash collection, a move aimed at saving nearly \$890,000 per year.¹⁴

C. *Ethics*

While Florida’s ethics law requires “government officials to publicly disclose gifts they receive” from non-relatives,¹⁵ state lawmakers may have crossed the line with a bill proposed in 2005 involving disclosures by lobby-

9. *Id.* at 212. A happy post-script: the lab’s testing produced a false positive—Abril was, in fact, HIV-negative. *Id.* at 207.

10. See S. 306, 109th Cong. § 202 (2005).

11. Carol Marbin Miller, *State Finishes Privatizing of Child Welfare*, MIAMI HERALD, Apr. 16, 2005, at 13B. Given that Florida’s “foster care system [is] often described as one of the worst in the United States,” it’s hard to see how this innovative move will leave the state’s foster children worse off. *Id.*

12. Marc Caputo, *Justice Blasts Lawyers over Death Row Appeals*, MIAMI HERALD, Jan. 28, 2005, at 1B.

13. *Id.*

14. Samuel P. Nitze, *City Leaders Back Big Tax Hike*, MIAMI HERALD, Sept. 14, 2004, at 3B.

15. Scott Andron, *Gift Law Confusing, Experts Say*, MIAMI HERALD, Feb. 8, 2004, at 1B.

ists. Under a proposed “booty call” amendment, lobbyists with ties to the Florida Legislature would be forced to reveal whether they are “having a romantic or sexual relationship with a lawmaker.”¹⁶

D. *Nepotism*

Anti-nepotism laws make it unlawful for public officials to put relatives on the public payroll. While Florida has an anti-nepotism law,¹⁷ it is less clear whether the law was violated when a Florida town administrator hired his wife than when he hired his daughter as town clerk.¹⁸ Freedom of association has sometimes been enlisted (usually unsuccessfully) to challenge anti-nepotism policies adopted by public employers.¹⁹

E. *Workplace Crime*

In Florida, workplace crime costs employers \$27.4 billion a year.²⁰ Almost 70% of all crime costs are “business related or nonresidential.”²¹ “Florida employers are two and a half times more likely to experience crime losses than Florida residents. And white-collar crime accounts for 47[%] of all business crime costs.”²²

III. TERMS OF EMPLOYMENT

A. *Hours and Wages*

1. Fair Labor Standards Act

New federal overtime rules (amending the Fair Labor Standards Act (FLSA)) took effect August 23, 2004.²³ While some critics charged that the

16. Marc Caputo, *The “Booty Call” Amendment: Lovemaking vs. Lawmaking*, MIAMI HERALD, May 5, 2005, at 8B.

17. FLA. STAT. § 112.3135(2)(a) (2004).

18. Amy Sherman, *Family Hiring Dispute Flares*, MIAMI HERALD, Apr. 26, 2005, at 1B.

19. See, e.g., Vaughn v. Lawrenceburg Power Sys., 269 F.3d 703, 712–13 (6th Cir. 2001) (holding that public employer’s anti-nepotism policy was rationally related to that employer’s reasonable fear that spousal loyalty would undermine discipline and, thus, did not violate the First Amendment right of marital association).

20. Ina Paiva Cordle, *Business Crime Empties Pockets*, MIAMI HERALD, Nov. 24, 2004, at 1C.

21. *Id.*

22. *Id.*

23. Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales and Computer Employees, 69 Fed. Reg. 22,122 (Apr. 23, 2004) (to be codified

new rules would cost six million American workers their overtime, police officers, firefighters, and other public-safety officers remain unaffected.²⁴

The Class Action Fairness Act, signed February 18, 2005, by President George W. Bush, shifting class action lawsuits filed in state courts to federal courts,²⁵ will not affect § 216(b) of the FLSA, which governs collective actions alleging violations of the FLSA, the Equal Pay Act, and the Age Discrimination in Employment Act.²⁶ Under the new law, federal district courts would exercise jurisdiction over any civil action involving more than \$5 million and in which the opposing parties are from different states.²⁷

According to a Department of Labor Wage and Hour Opinion Letter, an employer does not jeopardize the exempt status of in-house attorneys under § 13(a)(1) of the FLSA from overtime pay rules by insisting that they submit biweekly timesheets that document time spent working in various “cost centers.”²⁸

2. Public Employee Wages

Under federal law, employees who are called up for active duty in the military are entitled to return to their former jobs without loss of benefits or seniority when their service is completed.²⁹ Despite this law, many soldiers face a gap in pay while on active duty: the difference between their military pay and their former civilian salaries.³⁰ To reduce this gap, a bill was introduced in the 2005 Florida Legislature that will assist state National Guard and Reserve soldiers who lose wages when they are called up for active duty.³¹ About twenty-eight percent of the Florida Guard or Reserve on active duty formerly worked for the government as civilians.³² Even before this proposed “Citizen Soldier” bill, the state of Florida and many local governments already paid “all or part of their Guard or Reserve workers’ missed salaries.”³³ For example, “[c]ompanies and agencies such as the Broward

at 29 C.F.R. pt. 541); Elaine Walker & Patrick Danner, *New Rules for Overtime Start Today*, MIAMI HERALD, Aug. 23, 2004, at 1A.

24. Walker & Danner, *supra* note 23.

25. See Class Action Fairness Act of 2005, Pub. L. No. 109-2, §§ 4-5, 119 Stat. 4, 9-12 (2005).

26. See Fair Labor Standards Act of 1938, 29 U.S.C. § 216(b) (2000).

27. Class Action Fairness Act of 2005 § 4.

28. Dep’t of Labor Opinion Letter FLSA2005-16 (Apr. 11, 2005).

29. See 38 U.S.C. § 4312(a) (2000).

30. Phil Long, *State Eyes Cash Relief for Guard*, MIAMI HERALD, Feb. 14, 2005, at 1B.

31. *Id.*

32. *Id.*

33. *Id.*

County Sheriff's Office" go above and beyond federal standards by paying reservists "half of the difference between what the military pays them and what [the employer] ordinarily pays them."³⁴

On March 10, 2005, the Department of Labor (DOL) published its final rule requiring private and government employers to notify workers who might leave their jobs to serve in the military of their right to return to their jobs at the same pay, benefits, and status, under the Uniformed Services Employment and Reemployment Rights Act.³⁵

To help state agencies retain young lawyers, Florida lawmakers are weighing a bill aimed at helping attorneys in paying off their student loans.³⁶ The law "would allow the state to repay up to \$44,000 on student loans for assistant public defenders, assistant state attorneys, assistant attorneys general and assistant statewide prosecutors."³⁷ Without this law, government lawyers, who make an average of \$65,000 a year, feel pressed by looming student loans to find work in private practice where the median income of lawyers is \$120,000.³⁸

Labor negotiations over public employee pay also made news in the last year.³⁹ A 2004 employment contract between the Broward Teachers Union and the school district grants the county's 15,000 teachers an average of a four percent raise at a cost of \$35 million.⁴⁰ In addition, the contract includes monetary incentives for teachers to earn advanced degrees.⁴¹

In 2004, the First District Court of Appeal ruled that a city's legislative imposition of a pay freeze contained in an earlier contract, after impasse over a new contract, did not amount to an unfair labor practice.⁴² The court found that the old contract made clear that if no new collective bargaining agreement was reached, then salaries would remain at current levels until a new contract was signed.⁴³ For this reason, the court concluded that the employees had no expectation of wage increases once the old contract expired.⁴⁴

34. See Dalia Naamani-Goldman, *Military Praises Employers*, MIAMI HERALD, Apr. 29, 2005, at 5B.

35. See 20 C.F.R. § 1002 (2005).

36. Sherri M. Owens, *State Looks at Helping Its Lawyers: Big College Loans Often Force Attorneys into Private Practice*, ORLANDO SENT., Apr. 17, 2005, at B1.

37. *Id.*

38. *Id.*

39. See Steve Harrison, *Teachers' Pay Hike Deal Struck*, MIAMI HERALD, July 31, 2004, at 3B.

40. *Id.*

41. *Id.*

42. *City of Winter Springs v. Winter Springs Prof'l*, 885 So. 2d 494, 498-99 (Fla. 1st Dist. Ct. App. 2004).

43. *Id.* at 498.

44. *Id.*

3. State Minimum Wage

On May 2, 2005, as a result of a statewide voter initiative, Florida's minimum wage rose to \$6.15 hourly, while servers and other workers salaries who receive tips went from \$2.13 to \$3.13 an hour.⁴⁵ As part of article X of the state constitution, Florida's minimum wage "will be indexed to the inflation rate in the future."⁴⁶ New rates will go into effect each January 1.⁴⁷ While thirteen other states have minimum wages set above the national standard, such a rate hike will have more impact in a state like Florida, which is "more dependent on low-paying jobs" than most states.⁴⁸ Among other features, the Amendment: bars Florida employers from discriminating in any manner or retaliating against any person for exercising rights it protects; allows employees to sue any employer who refuses to pay minimum wage; and permits Florida's Attorney General to file a civil action to enforce the law.⁴⁹ Moreover, a full range of remedies are recoverable by prevailing employees, with a four year statute of limitations for non-willful violations and five years for willful violations.⁵⁰

B. Public Employee Pension Plans

Florida's state pension plan covers 225,000 retirees and 650,000 current employees in public employment.⁵¹ After the stock market bubble burst in 2001 and the public pension fund ended up with worthless Enron stock, the fund filed a landmark lawsuit against its stock investment manager, Alliance Capital Management, claiming "breach of contract, breach of fiduciary duty, fraud and negligence."⁵² The fund claimed Alliance invested in Enron, even after the company's accounting irregularities were publicly called into question.⁵³

In April 2005, a jury did not find found Alliance liable for \$281 million in Enron-related investment losses suffered by Florida's public pension

45. Gregg Fields, *Minimum Wage Boosted*, MIAMI HERALD, May 2, 2005, at 4G.

46. *Id.*

47. *Id.*

48. *Id.*

49. Fla. SB 2638 (2005) (proposed FLA. CONST. art. X, § 24).

50. *Id.*

51. Sophia Pearson, *Pension Fund Loses Legal Battle*, MIAMI HERALD, Apr. 19, 2005, at 1C.

52. *Id.*

53. Harriet Johnson Brackey, *Enron Among Various Targets*, MIAMI HERALD, Mar. 9, 2005, at 1C [hereinafter Brackey I].

fund.⁵⁴ Jurors concluded Alliance “didn’t breach its contract with the Florida State Board of Administration and wasn’t negligent in supervising the fund’s account.”⁵⁵ The fund was also ordered to pay Alliance \$1.1 million in unpaid management fees.⁵⁶ Despite this legal setback, “the state pension system has reaped \$40 million in settlement payments during the last two years [as part of] class-action securities lawsuits.”⁵⁷

Merrill Lynch, Florida’s largest pension advisor, acts as consultant for ninety-three public pension funds from Jacksonville to Hallandale Beach.⁵⁸ North Miami Beach is looking to hold Merrill Lynch accountable as pension consultant for the dismal growth—“only 0.9% on average in each of the last five years”—of its police and general employee pension fund.⁵⁹ By contrast, nationwide, public pension funds grew 4.1% a year.⁶⁰ Significantly, the Securities and Exchange Commission has launched an investigation into consultants who advise pension boards and fail to reveal conflicts of interest.⁶¹ To prevent abuses, “[t]he SEC is calling for pension consultants to separate their consulting activities from other businesses, to increase disclosure and put policies in place to prevent conflicts of interest.”⁶²

In a similar vein, “[t]he city of Coral Gables, [Florida] is suing its former [public] pension fund advisor, UBS Paine Webber, for over \$25 million in losses” of fund assets.⁶³

Finally, with regard to public pension developments, proposed changes for the city of Hollywood, Florida’s 220 firefighters include: increasing employee pension contributions from 7% to 8% per year; permitting employees to retire after twenty-three years of service rather than twenty-five years; and changing the formula for calculating pension benefits.⁶⁴

54. Pearson, *supra* note 51.

55. *Id.*

56. *Id.*

57. Brackey I, *supra* note 53.

58. Harriet Johnson Brackey, *SEC Targets Pension Board Advisors*, MIAMI HERALD, May 17, 2005, at 1C [hereinafter Brackey II].

59. Harriet Johnson Brackey, *Florida Pension Funds Report Poor Results*, MIAMI HERALD, May 17, 2005, at 4C [hereinafter Brackey III].

60. *Id.*

61. Brackey II, *supra* note 58.

62. *Id.*

63. Brackey III, *supra* note 59.

64. Jerry Berrios, *3-Year Firefighter Pact Approved*, MIAMI HERALD, Sept. 30, 2004, at 7B [hereinafter Berrios I].

C. *Health Insurance*

Under the Consolidated Omnibus Budget Reconciliation Act of 1985 (COBRA), employers who already offer health benefits owe a duty to offer continued coverage to most former employees and their dependents for eighteen to thirty-six months or until coverage under another plan begins.⁶⁵ Final COBRA notice regulations issued by the DOL went into effect in 2005 and provided an updated sample COBRA notice for use by employers of single-employer group health plans.⁶⁶ If an employer adopts the model notices, the DOL will consider the employer to be in good faith compliance with its rules.⁶⁷

As a complement to COBRA, under the Veterans Benefits Improvement Act of 2004, effective December 10, 2004, employees absent from the workplace because of military service are entitled to twenty-four months of continuation coverage in the employer's health insurance plan.⁶⁸

As of January 1, 2005, Blue Cross of Florida, the largest health plan in the state with 3.5 million members, will no longer cover weight-loss surgery.⁶⁹ "Doctors in Florida submitted 2522 requests for weight-loss surgery coverage to Blue Cross in 2004, up from 1500 a year earlier."⁷⁰ Critics suspect that Blue Cross of Florida dropped coverage because of the \$25,000 surgery cost.⁷¹

Locally, Fort Lauderdale's police union has made major changes in its self-insured health insurance plan in the face of a financial crisis.⁷² Among the numerous changes, the union fired the plan manager, raised premiums, switched to a larger plan administrator, and borrowed money.⁷³ While illegal conduct was not suspected, the plan has run up about \$1.17 million in unpaid

65. Consolidated Omnibus Budget Reconciliation Act of 1985, Pub. L. No. 99-272, § 1001, 100 Stat. 82, 224 (1986). The Eleventh Circuit Court of Appeals has ruled that penalties under COBRA may be recoverable only by plan participants, not by plan beneficiaries. *Wright v. Hanna Steel Corp.*, 270 F.3d 1336, 1344 (11th Cir. 2001).

66. Health Care Continuation Coverage, 69 Fed. Reg. 30,084, 30,106 (May 26, 2004) (to be codified at 29 C.F.R. pt. 2590).

67. *Id.* at 30,091.

68. 38 U.S.C.A. § 4317(a)(1)(A) (West Supp. 2005).

69. Lisa Girion, *Insurers Weigh Surgery Risks*, L.A. TIMES, June 27, 2005, at C1.

70. *Id.*

71. *Id.*

72. Samuel P. Nitze, *Health Plan for Cops Gets Clean Bill*, MIAMI HERALD, Nov. 10, 2004, at 7B.

73. *Id.*

doctors' bills and quarterly financial reports, required by contract to be filed with the city, were in arrears until August 2004.⁷⁴

Under a 2004 contract between the city of Fort Lauderdale and its police and fire unions, "the city will increase its monthly contributions toward employee health insurance costs."⁷⁵ By contrast, under the city of Hollywood's three-year contract with its fire union, "[f]irefighters will . . . contribute more money toward their healthcare costs."⁷⁶

Finally, a state court ruled in 2004 that a Florida labor union's claim that a school board committed an unfair labor practice by unilaterally changing terms in its health insurance plan was wholly a question for the Public Employees Relations Committee and was not suitable for arbitration under the board's collective bargaining agreement.⁷⁷

D. *Family Medical Leave Act*

Under the Family and Medical Leave Act (FMLA), all eligible state and local government employees are entitled to twelve weeks of unpaid leave in a twelve-month period: 1) for birth or adoption of a child or placement of a foster child; 2) to care for a spouse, child, or parent with a serious health condition; or 3) for the employee's own serious health condition.⁷⁸ To be eligible for FMLA leave, the employee must: 1) have worked 1250 hours in the twelve months leading up to the leave request;⁷⁹ 2) have worked for the current employer for at least twelve total months;⁸⁰ and 3) have worked at a worksite that has fifty or more employees within a seventy-five mile radius of the worksite.⁸¹

In *Walker v. Elmore County Board of Education*,⁸² the Eleventh Circuit ruled that a first year teacher was not eligible for FMLA leave at the time requested leave was to begin.⁸³ This was because she had not worked for the

74. *Id.*

75. Samuel P. Nitze, *Police, Firefighters OK Deals*, MIAMI HERALD, Oct. 2, 2004, at 6B.

76. Berrios I, *supra* note 64.

77. *Comm'n Workers of Am. v. Indian River County Sch. Bd.*, 888 So. 2d 96, 100-101 (Fla. 4th Dist. Ct. App. 2004).

78. 29 U.S.C. § 2612(a)(1) (2000).

79. § 2611(2)(A)(ii) (2000). It is rare that an employee's off-duty time counts as working time toward meeting the 1250 hours of service requirement. See *Rich v. Delta Air Lines, Inc.*, 921 F. Supp. 767, 772 (N.D. Ga. 1996).

80. § 2611(2)(A)(i).

81. § 2611(2)(B)(ii).

82. 379 F.3d 1249 (11th Cir. 2004).

83. *Id.* at 1253 n.9.

school board for at least twelve months.⁸⁴ Nevertheless, even employees who have worked fewer than twelve months may file retaliation claims under the FMLA.⁸⁵

In *Morrison v. Magic Carpet Aviation*,⁸⁶ the Eleventh Circuit addressed FMLA's threshold requirement that an employer have fifty employees within a seventy-five mile radius of the worksite.⁸⁷ In ruling that the entity was not the pilot's employer, the court applied the following test of an employer-employee relationship: "1) whether or not the employment took place on the premises of the alleged employer; 2) how much control the alleged employer exerted on the employees; and 3) whether or not the alleged employer had the power to fire, hire, or modify the employment condition[s]."⁸⁸

According to a DOL opinion letter, day laborers and "routine temps" sometimes count as employees for purposes of the fifty-employee threshold necessary for FMLA coverage.⁸⁹

Like most federal labor statutes regulating the workplace, FMLA bars employers from discriminating or retaliating against any employee for exercising rights granted under the Act.⁹⁰ The circuit courts, however, are in disarray over the proper framework for raising such suits. While the Eleventh Circuit has adopted the burden-shifting *McDonnell Douglas* framework in FMLA retaliation suits,⁹¹ the Ninth Circuit simply insists that the worker prove by a preponderance of the evidence that her exercise of FMLA rights amounted to "a negative factor in the decision to [discharge] her."⁹²

Employers are unhappy with FMLA, citing, for example, the Act's vagueness and the cost of compliance.⁹³ According to the Employment Pol-

84. *Id.* at 1253 & n.9.

85. *Beffert v. Pa. Dep't of Pub. Welfare*, No. Civ.A.05-43, 2005 WL 906362, at *3 (E.D. Pa. April 18, 2005).

86. 383 F.3d 1253 (11th Cir. 2004).

87. *See id.* at 1234; 29 U.S.C. § 2611(2)(B)(ii) (2000).

88. *Morrison*, 383 F.3d at 1255.

89. Dep't of Labor Opinion Letter FMLA2004-1-A (Apr. 5, 2004).

90. § 2615(b). Even former employees are entitled to bring retaliation suits under FMLA. *Smith v. Bellsouth Telecomm., Inc.*, 273 F.3d 1303, 1307 (11th Cir. 2001).

91. *Brungart v. Bellsouth Telecomm., Inc.*, 231 F.3d 791, 798 (11th Cir. 2000) (citing *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973)). "[T]o establish a prima facie case of retaliatory discharge or retaliation using the *McDonnell Douglas* framework, a plaintiff must show that 1) she engaged in statutorily protected conduct; 2) she suffered an adverse employment action; and 3) there is a causal connection between the protected conduct and the adverse employment action." *Id.* (citing *Parris v. Miami Herald Publ'g Co.*, 216 F.3d 1298, 1301 (11th Cir. 2000)).

92. *Bachelder v. Am. W. Airlines, Inc.*, 259 F.3d 1112, 1125 (9th Cir. 2001).

93. *See Cindy Krischer Goodman, Balancing Act: Time to Care*, MIAMI HERALD, Apr. 20, 2005, at 1C.

icy Foundation, a Washington, D.C. research group, “[c]ompliance with FMLA cost employers \$21 billion in 2004.”⁹⁴ At one end of the spectrum are employers who seek a tightening of the definition of a serious health condition to one requiring at least ten days leave, more specificity over defining illnesses that qualify for FMLA leave, and curbing the use of intermittent leave.⁹⁵ At the other extreme are those advocates who propose expanding FMLA to countenance “leave to care for a same-sex spouse, domestic partner, parental in-law, sibling, or grandparent.”⁹⁶

E. Drug Testing

Random drug testing, conducted without prior notice or any evidence or suspicion of drug taking, faces strong legal challenge as an unreasonable search and seizure under the Fourth Amendment.⁹⁷ An employer’s compelling case for random testing is most likely to be sustained when public safety is at stake.⁹⁸ The Supreme Court has yet to rule on the constitutionality of random drug testing.

In *Wenzel v. Bankhead*,⁹⁹ the plaintiff, Wenzel, worked in an administrative building in Tallahassee where no juveniles were present and the employer offered no evidence that the employee would be a safety threat even if he were under the influence of drugs or alcohol.¹⁰⁰ Wenzel refused to undergo random drug testing and sued his public employer over the issue.¹⁰¹ Although Wenzel had access to confidential juvenile information and facilities, the federal district court deemed the random “suspicionless” drug testing unconstitutional under the Fourth Amendment, concluding that the facts did not support a “special need” substantially important enough to outweigh Wenzel’s privacy interest.¹⁰²

94. *Id.*

95. *Id.*

96. *Id.*

97. *See, e.g.,* Kathleen M. Dorr, Annotation, *Validity, Under Federal Constitution, of Regulations, Rules, or Statutes Requiring Random or Mass Drug Testing of Public Employees or Persons Whose Employment Is Regulated by State, Local, or Federal Government*, 86 A.L.R. FED. 420, 423 (1988) (stating that some courts have held that “the government must have a reasonable individualized suspicion that a drug test will produce a positive result in order to test [certain governmental] employees”).

98. *E.g.,* *Smith v. Fresno Irrigation Dist.*, 84 Cal. Rptr. 2d 775, 785 (Ct. App. 1999) (concluding that construction and maintenance worker’s expectation of privacy was outweighed by irrigation district’s substantial safety-related grounds for random drug testing).

99. 351 F. Supp. 2d 1316 (N.D. Fla. 2004).

100. *Id.* at 1319, 1324.

101. *Id.* at 1317.

102. *See id.* at 1323–25.

According to a DOL opinion letter, employers may insist that employees returning from FMLA leave undergo drug testing as long as all similarly situated employees are treated the same and the testing relates to the specific health problem that led to FMLA leave.¹⁰³

F. *Privacy*

In 2004, the Homeland Security Department instituted a policy requiring its employees to sign a nondisclosure agreement so restrictive that it raises privacy concerns.¹⁰⁴ Although the policy affects only new employees, a lawyer for a public employee union warned that it “would discourage employees from talking to the public and Congress about ‘matters of public concern.’”¹⁰⁵ Since the policy bars “department employees from giving the public ‘sensitive but unclassified’ information,” public unions claim this gives the government “unprecedented leeway to search employee homes and personal belongings in violation of the Fourth Amendment.”¹⁰⁶

Although the federal Employee Polygraph Protection Act (EPPA) virtually eliminated polygraph exams in the private workplace, it still comes into play at the intersection of public and private employment such as when private contractors do work for a public employer.¹⁰⁷ For example, in *Polkey v. Transtecs Corp.*,¹⁰⁸ the Eleventh Circuit ruled that the EPPA did not allow a private contractor performing work for the Department of Defense to administer lie-detector tests under the Act’s “national defense” exemption.¹⁰⁹ The court made clear that this exception applies only to the federal government, not to private contractors.¹¹⁰ In addition, the “ongoing investigation exemption” did not apply, the court concluded, because Polkey was never suspected of wrongdoing.¹¹¹ Even though Polkey never underwent polygraph testing, he recovered damages because under the EPPA it is unlawful for an employer to request that an employee take a polygraph exam, even if no test is ever administered.¹¹²

103. Dep’t of Labor Opinion Letter FMLA 2004-4 (Oct. 25, 2004).

104. Brian Wingfield, *Unions for Border Workers Criticize Rules on Disclosure*, N.Y. TIMES, Nov. 30, 2004, at A20.

105. *Id.*

106. *Id.*

107. *See, e.g.*, *Polkey v. Transtecs Corp.*, 404 F.3d 1264, 1268–69 (11th Cir. 2005).

108. *Id.* at 1264.

109. *Id.* at 1268–69.

110. *Id.* at 1269.

111. *Id.* at 1270.

112. *Polkey*, 404 F.3d at 1267–68.

G. *Defamation*

An emerging area of defamation law, known as the “invited defamation defense,” has been successfully invoked by employers when an employee repeatedly demands that the employer spell out the grounds for discharge.¹¹³ In one Florida case, the court ruled that an employee’s insistence that his employer tell him why he was being dismissed constituted a complete defense to defamation.¹¹⁴

Employment-related defamation may arise as well when workers send offensive e-mails to colleagues. One Florida employee was dismissed for sending a co-worker e-mails that “included nude videos and pictures, lewd animation, profanity and suggestive remarks.”¹¹⁵

The Supreme Court of Florida imposed a two-week suspension and a \$15,000 fine on a Broward judge for sending an anonymous e-mail to another judge, taking him to task for his unfair treatment of Hispanic defendants.¹¹⁶ The punishment for the inappropriate e-mail had been recommended by the Judicial Qualifications Commission, an agency charged with probing allegations of judicial misconduct.¹¹⁷

H. *Workers’ Compensation*

In the last year, Florida courts and the Eleventh Circuit have rendered decisions in which employees have alleged that they were the targets of retaliation for exercising rights under the state’s workers’ compensation law.¹¹⁸ In *Borque v. Trugreen, Inc.*,¹¹⁹ the Eleventh Circuit ruled in a case from Florida that a workers’ compensation settlement agreement that does not specifically release the employer from any retaliatory discharge claim does not bar an employee from subsequently raising such claims.¹²⁰ “[M]ere reference to rights and benefits under the Workers’ Compensation Law is insufficient to waive a claim for retaliatory discharge.”¹²¹

113. See, e.g., *Charles v. Fla. Dep’t of Children & Families*, 30 Fla. L. Weekly D397 (Fla. 4th Dist. Ct. App. Feb. 9, 2005).

114. *Id.* at D398.

115. *Bradenton: Around Florida*, MIAMI HERALD, Apr. 27, 2005, at 9B.

116. Sara Olkon, *E-mail Costs Judge \$15,000+*, MIAMI HERALD, July 8, 2005, at 1B.

117. *Id.*

118. See FLA. STAT. § 440.205 (2004).

119. 389 F.3d 1354 (11th Cir. 2004).

120. *Id.* at 1358.

121. *Id.* (citing *Smith v. Piezo Tech. & Prof’l Adm’rs*, 427 So. 2d 182, 184 (Fla. 1983)).

In *Bruner v. GC-GW, Inc.*,¹²² a state court broadly read Florida's workers' compensation anti-retaliation provision to include protecting an employee who was dismissed for filing a workers' compensation claim against a former employer.¹²³ In reaching this result, the court rejected the employer's claim that it did not dismiss the employee for filing a workers' compensation claim, but out of a good faith concern that his earlier claim would increase the employer's workers' compensation insurance rates.¹²⁴

In *Flores v. Roof Tile Administration, Inc.*,¹²⁵ a Florida court ruled that there is a right to a jury trial in a suit for retaliatory discharge under Florida's workers' compensation law.¹²⁶

In *Miami-Dade County v. Lovett*,¹²⁷ the court determined that, under federal law, an employer may "offset workers' compensation payments up to the amount of [social security disability] benefits the claimant is receiving," but the law "prohibits the offset from decreasing the claimant's total benefit below 80% of his monthly [average weekly wage] or 80% of his monthly [average current earnings], which ever is greater."¹²⁸ The claimant in this case "was injured in the line of duty" and ended up "permanently and totally disabled."¹²⁹ "The [c]laimant . . . receiv[ed] \$265.05 per week in [social security disability] [b]enefits, and \$1600.38 per month in Florida Retirement System (FRS) in-line-of-duty disability benefits."¹³⁰ The court ruled that the employer correctly calculated the offset by providing the claimant with 100% of his average weekly wage.¹³¹

In 2003, the Florida Legislature amended the workers' compensation law to require medical proof in occupational disease cases where the employment is the major contributing cause of the disease.¹³² In *City of Cooper City v. Farthing*,¹³³ a former employee was denied workers' compensation because he offered no medical evidence that the incidence of his disease in his job was higher than in the public at large.¹³⁴

122. 880 So. 2d 1244 (Fla. 1st Dist. Ct. App. 2004).

123. *Id.* at 1247-48.

124. *Id.* at 1250.

125. 887 So. 2d 360 (Fla. 3d Dist. Ct. App. 2004).

126. *Id.* at 360.

127. 888 So. 2d 136 (Fla. 1st Dist. Ct. App. 2004).

128. *Id.* at 137-38.

129. *Id.* at 137.

130. *Id.*

131. *Id.* at 138.

132. *City of Cooper City v. Farthing*, 905 So. 2d 925, 927 n.2 (Fla. 1st Dist. Ct. App. 2005) (citing FLA. STAT. § 440.151(1)(a) (2003)).

133. *Id.* at 925.

134. *Id.* at 927.

In *Lee v. Volusia County School Board*,¹³⁵ workers' compensation benefits were denied because the claimant made false statements, such as claiming to be in pain and unable to do yard work, but surveillance videos showed the claimant engaging in activities inconsistent with his earlier reports to doctors and the employer's insurance carrier.¹³⁶

Under workers' compensation law, an employer who commits an intentional act aimed at causing injury or death to an employee may be sued in tort law.¹³⁷ In *Byers v. Ritz*,¹³⁸ dependents of a public safety officer brought a wrongful death action against the officer's supervisors after the officer was killed in an accident involving a backhoe taken without permission for use in post-hurricane clean-up effort.¹³⁹ In denying the plaintiffs' claim, the court ruled that the theft of the backhoe was not the proximate cause of the officer's death who was killed when he was hit by a tree limb that the backhoe operator was trying to remove.¹⁴⁰ In legal terms, the theft, while an intentional act, was causally superseded by the unintentional act of the backhoe's operator.¹⁴¹

In *Deere v. Sarasota County School Board*,¹⁴² the claimant tripped over toys and injured her lower back while at work as a pre-kindergarten aide.¹⁴³ Later, she was in a car accident and asked her doctor whether her compensable injury (under workers' compensation) had worsened.¹⁴⁴ The doctor refused to examine her and the employer's claims adjuster told the claimant "there is nothing we can do now."¹⁴⁵ When the claimant later sought workers' compensation benefits, the employer raised a statute of limitations defense.¹⁴⁶ In ruling for the claimant, the Florida court left no doubt that "[w]here an [employer or its insurance carrier] misleads a claimant about his or her rights or availability of workers' compensation, even unintentionally, resulting in the claimant's failure to file a timely claim, the [employer or its carrier] will be estopped from denying benefits."¹⁴⁷

135. 890 So. 2d 397 (Fla. 1st Dist. Ct. App. 2004).

136. *Id.* at 398-400.

137. *Byers v. Ritz*, 890 So. 2d 343, 346 (Fla. 3d Dist. Ct. App. 2004) (citation omitted).

138. *Id.* at 343.

139. *Id.* at 345.

140. *Id.* at 348-49.

141. *Id.* at 348.

142. 880 So. 2d 825 (Fla. 1st Dist. Ct. App. 2004).

143. *Id.* at 825.

144. *Id.* at 825-26.

145. *Id.* at 826.

146. *Id.*

147. *Deere*, 880 So. 2d at 826.

I. *Unemployment Compensation*

Four Florida cases in the past year have addressed one of the most common issues to be found in the law of unemployment compensation: what constitutes employee misconduct sufficient to render the worker ineligible for such benefits?¹⁴⁸ In *Rosas v. Remington Hospitality, Inc.*,¹⁴⁹ the court ruled that an employee's refusal to answer questions and cooperate in a theft investigation was "an isolated incident" that did not amount to misconduct sufficient to foreclose unemployment benefits.¹⁵⁰

In *Saunders v. Unemployment Appeals Commission*,¹⁵¹ Saunders, a diabetic, worked in an after-school program for children.¹⁵² Amid a diabetic attack at work, she went two blocks to a relative's house to inject insulin ("she did not keep [it] at the Center because she did not want the children or clients with drug problems to have access to the insulin or the needles").¹⁵³ In her haste, she did not inform anyone she was leaving because she believed she would return before the children arrived at 2:30 p.m.¹⁵⁴ While Saunders returned to the Center at about 2:20 p.m., four children were already there unsupervised.¹⁵⁵ She was terminated for "leaving her work site without permission and leaving young children unattended."¹⁵⁶ Saundser's employer contested her claim for unemployment benefits on the ground that Saunders was let go for misconduct.¹⁵⁷ The court noted that "where company policies are concerned, 'misconduct usually involves repeated violations of explicit policies after several warnings.'"¹⁵⁸ Siding with Saunders, the court concluded that "she did not intentionally refuse to comply with her employer's policies or willfully and wantonly disregard her employer's interests" sufficient to amount to misconduct warranting denial of unemployment benefits.¹⁵⁹

148. See FLA. STAT. § 443.101 (2004).

149. 899 So. 2d 390 (Fla. 3d Dist. Ct. App. 2005).

150. *Id.* at 391.

151. 888 So. 2d 69 (Fla. 4th Dist. Ct. App. 2004).

152. *Id.* at 70.

153. *Id.* at 71.

154. *Id.*

155. *Id.*

156. *Saunders*, 888 So. 2d at 71.

157. See *id.* at 70.

158. *Id.* at 72 (quoting *Grossman v. J.C. Penny Co.* 2071, 689 So. 2d 1206, 1207 (Fla. 3d Dist. Ct. App. 1997)).

159. *Id.* at 73.

In *City of Largo v. Rodriguez*,¹⁶⁰ an employee was dismissed for giving untruthful testimony during a grievance proceeding conducted to assess discipline imposed on the employee.¹⁶¹ In deciding whether the former employee was disqualified from receiving unemployment benefits because she was dismissed for misconduct, the court reiterated that an “employee’s action must be willful, wanton, or deliberate.”¹⁶² In holding for the employer, the court reasoned that dishonesty is willful misconduct sufficient to disqualify a claimant from unemployment benefits.¹⁶³

In *Blodgett v. Florida Unemployment Appeals Commission*,¹⁶⁴ an employee, out on pregnancy leave, was instructed to submit a written request for each thirty-day leave of absence under the employer’s personal leave policy.¹⁶⁵ The employee failed to make the December 28, 2002, deadline because she was unable to pick up leave forms from her doctor until January 14, 2003, when she was medically allowed to drive again.¹⁶⁶ She was fired for missing the deadline and she applied for unemployment compensation.¹⁶⁷ While misconduct sufficient to bar such benefits can stem from excessive absenteeism, the court nevertheless granted the former employee unemployment benefits because she attempted to comply with her employer’s policy and she was not dishonest or malingering.¹⁶⁸ What many of these cases underscore is that “misconduct” that constitutes sufficient cause for discharge may not amount to “misconduct” sufficient to bar unemployment benefits.

Florida law excludes from unemployment benefits coverage jobs designated as “major nontenured policymaking or advisory position[s], including a position in the Senior Management Service.”¹⁶⁹ In *Brenner v. Department of Banking & Finance*,¹⁷⁰ a Senior Management Service employee was deemed ineligible for unemployment benefits because, as part of the executive branch, his job duties and responsibilities were primarily policymaking or managerial in nature.¹⁷¹

160. 884 So. 2d 121 (Fla. 2d Dist. Ct. App. 2004).

161. *Id.* at 122.

162. *Id.* at 123 (citing *Anderson v. Unemployment Appeals Comm’n*, 822 So. 2d 563, 566 (Fla. 5th Dist. Ct. App. 2002)).

163. *Id.*

164. 880 So. 2d 814 (Fla. 1st Dist. Ct. App. 2004).

165. *Id.* at 815.

166. *Id.*

167. *Id.*

168. *Id.* at 815–16.

169. FLA. STAT. § 443.1216(4)(c)(4) (2004).

170. 892 So. 2d 1129 (Fla. 3d Dist. Ct. App. 2004).

171. *Id.* at 1130.

Typically, if an employee resigns her position, she is rendered ineligible for unemployment benefits.¹⁷² In *Florida Department of Revenue v. Florida Unemployment Appeals Commission*,¹⁷³ an employee signed a settlement agreement stipulating that he would resign instead of being terminated.¹⁷⁴ While the settlement agreement would have been void if it was intended to waive the employee's rights to unemployment benefits, the court sustained the settlement agreement and disqualified the claimant from unemployment benefits because the primary purpose of the settlement was not to waive the employee's rights to such benefits.¹⁷⁵

J. *Smoking*

While Florida does not have a law protecting employees who smoke, "[t]wenty-eight states and the District of Columbia protect workers who smoke."¹⁷⁶ While it is permissible in Florida for public employers to refuse to hire smokers,¹⁷⁷ two other southern states have taken another route. Alabama and Kentucky, for example, have passed on to state employees the cost of smokers by raising health insurance premiums for those who smoke.¹⁷⁸

In the first of its kind in the private sector, Weyco, a Michigan insurance benefits administrator, began testing its 200 employees for smoking in 2005.¹⁷⁹ Employees face random testing and, if they fail, they will be dismissed.¹⁸⁰ Such policies have fueled outrage by opponents who question whether employers should be able to shape how employees live their lives, even at home.¹⁸¹

172. Fla. Dep't of Revenue v. Fla. Unemployment Appeals Comm'n, 872 So. 2d 376, 377 (Fla. 1st Dist. Ct. App. 2004).

173. *Id.* at 376.

174. *Id.* at 377.

175. *Id.*

176. Kathy Barks Hoffman, *To Smoke, or Not to Smoke?*, MIAMI HERALD, Feb. 9, 2005, at 1C.

177. *E.g.*, City of N. Miami v. Kurtz, 653 So. 2d 1025, 1026, 1029 (Fla. 1995) (holding that there was no privacy violation for the city to require job applicants to sign affidavits avowing they have not used tobacco for a year).

178. Ariel Hart, *Alabama: Trying to Limit Health Spending for State Workers*, N.Y. TIMES, Nov. 17, 2004, at A26.

179. Jeremy W. Peters, *Company's Smoking Ban Means Off-Hours, Too*, N.Y. TIMES, Feb. 8, 2005, at C5.

180. *Id.*

181. Hoffman, *supra* note 176.

IV. EMPLOYMENT DISCRIMINATION

A. *Constitutional Challenges*

1. First Amendment

The United States Supreme Court has ruled that public employees have a First Amendment right to speak out on “matters of public concern.”¹⁸² By contrast, internal disputes bear no First Amendment weight.¹⁸³ In February 2005, the United States Supreme Court agreed to hear the case of a Los Angeles County prosecutor that tests the line between public and private concern.¹⁸⁴ In *Ceballos v. Garcetti*,¹⁸⁵ Ceballos, a deputy district attorney, learned that a deputy sheriff might have lied about evidence to secure a search warrant.¹⁸⁶ Ceballos complained about this concern in a memo to his supervisors.¹⁸⁷ Ceballos said he was demoted and transferred in retaliation for his actions.¹⁸⁸ He sued, alleging that he was punished for speaking out on a matter of public concern.¹⁸⁹ The Ninth Circuit Court of Appeals ruled for Ceballos, concluding that it was crucial that public employees be able to disclose wrongdoing in public agencies.¹⁹⁰ The United States Supreme Court’s ruling, expected by June 2006, “could affect the rights of millions of public employees, from police, prosecutors and teachers to public hospital workers.”¹⁹¹

A bill introduced in the Florida Legislature in 2005, aimed at protecting conservatives on public campuses, has some public university professors up in arms, claiming that the law will chill free speech in the classroom and curb their ability to discuss hot-button issues.¹⁹² Although similar bills have been filed in ten other states, Florida House Bill 837 “says students should not ‘be infringed upon by instructors who persistently introduce controversial matter

182. *Pickering v. Bd. of Educ.*, 391 U.S. 563, 574 (1968) (citing *Garrison v. Louisiana*, 379 U.S. 64 (1964); *Wood v. Georgia*, 370 U.S. 375 (1962)).

183. *Connick v. Myers*, 461 U.S. 138, 147 (1983) (recognizing that general comments about the workplace do not count as matters of public concern).

184. David G. Savage, *Whistle-Blower Case Gets Justices’ Attention*, L.A. TIMES, Mar. 1, 2005, at A18.

185. 361 F.3d 1168 (9th Cir. 2004), *cert. granted*, 125 S. Ct. 1395 (2005).

186. *Id.* at 1170–71.

187. *Id.* at 1171.

188. *Id.* at 1171–72.

189. *Id.* at 1172.

190. *Ceballos*, 361 F.3d at 1180.

191. Savage, *supra* note 184.

192. Kimberly Miller, *Florida Legislature: Classroom Bill Draws Fire*, MIAMI HERALD, Mar. 8, 2005, at 7B.

into the classroom that has no relation to the subject of study and serves no teaching purpose.”¹⁹³ The bill does not define the terms “persistent” or “controversial.”¹⁹⁴ “The bill also states that professors could not be hired, fired, promoted or granted tenure based on their political leanings or religious beliefs.”¹⁹⁵

Colorado Governor Bill Owens in 2005 pressured the University of Colorado to dismiss a controversial professor “who wrote that some people who worked at the World Trade Center [on 9/11] were ‘little Eichmanns,’ toiling on behalf of American foreign policy just as Adolf Eichmann did on behalf of the Holocaust.”¹⁹⁶

A federal judge in Tampa ruled in 2004 that the federal government must prove that a fired University of South Florida professor actually financed a Palestinian charity group and that the contributions were literally used for violent attacks on Israelis.¹⁹⁷ The defendant alleges that the anti-terrorism law he is charged with violating criminalizes his political speech and renders him guilty by association.¹⁹⁸ The government’s fifty-count racketeering indictment claims the defendant transmitted money to terrorist groups under the pretext of financing scholarly work and aiding orphans.¹⁹⁹

The circuit courts are split over the proper definition of an “adverse employment action” in retaliatory discharge claims brought by public employees.²⁰⁰ While all courts agree, for example, that dismissals constitute an adverse employment action,²⁰¹ courts disagree over whether a transfer amounts to an adverse employment action.²⁰² In *Stavropoulos v. Firestone*,²⁰³ the Eleventh Circuit applied Title VII of the Civil Rights Act of 1964 standards for defining an adverse employment action in a case involving a public university professor’s First Amendment retaliation claim.²⁰⁴

193. *Id.*

194. *Id.*; see Fla. HB 837 (2005) (proposed FLA. STAT. §§ 1002.21, 1004.09), available at <http://www.myfloridahouse.gov/> (search “Find a Bill By Number, Session 2005” for “837;” then follow “Original Filed Version” hyperlink under “Bill Text”).

195. Miller, *supra* note 192.

196. Kirk Johnson, *University President Resigns at Colorado Amid Turmoil*, N.Y. TIMES, Mar. 8, 2005, at A14.

197. Jay Weaver, *Judge: Prove Terror Intent*, MIAMI HERALD, Aug. 6, 2004, at 1B.

198. *Id.*

199. *Id.*

200. Ray v. Henderson, 217 F.3d 1234, 1240 (9th Cir. 2000).

201. Fairbrother v. Morrison, 412 F.3d 39, 56 (2d Cir. 2005).

202. See, e.g., *id.*; Hinson v. Clinch County, Ga. Bd. of Educ., 231 F.3d 821, 828–29 (11th Cir. 2000).

203. 361 F.3d 610 (11th Cir. 2004).

204. *Id.* at 616–17.

2. Equal Protection

In *City of Richmond v. J.A. Croson Co.*,²⁰⁵ a city put into effect an affirmative action plan under which thirty percent of its contracting work would go to minority-owned businesses.²⁰⁶ The Supreme Court struck down the plan, holding that the single standard of review for racial classifications should be “strict scrutiny.”²⁰⁷

In *Hershell Gill Consulting Engineers, Inc. v. Miami-Dade County*,²⁰⁸ white-owned engineering firms doing contracting work for the county sued the county over its affirmative action program, alleging an equal protection violation.²⁰⁹ While the federal district court found the program unconstitutional, it awarded no compensatory or punitive damages, only nominal damages and attorneys’ fees and costs.²¹⁰

B. Statutory Challenges

1. Title VII

a. Generally

Damage awards recoverable under Title VII of the *United States Code* are subject to taxation.²¹¹ Under the civil rights tax relief provision of the 2004 American Jobs Creation Act, however, individuals would be entitled to a tax deduction from their gross income for attorneys’ fees and court costs paid to litigate claims of unlawful discrimination.²¹²

In 2005, the Supreme Court ruled that sums paid by a taxpayer-client to an attorney under a contingent fee agreement count as gross income to the client under § 61(a) of the *Internal Revenue Code*.²¹³

The Eleventh Circuit has ruled that the Equal Employment Opportunity Commission (EEOC) is not precluded from suing nor is bound by an earlier judgment in private employment discrimination litigation between employ-

205. 488 U.S. 469 (1989).

206. *Id.* at 477–78.

207. *Id.* at 493, 505.

208. 333 F. Supp. 2d 1305 (S.D. Fla. 2004).

209. *Id.* at 1310.

210. *Id.* at 1344.

211. *Kendrick v. Jefferson County Bd. of Educ.*, 13 F.3d 1510, 1514 (11th Cir. 1994) (citing *United States v. Burke*, 504 U.S. 229, 241 (1992)).

212. American Jobs Creation Act of 2004, Pub. L. No. 108-357, § 703, 118 Stat. 1418, 1546 (2004).

213. *Comm’r v. Banks*, 125 S. Ct. 826, 831 (2005).

ees and their employer.²¹⁴ Thus, the EEOC was free to bring its own enforcement action against the employer.²¹⁵

b. *Sexual Harassment*

Three Florida cases involving sexual harassment were decided over the past year. In *Russell v. KSL Hotel Corp.*,²¹⁶ the court ruled that harassing acts, absent sexually explicit content directed at women and driven by animus against women, may constitute actionable sexual harassment.²¹⁷

In *EEOC v. Six L's Packing Co.*,²¹⁸ although settled, if the court would have ruled it is likely that the court would have found if employees are not fluent in English, the prudent employer should translate its harassment policy into their language so they are "on notice" of the company's policies.²¹⁹

In *Natson v. Eckerd Corp.*,²²⁰ the court ruled that because the employer had three different published versions of its sexual harassment policy, only two of which were directed at employees, it was "for the jury to determine which version of the policy was the one that Natson should have followed."²²¹ If she can establish that she satisfied either version of the policy, she will have established that her employer knew of the harassment and did not remedy it.²²²

c. *National Origin*

A public employee at Port Everglades recovered a \$305,000 jury verdict in 2004 in a lawsuit claiming that his federal employer created a hostile work environment on account of his Arab ancestry.²²³ The employee convinced jurors that "he was abused, harassed and humiliated by his supervisors in front of his peers because of his Lebanese national origin and his Arab-American race."²²⁴ Among other insults, the employee's supervisors made

214. See *EEOC v. Pemco Aeroplex, Inc.*, 383 F.3d 1280, 1294 (11th Cir. 2004).

215. *Id.* at 1295.

216. 887 So. 2d 372 (Fla. 3d Dist. Ct. App. 2004).

217. *Id.* at 378 (citing *Hall v. Gus Constr. Co.*, 842 F.2d 1010, 1014 (8th Cir. 1988); *King v. Auto, Truck, Indus. Parts & Supply, Inc.*, 21 F. Supp. 2d 1370, 1379 (N.D. Fla. 1998)).

218. No. 03-Cv-570-FTM-29DNF (M.D. Fla. filed Jan. 26, 2004).

219. G. Thomas Harper ed., *Personnel Policies: Do Your Employees Understand Your Policies*, FLA. EMPLOYMENT LAW LETTER, May 2005, at 5.

220. 885 So. 2d 945 (Fla. 4th Dist. Ct. App. 2004).

221. *Id.* at 948-49.

222. See *id.* at 949.

223. Kevin Deutsch, *Lebanese-American Worker Wins \$305,000 in INS Suit*, MIAMI HERALD, July 31, 2004, at 1B.

224. *Id.*

fun of his accent and made rude remarks about his prayer rug, even though the employee was Catholic, not Muslim.²²⁵

d. *Religion*

In March 2005, the U.S. House of Representatives approved a job-training bill that would allow faith-based organizations receiving federal funds to consider a person's religious beliefs in making employment decisions.²²⁶ Under current law, religious groups that receive federal money for job-training programs cannot discriminate on religious grounds in hiring or firing.²²⁷

2. Age Discrimination in Employment Act

On March 30, 2005, the Supreme Court ruled in *Smith v. City of Jackson*²²⁸ that disparate impact claims may be brought under the Age Discrimination in Employment Act (ADEA).²²⁹ A disparate impact claim emerges when an employer takes an action that is neutral on its face but has the accidental effect of discriminating against a protected class.²³⁰

Under the City of Jackson, Mississippi's pay plan, police officers with less than five years of service secured proportionately larger raises than those with over five years of service.²³¹ A group of older officers sued the city under the ADEA for disparate impact discrimination.²³² In response, the city asserted that it enacted the pay plan not to discriminate against older officers but to start making salaries more competitive with other police departments in the area.²³³ In the language of the ADEA, the city was relying on one of the "reasonable factors other than age," a defense which is not found in Title VII.²³⁴ This is so because Congress recognized that an employee's age, unlike his race, sex, religion, etc., sometimes is relevant to his ability to perform certain jobs.²³⁵ This employer defense was the strongest argument relied upon by courts that had rejected disparate impact claims under the

225. *See id.*

226. Job Training Improvement Act of 2005, H.R. 27, 109th Cong. § 129 (2005).

227. *See* 42 U.S.C. § 2000a (2000).

228. 125 S. Ct. 1536 (2005).

229. *Id.* at 1540.

230. *Id.* at 1544.

231. *Id.* at 1539.

232. *Id.*

233. *Smith*, 125 S. Ct. at 1546.

234. *Id.* at 1540–41.

235. *Id.* at 1545.

ADEA.²³⁶ While the Supreme Court dismissed the officers' lawsuit based on the "reasonable factors other than age" defense; it ruled that disparate impact claims are also allowable under the ADEA,²³⁷ while Justice Scalia, in his concurrence, reached the same result by deferring to the EEOC's reading of the Act.²³⁸

In *Conroy v. Abraham Chevrolet-Tampa, Inc.*,²³⁹ the Eleventh Circuit ruled that district courts are not required to give the jury a pretext instruction in an employment discrimination suit.²⁴⁰

3. Americans with Disabilities Act

Under the Americans with Disabilities Act (ADA), employers may "discipline, discharge or deny employment" to anyone whose alcohol consumption "impairs job performance or conduct" if the person is not a "qualified individual with a disability."²⁴¹ For example, in one Florida case, the court found no evidence that the employee's alcoholism permanently altered his ability to engage in a major life activity.²⁴² Thus, the employee was not disabled under the ADA and could be dismissed for excessive absenteeism stemming from his drinking.²⁴³

According to a 2004 EEOC Advisory Letter, the ADA does not require employers to alert employees that a co-worker has a disability such as hepatitis C.²⁴⁴ Indeed, the ADA bars employers from revealing medical information about applicants and employees.²⁴⁵

Under the 2004 guidelines issued by the EEOC, an employer may remove a worker from a food handling position if the worker is disabled by a disease transmissible through food found on the CDC list and the odds of spreading the disease cannot be reduced by reasonable accommodation.²⁴⁶

236. *See id.* at 1543.

237. *Id.* at 1546.

238. *Smith*, 125 S. Ct. at 1546–47 (Scalia, J., concurring).

239. 375 F.3d 1228 (11th Cir. 2004).

240. *Id.* at 1235.

241. EQUAL EMPLOYMENT OPPORTUNITY COMM'N, EMPLOYMENT PROVISIONS (TITLE I) TECHNICAL ASSISTANCE MANUAL, § 8.2 (1992), available at http://www.adaportal.org/Employment/Browse_TAM_I/Chapter_VIII_8-2.html.

242. *Roig v. Miami Fed. Credit Union*, 353 F. Supp. 2d 1213, 1217 (S.D. Fla. 2005).

243. *Id.*

244. *ADA Does Not Permit Telling Employees Co-Worker Has Hepatitis C*, EEOC Advises, 73 U.S.L.W. 2137, 2137 (2004).

245. *Id.*

246. EQUAL EMPLOYMENT OPPORTUNITY COMM'N, HOW TO COMPLY WITH THE AMERICANS WITH DISABILITIES ACT: A GUIDE FOR RESTAURANTS AND OTHER FOOD SERVICE EMPLOYERS, http://www.eeoc.gov/facts/restaurant_guide.html (last visited Oct. 24, 2005).

In 2004, the EEOC issued a fact sheet providing tips on dealing with employees with epilepsy.²⁴⁷ The guide spells out: 1) when epilepsy is a disability under the ADA; 2) when employers may inquire about an employee's epilepsy; 3) suggested reasonable accommodations; and 4) how to handle safety concerns.²⁴⁸

4. Retaliatory Discharge

In general, “[i]n order to establish a prima facie retaliation case, the plaintiff must demonstrate the following elements: 1) a statutorily protected expression; 2) an adverse employment action; and 3) a causal connection between the participation in the protected expression and the adverse action.”²⁴⁹

Under an anti-retaliation provision of Florida law known as the “participation clause,” it is unlawful for an employer to discriminate against a person who has “made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing.”²⁵⁰ In one Florida case, a police chief wrote a memo advising another officer about how to file a harassment claim.²⁵¹ The memo did not say whether the officer's claims were of a sexual nature, it did not name the alleged harasser, and it did not describe the specific acts of harassment.²⁵² After the police chief was dismissed, he filed a retaliatory discharge claim, invoking the “participation clause” in support of his suit.²⁵³ The court ruled that the city articulated a legitimate, nondiscriminatory reason for dismissing the police chief, suggesting that he lacked interpersonal skills and that the police chief did not show a pretext for retaliation.²⁵⁴ Finally, the court ruled that the police chief could not avail himself of the “participation clause” simply because he gave another officer the EEOC's phone number and wrote a memo on his behalf.²⁵⁵ The court

247. EQUAL EMPLOYMENT OPPORTUNITY COMM'N, QUESTIONS AND ANSWERS ABOUT EPILEPSY IN THE WORKPLACE AND THE AMERICANS WITH DISABILITIES ACT, <http://eeoc.gov/facts/epilepsy.html> (last visited Oct. 24, 2005).

248. *Id.*

249. *Russell v. KSL Hotel Corp.*, 887 So. 2d 372, 379 (Fla. 3d Dist. Ct. App. 2004) (citations omitted).

250. *Guess v. City of Miramar*, 889 So. 2d 840, 846 (Fla. 4th Dist. Ct. App. 2004) (quoting *EEOC v. Total Sys. Servs., Inc.*, 221 F.3d 1171, 1174 (11th Cir. 2000)).

251. *Id.* at 845.

252. *Id.*

253. *Id.* at 843, 846.

254. *Id.* at 848.

255. *Guess*, 889 So. 2d at 846–47.

made clear that the participation clause only protected acts occurring “in conjunction with or after the filing of a formal charge with the EEOC.”²⁵⁶

Title IX of the Education Amendments of 1972²⁵⁷ provides that “[n]o person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance.”²⁵⁸ The Supreme Court has ruled there is an implied right of action under Title IX available to victims of sex-based discrimination.²⁵⁹ On March 29, 2005, the United States Supreme Court ruled 5-4 in *Jackson v. Birmingham Board of Education*²⁶⁰ that Title IX also implies a private right of action for whistleblowers’ claims of retaliation over complaints.²⁶¹

In 2003, the Supreme Court ruled that counties may be subject to suit under the federal False Claims Act.²⁶² False Claims Act suits amount to whistleblower suits alleging retaliation over exposing governmental corruption.²⁶³

Finally, a Florida court ruled that under “public policy, employers have an obligation of reasonable cooperation where an employee’s appearance in the court system is required.”²⁶⁴ In other words, it is wrongful for an employee to lose unemployment benefits over a mandatory court appearance.²⁶⁵

V. ARBITRATION, COLLECTIVE BARGAINING, AND JUST CAUSE

A. Arbitration

There is an emerging form of mandatory arbitration negotiated between individual employees and their employers outside the setting of a collective bargaining agreement. These kinds of arbitrations, administered under the Federal Arbitration Act (FAA), are binding on the parties and foreclose any recourse to courts other than to appeal the arbitrator’s decision.²⁶⁶ In 2001, the United States Supreme Court ruled that the FAA governs most employ-

256. *Id.* at 846 (quoting *EEOC v. Total Sys. Servs., Inc.*, 221 F.3d 1171, 1174 (11th Cir. 2000)).

257. 20 U.S.C. § 1681 (2000).

258. § 1681(a).

259. *Cannon v. Univ. of Chicago*, 441 U.S. 677, 703 (1979).

260. 125 S. Ct. 1497 (2005).

261. *Id.* at 1507.

262. *Cook County v. United States ex rel. Chandler*, 538 U.S. 119, 133–34 (2003).

263. *See id.*

264. *Thomas v. Peoplease Corp.*, 877 So. 2d 45, 47 (Fla. 3d Dist. Ct. App. 2004).

265. *Id.*

266. *See generally* 9 U.S.C. §§ 1-14 (2000).

ment contracts except for those involving transportation employees.²⁶⁷ In the past year, two Eleventh Circuit cases have addressed the FAA's exception for transportation workers.

In *Bautista v. Star Cruises*,²⁶⁸ the Eleventh Circuit ruled that the FAA's exception for contracts of employment of seamen does not apply to cruise ship employment contracts with arbitration clauses governed by the United Nations Convention on Recognition and Enforcement of Foreign Arbitral Awards.²⁶⁹

Similarly, in *Hill v. Rent-A-Center, Inc.*,²⁷⁰ the Eleventh Circuit ruled that the FAA's transportation industry exemption does not include workers who incidentally deliver goods across state lines in the course of their job.²⁷¹

In *Rappa v. Island Club West Development, Inc.*,²⁷² the Florida court addressed whether a former employee was required by contract to arbitrate his dispute with his employer over unpaid wages.²⁷³ The court ruled that the trial court was required, as a preliminary matter, to hold an evidentiary hearing to weigh whether the employment contract's arbitration clause was unconscionable before assessing whether to compel arbitration.²⁷⁴ Under Florida's Arbitration Code, three elements must be weighed: "1) whether a valid written agreement to arbitrate exists; 2) whether an arbitrable issue exists; and 3) whether the right to arbitration was waived."²⁷⁵ In order to invalidate an arbitration clause, a "court must find that the clause is both procedurally and substantively unconscionable."²⁷⁶

In *Corpion v. Jenne*,²⁷⁷ the court interpreted a collective bargaining agreement as authorizing the arbitrator to decide whether there was "just cause" for a sheriff to demote a police officer, and that part of that authority is the power to decide whether the violation of a department policy was serious enough to warrant demotion or justified a lesser penalty.²⁷⁸

267. *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 119 (2001).

268. 396 F.3d 1289 (11th Cir. 2005).

269. *Id.* at 1292.

270. 398 F.3d 1286 (11th Cir. 2005).

271. *Id.* at 1290.

272. 890 So. 2d 477 (Fla. 5th Dist. Ct. App. 2004).

273. *Id.* at 479.

274. *Id.* at 480.

275. *Id.*

276. *Id.* (citing *Chapman v. King Motor Co. of S. Fla.*, 833 So. 2d 820, 821 (Fla. 4th Dist. Ct. App. 2002)).

277. 869 So. 2d 660 (Fla. 4th Dist. Ct. App. 2004).

278. *Id.* at 660-61.

In *DeSocio v. Sonic Automotive*,²⁷⁹ a salesperson's claim that the dealership fired him for threatening to expose unlawful sales practices went to arbitration.²⁸⁰ The employer won and the claims were dismissed.²⁸¹ But the arbitrator also ruled that the employer bore the cost of the arbitration because it failed to ask for costs in the case.²⁸² The Florida court ruled that since the employer never notified the employee of its intent to seek attorney's fees, it waived them.²⁸³ Under Florida law, unlike American Arbitration Association rules, an employer must give an employee notice of intent to seek fees.²⁸⁴

B. *Collective Bargaining*

Florida International University's "board of trustees declared an impasse in contract negotiations" with the public union representing faculty members who have been "working without a contract since January 2003."²⁸⁵ As a public university, "[w]hen an impasse is declared, an outside mediator is brought in."²⁸⁶ It is possible for the parties to reach a one-year agreement on salary if nothing else.²⁸⁷ The mediator "will make recommendations to the university's board of trustees."²⁸⁸ The board is authorized "to impose a one-year settlement without union approval."²⁸⁹

C. *Just Cause*

Under Florida law, the following grounds constitute just cause for dismissing a corrections officer: 1) "refus[ing] to truthfully answer questions specifically relating to the performance" of a guard's duties; 2) insubordination; 3) neglect; 4) refusing "to follow lawful orders or perform officially designated duties;" 5) "falsify[ing] reports or records;" and/or 6) "knowingly submit[ting] inaccurate or untruthful information for or on any . . . record, report or document."²⁹⁰

279. 894 So. 2d 1064 (Fla. 2d Dist. Ct. App. 2005).

280. *Id.* at 1065.

281. *Id.*

282. *Id.*

283. *Id.* at 1065, 1067.

284. *DeSocio*, 894 So. 2d at 1065.

285. Noah Bierman, *Stalled Talks Fuel Tensions at FIU*, MIAMI HERALD, Apr. 13, 2005 at 6B.

286. *Id.*

287. *Id.*

288. *Id.*

289. *Id.*

290. FLA. ADMIN. CODE ANN. r. 33-208.002 (7), (11), (13), (20) (2003).

In *Wright-Simpson v. Department of Corrections*,²⁹¹ the Florida court ruled that the state agency “proved by a preponderance of the evidence that it had cause to discipline [a guard] for conduct unbecoming a public employee” and the Public Employee Relations Commission did not abuse its discretion in upholding the guard’s dismissal.²⁹²

291. 891 So. 2d 1122 (Fla. 4th Dist. Ct. App. 2004).

292. *Id.* at 1126–27.